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

4 **ANGELA D. MAYFIELD,**

5 **Plaintiff,**

6 **v.**

7 **COUNTY OF MERCED, CINDY MORSE,**
8 **individually, and in her Official Capacity as**
9 **Primary Indigent Defense Contractor**
10 **THOMAS PFEIFF, individually and his Official**
11 **Capacity as Primary Indigent Defense**
12 **Contractor, LAW OFFICE OF MORSE AND**
13 **PFEIFF, a PARTNERSHIP, dba MERCED**
14 **DEFENSE ASSOCIATES,**

15 **Defendants.**

1:13-CV-1619-LJO-BAM

ORDER ON MOTION TO STRIKE
PORTIONS OF ANSWER (Doc. 76)

16 **I. INTRODUCTION**

17 Angela Mayfield (“Plaintiff”) alleges that the County of Merced, Cindy Morse, Thomas Pfeiff,
18 and the Law Office of Morse and Pfeiff, doing business as Merced Defense Associates, (collectively,
19 “Defendants”) engaged in a longstanding pattern and practice of discrimination against Plaintiff and
20 another female attorney due to their race and sex while they were working as contract criminal defense
21 attorneys. First Amended Complaint (“FAC”), Doc. 67 ¶¶ 8, 10. Defendants filed an answer consisting
22 of nineteen affirmative defenses. Doc. 71. Plaintiff now moves to strike eleven of the defenses pled.
23 Doc. 76.

24 **II. FACTUAL AND PROCEDURAL HISTORY**

25 Plaintiff is an African-American woman licensed to practice law in the State of California. FAC
26 ¶ 5. Defendants Morse and Pfeiff jointly own and operate a law firm, Merced Defense Associates. *Id* at

1 ¶¶ 7-8. In March 2003, Merced County contracted with Defendants’ firm to provide indigent defense
2 services, similar to those customarily provided by a public defender’s office. *Id.* In the spring of 2005,
3 Defendants hired Plaintiff as a contract attorney. *Id.* at ¶ 10. After working for Defendants for
4 approximately five years, Plaintiff learned that she received a significantly lower salary and a heavier
5 case load than her Caucasian male co-workers. *Id.* at ¶ 22. Plaintiff also alleges she was terminated
6 “without cause” on September 10, 2012, only a few days after she notified a judge in Defendant PfiEFF’s
7 presence that her case load was too heavy. *Id.* at ¶¶ 33-34. Upon her termination, Plaintiff decided to
8 speak with Merced County executive officer Angelo Lamas from whom she learned that Merced County
9 provided enough funding to pay Plaintiff more and to provide Merced Defense Associates with
10 additional attorneys. *Id.* at ¶¶ 35-36.

11 Plaintiff filed a charge of discrimination under the Fair Employment and Housing Act (“FEHA”) and received a right-to-sue letter on April 30, 2013. *Id.* at ¶ 3. Plaintiff filed a complaint with the United
12 States Equal Employment Opportunity Commission (“EEOC”) and received a right-to-sue letter on
13 September 4, 2013. *Id.* Defendant alleged she was discriminated against due to her race and sex, as she
14 received a heavier case load and a lower wage than her Caucasian male colleagues. *Id.* at ¶ 42.
15 Plaintiff filed her initial complaint in which she asserted fifteen causes of action against Defendants on
16 October 8, 2013. Doc. 1. On July 10, 2014, the Court adopted the recommendations of Magistrate Judge
17 Barbara A. McAuliffe and dismissed with prejudice the five claims that arose under the California
18 Government Tort Claims Act and common law tort theories. Doc. 50. Plaintiff filed the FAC on October
19 24, 2014, alleging Defendants violated her rights under Title VII of the Civil Rights Act of 1964 (“Title
20 VII”) 42 U.S.C. § 2000e-2, FEH Cal. Gov’t Code § 12940, Fair Labor Standards Act (“FLSA”) 29
21 U.S.C. § 201 , 29 U.S.C. § 206, California Labor Code § 1197.5, 42 U.S.C. § 1981, California Labor
22 Code § 2802.
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1 Defendants moved to dismiss the entire FAC. Docs. 54 and 55. On November 10, 2014, the
2 Court dismissed all claims against the County of Merced with leave to amend and granted in part but
3 denied in part the motion to dismiss as to Defendants Morse, Pfeiff, and Merced Defense Associates.

