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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver for
AMTRUST BANK,

Plaintiff,

v.

FIRST PRIORITY FINANCIAL,
INC., a California
corporation,

Defendant.

No. 2:15-cv-02507-JAM-KJN

**ORDER GRANTING PLAINTIFF'S
MOTION TO STRIKE DEFENDANT'S
AFFIRMATIVE DEFENSES**

This matter comes before the Court on Plaintiff Federal Deposit Insurance Corporation's (FDIC) ("Plaintiff") Motion to Strike Defendant First Priority Financial Inc.'s ("Defendant") twelfth, twenty-sixth, and twenty-seventh affirmative defenses (Doc. #12) from Defendant's answer (Doc. #5) to the complaint (Doc. #1). Defendant opposes the motion (Doc. #17).¹ For the reasons set forth below, Plaintiff's motion is GRANTED.

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for June 14, 2016.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 Plaintiff "is a corporation and instrumentality of the
3 United States of America, . . . and is authorized to be appointed
4 as receiver for insured depository institutions that have
5 failed." Id. ¶ 5. "On December 4, 2009, the Office of Thrift
6 Supervision closed AmTrust and appointed [Plaintiff] as
7 Receiver." Id. Plaintiff is permitted to file a lawsuit in this
8 court of law pursuant to 12 U.S.C. §§ 1819 and 1821(d)(2)(A)(i)
9 and succeeded to all of AmTrust's claims. Plaintiff now owns the
10 subject claims and has standing to prosecute this action as
11 AmTrust's receiver.

12 Plaintiff alleges that in both 2004 and 2007, AmTrust and
13 Defendant entered into a written Master Broker Agreement which
14 "set[] forth terms and conditions, pursuant to which [Defendant]
15 would originate and submit and AmTrust would accept and fund
16 mortgage loans." Compl. ¶¶ 7, 11. Plaintiff alleges Defendant
17 breached the terms and conditions of the referenced Master Broker
18 Agreements, id. ¶¶ 24, 34, 43, 52, accordingly, Plaintiff filed
19 this lawsuit for breach of contract, id. ¶ 1.

20 In Defendant's answer it denies the allegations in
21 Plaintiff's complaint and asserts thirty-two affirmative
22 defenses. Plaintiff seeks to strike Defendant's twelfth, twenty-
23 sixth, and twenty-seventh affirmative defenses: (12) Negligence
24 and Breach of Contract, (26) Comparative Indemnity, and
25 (27) Fraud.

26 II. OPINION

27 A. Legal Standard

28 A Motion to Strike is brought under Federal Rule of Civil

1 Procedure ("Rule") 12(f), which provides in pertinent part: "The
2 court may strike from a pleading an insufficient defense or any
3 redundant, immaterial, impertinent or scandalous matter." Fed.
4 R. Civ. P. 12(f). "A defense which demonstrates that plaintiff
5 has not met its burden of proof is not an affirmative defense."
6 Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1088 (9th Cir.
7 2002). "On the other hand, '[a]n affirmative defense, under the
8 meaning of [Rule] 8(c), is a defense that does not negate the
9 elements of the plaintiff's claim, but instead precludes
10 liability even if all of the elements of the plaintiff's claims
11 are proven.'" Barnes v. AT & T Pension Benefit Plan-Nonbargained
12 Program, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010) (first
13 alteration in original) (quoting Roberge v. Hannah Marine Corp.,
14 No. 96-1691, 1997 WL 468330, at *3 (6th Cir. 1997)). "While
15 courts rarely grant Rule 12(f) motions to strike affirmative
16 defenses, if an affirmative defense is a negative defense and
17 should instead be included as a denial in the answer, the motion
18 to strike will be granted." Lexington Ins. Co v. Energetic Lath
19 & Plaster, Inc., No. 2:15-CV-00861-KJM, 2015 WL 5436784, at *11-
20 12 (E.D. Cal. Sept. 15, 2015) (citing Barnes, 718 F. Supp. 2d at
21 1173).

