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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS, INC.,

Plaintiff and
Counterclaim Defendant,

v.

CHRISTINE LYNN DEAN and JAMES
ROLAND DEAN, individually and
doing business as TAVERN ON THE
GREENS, and PMGC, INC., an
unknown business entity doing
business as TAVERN ON THE GREENS,

Defendants.

No. 10-05088 CW

ORDER GRANTING IN
PART PLAINTIFF'S
MOTION TO DISMISS
DEFENDANTS'
COUNTERCLAIM,
Docket No. 21, AND
MOTION TO STRIKE
DEFENDANTS'
AFFIRMATIVE
DEFENSES, Docket
No. 22, DENYING
PLAINTIFF'S
SPECIAL MOTION TO
STRIKE DEFENDANTS'
COUNTERCLAIM,
Docket No. 23, AND
GRANTING
PLAINTIFF'S MOTION
FOR LEAVE TO FILE
REPLY BRIEFS,
Docket No. 29

_____ /

Plaintiff and Counterclaim Defendant J & J Sports
Productions, Inc. has moved to dismiss for lack of subject matter
jurisdiction and failure to state a claim the counterclaim filed
by Defendants Christine Lynn Dean and James Roland Dean,
individually and doing business as Tavern on the Greens, and PMGC,
Inc., also doing business as Tavern on the Greens. Docket No. 21.
In addition, Plaintiff has specially moved to strike Defendants'
counterclaim pursuant to California Code of Civil Procedure
§ 425.16, Docket No. 23, and moved to strike Defendants'
affirmative defenses, Docket No. 22. Defendants have opposed the

1 motions to dismiss and strike. Plaintiff did not file a timely
2 reply to any of the opposition briefs, but later moved for leave
3 to file late reply briefs. The motion for leave included the
4 proposed reply briefs. Defendants have not opposed the motion for
5 leave.

6 Having considered all of the parties' submissions, the Court
7 GRANTS Plaintiff's motion for leave to file reply briefs, and
8 GRANTS IN PART Plaintiff's motions to dismiss Defendants'
9 counterclaim and strike Defendants' affirmative defenses.
10 Plaintiff's special motion to strike the counterclaim pursuant to
11 section 425.16 is DENIED.

12 BACKGROUND

13 This lawsuit arises from a boxing match between Manny
14 Pacquiao and Miguel Cotto, the World Boxing Organization's
15 Welterweight Championship Fight, which was telecast on November
16 14, 2009. Plaintiff has alleged that it was granted the exclusive
17 commercial distribution (closed-circuit) rights to the nationwide
18 telecast, including the match, all under-card bouts and fight
19 commentary encompassed in the television broadcast of the event
20 (the Program).

21 On November 10, 2010, Plaintiff filed suit alleging that
22 Defendants unlawfully showed the Program at their establishment,
23 Tavern on the Greens, in Martinez, California. Plaintiff brings
24 four claims: (1) a violation of 47 U.S.C. § 605, (2) a violation
25 of 47 U.S.C. § 553, (3) conversion and (4) a violation of
26 California Business and Professions Code § 17200. With respect to
27 its first two claims, Plaintiff seeks statutory damages in the
28 amount of \$170,000 against each of the Defendants, in addition to

1 reasonable attorneys' fees and costs, as permitted by the
2 statutes. Plaintiff seeks compensatory, as well as punitive and
3 exemplary, damages from Defendants in connection with its claim
4 for conversion. Pursuant to its claim under section 17200,
5 Plaintiff seeks restitution and disgorgement of Defendants'
6 purportedly ill-gotten gains, as well as injunctive and
7 declaratory relief, and attorneys' fees.

8 On April 3, 2011, Defendants filed their Answer to
9 Plaintiff's Complaint. Defendants Christine Lynn Dean and James
10 Roland Dean admitted to owning a business entity known as PMGC,
11 Inc., which conducted business as Tavern on the Greens, but
12 otherwise denied Plaintiff's allegations and stated eleven
13 affirmative defenses. In addition, Defendants alleged a
14 counterclaim for declaratory relief, seeking an order from this
15 Court that sections 605 and 553 violate various provisions of the
16 Constitution. Defendants seek a "judicial determination of their
17 rights and duties," and a "declaration of the validity" of
18 sections 553 and 605, or, in the alternative, "a declaration of
19 the exact terms and meaning of the statutes, the conduct and/or
20 acts prohibited by the statute and/or permitted by the statutes,
21 so that the Defendants/Counter-claimants or other similar [sic]
22 similarly situated in the public can conform their conduct . . ."

