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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LAVONNA CASTELLANO and
PROJECT SENTINEL, INC.,

Plaintiffs,

v.

ACCESS PREMIER REALTY7, INC.
d/b/a Access Property Management;
DANIEL AKULOW; DOLORES
VALENZUELA; and ELVIA J.
ADDISON, individually and as Trustee,
Disclaimer Trust, Addison Revocable
Trust dated June 24, 1999,

Defendants.

No. 1:15-cv-00407-MCE-MJS

MEMORANDUM AND ORDER

Plaintiff Lavonna Castellano ("Castellano") is a former tenant of a senior citizen residential apartment complex located in Newman, California. Defendants owned and/or managed that complex during the time Castellano resided there in 2012 and 2013. Castellano, who claims to suffer from numerous disabling mental and physical impairments, alleges that Defendants refused to accommodate her need for an emotional support cat and took steps to terminate her tenancy when she did not immediately remove the cat from her apartment. Through the present lawsuit, Ms. Castellano alleges she ultimately moved out of Defendant's complex in May of 2013 under threat of eviction.

1 The second named Plaintiff, Project Sentinel, is a California non-profit corporation
2 which assists individuals with housing problems, including housing discrimination.
3 Project Sentinel tried to assist Castellano in obtaining a reasonable accommodation from
4 her landlord without success.

5 Plaintiffs commenced the present lawsuit on March 11, 2015. On May 25, 2015,
6 the currently operative pleading, Plaintiffs filed a First Amended Complaint (“FAC”). ECF
7 No. 9. The FAC alleges two causes of action under the Fair Housing Act, 42 U.S.C.
8 42 U.S.C. § 3602 et seq. (“Act”). In their First Cause of Action, Plaintiffs allege that
9 Defendants violated § 3604(f) of the Act in discriminating against Castellano by failing to
10 make reasonable modifications to accommodate her handicaps. Similarly, Plaintiffs’
11 Second Cause of Action asserts, pursuant to § 3617, that Defendants also ran afoul of
12 the Act by intimidating and threatening Castellano for exercising her right for a
13 reasonable accommodation under §3604(f).

14 Defendants proceeded to file their answer to the FAC on June 12, 2015. ECF
15 No. 11. That answer contains a total of eighteen affirmative defenses. By way of the
16 Motion to Strike now before the Court (ECF No. 14), Plaintiffs argue that all eighteen of
17 those defenses are either factually deficient, legally defective, or both. For the reasons
18 set forth below, Plaintiffs’ Motion is GRANTED in part and DENIED in part.

20 STANDARD

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22 An affirmative defense is an “assertion of facts and arguments that, if true, will
23 defeat the plaintiff’s [] claim, even if all the allegations in the complaint are true.” Black’s
24 Law Dictionary (10th ed. 2014). A court may strike a defectively pled affirmative defense
25 under Federal Rule of Civil Procedure 12(f),¹ which authorizes the removal of “an
26 insufficient defense.”

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28 ¹ All subsequent references to “Rule” are to the Federal Rules of Civil Procedure.

1 District courts in this circuit were previously split on whether the heightened
2 pleading standard that the United States Supreme Court announced in Twombly and
3 Iqbal² applied to affirmative defenses. Some courts, including this Court, concluded that
4 affirmative defenses were subject to the heightened pleading standard. See, e.g., Wine
5 Group LLC, v. L. and R. Wine Co., No. 2:10-cv-022040-MCE-KJN, 2011 WL 130236, at
6 *2 (E.D. Cal. Jan. 4, 2011); Dodson v. Strategic Rests. Acquisition Co. II, LLC,
7 289 F.R.D. 595 (E.D. Cal. 2013). Other courts, however, declined to apply the
8 heightened pleading standard to affirmative defenses, citing Wyshak v. City National
9 Bank, 607 F.2d 824, 826 (9th Cir. 1979), for the proposition that the pleadings need only
10 provide the plaintiff “fair notice” of the defense. See, e.g., Kohler v. Staples the Office
11 Superstore, LLC, 291 F.R.D. 464, 468 (S.D. Cal. 2013).