22 B. Evidentiary Objections

23 Defendant objects (Doc. #18) to Plaintiff's Exhibit A
24 attached to the Declaration of Lauren M. Gibbs (Plaintiff's
25 attorney of record) in support of the Motion to Strike (Doc. #13-
26 1). Exhibit A contains three pages of the seventeen page 2004
27 Master Broker Agreement between AmTrust bank and Defendant.

28 Defendant contends that "[t]he complete document has not

1 been disclosed to Defendant by Plaintiff[, and] Plaintiff should
2 not be allowed to select favorable portions of the alleged
3 agreement . . . while disregarding the rest" Def.'s
4 Objection to Pl.'s Ex. A 1:25-28. Defendant cites Federal Rule
5 of Evidence 106 as the basis for its objection.

6 The advisory committee's note to Federal Rule of Evidence
7 106 states: "The rule is based on two considerations[-t]he first
8 is the misleading impression created by taking matters out of
9 context[; t]he second is the inadequacy of repair work when
10 delayed to a point later in the trial." Fed. R. Evid. 106
11 advisory committee's note. Exhibit A is only relevant to this
12 Court's analysis for the choice-of-law provision it contains.
13 Further, Plaintiff also introduces Exhibit B—the 2007 Master
14 Broker Agreement between AmTrust bank and Defendant—which
15 contains an identical choice-of-law provision (Doc. #13-2).
16 Defendant does not object to this Exhibit and Defendant does not
17 contest Plaintiff's choice-of-law argument. Accordingly, neither
18 of the concerns raised by the advisory committee is presented by
19 the selected portions of the 2004 Master Broker Agreement in
20 Plaintiff's Exhibit A, and Defendant's objection is overruled.

21 C. Analysis

22 1. Choice-of-law

23 Plaintiff contends that the agreements at issue in this
24 action contain a choice-of-law provision electing Ohio law, and
25 that because of this provision this Court should apply Ohio
26 contract law. Mot. to Strike 6:3-4, 6 n.2. Defendant does not
27 oppose this argument.

28 Jurisdiction in this case is based on federal question,

1 therefore, federal common law applies to the choice-of-law rule
2 determination. See Huynh v. Chase Manhattan Bank, 465 F.3d 992,
3 997 (9th Cir. 2006) (stating where jurisdiction is not based on
4 diversity of citizenship, federal common law choice-of-law rules
5 apply); see also Daugherty v. Experian Info. Solutions, Inc., 847
6 F. Supp. 2d 1189, 1194 (N.D. Cal. 2012) (same). "Federal common
7 law follows the approach outlined in the Restatement (Second) of
8 Conflict of Laws." Huynh, 465 F.3d at 997.

9 Under the Restatement, the parties' choice-of-law "to govern
10 their contractual rights and duties will be applied if the
11 particular issue is one which the parties could have resolved by
12 an explicit provision in their agreement directed to that issue."
13 Restatement (Second) of Conflicts of Laws § 187(1) (1988).

14 Courts should honor the parties' choice unless "the chosen state
15 has no substantial relationship to the parties or the transaction
16 and there is no other reasonable basis for the parties' choice"
17 or "application of the law of the chosen state would be contrary
18 to a fundamental policy of a state which has a materially greater
19 interest than the chosen state in the determination of the
20 particular issue" and that state would be the state of the
21 applicable law in the absence of an effective choice-of-law by
22 the parties. Id. at § 187(2).

23 Here AmTrust was headquartered in Ohio, thus Ohio bears a
24 substantial relationship to the parties. Application of Ohio
25 contract law is not contrary to any fundamental California
26 policy. The Court therefore defers to the parties' choice-of-law
27 provision and applies Ohio contract law in analyzing this motion.
28

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2 2. Comparative Negligence and Contributory Indemnity
3 (Twelfth and Twenty-Sixth Affirmative Defenses)

4 Defendant alleges in its twelfth affirmative defense that
5 "Plaintiff is barred from recovery herein by reason of its
6 negligence at or about the time and place of the alleged
7 transaction and failure to satisfy its contractual obligation to
8 underwrite the loans." Answer 12:18-21. Defendant alleges in
9 its twenty-sixth affirmative defense that "Plaintiff is barred
10 from recovery on the alleged contract, because the equities of
11 this case entitle this Defendant to comparative and/or implied
12 indemnity from Plaintiff." Id. at 16:8-14.

13 Plaintiff argues these defenses must be stricken because
14 "[i]t is black letter law in Ohio that the related defenses of
15 comparative fault and contributory negligence are not valid
16 defenses to a claim for breach of contract." Mot. to Strike 6:6-
17 7.

18 Defendant counters that "[w]hile there is authority for the
19 contention that *generally* negligence is not a defense to a breach
20 of contract claim, the rule does not bar a plaintiff's negligence
21 from remaining relevant to a breach of contract action"
22 Opp'n at 12:7-10. Defendant provides examples of courts
23 considering negligence in determining whether there has been a
24 breach of implied contractual duties and whether causation is
25 satisfied. See id. 12:22-13:10 (citing Ohio Oil Gathering Corp.
26 III v. Welding, Inc., No. 2:09-cv-782, 2010 WL 5135999 (S.D. Ohio
27 Dec. 9, 2010); Becker v. BancOhio Nat'l Bank, 17 Ohio St. 3d 158
28 (1985); Bailey PVS Oxide (Delta) LLC v. Plas-Tanks, Inc., No.

1 3:02CV7363, 2005 WL 1377874, at *1 (N.D. Ohio June 6, 2005)).

2 Ohio case law prescribes that "it is well settled that
3 comparative negligence, contributory negligence, or assumption of
4 the risk are not defenses in contract." Chase Bank of Ohio v.
5 Nealco Leasing, Inc., 92 Ohio App. 3d 555, 569 (1993) (citing
6 Becker, 17 Ohio St.3d 158); see also Ohio Oil Gathering Corp.
7 III, 2010 WL 5135999, at *3 (precluding defendants from arguing
8 that comparative fault is a defense to a contract claim);
9 Bedillion v. Tri-Cty. Inc. Agency, No. 15722, 1993 WL 27381, at
10 *3 (Ohio Ct. App. Feb. 3, 1993) ("Comparative negligence is not a
11 defense in a contract action.").

12 Applying these cases to the instant case, the Court finds
13 that Defendant's twelfth and twenty-sixth asserted defenses are
14 improper affirmative defenses under Ohio contract law. Defendant
15 is not precluded from arguing Plaintiff's own negligence
16 undermines the elements of Plaintiff's claims, however, any such
17 defense is a negative defense and is properly stricken under Rule
18 12(f). See Lexington Ins. Co, 2015 WL 5436784, at *11-12 (citing
19 Barnes, 718 F. Supp. 2d at 1173). Plaintiff's motion to strike
20 Defendant's twelfth and twenty-sixth defenses as improper
21 affirmative defenses is GRANTED WITH PREJUDICE.

22 3. Fraud (Twenty-Seventh Affirmative Defense)

23 Defendant alleges in its twenty-seventh affirmative defense
24 that "the Complaint, and each cause of action therein, is barred
25 due to the fraudulent representations made by AmTrust instructing
26 and directing First Priority Financial not to verify any income
27 representations made by a borrower, while representing that
28 AmTrust would be performing the underwriting of a loan." Answer

1 16:17-22.

2 Plaintiff contends that Defendant's twenty-seventh
3 affirmative defense should be stricken for failure to meet the
4 heightened pleading requirements of Rule 9(b). Defendant
5 counters that it has met Rule 9(b)'s requirements. Defendant
6 also contends that "the knowledge of specific persons that made
7 the representations and sent/posted the instructions . . . are in
8 possession of AmTrust." Opp'n 9:19-22.

9 Rule 9(b) prescribes: "in all averments of fraud or mistake,
10 the circumstances constituting fraud or mistake shall be stated
11 with particularity." Fed. R. Civ. P. 9(b). Rule 9(b)'s
12 particularity requirement applies to affirmative defenses. ADP
13 Commercial Leasing, Inc. v. M.G. Santos, Inc., No. CV F 13-0587
14 LJO SKO, 2013 WL 3863897, at *9 (E.D. Cal. July 24, 2013) (citing
15 Multimedia Patent Trust v. Microsoft Corp., 525 F. Supp. 2d 1200,
16 1210-11 (S.D. Cal. 2007)). "[Rule] 9(b) requires more
17 specificity including an account of the 'time, place, and
18 specific content of the false representations as well as the
19 identities of the parties to the misrepresentations.'" Swartz v.
20 KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (quoting Edwards v.
21 Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004) (citation
22 omitted)); see also Kearns v. Ford Motor Co., 567 F.3d 1120, 1124
23 (9th Cir. 2009) (citations omitted) ("Averments of fraud must be
24 accompanied by the who, what, when, where, and how of the
25 misconduct charged.").

26 An exception to the particularity standard exists. The
27 Ninth Circuit "has held that the general rule that allegations of
28 fraud based on information and belief do not satisfy Rule 9(b)

1 may be relaxed with respect to matters within the opposing
2 party's knowledge[; i]n such situations, [a party] cannot be
3 expected to have personal knowledge of the relevant facts."
4 Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993). However,
5 evidence of AmTrust's alleged fraudulent behavior has not been
6 shown to be peculiarly within the possession of Plaintiff and
7 thus the exception to Rule 9(b)'s heightened pleading standard
8 does not apply.

9 While Defendant provides factual support for its fraud
10 affirmative defense in its opposition, see Opp'n 9:13-22,
11 "Defendant's allegations in [its o]pposition do not serve to cure
12 the deficiency in [its a]nswer." See Shellabarger v. Dicharry,
13 No. 2:13-CV-00188-TLN, 2014 WL 5797194, at *3 (E.D. Cal. Nov. 6,
14 2014). "Defendant must give Plaintiff[] fair notice of [its]
15 affirmative defenses in [its a]nswer-not in an [o]pposition to
16 Plaintiff['s] [m]otion filed at some later date." See id.; see
17 also Fed. R. Civ. Proc. 8(c)(1) (requiring that a party state its
18 affirmative defenses in a "responsive pleading"); Fed. R. Civ.
19 Proc. 7(a) (defining the following documents as "pleadings":
20 "(1) a complaint; (2) answer to a complaint; (3) answer to a
21 counterclaim designated as a counterclaim; (4) answer to a
22 crossclaim; (5) third-party complaint; (6) answer to a third-
23 party complaint; and (7) if ordered by the court, a reply to an
24 answer."); Morrison v. Mahoney, 399 F.3d 1042, 1046 (9th Cir.
25 2005) (explaining that "anything" not listed as a pleading under
26 Rule 7(a) is a "motion or paper").

27 As pled, Defendant's fraud defense fails to allege the "who,
28 where, and when" of the fraud. See Kearns, 567 F.3d at 1124.

1 Accordingly, the Court GRANTS Plaintiff's motion to strike
2 Defendant's twenty-seventh affirmative defense but Defendant is
3 given to leave amend this defense. See Wyshak v. City Nat'l
4 Bank, 607 F.2d 824, 826 (9th Cir. 1979) ("In the absence of
5 prejudice to the opposing party, leave to amend should be freely
6 given.").

7 III. ORDER

8 For the reasons set forth above, it is hereby ordered that
9 Plaintiff's Motion to Strike is GRANTED as follows:

10 1. Plaintiff's Motion to Strike Defendant's twelfth and
11 twenty-sixth affirmative defenses is GRANTED WITH PREJUDICE.

12 2. Plaintiff's Motion to Strike Defendant's twenty-seventh
13 affirmative defense is GRANTED WITH LEAVE TO AMEND.

14 Defendant shall file any amended answer within twenty days
15 of this Order.

16 As a final matter, Defendant's opposition is one page longer
17 than the page limit allowed by this Court's standing order. See
18 Order re Filing Requirements (Doc. #3-2) at p. 1. In accordance
19 with that order, Defendant's counsel, Patton & Sullivan LLP, is
20 sanctioned in the amount of \$50.00. Id. ("A violation of this
21 Order will result in monetary sanctions being imposed against
22 counsel in the amount of \$50.00 per page. . . .") Counsel is to
23 pay this amount within five days of the date of this Order.

24 IT IS SO ORDERED.

25 Dated: June 16, 2016

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27 
28 JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE