

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

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

J & J SPORTS PRODUCTIONS, INC.,

Case No. 1:12-cv-001945-LJO-SKO

Plaintiff,

**ORDER GRANTING PLAINTIFF'S
MOTION TO STRIKE**

v.

(Doc. 13)

MARTIN DELGADO, individually and dba
CARNICERIA Y TAQUERIA DON
CHUY,

Defendant.

I. INTRODUCTION

On November 29, 2012, J & J Sports Productions, Inc. ("Plaintiff") filed a complaint against Defendant Martin Delgado, individually and d/b/a Carniceria Y Taqueria Don Chuy ("Defendant"), alleging four counts for violations of 47 U.S.C. §§ 553 and 605, as well as causes for action for conversion and for violation of the California Business and Professions Code 17200. (Doc. 1.) This suit is based on Defendant's alleged unlawful interception, and exhibition of "Good v. Evil": *Miguel Angel Cotto v. Antonino Margarito*, WBA Super World Light Middleweight Championship Fight Program ("Program"), a nationwide telecast that was broadcasted December 3, 2011. (Doc. 13.)

On April 15, 2013, Defendant filed an answer to the complaint asserting twenty-eight affirmative defenses. (Doc. 12.) Plaintiff filed a motion to strike all of Defendant's affirmative

1 defenses arguing that Defendant failed to satisfy the legal standard necessary to sustain any affirmative
2 defense, because each is legally insufficient or does not provide Plaintiff with fair notice of the
3 defense. (Doc. 13.) Defendant did not file an opposition to Plaintiff's motion to strike. The Court
4 reviewed the motion and supporting documentation, and the matter was found suitable for decision
5 without argument pursuant to U.S. District Court for the Eastern District of California's Local Rule
6 230(g); the hearing set for June 19, 2013, was vacated and the matter was taken under submission.
7 (Doc. 15.) For the reasons set forth below, Plaintiff's motion to strike Defendant's affirmative
8 defenses is GRANTED.

9 II. DISCUSSION

10 A. Legal Standard

11 Pursuant to Federal Rule of Civil Procedure 12(f), the court is permitted to "strike from a
12 pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."
13 Fed. R. Civ. P. 12(f). A defense may be insufficient as a matter of pleading or as a matter of
14 substance. *See People, Inc., Classic Woodworking, LLC*, No. C-04-3133 MMC, 2005 WL 645592, at
15 *2 (N.D. Cal. Mar. 4, 2005). An affirmative defense may be considered insufficiently pled where it
16 fails to provide plaintiff with fair notice of the defense asserted. *Wyshak v. City Nat'l Bank*, 607 F.2d
17 824, 827 (9th Cir. 1979). An affirmative defense is insufficient as a matter of law where "there are no
18 questions of fact, that any questions of law are clear and not in dispute, and that under no set of
19 circumstances could the defense succeed." *Ganley v. Cnty. of San Mateo*, No. C06-3923 TEH,
20 2007 WL 902551, at *1 (N.D. Cal. Mar. 22, 2007). A matter is "immaterial" if it "has no essential or
21 important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty*,
22 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994).

23 As motions to strike a defense as insufficient are disfavored, they will not be granted if the
24 insufficiency of the defense is not clearly apparent. *See* 5C Charles Alan Wright & Arthur R. Miller,
25 Federal Practice and Procedure § 1381 (3d ed.) In ruling on a motion to strike, a "court[] may not
26 resolve disputed and substantial factual or legal issues" *Whittlestone, Inc. v. Handi-Craft Co.*,
27 618 F.3d 970, 973 (9th Cir. 2010) (internal quotation marks omitted). Because the purpose of
28 pleading an affirmative defense is simply to give fair notice to the plaintiff of the defense being

1 asserted, leave to amend should be freely granted in absence of prejudice to the opposing party.
2 *Wyshak*, 607 F.2d at 826- 27.