23 In connection with their counterclaim, Defendants allege the
24 following facts. Defendant PMCG, Inc. operates a golf course, on
25 which two buildings are located. One building is a mobile home
26 trailer. The mobile home is a residential dwelling rented to the
27 facility caretaker. The other building, located nearby, includes
28 a "Pro Shop" and "Tavern." The Tavern is a meeting and waiting

1 area for the golf course patrons when the golf course is open to
2 the public. The Tavern includes a kitchen, a snack bar, a large
3 room and a large screen television. As part of the residential
4 lease agreement, the caretaker is permitted private use of the
5 Tavern, including the kitchen and television, when the Tavern is
6 closed to the public. Defendants contend that the Tavern is only
7 a commercial facility when it is open to the public.

8 On November 14, 2009, the Tavern on the Greens was closed to
9 the public, and the facility was used solely by the caretaker as a
10 dwelling unit. The caretaker and Defendants ordered through a
11 cable service provider a telecast of the Program and watched it
12 with a group of friends. No products or services were offered for
13 sale to any person, and no business activities were conducted.

14 DISCUSSION

15 I. Motion to Strike Affirmative Defenses

16 Plaintiff moved to strike Defendants' first through tenth
17 affirmative defenses. In response, Defendants agreed to withdraw
18 their first, seventh and tenth affirmative defenses. Defendants
19 seek leave to amend their second, third, fourth, fifth and sixth
20 affirmative defenses, and contend that their eighth, ninth and
21 eleventh affirmative defenses are adequately plead.

22 Under Federal Rule of Civil Procedure 12(f), the court may
23 strike from a pleading an insufficient defense. However, a
24 defendant need only "state in short and plain terms its defenses
25 to each claim asserted against it." Fed. R. Civ. P. 8(b)(1).
26 "The key to determining the sufficiency of pleading an affirmative
27 defense is whether it gives plaintiff fair notice of the defense."
28 Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979). A

1 court should strike defenses only if they are clearly
2 insufficient. See William Z. Salcer, Panfeld, Eldman v. Envicon
3 Equities Corp., 744 F.2d 935, 939 (2d Cir. 1984).

4 Defendants' second affirmative defense asserts that Plaintiff
5 failed to mitigate its damages. Because Plaintiff seeks statutory
6 damages with respect to its claims under sections 553 and 605, and
7 restitution for allegedly ill-gotten gains pursuant to its claim
8 under section 17200, the defense of mitigation is not applicable.
9 Plaintiff seeks compensatory damages for conversion. Mitigation
10 in the context of Plaintiff's claim for conversion of its rights
11 to the Program is meaningless. Defendants' argument that
12 Plaintiff could have prevented its damage by notifying the public
13 that Comcast and other cable and satellite service providers were
14 not authorized to offer the Program does not amount to a defense
15 of mitigation. Accordingly, Defendants' mitigation defense is
16 stricken without leave to amend.

17 In their third affirmative defense, Defendants contend that
18 the damages Plaintiff allegedly suffered were the result of third
19 party actions. This is not an affirmative defense, but rather a
20 defense, that Defendants did not damage Plaintiff. It is stricken
21 without leave to amend.

22 Defendants' fourth affirmative defense contends that the
23 damages Plaintiff allegedly suffered are too speculative to be
24 recoverable. Again, this is not an affirmative defense but merely
25 a defense to Plaintiff's claim of damages. It is stricken without
26 leave to amend.

27 Defendants' fifth affirmative defense states that in the
28 event that Plaintiff is found to have suffered damage, Defendants

1 are entitled to indemnity from third parties. Defendants failed
2 to plead sufficient facts to give Plaintiff notice of the
3 identities of these third parties or the nature of their actions.
4 Leave to amend, however, is unwarranted because the existence of a
5 right to indemnification is not a defense to liability.
6 Defendants must bring an action against whomever they claim should
7 indemnify them.

8 Defendants' sixth affirmative defense asserts estoppel.
9 Defendants allege that "Plaintiff directed, ordered, approved
10 and/or ratified" their conduct, but plead no further details to
11 give Plaintiff fair notice of the defense. The defense is
12 stricken with leave to amend.

