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7 RECOLOGY, INC.

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
10/28/2021
Clerk of the Court
BY: EDWARD SANTOS
Deputy Clerk

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

11 GABRIELLA TABAK, individually and as
12 Guardian Ad Litem for minors BEN I.
13 TABAK, ADELA L. TABAK, and LEVI J.
14 TABAK; THE ESTATE OF ADAM
15 TABAK, DECEASED,
16
17 Plaintiffs,
18
19 v.
20
21 RECOLOGY, INC.; and DOES 1 TO 100,
22 inclusive,
23
24 Defendant.

Case No. CGC-21-594674

**DEFENDANT'S ANSWER TO PLAINTIFFS'
COMPLAINT**

Complaint Filed: 08/20/2021

1 Defendant RECOLOGY, INC. (“Defendant”) answers Plaintiffs GABRIELLA
2 TABAK, individually and as Guardian Ad Litem for minors BEN I. TABAK, ADELA L. TABAK,
3 and LEVI J. TABAK; and THE ESTATE OF ADAM TABAK, DECEASED (Adam Tabak referred
4 to as “Decedent”) (collectively “Plaintiffs”) as follows.

5 **GENERAL DENIAL**

6 Pursuant to section 431.30(d) of the California Code of Civil Procedure, Defendant
7 denies generally and specifically each and every allegation contained in the Complaint. Defendant
8 further denies Plaintiffs have sustained, or will sustain any loss or damage in the manner or amount
9 alleged, or otherwise, by reason of any act or omission, or any other conduct or absence thereof on the
10 part of Defendant or on the part of Defendant’s agents, representatives or employees.

11 **AFFIRMATIVE DEFENSES**

12 In further answer to the Complaint, Defendant asserts the following additional
13 defenses, which it designates as “affirmative defenses.” In asserting these defenses, Defendant does
14 not admit any of the allegations of the Complaint and does not assume the burden of proof as to any
15 matter that, as a matter of law, is Plaintiffs’ burden to prove. Defendant intends to rely upon any
16 additional defenses that become available or apparent during pretrial proceedings and discovery in this
17 action and hereby reserves the right to amend this Answer to assert all such further defenses.

18 **FIRST AFFIRMATIVE DEFENSE**

19 As a separate and distinct affirmative defense, Defendant alleges that the Complaint,
20 and each cause of action alleged therein, fails to state facts sufficient to constitute a cause of action
21 upon which relief can be granted.

22 **SECOND AFFIRMATIVE DEFENSE**

23 As a separate and distinct affirmative defense, Defendant alleges on information and
24 belief that Plaintiffs’ Complaint and each cause of action alleged therein, or some of them, are barred,
25 in whole or in part, because there exists an arbitration agreement between Decedent and Defendant
26 in which the parties agreed to submit any and all claims arising under the arbitration agreements to
27 final and binding arbitration and thus each and every cause of action alleged in the Complaint is subject
28 to final and binding arbitration in accordance with the terms of the arbitration agreement. Such claims

1 are further barred due to the failure or refusal of Plaintiffs to timely and completely utilize the
2 complaint procedure established by the arbitration agreement, including but not limited to the
3 applicable arbitration procedures, which were at all times available and applicable to Plaintiffs.
4 Defendant does not waive its right to enforce the arbitration agreement.

5 **THIRD AFFIRMATIVE DEFENSE**

6 As a separate and distinct affirmative defense, Defendant alleges that to the extent
7 Decedent's alleged injuries arose in the course of employment, Plaintiffs' claims are barred by the
8 exclusivity of the California Workers' Compensation Act, California Labor Code section 3600, et seq.

9 **FOURTH AFFIRMATIVE DEFENSE**

10 As a separate and distinct affirmative defense, Defendant alleges that the Complaint,
11 and each cause of action alleged therein, are barred to the extent that they were filed after the expiration
12 of the applicable statutory periods, including but not limited to the limitations periods set forth in
13 California Code of Civil Procedure section 335.1, California Government Code sections 12960 and
14 12965, and 29 U.S.C. § 2617(c).

15 **FIFTH AFFIRMATIVE DEFENSE**

16 As a separate and distinct affirmative defense, Defendant alleges that the Complaint,
17 and each cause of action alleged therein, are barred to the extent that Plaintiffs failed to timely comply
18 with the applicable procedural and administrative prerequisites including timely charge filing
19 requirements and the exhaustion of all administrative remedies available to them.

20 **SIXTH AFFIRMATIVE DEFENSE**

21 As a separate and distinct affirmative defense, Defendant alleges that it exercised
22 reasonable care to prevent and promptly correct any alleged discriminatory or otherwise unlawful
23 behavior.

