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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DANIEL BRUNO, individually
and on behalf of others
similarly situated,

Plaintiff,

v.

EQUIFAX INFORMATION SERVICES,
LLC and GENEVA FINANCIAL
SERVICES, LLC,

Defendants.

CIV. NO. 2:17-0327 WBS EFB

MEMORANDUM AND ORDER RE: MOTIONS
TO STRIKE

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Plaintiff Daniel Bruno brought this putative class
action against defendants Equifax Information Services, LLC
("Equifax") and Geneva Financial Services, LLC ("Geneva"),¹

¹ Five other defendants--RMB World Enterprises, BB
Direct, Genesis Marketing Group, American Marketing and Mailing
Services, and Strategic Marketing Services--were named in this
action. (Compl. ¶¶ 3-7 (Docket No. 1).) Plaintiff has dismissed
each of those defendants from this action. (See Docket Nos. 22,

1 alleging that defendants sold his and putative class members'
2 consumer reports to other parties for impermissible marketing
3 purposes in violation of the Fair Credit Reporting Act ("FCRA").
4 (Compl. (Docket No. 1).) Before the court are plaintiff's
5 Motions to strike each of the defenses alleged in defendants'
6 Answers. (Pl.'s Mot. as to Equifax (Docket No. 41); Pl.'s Mot.
7 as to Geneva (Docket No. 43).)

8 I. Factual and Procedural Background

9 Plaintiff is a California resident. (See Compl. Ex. B,
10 Car Loan Notice (indicating plaintiff resides in California)
11 (Docket No. 1-2).) Equifax is a credit reporting agency.
12 (Compl. ¶ 37.) Geneva is allegedly a collector of consumer
13 credit information and intermediary between Equifax and various
14 marketing agencies. (See id. ¶¶ 17, 28.)

15 In February 2016, plaintiff received a notice from a
16 Hanlees Nissan Chevrolet ("Hanlees") stating that he had been
17 prequalified for a car loan of \$5,500 to \$39,000. (Car Loan
18 Notice.) The notice identified Geneva as the lender. (Id.)
19 Plaintiff alleges that the notice was sent to him because Geneva
20 obtained a copy of his consumer report from Equifax and forwarded
21 the report to a marketing agency that was working on Hanlees'
22 behalf. (See Compl. ¶¶ 17, 21, 43.)

23 After receiving the car loan notice, plaintiff
24 contacted Hanlees to apply for the loan the notice stated he had
25 been prequalified for. (Id. ¶ 23.) Hanlees advised him to
26 contact Geneva regarding the loan. (Id.) When plaintiff

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28 29, 40, 56, and 62.)

1 contacted Geneva regarding the loan, Geneva allegedly informed
2 him that it "did not finance vehicles for purchase and instructed
3 him to contact the . . . car dealership for financing approval."
4 (Id. ¶ 26.)

5 Plaintiff thereafter filed this putative class action.
6 (Id. at 23.) Plaintiff alleges that his experience with Hanlees
7 and Geneva was the result of a nationwide scheme whereby Equifax
8 sells "tens of thousands of consumer reports" to Geneva and
9 Geneva sells such reports to and partners with various marketing
10 agencies for the purpose of "conduct[ing] promotional inquiries
11 [using] bogus firm offers of credit." (See id. ¶¶ 17, 21, 30.)
12 Such a scheme, plaintiff contends, violates the FCRA. (Id. at
13 1.) Plaintiff brings a cause of action against defendants for
14 furnishing and failing to maintain reasonable procedures designed
15 to avoid furnishing consumer reports to other parties for
16 "impermissible marketing purposes" in violation 15 U.S.C. §§
17 1681b and 1681e(a). (Id. at 16-18.) Plaintiff also brings
18 causes of action against Geneva for obtaining consumer reports
19 for "impermissible marketing purposes" in violation of 15 U.S.C.
20 §§ 1681b(f) and 1681e(e), and obtaining such reports under false
21 pretenses in violation of 15 U.S.C. § 1681q. (Id. at 18-21.)

