IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Richard Bukowski and Gayle Bukowski,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	No. 19 L 10529
Philip Morris USA, Inc., R.J. Reynolds Tobacco Company, Liggett Group LLC, and Walgreen Co.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before this court on the plaintiffs' motions to strike the defendants' affirmative defenses. The parties briefed the motions, and this court reviewed each of the submissions, including exhibits.

The Code of Civil Procedure provides that:

> The facts constituting any affirmative defense . . . that the negligence of a complaining party contributed in whole or in part to the injury of which he complains, . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint . . . and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.

735 ILCS 5-2-613(d). An affirmative defense assumes the truth of the complaint's allegations. *See Leyshon v. Diehl Controls N. Am., Inc.*, 407 Ill. App. 3d 1, 9 (1st Dist. 2010) (quoting Black's Law

Dictionary 451 (8th ed. 2004)). Ultimately, "[t]he test of whether a defense is affirmative and must be pleaded by a defendant is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222 (4th Dist. 1984).

With that explanation, there is plenty of blame to go around in this set of pleadings. First, each of the plaintiffs' motions is improperly pleaded. A motion to strike an affirmative defense is a motion with respect to the pleadings. *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 15 (citing 735 ILCS 5/2-615). Accordingly, the Code of Civil Procedure requires a motion to strike to, "point out specifically the defects complained of. . . ." 735 ILCS 5/2-615. The plaintiffs' motions fail the specificity requirement by, instead, arguing generalities with phrases such as, "for example," "to the extent that," "many of the affirmative defenses," and "other affirmative defenses." There is either a valid argument based on insufficiency, or not. It is not up to this court to decipher which of the defendants' affirmative defenses the plaintiffs believe, feel, suggest, or otherwise, are insufficient. In the future, such vague pleadings will be stricken at the outset. Second, it is plain the defendants misunderstand the concept of an affirmative defense. Insufficient pleading is the basis for a motion to dismiss, *see* 735 ILCS 5/2-615, not an affirmative defense; and we are beyond the motion stage at this point since the defendants answered the plaintiffs' complaint and have, therefore, waived any argument as to defects in the pleadings. *See Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 60 (1994). Third, the plaintiffs are equally at fault for prematurely challenging various affirmative defenses that unquestionably require a factual record before their validity may be determined. *See, e.g., M X L Indus. v. Mulder*, 252 Ill. App. 3d 18, 24-25 (2d Dist. 1993) (affirmative defense dismissed at trial on directed verdict motion).

Despite these various errors this court has reviewed each affirmative defense so that, if nothing else, it will not have to

revisit these issues in the future. Therefore, as to each affirmative defense of each defendant, the court's rulings on the plaintiffs' motions to strike are as follows:

Liggett

Affirmative Defense 1

Granted. Insufficient pleading is not an affirmative defense.

Affirmative Defense 2

Granted. A failure to state a claim is not an affirmative defense.

Affirmative Defense 3

Granted. A lack of proximate causation is not an affirmative defense.

Affirmative Defense 4

Granted. Each affirmative defense must be separately pleaded. Leave to re-plead granted.

Affirmative Defenses 5 - 6

Denied.

Affirmative Defense 7

Granted. Each affirmative defense must be separately pleaded. Additionally, there is no factual basis presented to apply the master settlement agreement to this litigation. Leave to re-plead granted.

Affirmative Defenses 8 - 15

Denied.

Affirmative Defenses 16 - 17

Denied. The merits of the affirmative defenses are inappropriate for resolution at this early stage of the litigation. Leave is granted for a motion after a sufficient record exists.

Affirmative Defenses 18 - 24

Denied.

Affirmative Defense 25

Denied. The merits of the affirmative defense are inappropriate for resolution at this early stage of the litigation. Leave is granted for a motion after a sufficient record exists.

Affirmative Defense 26

Granted. Neither the American Law Institute's 1962 declaration nor the Restatement (Second) of Torts section 402(A) provides a factual or legal basis for an affirmative defense.

Affirmative Defense 27

Denied. The merits of the affirmative defense are inappropriate for resolution at this early stage of the litigation. Leave is granted for a motion after a sufficient record exists.

Affirmative Defense 28

Granted. A business judgment is not an affirmative defense.

