

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

3  
4 JOE HAND PROMOTIONS, INC.,

No. C 11-6166 CW

5                                    Plaintiff,

ORDER GRANTING IN  
PART AND DENYING IN  
PART PLAINTIFF'S  
MOTION TO STRIKE  
AFFIRMATIVE DEFENSES

6                                    v.

7 BILL DAVIS, Individually and dba  
8 WEST COAST CIGARS,

[Docket No. 28]

9                                    Defendants.  
10 \_\_\_\_\_/

11                    On June 11, 2012, Plaintiff Joe Hand Promotions, Inc. filed a  
12 motion to strike the affirmative defenses asserted by Defendant  
13 Bill Davis, individually and doing business as West Coast Cigars.  
14 Defendant filed an opposition to Plaintiff's motion on June 25,  
15 2012. The Court takes Plaintiff's motion under submission without  
16 oral argument. Having considered the papers filed by the parties  
17 and the relevant legal authority, the Court grants Plaintiff's  
18 motion in part and denies it in part.

19                                    BACKGROUND

20                    On December 8, 2011, Plaintiff Joe Hand Promotions, Inc.  
21 filed this action against Defendant Bill Davis, individually and  
22 doing business as West Coast Cigars, bringing claims for  
23 conversion and for violations of 47 U.S.C. §§ 553 and 605 and  
24 California Business and Professions Code section 17200, et seq.  
25 Plaintiff filed a first amended complaint (1AC) on February 28,  
26 2012. Plaintiff alleges that it was granted the exclusive  
27 nationwide commercial distribution rights to Ultimate Fighting  
28 Championship 124: Georges St. Pierre v. Josh Koscheck (the

1 program), which was telecast nationwide on December 11, 2010. 1AC  
2 ¶ 14. Plaintiff alleges that Defendant Davis unlawfully  
3 intercepted and exhibited the program at his commercial  
4 establishment, West Coast Cigars. 1AC ¶¶ 11, 17. Defendant filed  
5 a motion to dismiss the 1AC which the Court denied by order  
6 entered May 14, 2012.

7 On May 29, 2012, Defendant filed an answer to the 1AC and a  
8 third party complaint against DirectTV, LLC (named as DirecTV,  
9 Inc.), asserting fifteen affirmative defenses to Plaintiff's  
10 claims:<sup>1</sup> (1) failure to state a claim; (2) no individual liability  
11 of defendant; (3) no right to recover; (4) no recovery under both  
12 § 553 and § 605; (5) no cable system; (6) damages caused by  
13 others; (7) method of valuation; (8) failure to mitigate damages;  
14 (9) unjust enrichment; (10) no basis for conversion;  
15 (11) defendant was unaware; (12) reservation of defenses;  
16 (13) statutes of limitations; (14) failure to state a claim  
17 against member of a limited liability company; (15) failure to  
18 name an indispensable party. Docket No. 27. On June 11, 2012,  
19 Plaintiff filed the instant motion to strike all of Defendant's  
20 affirmative defenses. Docket No. 28. Defendant timely filed an  
21 opposition to which Plaintiff filed a reply. Docket Nos. 30, 31.  
22 The matter is now submitted on the papers.

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24  
25 <sup>1</sup> The answer entitles two affirmative defenses as the  
26 "Fourteenth Affirmative Defense." Docket No. 27 at 7. Defendant  
27 concedes that the fifteenth affirmative defense was erroneously  
28 entitled "Fourteenth Affirmative Defense." Docket No. 30 at 17.  
For clarity, the second "Fourteenth Affirmative Defense" is  
referred to as the "fifteenth affirmative defense."

1 LEGAL STANDARD

2 Federal Rule of Civil Procedure 8 requires that, when  
3 "responding to a pleading, a party must . . . state in short and  
4 plain terms its defenses to each claim asserted against it." Fed.  
5 R. Civ. P. 8(b). Rule 12(f) provides that, on its own or on a  
6 motion from a party, a "court may strike from a pleading an  
7 insufficient defense or any redundant, immaterial, impertinent, or  
8 scandalous matter." Fed. R. Civ. P. 12(f). "The purposes of a  
9 Rule 12(f) motion is to avoid spending time and money litigating  
10 spurious issues." Barnes v. AT&T Pension Benefit Plan -  
11 Nonbargained Program, 718 F. Supp. 2d 1167 (N.D. Cal. 2010)  
12 (citing Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir.  
13 1993), reversed on other grounds, 510 U.S. 517 (1994)).

