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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
7

8 DENNIS BURTON, on behalf of
9 himself and all others similarly
10 situated,

11 Plaintiff,

12 vs.

13 NATIONSTAR MORTGAGE, LLC.,

14 Defendants.
15 _____/

CASE NO. CV F 13-0307 LJO GSA

**ORDER ON PLAINTIFF'S F.R.Civ.P. 12(f)
MOTION TO STRIKE AFFIRMATIVE
DEFENSES**
(Doc. 24)

16 **PRELIMINARY STATEMENT TO THE PARTIES AND COUNSEL**

17 Judges in the Eastern District of California carry the heaviest caseload in the nation,
18 and this Court is unable to devote inordinate time and resources to individual cases and
19 matters. This Court cannot address all arguments, evidence and matters raised by parties and
20 addresses only the arguments, evidence and matters necessary to reach the decision in this
21 order given the shortage of district judges and staff. The parties and counsel are encouraged to
22 contact United States Senators Diane Feinstein and Barbara Boxer to address this Court's
23 inability to accommodate the parties and this action. The parties are required to consider, and
24 if necessary, to reconsider consent to one of the Court's U.S. Magistrate Judges to conduct all
25 further proceedings in that the Magistrate Judges' availability is far more realistic and
26 accommodating to parties than that of U.S. District Judge Lawrence J. O'Neill who must
27 prioritize criminal and older civil cases. A Magistrate Judge consent form is available on this
28 Court's website.

1 Judge O'Neill must give criminal cases priority over civil cases and trials and must
2 proceed with criminal trials even if a civil action is older or its trial was set earlier. Civil trials
3 set before Judge O'Neill trail until he becomes available and are subject to suspension mid-trial
4 to accommodate criminal matters. Civil trials are no longer reset to a later date if Judge
5 O'Neill is unavailable on the original date set for trial. If a trial trails, it may proceed with little
6 advance notice, and the parties and counsel may be expected to proceed to trial with less than
7 24 hours notice. Moreover, this Court's Fresno Division randomly and without advance notice
8 reassigns civil actions to U.S. District Judges throughout the nation to serve as visiting judges.
9 In the absence of Magistrate Judge consent, this action is subject to reassignment to a U.S.
10 District Judge from outside the Eastern District of California. Case management difficulties,
11 including trial setting and interruption, are avoided if the parties consent to conduct of further
12 proceedings by a U.S. Magistrate Judge.

13 **INTRODUCTION**

14 Plaintiff Dennis Burton seeks to strike as insufficiently pled and barred legally
15 defendant Nationstar Mortgage LLC's ("Nationstar's") 20 affirmative defenses in Nationstar's
16 answer to Mr. Burton's First Amended Class Action Complaint for Damages and Injunctive
17 Relief ("FAC"). Nationstar contends that its affirmative defenses are legally sufficient to
18 render Mr. Burton's motion to strike unwarranted and "an unnecessary expenditure of both the
19 parties and the Court's resources." This Court considered Mr. Burton's F.R.Civ.P. 12(f) motion
20 to strike on the record and VACATES the September 5, 2013 hearing, pursuant to Local Rule
21 230(g). For the reasons discussed below, this Court STRIKES 13 affirmative defenses but
22 GRANTS leave to amend them.

23 **BACKGROUND**

24 Nationstar serviced Mr. Burton's property loan and entered into an agreement with Mr.
25 Burton to modify Mr. Burton's loan under the Home Affordable Modification Program
26 ("HAMP"). Mr. Burton is a current Colorado citizen and formerly resided at the property.
27 Nationstar determined that Mr. Burton's failure to reside on the property rendered the property
28 not owner occupied to invalidate the loan modification. Nationstar foreclosed on the property.

1 The FAC alleges breach of contract and fraud claims that Nationstar wrongfully refused to
2 modify permanently Mr. Burton's and similarly situated borrowers' loans as required under
3 HAMP although Mr. Burton and the other borrowers were qualified and satisfied HAMP
4 requirements for permanent loan modification. The FAC seeks to pursue claims for a proposed
5 class of "all homeowners nationwide who had executed permanent modifications agreements
6 ('PMAs') with Nationstar from January 2008 through the present whose PMAs Nationstar
7 refused to honor by permanently modifying the borrowers' loans."

