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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PAMELA KOUSSA,
Plaintiff,
v.
MING YEUNG, et al.,
Defendants.

Case No. [16-cv-05137-JSC](#)

**ORDER RE: MOTIONS TO DISMISS
COUNTERCLAIM AND REQUEST FOR
LEAVE TO AMEND COUNTERCLAIM**

Re: Dkt. Nos. 39, 42, 47

Plaintiff Pamela Koussa brings this action for alleged violations of the Americans with Disabilities Act (“ADA”) and California Unruh Civil Rights Act against Defendants Ming Yeung, Jia Yeung, and the Ming Yeung & Jia Yeung Trust. (Dkt. No. 1.¹) Ming Yeung has since filed a counterclaim seeking injunctive relief against Koussa for (1) unlawful business practices under California Business & Professions Code § 17200—the Unfair Competition Law (“UCL”)—for operating an architecture business without a license and (2) violating the False Claims Act, 31 U.S.C. § 3730, by failing to report income earned through disability access cases to the IRS.² (Dkt. No. 32.) Ming Yeung named the Internal Revenue Service (“IRS”) as a defendant and indispensable party to the cross-complaint. (*Id.* at 1 & ¶ 3.) Both Koussa and the United States—on the IRS’s behalf—filed motions to dismiss Ming Yeung’s counterclaims, which are now pending before the Court. (Dkt. No. 39, 42.) In response to those motions, Ming Yeung concedes

¹ Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

² Although Ming Yeung is now “counter-plaintiff” and Plaintiff “counter-defendant,” the Court refers to the parties by name for the purposes of clarity. In addition, there are two Defendants with the surname “Yeung” in the initial action, so the Court refers to Ming Yeung by his full name throughout this Order.

1 that his qui tam FCA claim must be dismissed, but he has also filed a motion for leave to amend
2 the cross-complaint with respect to that claim only. (Dkt. No. 43, 47.) Having considered the
3 party’s submissions, and having heard oral argument on March 30, 2017, the Court GRANTS the
4 motions to dismiss and DENIES Ming Yeung’s motion for leave to amend the counterclaim.

5 **I. Motions to Dismiss**

6 A. First Cause of Action: UCL Claim

7 In the UCL claim, Ming Yeung alleges that Koussa is unlawfully engaging in the “practice
8 of architecture” without a business license. (See Dkt. No. 32 ¶¶ 6-13.) Specifically, Ming Yeung
9 alleges that Koussa operates a business in which she “locates businesses which violate” the ADA
10 and Unruh Act. (*id.* ¶ 6.) As part of that business, she “physically visits such businesses and
11 inspects them for compliance with architectural and accessibility requirements for persons with
12 disabilities, directly inspects such facilities to assure their compliance with ADA requirements,
13 and earns an income for conducting these inspections and assisting business owners in complying
14 with ADA accessibility requirements.” (*Id.*)

15 Ming Yeung alleges that this business activity is unlawful because Koussa is offering
16 “professional services which require the skills of an architect[,]” including “[i]nvestigation,
17 evaluation, consultation, and advice” and “[c]ompliance with generally applicable codes and
18 regulations” and such conduct qualifies as the “practice of architecture,” which requires a business
19 license under California Business and Professional Code § 5500.1. (*Id.* ¶¶ 7-8.) Ming Yeung
20 further alleges that Koussa’s operation of a business without a license violates City of Richmond
21 Municipal Code § 7.040.010, which requires a business to hold a license and pay annual licensing
22 fees, and constitutes a misdemeanor under state law. (*Id.* ¶¶ 9-11.) As a result of this unlawful
23 business practice, Ming Yeung seeks to enjoin Koussa’s continued unlicensed business activities
24 and asks the Court to order retroactive payment of licensing fees to the state and City of Richmond
25 and Ming Yeung’s attorneys’ fees and costs. (*Id.* at 4; *see also* Dkt. No. 44 at 3 (stating that Ming
26 Yeung seeks “injunctive relief requiring [Plaintiff] to obtain licensing required by State and Local
27 laws and ordinances.”).)

28 “An unlawful business practice or act within the meaning of the UCL is an act or practice,

1 committed pursuant to business activity, that is at the same time forbidden by law.” *Pinel v.*
2 *Aurora Loan Servs., LLC*, 814 F. Supp. 2d 930, 937 (N.D. Cal. 2011) (internal quotation marks
3 and citation omitted). The UCL’s “unlawful” prong covers a wide range of conduct; among them,
4 it makes violations of other laws independently actionable. *See CRST Van Expedited, Inc. v.*
5 *Werner Enters, Inc.*, 479 F.3d 1099, 1107 (9th Cir. 2007) (internal quotation marks and citations
6 omitted). Here, Defendants’ “unlawful” claim is predicated on violation of the state criminal code
7 and City of Richmond Municipal Code for engaging in unlicensed business practices.

