

ORIGINAL

1 MITCHELL SILBERBERG & KNUPP LLP
ANTHONY J. AMENDOLA (SBN 133067), aja@msk.com
2 STEPHEN A. ROSSI, sar@msk.com
11377 West Olympic Boulevard
3 Los Angeles, CA 90064-1683
Telephone: (310) 312-2000
4 Facsimile: (310) 312-3100
5 Attorneys for Defendants
Move, Inc. and Leo Jay
6
7

FILED
Superior Court of California
County of Los Angeles

OCT 24 2018

Sherril R. Carter, Executive Officer/Clerk of Court
By Kristina Vargas Deputy
Kristina Vargas

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES
10 CENTRAL DISTRICT

11 BRIAN BOBIK, an Individual,
12 Plaintiff,
13 v.
14 MOVE, INC.; LEO JAY, an individual; and
DOES 1-25, Inclusive,
15 Defendants.
16

CASE NO. BC678768
Assigned To Judge Monica Bachner
Dept. 71
**MOVE, INC.'S ANSWER TO SECOND
AMENDED COMPLAINT**
File Date: October 6, 2017
Trial Date: None Set

10/25/18

Mitchell
Silberberg &
Knupp LLP

B399422.1

1 Defendant Move, Inc. ("Defendant" or "Move") submits this Answer to the allegations
2 contained in the unverified Complaint of Plaintiff Brian Bobik ("Plaintiff") as follows:

3
4 **GENERAL DENIAL**

5 Pursuant to the provisions of *California Code of Civil Procedure* Section 431.30(d),
6 Defendant denies, both generally and specifically, each and every allegation in the Complaint, and
7 specifically denies that Plaintiff has been, is, or will be damaged in the amount alleged, or in any
8 manner or sum whatsoever, or entitled to any recovery or remedy of any type whatsoever, by
9 reason of any of Defendant's acts, conduct or omissions.

10
11 **SEPARATE AFFIRMATIVE DEFENSES**

12 Without waiving or excusing Plaintiff's burden of proof or admitting that any of the
13 following are in fact defenses upon which Defendant has any burden of proof as opposed to
14 denials of matters as to which Plaintiff has the burden of proof, or that Defendant has any burden
15 of proof at all, Defendant hereby asserts the following affirmative defenses:

16
17 **FIRST AFFIRMATIVE DEFENSE**

18 **(Failure to State A Cause Of Action)**

19 1. Each purported cause of action in the Complaint fails to state facts sufficient to
20 constitute a cause of action against Defendant.

21
22 **SECOND AFFIRMATIVE DEFENSE**

23 **(Statute of Limitations)**

24 2. To the extent any of the conduct alleged in the Complaint occurred prior to the
25 limitations period, the Complaint, and each cause of action contained therein, is barred, in whole
26 or in part, by the applicable statutes of limitations, including but not limited to, the one-year
27 statute of limitations under the *California Government Code* Sections 12960(d) and 12965(b), the
28 two-year statute of limitations applicable to claims for intentional torts contained in *California*

1 *Code of Civil Procedure* (“CCP”) Section 335.1; the two-year statute of limitations contained in
2 CCP Section 339(1); the three-year statute of limitations contained in CCP Section 338(a); the
3 one-year statute of limitations contained in CCP Section 340; and the four-year “catch all” statute
4 of limitations contained in CCP Section 343.

5
6 **THIRD AFFIRMATIVE DEFENSE**

7 **(Failure to Exhaust Statutory Prerequisites or Remedies/Corrective Measures)**

8 3. The Complaint, and each alleged cause of action contained therein, is barred, in
9 whole or in part, because Plaintiff has failed to exhaust administrative or other government
10 remedies or corrective measures, and/or to comply with statutory prerequisites to bringing suit
11 including, but not limited to, those contained in the California Fair Employment and Housing Act,
12 *California Government Code* Section 12900 *et seq.*

13
14 **FOURTH AFFIRMATIVE DEFENSE**

15 **(No Jurisdiction)**

16 4. To the extent Plaintiff makes allegations or claims which were not made the subject
17 of a timely complaint or petition against Defendant submitted or filed by or on behalf of Plaintiff
18 with the appropriate administrative or governmental agency or department, the Court lacks
19 jurisdiction with respect to any such allegations or claims.

