

1 Alleged Defendant/Cross-Complainant

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Name of Court

ASSET ACCEPTANCE, LLC.;	}	CASE NO.
Plaintiff/Cross-Defendant		HONORABLE
vs.		NOTICE OF MOTION AND MOTION TO STRIKE CROSS-DEFENDANT'S AFFIRMATIVE DEFENSES;
		MEMORANDUM OF POINTS & AUHORITIES IN SUPPORT THEREOF;
		DATE: TIME: 8:30 am DEPT:
, an individual;	}	COMPLAINT FILED:
Defendant		CROSS COMPLAINT FILED:
/Cross-Complainant		TRIAL DATE: None set.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on _____ at 8:30 a.m. in Department _____ of the above-entitled Court located at _____, Defendant/Cross-Complainant hereby submits her Notice of Motion to Strike with Memorandum of Points and Authorities in Support of Motion to Strike Affirmative Defenses filed herein. The motion is made pursuant to Fed. R. Civ. P. 12(f), on the ground that Plaintiff/Cross-Defendant has pled more than the three affirmative defenses allowed under the FDCPA, Cross-Defendants have attempted to allege defenses which are not actually defenses, Cross-Defendants have raised immaterial defenses, and that the defenses are not pled with sufficient particularity to provide Cross-Complainant with "fair" notice. The purposes of a

1 Rule 12(f) motion is to avoid spending time and money litigating spurious issues. Moreover, the
2 pleadings fail to raise the alleged defenses beyond the speculative level. (See: Cross-Defendant's
3 Answer on file herein)

4 This motion is based on this Notice of Motion, the Memorandum of Points and
5 Authorities, all of the papers, exhibits, and pleadings on file in this action and such other
6 evidence and argument as shall be adduced at or before the hearing hereof.
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9 DATED:

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Alleged Defendant/Cross-Complainant

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2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **A. INTRODUCTION**

4 On _____, Plaintiff filed its complaint in this matter. The complaint alleges that defendant
5 owes plaintiff the sum of \$ _____ plus 10% per annum, pursuant to an alleged assignment of
6 a written agreement between Defendant and _____. No such agreement is attached to the
7 complaint. Defendant/Cross-Complainant contends that no such contract exists between Plaintiff
8 and Defendant, nor with _____.

9
10 The complaint sets forth no facts supporting the amount claimed to be owing to Plaintiff.

11 For this reason, on _____, Defendant served a Cross Complaint for damages,
12 injunctive & declaratory relief and an accounting pursuant to violations of the Fair Debt
13 Collection Practice Act. (FDCPA), along with a Demand for Bill of Particulars on Plaintiff
14 demanding that they produce actual proof of contracts, executed receipts and purchases and
15 assignments. **Plaintiff failed to respond, despite their statutory obligation to do so.**

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17 In responding to Defendant’s Cross-Complaint, Plaintiff/Cross-Defendant Asset Acceptance,
18 LLC., (hereinafter referred to as “Cross-Defendant”), filed an Answer to the Cross-Complaint
19 (on file herein), containing various “Affirmative Defenses”. Cross-Complainant moves to strike
20 the Thirteen Affirmative defenses from Cross-Defendant’s Answer to the Cross-Complaint on
21 the grounds that Cross-Defendant have pled more than the three affirmative defenses allowed
22 under the FDCPA, Cross-Defendants have attempted to allege defenses which are not actually
23 defenses, Cross-Defendants have raised immaterial defenses, and that the defenses are not pled
24 with sufficient particularity to provide Cross-Complainant with “fair” notice. Moreover, the
25 pleadings fail to raise the alleged defenses beyond the speculative level. In their Answer to
26 Complaint, Cross-Defendant sets forth several conclusory statements – with no factual support
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1 whatsoever – purporting to raise various alleged affirmative defenses.

