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UNITED STATES DISTRICT COURT

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SOUTHERN DISTRICT OF CALIFORNIA

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ATLEY HENRY; LAURA HENRY,

CASE NO. 17cv0688 JM(NLS)

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Plaintiff,

ORDER DENYING MOTION TO
STRIKE

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v.

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OCWEN LOAN SERVICING, LLC.;
IMPAC MORTGAGE CORP.,

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Defendants.

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BACKGROUND

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Pursuant to Fed.R.Civ.P. 12(f), Plaintiffs Atley and Laura Henry move to strike the affirmative defenses alleged by Defendants Ocwen Loan Servicing, LLC (“Ocwen”) and Deutsche Bank National Trust Company (“Deutsche Bank”), erroneously sued as Impac Mortgage Corp. (“Impac”), as Trustee Under the Pooling and Servicing Agreement Relating to Impac Secured Assets Corp., in response to Plaintiff First Amended Complaint (“FAC”). Defendants oppose the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below, the court denies the motion to strike.

On June 27, 2017, Plaintiffs filed the FAC, alleging four causes of action for: (1) violation of the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §1681s-2(b); (2) violation of the California Consumer Credit Reporting Agencies Act (“CCCRA”), Cal.

1 Div. Code §1785.25(a); (3) violation of the Rosenthal Fair Debt Collection Practices
2 Act (“RFDCPA”); and (4) breach of contract. Plaintiffs’ causes of action arise from
3 the following generally described allegations.

4 In 2009, Plaintiffs allegedly obtained a “home mortgage loan” from Impac, who
5 had retained Ocwen to act as the loan servicer. (FAC ¶¶17, 18). “At some point in
6 2012 or 2013, Plaintiffs began suffering financial difficulties in making their full
7 monthly payments upon the loan.” (FAC ¶23). In July 2013, Plaintiffs allegedly
8 received a document from Impac entitled “Loan Modification Agreement,” indicating
9 that the monthly payments were being reduced to \$310.09. (FAC ¶25). By letter dated
10 October 16, 2013, Ocwen informed Plaintiffs that their loan modification had been
11 approved, subject to submitting a notarized signed loan modification by October 26,
12 2013. (FAC ¶28). Plaintiffs complied with this requirement.

13 In December 2013, Plaintiffs began making the monthly \$310.09 payment.
14 However, Ocwen would not accept the payments, placed some of the payments in an
15 escrow account, and rejected others. (FAC ¶¶ 32-36). Plaintiffs contacted Impac and
16 were informed that the loan had, in fact, been modified. Impac also represented that
17 Ocwen “was really bad about paperwork, and instructed Plaintiffs to continue to make
18 their monthly payments.” “At some point in 2014,” Plaintiffs again contacted Ocwen
19 to inquire as to why their payments were not being accepted and were allegedly
20 informed that they were investigating the issue. (FAC ¶40).

21 Plaintiffs retained counsel in December 2014. Ocwen then allegedly represented
22 that it would not honor “the October 2013 modification agreement because it was not
23 a lucrative deal for Ocwen.” (FAC ¶45). The parties attempted to resolve their dispute.
24 The parties’ informal settlement discussions continued until January 2017. At that
25 time, Plaintiffs discovered that Ocwen had been furnishing new information each
26 month to the credit reporting agencies indicating that Plaintiffs’ account was over 180
27 days past due and the monthly shortfall in payments was \$964. As of November 30,
28 2016, the account was allegedly past due by more than \$40,663. Had Defendants

1 honored the loan modification, allegedly, the account would be current.

2 In February 2017, Plaintiffs provided written dispute letters to all consumer
3 credit reporting agencies (Experian, Equifax, and Trans Union) informing them about
4 the allegedly false and misleading information being reported by Ocwen. (FAC ¶58).
5 The credit reporting agencies contacted Ocwen about Plaintiffs' dispute letters. Ocwen
6 responded to the inquiry and represented that the reported past due amounts were
7 correct.

