IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff, v. ROBERT BRACE, ROBERT BRACE FARMS, Inc., and ROBERT BRACE and SONS, Inc., Defendants.	)	Civil Action No. 1:17-cv-00006-BR

UNITED STATES' MOTION TO STRIKE
AFFIRMATIVE DEFENSES

The United States of America, on behalf of the United States Environmental Protection Agency, respectfully moves the Court pursuant to Federal Rule of Civil Procedure 12(f) for an order striking the first, second, third, fourth, sixth, ninth, tenth, and eleventh affirmative defenses in Defendants' Answer (Dkt. No. 7, ¶¶ 54-57, 59, 62-64). The United States certifies that the parties have met-and-conferred regarding the subject matter of this motion but have been unable to come to a resolution.[1]

The bases for this Motion, as spelled out in more detail in the attached supporting memorandum of law, are:

1. Defendants' equitable defenses, including equitable estoppel, the doctrine of unclean hands, and fraud/fraudulent inducement, cannot be maintained against the United States.

[1]A detailed discussion of the parties' meet-and-confer process is described in the attached supporting memorandum of law.

2. Defendants have failed to meet the pleading requirement for alleging fraud or fraudulent inducement.

3. Defendants' ninth affirmative defense is legally insufficient because it is not a defense to the cause of action.

This Motion is supported by the attached memorandum of law. For the reasons set forth in that memorandum, the United States respectfully requests that the Court grant this Motion to Strike.

Dated: March 17, 2017

Respectfully submitted,

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UNITED STATES OF AMERICA Plaintiff, v. ROBERT BRACE, ROBERT BRACE FARMS, Inc., and ROBERT BRACE and SONS, Inc., Defendants.	)	Civil Action No. 1:17-cv-00006-BR

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT
OF ITS MOTION TO STRIKE AFFIRMATIVE DEFENSES

Pursuant to Federal Rule of Civil Procedure 12(f), Plaintiff the United States of America ("United States"), on behalf of the U.S. Environmental Protection Agency ("EPA"), respectfully moves this Court to strike the first, second, third, fourth, sixth, ninth, tenth, and eleventh affirmative defenses in Defendants' Answer (Answer ¶¶ 54-57, 59, 62-64) as legally insufficient, immaterial, and inapplicable. Granting the United States' Motion would serve to prevent delay, conserve resources, and avoid unnecessary expense.

I. PROCEDURAL BACKGROUND

On January 9, 2017, the United States, on behalf of the EPA, commenced this civil action under section 309(b) and (d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(b) and (d), against Defendants Robert Brace, Robert Brace Farms, Inc., and Robert Brace and Sons, Inc. ("Defendants"). The Complaint seeks injunctive relief and civil penalties for violations of CWA section 301(a), 33 U.S.C. § 1311(a), for the discharge of pollutants into waters of the United States without a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344.

In Defendants' Answer, filed February 15, 2017, Defendants denied liability and asserted eleven "affirmative" defenses:

1. The United States engaged in conduct that led the Defendants to believe that the physical activities in which they engaged on the Marsh Property were permissible and authorized.
2. The United States [sic] claims are barred, in whole or in part, based on the doctrine of unclean hands.
3. The United States' claims are barred, in whole or in part, based on fraud and/or fraudulent inducement.
4. The United States' claims are barred, in whole or in part, based on the official swampbuster determinations Defendants received following its [sic] compliance with relevant and applicable federal regulations promulgated by other United States agencies and by Plaintiffs covering the property and farming operations at issue, which the United States had misrepresented to the court in the prior referred-to litigation involving Defendants (Civ. No. 90-229 (W.D. Pa.)) and in other litigation before the Federal Court of Claims.
5. The United States' claims are barred, in whole or in part, based on their [sic] consistent use of the property at issue for agricultural purposes.
6. The United States [sic] claims are barred, in whole or in part, based on the inconsistent and contradictory positions it has taken, including those premised on the statements its agents have made under oath, in other litigation involving these Defendants.
7. The United States [sic] claims are barred, in whole or in part, based on the United States' agents and employees violating Defendants' substantive due process rights.
8. The United States claims are barred, in whole or in part, based on the United States' agents and employees violating Defendants' constitutionally protected property rights.
9. The United States [sic] claims are barred, in whole or in part, based on the United States' failure to identify a precise date on which they claim that the unauthorized activities at issue took place.
10. The United States [sic] claims are barred, in whole or in part, based on changes in regulations, guidance documents, and publications that occurred during the periods of time at issue in this matter.
11. The United States [sic] claims are barred by the inconsistent, contradictory and continuously changing federal regulations, guidance documents and publications promulgated, implemented and/or issued by multiple federal agencies of the United States, including, but not limited to Plaintiffs, which Plaintiffs have arbitrarily and capriciously imposed on Defendants' farming operations.