20
21 **FIFTH AFFIRMATIVE DEFENSE**

22 **(Legitimate and Independent Reasons)**

23 5. Even if Plaintiff were able to demonstrate that protected activity were a
24 contributing factor in the alleged prohibited action(s) against Plaintiff, Plaintiff is not entitled to
25 recover anything from this action because such action would have occurred for legitimate,
26 independent reasons even if the employee had not engaged in activities protected by the California
27 Fair Employment and Housing Act, *California Government Code* Section 12900 *et seq.*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SIXTH AFFIRMATIVE DEFENSE

(Legitimate, Non-Discriminatory/Non-Retaliatory Reasons)

6. At all times material herein, there were legitimate, non-retaliatory business reasons for any actions taken by Defendant with respect to Plaintiff and/or his employment.

SEVENTH AFFIRMATIVE DEFENSE

(Avoidable Consequences)

7. Plaintiff is not entitled to recover any damages as prayed for in the Complaint on the grounds that such damages could have been avoided under the doctrine of avoidable consequences.

EIGHTH AFFIRMATIVE DEFENSE

(Waiver)

8. Plaintiff has waived the right, by reason of his conduct and actions, to assert his alleged claims herein, in whole or in part.

NINTH AFFIRMATIVE DEFENSE

(Estoppel)

9. Plaintiff is estopped, by reason of his conduct and actions, from asserting each or any of the causes of action alleged in his Complaint.

TENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

10. By virtue of his conduct and actions, Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.

10/25/18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ELEVENTH AFFIRMATIVE DEFENSE

(No Actual Injuries)

11. The Complaint, and each cause of action contained therein, is barred, in whole or in part, because Plaintiff has not suffered any actual injury by reason of any of Defendant's acts, conduct, or omissions as alleged in the Complaint.

TWELFTH AFFIRMATIVE DEFENSE

(Laches)

12. Plaintiff's claims are barred, in whole or in part, by the equitable doctrine of laches to the extent Plaintiff has delayed inexcusably and unreasonably in the filing and prosecution of this action causing substantial prejudice to Defendant.

THIRTEENTH AFFIRMATIVE DEFENSE

(At-Will Employment)

13. The Complaint, and each cause of action contained therein, is barred, in whole or in part, because at all relevant times Plaintiff's employment with Defendant was at-will as a matter of law pursuant to *California Labor Code* Section 2922.

FOURTEENTH AFFIRMATIVE DEFENSE

(Outside Course and Scope of Employment)

14. To the extent any alleged discrimination occurred, which Defendant denies, any alleged discrimination committed by any employees or agents of Defendant was outside the scope and course their respective employment.

FIFTEENTH AFFIRMATIVE DEFENSE

(Not Disabled)

15. Plaintiff was not disabled within the meaning of *California Government Code* Section 12926 *et seq.*; and therefore, the Complaint, and each cause of action alleged therein, fails.

10/25/18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SIXTEENTH AFFIRMATIVE DEFENSE

(No Accommodation Requested)

16. Plaintiff never requested any reasonable accommodation and, therefore, cannot state a disability claim including, but not limited to, any claim for alleged disability discrimination under *California Government Code* Section 12940 *et seq.*

SEVENTEENTH AFFIRMATIVE DEFENSE

(Consent/Ratification)

17. By virtue of Plaintiff's conduct and actions, Plaintiff's claims are barred, in whole or in part, by the doctrine of express consent, implied consent, and/or ratification.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Failure to Engage in Interactive Process)

18. Plaintiff has waived or, alternatively, cannot state nor assert any cause of action for any alleged disability discrimination under *California Government Code* Section 12940 *et seq.*, because of the failure of Plaintiff and/or his agents to cooperate and or engage in the interactive process.

NINETEENTH AFFIRMATIVE DEFENSE

(Not Qualified)

19. Plaintiff was not qualified or could not perform the essential duties of his position with or without reasonable accommodation.

TWENTIETH AFFIRMATIVE DEFENSE

(Unreasonable Request/Undue Hardship)

20. To the extent Plaintiff claims that he requested an accommodation, such request was unreasonable and would have produced an undue hardship. Therefore, Plaintiff cannot

10/25/18

1 maintain any disability claim including, but not limited to, any claim under *California*
2 *Government Code* Section 12940 *et seq.*

3
4 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

5 **(Risk of Safety and Health of Plaintiff and Others)**

6 21. Plaintiff was not qualified or could not perform the essential duties of his position
7 in a manner that would not endanger his health or safety or the health or safety of others, with or
8 without reasonable accommodation.

