UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

Defendants, and

_____/

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION TO CONSTRUE SOME AFFIRMATIVE DEFENSES AS DENIALS, AND TO STRIKE OTHERS

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(f), Plaintiff Securities and Exchange Commission moves the Court to construe as denials certain of the Defendants' Affirmative Defenses, and to strike others in the pleadings of Defendants Dean Vagnozzi, Perry Abbonizio, Michael Furman, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta [D.E. 594, 607-609, 615, 617].

To aid the Court in its consideration of the relief sought herein regarding the six Defendants' separately pled Answers and Affirmative Defenses, the Commission summarizes in the chart attached as Exhibit A hereto the Affirmative Defenses at issue, the Commission's challenges, and the relief the Commission seeks as to each Affirmative Defense.

II. PROCEDURAL BACKGROUND

The Commission filed a Complaint against the Defendants in July 2020 [DE 1]. Simultaneous with the filing of the Complaint, the Commission filed a Motion for Temporary

Restraining Orders and Other Relief, which the Court granted [DE 14 & 42]. Each of the Defendants subsequently agreed to the entry of Preliminary Injunctions against them, which this Court entered. The Defendants then filed a Joint Motion to Dismiss for failure to state a claim and failure to file a Complaint within the statute of limitations [DE 363], which the Court denied [DE 583]. Between May 25, 2021, and June 9, 2021, the Defendants filed Answers and Affirmative Defenses. [DE 594, 607-609, 615, 617]. On June 16, 2021, the Court granted the Commission's Motion to file one Motion to Strike as to all Defendants' Affirmative Defenses. [DE 624].

III. MEMORANDUM OF LAW

A. General Standards for Striking Affirmative Defenses

An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove his case by a preponderance of the evidence. *Wright v. Southland Corp.*, 187 F.3d 1287, 1302 (11th Cir. 1999); *Van Schouwen v. Connaught Corporation*, 782 F. Supp. 1240, 1247 (N.D. Ill. 1991) ("An affirmative defense generally admits the matters alleged in a complaint but brings up some other reason why the plaintiff has no right to recovery. It thus introduces arguments not raised by a simple denial.").

Denials. A defense that merely denies the plaintiff's allegations is not an affirmative defense. *In re Rawson Food Services, Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense."); *United States v. Halifax Hosp. Med. Ctr.*, No 6:09-cv-1002, 2013 WL 6017329 at *12 (M.D. Fla. Nov. 13, 2013) (striking defenses of failure to state a claim and failure to plead fraud with particularity because they were "failure of pleading" defenses, not affirmative defenses); *Wendel v. International Real Estate News*, Case No. 19-cv-21658, 2019 WL 4254626 at *3 and *5 (S.D. Fla. July 31, 2019) (striking affirmative defenses that were mere denials of the complaint); *SEC v.*

Thunderbird, Case No. 20-cv-22901-Gayles, DE 49 (striking failure to state a claim because it is not an affirmative defense, as well as striking other affirmative defenses).

Legally insufficient affirmative defenses. Federal Rule of Civil Procedure 12(f) allows the Court to strike from a pleading "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). An affirmative defense is insufficient as a matter of law where: "(1) in the face of the pleadings, it is patently frivolous; or (2) it is clearly invalid as a matter of law." *Dionisio v. Ultimate Images and Designs, Inc.*, 391 F. Supp. 3d 1187, 1192 (S.D. Fla. 2019). A court should grant a motion to strike "when it is clear that the affirmative defense is irrelevant and frivolous and its removal from the case would avoid wasting unnecessary time and money in litigating the invalid defense." *SEC v. Keating,* Case No. CV 91-6785, 1992 WL 207918 at *2 (C.D. Cal. July 23, 1992). *See also Heller Financial, Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989) ("where, as here, motions to strike remove unnecessary clutter from the case, they serve to expedite, not delay").

