

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT,

Petitioner,

v.

KRIS SHANE CUMMINS, DAVID ALAN
WHITE, KATHERINE A. SHADLE,
AMERICAHOMEKEY, INC.

Respondents.

12-F-045-PF-22

August 30, 2012

**RULING AND ORDER ON THE GOVERNMENT'S
MOTION TO STRIKE AFFIRMATIVE DEFENSES**

The above-captioned matter was referred to the undersigned for a hearing pursuant to 42 U.S.C. § 3601, *et seq.*, as implemented by 24 C.F.R. Part 180.

On May 22, 2012, the U.S. Department of Housing and Urban Development (“Government” or “HUD”) filed a complaint against Kris Cummins (“Respondent Cummins”) and other respondents. The *Complaint* alleges that Respondents are liable for violations of the Program Fraud Civil Remedies Act of 1986 (“PFCRA”), 31 U.S.C. § 3801-3812, as implemented by 24 C.F.R. Part 28.

Respondent Cummins filed a timely response on June 22, 2012 (“Answer”). The *Answer* admits some of the Government’s allegations and denies others. In addition, the *Answer* raises the following four affirmative defenses: (1) that Respondent Cummins lacked fraudulent intent; (2) that HUD is not entitled to obtain judgment on the basis of the doctrines of unclean hands, mutual assent, and/or mistake; (3) that HUD breached its statutory, common law, or contractual duties and is therefore not entitled to judgment; and (4) that the common law contract defenses of waiver, estoppel, consent, accord and satisfaction, or ratification preclude judgment for HUD. (Answer, p.2).

On July 12, 2012, the Government filed a *Motion to Strike Affirmative Defenses* (“Motion to Strike”). In its *Motion to Strike*, the Government claims that Respondent Cummins’ first affirmative defense is irrelevant and his second, third, and fourth affirmative defenses were improperly pled. Additionally, the Government claims that Respondent Cummins’ second and fourth affirmative defenses are legally deficient.

Pursuant to 24 C.F.R. § 26.40(b), Respondent Cummins was afforded 10 days to respond to respond to the *Motion to Strike*, but did not do so. Accordingly, any objection to the granting of the *Motion to Strike* is deemed to be waived. Id.

LEGAL STANDARD

Affirmative defenses are a “defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true.” *Black’s Law Dictionary* (9th ed. 2009). Motions to strike such defenses are governed by Rule 12(f) of the Federal Rules of Civil Procedure, which state in relevant part, that “the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed.R.Civ.P. 12(f); See also Fatima/Zahra, Inc., HUDALJ 09-F-008-CMP-2 at *1 (noting that the Federal Rules of Civil Procedure provide guidance to this Court’s administration of the hearing process where HUD regulations do not specify the procedure to be followed in a given circumstance).

Although courts possess broad discretion in deciding whether to strike a pleading, it is “an extreme measure” and a “drastic remedy.” Stanbury Law Firm v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000). A motion to strike affirmative defenses is generally disfavored because it consumes scarce judicial resources, and may “potentially serve to delay,” Custom Vehicles, Inc. v. Forest River, Inc., 464 F.3d 725, 727 (7th Cir.2006); Heller, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294(7th Cir. 1989). “The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy.” Brown & Williamson Tobacco Corp. v. United States, 201 F.2d 819, 822 (6th Cir. 1953). Additionally, a pleading or affirmative defense may be stricken if it fails to give the opposing party fair notice of the defense and the non-moving party’s grounds for the claim. Bell Atlantic Corp. v. Twombly, 127 S.Ct 1955, 1964-65 (2007); Heferman v. Bass, 467 F.3d 596, 600 (7th Cir. 2006).

DISCUSSION

First, the Government claims Respondent Cummins’ first affirmative defense fails because he attempts to raise his intent to defraud as an issue that would prevent his liability in this case. At issue is whether the affirmative defense presents a legitimate question of law or fact. Lunsford v. United States, 570 F.2d 221, 229 (8th Cir. 1977) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1380 at 783 (1969)). Courts will grant a motion to strike if the Government would succeed in their claim regardless of any pled or inferable set of facts in support of the challenged defense. Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989).

