TENTATIVE RULING

For all the reasons discussed below, the demurrer to the following affirmative defenses is sustained: 3rd (No Damages to Plaintiff); 4th (Excuse of Performance); 10th (Statute of Frauds); 15th (Lack of Consideration); 16th (Conditions Precedent); 23rd (No Waiting Time Penalties); 24th (No Attorney Fees); 25th (No Expert Fees); 26th (Lack of Jurisdiction); and 27th (No Bases for California Law).

The demurrer to the following affirmative defenses is overruled: 5th (Waiver); 6th (Unclean Hands); 7th (Estoppel/Waiver); 9th (Failure to Mitigate); 12th (Apportionment); 18th (After-Acquired Evidence); 11th (Business Judgment and Good Faith); and 20th (Good Faith Bases for Termination)

No leave to amend was sought nor is granted unless the defendants convince the court otherwise to add the specific denials. The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance.

Analysis:

According to the complaint, plaintiff Mark DePuy worked for defendant Cat Canyon Resources, LLC for some unspecified length of time as the Chief Executive Officer of the company. His employment terminated in December of 2023. He filed suit on January 16, 2024, alleging two causes of action: (1) failure to pay severance wages pursuant to contractual obligation pursuant to Labor Code section 200; and (2) failure to timely pay wages at termination pursuant to Labor Code section 203.

According to the amended answer, filed on April 25, 2024, on or about March 11, 2023, the former managers and owners of Cat Canyon, including DePuy, created a contract (hereinafter referred to as "Award Letter"), which promised Mr. DePuy $100,000.00 ("the Award") in exchange for him remaining employed with the company through June 30, 2023. The Award Letter further promised Mr. DePuy a four (4) month's severance payment of his base salary and company-paid COBRA benefits if he was terminated without cause between March 13, 2023 and December 31, 2023. The Award Letter disallowed any such severance and benefits payments if Mr. DePuy's employment was subject to a "For Cause Termination." Mr. Wood purchased Cat Canyon on or about April 1, 2023. He was not aware of the Award Letter. Mr. DePuy was nevertheless paid the $100,000 Award, albeit three months later than specified in the Award Letter, to which Mr. DePuy agreed. In exchange, he allegedly waived any and all claims against Cat Canyon and Mr. Wood. The Answer also alleges that plaintiff breached his fiduciary duties to Cat Canyon and failed to perform his duties to the company, misappropriated company funds, and

negligently performed as an employee of Cat Canyon. Based on these facts, defendants alleged twenty-seven affirmative defenses.

In addition, defendants have filed a cross-complaint against plaintiff, alleging (1) Breach of Contract for failure to perform conditions precedent to make a claim under the Award Letter and by engaging in conduct that warranted a for cause termination; (2) negligence for failing to act as a reasonably prudent CEO and as a reasonably prudent employee of Cat Canyon Resources, LLC and misrepresenting the financial condition and health of the company; (3) breach of fiduciary duties based on same; (4) misappropriation of company funds and time by failing to document and accurately report all business expenses on approved expense forms, by using the company credit card for personal non-business related expenses, by failing to document and accurately report all vacation and sick time taken, and by failing to report in person for work Monday through Friday during normal business hours as required and requested by Mr. Wood; and (6) declaratory relief.

Plaintiff demurs to twenty-one of the twenty-seven alleged affirmative defenses. In its opposition, defendant agrees to withdraw the 13th (comparative fault), 17th (no causation), and 19th (frivolous claims) affirmative defenses. This tentative ruling will thus deal with the demurrer to the following affirmative defenses:

- 3rd: No Damage
- 4th: Excuse of Performance
- 5th: Waiver
- 6th: Unclean Hands
- 7th: Estoppel/Waiver
- 9th: Failure to Mitigate
- 10: Statute of Frauds
- 11th: Business Judgment and Good Faith
- 12th: Apportionment
- 15th: Lack of Consideration
- 16th: Conditions Precedent
- 18th: After-Acquired Evidence
- 20th: Good Faith Bases for Termination
- 23rd: No Waiting Time Penalties
- 24th: No Attorney's Fees
- 25th: No Expert Fees
- 26th: Lack of Jurisdiction
- 27th: No Bases for California Law

Some preliminary observations frame the issues before the court. "Under general rules of civil procedure, an answer must contain '[t]he general or specific

denial of the material allegations of the complaint controverted by the defendant' and '[a] statement of any new matter constituting a defense.' (Code Civ. Proc., § 431.30, subd. (b)(1) & (2).) 'The phrase "new matter" refers to something relied on by a defendant which is not put in issue by the plaintiff. [Citation.] Thus, where matters are not responsive to essential allegations of the complaint, they must be raised in the answer as "new matter." ' [Citation.]" (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 812.)

