C.D. Michel – SBN 144258
Anna M. Barvir – SBN 268728
Jason A. Davis – SBN 224250
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Blvd, Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Facsimile: (562) 216-4445
Email: CMichel@michellawyers.com

Attorneys for Petitioners - Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FRANKLIN ARMORY, INC., and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,

Petitioners-Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF JUSTICE, ROBERT A. BONTA, in his official capacity as Attorney General for the State of California, and DOES 1-10,

Respondents-Defendants.

Case No.: 20STCP01747

[Assigned for all purposes to the Honorable James C. Chalfant; Department 85]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS AND PETITIONERS' DEMURRER TO AND MOTION TO STRIKE RESPONDENTS' ANWER TO THE FIRST, SECOND, AND EIGHTH CAUSES OF ACTION TO THE SECOND AMENDED COMPLAINT

[Filed concurrently with Notice of Demurrer and Demurrer to and Motion to Strike Respondents' Answer; Declaration of Anna M. Barvir in Support of Petitioners' Demurrer and Motion to Strike [CCP § 430.41(a)]; and [Proposed] Order]

Hearing Date: October 14, 2021
Hearing Time: 9:30 a.m.
Department: 85

Action Filed: May 27, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Following two demurrers, the State finally filed an answer to Petitioners' Second Amended Complaint and Petition as to the First, Second, and Eighth Causes of Action that are not stayed. Unfortunately, the State's long-awaited answer is irredeemably deficient. Not only did the State fail to verify its answer as required by Code of Civil Procedure section 1089, but it also included an astonishing 53 affirmative defenses, almost none of which even attempted any application to the facts of this case. Several of the claimed defenses are not affirmative defenses at all, while others are not relevant to this action. All of the State' affirmative defenses are thus subject to demurrer, and some are also subject to a motion to strike. Of course, striking individual affirmative defenses may not even be necessary, given that the entire pleading should be stricken without leave to amend because it is not verified.

Proceeding with this filing was not Petitioners' preference, and their counsel made every effort to avoid it. Due to the State's refusal to engage in a good faith meet and confer effort and amend its answer to correct the clear deficiencies in that pleading, Petitioners had no choice but to bring this demurrer and motion to strike, because allowing fifty-three poorly pleaded affirmative defenses to survive at this stage would make the discovery process entirely unmanageable.

STATEMENT OF FACTS

Petitioners' counsel, Anna M. Barvir, emailed counsel for the State on July 5, 2021, requesting a telephonic meet-and-confer to discuss Petitioners' potential demurrer and motion to strike. (Barvir Decl., ¶4.) Her email summarized the grounds for Petitioners' motion and requested the opportunity to discuss the matter over the phone. The next day, Petitioners filed a declaration explaining their inability to meet and confer by the deadline and received the statutory 30-day extension. (*Id.*, ¶5.)

Counsel for the State, Kenneth Lake, replied on July 8th, explaining why the State believes its answer need not be verified. (Barvir Decl., ¶6.) He did not, however, then address Petitioners' concerns that the answer was too generally plead. (*Ibid*.) On July 14, Ms. Barvir sent another email, countering the State's arguments about verification and expanding on Petitioners' concerns about

the general nature of the State's affirmative defenses. (*Id.*, ¶7.) She requested that the State reconsider its decision not to amend and again requested a telephonic meet-and-confer so the parties could discuss the issue further. (*Ibid*.)

On July 19, Mr. Lake responded, asking Petitioners for more details about "which specific affirmative defense [Petitioners] take issue with and the specific deficiency of that defense." (Barvir Decl., ¶8.) Two days later, Ms. Barvir emailed once more to confirm that nearly all the State's defenses lacked sufficient facts and that most were subject to being stricken because they were either not cognizable affirmative defenses or were not relevant. (*Id.*, ¶9.) Because Petitioners sought to challenge the sufficiency of 51 out of 53 affirmative defenses, Ms. Barvir tried to respond to Mr. Lake's request in good faith, but it was not then possible to list every possible deficiency for each of dozens of defenses. (*Ibid*.) So she provided a handful of examples of each. (*Ibid*.) She again asked the State to reconsider its decision not to amend. (*Ibid*.) And she again asked Mr. Lake to meet and confer with her if he continued to misunderstand the grounds for Petitioners' motion. (*Ibid*.) She then informed Mr. Lake that if he had agreed to do neither by July 23, Petitioners would treat their efforts to meet and confer as closed and file the motion.