Bare bones allegations. Motions to strike are generally disfavored and should be granted sparingly. However, "an affirmative defense must be stricken when the defense is comprised of no more than bare bones, conclusory allegations or is insufficient as a matter of law." *Dionisio v. Ultimate Images and Designs, Inc.*, 391 F. Supp. 3d 1187, 1191 (S.D. Fla. 2019). *See also Gomez v. Bird Automotive LLC*, 411 F. Supp. 3d 1332, 1334 (S.D. Fla. 2019); *Wendel v. International Real Estate News*, Case No. 19-cv-21658, 2019 WL 4254626 at *3 (S.D. Fla. July 31, 2019); *Flying Fish Bikes, Inc. v. Giant Bicycle, Inc.*, No. 8:13-cv-2890, 2015 WL 847738 at *1 (M.D. Fla. Feb. 26, 2015); *HW Aviation LLC v. Royal Sons LLC*, Case No. 8:07-cv-2325, 2008 WL 4327296 at *7 (M.D. Fla. Sept. 17, 2008); *Microsoft Corp. v. Jesse's Computers & Repairs, Inc.,* 211 F.R.D. 681, 683-84 (M.D. Fla. 2002). "[A] court must not tolerate shotgun pleading of

affirmative defenses, and should strike vague and ambiguous defenses which do not respond to any particular count, allegation or legal basis of a complaint." *Gomez*, 411 F. Supp. 3d at 1334; *Wendel*, 2019 WL 4254626 at *3; *Morrison v. Exec. Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005).

Affirmative defenses against a government agency. Despite disfavoring motions to strike, courts have expressed "reluctan[ce]" to permit affirmative defenses to go forward against a government agency like the SEC, where the agency is "seeking to enforce a congressional mandate in the public interest." *SEC v. Lorin*, No. 90cv7461 (PNL), 1991 WL 576895, at *1 (S.D.N.Y. June 18, 1991). Indeed, as a general rule, a defendant in such an action will not be permitted to proceed with an equitable defense, such as one alleging unclean hands. *See id.* *See also SEC v. American Growth Funding II, LLC*, 2016 WL 8314623, at *3 (S.D.N.Y. Dec. 30, 2016).

It is well recognized in Commission enforcement actions that "[a]n increase in the time, expense and complexity of a trial may constitute sufficient prejudice to warrant granting a plaintiff's motion to strike." *SEC v. Thrasher*, Case No. 92 Civ. 6987, 1995 WL 456402 at *4 (S.D.N.Y. Aug. 2, 1995) (striking several affirmative defenses). "Courts must not be oblivious to the caseload pressure and budgetary restrictions on government enforcement agencies, nor should they be unmindful that the discovery process can be unduly and unnecessarily delayed" by parties seeking to establish meritless affirmative defenses. *SEC v. Sarivola*, Case No. 95 CIV 9270, 1996 WL 304371 at *1 (S.D.N.Y. June 6, 1996) (striking defenses of laches and estoppel).

To address the concerns that equitable defenses should not unduly impede or delay enforcement actions, such defenses have only been permitted in limited circumstances, *i.e.*, "where it appears that the government may have engaged in outrageous or unconstitutional activity." *Lorin,* 1991 WL 576895, at *1; *accord SEC v. Rosenfeld,* Case No. 97-cv-1467, 1197

WL 400131, at *2 (S.D.N.Y. July 16, 1997). In fact, "[w]here courts have permitted equitable defenses to be raised against the government, they have required that the agency's misconduct be egregious and the resulting prejudice to the defendant rise to a constitutional level." *Rosenfeld*, 1197 WL 400131, at *2 (internal citation omitted).

This framework for addressing affirmative defenses against the government are addressed on motions to strike brought under Rule 12(f). *See, e.g., In re Beacon Assocs. Litig.*, Case Nos. 09-cv-777, 10-cv-8000, 2011 WL 3586129, at *3-4 (S.D.N.Y. Aug. 11, 2011) (striking equitable defenses where, *inter alia,* defendants failed adequately to allege that they suffered "prejudice to their case of a constitutional magnitude"); *SEC v. KPMG LLP*, No. 03-cv-671, 2003 WL 21976733, at *3 (S.D.N.Y. Aug. 20, 2003) (striking unclean-hand defense under Rule 12(f) where defendants failed to allege the Commission's conduct "constituted egregious misconduct or prejudice that rose to a 'constitutional level' "); *Rosenfeld*, 1197 WL 400131, at *2-3 (striking affirmative defense under Rule 12(f) where the defendant failed to plead sufficient prejudice).