9
10 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

11 **(No Certification from Health-Care Provider)**

12 22. The Complaint, and each cause of action therein, is barred, in whole or in part, on
13 the grounds that Plaintiff failed timely to provide Move with a health-care provider's certification
14 of Plaintiff's alleged restrictions.

15
16 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

17 **(Failure to Take Advantage of Preventative or Corrective Opportunities)**

18 23. Plaintiff's claims are barred, in whole or in part, because Plaintiff unreasonably
19 failed to take advantage of any preventative or corrective opportunities to avoid the alleged harm,
20 if any.

21
22 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

23 **(Good Faith/Privileged)**

24 24. Plaintiff's claims are barred, in whole or in part, on the ground that all actions or
25 omissions of Defendant alleged in the Complaint were reasonable and undertaken in good faith,
26 consistent with law and/or business necessity, and therefore, privileged.

27
28
10/25/18

1 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

2 **(Managerial Privilege)**

3 25. Plaintiff's claims are barred, in whole or in part, by the doctrine of managerial
4 privilege or immunity.

5
6 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

7 **(After-Acquired Evidence)**

8 26. Plaintiff's claims are barred and/or the alleged damages must be reduced, in whole
9 or in part, by the after-acquired evidence of Plaintiff's misconduct that has been, or may be,
10 discovered.

11
12 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

13 **(Privilege, Justification and/or Free Speech)**

14 27. The acts and statements of Defendant herein were privileged, justified and/or
15 protected as free speech, in whole or in part, as a matter of California and/or federal law,
16 including, but not limited to, the common law, Section 47 of the *California Civil Code*, and
17 Article I, Sections 2 and 3 of the California Constitution and the First and Fourteenth
18 Amendments to the United States Constitution, and therefore cannot give rise to liability herein.

19
20 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

21 **(Lack of Malice)**

22 28. Plaintiff's claims are barred, in whole or in part, because all of the conduct, acts,
23 and omissions of Defendant were undertaken without malice.

24
25 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

26 **(Same Decision)**

27 29. Even if the alleged protected conduct or status of Plaintiff had played a motivating
28 part in any employment decision by Defendant regarding Plaintiff's employment, which

1 Defendant denies, Plaintiff is not entitled to any damages because Defendant would have made the
2 same employment decisions even if Plaintiff's alleged protected conduct or status had not played a
3 role in the decision.

4
5 **THIRTIETH AFFIRMATIVE DEFENSE**

6 **(Contributory or Comparative Fault of Plaintiff)**

7 30. Each of the alleged damages, injuries, and/or losses, if any, of Plaintiff were
8 proximately caused and contributed to by the negligence or other fault or misconduct of Plaintiff
9 or Plaintiff's agents, and, by reason thereof, any recovery by Plaintiff against Defendant must be
10 reduced by an amount equal to the proportionate fault of Plaintiff or Plaintiff's agents pursuant to
11 the applicable law.

12
13 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

14 **(Apportionment of Responsibility)**

15 31. The alleged damages, injuries, and/or losses suffered by Plaintiff, if any,
16 proximately resulted from the negligence or conduct of parties, persons, and/or entities other than
17 Defendant, and the liability of Defendant, if any, is as a result altogether barred or limited in direct
18 proportion to the percentage of fault or responsibility actually attributable to Defendant.

19
20 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

21 **(Offset/Setoff)**

22 32. If Plaintiff sustained any damage as a result of conduct alleged in the Complaint,
23 which Defendant denies, then Defendant is entitled to offset/setoff against any such recovery any
24 and all amounts owed to Defendant by Plaintiff, any overpayments to Plaintiff, any damages or
25 harm caused to Defendant by Plaintiff's actions or inaction, including without limitation, amounts
26 received by Plaintiff as income or payments from other sources including, but not limited to, that
27 received under federal or state disability benefits laws, or by any other benefits received by
28 Plaintiff.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Unjust Enrichment)

33. The imposition of any liability upon Defendant would unjustly enrich Plaintiff.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(Workers' Compensation Exclusive Remedy)