12 The Ninth Circuit, however, has resolved the split in the district courts. In
13 Kohler v. Flava Enterprises, Inc., the Ninth Circuit explained that “the ‘fair notice’
14 required by the pleading standards only require[s] describing [an affirmative] defense in
15 ‘general terms.’” 779 F.3d 1016, 1019 (9th Cir. 2015) (quoting 5 Charles Alan Wright &
16 Arthur Miller, Federal Practice and Procedure, § 1274 (3d ed. 1998)).³ Accordingly, this
17 Court now
18 applies the “fair notice” standard, and not the heightened pleading standard announced
19 in Twombly and Iqbal, when evaluating motions to strike affirmative defenses.

20 In the event the Court finds any affirmative defense to be invalid or improper, it
21 must then decide whether amendment should be permitted to rectify its shortcomings.
22 “[A] district court should grant leave to amend even if no request to amend the pleading
23 was made, unless it determines that the pleading could not possibly be cured by the

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26 ² See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

27 ³ The specific sentence that the Ninth Circuit quoted in Kohler provides: “As numerous federal
28 courts have held, an affirmative defense may be pleaded in general terms and will be held to be sufficient,
and therefore invulnerable to a motion to strike, as long as it gives the plaintiff fair notice of the nature of
the defense.” Wright & Miller, § 1274 (footnotes omitted).

1 allegation of other facts.” Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (internal
2 quotation marks omitted); see also Fed. R. Civ. P. 15(a).

4 ANALYSIS

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6 Plaintiff’s Motion requests that the Court strike all nineteen of the affirmative
7 defenses that Defendants assert in their Answer. The Court will examine each
8 affirmative defense in turn.

9 In the first and second affirmative defenses, Defendants assert that Plaintiffs’
10 Complaint fails to allege facts sufficient to state a claim upon which relief can be granted,
11 and that the allegations are not pled with sufficient particularity to constitute viable
12 claims. These assertions, however, are not affirmative defenses. See Black’s Law
13 Dictionary, supra; see also Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1088 (9th Cir.
14 2002) (“A defense which demonstrates that plaintiff has not met its burden of proof is not
15 an affirmative defense.”); Richmond v. Mission Bank, No. 1:14-cv-00184-AWI, 2014 WL
16 2002312 at *5 (E.D. Cal. May 15, 2014) (striking purported affirmative defense based on
17 failure to state a claim). Accordingly, Plaintiff’s Motion is GRANTED with respect to the
18 first and second affirmative defenses, and those defenses are stricken from Defendants’
19 Answer.

20 In the third affirmative defense, Defendants assert that Plaintiff’s claims may be
21 barred by the doctrines of “unclean hands, estoppel, acquiescence, and/or laches [sic].”
22 Defs.’ Answer, p. 13. Both estoppel and laches are included within the non-exhaustive
23 list of affirmative defenses in Rule 8(c)(1), and Defendants’ Answer sufficiently puts
24 Plaintiff on fair notice of those defenses. Accordingly, Plaintiff’s Motion is DENIED as to
25 the third affirmative defense.

26 As a fourth affirmative defense, Defendants allege that each of Plaintiffs’ claims is
27 barred because of Plaintiffs’ failure to notify Defendants of the alleged statutory
28 violations at the time they occurred. That is a potentially viable defense and gives

1 plaintiffs adequate notice. Therefore, Defendants' Motion is DENIED as to the fourth
2 affirmative defense.