3 **B. Affirmative Defenses Insufficiently Pled**

4 **1. First Affirmative Defense**

5 Defendant's first affirmative defense alleges that the complaint fails to state a claim. (Doc. 12,
6 ¶ 6 ("The Complaint and each of the purported causes of action contained therein fail to allege facts
7 sufficient to constitute a cause of action against these answering Defendants¹.").) "Affirmative
8 defenses plead matters extraneous to the plaintiff's prima facie case, which deny plaintiff's right to
9 recover, even if the allegations of the complaint are true. In contrast, denials of allegations in the
10 complaint or allegations that the Plaintiff cannot prove the elements of his claims are not affirmative
11 defenses." *G&G Closed Circuit Events, LLC v. Nguyen*, No. 10-cv-00168, 2010 WL 3749284, at *5
12 (N.D. Cal. Sept. 23, 2010). For this reason, as a technical matter, asserting that the complaint fails to
13 state a claim is an argument that there is a defect in the plaintiff's prima facie case, which is not an
14 affirmative defense.

15 On the other hand, Rule 12(h)(2) provides that the defense of failure to state a claim may be
16 made in any pleading permitted or ordered under Rule 7(a), which includes the answer. District courts
17 are split over whether an assertion of a failure to state a claim should be stricken as an affirmative
18 defense. *Compare J&J Sports Prods., Inc. v. Vizcarra*, No. 11-1151 SC, 2011 WL 4501318, at *3
19 (N.D. Cal. Sept. 27, 2011) and *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F.
20 Supp. 2d 1167, 1174 (N.D. Cal. 2010) (striking defense, noting that failure to state a claim under Rule
21 12(b)(6) is more properly brought as a motion and not as an affirmative defense) *with Valley*
22 *Community Bank v. Progressive Cas. Ins. Co.*, No. 5:11-cv-00574, 2011 WL 1833116, at *3 (N.D.
23 Cal. May 13, 2011) (denying motion to strike failure-to-state-claim defense as one that may be raised
24 in any pleading under Rule 12(h)(2) and *Robinson v. Adams*, No. 1:08-cv-01380-AWI-GSA, 2009 WL
25 4042894, at *1 (E.D. Cal. Nov. 20, 2009).

26
27
28

¹ Defendant's answer refers to more than one defendant, i.e., "Defendants."

1 Nonetheless, assuming the failure to state a claim defense is legally sufficient, the defense
2 itself is a bare conclusion of law and provides no indication or notice to Plaintiff how the complaint
3 fails to state a claim. As such, the defense is stricken as insufficiently pled. *Wyshack*, 607 F.2d at 827
4 ("The key to determining the sufficiency of pleading an affirmative defense is whether it gives the
5 plaintiff fair notice of the defense."). Defendant may amend the pleading to provide sufficient
6 allegations as to *how* the complaint fails to state a claim. *Kohler v. Staples the Office Superstore, LLC*,
7 __ F.R.D. __, 2013 WL 544058, at * 2 (S.D. Cal. Feb. 12, 2013) ("Fair notice generally requires that
8 the defendant state the nature and grounds for the affirmative defense."). To the extent that Defendant
9 does not elect to amend this defense, as Judge Shubb noted in *J&J Sports Productions, Inc. v.*
10 *Delgado*, No. CIV 2:10-2517 WBS KJN, 2011 WL 219594, at *2 (E.D. Cal. Jan 19, 2011), a
11 defendant may file an appropriate motion to dismiss for failure to state a claim or a motion pursuant to
12 Rule 12(c), and asserting it in the answer is not a necessary prerequisite to bringing such motions.

13 **2. Second, Third, Fifteenth through Seventeenth, and Twenty-First Affirmative**
14 **Defenses**

15 Plaintiff contends that Defendant's second, third, fifteenth through seventeenth, and twenty-
16 first affirmative defenses are applicable to contract causes of action, which were not alleged in the
17 complaint. According to Plaintiff, the complaint specifically asserts that Defendant did not contract
18 with Plaintiff to exhibit the Program. As such, Plaintiff maintains that these affirmative defenses are
19 all immaterial and impertinent and should be stricken.

