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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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SUKHWINDER KAUR, individually  
and as the successor in  
interest for the Decedent  
PARMINDER SINGH SHERGILL;  
KULBINDER KAUR SOHOTA;  
SARABJIT SINGH SHERGILL,

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Plaintiff,

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v.

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CITY OF LODI; CITY OF LODI  
POLICE DEPARTMENT; MARK  
HELMS, in his individual  
capacity as the Chief of  
Police for the City of Lodi;  
SCOTT BRATTON, in his  
individual capacity as a City  
of Lodi Police Officer; ADAM  
LOCKIE, in his individual  
capacity as a City of Lodi  
Police Officer,

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Defendants.

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21 Plaintiffs seek an order striking the fourteen  
22 affirmative defenses asserted by Defendants City of Lodi, City of  
23 Lodi Police Department, and Mark Helms. (Pls.' Mot. to Strike  
24 Affirmative Defenses ("Mot."), ECF No. 91.) Plaintiffs' motion is  
25 brought under Federal Rule of Civil Procedure ("Rule") 12(f).  
26 (Mot. 1:17-19.) Plaintiffs argue their motion should be granted  
27 because each asserted affirmative defense is either inapplicable  
28 or insufficiently pled.

No. 2:14-cv-00828-GEB-AC

**ORDER GRANTING PLAINTIFFS'  
MOTION TO STRIKE**

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## I. LEGAL STANDARD

Rule 8(b) of the Federal Rules of Civil Procedure requires a party to state "in short and plain terms its defenses to each claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A). Furthermore, Rule 12(f) permits a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

An affirmative defense may constitute "an insufficient defense" under Rule 12(f) either as a matter of law or as a matter of pleading. Kohler v. Islands Rests., LP, 280 F.R.D. 560, 563-64 (S.D. Cal. 2012). An affirmative defense is insufficient as a matter of law if it "lacks merit under any set of facts the defendant might allege." Dodson v. Strategic Rests. Acquisition Co. II, LLC, 289 F.R.D. 595, 603 (E.D. Cal. 2013) (citation and internal quotation marks omitted). An affirmative defense is insufficient as a matter of pleading if it fails to satisfy the applicable pleading standard.

The parties dispute which pleading standard applies to Plaintiffs' motion. Plaintiffs argue that the heightened pleading standard explained in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), applies. (Mot. 2:27-28; 3:1-2.) This standard requires a party alleging a claim to include enough facts in the claim to evince that the claim "is plausible on its face." Twombly, 550 U.S. at 570.

Defendants counter that the Ninth Circuit has "announced that the fair notice standard continues to govern the sufficiency of pleading affirmative defenses in wake of the Iqbal and Twombly decisions." (Defs.' Opp'n to Mot. ("Opp'n") 4:20-22,

1 ECF No. 94.) Under the fair notice pleading standard, "[t]he key  
2 to determining the sufficiency of pleading an affirmative defense  
3 is whether it gives plaintiff fair notice of the defense." Wyshak  
4 v. City Nat. Bank, 607 F.2d 824, 827 (9th Cir. 1979).

5 However, the parties' dispute concerning the applicable  
6 pleading standard need not be resolved here since even under the  
7 lesser Wyshak fair notice pleading standard, Plaintiffs' motion  
8 will be granted.

## 9 II. DISCUSSION

### 10 A. First Affirmative Defense: Good Faith

11 Defendants assert in their first affirmative defense  
12 "[t]hat at all times mentioned in the complaint on file herein,  
13 and immediately prior thereto, Defendants acted in good faith[.]"  
14 (Defs.' Answer to Third Am. Compl. ("Answer") 14:20-21, ECF No.  
15 90.) This conclusory assertion does not adequately notice a  
16 viable affirmative defense. Therefore, Defendants' first  
17 affirmative defense is stricken.

### 18 B. Second, Third, Sixth, Tenth, and Fourteenth Affirmative 19 Defenses: Failure to Allege Facts Sufficient to 20 Constitute a Cause of Action, Fails to State a Claim, 21 Punitive Damages, and Due Process Available

22 Defendants concur that the second, third, sixth, tenth,  
23 and fourteenth affirmative defenses are not proper since these  
24 defenses state a defect in Plaintiffs' *prima facie* case. (Opp'n  
25 6:21-26, 7:22-28); see Zivkovic v. S. Cal. Edison Co., 302 F.3d  
26 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that  
27 plaintiff has not met its burden of proof is not an affirmative  
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1 defense." ). Therefore, Defendants' second, third, sixth, tenth,  
2 and fourteenth affirmative defenses are stricken.

3 **C. Fourth, Fifth, and Seventh Affirmative Defenses:**  
4 **Immunities**

5 Defendants also concur with Plaintiffs that the fourth,  
6 fifth, and seventh affirmative defenses fail to provide  
7 Plaintiffs with "fair notice of any specific defense." (Opp'n  
8 7:11-15 (citation omitted).) Therefore, Defendants' fourth,  
9 fifth, and seventh affirmative defenses are stricken.