34. Plaintiff is not entitled to recover any compensatory or other monetary damages from Defendant for any alleged vexation, injury, or annoyance, or physical, mental or emotional distress or discomfort, on the grounds that the exclusive remedy for such alleged injury arises under the California Workers' Compensation Act and exclusive jurisdiction over such claims is vested in the California Workers' Compensation Appeals Board, *California Labor Code* Sections 3600, *et seq.*, and that Plaintiff failed to pursue and/or exhaust his remedies, if any, under the California Workers' Compensation Act or before the California Workers' Compensation Appeals Board.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

(Workers' Compensation Offset)

35. Even if the California Workers' Compensation laws do not provide the exclusive remedy for damages, to the extent that Plaintiff alleges he sustained injuries as the result of his employment relationship with Defendant, any civil damages to which Plaintiff is entitled must be offset by any award or settlement received under the Workers' Compensation laws.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Economic Damages)

36. Defendant is informed and believes and on that basis alleges that Plaintiff has failed to make reasonable efforts to mitigate the alleged damages Plaintiff claims to have suffered. Accordingly, the relief, if any, to which Plaintiff is entitled must be diminished, in whole or in part, by the extent of (a) the actual mitigation of Plaintiff's economic damages, and (b) any

10/25/18

1 additional mitigation of Plaintiff's economic damages which with reasonable diligence Plaintiff
2 could have accomplished.

3
4 **THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

5 **(Failure to Mitigate Non-Economic Damages)**

6 37. Defendant is informed and believes and on that basis alleges that Plaintiff has failed
7 to make reasonable efforts to mitigate the alleged non-economic damages Plaintiff claims to have
8 suffered. Accordingly, the relief, if any, to which Plaintiff is entitled must be diminished, in
9 whole or in part, by the extent of (a) the actual mitigation of Plaintiff's non-economic damages,
10 and (b) any additional mitigation of Plaintiff's non-economic damages which with reasonable
11 diligence Plaintiff could have accomplished.

12
13 **THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

14 **(ERISA)**

15 38. Plaintiff is not entitled to recover any compensatory or other monetary damages for
16 any alleged benefits as prayed for, including medical or retirement benefits, because the exclusive
17 remedy for such alleged damages is the Employee Retirement Income Security Act of 1974, as
18 amended, 29 U.S.C. § 1001, *et seq.*

19
20 **THIRTY-NINTH AFFIRMATIVE DEFENSE**

21 **(Breach of Employment Obligations)**

22 39. The Complaint is barred and/or the alleged damages must be reduced, in whole or
23 in part, because Plaintiff breached his obligations to his employer.

24
25 **FORTIETH AFFIRMATIVE DEFENSE**

26 **(Lack of Standing)**

27 40. Plaintiff's claims, or some of them, are barred in whole or in part for lack of
28 standing.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FORTY-FIRST AFFIRMATIVE DEFENSE

(No Entitlement to Prejudgment Interest)

41. Any claim for prejudgment interest is barred as to any purported cause of action for which such relief is not available.

FORTY-SECOND AFFIRMATIVE DEFENSE

(No Penalties/Lack of Willfulness)

42. Plaintiff is not entitled to any penalty award, including, but not limited to, any penalties under *California Government Code* Section 12940 *et seq.* and/or any other penalties alleged in the Complaint, because, at all relevant times, Defendant did not willfully fail to comply with the provisions of California and federal law, but rather acted in good faith and had reasonable grounds for believing that it did not violate relevant laws or the specified provisions.

FORTY-THIRD AFFIRMATIVE DEFENSE

(No Entitlement to Punitive Damages)

43. Plaintiff has failed to allege facts which support the recovery of any punitive or exemplary damages against Defendant under *California Civil Code* Section 3294.

FORTY-FOURTH AFFIRMATIVE DEFENSE

(Punitive Damages/Penalties Unconstitutional)

44. Plaintiff is not entitled to recover any punitive or exemplary damages, or any penalties, as prayed for in the Complaint on the grounds that any award of punitive or exemplary damages or penalties under California law in general, and/or any such award under California law as applied to the facts of this specific action, would violate the constitutional rights of Defendant under provisions of the United States and California Constitutions, including, but not limited to, the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the excessive fines and cruel and unusual punishment clauses of the Eighth Amendment of the United States Constitution.