On Friday, July 23, 2021 Mr. Lake emailed Ms. Barvir to tell her that he needed until Monday to consider the points she raised in the July 21st email. (Barvir Decl., ¶10.) Ms. Barvir obliged. (*Ibid*.) Hearing nothing all day on Monday or Tuesday, Ms. Barvir turned to preparing the demurrer and motion to strike. (*Id.*, ¶11.) On the morning of July 30, 2023, Mr. Lake left a voicemail for Ms. Barvir, requesting a telephone conference to discuss the case. (Barvir Decl., ¶12.) Ms. Barvir promptly returned the call and left a voicemail. (*Ibid*.) But as of the time of this filing, Mr. Lake has not returned the July 30th voicemail and has not agreed to meet and confer. (*Ibid*.) Petitioners thus proceeded with this demurrer to and motion to strike. (*Ibid*.)

ARGUMENT

I. THE COURT SHOULD STRIKE THE STATE'S ANSWER WITHOUT LEAVE TO AMEND BECAUSE IT WAS NOT VERIFIED AS REQUIRED BY SECTION 1089

A. Even Though Respondent Is a Government Entity, Its Answer Here Must Be Verified

Courts may "[s]trike out all or any part of any pleading not drawn or filed in conformity

with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc., § 436, subd. (b).)[1] One such law states that when an answer is filed in response to a writ petition, there are only three acceptable responsive pleading options: "[T]he party upon whom the writ or notice has been served may make a return by demurrer, verified answer or both." (*Id.*, § 1089.) Any responsive pleading to a writ petition that is not a demurrer must thus be verified or else may be stricken. (*Universal City Studios, Inc. v. Super. Ct.* (2003) 110 Cal.App.4th 1273, 1287 ["We agree with defendant that the unverified return which is not a demurrer should be stricken in terms of the merits of the mandate petition"].) "[A] return with a verified answer or demurrer is not a technicality, but is an integral and critical step in the procedure for determining the merit of a petition for extraordinary relief." (*Bank of Am., N.A. v. Super. Ct.* (2013) 212 Cal.App.4th 1076, 1085 (*Bank of Am.*).)

The State did not file a verified answer and, when given the opportunity to amend its answer to verify it, the State refused to do so. The State will likely argue that section 446, subdivision (a), which excuses public entity defendants from verifying answers to *complaints*, means that its answers to *writ petitions* need not be verified either. But this is incorrect. "Sections 1086 and 1089, contained in title 1, and supplemented by California Rules of Court, rules 56(a) and 56(c), require verification in mandate proceedings *without exception, and therefore prevail over the provisions of section 446*." (*People v. Super. Ct. (Alvarado)* (1989) 207 Cal.App.3d 464, 470, citing *Muni. Ct. v. Super. Ct. (Sinclair)* (1988) 199 Cal.App.3d 19, 25, fn. 1, italics added.)

The Court of Appeal's decision in *Hall v. Superior Court* (2005) 133 Cal.App.4th 908 ("*Hall*"), suggesting otherwise is not compelling. There, the court observed—in a footnote and without analysis—that government defendants need not verify their answers in writ proceedings. (*Id.* at p. 914, fn. 9.) The court cited three cases to reach this conclusion: *Lertora v. Riley* (1936) 6 Cal.2d 171, 176 (*Lertora*); *Crowl v. Commission on Professional Competence* (1990) 225 Cal.App.3d 334, 342 (*Crowl*); and *Verzi v. Superior Court* (1986) 183 Cal.App.3d 382, 385 (*Verzi*). All three cases reached the wrong conclusion for the same reason: All three focused singularly on

[1] All further statutory references are to the Code of Civil Procedure unless specified.

section 446's exception to the verification requirement for answers to complaints, while none addressed the contrary—and directly on point—requirement of section 1089 that answers to writ petitions *must* be verified. Indeed, in all three cases the *Hall* decision relies on, section 1089 was not even so much as *mentioned*, let alone dealt with in any depth.

First, *Lertora*, aside from being 85 years old, addressed the issue with just one line, glibly holding that "[t]he answer of an officer of the state of California to a complaint or petition need not be verified." (6 Cal.2d at p. 176.) As support, the *Lertora* court cited just *Seckels v. Department of Industrial Relations* (1929) 98 Cal.App. 647, 648, which itself did little more than restate section 446 without mentioning the contrary authority of section 1089 (which *was* the law in 1929). Further, section 446 does not use the word "petition" anywhere, so neither *Lertora* nor *Seckels* had reason to conclude that section 446 applies to answers to writ petitions as it does to complaints.