22 Defendants have filed separate Answers to plaintiff's
23 Complaint. (See Equifax's Answer (Docket No. 32); Geneva's
24 Answer (Docket No. 34).) Equifax alleges seven defenses² in its
25 Answer. (Equifax's Answer at 12-13.) Geneva alleges sixteen

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27 ² The term "defense" in this Order refers to both
28 affirmative defenses and challenges to plaintiff's prima facie
case.

1 defenses in its Answer. (Geneva's Answer at 11-14.) Plaintiff
2 now moves to strike each of the defenses alleged in defendants'
3 Answers under Federal Rule of Civil Procedure 12(f). (Pl.'s Mot.
4 as to Equifax; Pl.'s Mot. as to Geneva.)

5 II. Legal Standard

6 Rule 12(f) authorizes the court to strike
7 "insufficient" affirmative defenses³ and "redundant, immaterial,
8 impertinent, or scandalous matter[s]" from pleadings. Fed. R.
9 Civ. P. 12(f).

10 Affirmative defenses may be insufficient "as a matter
11 of law" or "as a matter of pleading." Harris v. Chipotle Mexican
12 Grill, Inc., 303 F.R.D. 625, 627 (E.D. Cal. 2014) (citing Dodson
13 v. Strategic Rests. Acquisition Co. II, LLC, 289 F.R.D. 595, 603
14 (E.D. Cal. 2013) (Karlton, J.)). An affirmative defense is
15 insufficient as a matter of law "if it lacks merit under any set
16 of facts the defendant might allege." Id. (citing Dodson, 289
17 F.R.D. at 603). An affirmative defense is insufficient as a
18 matter of pleading if it fails to provide "fair notice" of its
19 nature and grounds to the plaintiff. Kohler v. Flava Enters.,
20 Inc., 779 F.3d 1016, 1019 (9th Cir. 2015).⁴ "Fair notice" of an

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22 ³ "An affirmative defense is a defense that does not
23 negate the elements of the plaintiff's claim, but instead
24 precludes liability even if all of the elements of the
25 plaintiff's claim are proven." Hernandez v. Dutch Goose, Inc.,
26 No. C 13-03537 LB, 2013 WL 5781476, at *3 (N.D. Cal. Oct. 25,
27 2013). "A defendant bears the burden of proof on its affirmative
28 defenses." Id.

26 ⁴ Plaintiff argues that Kohler "did not specifically
27 hold" that the "fair notice" standard applies to affirmative
28 defenses, and the court should apply the "plausibility" standard
stated in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and

1 affirmative defense only requires that the defendant describe the
2 defense in "general terms." Id.

3 "[R]edundant" matters are those "that are needlessly
4 repetitive." City of Colton v. Am. Promotional Events, Inc., No.
5 EDCV 09-1864 PSG SSX, 2012 WL 32606, at *2 (C.D. Cal. Jan. 5,
6 2012). "[I]mmaterial" matters are those "which [have] no
7 essential or important relationship to the claim[s] for relief or
8 the defenses being pleaded." Id. "[I]mpertinent" matters are
9 those "that do not pertain, and are not necessary, to the issues
10 in question." Id. "[S]candalous" matters are those that
11 "improperly cast[] a derogatory light on someone, usually a
12 party." Wilkerson v. Butler, 229 F.R.D. 166, 170 (E.D. Cal.
13 2005) (O'Neill, J.).

