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Demurrers and Motions to Strike—They Aren't Just for Defendants Anymore

By Andrew Friedman

For decades, employment defense counsel have filed demurrers (state court)¹ and motions to strike (federal court)² to challenge plaintiffs' complaints in an effort to narrow the issues and/or force plaintiffs to clarify ambiguous allegations and claims. Relatively recently, however, plaintiffs' employment counsel have begun to seize the demurrer and motion to strike as weapons of their own to combat boilerplate, everything-but-the-kitchen-sink affirmative defenses.

The three most common grounds on which plaintiffs rely when filing demurrers/motions to strike are that affirmative defenses are: (1) insufficient as a matter of pleading because the Answer does not contain factual support; (2) legally insufficient because they are not actual affirmative defenses or are not cognizable given the claims asserted; and (3) uncertain because they do not identify to which specific cause(s) of action they apply. In response, the defense bar has argued that: (1) there is no requirement that affirmative defenses be supported by facts; (2) it is unfair to expect defendants to have facts to support defenses at such an

early stage in litigation; and (3) demurrers/motions to strike are a waste of time, money, and judicial resources.

Having to referee this dispute is the judiciary, which has warmed to the idea of plaintiffs using these mechanisms to challenge insufficient affirmative defenses. Indeed, one prominent Los Angeles Superior Court judge recently penned an article strongly suggesting that plaintiffs demur to answers because "too many attorneys lard their answers with empty affirmative defenses that cry out for removal" and that the elimination of these defenses will "force counsel to focus on the real issues."³ Moreover, a leading California civil litigation practice treatise authored by California judges—*California Practice Guide: Civil Procedure Before Trial*—specifically recommends that plaintiffs file demurrers to eliminate improper affirmative defenses, explaining that "[a] demurrer can be an effective tool for eliminating 'boilerplate' affirmative defenses that often appear in answers (e.g. 'waiver,' 'estoppel,' 'unclean hands,' etc.)."⁴

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The purpose of this article is to: (1) outline the authorities addressing the pleading standards applicable to affirmative defenses; (2) discuss arguments favoring and disfavoring challenges to affirmative defenses; and (3) summarize the law regarding challenges to the most frequently asserted affirmative defenses. Because California Superior Court decisions are neither readily available nor citable as precedent,⁵ and because the California courts of appeal have not thoroughly addressed demurrers to answers, the bulk of this article discusses federal cases.

CALIFORNIA AND FEDERAL LAW GENERALLY MANDATE THAT ALL PLEADINGS HAVE EVIDENTIARY SUPPORT

Section 128.7 of the California Code of Civil Procedure and Rule 11 of the Federal Rules of Civil Procedure provide that, whenever a pleading—which necessarily includes an answer with affirmative defenses—is filed, the filing attorney certifies that, to the best of his or her knowledge, *formed after an inquiry reasonable under the circumstances*, the pleading has evidentiary support. Under the letter, if not the spirit, of these certification requirements, defense attorneys should not assert any affirmative defenses in their answers unless they have first made a reasonable inquiry and determined evidentiary support exists for each affirmative defense asserted. Many courts have held that Rule 11 sanctions can be imposed against attorneys who assert affirmative defenses lacking evidentiary support.⁶ Aside from section 128.7 and Rule 11, other provisions of both California and federal law, as discussed in more detail below, mandate that affirmative defenses be pled with evidentiary support.