Similarly, *Crowl* relied entirely on section 446, as well as *Lertora* and *Seckels*, which as explained above, did not deal with the contrary rule of section 1089 at all. (*Crowl*, *supra*, 225 Cal.App.3d at p. 342.) What's more, *Crowl* ignored the then-recent ruling in *Sinclair* that section 1089 requires verification "without exception" and that "[d]espite section 446 . . . which provides that pleadings of public entities need not be verified, a petition by a public entity must be verified. (*Sinclair*, *supra*, 199 Cal.App.3d at p. 25, fn. 1.) And *Verzi* merely cited section 446 and moved on, referring to no supporting caselaw at all. (183 Cal.App.3d at p. 385.)

So as simple as *Hall* makes the issue appear, *Hall* is based on a precedential house of cards and, within the last year, the First Appellate District acknowledged that the question is not settled. Addressing the issue in *Alfaro v. Superior Court* (2020) 58 Cal.App.5th 371, 382, fn. 8 (*Alfaro*), the court identified the conflicting authorities on point:

> Defendant points to authority that an "unverified return which is not a demurrer should be stricken in terms of the merits of the mandate petition." [Citation.] Defendant does not address whether the verification requirement applies to public entities such as the People. (Compare *Verzi v. Superior Court* (1986) 183 Cal.App.3d 382, 385 [228 Cal. Rptr. 299] [verification not required] with *People v. Superior Court (Alvarado)* (1989) 207 Cal.App.3d 464, 469–470 [255 Cal. Rptr. 46] [verification required].) We need not decide the issue because, as Defendant concedes, courts have at times treated unverified returns " 'as a return by demurrer, because a demurrer admits the facts pleaded in a writ petition,' . . .." [Citations.] We so construe the People's return.

While *Alfaro* ultimately did not decide the issue because it could treat the responsive pleading as a demurrer, it is significant that the only case the court cited for the conclusion that no verification is required was *Verzi*, which was wrong for the reasons already discussed. Whereas *Alvarado* and *Sinclair*, the cases discussed above that *did* consider the requirements of section 1089, both rightly held that public entity defendants must verify their returns in writ proceedings.

In short, the State should have filed a verified answer. It did not. Petitioners informed the State of its error and asked the State to amend. The State declined. For the reasons discussed below, it is too late for the State to do so now; the answer should be stricken without leave to amend.

B. The Court Should Strike the State's Answer Without Leave to Amend

The repercussions of failing to file a verified answer are well established. "In the absence of a true return, all well-pleaded and verified allegations of the writ petition are accepted as true." (*Bank of Am., supra*, 212 Cal.App.4th at p. 1084, citing Code Civ. Proc., § 1094.) This is because a response that is neither a demurrer nor a verified answer "does not constitute a 'return' and does not effectively deny any of the allegations in the petition." (*Caliber Bodyworks, Inc. v. Super. Ct.* (2005) 134 Cal.App.4th 365, 372, fn. 5, citing *Shaffer v. Super. Ct.* (1995) 33 Cal.App.4th 993, 996, fn. 2.) Thus, "all facts pleaded in the petition are accepted as true." *Ibid.* In *Alfaro*, the court avoided this result by pointing out that other courts had treated unverified returns as demurrers where, as in that case, "the brief was 'essentially a memorandum of points and authorities in support of a demurrer' to the petition for writ of mandate.'" (58 Cal.App.5th at fn. 8.) Similarly, treating an unverified responsive pleading as a demurrer was also what recently saved the Attorney General when his office failed to file a verified return in *Ashmus v. Superior Court* (2019) 42 Cal.App.5th 1120, 1124, fn. 4 (*Ashmus*):

> Fortunately for [the Attorney General], there is a less catastrophic consequence available to us that we deem more appropriate than striking [the] entire argument . . .. We will likewise treat the Attorney General's return as a memorandum of points and authorities in support of a demurrer to Ashmus's petition for writ of mandate.

There is no "less catastrophic consequence" available this time. The State has already filed two demurrers, and the Court expressly ordered it to answer the petition. What's more, the State's answer lacks any analysis or supporting facts. (See infra, Part II.) It is thus not like the unverified

answers in *Alfaro* and *Ashmus*, which were "essentially [] memorand[a] of points and authorities in support of a demurrer." So there is really no way to construe the State's responsive pleading as a demurrer here. The State's answer was unverified, and it refused to amend to correct that error when given the opportunity. The Court should thus strike the State's unverified answer and take the well-pleaded and verified allegations of the writ petition as true. But if this Court disagrees, Petitioners also argue that the affirmative defenses in the State's unverified answer are almost all subject to demurrer, a motion to strike, or both.