2 **THE AFFIRMATIVE DEFENSES READ AS FOLLOWS:**

3 • **First Affirmative Defense: (Failure to State a Claim).**

4 Defendants’ First Affirmative Defense is pled as follows:

5 “The allegations of the Complaint fail to state a claim against Defendants upon which
6 relief can be granted.”

7 “Failure to state a claim is not a proper affirmative defense but, rather, asserts a defect in
8 [Cross-Complainant’s] prima facie case.” Barnes v. AT&T Pension Benefit Plan, 718 F. Supp.
9 2d. 1167 (N.D. Cal 2010)

10 Failure to state a claim is a defect in the plaintiff’s claim; it is not an additional set of
11 facts that bars recovery notwithstanding the plaintiff’s valid prima facie case. Therefore,
12 it is not properly asserted as an affirmative defense. Boldstar Tech., LLC v. Home Depot, Inc.,
13 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007).

14 Because “failure to state a claim under Rule 12 (b) (6) is more properly brought as a motion and
15 not an affirmative defense” Barnes, 718 F. Supp. 2d at 1174. It should be stricken from Cross-
16 Defendant’s Answer.

17 • **Second Affirmative Defense: (Failure to mitigate)** although under a legal obligation to
18 do so, Cross-Complainant has failed to take reasonable steps to mitigate any alleged damages
19 that he may have and is therefore barred from recovering damages, if any, from Cross-
20 Defendant.

21 • **Third Affirmative Defense: (Apportionment)** Without admitting that any damages exist, if
22 damages were suffered by Plaintiff as alleged in the Complaint, those damages were
23 proximately caused by and contributed by persons other than Defendants. The liability, if any
24 exists, of Defendants and/or any responsible parties, named or unnamed, should be apportioned
25 according to their relative degrees of fault, and the liability of Defendants should be reduced
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1 accordingly.

2 • **Fourth Affirmative Defense: (Unclean Hands)** The allegations in the Complaint and relief
3 requested are on information and belief barred in whole or in part by the doctrine of unclean
4 hands.

5 • **Fifth Affirmative Defense: (Estoppel)** The allegations in the Complaint and relief
6 requested are on information and belief barred in whole or in part by the doctrine of estoppel.

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8 • **Sixth Affirmative Defense: (Laches)** The allegations in the Complaint and relief
9 requested are on information and belief barred in whole or in part by the doctrine of laches.

10 • **Seventh Affirmative Defense: (Waiver)** Cross-Complainant has waived his rights, if any, to
11 recover the relief he seeks in the Cross-Complaint based upon his own conduct and admissions
12 with respect to the financial obligation at issue.

13
14 • **Eighth Affirmative Defense: (Statute of Limitations)** The allegations in the Cross- Complaint
15 and relief requested are on information and belief barred in whole or in part by the applicable
16 statute of limitations.

17 Defendants have, at all material times with respect to Plaintiff, acted in good faith in an effort to
18 comply fully with all relevant federal and state laws.

19
20 • **Ninth Affirmative Defense: (Bona Fide Error)** that it is informed and believes and thereon
21 alleges, that any violation of State or Federal law was not intentional and resulted from a bona
22 fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

23 • **Tenth Affirmative Defense: (Set-off)** To the extent that Cross-Complainant has suffered
24 any damage as a result of any alleged act or omission of Cross-Defendant, said damages must be
25 set off and reduced by the recovery of the complaint.
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1 •**Eleventh Affirmative Defense: (Absolute/Qualified Privilege)** Cross-Defendant’s conduct is
2 subject to an absolute or qualified privilege and not actionable.

