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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RABI YOUSSOFI,

Plaintiff,

v.

ALLIED INTERSTATE LLC,

Defendant.

CASE NO. 15CV2197-GPC(JLB)

**ORDER GRANTING PLAINTIFF’S
MOTION TO STRIKE
AFFIRMATIVE DEFENSES**

[Dkt. No. 5.]

Before the Court is Plaintiff’s motion to strike Defendant’s affirmative defenses. (Dkt. No. 5.) An opposition was filed on November 20, 2015. (Dkt. No. 10.) A reply was filed on November 23, 2015. (Dkt. No. 11.) After a review of the briefs, the answer, and the applicable law, the Court GRANTS Plaintiff’s motion to strike Defendant’s affirmative defenses.

Background

Plaintiff Rabi Youssofi (“Plaintiff”) filed a putative class action complaint alleging violations of the Fair Debt Collection Practices Act (“FDCPA”) based on a violation of 15 U.S.C. § 1692e(11)¹, and California’s Rosenthal Fair Debt Collection

¹“A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: . . . (11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in

1 Practices Act (“Rosenthal Act”). (Dkt. No. 1.) Defendant Allied Interstate LLC
2 (“Defendant”) filed an answer along with its affirmative defenses of standing, due
3 process, due process, bona fide error, and preemption. (Dkt. No. 4.)

4 Discussion

5 A. Legal Standard

6 Under Federal Rule of Civil Procedure (“Rule”)12(f), the Court may, by motion
7 or on its own initiative, strike “an insufficient defense or any redundant, immaterial,
8 impertinent or scandalous” matter from the pleadings. Fed. R. Civ. P. 12(f). The
9 purpose of Rule 12(f) is “to avoid the expenditure of time and money that must arise
10 from litigating spurious issues by disposing of those issues prior to trial.”
11 Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010) (quoting
12 Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev’d on other grounds
13 by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994)). The Court begins its analysis by
14 determining whether the affirmative defenses are “(1) an insufficient defense; (2)
15 redundant; (3) immaterial; (4) impertinent; or (5) scandalous.” See id. at 973-74.

16 The Court must view the pleading in the light more favorable to the pleader
17 when ruling upon a motion to strike. In re 2TheMart.com, Inc. Sec. Litig., 114 F. Supp.
18 2d 955, 965 (C.D. Cal. 2000) (citing California v. United States, 512 F. Supp. 36, 39
19 (N.D. Cal. 1981)). Motions to strike are regarded with disfavor because striking is
20 such a drastic remedy. Freeman v. ABC Legal Servs., Inc., 877 F. Supp. 2d 919, 923
21 (N.D. Cal. 2012). If a claim is stricken, leave to amend should be freely given when
22 doing so would not cause prejudice to the opposing party. Vogel v. Huntington Oaks
23 Delaware Partners, LLC, 291 F.R.D. 438, 440 (C.D. Cal. 2013) (citing Wyshak v. City
24 Nat’l Bank, 607 F.2d 824, 826 (9th Cir. 1979)).

25 In the Ninth Circuit, “[t]he key to determining the sufficiency of pleading an
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28 subsequent communications that the communication is from a debt collector, except
that this paragraph shall not apply to a formal pleading made in connection with a legal
action. 15 U.S.C. § 1692e(11).

1 affirmative defense is whether it gives plaintiff fair notice of the defense.”² Simmons
2 v. Navajo County, Ariz., 609 F.3d 1011, 1023 (9th Cir. 2010) (quoting Wyshak v. City
3 Nat’l Bank, 607 F.2d 824, 827 (9th Cir. 1979)). “Fair notice generally requires that the
4 defendant state the nature and grounds for the affirmative defense.” Roe v. City of San
5 Diego, 289 F.R.D. 604, 608 (S.D. Cal. 2013). “It does not, however, require a detailed
6 statement of facts.” Id.

7 **1. First Affirmative Defense - Standing**

8 Plaintiff argues that under Ninth Circuit law, a plaintiff only needs to show a
9 violation of a statutory right to establish Article III standing and the affirmative defense
10 of standing fails as a matter of law. Defendant argues that the issue of whether a
11 plaintiff can establish standing based on a bare violation of a federal statute is currently
12 before the United States Supreme Court. Since it needs to preserve the defense,
13 Defendant argues that the Court should not strike its standing defense.