B. The Court Should Construe Certain Affirmative Defenses as Denials Rather Than Affirmative Defenses

The following Affirmative Defenses should be treated as denials, and should not be treated as Affirmative Defenses: Lack of Scienter;[1] Mistake;[2] Acts of Others – *i.e.,* it was someone else;[3] and the Misrepresentations/Omissions Are Not Material.[4]

The Eleventh Circuit has explained:

> An affirmative defense raises matters extraneous to the plaintiff's *prima facie* case; as such, they are derived from the common law plea of 'confession and avoidance.' . . . On the other hand, some defenses negate an element of the plaintiff's *prima*

[1] Vagnozzi, Furman, and Abbonizio Aff. Def. 3.

[2] Vagnozzi, Furman, and Abbonizio Aff. Def. 5.

[3] Vagnozzi, Furman, and Abbonizio Aff. Def. 8.

[4] Vagnozzi, Furman, and Abbonizio Aff. Def. 13.

> *facie* case; these defenses are excluded from the definition of affirmative defense in Fed.R.Civ.P. 8(c).

In re Rawson Food Services, 846 F.2d at 1349.

For that reason, a defense that simply points out a defect or lack of evidence in a case is not an affirmative defense. *Id.* ("A defense which points out a defect in the plaintiff's *prima facie* case is not an affirmative defense."); *Royal Caribbean Cruises, Ltd. v. Jackson*, 921 F.Supp.2d 1366, 1372 (S.D. Fla. 2013). ("An affirmative defense is established only when a defendant admits the essential facts of a complaint and sets up other facts in justification or avoidance."); *SEC v. BIH*, 2013 WL 1212769 (M.D. Fla. Mar. 25, 2013) (treating as denials rather than as affirmative defenses the same defenses alleged here); *Reed v. Dollar Gen. Corp.*, No. 8:05-cv-1440, 2005 U.S. Dist. LEXIS 48170, at *4 (M.D. Fla. Aug. 23, 2005) ("[T]his defense is incorrectly labeled as an 'affirmative' defense, because '[s]aying that someone else is really the negligent actor is obviously not a confession and avoidance, the essence of a true affirmative defense'").

Here, defenses of lack of scienter, mistake, acts of others, and lack of materiality do not attempt to avoid liability while admitting to the essential facts of the Amended Complaint. Instead, they attack the Amended Complaint, either by denying the allegations outright or identifying a defect or lack of evidence in the Commission's case. As such, they are denials and the proper remedy is to construe them as such. *Tsavaris v. Pfizer, Inc.*, 310 F.R.D. 678 (S.D. Fla. 2015).

Why does it matter? If a defense is construed as an affirmative defense rather than as a denial, it impacts the parties' burdens, the chance for success on summary judgment, and jury instructions. For example, a defendant has the burden to demonstrate affirmative defenses, and jury instructions are provided concerning affirmative defenses. Thus, it is a distinction with a

difference as we proceed through litigation in this case.[5] The Court should clarify for the Parties that these defenses will not be treated as Affirmative Defenses.