13 In their eighth affirmative defense, Defendants charge that
14 Plaintiff's "Complaint is unconstitutionally vague as applied to
15 these Defendants." This generally-worded affirmative defense,
16 read in the context of Defendants' entire Answer and Counterclaim,
17 makes apparent that Defendants argue that sections 553 and 605 are
18 unconstitutionally vague as applied to their actions. Thus, the
19 defense is sufficient as plead. G & G Closed Circuit Events, LLC
20 v. Nguyen, 2010 WL 3749284, *6 (N.D. Cal.).

21 Defendants' ninth affirmative defense alleges that "the
22 Complaint is penal in nature in the damages sought by Plaintiff
23 disproportionate to any actual harm, if any it has suffered as a
24 result of the acts alleged, such that the Defendants have been
25 deprived of due process without reasonable notice." This asserted
26 defense is incomprehensible and fails to give Plaintiff fair
27 notice of the defense. Leave to amend is granted.

28

1 Finally, Defendants' eleventh affirmative defense, broadly
2 alleging that sections 605 and section 553 are unconstitutional,
3 mirrors the language in Defendants' counterclaim. Accordingly,
4 the sufficiency of the pleading of the defense is addressed with
5 respect to the counterclaim and the defense is not stricken.

6 II. Motion to Dismiss Defendants' Counterclaim

7 A. Subject Matter Jurisdiction--Standing

8 Dismissal is appropriate under Rule 12(b)(1) when the
9 district court lacks subject matter jurisdiction over the claim.
10 Fed. R. Civ. P. 12(b)(1). Plaintiff contends that Defendants lack
11 standing to pursue their counterclaim for declaratory relief. In
12 Lujan v. Defenders of Wildlife, the Supreme Court explained that

13 the irreducible constitutional minimum of standing
14 contains three elements. First, the plaintiff must
15 have suffered an injury in fact--an invasion of a
16 legally protected interest which is (a) concrete and
17 particularized, and (b) actual or imminent, not
18 conjectural or hypothetical. Second, there must be a
19 causal connection between the injury and the conduct
20 complained of--the injury has to be fairly traceable
21 to the challenged action of the defendant, and not the
22 result of the independent action of some third party
23 not before the court. Third, it must be likely, as
24 opposed to merely speculative, that the injury will be
25 redressed by a favorable decision.

26 504 U.S. 555, 560-61 (1992) (internal citations and quotation
27 marks omitted).

28 Defendants have standing to pursue a claim for declaratory
relief to the extent that they seek an order that the federal
provisions are unconstitutional as applied to their conduct
alleged in this case. Standing is satisfied because Defendants
have allegedly been injured by the enforcement of the two

1 provisions whose constitutionality is challenged, the enforcement
2 action is contingent on the validity of the two provisions, and an
3 order declaring the provisions are unconstitutional would preclude
4 Plaintiff's two claims against Defendants.

5 Defendants appears to seek declaratory relief not only on
6 their own behalf, but also on behalf of others similarly situated.
7 Three criteria must be satisfied when a litigant seeks to assert
8 the constitutional right of third parties: "The litigant must have
9 suffered an 'injury in fact,' thus giving him or her a
10 'sufficiently concrete interest' in the outcome of the issue in
11 dispute; the litigant must have a close relation to the third
12 party; and there must exist some hindrance to the third party's
13 ability to protect his or her own interests." Powers v. Ohio, 499
14 U.S. 400, 410-11 (1991) (internal citations omitted) (citing
15 Singleton v. Wulff, 428 U.S. 106, 112-16).

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18 Defendants lack standing to seek a declaration on behalf of
19 other members of the public, addressing the constitutional
20 validity of applying the provisions to various hypothetical
21 situations. Defendants have failed sufficiently to allege injury
22 arising from the various hypothetical scenarios, have not alleged
23 their likely future injury resulting from the challenged
24 applications of the laws, and have failed to plead a close
25 relationship with third parties facing the hypothetical situations
26 and a hindrance to the third parties' ability to protect their own
27 interests.
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1 Thus, Defendants have standing to pursue relief regarding the
2 alleged unconstitutionality of the statutes, but they do not have
3 standing to pursue relief for third parties.

