

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KAREN D. SMITH,

Plaintiff,

v.

THE BANK OF NEW YORK MELLON,
et al.,

Defendants.

CASE NO. C19-0538-JCC

ORDER

This matter comes before the Court on Plaintiff’s motions to strike affirmative defenses (Dkt. Nos. 29, 30). Having thoroughly considered the parties’ briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motions for the reasons explained herein.

I. BACKGROUND

Plaintiff alleges that Defendants violated the Washington Consumer Protection Act (CPA), Wash. Rev. Code § 19.86.020, and the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, by attempting to collect on a time-barred mortgage debt. (Dkt. No. 10 at 9–19.) On May 26, 2019, Defendants Bank of New York Mellon (“BONY”) and Shellpoint filed an answer to Plaintiff’s complaint, asserting sixteen affirmative defenses. (Dkt. No. 19.) On June 5, 2019, Defendant MTC Financial, Inc. (“Defendant MTC”) filed an answer to Plaintiff’s

1 complaint in which it asserted ten affirmative defenses. (Dkt. No. 26.) Plaintiff moves to strike
2 all of the affirmative defenses asserted by Defendants MTC, BONY, and Shellpoint, on the
3 grounds that each defense either lacks sufficient supporting facts to give Plaintiff fair notice or is
4 not actually an “affirmative” defense. (*See* Dkt. Nos. 29, 30.)

5 **II. DISCUSSION**

6 **A. Legal Standard**

7 Under Federal Rule of Civil Procedure 12(f), a district court “may strike from a pleading
8 an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
9 Civ. R. 12(f). “[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and
10 money that must arise from litigating spurious issues by dispensing with those issues prior to
11 trial” *Sidney–Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). To determine
12 whether a defense is “insufficient” under Rule 12(f), the Court asks whether it gives the plaintiff
13 fair notice of the defense. *Simmons v. Navajo Cty*, 609 F.3d 1011, 1023 (9th Cir. 2010) (citing
14 *Wyshak v. City Nat’l Bank*, 607 F.2d 824, 827 (9th Cir. 1979)). Under Federal Rule of Procedure
15 8, a party must “state in short and plain terms its defenses to each claim asserted against it.” Fed.
16 R. Civ. P. 8(b); *see also Rosen v. Marketing Grp, LLC*, 222 F. Supp. 3d 793, 802 (C.D. Cal.
17 2016) (“Affirmative defenses must be supported by at least some facts indicating the grounds on
18 which the defense is based, but need not include facts sufficient to demonstrate plausible
19 entitlement to relief.”).

20 1. Failure to State a Cause of Action – Defendants MTC, BONY, and Shellpoint

21 Defendants assert the defense of failure to state a claim upon which relief can be granted.
22 (Dkt. Nos. 19 at 15, 26 at 7.) By definition, “[a] defense which demonstrates that [a] plaintiff
23 has not met its burden of proof is not an affirmative defense.” *Zivkovic v. S. Cal. Edison Co.*, 302
24 F.3d 1080, 1088 (9th Cir. 2002). The assertion of failure to state a claim upon which relief can be
25 granted is not an *affirmative* defense; rather, it challenges the legal or factual sufficiency of a
26 plaintiff’s claims, and necessarily means that the plaintiff cannot meet his or her burden of proof.

1 Therefore, the Court STRIKES Defendants' first affirmative defense without leave to amend.¹

2 2. Collateral Estoppel and/or Res Judicata – Defendant MTC

3 Defendant MTC asserts that “Plaintiff’s claims against Trustee Corps may be barred in
4 whole or in part based on the doctrines of collateral estoppel and/or res judicata.” (Dkt. No. 26 at
5 7.) Plaintiff argues that this statement, void of any facts to support it, is insufficient to give
6 Plaintiff fair notice of the defense made against her. (Dkt. No. 29 at 6.) The Court agrees with
7 Plaintiff. Simply asserting the defense as a conclusory statement, with no indication as to which
8 claims Defendant believes are collaterally estopped or why they are collaterally estopped, does
9 not give Plaintiff fair notice. *See Rosen*, 222 F. Supp. 3d at 797. The Court STRIKES
10 Defendant’s second affirmative defense with leave to amend.

11 3. Equitable Defenses – Defendants MTC, BONY, and Shellpoint

12 Defendants assert that Plaintiff’s claims may be barred in whole or in part under the
13 doctrines of waiver, laches, estoppel, and/or unclean hands. (Dkt. Nos. 19 at 15, 26 at 7.) This
14 affirmative defense is insufficiently asserted by each Defendant. Defendants’ answers contain no
15 facts that explain how Plaintiff waived her claims or how she is estopped from bringing her
16 claims. On this basis, the Court STRIKES Defendants’ third affirmative defense with leave to
17 amend.

18 4. Failure to Suffer Damages Proximately Caused – Defendant MTC

19 Defendant MTC asserts: “Plaintiff’s claims against Trustee Corps may be barred in whole
20 or in part because Plaintiff has failed to suffer any damages proximately caused by Trustee
21 Corps.” (Dkt. No. 26 at 7.) Essentially, Defendant is asserting that Plaintiff failed to meet one
22 element of her burden of proof; however, as previously discussed, a challenge to the sufficiency
23 of a plaintiff’s claims is not an affirmative defense. *See Zivkovic*, 302 F.3d at 1088. The Court
24

25 ¹ This ruling does not preclude Defendants from challenging the legal sufficiency of
26 Plaintiff’s claims in a dispositive motion, such as a motion for judgment on the pleadings under
Federal Rule of Civil Procedure 12(c) or a motion for summary judgment.

1 STRIKES Defendant's fourth affirmative defense without leave to amend.

2 5. Plaintiff's Fault or Fault of Another – Defendants MTC, BONY, and Shellpoint

3 Defendants assert that Plaintiff's alleged damages, if any, are the result of her own fault
4 or the fault of another, for which Defendants have no liability. (Dkt. Nos. 19 at 17, 26 at 7.)
5 Plaintiff argues that this affirmative defense should be stricken as to all Defendants because it is
6 void of any factual allegations to support it. (See Dkt. No. 29 at 6–7, 30 at 8.) The Court agrees
7 with Plaintiff. Defendants' recitation of the affirmative defense, without any specificity or facts
8 to support it, does not give fair notice to Plaintiff regarding how she or someone other than
9 Defendants is at fault for her alleged damages. The Court STRIKES Defendant MTC's fifth
10 affirmative defense with leave to amend. The Court STRIKES Defendants BONY and
11 Shellpoint's twelfth and thirteenth affirmative defenses with leave to amend.

12 6. Failure to Mitigate – Defendants MTC, BONY, and Shellpoint

13 Defendants assert that Plaintiff's claims may be barred in whole or in part because she
14 failed to mitigate her alleged damages. (Dkt. Nos. 19 at 16, 26 at 8.) Plaintiff argues that this
15 defense should be stricken because it is "wholly devoid of any factual basis." (Dkt. Nos. 29 at 7,
16 30 at 7.) The Court agrees with Plaintiff. The vague assertion fails to give Plaintiff fair notice as
17 to which damages she allegedly failed to mitigate. Therefore, the Court STRIKES Defendant
18 MTC's sixth affirmative defense with leave to amend, and STRIKES Defendants BONY and
19 Shellpoint's fourth affirmative defense with leave to amend.

20 7. Breach of Duty – Defendant MTC

21 Defendant MTC asserts that "Plaintiff does not have a cognizable claim for damages
22 against Trustee Corps because Trustee Corps has not breached any duty with regard to its role as
23 trustee on the deed of trust for the real property at issue." (Dkt. No. 26 at 8.) Defendant is again
24 asserting that Plaintiff failed to meet one element of her burden of proof; as previously discussed,
25 a challenge to the sufficiency of a plaintiff's claims is not an affirmative defense. *See Zivkovic*,
26 302 F.3d at 1088. The Court STRIKES Defendant's seventh affirmative defense without leave to

1 amend.

2 8. Violations of Deed of Trust Act – Defendant MTC

3 Defendant MTC asserts that “Plaintiff’s claim is barred in whole or in part because
4 Trustee Corp has not violated any aspect of Washington’s Deed of Trust Act.” (Dkt. No. 26 at 8.)
5 For the reasons stated above, this is not an affirmative defense. Instead, it asserts that Plaintiff
6 cannot meet an element of her claim. The Court STRIKES Defendant’s eighth affirmative
7 defense without leave to amend.

8 9. Deed of Trust Act, Waiver, and Applicable Legal Principles – Defendant MTC

9 Defendant MTC asserts that “Plaintiff’s claims may be barred in whole or in part based
10 on Washington’s Deed of Trust Act, the doctrine of waiver, or applica[ble] related legal
11 principles.” (*Id.*) This assertion is extremely vague and does not give Plaintiff fair notice of the
12 defense made against her. Based on this statement, Plaintiff could not possibly know which
13 “legal principles” Defendant refers to or how they may pertain to any of her claims. Moreover,
14 the defense is duplicative of Defendant’s other affirmative defense regarding the Deed of Trust
15 Act. On this basis, the Court STRIKES Defendant MTC’s ninth affirmative defense with leave to
16 amend.

17 10. Statute of Limitations – Defendant MTC

18 Defendant MTC asserts that “Plaintiff’s claim is barred in whole or in part by an
19 applicable statute of limitations and/or statutes of repose.” (*Id.*) This boilerplate assertion does
20 not give Plaintiff fair notice because it does not state the applicable statute of limitations or
21 which of Plaintiff’s claims are barred. The Court STRIKES Defendant MTC’s tenth affirmative
22 defense with leave to amend.

23 11. Good Faith/Reasonable Commercial Standards – Defendants BONY and Shellpoint

24 Defendants BONY and Shellpoint assert that “Plaintiff’s claims may be barred because
25 Defendants at all times complied in good faith with all applicable statutes and regulations,
26 including Washington’s Consumer Protection Act, the FDCPA, and other relevant laws, thus

1 precluding any recovery by Plaintiff against Defendants.” (Dkt. No. 19 at 15.) Defendants’
2 assertion that they complied with the law is not an affirmative defense. Instead, it challenges the
3 factual sufficiency of Plaintiff’s claims by alleging that Plaintiff cannot prove a violation of the
4 law. *See Zivkovic*, 302 F.3d at 1088. Therefore, Court STRIKES Defendants BONY and
5 Shellpoint’s second affirmative defense without leave to amend.

6 12. Ratification and Consent – Defendants BONY and Shellpoint

7 Defendants BONY and Shellpoint assert in their fifth affirmative defense that Plaintiff
8 “has consented to, ratified, or acquiesced in all of the alleged acts or omissions of which she
9 complains.” (Dkt. No. 19 at 16.) Defendants’ sixth affirmative defense is essentially duplicative
10 of the fifth, alleging that “by conduct, acts and/or omissions, Plaintiff consented to and
11 acquiesced in Defendants’ alleged conduct.” (*Id.*) This boilerplate language does not give
12 Plaintiff fair notice because it lacks any factual support as to which acts Plaintiff consented to,
13 which acts she ratified, and which acts she acquiesced in. The Court STRIKES Defendants
14 BONY and Shellpoint’s fifth and sixth affirmative defenses with leave to amend.

15 13. No Attorney’s Fees – Defendants BONY and Shellpoint

16 Defendants BONY and Shellpoint assert that Plaintiff’s complaint does not allege
17 sufficient facts to support a claim or award of attorney fees. (Dkt. No. 19 at 16.) The award of
18 attorney fees is not an affirmative defense because it does not preclude the liability of a
19 defendant. *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167,
20 1174 (N.D. Cal. 2010). Instead, attorney fees are collateral to the merits of an action and are
21 awarded after judgment. *Id.* Accordingly, the Court STRIKES Defendants BONY and
22 Shellpoint’s seventh affirmative defense without leave to amend.

23 14. Independent/Intervening Conduct – Defendants BONY and Shellpoint

24 Defendants BONY and Shellpoint assert that Plaintiff is barred from recovery because
25 “any damages sustained by Plaintiff was the direct and proximate result of the independent,
26 intervening, negligent and/or unlawful conduct of independent third parties or their agents, and

1 not any act or omissions on the part of Defendants.” (Dkt. No. 19 at 16.) Defendants’ assertion
2 fails to give Plaintiff fair notice because it does not inform Plaintiff who the third party is, or
3 what the intervening or negligent acts were, that allegedly caused harm to Plaintiff. On this basis,
4 the Court STRIKES Defendants BONY and Shellpoint’s eighth affirmative defense with leave to
5 amend.

6 15. Setoff – Defendants BONY and Shellpoint

7 Defendants BONY and Shellpoint assert that Plaintiff’s claims are “subject to setoff
8 and/or recoupment for all amounts due and owing to defendants.” (*Id.*) This assertion, with no
9 factual support alleging which claims are subject to setoff or recoupment, is insufficient to give
10 Plaintiff fair notice of the defense made against her. The Court STRIKES Defendants BONY and
11 Shellpoint’s ninth affirmative defense with leave to amend.

12 16. Tolling – Defendants BONY and Shellpoint

13 Defendants BONY and Shellpoint assert that “any claims alleged by Plaintiff to be time-
14 barred are subject to equitable tolling.” (Dkt. No. 19 at 17.) This assertion challenges the legal
15 sufficiency of Plaintiff’s claim and is not an affirmative defense. *See Zivkovic*, 302 F.3d at 1088.
16 Plaintiff’s *prima facie* case is based on the allegation that the debt at issue was indeed time-
17 barred. Therefore, Defendants’ assertion necessarily requires that Plaintiff cannot meet the
18 burden of proof as to her claims. The Court STRIKES Defendants BONY and Shellpoint’s tenth
19 affirmative defense without leave to amend.

20 17. Several Liability – Defendants BONY and Shellpoint

21 Defendants BONY and Shellpoint assert that “should Plaintiff prevail against
22 Defendants, Defendants’ liability is several and limited to their own actionable segment of fault,
23 if any.” (Dkt. No. 19 at 17.) Apportionment of liability is not a defense to liability itself. *See*
24 *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987). “The Court has
25 discretion to use equitable factors in apportioning damages . . . [h]owever, the Court’s discretion
26 in apportioning damages among the defendants during the contribution phase does not effect the

1 defendants' liability." *Id.* Therefore, Defendants have not asserted an affirmative defense to their
2 liability against Plaintiff's claims. The Court STRIKES Defendants' eleventh affirmative defense
3 without leave to amend. However, this does not preclude Defendants from arguing that damages
4 should be apportioned according to Defendants' respective contribution of fault if joint and
5 several liability is imposed.

6 18. Authorized by Statute – Defendants BONY and Shellpoint

7 Defendants BONY and Shellpoint assert that "Plaintiff's claims may be barred because
8 the acts or omissions alleged in the Complaint have been approved and/or mandated, implicitly
9 or expressly, by applicable statutes and regulations." (Dkt. No. 19 at 17.) The assertion is void of
10 any factual support and does not give Plaintiff fair notice regarding which acts have been
11 approved by which statutes. The Court STRIKES Defendants BONY and Shellpoint's fourteenth
12 affirmative defense with leave to amend.

13 19. Not a Debt Collector – Defendants BONY and Shellpoint

14 Defendants BONY and Shellpoint assert that "Plaintiff's claims are barred because
15 [D]efendants are not debt collectors as defined by the FDCPA." (Dkt. No. 19 at 18.) Again,
16 Defendants are asserting that Plaintiff cannot meet one element of her FDCPA claim—that
17 Defendants are debt collectors. *See Heejon Chung v. U.S. Bank, N.A.*, 250 F. Supp. 3d 658, 680
18 (D. Haw. 2017). A challenge to the sufficiency of a plaintiff's claims is not an affirmative
19 defense. *See Zivkovic*, 302 F.3d at 1088. The Court STRIKES Defendants BONY and
20 Shellpoint's fifteenth affirmative defense without leave to amend.

21 20. Reservation of Rights – Defendants BONY and Shellpoint

22 At the end of their affirmative defenses, Defendants BONY and Shellpoint state:
23 "Defendants expressly reserve the right to assert such other and further affirmative defenses as
24 may be appropriate." (Dkt. No. 19 at 18.) Federal Rule of Civil Procedure 15 lays out the
25 requirements for amending a pleading, to include filing additional affirmative defenses. Rule 15
26 does not require a party to reserve the right to assert additional defenses. *See Johnson v.*

1 *Providence Health & Servs, Inc.*, Case No. C17-1779-JCC, Dkt. No. 39 at 5 (W.D. Wash. 2018).
2 Defendants' reservation of rights language is therefore unnecessary and immaterial to its
3 affirmative defenses. On this basis, the Court STRIKES Defendants BONY and Shellpoint's
4 sixteenth affirmative defense without leave to amend.

5 **III. CONCLUSION**

6 For the foregoing reasons, Plaintiff's motion to strike Defendant MTC's affirmative
7 defenses (Dkt. No. 29) is GRANTED. In accordance with this order, the Court STRIKES
8 Defendant MTC's affirmative defenses 1, 4, 7 and 8 *without leave* to amend. The Court
9 STRIKES Defendant's affirmative defenses 2, 3, 5, 6, 9, and 10 *with leave* to amend. If MTC
10 chooses to file an amended answer, it must do so within 14 days from the issuance of this order.

11 Plaintiff's motion to strike Defendants BONY and Shellpoint's affirmative defenses (Dkt.
12 No. 30) is GRANTED. In accordance with this order, the Court STRIKES Defendants BONY
13 and Shellpoint's affirmative defenses 1, 2, 7, 10, 11, 15, and 16 *without leave* to amend. The
14 Court STRIKES Defendants' affirmative defenses 3–6, 8, 9, 12–14 *with leave* to amend. If
15 BONY and Shellpoint choose to file an amended answer, they must do so within 14 days from
16 the issuance of this order.

17 DATED this 30th day of July 2019.

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21 John C. Coughenour
22 UNITED STATES DISTRICT JUDGE
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