3 Defendants' fifth through eighth affirmative defenses pertain to the propriety of
4 alleged damages. The fifth affirmative defense alleges that Plaintiff Castellano's alleged
5 "embarrassment and/or "humiliation" was not "severe enough to support a claim for the
6 intentional infliction of emotional distress and/or the recovery of punitive damages." *Id.*
7 at 14. Similarly, the eighth affirmative defense avers that Defendants' actions were not
8 sufficiently "extreme" or "outrageous" to support a claim for either intentional infliction or
9 for the recovery of punitive damages. The sixth defense alleges that the imposition of
10 statutory minimum damages would violate Defendants' Eighth Amendment protection
11 against excessive fines, in violation of both the California Constitution and the United
12 States Constitution. Additionally, with respect to punitive damages in particular, the
13 seventh affirmative defense alleges that the imposition of such damages would violate
14 Defendants' due process rights under both the California Constitution and the United
15 States Constitution. Finally, the eighth affirmative defense avers that the imposition of
16 any statutory minimum damages would violate Defendants' Eighth Amendment
17 protections against excessive fines, also in violation of both the state and federal
18 constitutions. These challenges to damages do not constitute proper affirmative
19 defenses, as they will not defeat either of Plaintiff's claims for housing discrimination.
20 See Black's Law Dictionary, supra.⁴ Accordingly, Plaintiffs' Motion is GRANTED as to
21 the fifth through eighth affirmative defenses, and those defenses are stricken.

22 Defendants' ninth affirmative defense takes particular aim at Plaintiff Project
23 Sentinel by alleging it lacks standing to participate in the lawsuit. A party's standing,
24 however, does not constitute a viable affirmative defense. Dairy Employees Union Local

25 ⁴ Additionally, to the extent the fifth and eighth defenses assert that Plaintiffs cannot meet their
26 burden of proof in establishing entitlement to emotional distress, those affirmative defenses are not viable
27 either. See Zivkovic, 302 F.3d at 1088. In addition, the Court notes that intentional infliction of emotional
28 distress is not alleged in any event by Plaintiff's FAC, which presents only Fair Housing Act claims.
Moreover, with regard to the sixth affirmative defense, it also appears inapplicable on its face. Plaintiffs'
FAC does not seek statutory minimum damages, and the Fair Housing Act under which Plaintiffs' claims
are asserted provides only for actual and punitive damages under 42 U.S.C. § 3613(c)(1).

1 No. 17 v. Ferreira Dairy, No. 5:14-cv-01295-RSWLM, 2015 WL 505934 at *4 (C.D. Cal.
2 Feb. 6, 2015); Dodson v. CSK Auto, Inc., No. 2:13-cv-00346-GEB-AC, 2013 WL
3 3942002 at *4 (E.D. Cal. July 30, 2013). Plaintiffs’ Motion is therefore GRANTED as to
4 the ninth affirmative defense.

5 The tenth and eleventh affirmative defenses maintain that Plaintiffs’ claims are
6 barred by both Plaintiffs’ failure to mitigate damages and by the claim that Plaintiffs’
7 injuries cannot have been proximately caused by any action or inaction attributable to
8 Defendants in any event. “[T]he duty to mitigate damages is an affirmative defense
9” Wehrs v. Wells, 688 F.3d 886, 893 (7th Cir. 2012). Plaintiffs’ challenge to the
10 tenth affirmative defense consequently fails. The eleventh affirmative defense,
11 however, is inapplicable to a discrimination claim, since negligence and associated
12 concepts of proximate causation do not apply to discrimination claims. See Johnson v.
13 Golden Empire Transit Dist., No. 1:14-cv-001841-LJO, 2015 WL 1541285 at *3 (E.D.
14 Cal. Apr. 7, 2015); J & J Sports Prods. Inc. v. Ramirez Bernal, No. 1:12-cv-01512-AWI,
15 2014 WL 2042120 at *6 (E.D. Cal. May 16, 2014). The Court therefore DENIES the
16 Motion to Strike as to the tenth affirmative defense but GRANTS it as to the eleventh
17 affirmative defense.

