IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Plaintiffs,

v.

PURDUE PHARMA L.P., et al.,

Defendants.

Case No. 18-cv-07591-CRB

ORDER GRANTING IN PART AND DENYING IN PART PLAINTFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' AFFIRMATIVE DEFENSES

Re: Dkt. No. 973

Defendants collectively assert 390 affirmative defenses for which they will bear the burden of proof at trial. See MSJ (dkt. 973) at 3 (citing Ex. A (dkt. 973–1)). Plaintiff argues that it is entitled to judgment on the pleadings or, in the alternative, to summary judgment on all 390 affirmative defenses because there is "an absence of evidence as to all of Defendants' affirmative defenses because they are too vague, conclusory, and factually unsupported to raise genuine disputes of material fact." MSJ at 3. For the reasons discussed below, the motion is granted in part and denied in part.

I. DISCUSSION

Plaintiff asserts UCL and public nuisance claims against Defendants. The UCL claim seeks civil penalties and injunctive relief, and the public nuisance claim seeks an abatement fund to redress prospective harm expected to occur because of the ongoing opioid epidemic in San Francisco. See MSJ at 1. Plaintiff does not seek "damages or recovery of historical costs" or "restitution as remedy." Id.

Plaintiff broadly argues that "Defendants assert boilerplate affirmative defenses that

are without factual support or that are denials of Plaintiff's prima facie case and are not actual affirmative defenses." See MSJ at 4. The argument targets all 390 of the affirmative defenses collectively asserted by Defendants. But Plaintiff identifies only a handful of the defenses that it contends are insufficiently pled, factually unsupported, or otherwise fail as a matter of law. See generally id. In other words, Plaintiff's motion does not specifically address many of the 390 defenses for which it contends that it is entitled to judgment on the pleadings or summary judgment.

Defendants argue that Plaintiff is not entitled to summary judgment or judgment on the pleadings for any defense that is not specifically challenged. See Opp. at 4–5. The Court agrees. To the extent that Plaintiff does not make specific arguments about a certain defenses or category of defenses—which is the case for many of the 390 defenses that Plaintiff purports to challenge—the Court denies Plaintiff's motion. The Court considers each of Plaintiff's arguments regarding specific defenses and categories of defenses below.[1]

A. Blanket Defenses

Defendants allege what Plaintiff characterizes as several broad "catchall" defenses. See MSJ at 5 (citing Endo Answ. at 167; Par Answ. at 135; Walgreens Answ. at 151; Teva Answ. at 144; Cephalon Answ. at 144). Defendants do not oppose Plaintiff's motion as to these defenses. Thus, summary judgment is granted for these defenses.

B. Inapplicable Defenses

Plaintiff argues that the following defenses "have no conceivable applicability" to the public nuisance and UCL claims. MSJ at 5.

- Voluntary payment doctrine (Walgreens Answ. at 151; Teva Answ. at 138; Cephalon Answ. at 138; Endo Answ. at 172; Par Answ. at 139; Actavis Answ. at

[1] The parties dispute whether Plaintiff's motion for judgment on the pleadings is procedurally proper to the extent that it seeks judgment on the pleadings for defenses that are insufficiently pled. See Opp. at 5–7 ("Once the deadline for filing a motion to strike has passed, any non-evidence-based challenge to an affirmative defense must be limited to its 'legal' viability."); see also Reply at 3–6. Because the Court's rulings are based on Rule 56, the Court does not reach this

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- Products liability defenses (Anda Answ. at 119; Allergan Answ. at 134; Walgreens Answ. at 158)
- Subrogation and insurance defenses (Anda Answ. at 122; Allergan Answ. at 136; Par Answ. at 143; Walgreens Answ. at 152)
- Workers' compensation claims (Anda Answ. at 122; Allergan Answ. at 137; Walgreens Answ. at 153)

Each defense is considered in turn.

1. Voluntary Payment Doctrine

The "voluntary payment doctrine" is based on the principle that "a payment voluntarily made with knowledge of the facts affords no ground for an action to recover it back." Am. Oil Serv. v. Hope Oil Co., 15 Cal. Rptr. 209, 213 (Ct. App. 1961); see also W. Gulf Oil Co. v. Title Ins. & Tr. Co., 92 Cal. App. 2d 257, 265, 206 P.2d 643, 648 (1949) ("Payments voluntarily made, with knowledge of the facts, cannot be recovered.").

Plaintiff argues that the doctrine does not apply here because the "nuisance and UCL claims do not seek to recover any payments made." See MSJ at 5. Plaintiff has dropped its claim for restitution, and the only monetary relief that Plaintiff seeks is civil penalties and a forward-looking abatement fund. Id.