8 Nationstar's Answer to Burton's First Amended Complaint ("answer") alleges 20
9 affirmative defenses summarized as follows:

10 1. (First) failure to state a cause of action in that the FAC fails to state sufficient
11 facts for a claim;

12 2. (Second) uncertainty in that the FAC fails to describe claims with sufficient
13 certainty;

14 3. (Third) failure to mitigate in that Mr. Burton's damages resulted from his failure
15 to mitigate damages;

16 4. (Fourth) waiver and estoppel in that Mr. Burton's conduct waived his right to
17 seek relief and estopped his recovery;

18 5. (Fifth) laches in that Mr. Burton's claims are barred by the doctrine of laches;

19 6. (Sixth) statute of limitations in that Mr. Burton's claims are barred by
20 limitations periods under California Code of Civil Procedure sections 335.1, 337(1), 338(b),
21 338(d), 339(1) and 343;

22 7. (Seventh) immunity in that Nationstar is immune from Mr. Burton's claims;

23 8. (Eighth) failure to satisfy conditions precedent to bar Mr. Burton's claims;

24 9. (Ninth) unclean hands in that Mr. Burton's claims are barred by the doctrine of
25 unclean hands;

26 10. (Tenth) voluntary payment in that the Mr. Burton voluntarily paid monies he
27 owed to Nationstar;

28 11. (Eleventh) failure to state a punitive damages claim in that the FAC lacks

1 sufficient facts to support punitive damages;

2 12. (Twelfth) procedural due process in that seeking punitive damages violates
3 Nationstar's rights to procedural due process under the Fourteenth Amendment;

4 13. (Thirteenth) consent/ratification in that Mr. Burton consented to Nationstar's
5 conduct and ratified it;

6 14. (Fourteenth) reasonably available alternatives in that Mr. Burton failed to
7 exercise alternatives to avoid alleged damages;

8 15. (Fifteen) accord and satisfaction/novation in that by agreements putative class
9 members waived rights to pursue claims to constitute modification of home loan agreements or
10 novation or an accord and satisfaction of the agreements;

11 16. (Sixteenth) privilege in that Nationwide's good faith assertion of its economic
12 interests is privileged;

13 17. (Seventeenth) comparative fault in that Mr. Burton's recovery is barred or
14 reduced in proportion to his comparative fault;

15 18. (Eighteenth) discharge of obligations in that Nationstar discharged its duties;

16 19. (Nineteenth) compliance with governing law in that Nationstar's compliance
17 with statutes, rules and regulations governing HAMP preclude Nationstar's liability; and

18 20. (Twentieth) no tender that Mr. Burton lacks standing to challenge the property's
19 trustee's sale in the absence of his tender or offer to tender his debt.

20 **DISCUSSION**

21 **F.R.Civ.P. 12(f) Motion To Strike Standards**

22 Mr. Burton seeks to strike all of the answer's affirmative defenses as insufficiently pled
23 and legally barred.

24 F.R.Civ.P. 8(c)(1) addresses affirmative defenses and requires a party responding to a
25 pleading to "affirmatively state any avoidance or affirmative defense." F.R.Civ.P. 12(f)
26 empowers a district court to "strike from a pleading an insufficient defense." "The function of
27 a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from
28 litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v.*

1 *Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993) (quotation marks, citation, and first alteration
2 omitted), *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023,
3 127 L.Ed.2d 455 (1994). A motion to strike is properly granted if it will make trial less
4 complicated or else eliminate delay, serious risks of prejudice to the moving party, or
5 confusion of the issues. *Fantasy, Inc.*, 984 F.2d at 1527.