4 B. Failure to State a Claim

5 Plaintiff also moves to dismiss Defendants' counterclaim
6 under Federal Rule of Civil Procedure 12(b)(6) for failure to
7 state a claim.

8
9 Dismissal for failure to state a claim is appropriate only
10 when the complaint does not give the defendant fair notice of a
11 legally cognizable claim and the grounds on which it rests. Bell
12 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint must
13 contain a "short and plain statement of the claim showing that the
14 pleader is entitled to relief." Fed. R. Civ. P. 8(a). In
15 considering whether the complaint is sufficient to state a claim,
16 the court will take all material allegations as true and construe
17 them in the light most favorable to the plaintiff. NL Indus.,
18 Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
19 principle is inapplicable to legal conclusions; "threadbare
20 recitals of the elements of a cause of action, supported by mere
21 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
22 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).
23

24 Defendants' counterclaim alleges,

25
26 Title 46 United States Code Section 605 and Section
27 553 are unconstitutional and violate the United States
28 Constitution, as amended, including specifically the
First, Fifth, Sixth, Ninth and Fourteenth Amendments,
in that the statutes are penal in nature, are void for

1 vagueness, are overbroad, and violate the fundamentals
2 of due process, including, but not limited to, the
3 lack of sufficient notice to Defendants and lack of
4 guidance for enforcement.

5 In turn, Defendants plead eight hypothetical scenarios to
6 demonstrate that the statutes are void for vagueness and
7 overbroad. Although stated in a single counterclaim, Defendants
8 have alleged two distinct constitutional theories--one challenging
9 the statutes' purported vagueness and another challenging the
10 statutes' overbreadth.

11 "A statute is unconstitutionally vague if persons of 'common
12 intelligence must necessarily guess at its meaning and differ as
13 to its application.'" Planned Parenthood of Cent. and Northern
14 Ariz. v. State of Ariz., 718 F.2d 938, 947 (9th Cir. 1983) (citing
15 Connally v. General Construction Co., 269 U.S. 385, 391 (1926)).

16 "[W]e insist that laws give the person of ordinary intelligence a
17 reasonable opportunity to know what is prohibited, so that he may
18 act accordingly . . . A vague law impermissibly delegates basic
19 policy matters to policemen, judges, and juries for resolution on
20 an ad hoc and subjective basis, with the attendant dangers of
21 arbitrary and discriminatory application." Id. (citing Grayned v.
22 City of Rockford, 408 U.S. 104, 108 (1972)).

23 Although claims of statutory vagueness usually arise in
24 criminal prosecutions, "the Supreme Court has also applied this
25 principle in civil proceedings, and in so doing has expressly
26 ruled that a criminal penalty need not be involved." Fleuti v.
27 Fleuti
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1 Rosenberg, 302 F.2d 652 (9th Cir. 1962) (citing Small Company v.
2 American Sugar Refining Co., 267 U.S. 233, 239 (1925)). Economic
3 regulation may be less precise than other forms of legislation
4 because businesses are more apt to plan behavior carefully,
5 consult relevant legislation in advance of action, and clarify the
6 uncertainties through inquiry or administrative proceedings.
7 Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498 (1982).

8 "The Court has also expressed greater tolerance of enactments with
9 civil penalties because the consequences of imprecision are
10 qualitatively less severe." Id. at 499.

11 "A clear and precise enactment may nevertheless be
12 'overbroad' if in its reach it prohibits constitutionally
13 protected conduct." Grayned, 408 U.S. at 114. A claim that a
14 statute is overbroad presents the question of whether the
15 challenged law unduly interferences with established
16 constitutional rights, such as rights protected under the First
17 Amendment. See id. at 115.

18 Defendants' claim that the federal statutes are
19 unconstitutionally vague is based on the Constitution's due
20 process guarantee under the Fifth Amendment. United States v.
21 Makowski, 120 F.3d 1078, 1080 (1997). Furthermore, Defendants
22 allege that the overly vague statutes infringe on their First
23 Amendment freedoms. Defendants challenge the constitutionality of
24 section 553, which relates to the unauthorized interception and
25 receipt of cable service, and section 605, which concerns the
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1 unauthorized use of the contents of cable channel transmissions.
2 Defendants allege that sections 553 and 605, facially and as
3 applied in the present case, are unconstitutionally vague and
4 overbroad, threatening liability without fair notice and chilling
5 their protected First Amendment activities. This claim is
6 cognizable.