20 These affirmative defenses are set forth by Defendant as follows:

21 **SECOND AFFIRMATIVE DEFENSE**

22 7. Plaintiff is barred from any recovery whatsoever against these answering
23 Defendants due to the Plaintiff breaching any and all alleged agreements and contracts
24 between the parties including any express and implied warranties, and negligently and
carelessly performing its own obligations.

25 **THIRD AFFIRMATIVE DEFENSE**

26 8. These answering Defendants alleges [sic], without admitting any liability
27 whatsoever, and without admitting that any injuries of any nature were suffered by
28 Plaintiff, that Plaintiff is barred from any recovery herein because of its breach of each
and every term and provision of the agreements and contracts alleged in the Complaint,
and its misrepresentations therein and thereon, and, the failure of consideration thereon.

1 **FIFTEENTH AFFIRMATIVE DEFENSE**

2 20. The Complaint, and each and every cause of action contained therein, [is]
3 barred, in whole or in part, by the Statute of Frauds.

4 **SIXTEENTH AFFIRMATIVE DEFENSE**

5 21. The acts of the Plaintiff and the acts of the other parties herein prevented,
6 precluded and excused these answering Defendants from performing its [sic]
7 obligations, if any were unperformed at all.

8 **SEVENTEENTH AFFIRMATIVE DEFENSE**

9 22. Any duty or obligation to Plaintiff has been excused by the failure of
10 consideration, waiver, breach of condition precedent, breach of contract, default,
11 election of remedies, impossibility of performance, prevention, frustration of purpose
12 and/or acceptance by Plaintiff, its representatives, agents, and/or employees.

13 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

14 26. The contract alleged in Plaintiff's complaint was a fully integrated contract and
15 any separate, collateral, additional or supplemental agreements alleged or claimed by
16 Plaintiff are barred by the Parole Evidence Rule.

17 The complaint does not allege a contract existed between Plaintiff and Defendant; thus these
18 defenses appear immaterial. Moreover, these defenses provide no factual details and fail to provide
19 adequate notice to Plaintiff of the nature of the defenses or how they relate to the allegations in the
20 complaint, particularly as these defenses pertain to contract claims. As such, these defenses are
21 STRICKEN. It is not certain, however, that these defenses could not be amended; due to the
22 conclusory nature of these defenses as pled, the Court cannot confidently conclude they are
23 insufficient as a matter of law. To the extent Defendant can cure the deficiencies by setting forth facts
24 establishing how each defense relates to the claims pled in the complaint, leave to amend is granted.

25 **3. Fourth Affirmative Defense**

26 Defendant's fourth affirmative defense alleges that "prior to the commencement of this action,
27 Defendants duly paid, satisfied, and discharged the alleged claims of Plaintiff set forth in the
28 Complaint herein, or were excused from performing thereon." (Doc. 12, ¶ 9.) Plaintiff contends that,
even assuming this defense has some relevance to the facts alleged in the complaint, Defendant's bare
legal conclusion provides no notice of the nature of the defense. Defendant provides no indication as
to when or how any obligation to Plaintiff was "paid, satisfied, and discharged." (Doc. 13, 6:1-7.)

1 Plaintiff is correct. As with the majority of Defendant's affirmative defenses, there are no facts
2 asserted that provide fair notice of the nature of this defense; rather, it merely states a threadbare legal
3 conclusion. Accordingly, Defendant's fourth affirmative defense is STRICKEN with leave to amend.

