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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

KARL BECK, individually and on behalf of all other similarly situated California residents,

Plaintiff,

v.

POINT LOMA PATIENTS CONSUMER COOPERATIVE CORPORATION, A California Corporation, **ADAM KNOPF,** an Individual, **JUSTUS H. HENKES IV**, an Individual, **419 CONSULTING INC**., a California Corporation, **GOLDEN STATE GREENS LLC**, a California LLC, **FAR WEST MANAGEMENT, LLC**, a California LLC, **FAR WEST OPERATING, LLC**, a California LLC, **FAR WEST STAFFING, LLC**, a California LLC, and **DOES 1-50**,

Defendants.

Case No: 37-2017-00037524-CU-BT-CTL

CLASS ACTION

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS TO DEFENDANTS' JOINT ANSWER

Date: May 4, 2018
Time: 9:00 a.m.
Judge: Hon. Joel R. Wohlfeil
Ctrm: C-73

Plaintiff Karl Beck ("Plaintiff") is entitled to judgment on the pleadings to streamline this litigation, and alleviate the need for expensive discovery and attendant motion practice for affirmative defenses that should be dismissed.

I. DEFENDANTS CONCEDE THEIR DEFENSES ARE NOT "NEW MATTER"

As demonstrated in Plaintiff's opening brief, defenses that are not "new matter" do not constitute affirmative defenses as a matter of law. Hence, they are subject to judgment on the pleadings without leave to amend. *See* Motion P&A, RoA # 85 at § III. Defendants concede this point. Opposition at p. 5:1-9. On this issue alone, Defendants should have stipulated to dismissal.

Yet, Defendants oppose judgment because their "general denial put at issue all of the material facts pled by Plaintiff. Therefore 'new matter' is either not required to be alleged, or has been sufficiently alleged, for" the First, Sixth, Seventh, Eighth, Twelfth, Fifteenth, and Sixteenth defenses. *Id.*, at p. 5:10-17.

As usual, Defendants fail to offer any authority to support their assertion that a general denial sufficiently pleads new matter. Thus, Plaintiff's points and authorities remain unrebutted. As a matter of law, Plaintiff is entitled to judgment as to Defendants' First, Sixth, Seventh, Eighth, Twelfth, Fifteenth, and Sixteenth Defenses. Motion P&A at § III.

III. THE BOILERPLATE DEFENSES DO NOT PLEAD "ULTIMATE FACTS"

Defendants concede their affirmative defenses are required to plead "ultimate facts." Opposition at p. 3:22-24 ("following a general denial, Defendants' answer may simply plead 'ultimate facts sufficient to constitute a defense,'… [Citation]") Defendants also concede that such ultimate facts are "required to provide Plaintiff with fair notice of the defenses…" *Id*., at 3:25.

But Defendants' defenses are mere boilerplate. *See Vilardo v. Cty. of Sacramento* (1942) 54 Cal. App. 2d 413, 418-19 ("It is elementary that a pleading must allege facts and not conclusions.") These boilerplate defenses are quoted verbatim below and clearly contain no ultimate facts at all:

- Second Defense: "Defendants allege that each cause of action in the Complaint is barred, in whole or in part, by the applicable statutes of limitations, including without limitation, California

Civil Procedure Code section(s) 338(a), 340(a), and/or 343, California Civil Code section 1783, and California Business and Professions Code section 17208." Joint Answer, RoA # 47, at p. 2 (emphasis added).

- Third Defense: "the Complaint, and each and every alleged cause of action therein are barred, in whole or in part, by the equitable doctrine of laches." *Id.* (emphasis added).
- Fourth Defense: "the Complaint, and each and every alleged cause of action therein are barred by the doctrine of waiver." *Id.* (emphasis added).
- Fifth Defense: "the Complaint, and each and every alleged cause of action therein are barred, in whole or in part, because Plaintiff consented to the conduct about which he now complains." *Id.*, at p. 3 (emphasis added).
- Tenth Defense: "Plaintiff is estopped by his conduct from recovering any relief under his Complaint, or any purported cause of action alleged therein." *Id.* (emphasis added).
- Eleventh Defense: "Any recovery on Plaintiff's Complaint, or any purported cause of action alleged therein, is barred in whole or in part by Plaintiff's failure to mitigate his damages." *Id.* (emphasis added).
- Thirteenth Defense: "Plaintiff's Complaint, or any cause of action contained therein, may be barred by the Business Judgment Rule applicable to claims of unlawful business practices under Business & Professions Code section 17200." *Id.*, at p. 4 (emphasis added).
- Fourteenth Defense: "Plaintiff's Complaint, or any cause of action contained therein, may be barred by the business justification defense to any alleged unfair business practices under Business & Professions Code section 17200." *Id.* (emphasis added).

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To avoid judgment of their boilerplate defenses, Defendants argue they are not required to "plead allegations supporting every element of their affirmative defenses." Opposition, at p. 3:26-4:2 *citing Hata v. Los Angeles County Harbor/UCLA Med. Ctr.* (1995) 31 Cal.App.4th 1791, 1805-06 (1995) and *Perkins v. Super. Ct.* (1981) 117 Cal.App. 3d 1, 6. This is gross misrepresentation of the cited cases, and an incorrect statement of the law.