II. THE STATE'S AFFIRMATIVE DEFENSES ARE SUBJECT TO DEMURRER BECAUSE THEY FAIL TO STATE SUFFICIENT FACTS TO CONSTITUTE A DEFENSE AND ARE UNCERTAIN

Section 430.20, subdivision (a), authorizes a party against whom an answer has been filed to file a demurrer if "[t]he answer does not state facts sufficient to constitute a defense" or is "uncertain." A demurrer tests the legal sufficiency of the pleading and requires that allegations are pleaded with requisite specificity. (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1061.) At minimum, the degree of specificity required calls for a pleading to allege facts, and not just mere conclusions. (*Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954.) To that end, affirmative defenses must be pleaded with the *same specificity as a cause of action in a complaint*. (*FPI Devel., Inc v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) Because conclusory allegations are not admitted by answer and have no pleading value, "boilerplate" affirmative defenses are insufficient. Indeed, "[t]erse legal conclusions" are not proper affirmative defenses. (*Ibid.*) And affirmative defenses must also "refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished." (Code Civ. Proc., § 431.30, subd. (g).)

The State's answer contains a kitchen sink of ***53*** purported affirmative defenses, but it does "not attempt to demonstrate any of these defenses had merit by, for example, explaining the underlying facts and applying the law to them." (*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 751.) Aside from Affirmative Defenses Nos. 1, 2, and 43, every other affirmative defense set forth in the answer is no more than a "[t]erse legal conclusion" without factual basis. They are improper and should each be stricken. (*City of Mountain View v. Super. Ct.* (1975) 54 Cal.App.3d 72, 84 [holding that it is error to overrule a demurrer to a portion of an answer that does not state facts to

constitute a defense].) Indeed, *only* legal conclusions are present, leaving the court and Petitioners to draw a broad range of inferences as to the factual basis underlying each defense. (See *Waco-Porter Corp. v. Super. Ct.* (1963) 211 Cal.App.559, 567 ["[W]hether an allegation is a statement of fact or a conclusion lies in the answer to the question: Does it usurp the province of the court to draw from it all legal inferences or conclusions which are determinative of the issue? [Citations.] As a general rule, if it does, it is a conclusion; if it does not, it is a statement of fact."].)

For example,[2] Affirmative Defense No. 3 states only that "[t]he second amended complaint and each and every cause of action stated therein are barred by the applicable statute of limitations." (Answer, p. 4.) The defense does not identify which, if any, statute of limitations the State is relying on or any fact that would support a claim that Petitioners missed it. Similarly, Affirmative Defense No. 11 reads in full: "[t]he second amended complaint is barred by the doctrine of unclean hands, as well as other applicable equitable doctrines." (Answer, p. 5.) It does not state which of Petitioners' claims the defense applies to as required by section 431.30. It does not allege any fact that Petitioners engaged in inequitable behavior related to their claims. And, perhaps worst of all, it does not identify which other "applicable equitable defenses" the State is referring to here.

As one last example, Petitioners refer to Affirmative Defense No. 10, which states that "[t]he second amended complaint, and each cause of action alleged therein, are barred by the doctrine of laches." (Answer, p. 5.) Here again, the State's answer falls short of the specificity required of proper affirmative defenses. The defense merely identifies a bald legal conclusion—unsupported by even a single fact—that the doctrine of laches bars Petitioners' claims. Laches is an equitable defense to the enforcement of stale claims. It may be applied when the complaining party has unreasonably delayed in the enforcement of a right, *and* where that party has either acquiesced in the adverse party's conduct or where the adverse party has suffered prejudice. (*Conti v. Bd. of Civ. Serv. Commrs.* (1969) 1 Cal.3d 351, 359.) The State's laches defense contains no facts

---

[2] Because this demurrer and motion to strike challenges the sufficiency of an unusually large number of defenses (51) and because of page limitations, Petitioners can provide only a handful of examples rather than explain at length every deficiency of every defense. But the examples illustrate well the problems with every challenged affirmative defense.

supporting any of the requisite elements. As more evidence of the lack of even surface-level tailoring by the State, the defense proclaims that it applies to "each cause of action" in the Second Amended Complaint, despite the answer purporting to be responsive only to the unstayed First, Second, and Eighth Causes of Action. (Answer, p. 1.) This defense, like nearly all the others, is the exact type of fact-free "terse legal conclusion" that *FPI Development* criticized.