6 F.R.Civ.P. 8(b)(1)(A) requires a party responding to a pleading to "state in short and
7 plain terms its defenses to each claim asserted against it." An affirmative defense may be
8 stricken as insufficient either as a matter of law or as a matter of pleading. *Kohler v. Islands*
9 *Restaurants, LP*, 280 F.R.D. 560, 564 (S.D. Cal. 2012). Legal insufficiency means that the
10 affirmative defense lacks merit "under any set of facts the defendant might allege." *McArdle v.*
11 *AT & T Mobility LLC*, 657 F.Supp.2d 1140, 1150 (N.D.Cal.2009), *rev'd on other grounds by*
12 *474 Fed. Appx. 515* (2012). Pleading insufficiency means a failure to provide the plaintiff with
13 fair notice. *Kohler*, 280 F.R.D. at 565. "Fair notice generally requires that the defendant state
14 the nature and grounds for the affirmative defense." *Kohler*, 280 F.R.D. at 564. In all
15 averments of fraud, including affirmative defenses, the circumstances constituting the fraud
16 must be stated with particularity. *Multimedia Patent Trust v. Microsoft Corp.*, 525 F.Supp.2d
17 1200, 1210-1211 (S.D. Cal. 2007).

18 The defendant bears the burden of proof on an affirmative defense, in the same way
19 that the plaintiff bears the burden of proof on a claim for relief. *See Kanne v. Conn. Gen. Life*
20 *Ins. Co.*, 867 F.2d 489, 492 n. 4 (9th Cir.1988), *cert denied*, 492 U.S. 906, 109 S.Ct. 3216
21 (1989). "If the court determines that an affirmative defense is insufficiently pled, it may strike
22 the defense and require the defendant to file an amended pleading that includes more specific
23 allegations. Leave to amend will be freely granted so long as no prejudice results to the moving
24 party." *Dodson v. Munirs Co.*, 2013 WL 3146818, at 8 (E.D. Cal. 2013).

25 With these standards in mind, this Court turns to Mr. Burton's challenges to the
26 affirmative defenses.

27 **Insufficient Pleading**

28 Mr. Burton faults all of the answer's affirmative defenses as insufficiently pled under

1 F.R.Civ.P. 8.

2 “Affirmative defenses are pleadings and, therefore, are subject to all pleading
3 requirements of the Federal Rules of Civil Procedure. Thus, defenses must set forth a ‘short
4 and plain statement,’ Fed.R.Civ.P. 8(a), of the defense.” *Heller Financial, Inc. v. Midwhey
5 Power Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir.1989). “The key to determining the sufficiency
6 of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.”
7 *Wyshak v. City National Bank*, 607 F.2d 824, 827 (9th Cir.1979). The "Ninth Circuit has
8 continued to recognize the 'fair notice standard' set forth in *Wyshak*, 607 F.2d at 827, in
9 determining the sufficiency of an affirmative defense." *Pickern v. Chico Steakhouse, LP*, 2013
10 WL 4051640, at *2 (E.D. Cal. 2013) (citing *Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011,
11 1023 (9th Cir.2010)). A fellow judge of this Court has explained:

12 . . . as the court recognized in *Kohler*, 280 F.R.D. at 566, the Supreme Court's
13 analysis in *Twombly*, 550 U.S. at 555, and *Iqbal*, 556 U.S. at 679, was limited to
14 pleadings under Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires that the
15 party stating a claim for relief provide “a short and plain statement of the claim
16 showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). In contrast, Rule
17 8(c), which governs affirmative defenses, requires only that the responding party
18 “affirmatively state” its affirmative defenses. Fed. R. Civ. P. 8(c). In making this
19 distinction, the *Kohler* court stated that “[f]actual plausibility—which is the key
20 difference between *Twombly/Iqbal* pleading and ‘fair notice’ pleading—is particularly
21 suited to claim pleading because Rule 8(a)(2) requires that the party ‘show[]’ that it is
22 entitled to relief.” *Kohler*, 280 F.R.D. at 566 (quoting *Iqbal*, 556 U.S. at 679). Thus,
23 “[a]pplying the same standard of pleading to claims and affirmative defenses, despite
24 this clear distinction in the rules' language, would run counter to the Supreme Court's
25 warning in *Twombly* that legislative action, not ‘judicial interpretation,’ is necessary to
26 ‘broaden the scope’ of specific federal pleading standards.” *Id.* (citing 550 U.S. at 569
27 n. 14).

28 *Pickern, LP*, 2013 WL 4051640, at *3

29 An affirmative defense which “simply states a legal conclusion or theory without the
30 support of facts explaining how it connects to the instant case” is insufficient to provide fair
31 notice. *Desert European Motorcars, Ltd. v. Desert European Motorcars, Inc.*, 2011 WL
32 3809933, at *2 (C.D. Cal. 2011). “[B]are bones conclusory allegations” fail to satisfy
33 requirements to plead affirmative defenses. *Heller Financial, Inc. v. Midwhey Powder Co.*,

1 *Inc.*, 883 F.2d 1286, 1295 (7th Cir. 1989). The "burden is on the defendant to proffer sufficient
2 facts and law to support an affirmative defense, and not on the plaintiff to gamble on
3 interpreting an insufficient defense in the manner defendant intended." *CTF Development, Inc.*
4 *v. Penta Hospitality, LLC*, 2009 WL 3517617, at *8 (N.D. Cal. 2009).

5 Mr. Burton characterizes the answer's affirmative defenses as "bare bones" and
6 "formula-like" recitations of legal doctrines without facts to render them insufficient. Mr.
7 Burton particularly faults the (fifteenth) accord and satisfaction/novation defense which
8 although based on waiver, estoppel, modification, novation and accord and satisfaction but
9 fails to plead supporting facts and to provide examples of purported agreements to base the
10 defense.

11 Nationstar urges this Court to apply the "fair notice" standard to its affirmative defenses
12 and argues that its affirmative defenses satisfy such standard. As to the (fifteenth) accord and
13 satisfaction/novation defense, Nationstar contends that it permissibly raises alternative theories
14 to address potential differing agreements between Nationstar and potential class members.

15 This Court agrees with Mr. Burton that the following affirmative defenses are bare
16 bones conclusions lacking facts to connect them to the FAC's claims: (third) failure to
17 mitigate, (fourth) waiver and estoppel, (fifth) laches, (sixth) statute of limitations, (seventh)
18 immunity, (eighth) failure to satisfy conditions, (ninth) unclean hands, (twelfth) procedural due
19 process, (thirteenth) consent/ratification, (fourteen) reasonably available alternatives,
20 (fifteenth) accord and satisfaction/novation, (sixteenth) privilege, and (nineteenth) compliance
21 with government law. These affirmative defenses are merely legal conclusions or theories
22 lacking reference or facts to explain their application to the FAC's claims. As such, they are
23 subject to striking with leave to amend.

24 **Improper Affirmative Defenses**

25 Mr. Burton characterizes as improper the following affirmative defenses: (first) failure
26 to state a claim, (second) uncertainty, (eighth) failure to satisfy conditions precedent, (ninth)
27 unclean hands, (eleventh) failure to state punitive damages, (eighteenth) discharge of
28 obligations, and (nineteenth) compliance with governing law (collectively the "denial

1 defenses"). Mr. Burton reasons that the denial defenses are improper because they attack
2 elements of the FAC's claims and the sufficiency of the FAC's pleading.

3 "The affirmative defense is a descendant of the old plea of 'confession and avoidance,'
4 whereby a defendant admits the plaintiff's prima facie case, and then alleges additional material
5 that defeats the plaintiff's cause of action." *Bd. of Trs. of Leland Stanford Junior Univ. v.*
6 *Roche Molecular Sys., Inc.*, 487 F.Supp.2d 1099, 1112 (N.D. Cal. 2007). Affirmative defenses
7 have thus been defined as "matters extraneous to the plaintiff's prima facie case, which deny
8 plaintiff's right to recover, even if the allegations of the complaint are true." *FDIC v. Main*
9 *Hurdman*, 655 F.Supp. 259, 262 (E.D.Cal.1987).