14 "The Ninth Circuit has long held that '[t]he key to  
15 determining the sufficiency of pleading an affirmative defense is  
16 whether it gives plaintiff fair notice of the defense.'" Perez v.  
17 Gordon & Wong Law Group, P.C., 2012 WL 1029425, at \*6 (N.D. Cal.)  
18 (quoting Wyshak v. City Nat. Bank, 607 F.2d 824, 827 (9th Cir.  
19 1979)). In Wyshak, the Ninth Circuit applied the fair notice  
20 pleading standard for complaints governed by Conley v. Gibson, 355  
21 U.S. 41 (1957), to the pleading of affirmative defenses. See  
22 Wyshak, 607 F.2d at 827 (citing Conley, 355 U.S. at 47-48).  
23 Conley held that "a complaint should not be dismissed for failure  
24 to state a claim unless it appears beyond doubt that the plaintiff  
25 can prove no set of facts in support of his claim which would  
26 entitle him to relief." 355 U.S. at 45-46 (footnote omitted).  
27 However, the Supreme Court's decisions in Bell Atlantic Corp. v.  
28 Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662

1 (2009), "departed from Conley and redefined the pleading  
2 requirements under Rule 8." Perez, 2012 WL 1029425 at \*6. "Under  
3 Twombly and Iqbal, 'the pleading standard Rule 8 announces . . .  
4 demands more than an unadorned, the-defendant-unlawfully-harmed-me  
5 accusation.'" Id. (quoting Iqbal, 556 U.S. at 678). "Rather, 'in  
6 order to give the defendant fair notice of what the . . . claim is  
7 and the grounds upon which it rests,' Twombly, 550 U.S. at 554-55,  
8 'a complaint must contain sufficient factual matter, accepted as  
9 true, to state a claim to relief that is plausible on its face,  
10 Iqbal, 556 U.S. at 678.'" Id. (internal quotation marks and  
11 citations omitted).

12 Like other judges in this district who have considered the  
13 question of what pleading standard applies to affirmative  
14 defenses, this Court has recently held that "the heightened  
15 pleading standard set forth in Twombly and Iqbal also applies to  
16 affirmative defenses." Powertech Tech., Inc. v. Tessera, Inc.,  
17 2012 WL 1746848 at \*5 (N.D. Cal.). "'Applying the standard for  
18 heightened pleading to affirmative defenses serves a valid purpose  
19 in requiring at least some valid factual basis for pleading an  
20 affirmative defense and not adding it to the case simply upon some  
21 conjecture that it may somehow apply.'" Barnes, 718 F. Supp. 2d  
22 at 1171-72 (quoting Hayne v. Green Ford Sales, Inc., 263 F.R.D.  
23 647, 650 (D. Kan. 2009)). See also Dion v. Fulton Friedman &  
24 Gullace LLP, 2012 WL 160221, at \*2 (N.D. Cal.); Perez, 2012 WL  
25 1029425, at \*6; Bottoni v. Sallie Mae, Inc., 2011 WL 3678878, at  
26 \*2 (N.D. Cal.); J & J Sports Productions v. Mendoza-Govan, 2011 WL  
27 1544886, at \*1 (N.D. Cal.). If a defense is struck, "[i]n the  
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1 absence of prejudice to the opposing party, leave to amend should  
2 be freely given." Wyshak, 607 F.2d at 826.

3 DISCUSSION

4 I. Motion to Strike All Affirmative Defenses

5 Plaintiff moves to strike all the affirmative defenses under  
6 the pleading standard set forth in Twombly and Iqbal, requiring a  
7 party to allege a sufficient factual basis to state an affirmative  
8 defense that is "plausible on its face." Barnes, 718 F. Supp. 2d  
9 at 1172. Under either the heightened Twombly and Iqbal pleading  
10 standard or the less demanding pleading standard underlying  
11 Wyshak, Defendant has adequately plead the fifteenth affirmative  
12 defense for failure to join a necessary party, but has not plead  
13 sufficient defenses in the first through fourteenth affirmative  
14 defenses.

15 A. Failure to State a Claim

16 Defendant's first affirmative defense states, "defendant  
17 alleges that neither the Complaint, nor any purported claim  
18 asserted therein, states facts sufficient to constitute a cause of  
19 action against defendant." Answer 4:4-7. Plaintiff argues that  
20 Defendant's first affirmative defense should be stricken, because  
21 failure to state a claim is not a valid affirmative defense.