8 Plaintiffs allege that Ocwen failed "to conduct a reasonable re-investigation of
9 the disputed information, and failed to update/modify/delete inaccurate information."
10 (FAC ¶64). Since April 5, 2016, Plaintiffs allege that they have received multiple
11 letters from Ocwen threatening to seek foreclosure upon the loan and take possession
12 of the property. Ocwen has never initiated foreclosure proceedings.

13 On August 23, 2017, the court denied Defendants' motion to dismiss.
14 Defendants answered on September 6, 2017, and Plaintiffs move to dismiss the
15 affirmative defenses identified in the FAC.

16 DISCUSSION

17 Legal Standard

18 Federal Rule of Civil Procedure 12(f) provides that the court "may strike from
19 a pleading an insufficient defense or any redundant, immaterial, impertinent, or
20 scandalous matter." "The function of a 12(f) motion to strike is to avoid the
21 expenditure of time and money that must arise from litigating spurious issues by
22 dispensing with those issues prior to trial. . . ." Whittlestone, Inc. v. Handi-Craft Co.,
23 618 F.3d 970, 973 (9th Cir. 2010) (quoting Fantasy, Inc. v. Fogerty, 984 F.2d 1524,
24 1527 (9th Cir. 1993, rev'd on other grounds 510 U.S. 517 (1994)). "The key to
25 determining the sufficiency of pleading an affirmative defense is whether it gives
26 plaintiff fair notice of the defense." Wyshak v. City Nat'l Bank, 607 F.2d 924, 827 (9th
27 Cir. 1979).

28 Plaintiff contends that the heightened pleading standards enunciated in Bell Atl.

1 Corp. v. Twombly, 550 U.S. 544, 555 (2007) and Ashcroft v. Iqbal, 566 U.S. 662
2 (2009) apply equally to pleading affirmative defenses. In these authorities, the
3 Supreme Court held that a claim may not contain wholly conclusory allegations but
4 must allege “sufficient factual material to state a claim which is plausible on its face.”
5 Iqbal, 566 U.S. at 665.

6 The parties agree that no circuit court has addressed whether a heightened
7 pleading standard applies to affirmative defenses, and that district courts are split on
8 the issue. In support of application of the heightened pleading standard to affirmative
9 defenses, courts have reasoned that the “same logic holds true for pleading affirmative
10 defenses [as for pleading a complaint] - without alleging facts as part of the affirmative
11 defenses, [a] [p]laintiff cannot prepare adequately to respond to those defenses.”
12 Francisco v. Verizon South, Inc., 2010 WL 2990159 (E.D. VA July 29, 2010) (quoting
13 Holtzman v. B/E Aerospace, Inc., 2008 WL 2225668 (S.D. Fla. 2008)) (noting that the
14 majority of district courts to have reached this issue have held that Twombly applies
15 to affirmative defenses); Anticancer Inc. v. Xenogen Corp., 248 F.R.D. 278, 282 (S.D.
16 Cal. 2007) (Judge Rudi Brewster holding that Twombly applies to affirmative defenses
17 because “like claims, counterclaims, and cross-claims, affirmative defenses also make
18 claims to relief”).

19 On the other hand, courts have held that heightened pleading is not required
20 under Rule 8(c).

21 [While plaintiff contends that the pleading standard of Twombly] should
22 also apply to affirmative defenses, he acknowledges that the Supreme
23 Court has never so held. (See Reply at 6–7.) To be sure, there is some
24 lower court authority holding that Twombly does apply to affirmative
25 defenses. However, the Ninth Circuit has yet to so hold, and this Court is
26 not convinced that Twombly should also apply to affirmative defenses.
27 Twombly addressed only Rule 8(a)(2), which provides that “[a] pleading
28 that states a claim for relief must contain ... a short and plain statement of
the claim showing that the pleader is entitled to relief.” In Ashcroft v. Iqbal,
— U.S. —, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), the Supreme Court reasoned
that “[w]here the well-pleaded facts do not permit the court to infer more than
the mere possibility of misconduct, the complaint has alleged - but has not ‘shown’ -
that the pleader is entitled to relief.” In contrast to the language of Rule 8(a)
governing claims, the pertinent language of Rule 8(b) governing defenses generally
provides that “in responding to a pleading, a party must ... state in short and plain