See Defendants' Answer (Dkt. No. 7) ¶¶ 54-64.

In accordance with the Court's Standing Order, on March 1, 2017, counsel for the United States contacted Defendants' counsel regarding the affirmative defenses' legal deficiencies and requested to meet-and-confer and provide Defendants an opportunity to amend or withdraw those defenses and avoid a motion to strike. Ex. A (3/1/17 email from Brown to Devlin) at 3-4. Counsel for Defendants asked to postpone the meet-and-confer process on the affirmative defenses until after a mediation session scheduled on March 8, 2017, assuming that the parties did not reach a settlement. Ex. A (3/2/17 email from Devlin to Brown) at 2. The United States then filed a consent motion to extend the deadline to file its motion to strike until March 17, 2017, which the Court granted on March 3, 2017. Dkt. No. 14.

On March 8, 2017, after the parties failed to reach settlement at mediation, the United States met and conferred with Defendants regarding the motion to strike. At the outset of the meeting, counsel for Defendants represented that they intended to move for leave to amend their Answer, which might address some of the deficiencies raised by the United States, but noted that they intended to retain at least some of the original affirmative defenses, such as equitable estoppel. In addition, Defendants have not committed to a date by which they will file their motion for leave to amend. *See* Ex. B (3/16/17 email from Devlin to Brown) at 1. Accordingly, the United States has filed this Motion to preserve its right to challenge the affirmative defenses as currently pled.

II. LEGAL STANDARD

Rule 12(f) of the Federal Rules of Civil Procedure provides that a court may strike an insufficient defense on its own or on a party's motion. Motions to strike "can save time and litigation expense by eliminating the need for discovery with regard to legally insufficient defenses." *F.D.I.C. v. White*, 828 F. Supp. 304, 307 (D.N.J. 1993); *see Sun Microsystems, Inc. v. Versata Enterprises, Inc.*, 630 F. Supp. 2d 395, 402 (D. Del. 2009) ("Motions to strike serve to

clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters." (internal quotation marks omitted)); *Mifflinburg Tel., Inc. v. Criswell*, 80 F. Supp. 3d 566, 573 (M.D. Pa. 2015). An affirmative defense may be stricken where the defense is legally insufficient or where it fails to meet the pleading requirements of Rule 8 or Rule 9 of the Federal Rules of Civil Procedure. *See Directv, Inc. v. Semulka*, No. CIV.A. 04-769, 2006 WL 318823, at *1 (W.D. Pa. Feb. 9, 2006); *United States v. Sensient Colors, Inc.*, 580 F. Supp. 2d 369, 378, 388-89 (D.N.J. 2008) (striking affirmative defenses that fail to satisfy the notice pleading requirements of Rule 8). Affirmative defenses may be stricken as insufficient where they "are merely bare bones conclusory allegations." *Directv, Inc. v. Semulka*, 2006 WL 318823, at *1.

III. ARGUMENT

A. Defendants' First, Second, Third, Fourth, Sixth, Tenth, and Eleventh Defenses in the Answer Are Not Proper Affirmative Defenses Because Such Equitable Defenses Cannot Be Maintained Against the United States in a CWA Enforcement Action.

Equitable defenses are not available to bar the government, acting in its sovereign capacity, from enforcing its laws to protect the public interest and welfare. *See, e.g.*, *Pan-American Petroleum & Transport Co. v. United States*, 273 U.S. 456, 506 (1927) (finding that equitable defenses shall not be asserted against the United States to "frustrate the purpose of its laws or to thwart public policy"); *Nat'l Labor Relations Bd. v. Kingston Cake Co.*, 206 F.2d 604, 611 (3d Cir. 1953) (holding that the "[unclean hands] doctrine does not apply since this is a proceeding by a governmental agency seeking enforcement of its order in the public interest"); *United States v. Vineland Chem. Co.*, 692 F. Supp. 415, 423-24 (D.N.J. 1988) (noting importance of compliance with environmental laws and absence of availability of equitable defenses against the government).