3 • **Twelfth Affirmative Defense: (Litigation Privilege)** To the extent that any of the
4 communications by Defendants are deemed to be false or misleading, which Defendants
5 expressly deny, they were not materially false or misleading and therefore are not actionable
6 under the FDCPA.
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9 **B. ARGUMENT**

10 **A. THE FDCPA ALLOWS ONLY THOSE DEFENSES SET FORTH IN STATUTE**

11 In this case, all of the defenses raised by Cross-Defendant relate to claims brought by Cross-
12 Complainant pursuant to the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 et
13 seq. Since the FDCPA is a federal statutory cause of action, the defenses are limited to those set
14 out in the statute itself. Howlett v. Rose, 496 U.S. 356, 375 (1990) (“The elements of, and the
15 defenses to, a federal cause of action are defined by federal law.”); see also Sayyed v. Wolpoff &
16 Abramson, 485 F.3d 226, 232 (4th Cir. 2007) (“To insist that some unarticulated, common law
17 immunity survived the creation of the FDCPA would be to fail to give effect to the scope of the
18 immunity articulated in the text”). Moreover, the FDCPA is a strict liability statute. Clark v.
19 Capital Credit & Collection Servs., 460 F.3d 1162, 1175 (9th Cir. 2006); Russell v. Equifax
20 A.R.S., 74 F.3d 30, 33 (2nd Cir. 1996).

21
22 An affirmative defense is the “cross-defendant’s assertion raising new facts and arguments that,
23 if true, will defeat the plaintiff’s or prosecution’s claim, even if all allegations in the complaint
24 are true.” Saks v. Franklin Covey Co., 316 F.3d 337, 350 (2d Cir. 2003).

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1 In an FDCPA case, there are only three defenses, pursuant to 15 U.S.C. § 1692k(c)-(e):

- 2 ● statute of limitations,
- 3 ● reliance on an FTC advisory opinion, and
- 4 ● bona fide error.

5 The court may strike from a defendant's answer "any insufficient defense." Pursuant to Fed. R.
6 Civ. Rule 12 (f). Courts strike frivolous affirmative defenses early on in an effort to streamline
7 the ultimate resolution of a case and avoid the waste of time and money involved in litigating
8 spurious issues. Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1442 (W.D. Mich. 1989).

9 **B. CROSS-DEFENDANT HAS NOT STATED A BONA FIDE ERROR DEFENSE**

10 **Defendant's Tenth Affirmative Defense is pled as follows:**

11 ...that it is informed and believes and thereon alleges, that any violation of State or Federal law
12 was not intentional and resulted from a bona fide error notwithstanding the maintenance of
13 procedures reasonably adapted to avoid such error. **(See: Answer pg. 3 paragraph 10)**

15 As noted above, the bona fide error defense is one of the three affirmative defenses authorized
16 by the FDCPA. In order to plead bona fide error, a defendant must allege facts showing that the
17 violation was not intentional and resulted from a bona fide error notwithstanding the
18 maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. 1692k(e).

19 Not only have Cross-Defendants failed to properly plead a bona fide error defense, but Cross-
20 Defendant has failed to offer any facts to support this affirmative defense. Rather, Cross-
21 Defendant merely asserts that any violation was "not intentional and resulted from a bona fide
22 error notwithstanding the maintenance by Cross-Defendant of procedures reasonably adapted to
23 avoid any such error." In all averments of fraud or mistake, the circumstances constituting fraud
24 or mistake shall be stated with particularity. Leatherman v. Tarrant County Narcotics Intelligence
25 and Coordination Unit, 507 U.S. 163, 168 (1993)

1 Failure to provide a “factual basis” in support of an affirmative defense is justification for
2 striking subject affirmative defense. Racick, 270 F.R.D. at 235 (“Defendants have essentially
3 copied the language in 15 U.S.C. §1692k(c), but have not provided any notice of the specific
4 error upon which it relies to assert the defense. Consequently, Defendants’ fourth affirmative
5 defense is stricken with leave to amend to cure this pleading deficiency.”).

6 If the bona fide error defense is to have any meaning in the context of a strict liability statute,
7 then pleading “procedures reasonably adapted to avoid any such error” must require more than a
8 mere conclusory assertion to that effect. The procedures themselves must be explained, along
9 with the manner in which they were adapted to avoid the violation alleged. Only then is the
10 alleged error or “mistake” entitled to be treated as one made in good faith. The affirmative
11 defense should be stricken because it does not contain a short and plain statement of any facts
12 supporting the defense, as required by FDCPA cases.