FEDERAL LAW: GROUNDS UPON WHICH A MOTION TO STRIKE AFFIRMATIVE DEFENSES MAY BE BROUGHT

Rule 12 of the Federal Rules of Civil Procedure allows a court to “strike from a pleading an insufficient defense.”⁷ An affirmative defense may be insufficient as a matter of law or as a matter of pleading.⁸

An affirmative defense is insufficient as a matter of law when it is not recognized as a defense to a particular claim⁹ or if it is not a true affirmative defense—a defense which, for example, demonstrates only that the plaintiff has not met her burden of proof on a necessary element of one of her claims.¹⁰ Such a defense is merely rebuttal against the evidence presented by the plaintiff.¹¹ On the other hand, “[a]n affirmative defense, under the meaning of Federal Rule of Civil Procedure 8(c), is a defense that does not negate the elements of the plaintiff’s claim, but instead precludes liability even if all of the elements of the plaintiff’s claim are proven.”¹²

An affirmative defense is insufficient as a matter of pleading if it does not comport with Rule 8 of the Federal Rules of Civil Procedure, which governs the general rules of pleading—whether by complaint or answer—in the federal courts. Rule 8 provides that claims for relief must set forth a “short and plain statement of the claim”¹³ and that affirmative defenses must be set forth in “short and plain terms.”¹⁴ In 1957, in *Conley v. Gibson*,¹⁵ the Supreme Court explained that Rule 8 requires that a plaintiff’s “short and plain statement” of her claim be sufficient to provide the defendant with “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”¹⁶

Although the Supreme Court did not (and has not) expressly addressed what it means for a defendant to plead its affirmative defenses in “short and plain terms,” the Ninth Circuit, in *Wyshak v. City National Bank*,¹⁷ adopted the “fair notice” standard from *Conley* and held that “the key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.”¹⁸ Accordingly, when pleading an affirmative defense under *Conley* and *Wyshak*, defendants are required to set forth a “short and plain” statement that gives the opposing party “fair notice” of the defense and the evidentiary facts upon which it rests.¹⁹

In 2007 and 2009, the United States Supreme Court abrogated *Conley* and clarified the Rule 8 pleading requirements in two opinions, *Bell Atlantic Corporation v. Twombly*²⁰ and *Aschcroft v. Iqbal*.²¹ In these opinions, the Supreme Court determined that Federal Rule 8 mandates that a pleading offer more than mere “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.”²² In other words, “[t]hreadbare recitals . . . supported by mere conclusory statements, do not suffice.”²³

Following the *Twombly* and *Iqbal* decisions, the district courts in the Ninth Circuit were confronted with the question of whether to stick with the *Conley/Wyshak* fair-notice standard when evaluating the sufficiency of affirmative defenses, or adopt the stricter *Iqbal/Twombly* plausibility standard. Because *Twombly* and *Iqbal* do not specifically address affirmative defenses, employment defense counsel argue *Iqbal/Twombly* should not apply to affirmative defenses. Rather,

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to the extent that defense counsel acknowledge that any pleading standard should apply to affirmative defenses, they argue that courts should reject the *Iqbal/Twombly* plausibility standard in favor of the *Conley/Wyshak* fair-notice standard, which they contend remains good law.

In *Vogel v. Huntington Oaks Delaware Partners, LLC*,²⁴ the Honorable Otis D. Wright II of the U.S. District Court for the Central District of California persuasively explained why the *Iqbal/Twombly* plausibility standard replaced the *Conley/Wyshak* fair-notice standard:

Framing the issue as a choice between *Twombly's* plausibility standard and *Wyshak's* fair-notice standard is misleading, because *Twombly* merely revised the fair-notice standard on which *Wyshak* is based. In *Wyshak*, the Ninth Circuit adopted the prevailing fair-notice standard for pleading complaints and applied it to affirmative defenses. At the time, fair notice was defined by *Conley v. Gibson*, which held that dismissal was warranted only if it appeared clear to the court that there were “no set of facts” that would entitle the plaintiff to relief. But *Conley* is no longer good law. *Twombly* and *Iqbal* soundly rejected the “no set of facts” standard by holding that fair notice requires the pleading of factual matter that creates a plausible right to relief. . . .