10 Mr. Burton argues that an affirmative defense which "challenges plaintiff's prima facie
11 case" is improperly raised as an affirmative defense to warrant its striking. *See J & J Sports*
12 *Productions, Inc. v. Gidha*, 2012 WL 537494, at * 2 (E.D. Cal. 2012). Mr. Burton argues that
13 the denial defenses fail to accept the FAC's allegations as true and set forth new matter to
14 justify Nationstar's conduct. Mr. Burton attacks the denial defenses as challenging elements of
15 the FAC's claims "without requiring Nationstar to carry the burden of proof, as required for
16 affirmative defenses."

17 Nationstar responds that a "negative" or denial defense labeled as affirmative is not
18 subject to striking "if no prejudice would result from leaving it in the answer." "Denials that
19 are improperly pled as defenses should not be stricken on that basis alone." *Weddle v. Bayer*
20 *AG Corp.*, 2012 WL 1019824, at *4 (S.D. Cal. 2012). Nationstar points to *Kohler*, 280 F.R.D.
21 at 567, where a fellow district judge observed:

22 Negative defenses may also be raised in [defendant's] answer. *See* Fed.R.Civ.P. 8(b). In
23 fact, Rule 12(b) permits [defendants'] to assert these exact defenses by motion or in the
24 responsive pleading. The Court fails to see how identifying a defense as "affirmative,"
when in actuality it is not, makes that defense legally insufficient.

25 Nationstar concludes that in the absence of prejudice to Mr. Burton, striking the denial
26 defenses will "serve no purpose other than to encourage the filing of other unnecessary motions
27 like this one that compel the expenditure of time and resources litigating irrelevant issues."

28 This Court above addressed the (eighth) failure to satisfy conditions precedent, (ninth)

1 unclean hands, and (nineteenth) compliance with governing law defenses and need not address
2 them again. As to the other denial defenses, Mr. Burton demonstrates no prejudice. Mr.
3 Burton is charged with establishing the FAC's claims. The denial defenses raise grounds
4 which Nationwide may pursue to challenge elements of the FAC's claims. Characterizing the
5 denial defenses as other than affirmative does not support their striking.

6 **Legally Insufficient Defenses**

7 Mr. Burton challenges the (sixth) limitations and (twentieth) no tender defenses as
8 "legally inadequate" in the absence of any set of facts to support them.

9 An "affirmative defense is legally insufficient only if it clearly lacks merit 'under any
10 set of facts the defendant might allege.'" *Kohler*, 280 F.R.D. at 564 (quoting *McArdle*, 657
11 F.Supp.2d at 1149–50). A defense is legally insufficient if in the absence of factual and legal
12 issues, the defense is unable to succeed under any set of circumstances. *See Ganley v. County*
13 *of San Mateo*, 2007 WL 902551, at 1, (N.D. Cal. 2007).

14 ***Limitations Defense***

15 Mr. Burton argues that the answer cites no applicable limitations defense in that the
16 cited limitations periods refer to an "action for assault, battery, or injury to, or for the death of,
17 an individual caused by the wrongful act or neglect of another" (Cal. Civ. Code, § 335.1),
18 "damages from any person performing or furnishing the design, specifications, surveying,
19 planning, supervision or observation of construction or construction of an improvement to real
20 property" (Cal. Civ. Code, § 337(1)), and an "action for trespass upon or injury to real
21 property" (Cal. Civ. Code, § 338(b)). Mr. Burton notes that California Civil Procedure section
22 339(1) does not apply because the FAC's claims rest on a fully executed permanent
23 modification agreement, not an oral contract. Mr. Burton continues that California Code of
24 Civil Procedure section 338(d)'s limitations period for fraud or mistake does not apply because
25 the FAC relies on Nationstar's termination letter dated March 7, 2010, which is less than three
26 years prior to the March 4, 2013 filing of this action. Mr. Burton concludes that since this
27 action satisfies a three-year limitations period, it likewise meets the four-year limitations period
28 of California Code of Civil Procedure section 343 for relief not otherwise provided.