First, the Code of Civil Procedure provides that dismissal of an answer is appropriate where it fails to "*state facts sufficient* to constitute a defense." CIV. PROC. CODE § 430.20 (emphasis added). If the answer does not state the ultimate facts to establish each element of a defense, it cannot be "sufficient to constitute" a defense. *Id.* Defendants construe this as a "heightened pleading standard" (Opposition, at p. 3:16), but Plaintiff seeks no more than necessary to understand Defendants' case in chief.[1]

The cases cited by Defendants, *Hata* and *Perkins* are in accord. In *Hata*, the plaintiff/appellee argued the trial court erred in granting nonsuit at the close of trial, because the defendant purportedly failed to plead a sovereign immunity defense. 31 Cal.App.4th at 1795-6. The court of appeal refused to overturn the nonsuit because the statutory defense was disclosed in defendants' answer. *Id.*, at 1804-05.

The *Hata* court rejected the plaintiff's argument of surprise because it had the opportunity *to demurer to or seek judgment on the pleadings to the answer early in the litigation*. *Id.* ("Hata failed to demurrer to the County's answer [Code Civ. Proc. § 430.80(d)] on the ground of insufficient pleading … Under these circumstances, it would have been unfair for the court to have determined the affirmative defenses were not pleaded with 'sufficient particularity'…") *citing* 5 Witkin, CAL.

[1] Defendants argue that "a number of affirmative defenses raise purely legal issues and require no 'factual' allegations." Opposition at p. 4:15-19 (referencing the First, Eighth, Ninth, Seventeenth, and Twentieth defenses). However, Plaintiff doesn't seek judgment to defenses nine, seventeen and twenty. The other two aren't new matter. Thus, the Court should disregard Defendants' misleading red herrings.

PROCEDURE, PLEADING § 1121-1164, pp. 537-587. As such, *Hata* actually supports Plaintiff's Motion by recognizing that the time to challenge affirmative defenses is at the pleading stage.[2]

In *Perkins*, the court issued a writ overturning the trial court's order striking a claim for punitive damages from the complaint. 117 Cal.App. 3d at 4. The court of appeal concluded that the boilerplate claim for punitive damages must be read in conjunction with *the rest of the complaint* so that "as a whole" it "contains sufficient facts to apprise the defendant of the basis upon which the plaintiff is seeking relief." *Id.*, at 6.

Here, Defendants have disclosed no ultimate facts to support their defenses. They instead argue that Plaintiff should simply look to the Complaint to discover them. *See* Opposition at 5:10-11 ("Defendants' general denial put at issue all of the material facts pled by Plaintiff. Therefore 'new matter' is either not required to be alleged, or has been sufficiently alleged.") But Defendants fail to explain how the Complaint can put Plaintiff on notice of "new matter" of which Plaintiff is clueless. It can't. New matter is the Defendants' burden, not Plaintiff's.

II. DISCOVERY CAN'T CURE DEFENDANTS' FAILURE TO PLEAD ULTIMATE FACTS

Defendants attempt to escape their pleading deficiencies by arguing that "[Plaintiff's] recourse is to engage in discovery instead of engaging in wasteful motion practice." Opposition at p. 5:20-22. But just as defendants are entitled to avoid discovery into baseless causes of action *via* successful demurrer, Plaintiff is similarly entitled to avoid discovery costs related to bankrupt affirmative defenses.

[2] On February 22, 2018, Plaintiff met and conferred with Defendants, asking that they amend their answer to avoid motion practice. Restis Decl., RoA # 89, Ex. 1. As is their habit, Defendants ignored meet and confer and thus chose to subject their answer to scrutiny by this Court.

This is especially true given Defendants' penchant for stonewalling discovery.[3] The Court should reject such transparent gamesmanship, and dispose of Defendants' baseless defenses at the pleading stage.

III. THE COURT SHOULD DISMISS DEFENDANTS' EQUITABLE DEFENSES

Defendants next argue the Court should not grant judgment on their equitable defenses to Plaintiff's UCL claim. They base this position on the premise that "UCL claims are actions in equity." Opposition, at p. 6:19 (citing cases).

But Defendants do not dispute that in *Cortez v. Purolator Air Filtration Products Co*. (2000) 23 Cal. 4th 163, the California Supreme Court held that "equitable defenses may not be asserted to wholly defeat a UCL claim since such claims arise out of unlawful conduct." *Id.* at 179. This is because "[t]he UCL imposes strict liability when property or monetary losses are occasioned by conduct that constitutes an unfair business practice." *Id.*, at 181.