"Such 'new matter' is also known as 'an affirmative defense.' Affirmative defenses must not be pled as terse legal conclusions, but 'rather . . . as facts averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint." (*Id*. at pp. 812-813 [cleaned up].) Nevertheless, a leading practice guide observes: "Although the [pleading] requirement exists, it is frequently ignored in practice. While a party may demur to an answer . . . such demurrers are filed very infrequently, so defendants or cross-defendants often do not plead as carefully in the answers as in pleadings seeking affirmative relief. Also, interrogatory 15.0 on the DISC-001 Official Form Interrogatories is an inexpensive and effective way to require defendant to explain the basis for affirmative defenses." (Weil & Brown, *Cal. Practice Guide: Civ. Proc. Before Trial* (2024) ¶ 6:459.)

Plaintiff can demur to defendant's answer on one of the following grounds: failure to state facts sufficient to constitute a defense, uncertainty, and failure to state whether contract alleged in the answer is written or oral. (Code Civ. Proc., § 430.20.) "Unlike the usual general demurrer to a complaint the inquiry is not into the statement of a cause of action. Instead it is whether the answer raises a defense to the plaintiff's stated cause of action." (*Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 879-880.)

"There are, however, certain important differences between these two kinds of demurrer. An important difference is that in the case of a demurrer to the answer, as distinguished from a demurrer to the complaint, the defect in question need not appear on the face of the answer. The determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer. This requirement, however, does not mean that the allegations of the complaint, if denied, are to be taken as true, the rule being that the demurrer to the answer admits all issuable facts pleaded therein and eliminates all allegations of the complaint denied by the answer. Another rule, particularly applicable to the case of a demurrer to the answer, is that each so-called defense must be considered separately without regard to any other defense. Accordingly, a separately stated defense or counterclaim which is sufficient in form and substance when viewed in isolation does not become insufficient when, upon looking at the answer as a whole, that defense or counterclaim appears inconsistent

with or repugnant to other parts of the answer." (*South Shore Land Co. v. Petersen, supra*, 226 Cal.App.2d at pp. 733-734 [cleaned up].)

Finally, affirmative defenses are limited in function to defeating the plaintiff's recovery. (*Morris Cerullo World Evangelism v. Newport Harbor Offices & Marina, LLC* (2021) 67 Cal.App.5th 1149, 1158.) Here, the court notes that defendant has filed a cross-complaint based largely on the same actions as asserted in the Answer. It has included in its Answer an affirmative defense for offset, which remains unchallenged. (Answer, 22nd Affirmative Defense.) Thus, defendants' claim for affirmative relief based on those actions will be fully assessed in this action. In that vein, the court wonders whether this exercise is an entirely necessary exercise—at least as to those defenses that will also be considered in conjunction with the cross-complaint. Nevertheless, it takes the pleadings as they come.

With these legal precepts in mind, the court now examines plaintiff challenges of the above listed affirmative defenses on the basis they failure to state facts sufficient to constitute a defense.

1. 3rd (No Damages to Plaintiff), 23rd (No Waiting Time Penalties), 24th (No Attorney Fees) and 25th (No Expert Fees) Affirmative Defenses

These defenses assert there are "no" damages to plaintiff (3rd), "no" waiting time penalties due based on a good faith dispute whether wages are due (23rd), "no" attorney's fees due to plaintiff under any theory (24th) and "no" expert fees due to plaintiff under any theory (25th). Plaintiff argues these affirmative defenses do not qualify as new matter.

In *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, the court explicated the difference between denials (also known as "traverses") and affirmative defenses (also known as "new matters"). The court stated, "Under Code of Civil Procedure section 431.30, subdivision (b)(2), the answer to a complaint must include '[a] statement of any new matter constituting a defense.' The phrase 'new matter' refers to something relied on by a defendant which is not put in issue by the plaintiff. Thus, where matters are not responsive to essential allegations of the complaint, they must be raised in the answer as 'new matter.' Where, however, the answer sets forth facts showing some essential allegation of the complaint is not true, such facts are not 'new matter,' but only a traverse." (*Id*. at p. 725 (cleaned up); see also *Walsh v. West Valley Mission Community College Dist*. (1998) 66 Cal.App.4th 1532, 1546.)

The court agrees that the identified affirmative defenses are not "new matter;" they have been put in issue by the plaintiff. (Complaint, ¶ 14 [attorney's fees and costs, waiting time penalties]; Prayer, ¶ 1 [wages owed]; ¶ 4 [waiting time penalties]; ¶ 5 [attorneys' fees and costs], ¶ 6 expert fees]). Defendants have

generally denied the allegations. (Answer, ¶ 1.) Defendants have also specifically denied that plaintiff has been damaged. (Answer, ¶ 2.)

Defendants argue that these assertions are really just specific denials, which are permitted in an answer. That may be so, but they do not withstand scrutiny as affirmative defenses. (*Walsh v. West Valley Mission Community College Dist*. (1998) 66 Cal.App.4th 1532, 1547 [in breach of contract action, statement by defendant that plaintiff did not perform was not affirmative defense; defendant was not attempting to bring up new matter, but was merely presenting evidence to refute allegations of complaint, which had been put into controversy by general denial].)