Because all of the State's defenses (except for Affirmative Defenses Nos. 1, 2, and 43) fail to state sufficient facts and are uncertain, they are each subject to demurrer. And, given Petitioners' extensive meet-and-confer efforts, and the State's refusal to amend its answer despite the pleadings' many deficiencies being clear, the Court should grant Petitioners' demurrer without leave to amend.

But if this Court is inclined to grant leave to amend, Petitioners ask that the Court require the State to show how it can amend its answer to sufficiently state defenses to Petitioners' claims. Indeed, the State has the burden of proving that an amendment would cure the defects in its answer, just as a plaintiff seeking to avoid the sustaining of a demurrer without leave to amend must show in what manner he can amend his complaint and how that amendment will change the effect of his pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; see also *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

III. ALL BUT TWO OF THE STATE'S AFFIRMATIVE DEFENSES ARE ALSO SUBJECT TO A MOTION TO STRIKE

A motion to strike may be used to cut out "any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc., § 436, subd. (a).) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court must take judicial notice. (*Id.*, § 437, subd. (a).) Here, all of the State's affirmative defenses, except for Nos. 1 and 2, are not only subject to demurrer, but they should *also* be stricken because they are irrelevant or improper, and their deficiencies are apparent on the face of the pleading.

A. The Court Should Strike All Those Defenses That Are Subject to Demurrer Because They Lack Sufficient Facts and Are Uncertain

The previous section explains why all of the State's Affirmative Defenses, except Nos. 1, 2, and 43, are subject to a demurrer which this Court should sustain. For the same reasons, the Court

should strike those 50 Affirmative Defenses. That is, because **Affirmative Defenses 3-42 and 44-53** lack sufficient facts and certainty to constitute proper defenses, they are improper under section 436, subdivision (a), and should thus be stricken.

B. The Court Should Strike Affirmative Defenses Nos. 13, 21, 23, 30, 32, 33, 34, 35, 36, 37, 38, 39, 43, 45, 46, 47, 48, and 49 Because They Are Irrelevant

Several of the State's Affirmative Defenses should be stricken because, even if they were sufficiently plead, they are irrelevant. Some of the State's Affirmative Defenses are irrelevant to the three unstayed causes of action that the State claimed its answer was limited to, (Answer, pp. 1-2), while others are irrelevant even under the generous assumption that the defenses are meant to apply to the entire Second Amended Complaint. "Irrelevant" or "immaterial" matters "have no proper place in the pleading" and are "properly stricken out." (*Eich v. Greeley* (1896) 112 Cal. 171, 173.)

Affirmative Defense No. 13, for example, states that "the second amended complaint and each cause of action therein are barred by the failure to precede the action with a claims as required by various Government Code sections, including *but not limited to* 945.4, 911.2, 905.2, 950.2, and 810 et seq." Setting aside the fact that the States alleges *no* facts supporting this conclusion, the code sections the State cites here are not relevant to the three currently unstayed causes of action. (Answer, p. 5.) Most importantly, each of these sections concerns only claims for money damages. (Govt. Code, § 814 ["Nothing in this part [sections 810-998.3] affects . . . the right to obtain relief other than money or damages against a public entity or public employee."]. But all claims for damages are stayed and, by the State's own description, the answer is only responsive to the three unstayed causes of action which seek only declaratory or injunctive relief or mandamus. (Compare Answer, pp. 1-2, with Second Amend. Compl., pp. 25-40.) Section 911.2 applies to claims for death or for injury to a person or personal property or growing crops, none of which apply here. And section 810 merely begins a list of definitions and immunities which the State makes no effort to explain the applicability of.

Similarly, **Affirmative Defense No. 23** states that "[t]o the extent applicable, Defendants are immune from suit under public entity immunity pursuant to, but not limited to, Government Code §§ 815, 815.2, 818, 818.2, 818.8, 820.4, 820.8, 821." (Answer, p. 7.) Again, the State simply

lists a series of code sections that are, at minimum, irrelevant to the three unstayed causes of action because those claims are for equitable relief, not money damages. For instance:

- Section 815 protects public entities from liability for injuries resulting from an act or omission by the entity or a public employee.
- Section 815.2 similarly protects public entities from liability for injuries proximately caused from an act or omission by the entity or a public employee if the public employee would be immune from liability.
- Section 818 is bars recovery of punitive damages from public entities.
- Section 818.8 states that a "public entity is not liable for an injury cause by adopting or failing to adopt an enactment or by failing to enforce any law."
- Section 820.4 states that a "public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law.
- Section 821, like section 818.8, protects public employees from liability for injuries caused by adoption or failure to adopt any enactment or failure to enforce any law. Others are irrelevant to even the unstayed claims:
- Section 818.8 protects against liability for injuries caused by any misrepresentation made by a public entity's employees, which Petitioners have not alleged.
- Section 820.8 protects public employees from liability for harm caused by the act or omission of a third party, which neither Petitioners nor the State have alleged.