1 terms its defenses to each claim asserted against it.” See Fed.R.Civ.P.
2 8(b)(1)(A). Further, Fed.R.Civ.P. 8(c)(1) governing affirmative defenses
3 in particular provides that “[i]n responding to a pleading, a party must
4 affirmatively state any avoidance or affirmative defense,” including the
5 various listed defenses. Neither Rule 8(b) nor Rule 8(c) contains language
6 that precisely corresponds to Rule 8(a)'s language requiring that the
7 pleader “show” that he is entitled to relief. Whether any of defendants'
8 affirmative defenses have been asserted in violation of Fed.R.Civ.P.
9 11(b)(4) is an issue that simply is not appropriate for adjudication at this
10 early stage of the proceedings, prior to plaintiff's propounding of
11 discovery directed to those affirmative defenses.

12 Garber v. Mohammadi, 2011 WL 2076341 (C.D. Cal. Jan. 19, 2011).

13 Although a close issue, the court concludes that affirmative defenses are not
14 subject to a heightened pleading standard. In addition to the technical Rule 8 argument
15 addressed in Garber, practical and judicial economy considerations further support
16 application of the traditional pleading standard for affirmative defenses. From a
17 practical point of view, a plaintiff may investigate a potential claim for weeks, months,
18 or even years before filing a complaint. To expect a defendant to retain counsel,
19 investigate claims, adequately prepare an answer, and to plead affirmative defenses
20 with particularity within 21 days of service of the complaint, Fed.R.Civ.P. 12(a)(1),
21 would seem to be unrealistic in most cases, subject to the nature and complexities of
22 each case. See Falley v. Friends Univ., 2011 U.S. Dist. LEXIS 40921 at *9 (D.Kan
23 April 14, 2011). Further, a heightened pleading standard may require the court to
24 address multiple motions to amend the answer as discovery reveals additional defenses.
25 See Ameristar Fence Prod., Inc v. Phx. Fence Co., 2010 U.S. Dist. LEXIS 81468 at *1
26 (D. Ariz. July 15, 2010). These considerations, in conjunction with the disfavored
27 nature of Rule 12(f) motions, and the limited role of pleadings in federal court, see
28 Stanbury Law Firm v. I.R.S., 221 F.3d 1059, 1063 (9th Cir. 2000), caution against the
application of the heightened pleading standard to affirmative defenses.¹

29 **The Motion**

30 In large part, Plaintiffs accurately represent that the affirmative defenses asserted

31 ¹ Consistent with Fed.R.Civ.P. 1, the court notes that there may be unique
32 circumstances where a heightened pleading standard is appropriate. However, this is
not one of those cases.


1 by Defendants are, in essence, boilerplate in nature and not necessarily applicable
2 under the particular circumstances of the case. At this early stage, nothing more is
3 required. The affirmative defenses are plainly stated. As the case commences
4 discovery, the court anticipates the parties will discover the contours of Plaintiffs'
5 claims and Defendants' defenses, and bring timely and appropriate motions.

6 Finally, the court rejects Plaintiffs' argument that enumerated Rule 12(b)
7 motions are not appropriately set forth as defenses in the answer. Rule 12(b)
8 specifically provides that defenses "may" be set forth in the answer or, alternatively,
9 be brought by separate motion. Fed.R.Civ.P. 12(b). Similarly, Rule 8(c) requires an
10 answer to "state any avoidance or affirmative defense." By any measure, enumerated
11 Rule 12(b) motions may be brought separately or, alternatively, included as an
12 affirmative defense.

13 In sum, the motion to strike is denied.

14 **IT IS SO ORDERED.**

15 DATED: February 26, 2018



Hon. Jeffrey T. Miller
United States District Judge

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17 cc: All parties

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