13 Because the defense at issue deals with an alleged “mistake” -- a “bona fide error” in the
14 statutory parlance – Cross-Defendant is obligated to comply with both Fed. R. Civ. P. 8 and
15 9(b). The standard under Rule 9(b) requires parties to state the circumstances of a
16 mistake with “particularity.” Konewko v. Dickler, Kahn, Sloikowski & Zavell, Ltd., 2008 U.S.
17 Dist. LEXIS 40685 (N.D. Ill. May 14, 2008); see also, Bradshaw v. Hilco Receivables, LLC, 725
18 F. Supp. 2d 532 (D. Md. 2010) (striking bona fide error defense that was not pled with
19 particularity)

20 Affirmative “defenses which amount to nothing more than mere conclusions of law and are
21 not warranted by any asserted facts have no efficacy.” National Acceptance Co. of Am. v. Regal
22 Prods., Inc., 155 F.R.D. 631, 634 (E.D. Wis. 1994).

23 Cross-Defendant’s Answer presents nothing by way of denial to defeat the causes of action.
24 The lack of substantive facts in Cross-Defendant’s Answer is a defect in substance that should
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1 not be allowed to be amended. “Affirmative defenses are pleadings and, therefore, are subject to
2 all pleading requirements of the California Rules of Civil Procedure.” Heller Financial v.
3 Midwehy Powder Co., 833 F.2d 1286, 1294 (7th Cir. 1989). However, affirmative defenses that
4 do not comport with the rules of pleading may be stricken. *Id.* The simple listing of ‘a series of
5 conclusory statements asserting the existence of an affirmative defense without stating a reason
6 why that affirmative defense might exist’ is not sufficient.” See, e.g., Barnes v. AT&T Pension
7 Benefit Plan, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010)

10 **C. CROSS-DEFENDANTS HAVE NOT STATED A STATUTE OF LIMITATIONS**
11 **DEFENSE or DOCTRINE OF LACHES, SET-OFF & ESTOPPEL DEFENSE**

12 **Defendants’ Ninth Affirmative Defense is pled as follows:**

13that it is informed and believes, and thereon alleges, that Cross-Complainant is barred by the
14 applicable statutes of limitation. (See: Answer page 2 paragraph ¶ 9)

15 **Defendants’ Sixth Affirmative Defense is pled as follows:**

16that it is informed and believes, and thereon alleges, that Cross-Complainant is barred by the
17 applicable and/or the equitable doctrine of estoppel. (See: Answer page 2 paragraph ¶ 6)

18 **Defendants’ Seventh Affirmative Defense is pled as follows:**

19that it is informed and believes, and thereon alleges, that Cross-Complainant is barred by the
20 applicable and/or the equitable doctrine of laches. (See: Answer page 2 paragraph ¶ 7)

21 **Defendants’ Tenth Affirmative Defense is pled as follows:**

22that it is informed and believes, and thereon alleges, that any recovery on the Cross-
23 Complainant must be set-off and reduced by the recovery on the complaint. (See: Answer page
24 3 paragraph ¶ 10)

25 Cross-Defendants’ statute of limitations defense is insufficient as a matter of law for failure to
26 plead sufficient facts. *Racick*, 270 F.R.D. at 235 (“courts have stricken similarly-worded
27 affirmative defenses for failure to reference the specific statute and relevant time periods”).

28 The statute of limitations for violations of the Federal Fair Debt Collection Practices

Act is one year. 15 U.S.C. §1692k(d). Less than one year elapsed between the violations alleged

1 in the November 8, 2012, cross-complaint. (See: Cross-Complaint on file herein) Therefore,
2 Cross-Defendant cannot prevail on a statute of limitations defense. See Scott, 2011 U.S. Dist.
3 LEXIS 5278, at *21-22.