4 **4. Fifth, Eighth, Ninth, Tenth, Eleventh, Twentieth, and Twenty-Fifth Affirmative**
5 **Defenses**

6 Defendant's fifth, eighth, ninth, tenth, eleventh, twentieth, and twenty-fifth affirmative
7 defenses are pled as follows:

8 **FIFTH AFFIRMATIVE DEFENSE**

9 10. These answering Defendants alleges [sic], without admitting any liability
10 whatsoever, and without admitting that any damages of any nature were suffered by
11 Plaintiff, that Plaintiff has waived all claims that it seeks to assert in this action, and/or
12 is estopped to assert or recover on the claims.

13 **EIGHTH AFFIRMATIVE DEFENSE**

14 13. These answering Defendants alleges [sic] that any and all events and
15 happenings, injuries and damages, if any, referred to in Plaintiff's Complaint were
16 proximately caused or contributed to by the negligence and fault of Plaintiff in that
17 Plaintiff did not exercise ordinary care in [sic] its own behalf at the time and places
18 referred to in the Complaint. Therefore, Plaintiff is completely barred from recovery
19 herein. In the alternative, under the doctrine of pure comparative negligence and fault,
20 said acts of Plaintiff reduces its right to recovery herein by the amount in which said
21 acts contributed to their [sic] damages, if any.

22 **NINTH AFFIRMATIVE DEFENSE**

23 14. These answering Defendants is [sic] informed and believes and based thereon
24 alleges that any and all events and happenings in connection with the matters alleged in
25 the Complaint, and the resulting injuries and damages, purportedly suffered by the
26 Plaintiff, if any, were proximately caused and contributed to by the independent,
27 intervening, negligent, intentional, willful and unlawful conduct of other defendants,
28 independent third parties and/or their agents, which therefore bars Plaintiff from
recovering the damages sought in the Complaint from these answering Defendants.

TENTH AFFIRMATIVE DEFENSE

15. Plaintiff's complaint and each and every purported cause of action stated
therein, and any damages recoverable thereunder, are reducible by the amount of
damages incurred by these answering Defendants as a result of Plaintiff's wrongful acts,
and/or the wrong-doing of others.

ELEVENTH AFFIRMATIVE DEFENSE

16. Plaintiff is barred from relief by the doctrine of laches, waiver, estoppel, and
unclean hands and each of said doctrines, due to its own acts and/or omissions with

1 reference to the subject matter of the Complaint.

2

3

TWENTIETH AFFIRMATIVE DEFENSE

4

25. Plaintiff's complaint and each purported cause of action contained therein is barred by reason of Plaintiff's consent to the acts and/or conditions alleged in the complaint.

5

6

TWENTY-FIFTH AFFIRMATIVE DEFENSE

7

30. Plaintiff's claims are barred by Plaintiff's license, consent and acquiescence to use of the property.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Plaintiff argues that each of these affirmative defenses is insufficiently pled and fails to provide adequate notice of the nature of the defense asserted. The Court agrees. The Federal Rules of Civil Procedure require that affirmative defenses be stated in simple, concise, and direct terms. Fed. R. Civ. P. 8(d)(1). In some cases, merely pleading the name of an affirmative defense is sufficient. *See, e.g., Am. Motorists Ins. Co. v. Napoli*, 166 F.2d 24, 26 (5th Cir. 1948) (holding that, in negligence action arising from car collision, pleading "contributory negligence" without extensive factual allegations is sufficient). The defense, however, must be articulated to such a degree that the plaintiff is not subject to unfair surprise. *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999) ("defendant nevertheless must plead an affirmative defense with enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced"). The affirmative defenses above are mere legal conclusions and fall short of providing Plaintiff notice of the nature of the defenses asserted. Further, it is not clear how many of these defenses are relevant to the allegations in the complaint. For example, Defendant's eighth affirmative defense alleges that Plaintiff acted with contributory negligence and shares comparative fault. (Doc. 12, ¶ 13.) There are no negligence claims alleged in the complaint; thus, unlike *Napoli*, merely pleading the name of the affirmative defense is not sufficient. Therefore, the fifth, eighth, ninth, tenth, eleventh, twentieth, and twenty-fifth affirmative defenses are STRICKEN. Defendant is permitted leave to amend to the extent the deficiencies can be corrected and to the extent that the defense is relevant to the allegations in the complaint.