Here, Respondent Cummins asserts that the Government’s claims against him should be barred because he acted without fraudulent intent. In response, HUD states that Respondent Cummins’ intent is irrelevant as to his liability under 31 U.S.C. § 3802. This section provides for liability if a person submits or certifies to a statement submitted to the agency that is false, fictitious, or fraudulent or is made false, fictitious, or fraudulent because of an omission. 31 U.S.C. § 3802. Section 3802 is clarified by 24 C.F.R. § 28.10(d), “[n]o proof of specific intent to defraud is required to establish liability under this section.” In short, Respondent Cummins could still be found liable under the statute even if it is assumed that he lacked fraudulent intent when he submitted or certified the statement to HUD that was false, fictitious, or fraudulent. As the regulation interpreting the statute do not provide for the Court’s consideration into the intent of a person submitting a statement to HUD, the Court finds Respondent Cummins lack of

fraudulent intent to be irrelevant in this case. Accordingly, Respondent Cummins' first affirmative defense is stricken.¹

Second, the Government moves to strike Respondent Cummins' second, third, and fourth affirmative defenses on the basis that they are inadequately pled. Specifically, the Government claims that the affirmative defenses should be stricken because they "utterly fail to provide HUD with fair notice of the defenses." (Motion to Strike, 6.) Defenses must be stated "in short and plain terms." Fed.R.Civ.P. 8(b)(1)(A). "[A]n affirmative defense may be pleaded in general terms and will be held to be sufficient . . . as long as it gives plaintiff fair notice of the nature of the offense." Lawrence v. Chabot, 182 Fed.Appx. 442, 456 (6th Cir.2006) (quoting 5 Wright & Miller, *Federal Practice and Procedure* § 1274). The "fair notice" requirement is met when the defense is sufficiently articulated so that the plaintiff is not unfairly surprised. Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) (citing Ingraham v. United States, 808 F.2d 1075, 1079 (5th Cir. 1987)). However, courts have found that merely stringing together a list of legal doctrines is generally insufficient to give an opposing party fair notice the affirmative defense. Reis Robotics USA, Inc. v. Concept Industries, Inc., 462 F.Supp. 2d 897, 904 (N.D. Ill. 2006); but see, Woodfield, 193 F.3d at 362 (citing American Motorists Ins. Co. v. Napoli, 166 F.2d. 24, 26 (5th Cir. 1948) and noting that in some instances, merely pleading the name of an affirmative defense is may be sufficient to constitute fair notice).

Here, for Respondent Cummins' asserts his second, third, and fourth affirmative defenses in the following manner:

SECOND DEFENSE

The claims against myself should be barred by, and/or should be mitigated by, the doctrines of unclean hands, mutual assent and/or mistake.

THIRD DEFENSE

The claims against myself should be barred by HUD's breaches of its statutory, common law, and/or contractual duties.

¹ The Court notes that although Respondent Cummins is precluded from raising this affirmative defense to rebut his liability under the PFCRA, Respondent Cummins is not precluded from producing evidence that he lacked fraudulent intent as a mitigating factor for any civil penalty that may be assessed.

FOURTH DEFENSE

The claims against myself should be barred under the doctrines of waiver, Estoppels, consent, accord and satisfaction, and/or ratification.

Respondent Cummins' affirmative defenses are nothing more than a list of several legal doctrines with absolutely no indication as to how they apply to the facts of this case. With regards to his third defense, Respondent Cummins fails to name a single statutory, common law, or contractual duty that he argues was breached by HUD.

The Court recognizes the notion that applying a higher pleading standard on affirmative defenses beyond the "short and plain statement" requirement could present an "unreasonable burden on defendants who 'risk the prospect of waiving a defense at trial by failing to plead it ... and have a short amount of time to develop the facts necessary to do so . . .'" Tyco Fire Products LP v. Victaulic Co., 777 F.Supp.2d 893, 900–01 (E.D.Pa.2011); see also Lane v. Page, 272 F.R.D. 581, 596 (D.N.M.2011) (noting that the time a plaintiff has to prepare a complaint is only limited by the statute of limitations, whereas defendants are required to answer in a much shorter time frame). However, allowing Respondent Cummins' to proceed with his affirmative defenses as pled in the *Answer* would leave the Government speculating as to what connection exists, if any, between Respondent Cummins' conclusory allegations against HUD and the facts of the case. Accordingly, the Court finds that Respondent Cummins' second, third, and fourth affirmative defenses have not been sufficiently pled as to provide the Government with fair notice of the defenses, and therefore must be stricken. See Software Publs. Ass'n v. Scott & Scott, LLP, 2007 WL 2325585 at *2 (N.D.Tex. Aug. 15, 2007) (striking the affirmative defenses of waiver, estoppel, ratification, laches, and unclean hands because merely naming them do not provide fair notice to the plaintiff).