As a result, *Twombly* “changed the legal foundation underlying” *Wyshak*, and *Twombly's* plausibility requirement should apply to affirmative defenses just as *Conley's* “no set of facts” standard did before *Twombly* was decided. . . . In reaching this decision, the [c]ourt recognizes that nowhere in the text of *Twombly*, *Iqbal*, nor *Conley* does the Supreme Court discuss affirmative

defenses. But simply because the issue was not before the Supreme Court does not mean *Twombly's* logic applies with any less force to affirmative defenses.²⁵

Similarly, in *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*,²⁶ the Honorable Marilyn Hall Patel of the U.S. District Court for the Northern District of California “set forth a well-reasoned and thorough analysis in support of her finding that the pleading standard articulated by the Supreme Court in *Twombly* and *Iqbal* likewise applies to affirmative defenses.”²⁷

Not surprisingly, given the cogent opinions by Judge Wright, Judge Patel, and others, the vast majority of the district courts across the United States (including a majority of district courts in California) have, when presented with the issue, extended the heightened pleading standards of *Twombly* and *Iqbal* to affirmative defenses and stricken or granted leave to amend affirmative defenses that lack factual support.²⁸ The heightened standard is used to “weed out the boilerplate listing of affirmative defenses which is common place in most defendants’ pleadings.”²⁹ In other words, the simple listing of “a series of conclusory statements asserting the existence of an affirmative defense without stating factual reasons why that affirmative defense might exist” is insufficient.³⁰ These courts have held that requiring a defendant to bolster its affirmative defenses with factual support not only “serves the purpose of discouraging the commonplace practice of asserting every possible affirmative defense, even those that are entirely irrelevant to a plaintiff’s claim,”³¹ but also “avoid[s] the expenditure of time and money that must arise from litigating spurious issues” and “makes the issues less complicated.”³²

However, even those district courts that continue to apply the less strict *Conley/Wyshak* fair-notice standard have held that affirmative defenses must be stricken where they

fail to provide the plaintiff with fair notice of the defenses asserted (i.e. with factual support).³³ In *Kohler v. Staples the Office Superstore, LLC*,³⁴ one of the few cases to reject the *Iqbal/Twombly* plausibility standard in favor of the *Conley/Wyshak* fair-notice standard, the district court rejected the defendant’s argument that simple identifications of its affirmative defenses were sufficient. Rather, the district court held that even under the *Conley/Wyshak* standard, each affirmative defense must be pled with “factual underpinnings.” Accordingly, the district court struck all of the affirmative defenses that were pleaded without supporting facts.

Although many courts have held that no showing of prejudice is required on a motion to strike insufficient affirmative defenses,³⁵ the courts have recognized that “the obligation to conduct expensive and potentially unnecessary and irrelevant discovery” regarding insufficient affirmative defenses “is a prejudice.”³⁶

CALIFORNIA STATE LAW: GROUNDS UPON WHICH A DEMURRER TO AFFIRMATIVE DEFENSES MAY BE BROUGHT

Like federal law, California law specifically provides that affirmative defenses cannot be “proffered in the form of terse legal conclusions”; rather, affirmative defenses must aver facts “as carefully and with as much detail as the facts which constitute the cause of action and which are alleged in the complaint.”³⁷ Moreover, Code of Civil Procedure section 430.20 expressly provides that “[a] party against whom an answer has been filed may object, by demurrer . . . to the answer upon any one or more of the following grounds: (a) The answer does not state facts sufficient to constitute a defense.” The California Judges Benchbook specifically advises judges that the “determination of whether an answer states a defense is governed by the same principles that apply in determining if a

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complaint states a cause of action.”³⁸ Likewise, *California Practice Guide: Civil Procedure Before Trial* reaffirms that a demurrer to an answer can be brought on the ground of “[f]ailure to state facts sufficient to constitute a defense” and that affirmative defenses must be pleaded with “as much detail as the facts which constitute the cause of action and which are alleged in the complaint.”³⁹

In addition to demurring to the answer on grounds that the affirmative defenses fail to state facts sufficient to constitute a defense, a demurrer is also proper where the defense is “uncertain,” “ambiguous,” or “unintelligible,”⁴⁰ allowing challenges to purported affirmative defenses on the grounds that they are not true affirmative defenses.

