

Attachment 4 - AFFIRMATIVE DEFENSES

Check boxes that apply to your case and complete appropriate text boxes. These defenses are not an exhaustive list of defenses that may be raised, and should not be considered to construe legal advice or be used as a substitute for your own research or the advice of an attorney.

Ambiguity: The defendant asserts that the plaintiff did not clearly state the amount or issues in this case, making it difficult for the defendant to respond. The defendant requests that the court grant leave to amend this Answer to allow additional defenses once additional information is discovered that will allow any additional defenses to be known by the defendant.

Failure to State a Cause of Action: The defendant asserts that the plaintiff has failed to state an essential element for one or more of its causes of action, specifically:

Breach of Contract

- The plaintiff is not the original creditor and did not state
 - who the original owner of the account was.
 - it is now the legal owner of this account and has a right to sue on it.
- The plaintiff did not state the date the contract was entered into.
- The plaintiff did not state the date the contract was breached or otherwise not complied with.
- The plaintiff failed to adequately describe the material terms of the contract or attach a copy of the contract as an exhibit to the complaint.
- Other:

Common Counts

- The plaintiff is not the original creditor, and did not state:
 - who the original owner of the account was.
 - it is now the legal owner of this account and has the right to sue on it.
- Other:

Fraud

- The plaintiff failed to specifically allege the representations that supposedly constituted the fraud.
- The plaintiff failed to specifically allege the person or persons who made the supposedly fraudulent representations or promises.
- Other:

Other:

Running of the Statute of Limitations: The defendant asserts that recovery in this case is barred by the statute of limitations as the time, as follows:

- Written Contract/Open Book Account/Account Stated (California Law)-** the Plaintiff has waited more than 4 years from the date of breach or last action of the defendant before filing this suit, and recovery is therefore barred under Code of Civil Procedure §§337-337a.
- Oral Contract (California Law)-** the Plaintiff has waited more than 2 years from the date of breach or last action of the defendant before filing this suit, and recovery is therefore barred under Code of Civil Procedure §339.
- Written Contract/Open Book Account/Account Stated (Delaware Law)-** The written contract between the plaintiff or plaintiff's assignor and the defendant contains a choice of law provision requiring all matters to be decided under the laws of Delaware. Pursuant to Delaware Code Ann. Tit. 10 §8106, the plaintiff's time to file this lawsuit expired three years after the date of breach or last activity by the defendant.
- Fraud-** The plaintiff has waited more than three years from the date of the wrongdoing alleged, and is therefore any claim for fraud has expired pursuant Code of Civil Procedure §338.
- Other-

Laches: The defendant asserts that the plaintiff has waited an unreasonably long time to file this lawsuit, and the defendant's ability to defend this lawsuit has been severely prejudiced due to this unreasonable delay by denying him or her access to

- documents or other physical evidence;
- witnesses;
- a reasonably fresh recollection of the events giving rise to this lawsuit;
- Other-

Breach of Contract by Plaintiff: The defendant asserts that the plaintiff failed to comply with the terms of the contract by:

- changing the terms of the contract without the consent of the defendant;
- failing to provide credit for the payments made by the defendant;
- agreeing to change the original contract, but then failing to honor the new agreement;
- failing to make payments under the insurance plan purchased by the defendant;
- breaching the implied warranty of good faith and fair dealing by acting unreasonably, denying the benefits of the contract to the defendant;
- Other-

No Breach by Defendant: The defendant asserts that he or she performed all duties owed under the contract other than any duties which were prevented or excused, and therefore never breached the agreement.

Discharge by Bankruptcy- 11 U.S.C. § 362(a): The defendant asserts that he or she has filed for bankruptcy, and included the alleged debt in the bankruptcy. The case number of the bankruptcy is: _____ and

- the bankruptcy is pending. The defendant asks that the court stay/suspend the plaintiff's action until the bankruptcy case is over.
- the debt upon which this lawsuit is based was discharged by this bankruptcy. Defendant asks that this case be dismissed.

Failure to Mitigate Damages: The defendant asserts that the plaintiff has failed to take reasonable steps to reduce or minimize the damages experienced. Specifically, the plaintiff has

- refused to accept a reasonable full settlement offered by the defendant, and by refusing this reasonable settlement has incurred additional interest, attorney fees, and court costs unnecessarily;
- unreasonably delayed the filing of this lawsuit and by such delay has experienced contractual interest, attorney fees, and court costs that would not have otherwise been experienced had reasonable diligence been exercised;
- failed to exercise reasonable diligence in failing to re-rent the subject property, or re-sell the subject assets;
- Other-

Lack of Privity: The defendant asserts that there is no contractual relationship or agreement between the plaintiff, or the plaintiff's assignor and the defendant, specifically:

- the defendant never entered into the contract or agreement alleged in the Complaint;
- the defendant is the victim of identity theft, and the account, contract, or agreement was created without the defendant's knowledge or consent;
- the plaintiff is not the original creditor, and the defendant lacks any evidence to establish that the plaintiff is the assignee of the account or debt;
- the plaintiff subsequently assigned its rights under the agreement to a subsequent party, and has therefore transferred privity to this third party;
- Other-

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Waiver: The defendant asserts that the plaintiff has through representations or actions waived its right to sue, and therefore cannot sustain this action.

Equitable Estoppel: The defendant asserts that the plaintiff specifically represented to the defendant the following:

The defendant reasonably relied upon this representation to his or her detriment and now asks the court to decide this case as if this representation were true.

Res Judicata/Collateral Estoppel: The defendant asserts that the issues in this case were decided previously in another court case involving the same issues and parties, and that the plaintiff is unable to seek a different result in this case.

Unjust Enrichment: The defendant asserts that the plaintiff is seeking to recover more than plaintiff is entitled to recover in this case, and award of the judgment sought by the plaintiff would unjustly enrich the plaintiff.

Statute of Frauds: The defendant asserts that the plaintiff is suing under a theory of an oral contract, but such an oral contract would be unenforceable because it is required to be in writing pursuant to Civil Code §1624(a)(1-7).

Parol Evidence Rule: The defendant asserts that the written agreement between the parties was intended to be the full agreement between the parties, and that the plaintiff cannot present any evidence not in writing to establish any terms of the contract not in the written agreement.

Satisfaction: The defendant asserts that the account, debt, or contract has already been satisfied, the plaintiff having received:

full satisfaction as the defendant has paid all that is owed under the agreement.

accord and satisfaction as the plaintiff has agreed to settle for less than the amount owed, and the defendant has paid this amount.

Substantial Compliance: The defendant asserts that he or she substantially complied with the contract, leaving only a small part of the contract undone, and that as a result awarding the judgment sought by the plaintiff would be unjust and unfair.

Prevention of Performance: The defendant asserts that the plaintiff prevented the defendant from performing under the contract as defined under Civil Code §1511, in that the plaintiff:

refused to accept payment by the defendant, excusing the defendant from performance.

refused to accept payment in full of the entire amount owed to the plaintiff, excusing the defendant from all amounts owed.

refused to allow the defendant to provide the goods or services agreed upon.

Other-

Anticipatory Repudiation: The defendant asserts that the plaintiff or plaintiff's assignor, or a person acting on behalf of the plaintiff or plaintiff's assignor stated that the plaintiff would not perform under the contract, and therefore no further payment or performance was required by the defendant.

Cancellation of Contract: The defendant asserts that the contract was mutually cancelled by the defendant and the plaintiff or plaintiff's assignor, and accordingly any duties owed by either party were excused.

Rescission/Return of Goods or Security: The defendant asserts that on or about _____ he or she promptly returned to the plaintiff or plaintiff's assignor what was received under the contract under the condition that the plaintiff or plaintiff's assignor cancel the obligation, and therefore rescinded the contract as described in Civil Code §1691.

Fraud, Deceit, or Misrepresentation by Plaintiff: The defendant asserts that the plaintiff or plaintiff's assignor obtained the defendant's consent to the contract or transaction through fraud, deceit, or misrepresentation by the plaintiff or plaintiff's assignor, and that as a result the contract is invalid.