4 On November 24, 2014, Defendants filed their answer to the FAC in which they assert the
5 following affirmative defenses: (1) failure to state a cause of action; (2) statute of limitations; (3) failure
6 to exhaust administrative remedies; (4) good faith conduct; (5) consent; (6) reasonable conduct; (7) res
7 judicata and collateral estoppel; (8) failure to mitigate damages; (9) comparative negligence; (10)
8 assumption of risk; (11) several liability for non-economic damages; (12) negligence of third persons;
9 (13) after-acquired evidence; (14) exclusive remedy of worker's compensation; (15) workers'
10 compensation set-off; (16) justification and privilege; (17) unclean hands; (18) estoppel, waiver and
11 laches; (19) reservation of defenses and immunities. Doc. 71 at ¶¶ 1-19. Plaintiff then filed a motion to
12 strike, asserting that Defendants' affirmative defenses are insufficiently pled or legally insufficient. Doc.
13 76. Defendants replied and Plaintiff responded. Docs. 84 and 86. The matter was taken under
14 submission on the papers pursuant to Local Rule 230(g). Doc. 85.

15 **III. DISCUSSION**

16 **A. Legal Standard**

17 Affirmative defenses plead matters extraneous to the plaintiff's prima facie case and operate to
18 deny plaintiff's right to recover, even if plaintiff's allegations are true. *Fed. Deposit Ins. Corp. v. Main*
19 *Hurdman*, 655 F. Supp. 259, 262 (E.D. Cal. 1987). Affirmative defenses are governed by Fed. R. Civ. P.
20 8(c), which provides, in pertinent part, that "a party must affirmatively state any avoidance or
21 affirmative defense." Fed. R. Civ. P. 8(c). The Ninth Circuit has held that "[t]he key to determining the
22 sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense."
23 *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (1979) (citing *Conley v. Gibson*, 355 U.S. 41, 47-48,
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1 (1957)). Fair notice generally requires that the defendant identify the nature and grounds for the
2 affirmative defense, rather than plead a detailed statement of the facts upon which the defense is based.
3 *Dodson v. Strategic Restaurants Acquisition Co. II, LLC*, 289 F.R.D. 595, 599 (E.D. Cal. 2013) (citation
4 omitted). While a plaintiff does not need to provide detailed factual allegations, *Bell Atlantic v.*
5 *Twombly*, 550 U.S. 544, 555 (2007), requires plaintiffs to establish grounds for entitlement to relief
6 beyond mere recitation of elements of a cause of action. *Wine Group LLC v. L. & R. Wine Co.*, No. 10-
7 CV-02204 MCE-KJN, 2011 WL 130236 at *2 (E.D. Cal. Jan. 14, 2011). In *Ashcroft v. Iqbal*, the Court
8 expanded on this idea, stating:

9 The pleading standard Rule 8 announces does not require detailed factual allegations, but
10 it demands more than an unadorned...accusation. A pleading that offers labels and
11 conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor
12 does a complaint suffice if it tenders naked assertions devoid of further factual
13 enhancement.

14 556 U.S. 662, 678 (2008) (citations and quotation marks omitted).

15 The Eastern District of California has affirmed that the *Iqbal's* “heightened” pleading standard
16 applies to affirmative defenses. *Wine Group LLC*, 2011 WL 130236 at *2. Courts in this district have
17 held that “to the extent that the heightened pleading standard announced by these cases is based on the
18 wording of Rule 8, a sufficient textual basis lies in Rule 8(b)(1) for extending their holdings to the
19 pleading of affirmative defenses.” *Dodson*, 289 F.R.D at 601. Applying this heightened standard will
20 “serve to weed out the boilerplate listing of affirmative defenses which is commonplace in most
21 defendants’ pleading where many of the defenses alleged are irrelevant to the claims asserted.” *Barnes*
22 *v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010).

