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 PETROLIAM NASIONAL BERHAD
 6 (PETRONAS)

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 8 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 9 OAKLAND DIVISION

10	PETROLIAM NASIONAL BERHAD)	CASE NO.: 09-CV-5939 PJH
11	(PETRONAS),)	
)	REPLY IN SUPPORT OF MOTION
12	Plaintiff,)	TO STRIKE AFFIRMATIVE
)	DEFENSES OF GODADDY
13	vs.)	
)	Date: August 3, 2011
14	GODADDY.COM, INC.,)	Time: 9:00 a.m.
)	Courtroom 3
15	Defendant.)	Judge: Hon. Phyllis J. Hamilton
)	

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1 Petronas’s motion to strike should be granted for all eleven of the affirmative defenses in
2 GoDaddy’s Answer to Amended Complaint (“Answer”). (Doc. No. 89, filed May 19, 2011).

3 With respect to its third through eleventh affirmative defenses, GoDaddy does not dispute
4 that those affirmative defenses—*as-pled in its Answer*—are “[b]are statements reciting mere
5 legal conclusions [that] do not provide a plaintiff with fair notice of the defense asserted, as
6 required by *Wyshak [v. City National Bank]*, 607 F.2d 824, 827 (9th Cir. 1979)]” and Fed. R. Civ.
7 P. 8. *CTF Dev., Inc. v. Penta Hospitality, LLC*, 2009 U.S. Dist. LEXIS 99538 (N.D. Cal. Oct.
8 26, 2009). Instead, GoDaddy argues that Petronas’s motion to strike is “moot” because
9 “GoDaddy has submitted a motion for leave to amend its answer to, among other things, provide
10 in the pleading the very factual statements Petronas claims are lacking.”¹ Opp. at 1:20-23. The
11 fact that GoDaddy has filed a motion to amend its third through eleventh affirmative defenses,
12 however, does not change the fact that those affirmative defenses *as-pled in its Answer* are
13 defective for the reasons set forth in Petronas’s motion to strike. And rather than render
14 Petronas’s motion “moot,” GoDaddy’s motion to amend all but concedes the merits of Petronas’s
15 motion. As such, and because GoDaddy fails to offer any argument against striking its third
16 through eleventh affirmative defenses *as they have been pled in its Answer*, Petronas’s motion
17 to strike should be granted as to them.

18 For its first and second affirmative defenses which, unlike its other affirmative defenses,
19 are not addressed by its motion to amend, GoDaddy makes a different argument—namely, that
20 Petronas has been given “ample notice” of those defenses by virtue of GoDaddy’s pleadings
21 other than its Answer. According to GoDaddy, its first and second affirmative defenses, which
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23 ¹ This is only partially accurate: GoDaddy’s motion to amend deals with GoDaddy’s third
24 through eleventh affirmative defenses. It does not seek to make any changes with respect to
25 GoDaddy’s first and second affirmative defenses.

1 allege that the complaint “fails to state a claim” and is barred “by the Lanham Act safe harbor for
2 domain name registrars,” should not be stricken because they have “been explained
3 exhaustively” and “set forth in detail” in “GoDaddy’s motion for judgment on the pleadings and
4 its motion to dismiss.” Opp. at 2:4-24.

5 But by conceding that its first and second affirmative defenses represent nothing more
6 than the arguments it made in its motions for judgment on the pleadings and to dismiss,
7 GoDaddy is conceding that they are, in fact, not affirmative defenses at all. It is well settled that,
8 unlike GoDaddy’s first and second ‘affirmative defenses,’ “[a]n affirmative defense is an
9 assertion raising new facts and arguments that, if true, will defeat plaintiff’s claim, even if all the
10 allegations in the complaint are true.” *E.E.O.C. v. California Psychiatric Transitions, Inc.*, 725
11 F. Supp. 2d 1100, 1118 (E.D. Cal. 2010) (*citing See Saks v. Franklin Covey Co.*, 316 F.3d 337,
12 350 (2nd Cir. 2003)). As one treatise has observed, “[s]ome lawyers routinely plead as
13 ‘affirmative defenses’ that: ‘plaintiff has failed to state a claim upon which relief may be
14 granted,’ . . . [s]uch routine allegations are *not* recommended [and] are *unnecessary* . . . because
15 *these matters are never waived* (FRCP 12(h)(2)).” Schwarzer, *et al.*, Federal Civil Procedure
16 Before Trial ¶ 8:1058 (Rutter 2010). As such, GoDaddy’s only argument against striking its first
17 and second affirmative defenses establishes merely that they are not ‘affirmative defenses’ at all
18 and are, in any event, unnecessary.

19 Accordingly, Petronas’s motion to strike should be granted in its entirety.

20 Dated: July 19, 2011

LAW OFFICES OF PERRY R. CLARK

21
22 By: _____ /s/ Perry R. Clark
23 Perry R. Clark
24 Attorney for Plaintiff
25 PETROLIAM NASIONAL BERHAD