C. The Court Should Strike Certain Affirmative Defenses With Prejudice[6]

1. Defenses The Court Has Ruled Upon

Vagnozzi, Furman, and Abbonizio each assert the Affirmative Defenses of failure to state a claim and statute of limitations.[7] However, the Court has already ruled on the Defendants' argument that the Amended Complaint fails to state a claim. (DE 583, Order denying Defendants' Joint Motion to Dismiss). The Court has also ruled that the Amended Complaint alleges facts within the five-year statute of limitations of 28 U.S.C. § 2462. *Id.* In addition, Congress has extended the statute of limitations and the extension is applicable to all pending cases charging claims involving scienter. National Defense Authorization Act, H.R. 6395, §§ 6501(a)(3) and 6501(b), 15 U.S.C. 7u(d)(8)(A). Accordingly, striking these Affirmative Defenses is appropriate. *BIH*, 2013 WL 1212769; *SEC v. Laura*, 2020 WL 8772252, at *3 (E.D.N.Y Dec. 30, 2020)

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[5] The Defendants did not identify which of their defenses are relevant to which Count. However, certain of Defendants' denials cannot as a matter of law be raised as defenses to some of the Counts charged against the Defendants. For example, lack of scienter, mistake, and immateriality are not, as a matter of law, defenses to the Commission's claim against the Defendants under Sections 5(a) and (c) of the Securities Act of 1933 ("Securities Act") (Count VII, Amended Complaint). Eleventh Circuit Civil Pattern Jury Instructions for Securities Act Section 5 Claims & cases cited in Annotations and Comments thereto. Scienter is not an element of claims under Sections 17(a)(2) and (3) of the Securities Act. *Aaron v. SEC*, 46 U.S. 680 (1980) (holding that negligence, rather than scienter, suffices for claims under Sections 17(a)(2) and (3) of the Securities Act). Likewise, whether or not a misrepresentation or omission is material has no bearing on claims under Sections 17(a)(1) and (3) of the Securities Act and under subsections (a) and (c) of Rule 10b-5 of the Securities Exchange Act of 1934 (the "Exchange Act"). *See* Order Denying Motion to Dismiss and cases cited therein, DE 583 at pp. 20-21.

[6] Vagnozzi, Furman, and Abbionizio asserted a catch-all affirmative defense, attempting to reserve the right to assert additional defenses in the future. While improper, this reservation of rights is essentially meaningless because it does not confer the Defendants the right to amend without the Court's approval, and thus does not prejudice the Commission. Accordingly, we do not ask the Court to expend resources addressing whether to strike this affirmative defense.

[7] Vagnozzi, Furman, and Abbonizio's First and Second Affirmative Defenses.

(striking Statute of Limitations defense on these same grounds where Court already ruled the Complaint alleged facts within the then-applicable statute of limitations). Further, the Court has already rejected the same assertion the Defendants raise in their defenses that the promissory notes are not securities because they fit squarely within one of the categories enumerated in *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990).[8] [DE 583].

The Commission will be prejudiced if these Affirmative Defenses are not stricken because we will expend resources litigating matters we have already litigated in this case, including re-litigating on summary judgment and/or trial matters that have already been litigated in this case, and responding to discovery concerning these matters.

3. Legally Insufficient or Irrelevant Defenses

The following Affirmative Defenses are legally insufficient or irrelevant as a matter of law as to any claim against the Defendants:

- Statute of Limitations
- Improper Forfeiture
- Unjust Enrichment
- Unconstitutional
- Lack of Loss Causation
- Waiver
- Laches
- Estoppel

[8] Vagnozzi, Furman, and Abbnizio Affirmative Defense 7; McElhone, LaForte, and Barleta Affirmative Defense 18.

We discuss these affirmative defenses separately immediately below. Because the Commission's prejudice is nearly identical for each of these if they are not stricken, we address it separately at the onset. Spending resources conducting and responding to discovery concerning insufficient defenses would prejudice the Commission. Less than three months of discovery time remain in this case, and summary judgment motions are due in less than three months as well. We do not want to seek an enlargement of the discovery period because it would affect the trial date, which ultimately affects when the victim investors can, should the Commission be successful litigating this case, receive funds., particularly given the schedule, would prejudice the Commission and require us to expend resources on these matters rather than on the matters we must address to prepare for summary judgment motion and trial.

