

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

IHOP IP, LLC et al.,)	
)	
Plaintiffs,)	
)	
vs.)	
)	Case No.: 4:11-cv-00548-NKL
INTERNATIONAL HOUSE OF PRAYER)	
et al.,)	
)	
Defendants.)	

**REPLY SUGGESTIONS IN SUPPORT OF MOTION TO
AMEND INITIAL SUMMONS AND
STRIKE CERTAIN AFFIRMATIVE DEFENSES**

I. East Bay's Suggestion that It Requires Discovery on Its Defenses Relating to Improper Service Does Not Save the Defenses from Being Insufficient and Inapplicable.

East Bay consents to IHOP's requested amendment of the initial summons but opposes the motion to strike its affirmative defenses relating to service of process on the grounds that discovery is needed. East Bay's opposition to the motion to strike lacks merit. East Bay has not articulated any factual basis for its defenses and has failed to state how discovery would make any difference (indeed, it possesses the facts concerning how it was served). See Lucas v. Jerusalem Café, LLC, No. 4:10-cv-00582-DGK, 2011 WL 1364075, at *2 (W.D. Mo. Apr. 11, 2011) (holding defendants to the same pleading standards as plaintiffs with respect to affirmative defenses because "the purpose of pleading requirements is to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case.") Significantly, East Bay does not contest that it previously waived service [Doc. 4], does not challenge the competency of the process server, does not dispute the authority of its treasurer who accepted

service, and does not identify any other feature of the process or service thereof that was improper. Given the facts of the case (as provided in numbered paragraphs 1-13 of IHOP's opening brief [Doc. 45]) and East Bay's consent to amend the initial summons to reflect its official rather than trade name, there are no facts that could form a plausible basis for its affirmative defenses. As such, East Bay's assertions remain "threadbare recitals" that fail to provide enough notice that there is some plausible, factual basis for the defense. See Lucas, 2011 WL 1364075 at *2. Accordingly, the affirmative defenses relating to service of process should be stricken.

II. East Bay's Consent to the Amendment of the Initial Summons Completes the Technical Corrections Necessary in a Misnomer Situation.

When a true misnomer situation arises, where the plaintiff has named and served the right defendant by the wrong name, it is appropriate for the plaintiff to amend the pleadings and the court to amend the initial summons. Roberts v. Michaels, 219 F.3d 775, 778-79 (8th Cir. 2000). IHOP has corrected the misnomer in the Second Amended Complaint, which relates back to the First Amended Complaint. As explained in IHOP's opening brief, IHOP served East Bay with process and the First Amended Complaint out of an abundance of caution despite the waiver of service by its former counsel. Thus, only the initial summons remains to be corrected to name the defendant by its official name. East Bay has consented to IHOP's request to amend the initial summons. With the corrected pleadings and documents on file, service of the First Amended Complaint on East Bay should be considered service of the First Amended Complaint on The Prayer Furnace, Inc.

III. Conclusion

For all the reasons given above and in IHOP's Suggestions in Support of its motion, IHOP respectfully requests that the Court amend the initial summons under Rule 4(a) such that

service on International House of Prayer East Bay is effective as to The Prayer Furnace, Inc. and strike the insufficient and inapplicable affirmative defenses in paragraphs 53 and 54 of East Bay's answer asserting improper service of process and an improper return of service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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