22 Some courts in this district have held that "[f]ailure to  
23 state a claim is not a proper affirmative defense but, rather,  
24 asserts a defect in [the plaintiff's] prima facie case.'" J & J  
25 Sports Productions v. Vizcarra, 2011 WL 4501318, at \*3 (N.D. Cal.)  
26 (quoting Mendoza-Govan, 2011 WL 1544886 at \*5). See also Barnes,  
27 718 F. Supp. 2d at 1174; Perez, 2012 WL 1029425 at \* 11. However,  
28 in Valley Community Bank v. Progressive Cas. Ins. Co., 2011 WL

1 1833116, \*3 (N.D. Cal.), the court held that "Federal Rule of  
2 Civil Procedure 12(h)(2) provides that failure to state a claim  
3 upon which relief may be granted is a defense that may be raised  
4 in any pleading allowed or ordered under Federal Rule of Civil  
5 Procedure 7(a)," such as an answer. The court therefore denied  
6 the plaintiff's motion to strike the affirmative defense of  
7 failure to state a claim.

8 Rule 12(h), which governs waiving and preserving certain  
9 defenses, states in part as follows:

10 Failure to state a claim upon which relief can be  
11 granted, to join a person required by Rule 19(b), or  
to state a legal defense to a claim may be raised:

12 (A) in any pleading allowed or ordered under Rule 7(a);

13 (B) by a motion under Rule 12(c); or

14 (C) at trial.

15 Fed. R. Civ. P. 12(h)(2). Plaintiff recognizes the split of  
16 authority as to whether failure to state a claim is a valid  
17 affirmative defense. Docket No. 31 (Reply) at 3. Plaintiff  
18 argues, however, that even if this defense is expressly permitted  
19 by Rule 12(h)(2), the Court has already held that "the  
20 allegations in the First Amended Complaint are sufficient to  
21 satisfy the requirements of Rule 8(a) of the Federal Rules of  
22 Civil Procedure in that they provide Defendant fair notice of  
23 legally cognizable claims and the grounds on which they rest."  
24 The Court denied Defendant's motion to dismiss for failure to  
25 state a claim pursuant to Rule 12(b)(6). Docket No. 25 (Order  
26 denying motion to dismiss 1AC). Because the Court's ruling on the  
27 sufficiency of the allegations of the 1AC stands as the law of the  
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1 case, the motion to strike the first affirmative defense is  
2 granted with prejudice.

3 B. Failure to Join Indispensable Party

4 The fifteenth affirmative defense alleges as follows:

5 Defendant Bill Davis was sued individually and,  
6 erroneously, as d/b/a West Coast Cigars. In fact  
7 West Coast Cigars is a limited liability company, and  
8 Bill Davis is a member of the LLC. Defendant is a  
9 member of the LLC, which protects him from individual  
10 liability, and Plaintiff offers no facts which would  
11 deprive Defendant of his protection thereby.

12 Answer 7:8-17 (second "Fourteenth Affirmative Defense"). Failure  
13 to join a party required to be joined by Rule 19 is a defense  
14 expressly permitted by Rule 12(h)(2).

15 Plaintiff contends that Defendant "makes no effort to explain  
16 how West Coast Cigars, LLC" is a necessary or indispensable party.  
17 Docket No. 28 at 14. Defendant has alleged, however, that West  
18 Coast Cigars, the commercial establishment where Plaintiff alleges  
19 the program was unlawfully intercepted and exhibited, is a limited  
20 liability company that is "subject to service of process in  
21 California and to the jurisdiction of this court." Answer 7:15-  
22 17. The Court determines that the allegations set forth in the  
23 Answer are sufficient to give Plaintiff fair notice of the factual  
24 basis for this affirmative defense under the plausibility standard  
25 set forth in Twombly and Iqbal, and under the lesser pleading  
26 standard that governed in Wyshak.