The prejudice is compounded not only by the limited time remaining for discovery, but also by the fact that the Defendants' pled shotgun affirmative defenses, comprised primarily of one-line conclusory statements with no indication of even a hint of the basis for the purported defenses. Thus, we must expend resources to first ascertain the basis of the defenses and then to conduct discovery concerning the facts underlying the bases for the defenses, while also addressing any discovery disputes, in less than three months while preparing for trial. The Commission would also be prejudiced because we would need to address the affirmative defenses on summary judgment in order to succeed on obtaining a judgment on the claims, thus requiring not only significant Commission resources but also those of the Court. Because these affirmative defenses are insufficient, in general or as pled, as a matter of law, they should be stricken now under Rule 12(f). Further, equitable defenses such as laches, waiver, and estoppel, raise significant discovery issues if they concern the Commission's investigation and nonpublic matters that will lead to further discovery litigation. The Defendants have already set the Commission's 30(b)(6)

deposition concerning a host of topics that have no apparent relevance to this case – such as topics concerning our policies, guidelines, action memos Commission counsel sent to the Commissioners of the Commission, and other privileged and apparently irrelevant issues. Because the Defendants alleged shotgun affirmative defenses, there is no notice of exactly what is being asserted, and the Defendants are engaging in broad fishing expeditions to seek discovery in this case in the final three months of discovery remaining. As set forth below, the affirmative defenses should be stricken under Rule 12(f), which will help prevent the prejudice to the Commission stated herein.

Statute of Limitations. As set forth above, the Court has already ruled that the Amended Complaint alleges claims based on conduct within the five-year statute of limitations period of 28 U.S.C. § 2462, which statute of limitations has now been extended by Congress. Regardless, there are no facts or evidence with respect to statute of limitations that could defeat the Commission's claims as set forth in the Amended Complaint because, as the Court has already found, the Amended Complaint alleges violations of the federal securities laws *based on* conduct during the five-year period preceding the filing of this case. This serves as a second basis for the Court to strike the statute of limitations affirmative defense – namely, Vagnozzi, Furman, and Abbonizio's Second Affirmative Defenses.

Improper Forfeiture & Unjust Enrichment. Vagnozzi, Furman, and Abbonnizio each allege a "forfeiture" affirmative defense that states: "Plaintiff's claims fail because the Amended Complaint seeks an impermissible forfeiture;" [9] and an unjust enrichment affirmative defense that states: "Plaintiff cannot recover damages because any such recovery would be a windfall resulting in unjust enrichment to Plaintiff or to a party Plaintiff purports to seek to reimburse."[10] However,

[9] Vagnozzi, Furman, and Abbonizio's Ninth Affirmative Defense.

[10] Vagnozzi, Furman, and Abbonizio's Tenth Affirmative Defense.

the Commission is not seeking any forfeiture and is not seeking damages. Instead, the Commission seeks a civil money penalty and disgorgement of the Defendants' ill-gotten gains – i.e. the Defendants' unjust enrichment. *SEC v. Kirkland*, Case No. 06-cv-183, 2006 WL 8449839, *2 (M.D. Fla. Sept. 6, 2006) (striking affirmative defenses), *citing SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996). The amount, if any, that investors have received (which we guess is maybe what Defendants are arguing as unjust enrichment) is a consideration in calculating disgorgement, but is not a defense. *Id.* (striking affirmative defense that disgorgement would be affected by amounts investors received through settlements). Accordingly, the Court should strike the forfeiture and unjust enrichment Affirmative Defenses because they are not defenses to any claim in this case.

Unconstitutionality. Vagnozzi, Furman, and Abbonizio each allege the purported affirmative defense of "unconstitutionality" and allege that "Plaintiff's claims fail because the relief Plaintiff seeks violate the federal constitution."[11] As set forth below in the next Section of this Memorandum of Law, the Defendants fail to provide any detail whatsoever as to which relief is purportedly unconstitutional, or how. Nonetheless, the Commission seeks three forms of relief: a permanent injunction, disgorgement, and a civil penalty. Congress has explicitly authorized the Commission to seek this type of relief. Accordingly, this Affirmative Defense cannot succeed and the Court should strike Vagnozzi, Furman, and Abbonizio's Eleventh Affirmative Defense.