10/25/18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FORTY-FIFTH AFFIRMATIVE DEFENSE

(Business Judgment Rule)

45. Plaintiff's claims are barred, in whole or in part, because any decisions made by Defendant with respect to Plaintiff's employment were reasonably based on the facts as they understood them.

FORTY-SIXTH AFFIRMATIVE DEFENSE

(Impossibility)

46. Plaintiff's claims are barred, in whole or in part, by impossibility of performance.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

(Substantial Compliance)

47. Defendant substantially complied with all obligations under the law.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

(Attorneys' Fees)

48. The Complaint, and each purported cause of action contained therein, fails to allege facts sufficient to allow recovery of attorneys' fees from Defendant.

FORTY-NINTH AFFIRMATIVE DEFENSE

(Reservation of Rights)

49. Defendant does not presently know all of the facts and circumstances respecting Plaintiff's claims. Defendant reserves the right to amend this Answer should it later discover facts demonstrating the existence of additional affirmative defenses.

10/25/18

PRAYER FOR RELIEF

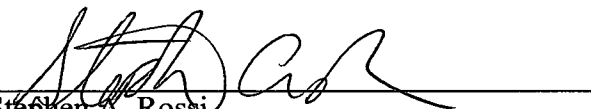
WHEREFORE, Defendant Move, Inc. prays for judgment as follows:

1. That Plaintiff take nothing by reason of the Complaint;
2. That Plaintiff's Complaint be dismissed in its entirety, with prejudice, in favor of Defendant;
3. That Defendant be awarded its costs of suit incurred herein;
4. That Defendant be awarded its attorneys' fees incurred herein; and
5. That the Court order such other and further relief in favor of Defendant as the Court deems just and proper.

DATE: October 24, 2018

Respectfully submitted,

MITCHELL SILBERBERG & KNUPP LLP
ANTHONY J. AMENDOLA
STEPHEN A. ROSSI

By: 
Stephen A. Rossi
Attorneys for Defendants
Move, Inc. and Leo Jay

10/25/18

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles , State of California, I am over the age of
4 eighteen years and am not a party to this action; my business address is Mitchell Silberberg &
5 Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, CA 90064-1683, and my business
6 email address is a1s@msk.com.

7 On October 24, 2018, I served a copy of the foregoing document(s) described as **MOVE
8 INC.'S ANSWER TO SECOND AMENDED COMPLAINT** on the interested parties in this
9 action at their last known address as set forth below by taking the action described below:

10 Jasmine A. Duel, Esq.
11 Kousha Berokim, Esq.
12 BEROKIM & DUEL, P.C.
13 270 N. Canon Drive, 3rd Floor
14 Beverly Hills, CA 90210
15 E: jasmine@berokimduel.com
16 E: berokim@berokimduel.com
17 T: (310) 846-8553
18 F: (310) 300-1233

Counsel for Plaintiff
BRIAN BOBIK

- 19 **BY OVERNIGHT DELIVERY:** I placed the above-mentioned document(s) in sealed
20 envelope(s) designated by the carrier, with delivery fees provided for, and addressed as set
21 forth above, and deposited the above-described document(s) with **FEDEX** in the ordinary
22 course of business, by depositing the document(s) in a facility regularly maintained by the
23 carrier or delivering the document(s) to an authorized driver for the carrier.
- 24 **BY PLACING FOR COLLECTION AND MAILING:** I placed the above-mentioned
25 document(s) in sealed envelope(s) addressed as set forth above, and placed the envelope(s)
26 for collection and mailing following ordinary business practices. I am readily familiar
27 with the firm's practice for collection and processing of correspondence for mailing with
28 the United States Postal Service. Under that practice it would be deposited with the U.S.
Postal Service on that same day with postage thereon fully prepaid at 11377 West Olympic
Boulevard, Los Angeles, California 90064-1683 in the ordinary course of business.
- BY ELECTRONIC MAIL:** Upon agreement of all interested parties, I served the above-
mentioned document electronically on October 24, 2018 on the parties listed at the email
addresses above and, to the best of my knowledge, the transmission was complete and
without error in that I did not receive an electronic notification to the contrary.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 24, 2018, at Los Angeles, California.


Alma L. Silva

10/25/18