24 **SEVENTH AFFIRMATIVE DEFENSE**

25 As a separate and affirmative defense, Defendant alleges that it had no knowledge of
26 any discriminatory or otherwise unlawful behavior by any of its employees, agents, or representatives.

27 **EIGHTH AFFIRMATIVE DEFENSE**

28 As a separate and distinct affirmative defense, Defendant alleges that to the extent any

1 employee engaged in any discriminatory or otherwise unlawful behavior, the alleged acts were
2 committed outside the course and scope of employment and were not authorized, adopted, or ratified
3 by Defendant and/or Defendant did not know nor should it have known of such conduct.

4 **NINTH AFFIRMATIVE DEFENSE**

5 As a separate and distinct affirmative defense, Defendant alleges that the employment
6 actions complained of by Plaintiffs were based on legitimate, non-discriminatory reasons.

7 **TENTH AFFIRMATIVE DEFENSE**

8 As a separate and distinct affirmative defense, Defendant alleges that with respect to
9 the employment actions complained of by Plaintiffs, Defendant would have taken the same
10 employment actions in the absence of the alleged discriminatory factor.

11 **ELEVENTH AFFIRMATIVE DEFENSE**

12 As a separate and distinct affirmative defense, Defendant alleges that Plaintiffs' claims,
13 in whole or in part, are barred, or any recovery should be reduced, pursuant to the avoidable
14 consequences doctrine.

15 **TWELFTH AFFIRMATIVE DEFENSE**

16 Defendant is informed and believes that a reasonable opportunity for investigation and
17 discovery will reveal and, on that basis alleges to the extent that the Court may find that Decedent did
18 not have a disability that limited a major life activity and that Defendant had an obligation to
19 reasonably accommodate such a disability, Decedent, even with reasonable accommodations, was
20 unable to perform an essential job duty without endangering Decedent's health or safety or the health
21 or safety of others.

22 **THIRTEENTH AFFIRMATIVE DEFENSE**

23 As a separate and distinct affirmative defense, Defendant alleges that assuming that
24 Decedent made a request for reasonable accommodation, Decedent's requested accommodation
25 imposes an undue hardship.

26 **FOURTEENTH AFFIRMATIVE DEFENSE**

27 As a separate and distinct affirmative defense, Defendant is informed and believes that
28 a reasonable opportunity for investigation and discovery will reveal and, on that basis alleges that

1 Plaintiff failed to provide sufficient notice that Plaintiff sought qualifying leave under the California
2 Family Rights Act and Family Medical Leave Act.

3 **FIFTEENTH AFFIRMATIVE DEFENSE**

4 As a separate and distinct affirmative defense, Defendant alleges that Defendant's acts
5 were made in good faith and had reasonable ground for believing such acts were in compliance with
6 the Family Medical Leave Act, and therefore, liquidated damages are not appropriate.

7 **SIXTEENTH AFFIRMATIVE DEFENSE**

8 As a separate and distinct affirmative defense, Defendant is informed and believes that
9 a reasonable opportunity for investigation and discovery will reveal and, on that basis alleges, that the
10 Complaint and each cause of action set forth therein, or some of them, cannot be maintained against
11 Defendant because Plaintiffs failed to allege the requisite causal connection between alleged protected
12 status or activities and the alleged adverse employment action(s).

13 **SEVENTEENTH AFFIRMATIVE DEFENSE**

14 As a separate and distinct affirmative defense, Defendant is informed and believes that
15 a reasonable opportunity for investigation and discovery will reveal and, on that basis alleges, that
16 Defendant's conduct towards Plaintiff was fully justified based upon its judgment of differences in
17 individual performance, qualifications, skill, effort, responsibility, merit or other *bona fide*
18 occupational qualifications, business necessity (including undue hardship), by job relatedness, by non-
19 discrimination or affirmative action plans and/or by requirement of law.

20 **EIGHTEENTH AFFIRMATIVE DEFENSE**

21 As a separate and distinct affirmative defense, Defendant alleges that to the extent that
22 during the course of this litigation it acquires any evidence of Plaintiffs' or Decedent's wrongdoing,
23 such after-acquired evidence bars Plaintiffs' claims of liability or damages or reduces such claims as
24 provided by law.

25 **NINETEENTH AFFIRMATIVE DEFENSE**

26 As a separate and distinct affirmative defense, Defendant alleges that the injuries and
27 damages alleged in the Complaint were caused by and/or were contributed to by Decedent's own acts
28 or failure to act and that Plaintiffs' recovery, if any, should be reduced by an amount proportionate to

1 the amount by which said acts caused or contributed to said alleged injuries or damages.