Lack of Causation. Vagnozzi, Furman, and Abbonizio each allege "lack of causation" as an affirmative defense. Specifically, they allege that "Plaintiff's claims against Defendant cannot be maintained because superseding or intervening events, not caused by Defendant, caused some

[11] Vagnozzi, Furman, and Abbonizio's Eleventh Affirmative Defense.

or all of the alleged damages." [12] This defense improperly attempts to import the requirement that investors in private securities fraud lawsuits must prove false and misleading statements caused damages. However, it is well established that loss causation is not an element the Commission must prove under Securities Act Section 17(a) or Exchange Act Section 10(b). *SEC v. Goble*, 682 F.3d 934, 942 (11th Cir. 2012); *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012); *SEC v. BIH Corp.*, No. 2:10-cv-577, 2013 WL 1212769 at *5 (M.D. Fla. March 25, 2013) (striking affirmative defenses relating to reliance and investor losses). Consequently the Court should strike with prejudice the "lack of causation" affirmative defense – namely, Vagnozzi, Furman, and Abbonizio's Twelfth Affirmative Defense.

Laches. Each of the individual Defendants asserts Affirmative Defenses of laches (delay), alleging nothing more than the "claims are barred, in whole or in part by the doctrine of laches." [13] However, the Eleventh Circuit and other courts have held that this affirmative defenses is not available against the government in an enforcement action. *SEC v. Silverman*, 328 Fed. Appx. 601, 2009 WL 1376248 at *4 (11th Cir. 2009) (unpublished) (affirming District Court dismissal of laches as an affirmative defense, and stating "we agree with the district court's finding that laches is not available as a defense to this SEC civil law enforcement action. This is so 'because the United States is not . . . subject to the defense of laches in enforcing its rights.' *United States v. Summerlin*, 310 U.S. 414 (1940). Accordingly, where, as in this case, a government agency brings an enforcement action to protect the public interest, laches is not a defense."). Numerous other courts have reached an identical conclusion. *United States ex rel. Bingham v. Baycare Health Sys.*,

[12] Vagnozzi, Furman, and Abbonizio's Twelfth Affirmative Defense.

[13] Vagnozzi Affirmative Defense 15, McElhone, LaForte, and Barlet's Affirmative Defense 4, and Furman and Abbonizio Affirmative Defense 16.

Case No. 8:14-cv-73, 2016 WL 7232445 at *1 (M.D. Fla. April 14, 2016) (striking affirmative defenses of laches and waiver because they are not available against the government); *FTC v. U.S. Work Alliance, Inc.*, Case No. 1:08-cv-2053, 2009 WL 10669724 at *3 (N.D. Ga. Feb. 24, 2009) ("the law is clear that laches cannot be pleaded against the federal government in suits by it to protect the public interest"); *CFTC v. Kraft Foods Group, Inc.*, 195 F. Supp. 3d 996, 1010 (N.D. Ill. 2016) (striking affirmative defense of laches and noting that "it falls within the general rule that the United States is not subject to the equitable defense of laches in enforcing its rights"); *SEC v. Toomey*, 886 F. Supp. 719, 725 (S.D.N.Y. 1992) (striking laches defense as not available against the Commission); *SEC v. Sands*, 902 F. Supp. 1149, 1167 (C.D. Cal. 1995) ("It is well established that laches is not an affirmative defense against the United States"). In accord with these cases, the Court should strike the Affirmative Defense of laches with prejudice – namely, Vagnozzi Affirmative Defense 15, McElhone, LaForte, and Barlet's Affirmative Defense 4, and Furman and Abbonizio Affirmative Defense 16.