26

5. Seventh Affirmative Defense

27

28

Defendant's seventh affirmative defense alleges Plaintiff's claims are "barred, in whole or [in part], by reason of the applicable statute of limitations set forth in Code of Civil Procedure, including

1 but not limited to, Sections 337, 338, 339, 340, and 343." (Doc. 12, ¶ 12.) The statute of limitations
2 governing actions pursuant to 47 U.S.C. § 605 is one year. *DirecTv, Inc. v. Webb*, 545 F.3d 837, 847-
3 48 (9th Cir. 2008). The statute of limitations for claims arising under 47 U.S.C. § 553 is either one,
4 two, or three years. See *J&J Prods. v. Soto*, No. 10-cv-885-LAB (CAB), 2010 WL 3911467, at *1
5 (S.D. Cal. Sept. 28, 2010). Finally, the statute of limitations is three years for a conversion claim (Cal.
6 Code Civ. Pro. § 338(c)), and four years for a claim under Section 17200 (Cal. Bus. Prof. Code
7 § 17208). Plaintiff filed its complaint on November 29, 2012, and the Program aired on December 3,
8 2011. Given the allegations in the complaint, it is unclear how the statutes of limitations bar Plaintiff's
9 causes of action. Specifically, Defendant does not allege any theory or facts giving Plaintiff notice
10 how the claims are outside the applicable limitation periods, despite the allegations in the complaint.
11 *J&J Sports Prods., Inc. v. Mendoza-Govan*, No. C 10-05123 WHA, 2011 WL 1544886, at *4 (N.D.
12 Cal. Apr. 25, 2011). This defense is STRICKEN with leave to amend. Nonetheless, as noted in
13 *Mendoza-Govan*, the Court declines to find that Plaintiff's claims are definitively timely under the
14 applicable statute of limitations. See *SEC v. Sands*, 902 F. Supp. 1149, 1166 (C.D. Cal. 1995) ("Even
15 when the defense under attack presents a purely legal question, the courts are reluctant to determine
16 disputed or substantial questions of law on a motion to strike.").

17 **6. Nineteenth and Twenty-Sixth Affirmative Defenses**

18 Defendant's nineteenth affirmative defense states that Defendant "at all times acted in good
19 faith and observed all reasonable standards in its actions and dealings with Plaintiff." (Doc. 12, ¶ 24.)
20 Defendant's twenty-sixth affirmative defense states that "Plaintiff's claims are barred because any
21 alleged unauthorized publication was not caused by a volitional act attributable to the Defendant."
22 (Doc. 12, ¶ 31.)

23 Plaintiff contends that both of these are good-faith defenses which are inapplicable to the
24 causes of action pled. Specifically, a claim of conversion and violations of 47 U.S.C. §§ 553 and 605
25 are strict liability offenses – there can be no "good faith" defense. *Don King Prods./Kingsvision v.*
26 *Lovato*, No. C-95-2827 (THE), 1996 WL 682006, at *3 (N.D. Cal. Nov. 15, 1996). Accordingly,
27 Plaintiff maintains that these defenses are insufficient as a matter of law.

1 Pursuant to Sections 553 and 605, a "[p]laintiff need not establish 'willfulness' in order to
2 establish liability." *Joe Hand Promotions, Inc. v. McInnis*, 10–CV–01614–LHK, 2011 WL 1740109,
3 at *7 (N.D. Cal. May 5, 2011); *see also J & J Sports Prods., Inc. v. Delgado*, CIV. 2:10–2517 WBS,
4 2012 WL 371630, at *3 (E.D. Cal. Feb. 3, 2012) ("Both § 553 and § 605 are strict liability statutes.").
5 Thus, a defendant's good faith or lack of willfulness is not a defense to liability. Nonetheless, it is a
6 defense to the amount of statutory damages that may be awarded. *See J & J Sports Prods. v. Coyne*,
7 857 F. Supp. 2d 909, 917 n.8 (N.D. Cal. 2012) ("It appears that Double Play acted in good faith when
8 it purchased the Program from Comcast by contacting Comcast and asking how it could go about
9 obtaining the Program. But that good faith does not affect Double Play's liability under § 553.
10 However, the Court may take Double Play's good faith into account when it sets damages.")