Last, the Government claims Respondent Cummins second and fourth affirmative defenses should be stricken because they are legally deficient. The question presented is whether these defenses can be asserted against the Government by overcoming the strong policy against impairing the Government's ability to provide for the public good. The Court recognizes the proposition that general principles of equity cannot be raised against the federal government to "frustrate the purpose of its laws or to thwart public policy." Pan-Am., 273 U.S. at 506. However, the Supreme Court specifically declined to expand this principle "into a flat rule that estoppel may not in any circumstances run against the Government." Heckler v. Community Health Services, Inc., 467 U.S. 51, 61 (1984). It also did not reject completely the premise that "the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." *Id.* at 60. See also S.E.C. v. Cuban, 798 F. Supp. 2d 783, 788 (N.D. Tex. 2011). Therefore, to survive the overwhelming policy against hearing these defenses, the equitable defense must also assert affirmative misconduct by the government. United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973). Although Respondent Cummins, unquestionably, has a difficult burden to prove that such equitable defenses may be raised against HUD in this case, the Court does not find that

he should be precluded from doing so before he has had the opportunity adequately plead his affirmative defenses.

The Court notes that the Government moves to strike Respondent Cummins' affirmative defenses with prejudice. In considering the Government's request, the Court finds it necessary to take into account the severity of the request and Respondent Cummins' status as a *pro se* litigant. Documents filed *pro se* are "to be liberally construed" and "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976)). Further, "defenses are pleadings, and as such, leave to amend is freely granted as justice requires." Heller Fin. Inc., 883 F.2d at 1294; Foman v. Davis, 371 U.S. 178, 182 (finding that a plaintiff should be afforded an opportunity to test his claim on the merits and that in the absence of any apparent or declared reason, leave to amend should be freely given). Since the onset of litigation, Respondent Cummins has acted *pro se*. Additionally, he was afforded only 30 days to file a timely response to the *Complaint*. The Court finds Respondent Cummins attempted to provide notice to the Government of his affirmative defenses. Although the notice provided does not constitute "fair notice," Respondent Cummins should not be permanently enjoined from asserting these defenses when bringing them in compliance could be as simple as elaborating on them. As far as the basis for the deficiency in Respondent Cummins' second, third, and fourth affirmative defenses lies in that they do not give the Government fair notice, the Court declines to strike said defenses with prejudice, since doing so would be too harsh a remedy given Respondent Cummins' *pro se* status. See FRCP 8(e) ("Pleadings must be construed so as to do justice").

CONCLUSION

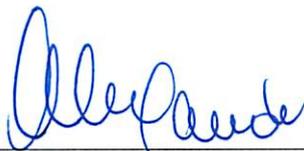
Consistent with the foregoing, the Court finds Respondent Cummins' first affirmative to be irrelevant. Additionally, Respondent Cummins has failed to give the Government fair notice by adequately pleading his second, third, and fourth affirmative defenses.

ORDER

(1) Respondent Cummins' first affirmative defense is **STRICKEN** with prejudice.

(2) Respondent Cummins' second, third, and fourth affirmative defenses are **STRICKEN** without prejudice. Respondent Cummins' is not precluded from renewing his affirmative defenses in a manner that would provide the Government with fair notice.

So **ORDERED**.



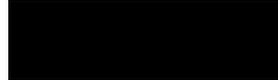
Alexander Fernández
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RULING AND ORDER ON THE GOVERNMENT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES, issued by Alexander Fernández, Administrative Law Judge, HUDALJ No. 12-F-045-PF-22, were sent to the following parties on this 30th day of August, 2012, in the manner indicated:


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