14 The first affirmative defense alleges that “Plaintiff has not alleged that he
15 suffered any actual harm, therefore, he lacks standing to bring this suit under Article
16 III of the United States Constitution.” (Dkt. No. 4, Ans. at 5.)

17 In the Ninth Circuit, the Article III “injury in fact” requirement can be met by a
18 violation of a statute. Edwards v. First Am. Corp., 610 F.3d 514, 517 (9th Cir. 2010);
19 see also Robins v. Spokeo, Inc., 742 F.3d 409, 413 (2014). Currently before the United
20 States Supreme Court is the issue of whether a plaintiff can establish Article III
21 standing by alleging a violation of a statutory right. Spokeo, Inc. v. Robins, 135 S. Ct.
22 1892 (2015). Since the United States Supreme Court has not yet ruled on the standing
23 issue in Spokeo, Inc., Edwards is currently good law and binding authority on this
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25 ² The Ninth Circuit has not yet decided whether the pleading standard in Bell
26 Atlantic Corp. v. Twombly, 550 U.S. 544, 127 (2007) and Ashcroft v. Iqbal, 556 U.S.
27 662 (2009) apply to affirmative defenses. District courts within the Ninth Circuit are
28 split on the issue. See J & J Sports Productions, Inc. v. Scace, No.
10cv2496–WQH–CAB, 2011 WL 2132723, at *1 (S.D. Cal. May 27, 2011). Plaintiff
acknowledges the split, notes that the courts in the Southern District of California apply
the “fair notice” standard, and applies the “fair notice” standard in his analysis. (Dkt.
No. 5-1 at 7-8.)

1 Court. Therefore, the Court GRANTS Plaintiff's motion to strike the affirmative
2 defense of standing. If the Supreme Court rules on Spokeo, Inc. during the pendency
3 of this case, and reverses the Ninth Circuit's ruling on "injury in fact" as to standing,
4 Defendant may request leave to file an amended answer to add the affirmative defense
5 of standing.

6 **2. Second, Third and Fifth Affirmative Defenses - "Due Process" "Due**
7 **Process" and "Preemption"**

8 The second and third affirmative defenses of "due process" and the fifth
9 affirmative defense of "preemption" concern the statutory damages available under the
10 FDCPA and California's Rosenthal Act.

11 Plaintiff argues that these affirmative defenses fail as a matter of law and cites
12 to the holding in Gonzales v. Arrow Fin. Servs., LLC, 660 F.3d 1055 (9th Cir. 2011).
13 Defendant opposes contending that allowing Plaintiff to recover statutory damages
14 under the FDCPA and Rosenthal Act is duplicative and may lead to exceeding the
15 FDCPA statutory damages cap. It also argues that a duplicative statutory award would
16 be grossly out of proportion to any harm allegedly suffered by the failure to include a
17 single sentence in a limited number of debt collection letters sent out for a limited
18 amount of time. Lastly, Defendant argues that the FDCPA's statutory cap on class
19 action damages preempts the damages provisions in the Rosenthal Act. In support,
20 Defendant cites to the dissenting opinion in Gonzales.

21 The second affirmative defense states that "the penalties sought by Plaintiff
22 under different statutes violates Allied's right to due process under the Fourteenth
23 Amendment to the United States Constitution because they are duplicative." (Dkt. No.
24 4, Ans. at 5.) The third affirmative defense provides that "the penalties sought by
25 Plaintiff violate Allied's right to due process under the Fourteenth Amendment to the
26 United States Constitution because the penalties bear no relation to any harm allegedly
27 suffered." (Id. at 5.) The fifth affirmative defense asserts that "Plaintiff's attempt to
28 recover statutory penalties under state law is preempted by the cap on class action

1 damages imposed under federal law. (Id. at 6.)

2 In class action suits, statutory damages under the FDCPA are limited to the lesser
3 of \$500,000 or 1% of the debt collector's net worth. 15 U.S.C. § 1692k(a)(2)(B). In
4 Gonzales, the Ninth Circuit held that a consumer may seek cumulative damages under
5 both the FDCPA and the Rosenthal Act as long as the damages does not exceed the
6 FDCPA statutory cap. Gonzales, 660 F.3d at 1067-68. In this case, Plaintiff agrees
7 that any damages over the FDCPA statutory cap is not allowed. Moreover, the Ninth
8 Circuit held that the Rosenthal Act is not preempted by the FDCPA. Id. at 1067.