2 **TWENTIETH AFFIRMATIVE DEFENSE**

3 As a separate and distinct affirmative defense, Defendant is informed and believes that
4 a reasonable opportunity for investigation and discovery will reveal and, on that basis alleges,
5 Plaintiffs' recovery, if any, of non-economic damages based upon the Complaint is limited to the
6 percentage of fault, if any, attributable to Defendant as provided in the Fair Responsibility Act of 1986,
7 Civil Code sections 1431-1431.5.

8 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

9 As a separate and distinct affirmative defense, Defendant alleges that Plaintiffs' claims
10 are barred and/or any recovery to which Plaintiffs might be entitled (and Defendant does not admit
11 that Plaintiffs are entitled to any recovery) must be reduced by reason of Plaintiffs' and Decedent's
12 failure to mitigate their damages.

13 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

14 As a separate and distinct affirmative defense, Defendant alleges that any recovery to
15 which Plaintiffs might be entitled (and Defendant does not admit that Plaintiffs are entitled to any
16 recovery) must be offset by any benefits and/or other monies that Plaintiffs have received or will
17 receive from any source, including but not limited to other insurance, state or federal disability
18 payments, and workers' compensation payments.

19 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

20 As a separate and distinct affirmative defense, Defendant alleges that all or portions of
21 the Plaintiffs' claims are barred by the defense of waiver and/or release, or accord and satisfaction.

22 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

23 As a separate and distinct affirmative defense, Defendant alleges that the Complaint,
24 and each cause of action alleged therein, or some of them, are barred by the doctrines of unclean hands,
25 estoppel, waiver, and laches.

26 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

27 As a separate and distinct affirmative defense, Defendant alleges that some or all of
28 Plaintiffs' claims are barred, in whole or in part, on the grounds of res judicata, issue preclusion, or

1 judicial estoppel.

2 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

3 As a separate and distinct affirmative defense, Defendant alleges that some or all of
4 Plaintiffs' claims are barred, in whole or in part, on the grounds that Defendant did not cause
5 Decedent's death or otherwise cause him injury.

6 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

7 As a separate and distinct affirmative defense, Defendant alleges that some or all of
8 Plaintiffs' claims are barred, in whole or in part, on the grounds of comparative negligence.

9 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

10 As a separate and distinct affirmative defense, Defendant alleges that some or all of
11 Plaintiffs' claims are barred, in whole or in part, on the grounds that a third party who is not an agent
12 of Defendant caused Plaintiffs' harm, if any.

13 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

14 As a separate and distinct affirmative defense, Defendant alleges that some or all of
15 Plaintiffs' claims are barred, in whole or in part, on the grounds of consent wherein Decedent either
16 expressly or implicitly consented to Defendant's conduct alleged in the Complaint.

17 **THIRTIETH AFFIRMATIVE DEFENSE**

18 As a separate and distinct affirmative defense, Defendant alleges that some or all of
19 Plaintiffs' claims are barred, in whole or in part, on the grounds that any misrepresentation (which
20 Defendant denies) was neither willfully made nor fraudulent and was justified based on Defendant's
21 knowledge at the time it was made. *Graham v. Ellmore*, 135 Cal.App.4th 129, 133 (1933).

22 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

23 As a separate and distinct affirmative defense, Defendant alleges that the United States
24 and/or California Constitutions bar any claim by Plaintiffs for punitive damages.

25 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

26 As a separate and distinct affirmative defense, Defendant alleges that Plaintiffs' claim
27 for punitive damages is barred because Defendant had suitable anti-discrimination policies in effect at
28 all material times. *Kolstad v. ADA*, 527 U.S. 526 (1999); *White v. Ultramar, Inc.*, 21 Cal. 4th 563

1 (1999).

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Defendant prays that:

- 4 1. Plaintiffs' Complaint be dismissed in its entirety with prejudice;
- 5 2. Plaintiffs take nothing by this action;
- 6 3. Judgment be entered in Defendant's favor and against Plaintiffs;
- 7 4. Defendant be awarded its costs and attorneys' fees incurred herein; and
- 8 5. Defendant be awarded such other and further relief as the Court deems just and proper.
- 9

10 Dated: October 28, 2021

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12 _____
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14 ROBERT M. GEIGER
15 LITTLER MENDELSON, P.C.

16 Attorneys for Defendant
17 RECOLOGY, INC.

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