To Affirmative Defense No. 23's list of marginally relevant public entity immunities, the State adds **Affirmative Defense No. 38** for good measure. This defense states that the State "is not liable for any injury or damages, if any there were, for failure to inspect or for a negligent inspection of property owned or controlled by a third party. (Gov. Code, §§ 818.6 and 821.4.)" (Answer, p. 9.) But Petitioners have not alleged any claims related to a negligent inspection of property. Yet again, the State seems to have copy-and-pasted a list of affirmative defenses with no effort to tailor them to the operative complaint at all.

As a final example of the State's irrelevant defenses, Petitioners highlight Affirmative **Defense No. 43**, which reads in full: "Defendants have not deprived any person of any right, privilege or immunity guaranteed by the California Constitution." (Answer, p. 10.) Of course, Petitioners never claimed any violation of the state constitution—not in the entire operative complaint, much less in the three unstayed causes of action. This defense is thus not responsive to anything in the Second Amended Complaint and is thus irrelevant.

Because **Affirmative Defenses Nos. 13, 21, 23, 30, 32, 33, 34, 35, 36, 37, 38, 39, 43, 45, 46, 47, 48, 49** are irrelevant to the claims they purport to apply to, the should each be stricken.

C. The Court Should Strike Affirmative Defenses Nos. 14, 15, 16, 17, 18, 19, 21, 22, 24, 25, 27, 29, 30, 31, 32, 44, 50, 51, and 53 Because They Are Not Affirmative Defenses At All

The next pile of defenses in this "kitchen sink" should be wiped from the State's answer because they are not cognizable affirmative defenses at all and are thus improper. A proper affirmative defense is a "new matter" alleging facts showing that "notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought." (*Goddard v. Fulton* (1863) 21 Cal. 430, 436; accord *Walsh v. W. Valley Mission Cmty. Coll. Dist*. (1998) 66 Cal.App.4th 1532, 1542, fn. 3.) In short, an affirmative defense "creates a new issue" on which the defendant bears the burden of proof, rather than a "traverse" that contradicts an existing cause of action. (*Rancho Santa Marg. v. Vail* (1938) 11 Cal.2d 501, 543.)

Many of the State's defenses would not constitute proper affirmative defenses even if sufficient facts were plead. Instead, they appear to be denying that specific elements of Petitioners' claims are met, which makes them improperly plead. (*Civ. Serv. Employees Ins. Co. v. Super. Ct.* (1978) 22 Cal.3d 362, 368, fn. 2 ["Although the answer contained a total of 15 ostensible 'affirmative defenses,' the bulk of these were more in the nature of general and special demurrers than defenses."].) For example, **Affirmative Defense No. 14** states that "Defendants have not deprived Plaintiffs of any right guaranteed by law." (Answer, p. 6.) Similarly, **No. 16** states that Petitioners "are not entitled to mandamus relief because there is no clear, present, and ministerial duty on the part of Defendants, Plaintiffs do not have a clear, present, and beneficial right to the performance of that duty, defendants have discretion that cannot be directed by the courts, and an adequate remedy exists at law for Plaintiffs." (*Ibid.*) **No. 17** claims that the State was "acting legitimately in accordance with statutory requirements" and "neither owed nor breached any duty under law to Plaintiffs." (*Ibid.*) **No. 21** claims that the complaint is barred because the State was "not aware of any wrongful conduct, and had no reason to be aware of any wrongful conduct, if any there were." (*Ibid.*) And **No. 30** (which is irrelevant to the unstayed claims for equitable relief)

claims that Petitioners' "claim for damages is barred to the extent that [they] had a duty to mitigate, but failed to mitigate, their damages, if any there were." (*Id.*, p. 8.)

None of these are cognizable affirmative defenses on their own, but rather arguments that Petitioners have not established or cannot establish the elements of their claims (though the State does not specify *which* claims). Under even the most generous reading, these "defenses" are *at most* part of the State's First and Second Affirmative Defenses that the complaint fails to state a claim and fails to allege facts sufficient to entitle Petitioners to the relief they seek. (See *id.*, p. 4.) Other defenses do not even come that close. **Affirmative Defense No. 53** is essentially a "wish for more wishes." After pleading over 50 defenses, the State lists as its final "defense" that:

> Because Plaintiffs' second amended complaint is couched in conclusory terms, answering Defendants cannot fully anticipate all affirmative defenses that may apply in this case. In addition, information disclosed during discovery and investigation may indicate additional defenses that apply in this case. Accordingly, Defendants reserve the right to supplement, alter or amend this answer to add additional defenses.