Defendants respond that even though Plaintiff does not seek money damages, the voluntary payment doctrine should still apply because Plaintiff's request for an abatement fund "is really just a request for a huge pot of money" to cover costs Plaintiff expects to incur in coming years to redress opioid-related harms. Opp. at 11.

Defendants cite no authority to support their argument that the voluntary payment doctrine applies to a prospective abatement fund. Nor do Defendants otherwise show why the doctrine should apply to Plaintiff's claims for civil penalties and abatement. Thus, summary judgment on the voluntary payment defense is granted.

2. Products Liability Defenses

In its opening brief, Plaintiff asserts that Defendants' strict products liability

defense has "no conceivable applicability" to the nuisance and UCL claims because the defense applies only to products liability actions. MSJ at 5. Although they recognize that Plaintiff is not asserting a products liability action, Defendants contend that Plaintiff is effectively pursuing a products liability action "in the guise of a nuisance action." Opp. at 12.

Defendants' argument is not persuasive. The "telltale sign" of a products liability action is that the plaintiff is "seeking to hold the defendant liable precisely because the product's potential for harm substantially outweighs any possible benefit derived from it." Opp. at 12 (citing Merrill v. Navegar, Inc., 26 Cal. 4th 465, 478 (2001) (cleaned up)). But here, Plaintiff's theories of liability are that (1) Defendants made false and misleading statements about the safety and efficacy of opioids and (2) Defendants failed to implement effective systems to monitor for suspicious orders of opioids and to prevent diversion of opioids. Neither theory alleges that the potential for harm from opioids substantially outweighs their benefits—rather, the theories are based on alleged misrepresentations and systemic failures to monitor for diversion. Thus, summary judgment is granted as to the products liability defenses.

3. Subrogation

Plaintiff argues that Defendants' defense of subrogation is only relevant to insurers' claims. See MTD at 5–6. Defendants respond that subrogation claims may arise here because Plaintiff's claims are based on the theory that "Defendants' alleged wrongful conduct resulted in personal injury and death to individuals." Opp. at 13. But Defendants do not identify any specific subrogation interests at issue, nor do Defendants identify any person who may hold a subrogation interest. Accordingly, summary judgment is granted as to the subrogation defenses.

4. Remoteness and Derivative Injury

Plaintiffs argue that the defenses of remoteness and derivative injury are limited to workers compensation cases. MSJ at 5. In their opposition, Defendants appear to argue that the defenses apply here because Plaintiff "must prove proximate causation and a

defendant may not be held liable if the alleged misconduct is 'too remote' to be a 'legally sufficient proximate cause." Opp. at 13–14. But Defendants' arguments attack Plaintiff's ability to carry its burden of proving the elements of its claims. Defendants do not show why the affirmative defenses of remoteness and derivative injury apply here. Accordingly, summary judgment is granted with respect to these defenses.

C. Factually Unsupported Defenses

In its opening brief, Plaintiff argues that certain defenses are "boilerplate defenses" pled without factual support. MSJ at 4-5. Plaintiff specifically points to the following:

- Actavis, Cephalon, and Teva's defenses asserting doctrines of laches, waiver, unclean hands, estoppel, release, and/or ratification ("equitable defenses")
- Anda's defense asserting that Plaintiff's action is "arbitrary and capricious"
- Endo and Par's affirmative defenses asserting the statute of limitations

In its reply brief, Plaintiff concedes that Defendants' statute of limitations defense is viable. See Reply at 1 ("Defendants fail to show triable issues on any but the UCL statute of limitations."). And Defendants do not oppose Plaintiff's motion as to the "arbitrary and capricious" defense. See generally Opp. Thus, the motion is denied as to the statute of limitations defenses and granted as to the "arbitrary and capricious" defenses.

As to the equitable defenses, Defendants argue that they are entitled to assert the equitable defenses because Plaintiff is "seeking equitable remedies" and "California law permits equitable defenses to be asserted against a government entity seeking such relief." See Opp. at 9. Defendants also cite evidence supporting the defenses, including evidence suggesting that Plaintiff delayed in filing their claims. Opp. at 10.

In ConAgra, the California Court of Appeals held that "'neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public.'" 17 Cal. App. 5th 51, 136 (quoting County of San Diego v. California Water & Tel. Co., 30 Cal. 2d 817, 826 (1947)). There, the court rejected defendant's assertion of laches because the "application would defeat a public policy aimed at protecting the

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