11 Here, these defenses are insufficiently pled as they contain no factual allegations regarding
12 how Defendant acted in good faith or performed no volitional act with respect to unlawful exhibition
13 of the Program. To the extent that Defendant amends these defenses to set forth a factual predicate for
14 his purported good faith or lack of a volitional act, the Court does not find the defenses insufficient as
15 a matter of law. Further, amendment of the defenses is not prejudicial to Plaintiff because the defense
16 of good faith may always be asserted during the course of the litigation to limit the extent of statutory
17 damages awarded under Sections 553 or 605, even if good faith itself is not a defense to liability.
18 Defendant's nineteenth and twenty-sixth affirmative defenses are STRICKEN with leave to amend.

19 **7. Twenty-Second through Twenty-Fourth Affirmative Defenses**

20 Defendant's twenty-second defense "pleads the defense of the doctrine of fair use" and
21 Defendant's twenty-third affirmative defense states that "Plaintiff's claims are barred under the Digital
22 Millennium Act 17 U.S.C. § 512." (Doc. 12, ¶¶ 27, 28.) Defendant's twenty-fourth affirmative
23 defense provides that "Plaintiff's claims are barred by implied license." (Doc. 12, ¶ 29.)

24 Plaintiff asserts that all three of these affirmative defenses are copyright defenses, yet there are
25 no copyright claims pled in the complaint. Plaintiff contends that these defenses should be stricken as
26 immaterial and impertinent. Further, even to the extent they are not immaterial, Plaintiff argues that
27 the defenses provide only bare legal conclusions and give no notice as to how the doctrines of fair use,
28 implied use, or a copyright statute relevant to online materials would have any relevance to this case.

1 These affirmative defenses are stated as mere legal conclusions, and it is not evident what
2 relevance the defenses have to this action; as Plaintiff noted, these are generally considered defenses to
3 copyright claims and no copyright claims have been pled in the complaint. As such, the defenses are
4 STRICKEN as insufficiently pled. To the extent that these affirmative defenses have relevance to the
5 facts and claims alleged in the complaint, any amended defense must provide a theory establishing the
6 relevance to Plaintiff's claims.

7 **8. Twenty-Seventh Affirmative Defense**

8 Defendant's twenty-seventh affirmative defense asserts that "Plaintiff's claims are barred
9 because statutory damage[s] sought are unconstitutionally excessive and disproportionate to any actual
10 damages that may have been sustained in violation of the Due Process Clause." (Doc. 12, ¶ 32.)
11 Plaintiff asserts that, other than merely denying an element of Plaintiff's causes of action, i.e.,
12 damages, Defendant provides no support for the assertion that seeking damages statutorily provided
13 for by Congress is unconstitutional. As such, Plaintiff contends Defendant has failed to provide fair
14 notice of the defense. The Court agrees that this defense is insufficient as there is no theory pled
15 establishing how the damages sought are unconstitutional. Moreover, it is not clear that this defense
16 amounts to more than a denial of Plaintiff's asserted right to damages. The twenty-seventh affirmative
17 defense is STRICKEN with leave to amend.

18 **C. Affirmative Defenses Insufficient as a Matter of Law, Redundant, or Immaterial**

19 According to Rule 12(f) of the Federal Rules of Civil Procedure, a "court may strike from a
20 pleading an 'insufficient defense' or any 'redundant,' 'immaterial,' 'impertinent,' or 'scandalous matter.'" *Fed. R. Civ. P. 12(f)*. The Ninth Circuit defines "immaterial matter" as matter that "has no essential or
21 important relationship to the claim for relief or the defenses being pleaded," and "impertinent matter"
22 as "statements that do not pertain, and are not necessary, to the issues in question." *Fantasy, Inc.*,
23 984 F.2d at 1524.