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- Incapacity:** The defendant asserts that he or she was under the age of 18, or mentally or physically incapacitated or disabled in such a way that prevented him or her from having the legal capacity to enter into the contract, rendering the contract invalid.
- Lack of Consideration:** The defendant asserts that he or she did not receive the goods or services promised.
- Failure of Consideration:** The defendant asserts that the goods or services provided by the plaintiff or the plaintiff's assignor were substantially inferior to the standard of the industry or what was promised such that any further payment by the defendant would be unconscionable.
- Failure of Condition Precedent:** The defendant asserts that his or her performance under the contract or agreement was conditioned upon the plaintiff first performing, or another act or condition to occur, that such performance, act, or condition never took place, and that as a result the defendant was never obligated to perform. See Civil Code §1498.
- Translation of Contract:** The defendant asserts that the contract is a consumer contract and was negotiated with the plaintiff or plaintiff's assignor, or the representative for that person or entity in Spanish Chinese Tagalog Vietnamese or Korean, however the plaintiff or plaintiff's assignor violated Civil Code §1632 by failing to provide a copy of the written contract in this language as required. The defendant revokes and cancels the contract, and asserts that no collection under the contract is permitted.
- Quantum Meruit:** The defendant asserts that the plaintiff is only entitled to receive payment for the goods or services actually provided or the fair market value of the goods or services provided because:
- the plaintiff or plaintiff's assignor failed to completely provide the goods or services agreed upon, and is only entitled to receive payment for the portion of the goods or services provided.
 - the price of the goods or services were not negotiated and/or agreed upon between the parties in advance, and the plaintiff is therefore only entitled to recover the fair market value of the goods or services provided.
- Offset:** The defendant asserts that the plaintiff or plaintiff's assignor owes money or other valuable consideration to the defendant, or has not properly credited payments made, and that as a result the defendant owes less than the amount claimed by the plaintiff.
- Usury:** The defendant asserts that the contract or agreement is subject to California law, is not subject to an exception, and the plaintiff seeks an interest rate higher than permitted under California law, and is therefore not entitled to recover interest. See Civil Code §§1914.12-1, 196.12-2.
- No Damage to Plaintiff:** The defendant asserts that even if the plaintiff's other allegations are true, the plaintiff did not suffer any damages (economic loss).
- Novation:** With the plaintiff or plaintiff's assignor's knowledge and consent, the contract was modified to substitute another person or entity in place of the defendant, and that no further obligation is owed by the defendant.
- Lack of Standing:** The defendant asserts that the plaintiff or the person acting on behalf of this plaintiff does not have standing to bring this case. Specifically:
- the plaintiff is a corporation, limited liability company or some other form of business entity, however the person filing this complaint a natural person who is not an attorney. A corporation, LLC or other business entity cannot act *in pro per*, and must be represented by counsel.
 - the plaintiff is not who the defendant entered into the contract with, and did not state that it is the legal owner of the alleged debt and has a right to bring this case, or failed to attach any agreement that shows it is the legal owner of the debt and has a right to bring this case.
- Unclean Hands:** The defendant asserts that the plaintiff has committed a wrongdoing, and this lawsuit is attempting to benefit from this wrongdoing.

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Improper Notice of Breach: The defendant asserts that the contract or agreement required the plaintiff or the plaintiff's assignor to provide notice of any breach to the defendant and allow him or her the opportunity to remedy the breach prior to the initiation of any legal proceedings, and the plaintiff or plaintiff's assignor failed to provide such notice.

Duress/Undue Influence: The defendant asserts that the plaintiff forced him or her to enter into the contract against his or her will by taking unfair advantage of the defendant's mental state/incapacity or by using threats of force.

Lack of Acceptance: The defendant asserts that no contract was formed because he or she never explicitly or through his or her actions accepted the contract or certain terms of the contract.

Frustration of Purpose: The defendant asserts that an unexpected event or occurrence happened which totally destroyed the items or goods, or prevented the defendant from receiving the goods or services, such that enforcement of the contract would not allow the parties to each receive the benefit of their bargain.