27 C. Defenses That Deny Liability

28 Defendant's second, third, fourth, fifth, seventh, ninth, and  
tenth affirmative defenses purport to deny liability or negate an  
element that Plaintiff is required to prove. Such negative  
defenses are not properly plead as affirmative defenses, but are

1 merely denials of the allegations of the IAC. Proper  
2 “[a]ffirmative defenses plead matters extraneous to the  
3 plaintiff’s prima facie case, which deny plaintiff’s right to  
4 recover, even if the allegations of the complaint are true.”  
5 J & J Sports Productions v. Gidha, 2012 WL 537494, at \*3 (E.D.  
6 Cal.) (quoting Federal Deposit Ins. Co. v. Main Hurdman, 655 F.  
7 Supp. 259, 262 (E.D. Cal. 1987)) (formatting in original). “In  
8 contrast, denials of the allegations in the Complaint or  
9 allegations that the Plaintiff cannot prove the elements of his  
10 claims are not affirmative defenses.” G & G Closed Circuit  
11 Events, LLC v. Nguyen, 2010 WL 3749284, at \*5 (N.D. Cal.)  
12 (quotation marks and citation omitted).

13 The second affirmative defense alleges that Defendant “cannot  
14 be held individually liable for actions, if any, of other  
15 individuals without their consent or authorization, and defendant  
16 did not reap any commercial profit from any alleged violations.”  
17 Answer 4:8-13. This defense merely denies liability and is  
18 stricken without leave to amend.

19 The third affirmative defense alleges that “plaintiff cannot  
20 recover damages under either the first claim for violation of 47  
21 U.S.C. § 605 and the second claim for violation of 47 U.S.C.  
22 § 553, on the one hand, and the conversion claim on the other.”  
23 Answer 4:16-23. Defendant contends that this defense to  
24 Plaintiff’s right to recover properly challenges the failure to  
25 state a claim, which the Court has already determined in denying  
26 Defendant’s Rule 12(b)(6) motion. To the extent that the third  
27 affirmative defense denies liability under claims plead in the  
28 alternative and requires Plaintiff to elect a remedy, Plaintiff is



1 entitled in the pleadings to "state as many separate claims or  
2 defenses as it has, regardless of consistency." Fed. R. Civ. P.  
3 8(d)(3). This defense is therefore stricken without leave to  
4 amend.

5 Similarly, the fourth affirmative defense alleges that  
6 "plaintiff cannot recover damages under both the first claim for  
7 violation of 47 U.S.C. § 605 and the second claim for violation of  
8 47 U.S.C. § 553." Answer 4:24-28. While Plaintiff may not  
9 recover under both section 553 and section 605 for a single  
10 violation, Plaintiff may state claims in the alternative pursuant  
11 to Rule 8(d)(3). See J & J Sports Productions v. Manzano, 2008 WL  
12 4542962, at \*2 (N.D. Cal.) ("A signal pirate violates section 553  
13 if he intercepts a cable signal, he violates section 605 if he  
14 intercepts a satellite broadcast. But he cannot violate both by a  
15 single act of interception."). This defense is stricken without  
16 leave to amend.

17 The fifth affirmative defense alleges "there was no cable  
18 system at the establishment identified in plaintiff[']s Complaint  
19 and therefore defendant cannot be liable as a matter of law for  
20 violation of 47 U.S.C. § 553." Answer 5:1-7. This defense denies  
21 liability under section 553 and is not properly asserted as an  
22 affirmative defense.

23 The seventh affirmative defense alleges that the complaint  
24 "seeks excessive damages, which should be constrained by the 'per  
25 person' valuation method and capped at \$50.00 per person or a  
26 similarly modest sum, or denied entirely." Answer 5:17-22. This  
27 defense purports to deny liability for the damages sought by  
28 Plaintiff and does not state an affirmative defense.

1 Plaintiff argues that the ninth affirmative defense, which  
2 alleges that "Plaintiff would be unjustly enriched by the relief  
3 sought in the Complaint," Answer 5:25-26, is insufficiently plead  
4 because it makes only a conclusory allegation. Docket No. 28 at  
5 9. Defendant argues that the ground for the unjust enrichment  
6 defense is that the complaint seeks damages under all theories of  
7 liability and that Plaintiff would be unjustly enriched if it were  
8 awarded all the damages that it seeks. Docket No. 30 at 14 ¶ 9.  
9 As discussed above, however, Plaintiff is permitted to state  
10 claims in the alternative pursuant to Rule 8(d)(3). Because  
11 Defendant does not state a sufficient basis to assert unjust  
12 enrichment, the Court strikes Defendant's ninth affirmative  
13 defense without leave to amend.

14 The tenth affirmative defense alleges that "an interest in  
15 intangible personal property such as an exclusive license to  
16 distribute a broadcast signal is not the proper subject of a claim  
17 of conversion under California law." Answer 6:1-8. This defense  
18 amounts to denial of liability for conversion and does not state  
19 an affirmative defense.