8 Koussa does not address whether violation of these rules and regulations might constitute
9 unlawful business practices to state a cognizable UCL claim. Instead, she advances three
10 arguments for dismissal: (1) the litigation privilege precludes the claim; (2) the business licensing
11 scheme Ming Yeung alleges does not apply to Koussa’s activity of filing disability access civil
12 rights cases in federal court and prosecuting such claims is not the “practice of architecture” for
13 which licensing is required; and (3) Ming Yeung lacks standing to bring a UCL claim. (Dkt. No.
14 39 at 5-7.) The Court will address standing first, as without standing the Court has no jurisdiction
15 to assess whether the complaint states a claim—that is, whether the underlying conduct qualifies
16 as business practices and requires a license.

17 The UCL restricts standing “to persons who have suffered injury in fact and have lost
18 money or property as a result of the unfair competition.” *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098,
19 1104 (9th Cir. 2013) (citing Cal. Bus. & Prof. Code § 17204). To plausibly allege injury in fact, a
20 plaintiff must allege facts sufficient to plausibly “(1) establish a loss or deprivation of money
21 sufficient to qualify as an injury in fact, i.e., *economic injury*, and (2) show that the economic
22 injury was the result of, i.e., *caused by*, the unfair business practice . . . that is the gravamen of the
23 claim.” *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 337 (2011).

24 Ming Yeung has not done so in his counterclaim. There are no allegations as to how he
25 has lost money or property as a result of Koussa’s alleged unlawful business activity of failing to
26 pay for a business license. The counterclaim alleges that the state or City of Richmond has lost
27 potential licensing fees and taxes for business activities (*see* Dkt. No. 32 at 4), but this does not
28 show how Ming Yeung has personally suffered an economic injury. Indeed, Ming Yeung failed to

1 respond to Koussa’s standing argument in his opposition, thereby conceding that he lacks standing
 2 to bring the claim. *See Ardente v. Shanley*, No. 07-4479 MHP, 2010 WL 546485, at *6 (N.D. Cal.
 3 Feb. 9, 2010) (“Plaintiff fails to respond to this argument and therefore concedes it through
 4 silence.”). Thus, Ming Yeung fails to allege injury in fact necessary for standing to assert a UCL
 5 claim. The dismissal will be without leave to amend as at oral argument Ming Yeung was unable
 6 to articulate any theory of standing.³

7 B. Second Cause of Action: False Claims Act Violation

8 The second cause of action is an FCA claim based on lost income tax revenue. In their
 9 motion to dismiss Koussa’s complaint, Defendants sought dismissal, leave to file a cross-
 10 complaint, or an order to show cause on the grounds that Koussa’s revenue from disability access
 11 cases has caused her to engage in tax evasion. (*See* Dkt. No. 17.) Addressing the request in its
 12 order denying the motion to dismiss, the Court noted that the request for leave to file a
 13 counterclaim was procedurally improper and that “as to substance, Defendants’ proposed
 14 counterclaim is a non-starter” because “the False Claims Act specifically excludes from its
 15 purview claims alleging injury to the government in the form of lost income tax revenue.” 31
 16 U.S.C. § 2739(d) (noting that the FCA does not apply to “claims, record, or statements made
 17 under the Internal Revenue Code of 1986”).

18 Despite that admonition, Ming Yeung brings an FCA claim based on lost income tax
 19 revenue in his cross-complaint. Both Koussa and the government move to dismiss the claim on
 20 the grounds that, as the Court previously acknowledged, there is no FCA claim for lost income tax
 21 revenue. (Dkt. No. 39 at 8; Dkt. No. 42 at 4-5.) The government cites cases that have concluded
 22 that district courts lack jurisdiction over qui tam plaintiff’s FCA claims based on violations of the
 23

24 ³ Because the Court dismisses the UCL claim for lack of standing—a jurisdictional defect—it
 25 does not reach Koussa’s argument that the litigation privilege precludes Ming Yeung’s claims.
 26 However, the Court notes that other courts have applied the litigation privilege, which typically
 27 bars torts, to bar UCL claims. *See, e.g., Kane v. DeLong*, No. C-12-5437 EMC, 2013 WL
 28 1149801, at *11-12 (N.D. Cal. Mar. 19, 2013) (citations omitted); *Che v. Aurora Servs., LLC*, 847
 F. Supp. 2d 1205, 12010 (C.D. Cal. 2012), so to the extent the UCL action is based on Koussa’s
 filing ADA disability access actions, the privilege prohibits such claim even if it was unfair
 because Koussa did not actually visit the business as a customer but as part of her practice of
 seeking out businesses to sue, as Ming Yeung alleges.