(Answer, p. 11.) Setting aside the hypocrisy of claiming that *Petitioners* are the ones couching their pleading in conclusory terms at the end of an answer that offers *nothing but* conclusory statements, this "defense" is really just a reservation of a "right" to add defenses later because the State cannot anticipate all the defenses that might apply. That's hard to imagine, considering that the State appears to have pleaded every affirmative defense it could think of, then several more it made up. In any event, a reservation of the right to supplement to add defenses, even if such a right existed, does not constitute a proper affirmative defense and should be stricken.

Affirmative Defenses Nos. **14, 15, 16, 17, 18, 19, 21, 22, 24, 25, 27, 29, 30, 31, 32, 44, 50, 51, and 53** should each be stricken because they are not affirmative defenses at all, even if the State had pleaded any facts to support them.

D. The Court Should Strike Affirmative Defenses Nos. 11, 12, 16, 23, 27, 28, 50, 51, 52, and 53 Because They Combine Multiple Defenses into One

Another group of affirmative defenses is improper because each pleads two or more defenses in a single defense, violating the Rules of Court, which call for "separately stated" defenses. (Cal. Rules of Court, rule 2.112.) For example, **Affirmative Defense No. 12** reads: "The

second amended complaint, and each and every cause of action stated therein, are barred by the doctrines of estoppel *and/or* waiver." (Answer, p. 5, italics added.) Equitable estoppel and waiver, while similar in some ways, are not the same defense. Waiver is the intentional relinquishment of a known right, (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572), while estoppel prevents a claimant from adopting a new position inconsistent with a prior position if it would result in an injury to another, (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261).

Affirmative Defense No. 28 likewise mixes somewhat related, but still distinct, types of privilege. It states that each cause of action is "barred because the actions complained of were justified and privileged under, but not limited to, the litigation privilege and that described in California Civil Code § 47, as well as the official information privilege, and the *Noerr-Pennington* doctrine." (Answer, p. 8.) The "litigation privilege" protects certain statements made in litigation from being used against a person, typically in a defamation context. (*Vo v. Nelson & Kennard* (E.D. Cal. 2013) 931 F.Supp.2d 1080, 1095, citing Civ. Code, § 47, subd. (b).) The "official information" privilege protects information "acquired in confidence by a public employee in the course of duty and not openly or officially disclosed to the public prior to the assertion of privilege." (*Ibarra v. Super. Ct.* (2013) 217 Cal.App.4th 695, 705.) While, under *Noerr-Pennington*, private entities are immune from liability under antitrust laws for attempts to influence the passage or enforcement of laws. "Stated most generally, the *Noerr-Pennington* doctrine declares that efforts to influence government action are not within the scope of the Sherman Act, regardless of anticompetitive purpose or effect." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 320.) This doctrine is not even about privilege as the other two are; it is a defense to Sherman Act violations and is clearly not relevant here. Even if it were, it should not have been merged with two other defenses.

But perhaps the most serious example is **Affirmative Defense No. 27**:

> To the extent that the second amended complaint herein attempts to predicate liability upon any public entity, Defendants, or any agent or employee thereof for purported negligence in retention, hiring, employment, training, or supervision of any public employee, liability is barred by Government Code sections 815.2 and 820.2 and *Herndon v. County of Marin*, 25 Cal.App.3d 933, 935 36 (1972), *reversed on other grounds by Sullivan v. County of Los Angeles*, 12 Cal.3d 710 (1974); by the lack of any duty running to Plaintiffs; by the fact that any such purported act or omission is governed exclusively by statute and is outside

> the purview of any public employees' authority; and by the failure of any such acts or omissions to be the proximate cause of any injury alleged in the second amended complaint.

(Answer, p. 7.) While difficult to parse,[3] this "affirmative defense" seems to be that: (1) Government Code sections 815.2 and 820.2 bar liability; (2) the State has no duty to Petitioners; (3) the State had to act as applicable statutes require; and (4) the State's actions were not the proximate cause of any injury alleged by Petitioners. Whether or not any of these individually are properly pleaded affirmative defenses (and they are not, for various reasons), the State cannot cram four defenses into one, making it tougher to litigate this case later on.