18 Turning to the propriety of Plaintiffs’ demand for injunctive relief, the twelfth and
19 thirteenth affirmative defenses take aim at that relief by claiming that Plaintiffs have not
20 described in sufficient detail the act or acts to be restrained, and that the demand for
21 injunctive relief is inappropriate in any event because “media related and other recent
22 actions” by Plaintiffs and their counsel will make it difficult, if not impossible, for
23 Defendants to maintain confidentiality if required to do so. Id. at 15 Because both of
24 these defenses attack only the propriety of a single form of damages rather than the
25 viability of either of Plaintiff’s claims themselves, they do not constitute proper affirmative
26 defenses and Plaintiffs’ Motion to Strike those affirmative defenses is GRANTED.

27 The fourteenth affirmative defense also attacks the viability of Plaintiffs’ claims by
28 arguing they are de minimis, either in whole or in part, as set forth in the FAC. The

1 sixteenth affirmative defense also takes aim at recoverable damages by arguing that the
2 FAC fails to state a claim against Defendants upon which attorneys' fees and costs can
3 be awarded. Again, these affirmative defenses address only the propriety of certain
4 damages, or the extent of Plaintiffs' harm rather than overall viability of Plaintiffs' claims
5 themselves. See, e.g., J & J Sports Prods., Inc. v. Delgado, No. 1:12-cv-001945-LJO,
6 2013 WL 3288564 at *8 (E.D. Cal. June 28, 2013) (striking defenses based on
7 de minimis claims and failure to state claims for attorney's fees). Accordingly, the
8 fourteenth and sixteenth affirmative defenses fail and are STRICKEN.

9 Defendant's fifteenth affirmative defense attacks the evidentiary viability of
10 Plaintiffs' claims by arguing that they may be barred or limited, either in whole or in part,
11 by the "Doctrine of After Acquired Evidence." Id. at 15. Without more, this defense is
12 barred since it fails to provide fair notice as to how this purported doctrine applies under
13 the circumstances of the present matter. Bare and conclusory legal assertions do not
14 suffice in affording the requisite fair notice. See, e.g., McCune v. Munirs Co., No. 2:12-
15 cv-02733-GEB, 2013 WL 5467212 at *1 (E.D. Cal. Sept. 30, 2013 ("An affirmative
16 defense which simply states a legal conclusion or theory . . . is insufficient to provide fair
17 notice.")). The fifteenth defense is therefore STRICKEN.

18 Finally, Defendants' last two affirmative defenses are jurisdictional in nature in
19 asserting that subject matter jurisdiction is lacking (seventeenth defense) and
20 alternatively that personal jurisdiction is also absent (eighteenth defense). Claims based
21 on lack of jurisdiction, however, do not constitute affirmative defenses. Joe Hand
22 Promotions, Inc. v. Nguyen, No. 11-cv-04745-RMW, 2012 WL 1183738 at *2 (N.D. Cal.
23 Apr. 6, 2012) (lack of subject matter jurisdiction). Accordingly, Plaintiffs' Motion is
24 GRANTED as to the seventeenth and eighteenth affirmative defenses.

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1 **CONCLUSION**

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3 Plaintiffs' Motion to Strike Defendants' Affirmative Defenses (ECF No. 14) is
4 GRANTED in part and DENIED in part. Plaintiff's Motion is GRANTED as to the first,
5 second, fifth through eighth, ninth, and eleventh through eighteenth affirmative defenses.
6 Accordingly, those affirmative defenses are STRICKEN from Defendants' Answer
7 without prejudice. Plaintiffs' Motion is DENIED as to the third, fourth and tenth
8 affirmative defense contained within Defendants' Answer. Defendants have twenty (20)
9 days following the date this Memorandum and Order is electronically filed to amend their
10 Answer should they choose to do so.

11 IT IS SO ORDERED.

12 Dated: November 20, 2015

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16 MORRISON C. ENGLAND, JR., CHIEF JUDGE
17 UNITED STATES DISTRICT COURT
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