Nationstar responds that Mr. Burton seeks resolution of limitations defenses factually

1 and legally, which is unavailable at this pleading stage, especially since the FAC alleges class
2 claims. Nationstar notes that it asserts the four-year limitations period for written agreements
3 under California Civil Code section 337(1), not the four-year limitations period under
4 California Code of Civil Procedure section 337.1, which Mr. Burton confuses. Nationstar
5 points out that the FAC's promissory estoppel claim entitles it to assert the two-year limitations
6 period of California Code of Civil Procedure section 339 for oral contracts. Nationstar further
7 notes that it asserts the two-year limitations period under California Code of Civil Procedure
8 section 335.1 given the FAC's allegations of Mr. Burton's emotional distress damages.

9 As discussed above, without supporting facts, the (sixth) statute of limitations defense
10 is a bare bones legal conclusion. However, contrary to Mr. Burton's contentions, the
11 limitations defense points to applicable limitations periods based on the FAC's claims.
12 Moreover, Mr. Burton, by seeking to strike the limitations defense, seeks resolution of legal
13 and factual issues not available at this pleading stage. Although the limitations defense is
14 insufficient as a matter of pleading, it is not insufficient as a matter of law and is subject to
15 amendment to clear up application of particular limitations periods to the FAC's claims.

16 ***Failure To Tender Indebtedness***

17 Mr. Burton argues that failure to tender indebtedness does not apply in that the FAC's
18 claims are based on the lack of authority to foreclose on the property given that Nationstar was
19 contractually obligated to provide Mr. Burton a permanent loan modification.

20 The tender requirement applies "when there is an alleged irregularity in the notice or
21 procedure of the sale." *Menan v. U.S. Bank Nat'l Assn.*, 2013 WL 595349, at * 7 (E.D. Cal.
22 2013). The tender requirement does not apply when "the foreclosure sale itself was wrongful
23 and should not have occurred at all because defendants were contractually obligated not to
24 conduct the sale." *Menan*, 2013 WL 595349, at * 7. "The law does not require plaintiff to
25 tender the purchase price to a trustee who has no right to sell the property at all." *Menan*, 2013
26 WL 595349, at * 7.

27 Mr. Burton challenges his need to tender because the FAC does not challenge
28 irregularities in the foreclosure proceedings. Mr. Burton contends that in absence of a right to

1 foreclose, he was not required to tender his indebtedness.

2 Nationstar correctly notes that determination whether Mr. Burton has invoked a tender
3 exception is premature. If Nationstar correctly acted, the foreclosure is not void and subject to
4 the tender requirement. The propriety of tender is subject to factual and legal evaluation not
5 available at this pleading stage. Mr. Burton fails to demonstrate that the tender defense lacks
6 merit under any set of facts.

7 **CONCLUSION AND ORDER**

8 For the reasons discussed above, this Court:

9 1. STRIKES as insufficiently pled the (third) failure to mitigate, (fourth) waiver
10 and estoppel, (fifth) laches, (sixth) statute of limitations, (seventh) immunity, (eighth) failure to
11 satisfy conditions precedent, (ninth) unclean hands, (twelfth) procedural due process,
12 (thirteenth) consent/ratification, (fourteenth) reasonably available alternatives, (fifteenth)
13 accord and satisfaction/novation, (sixteenth) privilege, and (nineteenth) compliance with
14 government law defenses but GRANTS Nationstar leave to amend these affirmative defenses
15 to the extent they are supported by fact and law;

16 2. DENIES striking the answer's other affirmative defenses; and

17 3. ORDERS Nationstar, no later than September 20, 2013, to file and serve either:
18 (a) an amended answer; or (b) a statement that it elects to proceed on its answer without
19 amendment and without the stricken affirmative defenses. If Nationstar elects to file an
20 amended answer, Nationstar is admonished to pursue only affirmative defenses based on
21 sufficient supporting facts and law and that this Court will grant Nationstar no further attempt
22 to plead affirmative defenses without a showing of absolute good cause.

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26 IT IS SO ORDERED.

27 Dated: September 3, 2013

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

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