Finally, a demurrer to an answer may be brought if the affirmative defenses do not specifically identify the causes of action they are intended to oppose.⁴¹

DEFENSE ARGUMENTS AGAINST BEING REQUIRED TO PROVIDE FACTUAL ALLEGATIONS IN SUPPORT OF THEIR AFFIRMATIVE DEFENSES

Defense counsel typically argue five points to support why they should be allowed to plead boilerplate affirmative defenses without supporting facts.

First, defense counsel who have removed a case to federal court and earlier filed an answer in state court (usually the day before removal), argue that they need not comply with any federal affirmative defense pleading standard because the complaint was filed in state court, and California purportedly does not require counsel to plead defenses with factual support. As discussed above, however, California mandates that affirmative defenses aver facts “as carefully and with as much detail as the facts which constitute the cause of action and which are alleged in the complaint.”⁴² Moreover, Rule 81 of the Federal Rules of Civil Procedure specifically empowers federal courts to order that parties re-plead after removal.⁴³ In any event, federal courts have rejected this argument under the rationale that the Federal Rules of Civil Procedure govern all pleadings in federal court—even those removed from state court.⁴⁴

Second, defense counsel argue that it is unfair to require them to support affirmative defenses with any facts, much less the factual detail required of plaintiffs in pleading complaints, because they have had insufficient time to investigate the plaintiff’s claims. A minority of district courts have found this argument persuasive,⁴⁵ even though it is based on a false premise. Most

defense counsel (particularly employment defense counsel) are well aware of a plaintiff’s claims long before the complaint is actually filed. In some cases, defense counsel will have had longer to prepare its defenses than plaintiff’s counsel had to prepare the complaint, where defense counsel represented and advised the defendant employer during the process which is at issue in the litigation. In most other cases, employment defense counsel will have had months to investigate the plaintiff’s claims to respond to an EEOC charge or a DFEH complaint or a demand letter from the plaintiff’s counsel, or to prepare for a pre-litigation mediation.

Moreover, any disadvantage employment defense counsel face related to time to investigate a claim is offset by the informational asymmetry inherent in the employer-employee relationship (*i.e.*, the employer generally has unfettered access to all of the documents, witnesses, and information surrounding the plaintiff’s employment). Some courts have bluntly rejected this “unfair burden” argument, holding that “this [burden] is part and parcel of being a defendant or defense counsel—they are always on their heels,” and because they can readily supplement their affirmative defenses when they learn of additional facts, “any real or perceived prejudice is largely a red herring.”⁴⁶

Third, defense counsel argue they should be allowed to use speculative affirmative defenses as “placeholders,” in case they later find factual support for the defenses, because otherwise they will have waived those defenses for failure to plead them. By acknowledging that they lack factual support for their defenses, defense counsel necessarily admit they have violated Rule 11/Section 128.7. Violation aside, most courts have found this argument unpersuasive, given that if a defendant must omit an affirmative defense for lack of the necessary factual support, it may do so secure in the knowledge that the Ninth Circuit has held that “if discovery reveals evidence supporting

additional affirmative defenses, defendants may freely seek leave from the court to amend their answers.³⁴⁷

Fourth, defense counsel often argue that demurrers/motions to strike affirmative defenses should be denied because plaintiffs' counsel are unable to show that inclusion of insufficient defenses causes prejudice. This argument is routinely rejected. Although some cases generally suggest that a motion to strike must be accompanied by a showing of prejudice,⁴⁸ defense counsel fail to recognize that in most of those cases (as Judge Patel recognized in *Barnes*⁴⁹), the party moving to strike attempted to do so pursuant to the "redundant, immaterial, impertinent, or scandalous matter," not the "insufficient," portion of Rule 12(f).⁵⁰ Thus, a showing of prejudice is not required to strike a pleading pursuant to the "insufficient" portion of Rule 12(f).⁵¹ In addition, the vast majority of cases recognize that even if a showing of prejudice was required, the prospect of expensive and potentially unnecessary and irrelevant discovery is more than sufficient prejudice to justify a motion to strike.⁵²

Fifth, defense counsel argue that it is a waste of time, money, and judicial resources to allow a plaintiff to demur to or move to strike insufficient affirmative defenses. Most courts have rejected this argument, finding the opposite to be true—prohibiting defendants from asserting factually insufficient affirmative defenses saves time, money, and judicial resources.⁵³

COMMON OBJECTIONS TO AFFIRMATIVE DEFENSES

Virtually every answer defense counsel file begins with the same purported defense, "Failure to State a Claim for Relief," which the courts routinely strike because it is not an affirmative defense.⁵⁴ Likewise, virtually every answer employment defense counsel file ends with the same purported defense, "Reservation of Rights," which courts routinely strike because it, too, is not

an affirmative defense.⁵⁵

Sandwiched between these two ubiquitous purported affirmative defenses are typically dozens of others that are not affirmative defenses or are factually insufficient defenses that courts routinely strike. For example, courts routinely strike negative defenses because they are not true affirmative defenses.⁵⁶ Similarly, the following affirmative defenses have been stricken because they are not legally cognizable defenses to employment claims: consent to discrimination/retaliation/wrongful termination;⁵⁷ comparative negligence in discrimination and/or retaliation claims;⁵⁸ assumption of the risk in discrimination claims;⁵⁹ fault of a third party in discrimination/retaliation claims;⁶⁰ punitive damages,⁶¹ and workers' compensation preemption to discrimination claims.⁶²

Finally, courts routinely strike the following affirmative defenses where defense counsel do not plead evidentiary support: unclean hands,⁶³ estoppel,⁶⁴ waiver,⁶⁵ laches,⁶⁶ failure to exhaust internal remedies,⁶⁷ claims limited by scope of administrative complaint,⁶⁸ failure to mitigate,⁶⁹ punitive damages,⁷⁰ and the statute of limitations.⁷¹ Indeed, some district courts view factually insufficient affirmative defenses with such disdain that they do not bother to individually analyze each defense; they simply strike them all.⁷² ⁴¹²

ENDNOTES

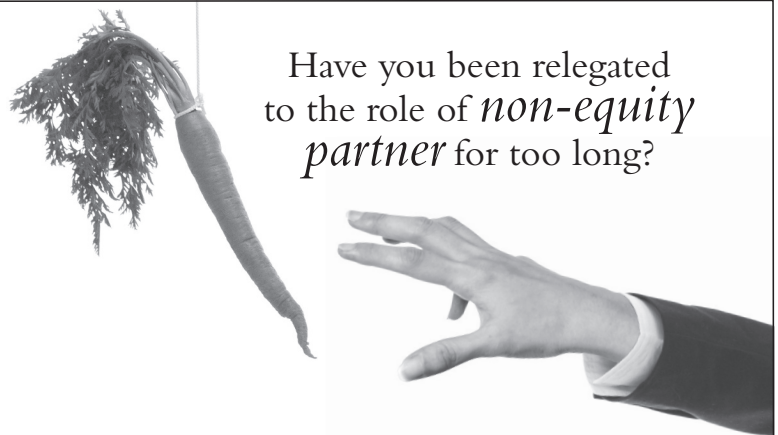
1. Cal. Civ. Proc. Code § 430.20.
2. Fed. R. Civ. P. 12(f).
3. See Anthony J. Mohr, *Surprise me! It may be time for a little more derring-do in the courtroom*, ADVOCATE (July 2014).
4. WEIL & BROWN, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 7:35 (The Rutter Group 2015) [hereinafter, CAL. PRAC. GUIDE].
5. *Budrow v. Dave & Buster's of California, Inc.*, 171 Cal. App. 4th 875, 885 (2009); *Santa Ana Hosp.*

Med. Ctr. v. Belshe, 56 Cal. App. 4th 819, 831 (1997).

6. *Ruth v. Unifund CCR Partners*, 604 F.3d 908, 911 (6th Cir. 2010); *MHC Invest. Co. v. Racom Corp.*, 323 F.3d 620 (8th Cir. 2003); *Mayfield v. County of Merced*, 2015 WL 791309, at *6 (E.D. Cal. 2015); *Davis v. United States*, 739 F. Supp. 2d 64 (D. Mass. 2010); *Gargin v. Morrell*, 133 F.R.D. 504, 506 (E.D. Mich. 1991). *But see Quintana v. Baca*, 232 F.R.D. 631, 633 (C.D. Cal. 2005).
7. FED. R. CIV. P. 12(f).
8. *Rodgers v. Claim Jumper Rest., LLC*, 2014 WL 1760959, at *1 (N.D. Cal. 2014); *Mayfield*, 2015 WL 791309, at *3; *Vogel v. Huntington Oaks Delaware Partners, LLC*, 291 F.R.D. 438, 440 (C.D. Cal. 2013); *Polk v. Legal Recovery Law Offices*, 291 F.R.D. 485, 488 (S.D. Cal. 2013).
9. *Tonka Corp. v. Rose Art Indus., Inc.*, 836 F. Supp. 200, 217 (D. N.J. 1993).
10. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).
11. *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010).
12. *Id.* (quoting *Mayfield*, 2015 WL 791309, at *2; *Roberge v. Hannah Marine Corp.*, 1997 WL 468330, at *3 (6th Cir. 1997)).
13. FED. R. CIV. P. 8(a)(2).
14. FED. R. CIV. P. 8(b)(2).
15. *Conley v. Gibson*, 355 U.S. 41 (1957).
16. *Id.* at 47.
17. *Wyshak v. City Nat. Bank*, 607 F.2d 824 (9th Cir. 1979).
18. *Id.* at 827.
19. *Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049 (N.D. Cal. 2004).
20. 550 U.S. 554 (2007).
21. 556 U.S. 662 (2009).
22. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).
23. *Id.*
24. 291 F.R.D. 438, 440 (C.D. Cal. 2013).
25. *Id.* (citations omitted); *see also*

- Hayden v. United States*, 2015 WL 350665, at *3-4 (D. Or. 2015) (agreeing with Judge Wright’s analysis).
26. 718 F. Supp. 2d 1167 (N.D. Cal. 2010).
 27. *Hayden*, 2015 WL 350665, at *5.
 28. *Barnes*, 718 F. Supp. 2d at 1171; *Mayfield*, 2015 WL 791309, at *3; *Hiramanek v. Clark*, 2015 WL 693222, at *1 (N.D. Cal. 2015); *Gibson Brands, Inc. v. John Hornby Skewes & Co.*, 2014 WL 4187979, at *4 (C.D. Cal. 2014); *Vogel v. Huntington Oaks Delaware Partners, LLC*, 291 F.R.D. 438, 440 (C.D. Cal. 2013); *Hayden*, 2015 WL 350665, at *5; *Castillo v. Roche Labs., Inc.*, 2010 WL 3027726, *2 (S.D. Fla. 2010).
 29. *Barnes*, 718 F. Supp. 2d at 1172.
 30. *Id.*
 31. *Vogel*, 291 F.R.D. at 441.
 32. *Gibson*, 2014 WL 4187979, at *2 (quoting *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)).
 33. See, e.g., *Figueroa v. Stater Bros. Markets*, 2013 WL 4758231, at *3 (C.D. Cal. 2013) (holding that even under the *Wyshak* standard “bare statements reciting mere legal conclusions” are insufficient).
 34. 291 F.R.D. 464, 469 (S.D. Cal. 2013).
 35. *Hayden*, 2015 WL 350665, at *2 (“A showing of prejudice is not required to strike an ‘insufficient’ portion of the pleading as opposed to ‘redundant, immaterial, impertinent, or scandalous matter’ under Rule 12(f)”) (quoting *Bottoni v. Sallie Mae, Inc.*, 2011 WL 3678878, at *2 (N.D. Cal. 2011)).
 36. *Minns v. Advanced Clinical Employment Staffing LLC*, 2014 WL 5826984, at *2 (N.D. Cal. 2014).
 37. *FPI Dev., Inc. v. Nakashima*, 231 Cal. App. 3d 367, 384 (1991); see also CAL. PRAC. GUIDE, *supra* note 4, at ¶ 6:459; *South Shore Land Co. v. Petersen*, 226 Cal. App. 2d 725, 732 (1964) (“Generally speaking, the determination whether an answer states a defense is governed by the same principles which are applicable in determining if a complaint states a cause of action”); accord 2 CAL. JUDGES BENCHBOOK CIV. PROC. BEFORE TRIAL § 12.27.
 38. 2 CAL. JUDGES BENCHBOOK CIV. PROC. BEFORE TRIAL § 12.27 (citing *South Shore*, 226 Cal. App. 2d at 732).
 39. CAL. PRAC. GUIDE, *supra* note 4, at ¶¶ 6:459, 7:35.
 40. Cal. Code Civ. Proc. § 430.20.
 41. Cal. Code Civ. Proc. § 431.30(g) (“defenses shall be separately stated[] and [they] shall refer to the causes of action which they are intended to answer”).
 42. *FPI*, 231 Cal. App. 3d at 384. See also CAL. PRAC. GUIDE, *supra* note 4, at ¶ 6:459; *FPI*, 231 Cal. App. 3d at 384; *South Shore*, 226 Cal. App. 2d at 732.
 43. Fed. R. Civ. Proc. 81(c)(2).
 44. *Sellers v. South Carolina Autism Soc., Inc.*, 2012 WL 1015807 (D. S.C. 2012).
 45. *Polk*, 291 F.R.D. at 490; *Holdbrook v. SAIA Motor Freight Line, LLC*, 2010 WL 865380 (D. Colo. 2010).
 46. *Vogel*, 291 F.R.D. at 441.
 47. *Dodson v. Strategic Restaurants Acquisition Co. II, LLC*, 289 F.R.D. 595, 602 (E.D. Cal. 2013) (quoting *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984)).
 48. *Harris v. Chipotle Mexican Grill, Inc.*, 303 F.R.D. 625, 628 (E.D. Cal. 2014); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003); *New York City Employees’ Ret. Sys. v. Berry*, 667 F. Supp. 2d 1121, 1128 (N.D. Cal. 2009).
 49. 718 F. Supp. 2d 1167 (N.D. Cal. 2010).
 50. *Barnes*, 718 F. Supp. 2d at 1173.
 51. *Hayden v. United States*, 2015 WL 350665, at *2 (D. Or. 2015); *Bottoni v. Sallie Mae, Inc.*, 2011 WL 3678878, at *2 (N.D. Cal. Aug. 22, 2011).
 52. *Barnes*, 718 F. Supp. 2d at 1173; *Hernandez v. Dutch Goose, Inc.*, 2013 WL 5781476, at *5 (N.D. Cal. 2013); see also *Ganley v. County of San Mateo*, 2007 WL 902551, at *1 (N.D. Cal. 2007) (motions to strike are proper even if their only purpose is to make the issues less complicated and “streamline the ultimate resolution of the action”).
 53. *Id.*
 54. *Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) (“A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense”); *Vogel*, 2014 WL 340662, at *2 (striking failure to state a claim affirmative defense); *Cassirer*, 2014 WL 5510996, at *3 (same); *Gibson*, 2014 WL 4187979, at *3 (same); *Minns*, 2014 WL 5826984, at *3 (same); *Quintana v. Baca*, 233 F.R.D. 562, 564 (C.D. Cal. 2005)(same); *J & J Sports Prods., Inc. v. Enequina Soto*, 2010 WL 3911467, at *1 (S.D. Cal. 2010)(same); *Polk v. Legal Recovery Law Offices*, 291 F.R.D. 485, 491 (S.D. Cal. 2013); *Richmond v. Mission Bank*, 2014 WL 2002312, at *5 (E.D. Cal. 2014)(same and citing supporting cases).
 55. *Cassirer*, 2014 WL 5510996, at *4 (striking reservation of rights affirmative defense); *Botell v. U.S.*, 2012 WL 1027270 (E.D. Cal. 2012) (same); *Paducah River Painting, Inc. v. McNational Inc.*, 2011 WL 5525938 (W.D. Ky. 2011).
 56. *Barnes*, 718 F. Supp. 2d at 1173.
 57. *Richmond v. Mission Bank*, 2014 WL 2002312, at *5 (E.D. Cal. 2014); *Mayfield*, 2015 WL 791309, at *4.
 58. *Ingram v. Pacific Gas & Elec. Co.*, 2014 WL 295829, at *3 (N.D. Cal. 2014); *Mayfield*, 2015 WL 791309, at *4.
 59. *Lane v. Micro-Focus (US), Inc.*, 2010 WL 5018146, at *3 (W.D. Wash. 2010); *Mayfield*, 2015 WL 791309, at *4.
 60. *Mayfield*, 2015 WL 791309, at *4.
 61. *Kiswani v. Phoenix Sec. Agency*,

- Inc.*, 2006 WL 463383, at *5 (N.D. Ill. 2006).
62. *Mayfield*, 2015 WL 791309, at *4.
63. *Vogel v. OM ABS, Inc.*, 2014 WL 340662, at *2 (C.D. Cal. 2014); *Mayfield*, 2015 WL 791309, at *6.
64. *Desert European Motorcars, LTD v. Desert European Motorcars, Inc.*, 2011 WL 3809933, at *2-*4 (C.D. Cal. 2011); *Vogel*, 2014 WL 340662, at *2; *Mayfield*, 2015 WL 791309, at *6; *Kohler v. Staples the Office Superstore, LLC*, 291 F.R.D. 464, 470 (S.D. Cal. 2013); *Polk*, 291 F.R.D. at 491.
65. *Desert European*, 2011 WL 3809933, at *2-*4; *Vogel*, 2014 WL 340662, at *2; *Mayfield*, 2015 WL 791309, at *6; *Kohler*, 291 F.R.D. at 470; *Polk*, 291 F.R.D. 485 at 491.
66. *Desert European*, 2011 WL 3809933, at *2-*4; *Vogel*, 2014 WL 340662, at *2; *Mayfield*, 2015 WL 791309, at *6; *Kohler*, 291 F.R.D. at 470; *Polk*, 291 F.R.D. at 491.
67. *Richmond v. Mission Bank*, 2014 WL 2002312, at *6 (E.D. Cal. 2014).
68. *Richmond*, 2014 WL 2002312, at *7.
69. *Kohler*, 291 F.R.D. at 469; *Vogel*, 2014 WL 340662, at *3; *Polk*, 291 F.R.D. at 491; *Nextdoor.com, Inc. v. Abhyanker*, 2013 WL 3802526, at *10 (N.D. Cal. 2013); *Dairy Employees Union Local No. 17 v. Dairy*, 2015 WL 505934, at *6 (C.D. Cal. 2015).
70. *E.E.O.C. v. Kelley Drye & Warren, LLP*, 2011 WL 3163443, at *5 (S.D.N.Y. 2011).
71. *Gibson*, 2014 WL 4187979, at *5; *J&J Sports Prods., Inc. v. Montanez*, 2010 WL 5279907, at *3 (E.D. Cal. 2010); *Desert European*, 2011 WL 3809933, at * 3.
72. *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 (N.D. Cal. 2013); *Dion v. Fulton Friedman & Gullace LLP*, 2012 WL 160221, at *3 (N.D. Cal. 2012); *Barnes*, 718 F. Supp. 2d at 1173.



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