In this CWA enforcement action alleging the unauthorized discharge of pollutants into protected waters, the United States is indisputably acting in its sovereign capacity to protect the public's interest in "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Thus, the equitable defenses raised by Defendants in their Answer, including equitable estoppel, the doctrine of unclean hands, and fraud or fraudulent inducement are unavailable and should be stricken. *See F.D.I.C. v. White*, 828 F. Supp. at 311 ("[P]ublic policy clearly militates against the assertion of equitable defenses of estoppel, waiver or unclean hands . . . . these defenses are insufficient as a matter of law . . . ."); *United States v. Kramer*, 757 F. Supp. 397, 427, 428 (D.N.J. 1991) (finding that "equitable defenses cannot be asserted against the government when it acts in its sovereign capacity to protect the public health and safety" (internal quotation marks omitted) and striking "all the many equitable defenses raised by various defendants"). Furthermore, Defendants' fraud defense, in addition to being an impermissible equitable defense, should be stricken because it was not pled with requisite particularity, as required by Federal Rule of Civil Procedure 9(a).

1. Defendants' First, Fourth, Sixth, Tenth, and Eleventh Defenses Assert Equitable Estoppel or Related Impermissible Reliance-Based Defenses.

Defendants' first, fourth, and sixth, tenth, and eleventh affirmative defenses raise variations of an equitable estoppel or waiver defense, which is strongly disfavored against the United States especially where, as here, the government is acting in its sovereign capacity to protect the public interest. *See Admiralty Condo. Ass'n, Inc. v. Director, Fed. Emergency Mgmt. Agency*, 594 F. App'x 738, 741 (3d Cir. 2014) ("[E]quitable estoppel claims against the government are disfavored."). "[I]t is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). *See also Office of Personnel Management v. Richmond,*

496 U.S. 414, 419 (1990) ("[E]quitable estoppel will not lie against the Government as it lies against private litigants."). Although the Supreme Court has not completely foreclosed the possibility that "extreme circumstances" could someday support an estoppel claim against the government, the Supreme Court has consistently "reversed every finding of estoppel [against the government] that [it] ha[s] reviewed." *Richmond*, 496 U.S. at 422-23, 434. The Third Circuit has held that to invoke estoppel against the government, a defendant must prove not only that he reasonably relied on a misrepresentation to his detriment, but also that government officials engaged in "affirmative misconduct." *United States v. Asmar*, 827 F.2d 907, 912 (3d Cir. 1987). *See also DiPeppe v. Quarantillo*, 337 F.3d 326, 335 (3d Cir. 2003) (applying *Asmar* test); *United States v. St. John's Gen. Hosp.*, 875 F.2d 1064, 1069 (3d Cir. 1989) (same).

Defendant's first, fourth, sixth, tenth, and eleventh affirmative defenses are insufficient and should be stricken because, even if assumed to be true, they would not constitute grounds for estopping the United States. Defendants have not sufficiently alleged the basic elements of an equitable estoppel defense, nor have they alleged that the United States engaged in affirmative misconduct. *Asmar*, 827 F.2d at 912. *See also Sun Microsystems, Inc.*, 630 F. Supp. 2d at 408-09. Rather, the defenses merely contain conclusory assertions that the United States' Complaint is barred because of government officials' "conduct" (first defense), misrepresentations (fourth defense), "inconsistent and contradictory positions" (sixth defense), and inconsistent, contradictory, and changing regulations, guidance documents, and publications (tenth and eleventh defenses). The first defense fails to allege misrepresentation, reasonable reliance, detriment to Defendants, or affirmative misconduct. Answer ¶ 54. Defendants' fourth defense lacks allegations of reasonable reliance on a misrepresentation, detriment to Defendants, and affirmative misconduct. Answer ¶ 57. The sixth, tenth, and eleventh defenses likewise fail to

allege the traditional elements of estoppel, as well as affirmative misconduct. Answer ¶¶ 59, 63, 64. Defendants' conclusory allegations simply do not amount to "affirmative misconduct," *Asmar*, 827 F.2d at 912, or "extreme circumstances," *Richmond*, 496 U.S. at 434, that might support estoppel against the government. *See Am. Training Servs., Inc. v. Veterans Admin.*, 434 F. Supp. 988, 1001 (D.N.J. 1977) ("A governmental agency will not be bound by ordinary errors or omissions in the conduct of its employees because there is generally a prevailing public interest in correcting erroneous interpretations of policy. Neither will the government normally be bound by erroneous advice or by entry into an agreement which is not in accordance with the law."). *See also United States v. City of Hoboken*, 675 F. Supp. 189, 199 (D.N.J. 1987) (noting that "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law" (internal quotation marks and citation omitted) and rejecting equitable estoppel defense "as a matter of law" where defendants claimed to rely on EPA's conduct that was inconsistent with the law).