Defendants also concede that Plaintiff's UCL claim is predicated on Defendants' alleged violations of California's medical marijuana laws, violations of the Corporations Code, and violations of the CLRA. *Id.*, at 7:9-15 citing Complaint ¶ 80. Thus, Defendants should have

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[3] *See* Restis Decl. ISO Motion to Compel RFP (Set One), RoA # 120, ¶¶ 10, 12 ("Defendants never responded to my February 22nd [and March 9th] letter[s]); *id.*, Exs. I-P (straight boilerplate objections with no responses); *also* Restis Decl. ISO Motion to Compel Srog (Set One), RoA # 114, ¶¶ 10-11 ("Defendants never responded to my March 12th letter" and didn't follow up on in person meet and confer); *id.*, Exs. I-P (boilerplate objections with useless, evasive responses).

Defendants are correct that Plaintiff propounded Form Interrogatory 15.1 on all Defendants, but they objected to that as well. Restis Reply Decl., Ex. A, at p. 7 ("Objection. This request is unduly burdensome and oppressive. This request is also premature as discovery has only begun. This request is also vague and ambiguous and impossible to answer given the state of the pleadings. Plaintiff has filed a motion for judgment on the pleadings as to Defendants' Answer. Defendants' Answer, and the denials of material allegations, and special and affirmative defenses therein, may change by stipulation or by order of the Court. After that time, Defendants will supplement this response.")

Defendants have also filed a motion for protective order seeking to prevent Plaintiff from inquiring into Defendants' assets, liabilities and cash flows, and identify Defendants' employees. *See* RoA # 99. All of this information is directly relevant, or witness to, Plaintiff's case in chief. Yet in the six-plus months since the Complaint was filed, Defendants have failed to propound a single item of discovery. Restis Declaration ISO Reply to Motion for Judgment on the Pleadings ("Restis Reply Decl."), ¶ 3.

stipulated to judgment on these equitable Defenses.

But Defendants refuse to do so. Instead, they hang their opposition on other statements in *Cortez* that actually support Plaintiff's Motion. In discussing the *quantum of remedy to be afforded* a plaintiff, as opposed to *whether* a plaintiff is entitled to a remedy at all, *Cortez* found that a trial court may take equitable "considerations" into account. *See Cortez*, at 180-81 ("Therefore, in addition to those defenses which might be asserted to a charge of violation of the statute that underlies a UCL action, a UCL defendant may assert equitable considerations.") (emphasis added). *Cortez* thus made a critical distinction between the "defenses" that can defeat a UCL cause of action, and "considerations" that the trial court can weigh after liability has been determined and a remedy is being crafted. In other words, the defense is not available, but the defendant is not prohibited from submitting evidence to limit the quantum of relief. *Id.*

The Second District Court of Appeal read *Cortez* in the same manner as Plaintiff. In *Ticconi v. Blue Shield of Cal. Life & Health Ins. Co*. (2008) 160 Cal. App. 4th 528, 543-45, the court considered whether the defendant insurance company could rely on the defense of unclean hands to create individual issues that would predominate and render class certification inappropriate. *Id.*, at 543. The court held that

> the equitable defense of unclean hands is not available in this UCL action based on violation of statutes, namely, [Statutes]. Courts have long held that the equitable defense of unclean hands is not a defense to an unfair trade or business practices claim based on violation of a statute. To allow such a defense would be to judicially sanction the defendant for engaging in an act declared by statute to be void or against public policy. [Citations].

Ticconi, 160 Cal. App. 4th at 543 (emphasis added). The court of appeal went on to explain that in *Cortez*, *supra*, "[t]he Supreme Court held that the equities may be considered when the trial court exercises its discretion to fashion a *remedy* under Business and Professions Code section 17203. [Citation]. But, equitable defenses *may not be used to defeat the cause of action under the UCL*." *Id.*, at 544 (emphasis in original).

Since Defendants' rebuttal to Plaintiff's motion is legally incorrect, the Court should grant judgment on the pleadings without leave to amend to Defendants' Third (Laches), Fourth (Waiver), Fifth (Consent), Tenth (Estoppel), Eleventh (Failure to Mitigate), and Fifteenth (Estoppel) Defenses *as to* Plaintiff's claim for "unlawful" business practices.[4]

V. CONCLUSION

As requested in Plaintiff's Motion, the Court should grant judgment without leave to amend the following Affirmative Defenses as failing to constitute new matter: First, Sixth, Seventh, Eighth, Twelfth, Fifteenth, and Sixteenth.

The Court should dismiss without leave to amend the following Affirmative Defenses *to Plaintiff's UCL cause of action* because equitable defenses are not available to that claim: Third, Fourth, Fifth, Tenth, Eleventh, and Fifteenth.

The Court should dismiss *with leave to amend* the following Defenses (to claims other than the UCL, as appropriate) because they fail to plead ultimate facts: Second, Third, Fourth, Fifth, Tenth, Eleventh, Thirteenth, and Fourteenth.

Respectfully submitted,

DATED: April 27, 2018

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[4] In Plaintiff's opening brief, he explained that "[t]his motion is necessary to frame this issue for Plaintiff's forthcoming motion for class certification. In deciding whether to certify a class, the Court is direct to consider 'whether substantially similar questions are common to the class and predominate over individual questions or whether *the claims or defenses of the representative plaintiffs are typical of class claims or defenses*.'" Motion P&A, RoA # 85, at p. 4:1-:5:7 (emphasis in original, citing cases).

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