23 **1. Legal Insufficiency**

24 Legal sufficiency of an affirmative defense is determined in light of the related claims. Thus, an
25 affirmative defense is legally insufficient only if it lacks merit under any set of facts a defendant might
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1 allege. *McArdle v. AT&T Mobility, LLC*, 657 F. Supp. 2d 1140, 1149 (N.D. Cal. 2009), *rev'd on other*
2 *grounds*, 474 Fed. Appx. 515 (9th Cir. 2012). When determining the legal sufficiency of an affirmative
3 defense on a motion to strike, the court “may not resolve disputed and substantial factual or legal issues
4 in deciding” a motion to strike. *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F. 3d 970, 973 (9th Cir.
5 2010).

6 **2. Pleading Insufficiency**

7 An affirmative defense is insufficiently pled if it fails to give the plaintiff fair notice of the nature
8 of the defense. *Barnes*, 718 F. Supp 2d at 1170. “Because the defendant bears the burden of proof on
9 affirmative defenses, the defendant must plead “at least some valid factual basis” in support of its
10 affirmative defense. *Perez v. Gordon & Wong Law Grp.*, P.C. No. 11-CV-03323-LHK, 2012 WL
11 1029425 at * 7 (N.D. Cal. Mar. 26, 2012).

12 Rule 12(f) of the Federal Rules of Civil Procedure states that a district court “may strike from a
13 pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”
14 “Whether to grant a motion to strike lies within the sound discretion of the district court.” *Neilson v.*
15 *Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003). The grounds for a motion to
16 strike must appear on the face of the pleading under attack. When ruling on a motion to strike, the Court
17 must view the pleading under attack in the light most favorable to the pleader. *Amini Innovation Corp. v.*
18 *McFerran Home Furnishings, Inc.*, No. CV-13-6496-RSWL, 2014 WL 360048 at *2 (C.D. Cal. Jan. 31,
19 2014).

20 An affirmative defense may be stricken as insufficient either as a matter of law or as a matter of
21 pleading. *Kohler v. Islands Restaurants, LP*, 280 F.R.D. 560, 564 (S.D. Cal. 2012).

22 **B. Analysis**

23 Plaintiff seeks to strike eleven of the affirmative offenses that Defendants assert in its answer and
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1 request this Court strike each such defense as insufficient as pled or as a matter of law.

2 **1. Fifth Affirmative Defense: Consent**

3 In its fifth affirmative defense, Defendants assert that Plaintiff “agreed, consented, and
4 welcomed defendants’ conduct.” Doc. 71 at 11. Defendant has cited no legal authority for its position
5 that consent is an affirmative defense to Plaintiff's claims for discrimination and retaliation. To the
6 contrary, there is authority that suggests consent is not an affirmative defense against discrimination. *See*
7 *Richmond v. Mission Bank*, No. 1:14-CV-00184-AWI, 2014 WL 2002312, at *5 (E.D. Cal. May 15,
8 2014). Additionally, Defendant has done no more than state boilerplate language of the affirmative
9 defense. Therefore, the fifth affirmative defense is **STRICKEN** without leave to amend because the
10 affirmative defense is inapplicable as a matter of law.

11 **2. Seventh Affirmative Defense: Res Judicata and Collateral Estoppel**

12 In its seventh affirmative defense, Defendants assert that Plaintiff’s action is barred by “the
13 doctrine of res judicata and/or collateral estoppel.” Doc. 71 at 11. Defendants failed to provide Plaintiff
14 with fair notice of either the defense of res judicata or collateral estoppel. Defendants have not plead “at
15 least some valid factual basis” for either defense, because they have not provided the details of any prior
16 action or suit which would give rise to these affirmative defenses. *Perez*, P.C. No. 2012 WL 1029425 at
17 * 7. Indeed, Defendants did nothing more than state formulaic elements of the defense. Therefore, the
18 seventh affirmative defense is **STRICKEN**.