24 **1. Sixth Affirmative Defense**

25 Defendant's sixth affirmative defense contends that "Plaintiff[,] with full knowledge of all
26 pertinent facts and information, failed to mitigate any damages it might have sustained." (Doc. 12,
27 ¶ 11.) Plaintiff asserts that the defense is insufficiently pled, it has no legal significance in this case,
28

1 and it should be stricken as legally insufficient. (Doc. 13, 6:21-7:4.)

2 Here, the complaint alleges no continuing harm. Rather, Plaintiff's claims arise from
3 Defendant's alleged unauthorized showing of the Program, a discrete event. Generally, the duty to
4 mitigate arises when the injured party has an opportunity to prevent continuation or enhancement of
5 the injury. *See generally Valle de Oro Bank v. Gamboa*, 26 Cal. App. 4th 1686, 1691 (1994).
6 Defendant's assertion that Plaintiff failed to mitigate damages has "no essential or important
7 relationship to the claim for relief," and the defense is STRICKEN as immaterial. *Fantasy, Inc.*,
8 984 F.2d at 1527.

9 **2. Twelfth and Thirteenth Affirmative Defenses**

10 Defendant's twelfth affirmative defense states that "[n]o act or conduct of these answering
11 Defendants caused any damage or injury to Plaintiff." (Doc. 12, ¶ 17.) Defendant's thirteenth
12 affirmative defense asserts that "[t]he damages called by Plaintiff, or to which Plaintiff is entitled to
13 recover, if any, are de minimis and trivial in nature." (Doc. 12, ¶ 18.) Plaintiff asserts that these are
14 not affirmative defenses, but denial of elements of Plaintiff's causes of action, i.e., damages; Plaintiff
15 argues these damages should be stricken as redundant.

16 As these are not defenses to liability, but merely deny Plaintiff's right to the damages it seeks,
17 they are not truly affirmative defenses. *Fed. Deposit Ins. Corp. v. Main Hurdman*, 655 F. Supp. 259,
18 262 (E.D. Cal. 1987) ("Affirmative defenses plead matters extraneous to the plaintiff's prima facie
19 case, which deny plaintiff's right to recover, even if the allegations of the complaint are true."); *see*
20 *also Nguyen*, 2010 WL 3749284, at *5 ("In contrast, denials of the allegations in the Complaint or
21 allegations that the Plaintiff cannot prove the elements of his claim are not affirmative defenses.")
22 Thus, the defenses are STRICKEN without leave to amend. As these are not affirmative defenses,
23 however, Defendant is not precluded from raising these defenses during the course of the litigation.

24 **3. Fourteenth Affirmative Defense**

25 Defendant's fourteenth affirmative defense alleges as follows:

26 19. The Complaint and each of the purported causes of action therein fails to state
27 facts sufficient to support an award of attorney's fees against these answering
28 Defendants. These answering Defendants [have] incurred, and will incur in the future,
attorney's fees against these answering Defendants has incurred, and will incur in the

1 future, attorney[']s fees and costs and request an award of attorney[']s fees and costs to
2 be paid by the Plaintiff pursuant to the contract terms and provisions.