7
8 Plaintiff argues that Defendants' counterclaim is
9 inadequately plead because it is overly general and implausible.
10 Plaintiff complains that Defendants have alleged, in a conclusory
11 fashion, violations of the First, Fifth, Sixth, Ninth and
12 Fourteenth Amendments. As noted above, to the extent it is based
13 on the Fifth and First Amendments, Defendants' counterclaim is
14 cognizable. Plaintiff is correct that it is impossible to
15 ascertain the theories upon which Defendants assert violations of
16 the Sixth, Ninth and Fourteenth Amendments. The Court also
17 disregards the various hypothetical scenarios that Defendants have
18 plead. See Comite de Jornaleros de Redondo Beach v. City of
19 Redondo Beach, 607 F.3d 1178, 1193 (9th Cir. 2010) (Courts "cannot
20 invalidate an ordinance for vagueness based on these sorts of
21 hypertechnical, imaginative interpretations and hypothetical
22 concerns.").

23
24 Accordingly, the Court denies Plaintiff's motion to dismiss
25 Defendants' counterclaim to the extent that it is based on the
26 First and Fifth Amendments. However, Plaintiff's motion is
27 granted to the extent Defendants' counterclaim is based on the
28

1 Sixth, Ninth and Fourteenth Amendments. Within fourteen days of
2 this order, Defendants may submit an amended counterclaim,
3 rectifying their allegations as to the Sixth, Ninth and Fourteenth
4 Amendments.

5 III. Special Motion to Strike Defendants' Counterclaim

6 Finally, Plaintiff specially moves under California Code of
7 Civil Procedure § 425.16 to strike Defendants' counterclaim.
8 Section 425.16(b)(1), which addresses Strategic Lawsuits Against
9 Public Participation (SLAPP), provides,
10

11 A cause of action against a person arising from any
12 act of that person in furtherance of the person's
13 right of petition or free speech under the United
14 States or California Constitution in connection with a
15 public issue shall be subject to a special motion to
16 strike, unless the court determines that the plaintiff
17 has established that there is a probability that the
18 plaintiff will prevail on the claim.

19 California anti-SLAPP motions are available to litigants
20 proceeding in federal court. Thomas v. Fry's Elecs., Inc., 400
21 F.3d 1206, 1206 (9th Cir. 2005). However, Plaintiff's anti-SLAPP
22 motion must be denied because it is directed at Defendants'
23 counterclaim, which presents a federal constitutional question.
24 Hilton v. Hallmark Cards, 599 F.3d 894, 901 (9th Cir. 2010) ("[A]
25 federal court can only entertain anti-SLAPP special motions to
26 strike in connection with state law claims."). See In re Bah, 321
27 B.R. 41, 45 (9th Cir. 2005).

28 CONCLUSION

Plaintiff's motion for leave to file late reply briefs is
GRANTED. Plaintiff's motion to strike Defendants' affirmative

1 defenses is GRANTED IN PART. Defendants' second, third, fourth
2 and fifth affirmative defenses are stricken without leave to
3 amend. Defendants' sixth and ninth affirmative defenses are
4 stricken with leave to amend within fourteen days of the date of
5 this order. Defendants' eighth affirmative defense is not
6 stricken.

7
8 Plaintiff's motion to dismiss Defendants' counterclaim is
9 DENIED to the extent that it is based on the First and Fifth
10 Amendments. Plaintiff's motion to dismiss Defendants'
11 counterclaim is GRANTED to the extent Defendants' counterclaim is
12 based on the Sixth, Ninth and Fourteenth Amendments, but
13 Defendants may amend their counterclaim within fourteen days of
14 this order. Plaintiff's motion to dismiss Defendants'
15 counterclaim is GRANTED to the extent that it seeks relief for
16 third parties and an explanation of the application of sections
17 553 and 605 to various hypothetical scenarios.

18
19 Plaintiff's special motion to strike Defendants' counterclaim
20 is DENIED.

21 On July 12, 2012, the parties shall appear for a further case
22 management conference and for hearing in regards to any
23 dispositive motion that the parties may file.

24
25 IT IS SO ORDERED.

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28 Dated: 9/12/2011

CLAUDIA WILKEN
United States District Judge