The demurrer to these affirmative defenses is granted.

2. Equitable Defenses: 5th (Waiver); 6th (Unclean Hands); 7th (Estoppel/Waiver); 9th (Failure to Mitigate); 12th (Apportionment); 18th (After-Acquired Evidence)

Plaintiff argues that equitable defenses, such as those raised by these affirmative defenses, are not available to avoid statutory obligations, including a Labor Code violation. (See *Stuart v. Radioshack Corp.* (2009) 259 F.R.D. 200.) He asserts his causes of action are purely statutory and based upon the non-payment of wages owed. (See, e.g., Labor Code §§ 200, 203.)

Defendants rely on its own allegations in its Answer that plaintiff engaged in multiple acts of wrongdoing leading to the for cause termination, including creating and allowing the creation of the Award Letter to pay himself a $100,000 bonus in breach of his fiduciary duties to Cat Canyon Resources, LLC which he knew to be in financial distress. Defendants essentially recharacterize the causes of action alleged in plaintiff's complaint as contractual rather than statutory. From that perspective, it asserts that the defenses are valid.

Plaintiff argues that defendant "mischaracterizes" the nature of plaintiff's wage and hour complaint, asserting there are just two statutory causes of action alleged for violations of the Labor Code. But such a narrow interpretation is not supported by law. The essential factual elements of a claim for nonpayment of wages are: (1) That [name of plaintiff] performed work for [name of defendant]; (2) That [name of defendant] owes [name of plaintiff] wages under the terms of the employment; and (3) The amount of unpaid wages. (CACI 2700.) Wages is defined in the instruction and the directions for use indicate that may be modified to include additional compensation, such as severance pay. Thus here, even if the cause of action is brought pursuant to a Labor Code violation, plaintiff will have to prove that he is entitled to the severance pay "under the terms of the employment." Such terms, according to the complaint, exist in a contract. (Complaint, ¶ 10—defendant claimed employee terminated for cause to avoid "contractual severance wage

obligation"; ¶ 11—severance pay due under "relevant employment materials provided by company.") Contractual defenses are thus appropriate for purposes of pleading.

Thus, the court finds the affirmative defenses are new matter and overrules the demurrer.

3. 11th (Business Judgment and Good Faith) and 20th (Good Faith Bases for Termination) Affirmative Defenses

The 11th affirmative defense is based on defendant's proper exercise of discretion and business judgment in, presumably, withholding the severance payment. The 20th affirmative defense is based on the fact that defendant had a good faith basis for terminating plaintiff.

As noted above, plaintiff will have to prove he was entitled to severance pay under the terms of employment—in this case, pursuant to contract. The Answer alleges that the contract, e.g., the Award Letter, disallowed any severance payments if plaintiff was subject to for cause termination. (Answer, ¶ 12.) This qualifies as new matter and the demurrer is thus overruled.

4. 26th Affirmative Defense (Lack of Jurisdiction) and 27th Affirmative Defense (No Bases for California Law)

These affirmative defenses are not new matter. They have been put in issue by plaintiff. (Complaint, ¶¶ 1-7.) Defendant has generally denied the allegations. (Answer, ¶ 1.) (*State Farm Mut. Auto. Ins. Co. v. Superior Court*, *supra,* 228 Cal.App.3d at 725—"Where, however, the answer sets forth facts showing some essential allegation of the complaint is not true, such facts are not 'new matter,' but only a traverse.")

The demurrer to these affirmative defenses is sustained.

5. Contract Defenses

Plaintiff argues: "Despite the fact that Plaintiff has not alleged any breach of contract claim, Defendant has raised a number of contract defense theories in its answer which do not apply to Labor Code actions and which, therefore, unnecessarily increase the complexity and cost of litigating this matter. Specifically, Defendants' 4th Affirmative Defense (Excuse of Performance), 10th Affirmative Defense (Statute of Frauds), 15th Affirmative Defense (Lack of Consideration), and 16th Affirmative Defense (Conditions Precedent), are all improper and nonsensical within the context of an action for wages owed under Labor Code § 200 et seq. and for derivative waiting time penalties Labor Code § 203."

As explained above, an element of the cause of action for nonpayment of severance pay requires plaintiff to prove he is entitled to such pay "under the terms of the employment." The complaint alleges that such terms were contractual. The court finds that contractual defenses are thus appropriate.

The demurrer to these affirmative defenses is overruled.

Summary of Ruling

The demurrer to the following affirmative defenses is sustained: 3rd (No Damages to Plaintiff); 4th (Excuse of Performance); 10th Affirmative Defense (Statute of Frauds), 15th Affirmative Defense (Lack of Consideration); 16th Affirmative Defense (Conditions Precedent); 23rd (No Waiting Time Penalties); 24th (No Attorney Fees); 25th (No Expert Fees); 26th (Lack of Jurisdiction); and 27th (No Bases for California Law).

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