Affirmative Defense 29

Granted. Although standing is an affirmative defense, no facts are pleaded to indicate the plaintiffs lack standing. Leave to re-plead granted.

Affirmative Defense 30

Denied. The merits of the affirmative defense are inappropriate for resolution at this early stage of the litigation. Leave is granted for a motion after a sufficient record exists.

Affirmative Defense 31

Granted. Leave to re-plead granted.

Philip Morris USA

Affirmative Defense 1

Granted. Insufficient pleading is not an affirmative defense.

Affirmative Defense 2

Granted. A failure to state a claim is not an affirmative defense.

Affirmative Defense 3

Granted. A lack of proximate causation is not an affirmative defense.

Affirmative Defenses 4 - 5

Denied.

Affirmative Defense 6

Granted. Each affirmative defense must be separately pleaded. Leave to re-plead granted.

Affirmative Defense 7

Granted. Each affirmative defense must be separately pleaded. Additionally, there is no factual basis presented to apply the master settlement agreement to this litigation. Leave to re-plead granted.

Affirmative Defenses 8 - 12

Denied.

Affirmative Defense 13

Granted. Neither the American Law Institute's 1962 declaration nor the Restatement (Second) of Torts section 402(A) provides a factual or legal basis for an affirmative defense.

Affirmative Defense 14

Denied. The merits of the affirmative defense are inappropriate for resolution at this early stage of the litigation. Leave is granted for a motion after a sufficient record exists.

Affirmative Defenses 15 - 21

Denied.

Affirmative Defenses 22 - 23

Denied. The merits of the affirmative defenses are inappropriate for resolution at this early stage of the litigation. Leave is granted for a motion after a sufficient record exists.

Affirmative Defense 24

Granted. Standing is an affirmative defense, but no facts are pleaded to indicate the plaintiff lacks standing. Leave to re-plead granted.

Affirmative Defense 25

Granted. Leave to re-plead granted.

Affirmative Defenses 26 - 27

Granted. A reservation of rights is not an affirmative defense.

R.J. Reynolds

Affirmative Defense 1

Granted. Insufficient pleading is not an affirmative defense.

Affirmative Defense 2

Granted.

Affirmative Defense 3

Granted. Each affirmative defense must be separately pleaded. Additionally, there is no factual basis presented to apply the master settlement agreement to this litigation. Leave to re-plead granted.

Affirmative Defenses 4 - 6

Denied.

Affirmative Defense 7
Denied. The merits of the affirmative defense are inappropriate for resolution at this early stage of the litigation. Leave is granted for a motion after a sufficient record exists.
Affirmative Defenses 8-11
Denied.
Affirmative Defense 12
Granted. Insufficient pleading is not an affirmative defense.
Affirmative Defense 13
Denied. The merits of the affirmative defense are inappropriate for resolution at this early stage of the litigation. Leave is granted for a motion after a sufficient record exists.
Affirmative Defenses 14 - 17
Denied.

Walgreens
Affirmative Defense 1
Granted. Insufficient pleading is not an affirmative defense.
Affirmative Defenses 2 - 5
Denied.
Affirmative Defense 6
Denied. The merits of the affirmative defense are inappropriate for resolution at this early stage of the litigation. Leave is granted for a motion after a sufficient record exists.
Affirmative Defenses 7 - 13
Denied.

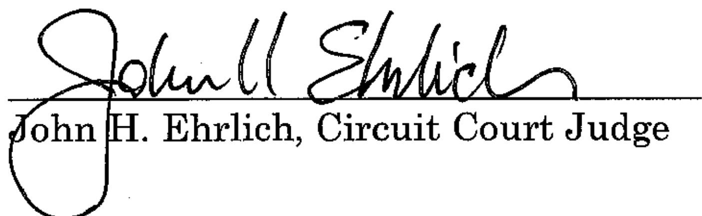
It is further ordered that:

1. The defendants have until October 8, 2020 to file their amended affirmative defenses; and
2. The plaintiffs have until November 5, 2020 to file their responses to the amended affirmative defenses.

Judge John H. Ehrlich

SEP 11 2020

Circuit Court 2075



John H. Ehrlich, Circuit Court Judge