9 Based on the holding in Gonzales, the affirmative defenses of “due process”,
10 “due process”, and “preemption” fail as a matter of law. Accordingly, the Court
11 GRANTS Plaintiff's motion to strike the second, third and fifth affirmative defenses.

12 3. Fourth Affirmative Defense - Bona Fide Error

13 Plaintiff argues that the affirmative defense of “bona fide error” must be stricken
14 because it fails to plead the circumstances of the mistake with detail. In opposition,
15 Defendant argues that it explicitly told Plaintiff about the facts surrounding
16 Defendant's error.

17 “The bona fide error defense is an affirmative defense, for which the debt
18 collector has the burden of proof.” Reichert v. Nat'l Credit Sys., Inc., 531 F.3d 1002,
19 1006 (9th Cir. 2008) (citing Fox v. Citicorp Credit Servs., Inc., 15 F.3d 1507, 1514 (9th
20 Cir. 1994)). The FDCPA provides an exception to liability “if the debt collector shows
21 by a preponderance of evidence that the violation was not intentional and resulted from
22 a bona fide error notwithstanding the maintenance of procedures reasonably adapted
23 to avoid any such error.” 15 U.S.C. § 1692k(c). District courts have held that the
24 affirmative defense of bona fide error must be stated with particularity under Rule 9(b).
25 See Walters v. Performant Recovery, Inc., –F. Supp. 3d –, 2015 WL 4999796, at *4 (D.
26 Conn. Aug. 21, 2015) (bona fide error defense “is subject to a heightened pleading
27 standard, regardless of whether Iqbal or Twombly generally apply to affirmative
28 defenses”); Nguyen v. HOVG, LLC, No. 14CV837 BTM RBB, 2014 WL 5361935, at

1 *2 (S.D. Cal. Oct. 20, 2014) (granting Plaintiff’s motion to strike affirmative defense
2 of “bona fide error” since Defendant did not state any facts regarding the mistake that
3 was made and mistake must be stated with particularity); Jacobson v. Persolve, LLC,
4 14cv735-LHK, 2014 WL 4090809, at *7 (N.D. Cal. Aug. 19, 2014) (citing merely to
5 legal standard for bona fide error is not sufficient to assert affirmative defense); Wiebe
6 v. Zakheim & Lavrar, P.A., No. 6:12-cv-1200-ORL-18TBS, 2012 WL 5382181, at *2
7 (M.D. Fla. Nov. 1, 2012) (“A claim of bona fide error is tantamount to a claim of
8 mistake and therefore, the Defendant must plead this defense with the particularity
9 required by Rule 9(b).”); Bradshaw v. Hilco Receivables, LLC, 725 F. Supp. 2d 532,
10 537 (D. Md. July 27, 2010) (striking “bona fide error” defense of merely copying
11 language of § 1692k(c) and failing to plead facts that give the plaintiff sufficient notice
12 of the specific mistake); Konewko v. Dickler, Kahn, Sloikowski & Zavell, Ltd., No. 07-
13 C-5338, 2008 WL 2061551, at *1 (N.D. Ill. May 14, 2008) (finding defendant
14 “obligated to comply with both Fed. R. Civ. P. 8 and 9(b)” when asserting bona fide
15 error defense under the FDCPA).

16 Here, Defendant alleges that “Plaintiff’s claims are barred on the basis that any
17 statutory violation was the unintentional result of a bona fide error.” (Dkt. No. 4, Ans.
18 at 6.) This conclusory affirmative defense provides no facts to support the allegation
19 of “mistake.” Accordingly, the Court GRANTS Plaintiff’s motion to strike the fourth
20 affirmative defense of “bona fide error” with leave to amend.

21 **Conclusion**

22 Based on the above, the Court GRANTS Plaintiff’s motion to strike affirmative
23 defenses. Defendant is granted leave to file an amended answer to cure the deficiencies
24 as to the affirmative defense of “bona fide error.” Defendant shall file an amended

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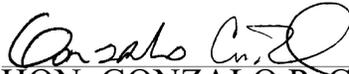
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1 answer on or before **January 29, 2016.** The hearing set for January 8, 2016 shall be
2 **vacated.**

3 IT IS SO ORDERED.

4 DATED: January 4, 2016

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6 HON. GONZALO P. CURIEL
7 United States District Judge
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