In short, because **Affirmative Defense Nos. 11, 12, 16, 23, 27, 28, 50, 51, 52, and 53** combine multiple defenses into one, the Court should strike each one.

E. The Court Should Strike Affirmative Defenses Nos. 3, 11, 13, 16, 18, 19, 20, 22, 23, 26, 27, 29, 33, 34, 35, 37, 39, 40, 41, 44, 45, 46, 47, 48, 49, and 51 Because They Are Improperly Duplicative of Other Claimed Defenses

The final category of improperly pleaded affirmative defenses in the State's answer fails because they are duplicative with other defenses already stated. While a matter in a pleading being redundant is not grounds for a demurrer, it is grounds for a motion to strike. (*Henke v. Eureka Endowment Assn.* (1893) 100 Cal. 429, 433.)

For example, **Affirmative Defense No. 39** states that "[t]he complaint and each cause of action therein are barred by the statute of limitations of Code of Civil Procedure section 342 [relating to claims against public entities] and Government Code sections 945.4 and 945.6." (Answer, p. 9.) But the State already raised a more general statute of limitations defense at **Affirmative Defense No. 3**. (See *id.*, p. 4 ["The second amended complaint and each and every cause of action stated therein are barred by the applicable statute of limitations."].) These defenses are improperly duplicative, and at least one of them should be stricken.

Similarly, **Affirmative Defense No. 26** states that "[i]f any wrongful activity occurred, or if Plaintiffs suffered any injury or damages, it was caused by other parties or persons over whom

---

[3] Petitioners would even say this defense is "incomprehensible," yet another reason it should be stricken.

Defendants had no control." (Answer, p. 7.) But **Affirmative Defense No. 20** already raised the defense of superseding and intervening actions from third parties. (*id.*, p. 6.)

But perhaps, the best example of the State duplicating defenses is **Affirmative Defense No. 23**, which raises various public immunity defenses under Government Code sections 815, 815.2, 818, 818.2, 818.8, 820.4, 820.8, and 821. (Answer, p. 7.) The State then individually repeats various public immunity and public employee defenses, citing the very same code sections in **Affirmative Defense Nos. 27, 33, 34, 35, 41, 45, 46, 47, 48, and 49.** (*Id.*, pp. 7-10 .)

In short, the Court should strike **Affirmative Defense Nos. 3, 11, 13, 16, 18, 19, 20, 22, 23, 26, 27, 29, 33, 34, 35, 37, 39, 40, 41, 44, 45, 46, 47, 48, 49, and 51** because they are improperly duplicative of other affirmative defenses.

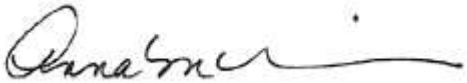
CONCLUSION

Petitioners did not want to have to bring this motion. In fact, counsel for Petitioners almost *never* bring such motions. They generally involve significant expense with little benefit. But here, the State has presented an extraordinary number of unsupported, irrelevant, and otherwise improper defenses. Foregoing the opportunity to perfect the pleadings will thus transform what should be limited mandamus discovery into a full-blown discovery battle, characterized by marginally relevant requests necessary to test the sufficiency of defenses that likely never had factual support in the first place. What's more, Petitioners tried repeatedly—for almost a full month—to meet with the State so it could amend and correct the answer's many deficiencies without the need for motion practice. The State refused, so Petitioners had to file.

Petitioners thus hope this Court will strike the unverified answer as a whole without leave to amend. Should this Court, however, disagree that the State must verify, the Court should grant Petitioners' motion to strike and sustain their demurrer as to Affirmative Defenses 3-53. If leave to amend is granted, the State should be held to explain how it would correct its answer.

Dated: August 4, 2021

MICHEL & ASSOCIATES, P.C.



Anna M. Barvir
Attorneys for Petitioners-Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On August 4, 2021, I served the foregoing document(s) described as

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS AND PETITIONERS' DEMURRER TO AND MOTION TO STRIKE RESPONDENTS' ANWER TO THE FIRST, SECOND, AND EIGHTH CAUSES OF ACTION TO THE SECOND AMENDED COMPLAINT

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof by the following means, addressed as follows:

Benjamin Barnouw
Deputy Attorney General
Email: Ben.Barnouw@doj.ca.gov
Kenneth G. Lake
Deputy Attorney General
Email: Kenneth.Lake@doj.ca.gov
Alexis Diamond
Deputy Attorney General
Email: Alexis.Diamond@doj.ca.gov
California Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Attorney for Respondents-Defendants

X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission through One Legal. Said transmission was reported and completed without error.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 4, 2021, at Long Beach, California.

Laura Palmerin