Further, in their duplicative tenth and eleventh defenses, Defendants appear to assert that the United States' claim is barred due to changes or inconsistencies in the law. Defendants' mistake or ignorance of the law is not, however, an appropriate affirmative defense to an action enforcing the CWA—a strict liability statute. *See United States v. Sheyenne Tooling & Mfg. Co., Inc.*, 952 F. Supp. 1414, 1418-19 (D.N.D. 1996); *see also Kelly v. U.S. E.P.A.*, 203 F.3d 519, 522 (7th Cir. 2000) ("[N]othing in the statute makes good faith or a lack of knowledge a defense. . . . Civil liability under the Clean Water Act . . . is strict."). Furthermore, to the extent that the basis for these defenses is that Defendants relied on old or outdated law in committing the CWA violations described in the United States' Complaint, those defenses still fail because such reliance is unreasonable. *See City of Hoboken*, 675 F. Supp. at 199.

2. Defendants' Second Defense Asserts the Doctrine of Unclean Hands, which Is Unavailable Against the United States.

It is well established that "the equitable doctrine of unclean hands may not be asserted against the United States when it acts in its sovereign capacity to protect the public welfare." *Vineland Chemical*, 692 F. Supp. at 423; *see United States v. Kramer*, 757 F. Supp. at 428 (striking all equitable defenses, including unclean hands); *F.D.I.C. v. White*, 828 F. Supp. at 311 (same). Further, Defendants' allegation of this defense is entirely conclusory. *See Directv, Inc. v. Semulka*, 2006 WL 318823, at *1; *Sutton v. Chanceford Twp.*, No. 1:14-CV-1584, 2017 WL 770586, at *3 (M.D. Pa. Feb. 28, 2017); *F.D.I.C. v. Modular Homes, Inc.*, 859 F. Supp. 117, 120-21 (D.N.J. 1994). Accordingly, there is no basis for Defendants' assertion of unclean hands and that defense should be stricken.

3. Defendants' Third Defense Asserts Fraud or Fraudulent Inducement, Neither of which Is Available Against the United States.

Defendants' assertion of fraud or fraudulent inducement, in addition to being an impermissible equitable defense asserted against the government, does not meet the requirements of Federal Rule of Civil Procedure 9(b). "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Affirmative defenses subject to Rule 9(b) must be supported "with all of the essential factual background that would accompany 'the first paragraph of any newspaper story'—that is, the 'who, what, when, where and how' of the events at issue." *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 217 (3d Cir. 2002) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420, 1426 (3d Cir. 1997)). Because Defendants have failed to meet this basic pleading requirement, their fraud defense must be stricken. *See United States v. Rohm & Haas Co.*, 939 F. Supp. 1142, 1153 (D.N.J. 1996) (striking fraud defense for lack of "particularity which Rule 9(b) requires").

B. Defendants' Ninth Affirmative Defense Is Legally Insufficient.

"An affirmative defense is insufficient if it is not recognized as a defense to the cause of action." *Environ Prod., Inc. v. Total Containment, Inc.*, 951 F. Supp. 57, 60 (E.D. Pa. 1996). Defendants' ninth defense is insufficient because the United States is not required to plead "a precise date on which they claim that the unauthorized activities at issue took place." Answer ¶ 62. The United States has alleged the month and year in which the activities began, which is clearly within any applicable statute of limitations. There is no requirement to specify a precise date for CWA violations. Thus, there is no set of facts under which Defendants' ninth affirmative defense would be a valid defense and it must be stricken.

CONCLUSION

For the forgoing reasons, the United States respectfully requests that the Court strike the first, second, third, fourth, sixth, ninth, tenth, and eleventh affirmative defenses in Defendants' Answer (Answer ¶¶ 54-57, 59, 62-64).

Dated: March 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, I served the foregoing Motion to Strike Affirmative Defenses and supporting Memorandum of Law on the following counsel for Defendants via ECF:

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