Waiver. The Defendants allege as an Affirmative Defense that the "claims are barred by the doctrine of waiver."[14] And nothing more. However, the waiver defense is not applicable against a government agency in a case the agency brought to enforce an act of Congress – which is precisely what this case is. *See FTC v. Leshin*, 2007 WL 9703567, at *4 (S.D. Fla. 2007) (Ungaro, J.) ("the waiver defense has been found not to be applicable against a government agency"); *SEC v. Morgan, Lewis & Bockius*, 209 F.2d 44, 49 (3d Cir. 1954) (a government agency "may not waive the requirement of an act of Congress"); *FTC v. Premier Precious Metals, Inc.*,

[14] Vagnozzi Affirmative Defense 14; McElhone, LaForte, and Barleta Affirmative Defense 6; and Furman and Abbonizio Affirmative Defense 15.

Case No. 12-cv-60504, ECF No. 86 at 1-2 (S.D. Fla. Dec. 5, 2012) (Scola, J.) ("Waiver is not a viable defense where the FTC brings an action to enforce an act of Congress.").

In accord with these cases, the Court should strike the Affirmative Defense of waiver with prejudice – namely, Vagnozzi Affirmative Defense 14; McElhone, LaForte, and Barleta Affirmative Defense 6; and Furman and Abbonizio Affirmative Defense 15.

Estoppel. Each of the individual Defendants asserts the Affirmative Defense of estoppel. In doing so, each Defendant alleges nothing more than this hollow assertion: "Plaintiff's claims are barred by the doctrine of estoppel."[15]

The government cannot normally be estopped on the same terms as a private litigant. In *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60-61 (1984). An estoppel claim against the government can lie "only in the most extreme circumstances." *In the Matter of Turtle Creek, Ltd.,* 194 B.R. 267, 274 (Bankr. N.D. Ala. 1996), *quoting Gibson v. Resolution Trust Corp.*, 51 F.3d 1016, 1025 (11th Cir. 1995). At a minimum, traditional equitable estoppel elements must be met: "(1) words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to the acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated." *Bokum v. C.I.R.*, 992 F.2d 1136, 1141 (11th Cir. 1993) (quotations omitted).

Generally this means "if estoppel is available against the Government, it is warranted only if affirmative and egregious misconduct by government agents exists." *Silverman*, 2009 WL 1376248 at *4 (affirming dismissal of defendants' estoppel claim alleging the Commission waited too long to bring a motion for disgorgement and penalty claims). *See also CFTC v. Southern Trust*

[15] Vagnozzi Affirmative Defense 16; McElhone, LaForte, and Barleta Affirmative Defense 5; and Furman and Abbonizio Affirmative Defense 14.

Metals, Inc., 880 F.3d 1252, 1260-61 (11th Cir. 2018) (affirming district court ruling dismissing estoppel defense against the CFTC, and noting "The Supreme Court has never established that the doctrine of equitable estoppel can be applied against the government and, in fact, has implied that it cannot be"), *quoting Tovar-Alvarez v. United States Attorney General*, 427 F.3d 1350, 1353-54 (11th Cir. 2005); *FDIC v. Harrison*, 735 F.2d 408, 410-11 (11th Cir. 1984); *U.S. ex rel. Freedman v. Suarez-Hoyos*, Case No. 8:04-cv-933, 2012 WL 4344199 at *6 (M.D. Fla. Sept. 21, 2012) (granting summary judgment on estoppel defense).

Here, in eleventh month of litigation, the Defendants have not alleged *any* basis for an estoppel defense whatsoever, let alone a basis sufficient to conclude that the Commission engaged in egregious conduct sufficient to raise an estoppel defense against a government agency. Accordingly, the Court should strike this Affirmative Defense – namely, Vagnozzi Affirmative Defense 16; McElhone, LaForte, and Barleta Affirmative Defense 5; and Furman and Abbonizio Affirmative Defense 14.

D. Shotgun Affirmative Defenses

For those Affirmative Defenses the Court does not strike with prejudice, the Court should strike them without prejudice and should require the Defendants to re-plead them so the Commission is on notice of what the Affirmative Defenses are.