No Deficiency Judgment Permitted: The defendant asserts that the plaintiff seeks in this lawsuit to collect for a deficiency on a loan protected by collateral, and that no deficiency is permitted because:

the loan was a first mortgage for the purchase of real property, and the plaintiff or plaintiff's assignor non-judicially foreclosed on this property, and under Code of Civil Procedure §726 is not entitled to a deficiency.

the loan was secured by a motor vehicle that was repossessed by the plaintiff, but the plaintiff or plaintiff's assignor failed to

send a notice of intention to sell the vehicle as required under Civil Code §2983.2.

include in the notice of intention to sell that the defendant had a right to redeem the motor vehicle by paying in full the indebtedness evidenced by the contract until the expiration of 15 days from the date of giving or mailing the notice with an itemization of the contract balance and of any delinquency, collection or repossession costs and fees and setting forth the computation or estimate of the amount of any credit for unearned finance charges or cancelled insurance as of the date of the notice (Civil Code §2983.2(a)(1)).

include in the notice of intention to sell that the defendant had a conditional right to reinstate the contract until the expiration of 15 days from the date of giving or mailing of the notice and all conditions required to reinstate, or that there is no right of reinstatement and the reasons why the defendant has no right of reinstatement (Civil Code §2983.2(a)(2)).

include in the notice of intention to sell that, upon written request, the seller or holder shall extend for an additional 10 days the redemption period, or if entitled to the conditional right of reinstatement, both the redemption and reinstatement periods, or provide the proper form for applying for the extension (Civil Code §2983.2(a)(3)).

include in the notice of intention to sell the place at which the motor vehicle will be returned upon redemption or reinstatement (Civil Code §2983.2(a)(4)).

include in the notice the name and address of the person or office to whom payment shall be made (Civil Code §2983.2(a)(5)).

state in the notice of intention to sell the seller's or holder's intent to dispose of the motor vehicle upon the expiration of 15 days from the date of giving or mailing of the notice (Civil Code §2983.2(a)(6)).

inform the defendant in the notice that upon written request the seller or holder will furnish a written accounting regarding the disposition of the motor vehicle, and that this request must be personally served or sent first class mail, postage prepaid, or certified mail, return receipt requested, to a person or office and address designated by the seller or holder. (Civil Code §2983.2(a)(7)).

include in the notice of intention to sell in at least 10 point bold type as follows: "NOTICE. YOU MAY BE SUBJECT TO SUIT AND LIABILITY IF THE AMOUNT OBTAINED UPON DISPOSITION OF THE VEHICLE IS INSUFFICIENT TO PAY THE CONTRACT BALANCE AND ANY OTHER AMOUNTS DUE." (Civil Code §2983.2(a)(8)).

inform the defendant in the notice of intention to sell that upon disposition of the motor vehicle, he or she would be liable for the deficiency balance plus interest at the contract rate, or at the legal rate of interest pursuant to Civil Code §3289 if there is no contract rate of interest, from the date of disposition of the motor vehicle to the date of entry of judgment (Civil Code §2983.2(a)(9)).

sell the vehicle in a commercially reasonable manner.

sell the vehicle, and instead appropriated the vehicle for the plaintiff's or plaintiff's assignor's personal use and benefit.

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Recoupment: The plaintiff Debt Collection Agency and/or its Attorney who regularly collects debt for it are subject to the Rosenthal Fair Debt Collection Act ("RFDCA")- Civil Code §1788 et. seq. and/or the California Business and Professions Code §6077.5 et. seq.) By violating these laws, as listed below, it must pay back any out-of-pocket expenses defendant paid due to these violations. If the defendant shows plaintiff intentionally violated the law, plaintiff must also pay up to \$1,000 for each violation. These sums off-set (reduce or eliminate) defendant's debt, if any. (§1788.30(a)-(g)).

Specifically, it is alleged:

- the plaintiff or plaintiff's attorney did not disclose in its initial communication with the defendant that it was trying to collect a debt and that any information obtained would be used for that purpose (15 USC §1692e(11))
- the plaintiff or plaintiff's attorney did not give the defendant:
 - a debt validation notice at all (15 USC §1692g; Bus. & Prof. Code §6077.5(g))
 - a debt validation notice at the same time or within five days of its initial communication with the defendant (15 USC §1692g(a)(1)-(5))
- the loan was secured by a motor vehicle that was repossessed by the plaintiff, but the plaintiff or plaintiff's assignor failed to:
 - send a notice of intention to sell the vehicle as required under Civil Code §2983.2.
 - include in the notice of intention to sell that the defendant had a right to redeem the motor vehicle by paying in full the indebtedness evidenced by the contract until the expiration of 15 days from the date of giving or mailing the notice with an itemization of the contract balance and of any delinquency, collection

Additional Defenses: The defendant additionally raises the following, separately stated additional defenses: