

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 TRINA ROADHOUSE; SCOTT)
4 ROADHOUSE,)
5 Plaintiffs,)
6 vs.)
7 PATENAUDE & FELIX, A.P.C., a foreign)
8 corporation; DOES I-V inclusive; and ROE)
9 Corporations VI-X, inclusive,)
10 Defendants.)

Case No.: 2:13-cv-00560-GMN-CWH

ORDER

11 Pending before the Court is the Motion to Strike Defendant’s Affirmative Defenses
12 (ECF No. 10) filed by Plaintiffs Trina and Scott Roadhouse (“Plaintiffs”). Defendant Patenaude
13 & Felix, APC (“Defendant”) filed a Response (ECF No. 15) and Plaintiffs filed a Reply (ECF
14 No. 18).

15 I. BACKGROUND

16 This case arises from a lawsuit initiated by Defendant against Plaintiffs in Clark County
17 District Court (“State Court Action”). In the State Court Action, Defendant sought collection
18 of “an alleged past due credit card account more than six years from when the documents in
19 Defendant’s possession indicated that any payment was made on the subject account.” (Mot. to
20 Strike 2:4–9, ECF No. 10; see also Compl. ¶¶ 24–29, ECF No. 1.) Although Plaintiffs
21 ultimately prevailed in the State Court Action, (Compl. ¶ 28), Plaintiffs filed this action in
22 federal court alleging causes of action for (1) Violations of the Federal Fair Debt Collection
23 Practices Act; (2) Violation of Nevada’s Deceptive Trade Practices Act; (3) Negligence; and
24 (4) Intentional Interference with Contractual Relations, (Compl. ¶¶ 31–53).

25 After Defendant filed its Answer, (ECF No. 8), Plaintiffs filed the instant motion in

1 which they request that the Court strike eight¹ of Defendant’s affirmative defenses (Mot. to
2 Strike 6:18–8:4, ECF No. 10.) Defendant initially filed a Motion for Leave to file an Amended
3 Answer, (ECF No. 14), but later filed a “Notice of Intent to Stand on First Filed Answer” (ECF
4 No. 23).

5 **II. LEGAL STANDARD**

6 “[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money
7 that must arise from litigating spurious issues by dispensing with those issues prior to trial . . .”
8 *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Rule 12(f) of the
9 Federal Rules of Civil Procedure authorizes a court to strike from a pleading, among other
10 things, “an insufficient defense.” Fed. R. Civ. P. 12(f). An affirmative defense is insufficiently
11 pleaded if it fails to give the plaintiff fair notice of the nature of the defense. See *Simmons v.*
12 *Navajo Cnty., Ariz.*, 609 F.3d 1011, 1023 (9th Cir. 2010) (citing *Wyshak v. City Nat’l Bank*, 607
13 F.2d 824, 827 (9th Cir. 1979)). Furthermore, the Court sees no reason that the pleading
14 standard announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v.*
15 *Iqbal*, 556 U.S. 662 (2009), should not equally apply to affirmative defenses. See, e.g., *Barnes*
16 *v. AT & T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D.
17 Cal. 2010).² Thus, to survive a motion to strike affirmative defenses, the defendant must plead

19 ¹ Plaintiffs’ Reply appears to request that the Court additionally strike affirmative defenses nine, eleven, and
20 twelve. (Reply 2:4, ECF No. 18.) However, because this request was not raised in Plaintiffs’ Motion to Strike,
21 the Court does not consider whether these affirmative defenses should be stricken and will consider only the
22 sufficiency of affirmative defenses one, two, three, five, six, eight, ten, and thirteen, as Plaintiffs requested in
23 their Motion. (Mot. to Strike 6:18–9:4, ECF No. 10.)

24 ² Defendant asserts that *Barnes* cautions a court to strike affirmative defenses only when “it appears to a
25 certainty that plaintiffs would succeed despite any state of the facts which could be proofed in support of the
defense.” (Resp. 2:6–15, ECF No. 15 (quoting *Barnes*, 718 F. Supp. 2d at 1170).) However, this ignores the first
part of the sentence from *Barnes* that limits this standard to affirmative defenses that were “properly pled.” See
Barnes, 718 F. Supp. 2d at 1170 (“[O]nce an affirmative defense has been properly pled, a motion to strike
which alleges the legal insufficiency of an affirmative defense will not be granted unless it appears to a certainty
that plaintiffs would succeed despite any state of facts which could be proved in support of the defense.”
(emphasis added) (internal quotation marks omitted)). Thus, before the Court would apply the rigorous standard
that Defendant requests, Defendant would have to first establish that the affirmative defenses are properly pled.
This, Defendant cannot do.

1 facts showing that the defense is plausible, not just possible. See *Iqbal*, 556 U.S. at 678 (citing
2 *Twombly*, 550 U.S. at 555).

3 If the court grants a motion to strike affirmative defenses as insufficiently plead, the
4 court must then decide whether to grant leave to amend. See, e.g., *Barnes*, 718 F. Supp. 2d at
5 1170, 1173. The court should “freely give” leave to amend when there is no “undue delay, bad
6 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
7 virtue of . . . the amendment, [or] futility of the amendment” Fed. R. Civ. P. 15(a); *Foman*
8 *v. Davis*, 371 U.S. 178, 182 (1962). Generally, a Court will deny leave to amend only when it
9 is clear that the deficiencies cannot be cured by amendment. See *DeSoto v. Yellow Freight Sys.,*
10 *Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

11 **III. DISCUSSION**

12 The Court agrees with Plaintiffs that Defendant’s Answer fails to provide the requisite
13 factual basis to support these eight affirmative defense. For the reasons discussed below, the
14 Court agrees with Plaintiffs and rejects each of Defendant’s arguments in opposition.

15 Defendant attempts to overcome Plaintiffs’ motion by arguing that *Twombly* and *Iqbal*
16 apply only to pleading claims under Rule 8(a), and do not apply to pleading affirmative
17 defenses under Rule 8(c). However, the Court is not persuaded by Defendant’s exceedingly
18 narrow interpretation of these cases. Rather, as discussed above, the Court is persuaded by
19 those cases that adopt the pleading standard for claims pleaded under Rule 8(a), articulated in
20 *Twombly* and *Iqbal*, as the standard for pleading affirmative defenses under Rule 8(c). See
21 *Barnes*, 718 F. Supp. 2d at 1172 (“The court can see no reason why the same principles applied
22 to pleading claims should not apply to the pleading of affirmative defenses which are also
23 governed by Rule 8.”). Furthermore, the Court agrees with the court in *Barnes* that “[a]pplying
24 the same standard will also serve to weed out the boilerplate listing of affirmative defenses
25 which is commonplace in most defendants’ pleadings where many of the defenses alleged are

1 irrelevant to the claims asserted.” Id. Accordingly, Defendant must allege sufficient facts to
2 establish that the affirmative defenses are plausible.

3 Here, each of the eight defenses that Plaintiffs seek to strike consists of a single
4 sentence. (Answer 2:13–4:3, ECF No. 8.) And, each of these sentences amounts to the type of
5 “formulaic recitation . . . with conclusory allegations” that Iqbal and Twombly soundly rejected.
6 See Iqbal, 556 U.S. at 678. In these affirmative defenses, Defendant alleged only conclusory
7 statements and failed to allege any identifiable facts supporting the affirmative defenses.
8 Defendant has failed to do anything more than assert that these affirmative defenses might
9 exist. Based on the statements in the Answer, the Court cannot find that these affirmative
10 defenses are plausible on their face.

11 Therefore, the Court must strike the following eight affirmative defenses found in
12 Defendant’s Answer: (1) “Plaintiff’s claims are forever barred by the doctrines of collateral
13 estoppel and/or res judicata”; (2) “Defendant is informed and believes and thereon alleges that
14 Plaintiff failed and neglected to mitigate any damages asserted in the Complaint, including but
15 not limited to any attorneys’ fees and costs”; (3) “Defendant alleges that all its actions were
16 taken in good faith and with a reasonable belief that such actions were legal, appropriate and
17 necessary, and thus unintentional for purposes of any statutory damages”; (5) “Defendant
18 alleges that any representations or statements alleged to have been made by Defendant were
19 true, accurate at the time made, and/or otherwise were made in good faith and with a reasonable
20 belief as to their validity and accuracy, and thus unintentional for purposes of any statutory
21 damages”; (6) “Declaratory relief is not permitted under the statutory schemes pled by
22 Plaintiff”; (8) “Defendant alleges that it relied upon the representations of its client that claims
23 were within the statute of limitations, and any inaccuracies or misrepresentations alleged were
24 the result of such reliance”; (10) “Defendant alleges that it relied upon the representations of its
25 client and any inaccuracies or misrepresentations alleged were the result of such reliance”; and

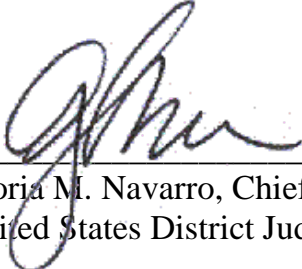
1 (13) “Defendant presently has insufficient knowledge or information on which to form a belief
2 as to whether Defendant may have additional, yet unstated, defenses available. Defendant
3 reserves herein the right to assert additional defenses in the event discovery indicates that they
4 would be appropriate.” (Answer 2:13–4:3.)

5 Just as these statements would be insufficient to state causes of action, they are also
6 insufficient to properly state an affirmative defense. However, even though the allegations in
7 Defendant’s Answer are inadequate, the Court cannot find that the defects in Defendant’s
8 Answer could not be cured by amendment. Accordingly, the Court will grant Defendant leave
9 to file an amended answer if it can cure the defects identified in this Order. Defendant shall file
10 its Amended Answer by **Monday, July 7, 2014**. Failure to file an amended answer shall result
11 in Defendant being barred from raising these affirmative defenses in this action.

12 **IV. CONCLUSION**

13 **IT IS HEREBY ORDERED** that Plaintiffs’ Motion to Strike Affirmative Defenses
14 (ECF No. 10) is **GRANTED**. Defendant’s first, second, third, fifth, sixth, eighth, tenth, and
15 thirteenth affirmative defenses are hereby stricken. Defendant shall file an Amended answer
16 that cures the defects identified in this Order by **Monday, July 7, 2014**. Failure to file an
17 Amended Answer by this date shall result in Defendant being barred from raising these
18 affirmative defenses in this action.

19 **DATED** this 23rd day of June, 2014.

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22 _____
23 Gloria M. Navarro, Chief Judge
24 United States District Judge
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