14 III. Discussion

15 A. Defenses That Are Not Affirmative Defenses

16 i. Equifax

17 The court has reviewed Equifax's Answer and determined
18

19 Ashcroft v. Iqbal, 556 U.S. 662 (2009) to the defenses stated in
20 defendants' Answers. (See Pl.'s Reply as to Equifax at 2 (Docket
21 No. 65).) The court acknowledges that a number of decisions from
22 the Northern District of California have continued to apply the
23 "plausibility" standard to affirmative defenses post-Kohler.
24 See, e.g., Murphy v. Trader Joe's, No. 16-CV-02222 SI, 2017 WL
25 235193, at *2 (N.D. Cal. Jan. 19, 2017). This court, however,
26 has generally understood Kohler to have held that the "fair
27 notice" standard applies to affirmative defenses. See Jing Jing
28 Yao v. City of Folsom, No. 2:16-CV-2609 MCE AC, 2017 WL 1383274,
at *2 (E.D. Cal. Apr. 18, 2017) ("[T]his Court has . . . held
that Kohler resolves the issue of which pleading standard applies
to affirmative defenses"); Rodriguez v. Brown, No. 1:15-
CV-1754 LJO EPG (PC), 2017 WL 1090161, at *1 (E.D. Cal. Mar. 22,
2017) (same); Television Educ., Inc. v. Contractors Intelligence
Sch., Inc., No. CV 2:16-1433 WBS EFB, 2016 WL 7212791, at *1 n.2
(E.D. Cal. Dec. 12, 2016) (same).

1 that Equifax's first, second, third, fifth, sixth, and seventh
2 defenses are not affirmative defenses. Such defenses need not be
3 pled in Equifax's Answer although they may still be raised later
4 in this action. Accordingly, the court will strike such
5 defenses.

6 ii. Geneva

7 The court has reviewed Geneva's Answer and determined
8 that Geneva's first, tenth, eleventh, twelfth, fourteenth,
9 fifteenth, and sixteenth defenses are not affirmative defenses.
10 Such defenses need not be pled in Geneva's Answer although they
11 may still be raised later in this action. Accordingly, the court
12 will strike such defenses.

13 B. Defenses That Are Affirmative Defenses But Fail to Give
14 Fair Notice

15 Geneva's fourth defense states that "[a]t all relevant
16 times, [Geneva] acted within the absolute and qualified
17 privileges afforded it under the FCRA, the United States
18 Constitution, applicable State Constitutions, and the common
19 law." (Geneva's Answer at 12.) This defense does not specify
20 what privilege Geneva asserts or explain how that privilege might
21 be relevant in this action. The court finds that Geneva has
22 failed to provide plaintiff fair notice of this defense, and will
23 strike the defense.

24 Geneva's sixth defense states that "[p]laintiff's
25 claims are barred, in whole, or in part, by the equitable
26 theories of estoppel, waiver, and laches." (Id.) Geneva does
27 not explain, and it is not apparent to the court, how the legal
28 doctrines cited in this defense are relevant in this action.

1 Without providing such information, Geneva cannot be said to have
2 provided plaintiff fair notice of this defense. Accordingly, the
3 court will strike this defense.

4 Geneva's eighth defense states that "Plaintiff, though
5 under a duty to do so, has failed and neglected to reasonably
6 mitigate his alleged damages and, therefore, cannot recover
7 against [Geneva]." (Id. at 13.) The only actual damages alleged
8 in plaintiff's Complaint are for "mental distress and emotional
9 anguish stemming from the ongoing invasion of [plaintiff's]
10 privacy." (Compl. ¶ 100.) Geneva does not explain, and it is
11 not apparent to the court, how plaintiff could have mitigated
12 such damages. The court finds that Geneva has not provided
13 plaintiff fair notice of its mitigation defense, and will strike
14 that defense.

15 Geneva's ninth defense states that "[a]ny credit report
16 or other information released by [Geneva] to a third party
17 concerning Plaintiff was done pursuant to the express provisions
18 of the FCRA." (Geneva's Answer at 13.) Similar to Geneva's
19 fourth defense, this defense states neither the specific FCRA
20 provision Geneva allegedly acted pursuant to nor how that
21 provision might be relevant in this action. Accordingly, the
22 court will strike this defense.

23 C. Defenses That Are Affirmative Defenses and Provide Fair
24 Notice

25 i. Equifax

26 Equifax's fourth defense states that the FCRA
27 violations alleged in plaintiff's Complaint are "the fault of
28 other persons or entities and Plaintiff's damages, if any, should

1 be apportioned according to the principles of comparative fault.”
2 (Equifax’s Answer at 13.) Comparative fault is an affirmative
3 defense to negligence claims. See J & J Sports Prods., Inc. v.
4 Delgado, No. 1:12-CV-1945 LJO SKO, 2013 WL 3288564, at *5 (E.D.
5 Cal. June 28, 2013). At oral argument, the parties agreed that
6 plaintiff has alleged a negligence cause of action under the FCRA
7 in this action. It is thus apparent that comparative fault is a
8 relevant issue in this action, and plaintiff is aware of the
9 general terms of that defense. Accordingly, the court will not
10 strike this defense.⁵

11 ii. Geneva

12 Geneva’s second defense states that at all relevant
13 times, Geneva “had in place reasonable and appropriate procedures
14 in compliance with the Fair Credit Reporting Act (‘FCRA,’ 15
15 U.S.C. §§ 1681a-v) in its handling of all credit data, including
16 . . . data relating to Plaintiff.” (Geneva’s Answer at 11.)
17 Geneva cites Taylor v. First Advantage Background Servs. Corp,
18 207 F. Supp. 3d 1095 (N.D. Cal. 2016) in support of its
19 contention that this defense is an affirmative defense, which
20 plaintiff did not oppose at oral argument. As plaintiff raised
21 the issue of whether defendants employed reasonable procedures to
22 help ensure compliance with the FCRA in his Complaint, (see
23 Compl. ¶¶ 94, 106), the court finds that he has fair notice of
24 this defense.

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26 ⁵ Plaintiff stated at oral argument that this defense
27 should be stricken because Equifax has not joined the other
28 allegedly liable parties to this action. Plaintiff does not
cite, and the court is not aware of, an authority that requires
such joinder in order to assert a comparative fault defense.

1 The court will strike Geneva's third defense, as it is
2 redundant of Geneva's second defense.

3 Geneva's fifth defense states that "Plaintiff has
4 failed to join a party needed for the just adjudication of [this]
5 action pursuant to the requirements of Rule 19 of the Federal
6 Rules of Civil Procedure (Fed. R. Civ. P. 19), in that if Geneva
7 is liable to Plaintiff . . . it is liable to Plaintiff jointly
8 with Datamyx LLC and/or Deluxe Corporation." (Geneva's Answer at
9 12.) As this defense both cites a specific authority and
10 provides the names of the specific parties at issue, the court
11 finds that Geneva has provided plaintiff fair notice of this
12 defense.

13 Geneva's seventh defense states that "any purported
14 damages to Plaintiff . . . are the result of the actions,
15 omissions, and/or errors of individuals and/or entities . . .
16 over whom [Geneva] has neither authority [nor] ability to
17 control." (Id. at 12-13.) Geneva represented at oral argument
18 that this defense is the same defense as Equifax's comparative
19 fault defense. The court declines to strike this defense for the
20 same reason it declines to strike Equifax's comparative fault
21 defense.

22 Geneva's thirteenth defense states that "[s]ome or all
23 of Plaintiff['s] claims are barred by applicable statutes of
24 limitations, including but not limited to 15 U.S.C. § 1681[p]." (Id.
25 at 14.) Geneva represented at oral argument that this
26 defense is without merit and conceded that it should be stricken.
27 Accordingly, the court will strike this defense.

28 IT IS THEREFORE ORDERED that plaintiff's Motions to

1 strike defendants' defenses be, and the same hereby are, GRANTED
2 IN PART as follows:

3 (1) Equifax's first, second, third, fifth, sixth, and
4 seventh defenses are stricken.

5 (2) Geneva's first, third, fourth, sixth, eighth, ninth,
6 tenth, eleventh, twelfth, thirteenth, fourteenth,
7 fifteenth, and sixteenth defenses are stricken.

8 Plaintiff's Motions are DENIED in all other respects.

9 Defendants have twenty days from the date this Order is
10 signed to file amended Answers, if they can do so consistent with
11 this Order.

12 Dated: June 30, 2017



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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