4 As for Defendants' reference to "the equitable doctrine of laches, set-off and estoppel," it is
5 misplaced. "Laches requires proof of (1) lack of diligence by the party against whom the defense
6 is asserted, and (2) prejudice to the party asserting the defense." Costello v. United States, 365
7 U.S. 265, 282 (1961). Estoppel protects one party from being harmed by another party's
8 voluntary conduct. Moreover, no written contract exists between cross-complainant and cross-
9 defendant and cross-defendant has failed to comply with cross-complainant demand for a bill of
10 particular, thus eliminating all of cross defendant's claims. Cross-Defendant has failed to provide
11 any facts in support of these "affirmative defenses." Additionally, "principles of equity [can not]
12 be used to avoid a statutory mandate. Jiagbogu v. Mercedes-Benz USA, 118 Cal. App. 4th 1235,
13 1244 (Cal. App. 2d Dist. 2004).

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16 **D. DEFENSES TO BE STRICKEN BECAUSE THEY ARE NOT ACTUALLY**
17 **DEFENSES**

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19 The following "Affirmative Defenses" raised in Cross-Defendant's Answer should be stricken
20 because they are not actually defenses.

21 **1. First Affirmative Defense – Failure to State a Cause of Action**

22 **Defendants' First Affirmative Defense is pled as follows:**

23 ...that it is informed and believes, and thereon alleges, that Defendant/Cross-Complainant fails
24 to state a cause against Plaintiff/Cross-Defendants. (See: **Answer page 2 paragraph ¶ 2**)
25 "Failure to state a claim is not a proper affirmative defense but, rather, asserts a defect in
26 [Plaintiff's] prima facie case." Barnes, 718 F. Supp. 2d at 1174. See also, Scott, 2011 U.S. Dist.
27 LEXIS 5278 at *23-24. Failure to state a claim is a defect in the plaintiff's claim; it is not an

1 additional set of facts that bars recovery notwithstanding the plaintiff's valid prima facie case.
2 Therefore, it is not properly asserted as an affirmative defense. Boldstar Tech., LLC v. Home
3 Depot, Inc., 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007).

4 **D. THIRD & FOURTH AFFIRMATIVE DEFENSE – FAILURE TO MITIGATE &**
5 **APPORTIONMENT**

6 **Defendant's Third Affirmative Defense is pled as follows:**

7that it is informed and believes, and thereon alleges, that Defendant/Cross-Complainant
8 has failed to mitigate the damages, if any, that he allegedly incurred. **(See: Answer page 2**
9 **paragraph ¶ 3)**

10 “Defendants fail, again, to provide any factual basis that would allow the inference that this
11 defense is plausible.” Racick, 270 F.R.D. at 234-35 (E.D.N.C. 2010) (striking failure to mitigate
12 defense). Moreover, failure to mitigate damages is not a defense to the FDCPA. Scott, 2011 U.S.
13 Dist. LEXIS 5278 at *22-23 (striking failure to use reasonable care defense).

14 **Defendant's Fourth Affirmative Defense is pled as follows:**

15that it is informed and believes, and thereon alleges, that Defendant/Cross-Complainant and
16 others are in whole or in part responsible for the acts and injuries alleged in the Cross-Complaint
17 and that any recovery on the cross-complaint must be reduced pursuant to their responsibility.

18 **(See: Answer page 2 paragraph ¶ 4)**

19 This affirmative defense provides Defendant/Cross-Complainant no notice upon which he can
20 prepare a defense. Racick, 270 F.R.D. at 236 (“The court finds that these boilerplate affirmative
21 defenses, with no assertion of any facts that would allow drawing of reasonable inference that
22 such defenses are plausible, fail to meet the notice pleading standard.”).

23 Further, this affirmative defense does not state which of the allegations in the Complaint to
24 which it applies. This affirmative defense does not allege facts regarding which persons “caused
25 or contributed” to the acts of Cross-Defendant. Cross-Defendant does not allege the identity of
26 the “responsible parties” to which Cross-Defendant refers or facts defining the scope of Cross-
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1 Defendant’s control over these “responsible parties.” Cross-Defendant does not allege how the
2 actions of others – presumably debt collection attempts – caused Cross-Complainant’s damages.
3 Cross-Defendant does not provide facts, which would show that a third-party was negligent or
4 careless. Cross-Complainant is entirely unable to prepare a response to such a vague affirmative
5 defense and it should be stricken. Scott, 2011 U.S. Dist. LEXIS 5278 at *22-23 (striking
6 negligence of third parties defense).
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9 **E. EIGHTH AFFIRMATIVE DEFENSE – WAIVER**

10 **Cross-Defendant’s Eighth Affirmative Defense is pled as follows:**

11that it is informed and believes, and thereon alleges, that Defendant/Cross-Complainant
12 is barred by the doctrine of waiver.. (See: **Answer page 2 paragraph ¶ 8**)

13 Cross-Defendant offers the Court and Cross-Complainant no factual basis whatsoever for the
14 moving target affirmative defense of “waiver” and as such Cross-Defendant is not entitled to the
15 defense as a matter of law pursuant to Iqbal and Twombly. Racick, 270 F.R.D. at 237 (striking
16 “doctrine of latches, waiver and/or estoppel” for failing “to meet the notice pleading
17 requirements because it is a bare legal conclusion.”); Scott, 2011 U.S. Dist. LEXIS 5278 at *22-
18 23 (striking estoppel defense). “A reference to a doctrine, like a reference to statutory provisions,
19 is insufficient notice.” Qarbon.com Inc., 315 F. Supp. 2d at 1049. See also, Scott, 2011 U.S. Dist.
20 LEXIS 5278 at *20. Moreover, waiver is not a defense to the FDCPA.
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22 Cross-Complainant is entirely unable to prepare a response to such a vague affirmative defense
23 and it should be stricken from Cross-Defendant’s Answer.

24 **F. DEFENDANTS HAVE NOT STATED THE DEFENSE OF CONFORMITY WITH**
25 **AN FTC ADVISORY OPINION**

26 Cross-Defendant has not pled the FTC advisory opinion defense.

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1 **G. FOURTH AFFIRMATIVE DEFENSE – UNCLEAN HANDS**

2 **Defendants’ Fourth Affirmative Defense is pled as follows:**

3 that it is informed and believes, and thereon alleges, that Defendant/Cross-Complainant
4 is barred by the doctrine of unclean hands. **(See: Answer page 2 paragraph 5)**

5 This affirmative defense bears no relation to the claims asserted in this case. This is not an
6 action in equity, thus “unclean hands” is not a valid defense. Moreover, “simply stating that a
7 claim fails due to plaintiff’s ‘unclean hands’ is not sufficient to notify the cross-complainant
8 what behavior has allegedly given them ‘unclean hands.’” Scott, 2011 U.S. Dist. LEXIS 5278 at
9 *20, quoting CTF Dev., Inc. v. Penta Hospitality, LLC, 2009 U.S. Dist. LEXIS 99538, at *22
10 (N.D. Cal. Oct. 26, 2009). It is not simply enough to refer to a statute or doctrine without
11 supporting facts showing its applicability. Qarbon.com Inc., 315 F. Supp. 2d at 1049.
12 Therefore, this affirmative defense should be stricken from Cross-Defendants’ Answer.

13 **H. TWELFTH & THIRTEENTH AFFIRMATIVE DEFENSE – FIRST**
14 **AMENDMENT & LITIGATION PRIVILEGE**

15 **Defendant’s Twelfth & Thirteenth Affirmative Defense is pled as follows:**

16 ¶12.....that it is informed and believes, and thereon alleges, that the action alleged in the
17 Cross-Complainant was subject to an absolute and/or qualified privilege and not actionable.

18 ¶13.....that it is informed and believes, and thereon alleges, that Defendant/Cross-
19 Defendant’s cross-complaint (and the cause of action the action alleged therein) is barred
20 because each of the Cross-Complainant’s claims is subject to the litigation privilege set forth in
21 California Civil Code 47 (b) as well as arising under federal and state common law. **(See:**
22 **Answer page 3 paragraphs ¶ 12 & ¶ 13)**

23 Litigation privilege is not a recognized defense in FD CPA cases. Hartman v. Great Seneca
24 Fin. Corp., 569 F.3d 606, 615 (6th Cir. 2009); Pepper v. Routh Crabtree, APC, 219 P.3d 1017,
25 1023 (Alaska 2009). As such, this affirmative defense should be stricken from Cross-
26 Defendant’s Answer. If the cross-defendant is advocating the existence of a federal common law
27 litigation privilege. Heintz v. Jenkins cuts squarely against their argument. So the cross-
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1 defendant also premises their immunity arguments on their First Amendment rights of free
2 speech, and to petition for redress, which they assert are violated by applying FDCPA to the act
3 of filing a complaint in a court of law. But whether the historical antecedents for common law
4 immunity emanate from First Amendment concerns, or from the underpinnings of the Anglo-
5 American privilege for judicial proceedings, the cross-defendant's immunity arguments cannot
6 overcome the unambiguous text of the statute and the unambiguous holding of *Heintz v. Jenkins*,
7 which this Court must follow. *Kelly v. Great Seneca Fin. Corp.*, 443 F. Supp. 2d 954, 960 (S.D.
8 Ohio 2005), citing *Heintz v. Jenkins*, 514 U.S. 291; 115 S. Ct. 1489; 131 L. Ed. 2d 395
9 (1995).“The privilege for communications made during judicial proceedings and for
10 communications made between certain interested persons, Cal. Civ. Code § 47(b) and (c),
11 likewise has no application to the facts or legal claims in Cross-Complainant's complaint, which
12 do not allege any defamatory actions by Cross-Defendant.” Scott, 2011 U.S. Dist. LEXIS 5278
13 at *23 (striking litigation privilege defense). Court have previously rejected a FDCPA
14 “Defendant's assertion that the First Amendment, as a matter of law, protects the filing of a state
15 court complaint from the reach of the FDCPA.” *Lopez Reyes v. Kenosian & Miele, LLP*, 619 F.
16 Supp. 2d 796, 804 (N.D. Cal. 2008) (Jenkins, J); see also, Hartman, 569 F.3d at 615.

19 **I. CROSS-DEFENDANT'S ANSWER IS DEVOID OF ANY FACTUAL ALLEGATIONS**
20 **CONSTITUTING A DENIAL OF LIABILITY OR**
21 **AFFIRMATIVE DEFENSES**

22 Cross-Complainant is unable to prepare a case against facts not stated either by discovery
23 (failure to comply with a demand for bill of particulars), or pleadings, and Cross-Defendant has
24 raised no need for the unconscionable delay. In *FPI Development, Inc vs. A1 Nakashima*, (1991)
25 [231 Cal.App.3d 367, 384], the court held that the affirmative defenses pled in an answer to a
26 complaint must be pled in the same fashion, and with the same specificity, as a cause of action in
27 a complaint.

1 **J. CONCLUSION**

2 A cross-defendant should not be able to assert a laundry list of defenses hoping to find at a
3 later date some fact that supports the defense. In this instance, Cross-Defendant has not set forth
4 sufficient facts in support of any of their affirmative defenses. It is impossible to determine if any
5 of the affirmative defenses pled by Cross-Defendant in the Answer is plausible on its face.
6 Should Cross-Defendant discover any basis for its affirmative defenses as this litigation progress,
7 it should seek leave of Court to assert them at some other time.
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9 Moreover, the FDCPA Cross-Complaint is statutorily limited to just three affirmative
10 defense, none of which apply here. Therefore, Cross-Complainant requests that each of these
11 affirmative defenses be stricken and that Cross-Defendants be denied leave to amend their
12 Answer.

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16 Dated:

17 _____
18 Alleged Defendant/Cross-Complainant
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