10 **D. Eighth Affirmative Defense: Reservation of Affirmative**  
11 **Defenses**

12 Defendants' eighth affirmative defense states in part:  
13 "Defendants expressly reserves [sic] the right to assert  
14 additional affirmative defenses if and to the extent that such  
15 affirmative defenses become applicable[.]" (Answer 15:17-18.)

16 Plaintiffs argue this is not an affirmative defense.  
17 (Mot. 9:11.) Defendants seem to agree and acknowledge they "need  
18 not reserve the right to amend . . . ." (Opp'n 8:3-4.)

19 The "'reservation of affirmative defenses' is not an  
20 affirmative defense." E.E.O.C. v. Timeless Invs., Inc., 734 F.  
21 Supp. 2d 1035, 1055 (E.D. Cal. 2010). Therefore, Defendants'  
22 eighth affirmative defense is stricken.

23 **E. Ninth Affirmative Defense: Comparative Negligence**

24 Defendants' ninth affirmative defense states:

25 Defendants assert that if Defendants are  
26 adjudged, decreed, or otherwise determined to  
27 be liable to Plaintiff, then in that event,  
28 Defendants will be entitled to apportion the  
degree of their fault or responsibility for  
said incident attributable to the Plaintiff  
or to any other Defendants named herein or

1 yet to be named. The amount of damages  
2 attributable to these answering Defendants is  
3 to be abated, reduced, or eliminated to the  
4 extent that the Plaintiffs' own negligence,  
5 or the negligence of any other Defendants,  
6 contributed to the Plaintiffs' claimed  
7 damages, if any there were. This  
8 apportionment of damages is to be  
9 administered in accordance with the  
10 principles of equity and pursuant to the  
11 doctrine of comparative negligence and  
12 pursuant to Civil Code Section 1431.2.

13 (Answer 15:19-27.)

14 Plaintiffs argue "Defendants' assertion of this  
15 affirmative defense is completely devoid of the requisite  
16 facts . . . provid[ing] 'fair notice' of this defense." (Mot.  
17 10:18-21.) Defendants counter that this affirmative defense is  
18 sufficient because it is similar to an affirmative defense upheld  
19 in Edwards v. County of Modoc, No. 2:14-cv-02646-MCE-KJN, 2015 WL  
20 4456180 (E.D. Cal. July 20, 2015), where "Defendants allege[d]  
21 that Plaintiff's contributory negligence caused and contributed  
22 to his damages." Id. at \*3.

23 "A bare assertion of negligence or contributory fault  
24 without 'any indication of the conduct supporting the defense'  
25 does not pass muster, even under the fair notice standard."  
26 Devermont v. City of San Diego, No. 12-CV-01823 BEN (KSC), 2013  
27 WL 2898342, at \*6 (S.D. Cal. June 14, 2013) (quoting Roe v. City  
28 of San Diego, 289 F.R.D. 604, 611-12 (S.D. Cal. 2013)). Here,  
Defendants do not indicate any conduct supporting this  
affirmative defense. Therefore, Defendants' ninth affirmative  
defense is stricken.

1           **F. Eleventh Affirmative Defense: Failure to Mitigate**  
2           **Damages**

3           Defendants' eleventh affirmative defense states  
4 "Plaintiffs have failed to mitigate their damages, if any there  
5 are[.]" (Answer 16:3-4.)

6           Plaintiffs argue this affirmative defense is irrelevant  
7 and immaterial since "Plaintiffs have not alleged that their  
8 damages are 'continuing.'" (Mot. 11:17-18.) Defendants counter  
9 that Plaintiffs' Third Amended Complaint ("TAC") both does, and  
10 does not, allege such damages, contending: "Plaintiffs'  
11 deprivation of association claim . . . does not clearly indicate  
12 whether they suffer from continuing or enhanced damages," (Opp'n  
13 9:15-17), and "Plaintiff has admitted in its TAC to continuing  
14 damages." (Opp'n 9:22.) However, Plaintiffs' deprivation of  
15 association claims (Third and Fourth Claims) are not asserted  
16 against Defendants City of Lodi, City of Lodi Police Department,  
17 and Mark Helms. (TAC ¶¶ 80, 85; Answer 9:10-19.) Plaintiffs state  
18 in their Reply brief: "Plaintiffs agree that the allegations  
19 properly state a claim for continuing damages" and therefore, "a  
20 failure to mitigate claim is appropriate." (Pls.' Reply to Opp'n  
21 to Mot. ("Reply") 6:18-19, ECF No. 97.)

22           Plaintiffs further argue "Defendants have not properly  
23 stated [this affirmative defense]." (Mot. 11:21.) Defendants  
24 counter that this affirmative defense provides fair notice. (See  
25 Opp'n 9:23-25.)

26           However, Defendants' failure to mitigate affirmative  
27 defense "gives no notice to [Plaintiffs] of the basis of [their]  
28 alleged failure to mitigate." Kohler v. Staples the Office

1 Superstore, LLC, 291 F.R.D. 464, 469 (S.D. Cal. 2013). Contra  
2 Eurow & O'Reilly Corp. v. Superior Mfg. Group, Inc., No. CV 14-  
3 6595-RSWL VBKX, 2015 WL 1020116, at \*3 (C.D. Cal. Mar. 6, 2015)  
4 ("Though [p]laintiff does not allege specific facts to support  
5 its allegation, [c]ourts have typically held that a generalized  
6 statement . . . meets [a party's] pleading burden with respect to  
7 the affirmative defense of damage mitigation." (alterations in  
8 original) (citation and internal quotation marks omitted)).

9 Therefore, Defendants' eleventh affirmative defense is  
10 stricken.

11 **G. Twelfth Affirmative Defense: Immunity**

12 Defendants assert in their twelfth affirmative defense

13 they are immune from liability as a result of  
14 executive and/or legislative and/or judicial  
15 immunity under the common law, United States  
16 statutes, and the opinions of the State and  
17 Federal Courts interpreting these laws. Chief  
18 Mark Helms contends that he is entitled to  
the defense of qualified immunity. City of  
Lodi contends that Officer Bratton and Lockie  
[the "Officer Defendants"] are entitled to  
the defense of qualified immunity[.]

(Answer 16:5-9.)

19 Plaintiffs argue "the [first] sentence should be  
20 stricken because it is 'redundant' under Rule 12(f)[,]" and fails  
21 to provide fair notice of the asserted immunities. (Mot. 12:16-21  
22 (referring to arguments made for the fourth affirmative  
23 defense).) Defendants counter that the first sentence should not  
24 be stricken because "the first sentence lists the applicable  
25 background authority Defendants will rely upon in asserted [sic]  
26 the qualified immunity defense." (Opp'n 10:26-27.)  
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1           The first sentence is stricken since it is evident that  
2 it fails to provide fair notice of what is asserted.

3           Plaintiffs also challenge the second sentence for the  
4 first time in their Reply brief. (Reply 7:18-28.) However, “[t]he  
5 district court need not consider arguments raised for the first  
6 time in a reply brief.” Zamani v. Carnes, 491 F.3d 990, 997 (9th  
7 Cir. 2007). Therefore, this argument is disregarded.

8           Plaintiffs also challenge the third sentence, arguing  
9 that the Officer Defendants “are separately represented and  
10 Defendant City of Lodi cannot raise this [qualified immunity]  
11 defense on behalf of another party.” (Mot. 12:23-27 (citations  
12 and internal quotation marks omitted).) Defendants counter that  
13 Defendant City of Lodi has properly asserted qualified immunity  
14 on behalf of the Officer Defendants since Defendant City of  
15 Lodi’s liability is contingent on whether the Officer Defendants’  
16 conduct was unlawful. (Opp’n 11:14-17, 12:20-22.)

17           The affirmative defense as stated, however, does not  
18 put Plaintiffs on notice as to how the Officer Defendants’  
19 immunity relates to Defendant City of Lodi’s liability or the  
20 basis for Defendant City of Lodi’s standing to assert an  
21 affirmative defense which can be asserted by certain individuals.  
22 Therefore, the third sentence is stricken.

23           **H. Thirteenth Affirmative Defense: Self-Defense and**  
24           **Defense of Others**

25           Defendants assert “[t]hat at all times mentioned in the  
26 [TAC] . . . and immediately prior thereto, Defendants acted in  
27 self-defense and in the defense of others[.]” (Answer 16:10-11.)  
28 Plaintiffs argue “[t]his affirmative defense makes no sense in



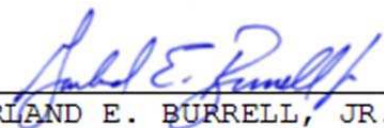
1 the context of the answering City Defendants, because none of  
2 those answering City Defendants was at the scene of the incident  
3 when Parminder Singh Shergill was shot to death." (Mot. 13:7-9.)  
4 Defendants counter that Defendant City of Lodi asserts this  
5 defense. (Opp'n 13:3-18.)

6 Defendants have not provided Plaintiffs with fair  
7 notice of the factual basis supporting this affirmative defense.  
8 See Qarbon.com Inc. v. eHelp Corp., 315 F. Supp. 2d 1046, 1049  
9 (N.D. Cal. 2004) (striking affirmative defenses of waiver,  
10 estoppel, and unclean hands in part because defendant "fail[ed]  
11 to allege the factual basis"). Therefore, the thirteenth  
12 affirmative defense is stricken.

### 13 III. CONCLUSION

14 For the reasons stated, Plaintiffs' motion to strike is  
15 granted. Defendants have fourteen (14) days leave from the date  
16 on which this order is filed to file an amended answer addressing  
17 any affirmative defense.

18 Dated: September 18, 2015

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23 GARIAND E. BURRELL, JR.  
24 Senior United States District Judge  
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