19 **3. Ninth Affirmative Defense: Comparative Negligence**

20 In its ninth affirmative defense, Defendants allege that any harm that Plaintiff sustained was “the
21 direct and proximate result of Plaintiff’s own fault, carelessness, and negligence.” Doc. 71 at 11.
22 Plaintiff did not bring a claim of negligence against Defendants. Defendants failed to cite any legal
23 authority for its position that comparative negligence is an affirmative defense to Plaintiff's claims for
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1 discrimination and retaliation. The Court is only aware of cases that do not allow comparative
2 negligence to be asserted as an affirmative defense when negligence is not alleged in the complaint.
3 *Ingram v. Pac. Gas & Elec. Co.*, No. 12-CV-02777-JST, 2014 WL 295829, at *3 (N.D. Cal. Jan. 27,
4 2014). Therefore, the ninth affirmative defense is **STRICKEN** without leave to amend because the
5 affirmative defense is inapplicable as a matter of law.

6 **4. Tenth Affirmative Defense: Assumption of Risk**

7 In the tenth affirmative defense, Defendants allege that Plaintiff “had reasonable knowledge and
8 belief of the defect or condition alleged in the Complaint and voluntarily assumed the risk that plaintiff
9 might be injured and damaged by risk of such defect or condition.” Doc. 71 at 12. The Court is not
10 aware of any authority that stands for the proposition that assumption of risk applies in the employment
11 discrimination context. Furthermore, Defendants have failed to present any facts showing that Plaintiff
12 either expressly or impliedly absolved Defendants of any duty owed to Plaintiff. *Lane v. Micro-Focus*
13 *(US), Inc.*, No. C09-1363 MJP, 2010 WL 5018146, at *3 (W.D. Wash. Dec. 3, 2010). Therefore, the
14 tenth affirmative defense is **STRICKEN** without leave to amend because the affirmative defense is
15 inapplicable as a matter of law.

16 **5. Eleventh Affirmative Defense: Civil Code § 1431.2**

17 In the eleventh affirmative defense, Defendants assert that “under the law of comparative
18 negligence and under the provisions of California Civil Code § 1431.2, defendants should be required to
19 pay only in proportion with defendant’s own negligence, if any, by way, of any judgment entered
20 against defendants in this legal action.” Doc. 71 at 12. California Civil Code § 1431.2, however, is
21 limited in its application to “actions for personal injury, property damage, or wrongful death.” Cal. Civ.
22 Code § 1431.2. As Plaintiff has not made any claims of personal injury, property damage or wrongful
23 death this affirmative defense is legally insufficient. Therefore, the eleventh affirmative defense is

1 **STRICKEN** without leave to amend because the affirmative defense is inapplicable as a matter of law,

2 **6. Twelfth Affirmative Defense: Negligence of Third Person**

3 In the twelfth affirmative defense, Defendants allege that a third party is at fault for the matters
4 referred to in the Complaint. Doc. 71 at 12. Defendants failed to provide Plaintiff with information
5 regarding the identity of the alleged third parties. Indeed, Defendants have again done nothing more than
6 provide boilerplate language. For that reason the twelfth affirmative defense is insufficiently pled and
7 therefore it is **STRICKEN**.

8 **7. Fourteenth Affirmative Defense: Exclusive Remedy of Worker's Compensation**

9 In the fourteenth affirmative defense, Defendants allege that Plaintiff's action is barred by Cal.
10 Labor Code § 3600, which guides liability for compensation, conditions of compensation, credits against
11 judgment or settlement when an employee is injured or killed by a third party in the course of
12 employment. Doc. 71 at 13. "Negligent response to harassment or discrimination claims because these
13 claims are based on accusations of discrimination, which is not a normal risk of the compensation
14 bargain." *Scott v. Solano County Health and Social Services Dept.*, 459 F. Supp. 2d 959, 971 (E.D. Cal.
15 2006). As discrimination is not a normal risk of employment this affirmative defense is legally
16 insufficient. Therefore, the fourteenth affirmative defense is **STRICKEN** without leave to amend
17 because the affirmative defense is inapplicable as a matter of law.

18 **8. Fifteenth Affirmative Defense: Worker's Compensation Set-Off**

19 In the fifteenth affirmative defense, Defendants allege that any verdict found for Plaintiff should
20 be offset by the workers' compensation benefits. Doc. 71 at 13. Defendant has cited no legal authority
21 for its position that workers' compensation benefits offset damages in claims for discrimination and
22 retaliation. This Court has not located any such authority. Therefore, this affirmative defense is
23 **STRICKEN** without leave to amend because the affirmative defense is inapplicable as a matter of law.

1 **9. Sixteenth Affirmative Defense: Justification and Privilege**

2 In the sixteenth affirmative defense, Defendants allege that their conduct was justified and
3 privileged. Doc. 71 at 13. Defendants have not plead “at least some valid factual basis” for this
4 affirmative defense as they have not provided any rationale for their allegedly discriminatory action.
5 *Perez*, 2012 WL 1029425 at * 7. Without such information, Defendant is not providing Plaintiff with
6 fair notice. Therefore, this affirmative defense is **STRICKEN**.

7 **10. Seventeenth Affirmative Defense: Unclean Hands**

8 In the seventeenth affirmative defense, Defendants assert “Plaintiff’s action is barred by the
9 equitable doctrine of unclean hands.” Doc. 71 at 13. The doctrine of unclean hands requires that those
10 seeking the Court’s protection “have acted fairly and without fraud or deceit as to the controversy in
11 issue.” *Ellenburg v. Broadway, Inc.* 763 F. 2d 1091, 1097 (9th Cir. 1985). Again, Defendants have failed
12 to provide the Plaintiff with any facts that would put her on fair notice as to the actions which would be
13 considered fraudulent or deceptive. For this reason, this affirmative defense is **STRICKEN**.

14 **11. Eighteenth Affirmative Defense: Estoppel, Waiver, and Laches**

15 In the eighteenth affirmative defense, Defendants assert “Plaintiff’s action is barred by the
16 equitable doctrines of estoppel, waiver, and laches.” Doc. 71 at 13. Once again, Defendants have failed
17 to provide the Plaintiff with any facts that would put her on fair notice as to the defense alleged. For this
18 reason, this affirmative defense is **STRICKEN**.

19 The Court notes that Defendants did little more than provide a formulaic recitation of the
20 elements of the majority of the affirmative defenses presented. In addition, many of the affirmative
21 defenses pled by the Defendants are entirely inapplicable to this case. This is legal work unbecoming of
22 an officer of this court. However, as it is not prejudicial to the Plaintiff, the Court grants Defendants
23 leave to amend those affirmative defenses that are not clearly barred by law. *See Wyshak v. City Nat’l*

1 *Bank*, 607 F. 2d 824, 826 (9th Cir. 1979) (“Unless it would prejudice the opposing party, courts freely
2 grant leave to amend stricken pleadings.”). The Court warns Defendants to plead only those affirmative
3 defenses applicable to the case and to provide Plaintiff with fair warning of the factual basis for those
4 affirmative defenses. Defendants are reminded of their obligations under Fed. R. Civ. P. 11 (b)(2) to
5 plead only those “claims, defenses, and other legal contentions [] warranted by existing law or by a
6 nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”
7 This Court should not be put to the burden of being the hall monitor for obviously deficient pleadings.

8 **IV. CONCLUSION AND ORDER**

9 For the reason discussed above, the Court GRANTS Plaintiff’s motion to strike eleven of
10 nineteen of Defendants’ affirmative defenses with leave to amend affirmative defenses seven, twelve,
11 sixteen and seventeen, and without leave to amend affirmative defenses five, nine, ten, eleven, fourteen
12 and fifteen. Any amended answer shall be filed and served within twenty (20) days of this order.

13
14 IT IS SO ORDERED.

15 Dated: February 24, 2015

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