1 tax code. (Dkt. No. 42 at 5 (citations omitted).) *See, e.g., U.S. ex rel. Lissack v. Sakura Global*
2 *Capital Mkts., Inc.*, 377 F.3d 145, 152-53 (2d Cir. 2004) (affirming district court’s dismissal for
3 lack of subject matter jurisdiction of FCA claim based on failure to pay taxes).

4 In his opposition to Koussa’s motion, Ming Yeung clarifies that he is withdrawing his FCA
5 claim. (Dkt. No. 44 at 2.) In response to the IRS’s motion, Ming Yeung expressly concedes the
6 FCA does not apply to claims, records, or statements made under the Internal Revenue Code of
7 1986 and acknowledges that, to the extent an FCA claim lies, he failed to comply with the FCA’s
8 mandate that qui tam actions be filed under seal to permit the government time to investigate the
9 allegations and elect whether to intervene. (*See* Dkt. No. 43 at 2 (citing 31 U.S.C. §§ 3730(b)(1),
10 (2)).) Accordingly, the Court will dismiss Ming Yeung’s FCA claim based on lost income tax
11 revenue for lack of subject matter jurisdiction. As there are no remaining claims pertaining to the
12 IRS, the Court will dismiss the government from this action.

13 **II. Motion for Leave to Amend**

14 On a related note, Defendants have filed a motion for leave to amend their cross-complaint
15 “but only as to [the] Qui Tam counterclaim as to IRS.” (Dkt. No. 47.)

16 The Federal Rules of Civil Procedure provide Defendants an opportunity to amend its
17 counterclaim once as of right within 21 days after service of a Rule 12(b) motion. Fed. R. Civ. P.
18 15(a)(1). That deadline has passed. Accordingly, Defendants require the opposing party’s written
19 consent or the court’s leave to amend, which should be “freely given when justice so requires.”
20 Fed. R. Civ. P. 15(a). However, the Local Rules require a party to reproduce the entire pleading
21 when moving for leave to amend. *See* N.D. Cal. Civ. L.R. 10-1. Defendants have not done so.
22 Without a proposed pleading, the Court cannot conclude whether the factors commonly used to
23 determine the propriety of a motion for leave to amend—bad faith, delay, prejudice, or futility.
24 *See Foman v. Davis*, 371 U.S. 178, 182 (1962). This is, in part, because their motion—titled
25 “Request for Leave to Amend”—is really a motion for an extension of time to amend; specifically,
26 they seek a 60-day extension to file an amended pleading to amend consistent with the Court’s
27 resolution of Plaintiff’s and the IRS’s motions to dismiss the counterclaims and to (Dkt. No. 47 at
28 2.) But in their motion, Defendants do not identify how or why they need to amend their qui tam

1 claim; this alone is enough to deny their request.⁴

2 The Court likewise declines Defendants' request for an extension to "afford sufficient time
3 to plead a good faith argument for the extension, modification, or reversal of existing law or the
4 establishment of new law, as may be necessary and appropriate on [their] unique [FCA] claim."
5 (Dkt. No. 47 at 2.) If Defendants have a good faith argument regarding the well-established FCA
6 exemption for tax claims, the time to make it was in opposition to the motion to dismiss. They did
7 not; instead, they conceded the motion. Accordingly, the Court DENIES Defendants' request,
8 whether viewed as a request for an extension to file an amended complaint or an extension of time
9 to move for leave to so file.

10 **CONCLUSION**

11 For the reasons described above, the Court GRANTS the motions to dismiss both
12 counterclaims without leave to amend and dismisses the United States (or IRS) as a party to this
13 action. The Court also DENIES Defendants' motion for leave to amend the qui tam counterclaim
14 or for a 60-day extension of time to do so.

15 The parties shall hold their joint site inspection on May 3, 2017. Any change to this
16 deadline shall require Court approval.

17 This Order disposes of Docket Nos. 39, 42, and 47.

18 **IT IS SO ORDERED.**

19 Dated: April 3, 2017

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21 
22 JACQUELINE SCOTT CORLEY
23 United States Magistrate Judge
24

25 _____
26 ⁴ In his opposition to the motions to dismiss, however, Ming Yeung stated that he may amend to
27 allege a qui tam action based on Koussa's failure to report income from her ADA settlements to
28 the federal government in connection with her receipt of social security benefits. (*See, e.g.*, Dkt.
No. 43 at 2.) He has not alleged any facts in support of such claim and alleges that he will wait for
Koussa to respond to certain prefiling inquiries then will file an amended complaint by March 15,
2017. (*See* Dkt. No. 44 at 2.) As of April 3, 2017, Ming Yeung has not filed an amended
counterclaim.