20 The Court grants the motion to strike these defenses without  
21 leave to amend because they are not affirmative defenses that must  
22 be plead. The Court's ruling does not preclude Defendant from  
23 asserting these allegations as ordinary denials and defenses to  
24 liability.

25 D. Affirmative Defenses Insufficiently Plead

26 Defendant's sixth and thirteenth affirmative defenses are  
27 stricken because they fail to provide fair notice of the grounds  
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1 upon they rest under either the Twombly and Iqbal plausibility  
2 standard or the lesser pleading standard that governed Wyshak.

3       The sixth affirmative defense alleges that "the damages of  
4 plaintiff, if any, as alleged were not caused by the answering  
5 defendant, but were the result of plaintiff's own actions or  
6 breaches, or the acts of third parties over which the answering  
7 defendant had no control." Answer 5:10-14. Plaintiff contends  
8 that this defense negates the element of causation that Plaintiff  
9 would be required to prove and is therefore improperly plead as an  
10 affirmative defense. Docket No. 28 at 8. Because Defendant would  
11 bear the burden to prove that a superseding act by a third party  
12 caused Plaintiff's damages, Defendant may assert this as an  
13 affirmative defense but must plead sufficient factual allegations  
14 to provide fair notice to Plaintiff. See Nguyen, 2010 WL 3749284  
15 at \*2. Defendant alludes to his third-party complaint against  
16 DirectTV as the basis for this affirmative defense, Docket No. 30  
17 at 13 ¶ 6, but as currently plead, the sixth affirmative defense  
18 does not sufficiently allege who, or what conduct, may have caused  
19 Plaintiff's damages. See Mendoza-Govan, 2011 WL 1544886 at \*4.  
20 Because there is insufficient information about the grounds for  
21 this defense, it is insufficiently plead so as to provide fair  
22 notice. This defense is therefore stricken with leave to amend.

23       Plaintiff argues that Defendant's thirteenth affirmative  
24 defense, which alleges that Plaintiff's claims are barred by the  
25 applicable statute of limitations, should be stricken. As noted  
26 above, Plaintiff filed the instant action on December 8, 2011.  
27 Plaintiff alleges that the program was broadcast on December 11,  
28 2010. 1AC ¶ 14. Defendant has not alleged that the program was

1 televised on any earlier date. "In evaluating a motion to strike,  
2 the court must treat all well-pleaded facts as true." Joe Hand  
3 Promotions, Inc. v. Alvarado, 2011 WL 201466, \*2 (E.D. Cal.) (in a  
4 similar case, accepting as true the date that a program was  
5 broadcast for the purposes of evaluating a statute of limitations  
6 affirmative defense in a motion to strike, where the defendant had  
7 not asserted a different date from the date plead by the  
8 plaintiff). The statute of limitations for claims arising under  
9 47 U.S.C. § 605 is one year. DirectTV, Inc. v. Webb, 545 F.3d 837,  
10 847-48 (9th Cir. 2008). The statute of limitations for claims  
11 under 47 U.S.C. § 553 is either one, two or three years. See J &  
12 J Sports Productions v. Soto, 2010 WL 3911467, at \*1 (S.D. Cal.)  
13 (citing Nat'l Satellite Sports, Inc. v. Time Warner Ent. Co., 255  
14 F. Supp. 2d 307, 314 (S.D.N.Y. 2003); DirectTV, Inc. v. Johnson,  
15 2004 WL 2011392 at \*3 (N.D. Ill.)); Alvarado, 2011 WL 201466 at  
16 \*2. The statute of limitations for Plaintiff's conversion claim  
17 is three years. Cal. Code Civ. Proc. § 338(c). The statute of  
18 limitations for violations of the California Business and  
19 Professions Code is four years. Cal. Bus. & Prof. Code § 17208.  
20 Because Plaintiff initiated its lawsuit less than one year after  
21 the alleged broadcast date of the program, the claims are timely  
22 on the face of the allegations of the complaint.

23 Because Defendant has failed to allege an earlier date of  
24 broadcast, he has failed to give Plaintiff notice of the grounds  
25 for his statute of limitations defense. Accordingly, the Court  
26 strikes this affirmative defense. Defendant may amend this  
27 affirmative defense only if he can truthfully allege that the  
28 program was broadcast on a date before December 11, 2010.