3 This defense is legally insufficient for two reasons. First, the denial of sufficient facts pled in
4 the complaint to support an award of attorney's fees is a denial of an element of Plaintiff's damages,
5 and is not actually an affirmative defense. *Kohler v. Bed Bath & Beyond of Cal., LLC*, No. CV 11-
6 4451 RSWL (SPx), 2012 WL 424377, at *2 (C.D. Cal. Feb. 8, 2012) (striking affirmative defense that
7 the plaintiff had no basis for attorney's fees as "a failure of Plaintiff's prima facie case" and not an
8 affirmative defense). Second, Defendant's assertion that he has incurred attorney's fees and will seek
9 an award of attorney's fees in the future is essentially an affirmative request for relief, not a defense.
10 *Doyle v. Ill. Cent. R.R. Co.*, No. CV F 08-0971, 2008 WL 4838556, at *3 (E.D. Cal. Nov. 5, 2008)
11 ("An affirmative defense is a defense, not a claim for affirmative relief."). This defense is legally
12 insufficient, and it is STRICKEN with prejudice and without leave to amend.

13 **4. Eighteenth Affirmative Defense**

14 Defendant's eighteenth affirmative defense states, "[Defendants] may have additional, as yet
15 unstated, affirmative defenses available. (Doc. 12, ¶ 23.) Defendant, however, may not reserve the
16 right to assert affirmative defenses for a future date. *See Solis v. Zenith Capital, LLC*, No. C 08-4854
17 PJH, 2009 WL 1324051, at *7 (N.D. Cal. May 8, 2009) ("An attempt to reserve affirmative defenses
18 for a future date is not a proper affirmative defense in itself.") If Defendant wishes to amend any
19 affirmative defenses during the course of discovery, such an amendment request must comply with
20 Rule 15. As noted in *Solis*, "Defendant cannot avoid the requirements of Rule 15 simply by 'reserving
21 the right to amend or supplement their affirmative defenses.'" *Id.* at *7. Hence, this is an insufficient
22 defense as a matter of law and is STRICKEN without leave to amend.

23 **5. Twenty-Eighth Affirmative Defense**

24 Defendant's twenty-eighth affirmative defense asserts that "[t]he relief sought under Title 47
25 Section 553 (count two) and 605 (count one), constitute inconsistent legal remedies in that the former
26 applies to cable systems, while the latter applies to radio systems." (Doc. 12, ¶ 33.) To the extent that
27 Defendant is asserting that Plaintiff cannot recover under both Count 1 and Count II of the complaint
28 because it is impossible to have one occurrence that is both simultaneously a violation of Section 553

1 (cable) and Section 605 (satellite), Defendant is correct. Plaintiff may not recover under both Section
2 553 and Section 605 for a single violation. *J&J Sports Prods., Inc. v. Manzano*, No. C-08-01872,
3 2008 WL 4542962, at *2 (N.D. Cal. Sept. 29, 2008) ("A signal pirate violates section 553 if he
4 intercepts a cable signal, he violates section 605 if he intercepts a satellite broadcast. But he cannot
5 violate both by a single act of interception."). In the pleadings, however, "[a] party may state as many
6 separate claims or defenses as it has, regardless of consistency." Fed. R. Civ. P. 8(d)(3). Defendant is
7 free to raise this defense during the course of the litigation, but it is not an affirmative defense. The
8 twenty-eighth affirmative defense is STRICKEN without leave to amend.

9 III. CONCLUSION AND ORDER

10 For the reasons set forth above, Plaintiff's Motion to Strike affirmative defenses in Defendant's
11 answers is GRANTED.

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. Plaintiff's Motion to Strike Defendant's Sixth, Twelfth, Thirteenth, Fourteenth,
14 Eighteenth, and Twenty-eighth Affirmative Defenses is GRANTED with prejudice to
15 amendment;
- 16 2. Plaintiff's Motion to Strike all other affirmative defenses is GRANTED without
17 prejudice to amendment;
- 18 3. Any amended affirmative defenses must be filed on or before July 17, 2013; and
- 19 4. If Defendant does not elect to amend the affirmative defenses, the answer filed on April
20 15, 2013 (Doc. 12), shall be deemed the operative answering pleading, but all the
21 affirmative defenses therein are stricken.

22
23
24 IT IS SO ORDERED.

25 Dated: June 28, 2013

26 /s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE