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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KELLIE M. O'HANLON,)	Case No. CV 15-06640 DDP (PJWx)
)	
Plaintiff,)	ORDER DENYING IN PART AND
)	GRANTING IN PART PLAINTIFF'S
v.)	MOTION TO STRIKE AFFIRMATIVE
)	DEFENSES
J.P. MORGAN CHASE BANK,)	
N.A.,)	[Dkt. No. 34]
)	
Defendant.)	
_____)	

Presently before the Court is pro se Plaintiff Kellie M. O'Hanlon's Motion to Strike Affirmative Defenses 1-3 and 5-10. (Dkt. No. 34.) Defendant opposed the Motion. (Dkt. No. 39.) After considering the parties' submissions, the Court adopts the following Order.

I. BACKGROUND

This dispute arises out of Plaintiff's former employment with Defendant J.P. Morgan Chase Bank, N.A., and Plaintiff's employee credit card. (See Notice of Removal, Dkt. No. 1, Ex. A.) This Court previously held that Plaintiff was not required to arbitrate this dispute. (See Order Denying Defendant's Motion to Compel Arbitration, Dkt. No. 18.) Thereafter, pursuant to the stipulation

1 of the parties, the Court granted Plaintiff leave to file an
2 amended complaint. (Dkt. No. 25.) Plaintiff filed her First
3 Amended Complaint ("FAC") on November 19, 2015. (Dkt. No. 26.)
4 Defendant filed its Answer on December 3, 2015. (Dkt. No. 27.)
5 Then, on December 24, 2015, Defendant filed an Amended Answer.
6 (Dkt. No. 31.) Plaintiff then filed the instant Motion to Strike
7 on January 11, 2016. (Dkt. No. 34.)

8 Plaintiff's main contention is that Defendant wrongfully
9 terminated her for disputing the balance on her employee credit
10 card. (FAC ¶¶ 1-3.) She alleges a wrongful termination cause of
11 action based on her raising a Fair Credit Billing Act complaint and
12 then being terminated for "acting improperly with respect to filing
13 a false credit bureau credit card dispute." (Id. ¶¶ 13-17.) She
14 claims that Defendant terminated her in retaliation for her
15 complaint and that the termination prevented her from accepting
16 another internal position with Defendant. (Id. ¶¶ 18-23.)

17 Further, Plaintiff's FAC alleges violations of the Fair Credit
18 Billing Act, 15 U.S.C. § 1601 et seq., the Fair Debt Collection
19 Practices Act, 15 U.S.C. § 1692g et seq., and the Fair Credit
20 Reporting Act, 15 U.S.C. § 1681, based on Defendant's failure to
21 allow Plaintiff to dispute her alleged credit card billing error.
22 (FAC ¶¶ 24-26.) Plaintiff claims Defendant also violated
23 California Labor Code section 2930¹ based on Defendant's alleged
24 failure to provide Plaintiff with a copy of an investigation report
25 that occurred prior to Plaintiff's termination. (Id. ¶ 28.)

26

27 ¹ The parties stipulated to dismiss with prejudice
28 Plaintiff's claims under California Labor Code sections 201 and
208. (See Order, Dkt. No. 38.)

1 Plaintiff also alleges a cause of action for violation of the
2 Credit Card Accountability, Responsibility, and Disclosure Act of
3 2009, caused by Defendant raising her credit card interest rate
4 from 10.24% to 29.99% in one billing cycle without sufficient
5 notice and warning – and applying that higher rate to backdated
6 purchases. (Id. ¶¶ 29-32.) Lastly, Plaintiff has a cause of
7 action for negligent infliction of emotional distress caused by the
8 termination of her employment. (Id. ¶¶ 33-37.)

9 Defendant has filed two Answers to the Complaint. (Dkt. Nos.
10 27, 31.) Under Federal Rule of Civil Procedure 15(a)(1)(A), a
11 party may amend its pleading once as a matter of course within
12 twenty-one days of service. Here, Defendant’s Amended Answer was
13 filed twenty-one days after filing the first Answer. According to
14 Defendant, it filed the Amended Answer following a meet and confer
15 with Plaintiff about her proposed Motion to Strike, and the
16 amendment “reduced the number of its affirmative defenses to eleven
17 and re-pled the remaining defenses with more specificity.” (Opp’n
18 at 4.)

19 Defendant’s Amended Answer raises eleven affirmative defenses:
20 (1) statutes of limitations; (2) laches; (3) estoppel; (4) waiver;
21 (5) unclean hands; (6) independent or superseding causes; (7)
22 failure to mitigate; (8) Plaintiff caused damage; (9) pre-existing
23 condition; (10) offset; and (11) any additional affirmative
24 defenses raised during discovery. (Am. Answer at 15-20.)

25 Plaintiff has now filed a Motion to Strike Defendant’s first
26 through third and fifth through tenth affirmative defenses.

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1 **II. LEGAL STANDARD**

2 Rule 12(f) of the Federal Rules of Civil Procedure states that
3 the "court may strike from a pleading . . . any redundant,
4 immaterial, impertinent, or scandalous matter." Fed. R. Civ. P.
5 12(f). Immaterial matter is that which has no bearing on the
6 claims for relief or the defenses being pled. Whittlestone, Inc.
7 v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010). Impertinent
8 matter consists of statements that do not pertain, and are not
9 necessary, to the issues in question. Id.

10 "To strike an affirmative defense, the moving party must
11 convince the court that there are no questions of fact, that any
12 questions of law are clear and not in dispute, and that under no
13 set of circumstances could the defense succeed." S.E.C. v. Sands,
14 902 F. Supp. 1149, 1165 (C.D. Cal. 1995) (internal quotation
15 omitted). Generally, motions to strike are "disfavored" and
16 "courts are reluctant to determine disputed or substantial
17 questions of law on a motion to strike." Id. at 1165-66; see also
18 Miller v. Fuhu, Inc., No. 2:14-cv-06119-CAS(ASx), 2014 WL 4748299,
19 at *1, (C.D. Cal. Sept. 22, 2014).

20 Under Rule 12(f), the court has the discretion to strike a
21 pleading or portions thereof. MGA Entm't, Inc. v. Mattel, Inc.,
22 2005 WL 5894689, at *4 (C.D. Cal. 2005). "A motion to strike under
23 Rule 12(f) should be denied unless it can be shown that no evidence
24 in support of the allegation would be admissible, or those issues
25 could have no possible bearing on the issues in the litigation."
26 Gay-Straight Alliance Network v. Visalia Unified Sch. Dist., 262 F.
27 Supp. 2d 1088, 1099 (E.D. Cal. 2001). In considering a motion to
28 strike, the court views the pleadings in the light most favorable

1 to the non-moving party. See In re 2TheMart.com Secs. Litig., 114
2 F. Supp. 2d 955, 965 (C.D. Cal. 2000)).

3 **III. ANALYSIS**

4 **A. Standard for Pleading Affirmative Defenses**

5 Federal Rule of Civil Procedure 8(c)(1) provides a list of
6 some potential affirmative defenses and states that “[i]n
7 responding to a pleading, a party must affirmatively state any
8 avoidance or affirmative defense.” Fed. R. Civ. Pro. 8(c)(1).
9 There is some uncertainty as to whether the pleading standard
10 announced in Twombly and Iqbal apply to pleading defenses. See
11 Gibson Brands, Inc. v. John Hornby Skewes & Co. Ltd., No. CV 14-
12 00609 DDP (SSx), 2014 WL 5419512, at *2, (C.D. Cal. Oct. 23, 2014)
13 (“As a preliminary matter, it is not yet clear in the Ninth Circuit
14 whether the pleading requirements of Ashcroft v. Iqbal and Bell
15 Atlantic Corp. v. Twombly apply to affirmative defenses as well as
16 claims and counterclaims.” (internal citations omitted)); see also
17 Perez v. Gordon & Wong Law Grp., P.C., No. 11-CV-03323-LHK, 2012 WL
18 1029425, at *6-8 (N.D. Cal. Mar. 26, 2012)(discussing the different
19 pleading standards and holding that the same policies for changing
20 the pleading standard for complaints in Twombly and Iqbal apply to
21 pleading affirmative defenses, thus holding the affirmative
22 defenses to that standard).

23 This Court in Gibson did not specify whether Twombly and Iqbal
24 standards do apply, but noted that “[t]he Court simply seeks to
25 avoid the use of ‘boilerplate’ defenses: a ‘series of conclusory
26 statements asserting the existence of an affirmative defense
27 without stating a reason why that affirmative defense might
28 exist.’” Gibson Brands, No. CV 14-00609 DDP (SSx), 2014 WL

1 5419512, at *2 (quoting Barnes v. AT&T Pension Ben. Plan –
2 Nonbargained Program, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010)).
3 The Court adheres to the same approach here, and notes that the
4 result is the same for these affirmative defenses under either
5 notice pleading standards or fact pleading standards.

6 **B. Defendant's Affirmative Defenses**

7 Here, Plaintiff seeks to dismiss nine of Defendant's eleven
8 affirmative defenses for lack of sufficient factual basis and/or
9 for failing to state a colorable affirmative defense.

10 **1. Statute of Limitations**

11 This is a specifically enumerated affirmative defense under
12 FRCP 8(c)(1). Plaintiff claims that Defendant does not plead the
13 statutory code section providing the statute of limitations in each
14 of the causes of action against which Defendant raises this
15 defense; this failure prevents Plaintiff from understanding the
16 basis of Defendant's theory of untimeliness. (Mot. Strike at 5-9.)
17 Plaintiff alleges her own sources and computations of the statute
18 of limitations in her Motion. (Id.) Defendant responds that it
19 does sufficiently provide its theory in the Amended Answer and that
20 Plaintiff simply disagrees on the merits of the theory. (Opp'n at
21 8-10.)

22 The Court finds that Plaintiff's main issue is with how
23 Defendant calculated the different statutes of limitations, which
24 is a merits issue. Defendant alleged that there were four-year,
25 two-year, or one-year statutes of limitations for different causes
26 of action and that they all expired prior to Plaintiff filing the
27 case. (See Am. Answer at 15-16.) However, Defendant did fail to
28 fully set forth the statutes of limitations' legal basis for each

1 of the causes of action the defense is alleged against. Plaintiff
2 is correct that this is insufficient to prepare Plaintiff to
3 respond to such an argument. Defendant should delineate the causes
4 of actions' statutes of limitations and the facts that give rise to
5 Defendant's theory that such statutes of limitations were not met
6 in this case, such as when the limitation period began running,
7 according to Defendant. Therefore, the Court grants the Motion to
8 Strike this affirmative defense, with leave to amend.

9 **2. Laches**

10 This is a specifically enumerated affirmative defense under
11 FRCP 8(c)(1). Plaintiff claims that insufficient facts are pled to
12 show that Plaintiff was neglectful or not diligent, or that
13 Defendant was prejudiced or disadvantaged in some way by
14 Plaintiff's actions. (Mot. Strike at 9-11.) Plaintiff claims that
15 there had only been a year since she knew the nature of her case
16 before she brought the suit, which shows diligence. (Id.)
17 Defendant argues that its theory of delay is clear in the pleading
18 as to all causes of action: Defendant has been prejudiced by
19 Plaintiff's six-year delay and failure to bring Defendant's
20 attention to the interest rate issue until six years later. (Opp'n
21 at 10-11.)

22 The Court holds that laches is properly pled by Defendant.
23 Defendant's pleading the timeline in the statute of limitations
24 defense sufficiently sets forth the timeline that Defendant takes
25 issue to in this affirmative defense. Defendant also pleads
26 prejudice: "As a result of Plaintiff's unreasonable delay,
27 Defendant suffered prejudice or injuries due to the passage of time
28 and diminution of memories, turnover of employees who might be

1 potential witnesses, and to the extent that any relevant records
2 were lost or destroyed." (Am. Answer at 16.) The key elements of
3 this affirmative defense are delay and prejudice, and Defendant has
4 pled those elements at a sufficient level to provide Plaintiff with
5 enough information to formulate her case and respond to the
6 affirmative defense. Therefore, the Motion to Strike is denied as
7 to this cause of action.

8 **3. Estoppel**

9 This is a specifically enumerated affirmative defense under
10 FRCP 8(c)(1). Plaintiff argues that the pleading is not clear as
11 to what kind of estoppel defense Defendant is raising, and that no
12 matter what, there are insufficient facts pled to provide Plaintiff
13 with notice of what she is alleged to have done or failed to do to
14 give rise to such a defense. (Mot. Strike at 11-14.) Defendant
15 responds that it was claiming equitable estoppel and did provide
16 sufficient facts. (Opp'n at 11-12.) The Amended Answer states
17 that Plaintiff's third and fourth causes of action are barred by
18 estoppel caused by Plaintiff "conceal[ing] material facts in that
19 she failed to bring her complaints with respect to her credit card
20 to Defendant's attention despite her awareness of the allegedly
21 true facts." (Am. Answer at 17.)

22 The Court holds that this is an appropriate affirmative
23 defense theory and can be pled by Defendant, but that Defendant
24 must provide more information and facts to support it. The fact
25 that this is an equitable estoppel defense needs to be specifically
26 noted. More and clearer facts must be pled to put forth the theory
27 of this defense. Therefore, the Court grants the Motion to Strike
28 as to this affirmative defense, with leave to amend.

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4. Unclean Hands

Unclean hands is a common law affirmative defense. Gibson Brands, No. CV 14-00609 DDP (SSx), 2014 WL 5419512, at *4. Here, Defendant has alleged that it kept policies regarding "employee dishonesty and misconduct as well as relating to credit issued by Defendant." (Am. Answer at 17.) Defendant claims that Plaintiff engaged in misconduct by not abiding by such policies and "misrepresenting facts relating to her credit card." (Id.) Thus, Defendant argues that Plaintiff may have caused her damages by her own bad acts, those acts being disputed by Plaintiff in her Opposition. (See Opp'n at 14-15.) However, unclean hands is not the same as claiming fraud; it means that as an equitable matter, Plaintiff may – if Defendant is correct – have had a part to play in creating the bad situation and employment termination that she complains of in her case-in-chief. Therefore, the Court denies the Motion to Strike as to this affirmative defense.

5. Independent/Superseding Cause

As pled, Defendant has simply stated that "all or portions of Plaintiff's claims are barred, in whole or in part, by the doctrine of independent or superseding causes" and that this bars or reduces any injures Defendant could be responsible for. (Am. Answer at 18.) This could be an affirmative defense, but as currently pled, it does not provide notice nor factual bases for what or who is the independent or superseding cause so that Plaintiff could amend the pleadings and add that party or address the alleged other cause. See G&G Closed Circuit Events, LLC v. Nguyen, No. 10-CV-00168-LHK, 2010 WL 3749284, at *2 (N.D. Cal. 2010). Therefore, Plaintiff's

1 Motion to Strike is granted as to this affirmative defense, with
2 leave to amend.

3 **6. Failure to Mitigate**

4 Failure to mitigate damages is a common affirmative defense.
5 See, e.g., Gibson Brands, No. CV 14-00609 DDP (SSx), 2014 WL
6 5419512, *2. Here, Defendant's Amended Answer pleads that
7 Plaintiff failed to mitigate by, among other acts, "failing to
8 secure alternative employment; failing to take reasonable steps to
9 avoid pain, anguish, emotional distress, damage to her reputation,
10 or any situation with her mortgage resulting in Plaintiff allegedly
11 needing to borrow funds or the need to redeem or cash out any
12 retirement accounts, and any payments made for benefits or medical
13 care." (Am. Answer at 18.) These factual allegations and theories
14 of mitigation are sufficient to put Plaintiff on notice of the
15 grounds for Defendant's affirmative defense. Therefore, the Motion
16 to Strike is denied as to this affirmative defense.

17 **7. Plaintiff Caused Damage**

18 This particular affirmative defense has been pled before, see,
19 e.g., Hernandez v. Dutch Goose, Inc., No. C 13-03537 LB, 2013 WL
20 5781476, at *7 (N.D. Cal. 2013), and it is similar to a theory of
21 contributory negligence, which is an enumerated affirmative defense
22 in Rule 8. Defendant pleads here that Plaintiff's injuries in this
23 case were caused by her own actions, such as "her filing a false
24 credit bureau credit card dispute, her misleading Defendant as to
25 the nature of that dispute and/or the history of charges, payments,
26 and/or delinquencies, and Plaintiff's failure to exercise ordinary
27 care on her own behalf." (Am. Answer at 19.) This is sufficient
28 for Plaintiff to know the facts and theory that Defendant relies on

1 to support its affirmative defense; thus, the Motion to Strike is
2 denied as to this defense.

3 **8. Pre-Existing Condition**

4 Defendant makes a claim that to the extent Plaintiff seeks
5 damages for physical, mental, or emotional distress, that
6 Plaintiff's damages should be lessened to reflect any physical,
7 mental, or emotional distress that is a result of a pre-existing
8 condition rather than any conduct by Defendant. (Am. Answer at
9 19.) As Defendant puts it, such damages would be "the result of
10 pre-existing psychological disorders or alternative concurrent
11 causes and not the result of any act or omission of Defendant."
12 (Id.) This is sufficient to give Plaintiff notice of Defendant's
13 defense theory as to Plaintiff's claim for damages. It need not be
14 stated at a higher level of specificity, particularly as it is a
15 damages defense. Therefore, the Court denies the Motion to Strike
16 as to this affirmative defense.

17 **9. Offset**

18 Defendant claims that any damages Plaintiff may receive as a
19 result of this suit would be offset by sums owed to Defendant.
20 (Id. at 19-20.) Defendant explains, "[t]o the extent that
21 Plaintiff was paid money by Defendant to which she was not legally
22 entitled, and/or was reimbursed for expenses not actually incurred
23 or over-reimbursed for expenses or other monies, Defendant is
24 entitled to an offset against any monies found owing to Plaintiff."
25 The Court agrees with Plaintiff that Defendant has failed to
26 properly allege an offset claim. The information regarding
27 outstanding monetary claims by Defendant against Plaintiff would be
28 known to Defendant and therefore Defendant should plead more facts

1 to put Plaintiff on notice of what is Defendant's theory of
2 reducing damages here. Therefore, the Motion to Strike this
3 affirmative defense is granted, with leave to amend.

4 **IV. CONCLUSION**

5 For all the reasons stated above, the Court GRANTS in part and
6 DENIES in part Plaintiff's Motion to Strike Affirmative Defenses.
7 Defendant has fourteen days to amend.

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9 IT IS SO ORDERED.

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11 Dated: February 25, 2016



DEAN D. PREGERSON
United States District Judge

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