1 E. Redundant, Immaterial, or Impertinent Affirmative  
2 Defenses

3 Defendant's eighth affirmative defense alleges in a  
4 conclusory manner that "plaintiff has failed to mitigate damages."  
5 Answer 5:23-24. Defendant argues that the factual basis for this  
6 defense is that Plaintiff's damages, including costs of  
7 investigation and filing fees, could have been reduced or  
8 eliminated if Plaintiff had joined West Coast Cigars, LLC as an  
9 indispensable party, or had "communicated with its customers about  
10 the existence of the purported licensing scheme." Docket No. 30  
11 at 14. Even if the answer had included these additional  
12 allegations, they do not support an affirmative defense to  
13 liability. Mitigation of damages is inapplicable to the types of  
14 claims brought by Plaintiff in the instant action and thus this  
15 defense is immaterial or impertinent. See J & J Sports  
16 Productions v. Coyne, 2011 WL 227670, at \*2 (N.D. Cal.) (striking  
17 this defense as irrelevant in a similar broadcast interception  
18 case); G & G Closed Circuit Events, LLC v. Nguyen, 2010 WL  
19 3749284, at \*5 (N.D. Cal.) (same).

20 The eleventh affirmative defense, which alleges that  
21 "defendant was not aware and had no reason to believe that his  
22 acts constituted any violation of law," does not state a valid  
23 affirmative defense. Answer 6:9-12. This defense essentially  
24 asserts "ignorance of the law," which is not a defense to  
25 liability. "'Ignorance of the law will not excuse any person,  
26 either civilly or criminally.'" Mendoza-Govan, 2011 WL 1544886 at  
27 \*6 (quoting Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich  
28 LPA, 130 S.Ct. 1605, 1611 (2010)). Defendant's allegation that he

1 was "not aware" of the law is immaterial to liability and does not  
2 state a defense.

3 Defendant's twelfth affirmative defense "reserves all  
4 defenses to be set forth in amended pleadings, and all claims to  
5 be set forth in amended pleadings, pending investigation and  
6 discovery." Answer 6:15-19. "An attempt to reserve affirmative  
7 defenses for a future date is not a proper affirmative defense in  
8 itself. Instead, if at some later date defendant seeks to add  
9 affirmative defenses, she must comply with Rule 15 of the Federal  
10 Rules of Civil Procedure." Mendoza-Govan, 2011 WL 1544886 at \*7  
11 (quoting Solis v. Zenith Capital, LLC, 2009 WL 1324051, at \*7  
12 (N.D. Cal.) (quotation marks omitted)). This defense purporting  
13 to reserve future affirmative defenses is therefore redundant and  
14 immaterial.

15 The fourteenth affirmative defense alleges as follows:

16 Defendant Bill Davis was sued individually and,  
17 erroneously, as d/b/a West Coast Cigars. In fact,  
18 West Coast Cigars is a limited liability company, and  
19 Bill Davis is a member of the LLC. Defendant is a  
20 member of the LLC, which protects him from individual  
21 liability, and Plaintiff offers no facts which would  
22 deprive Defendant of his protection thereby.

23 Answer 7:1-6. To the extent this defense is duplicative of the  
24 fifteenth affirmative defense of failure to join West Coast  
25 Cigars, LLC as a necessary party, the fourteenth affirmative  
26 defense is stricken as redundant. To the extent that this defense  
27 merely asserts the defense of failure to state a claim, it is  
28 duplicative of the first affirmative defense and is stricken in  
light of the Court's ruling denying Defendant's Rule 12(b)(6)  
motion.

1 Accordingly, the Court strikes the eighth, eleventh, twelfth  
2 and fourteenth affirmative defenses without leave to amend.

3 CONCLUSION

4 For the reasons set forth above, the Court DENIES the motion  
5 to strike Defendant's fifteenth affirmative defense; GRANTS  
6 Plaintiff's motion to strike without leave to amend as to  
7 Defendant's first through fifth, seventh through twelfth, and  
8 fourteenth affirmative defenses; and GRANTS the motion to strike  
9 Defendant's sixth and thirteenth affirmative defenses with leave  
10 to amend. Defendant may amend the answer only to correct the  
11 deficiencies on which he is granted leave to amend, and must file  
12 an amended answer within fourteen days of the date of this Order.

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14 IT IS SO ORDERED.

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16 Dated: 10/9/2012

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18 CLAUDIA WILKEN  
19 United States District Judge  
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