The pleading requirements of Rule 8 of the Federal Rules of Civil Procedure apply equally to affirmative defenses as to complaints. *Heller*, 883 F.2d at 1295 ("Affirmative defenses are pleadings and therefore are subject to all pleading requirements of the Federal Rules of Civil Procedure"); *BIH*, 2013 WL 1212769 at *1 ("Affirmative defenses are subject to the general pleading requirements of Rule 8 . . . and must give the plaintiff 'fair notice' of the nature of the defense and the grounds on which it rests" and "state a plausible defense"); *Microsoft*, 211 F.R.D.

at 684 (affirmative defenses are subject to Rule 8 pleading requirements and "must do more that make conclusory allegations").

Under those standards, a "defendant must allege some additional facts supporting the affirmative defense." *Gomez*, 411 F. Supp. 3d at 1334. *See also Wendel*, 2019 WL 4254626 at *3 (same). Courts should strike affirmative defenses where they fail to recite more than bare-bones conclusory allegations. *Gomez*, 411 F. Supp. 3d at 1334; *Wendel*, 2019 WL 4254626 at *3, *5; *Merrill Lynch Bus. Fin. Serv. v. Performance Mach. Sys.,* 2005 WL 975773 at *11 (S.D. Fla. March 4, 2005); *Luxottica*, 186 F. Supp. 3d at 1374-75. "Furthermore, a court must not tolerate shotgun pleading of affirmative defenses, and should strike vague and ambiguous defenses which do not respond to any particular count, allegation or legal basis of a complaint." *Gomez*, 411 F. Supp. 3d at 1334; *Wendel*, 2019 WL 4254626 at *3, *5; *Morrison*, 434 F. Supp. 2d at 1318.

A majority of district courts in the Eleventh Circuit have held that the pleading standards for affirmative defenses include meeting the threshold plausibility requirement for complaints set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). *See, e.g., Gomez*, 411 F. Supp. 3d at 1334-1338 (noting a split of district court opinions in the Eleventh Circuit but that a majority hold that the *Twombly* and *Iqbal* standards apply to affirmative defenses); *BIH*, 2013 WL 1212769 at *1; *Electronic Communication Technologies, LLC v. Clever Athletics Co.*, Case No. 9:16-cv-81466, 2016 WL 7409710 at *1-2 (S.D. Fla. Dec. 19, 2016). A minority of courts have held the *Twombly* "sufficient facts" standard does not apply to affirmative defenses. *See, e.g., Vigo Importing*, 2016 WL 7104871 at *2.

In *Gomez*, the Court explained why applying to affirmative defenses the same pleading standard applicable to complaints is warranted. 411 F.Supp.3d at 1337 (applying the standards under *Twombly* on motion to strike affirmative defenses):

> First, *Iqbal's* extension of the *Twombly* pleading standard was premised on *Twombly's* holding that the purpose of Rule 8 – in general – was to give parties notice of the basis for the claims being sought. Importantly, the Supreme Court discussed Rule 8 at large and never limited its holding solely to complaints. Plaintiff's reliance on a subtle difference in wording (i.e. "show" and "state") between Rule 8(a) and 8(b) is unpersuasive because the purpose of pleading sufficient facts is to give fair notice to the opposing party that there is a plausible and factual basis for the assertion and not to suggest that it might simply apply to the case. This was the foundation for the decisions in *Twombly* and *Iqbal* and it applies equally to complaints and affirmative defenses.
>
> Second "it neither makes sense nor is it fair to require a plaintiff to provide defendant with enough notice that there is a plausible, factual basis for...[its] claim under one pleading standard and then permit the defendant [or counter-defendant] under another pleading standard simply to suggest that some defense may possibly apply in the case." *Castillo v. Roche Labs. Inc.*, 2010 WL 3027726, at *2 (S.D. Fla. Aug. 2, 2010) (quoting *Palmer v. Oakland Farms, Inc.,* 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010)). And third, "when defendants are permitted to make "[b]oilerplate defenses," they "clutter [the] docket; they create unnecessary work, and in an abundance of caution require significant unnecessary discovery." *Castillo,* 2010 WL 3027726, at *3 (citation and internal quotation marks omitted).
>
> When coupling the three considerations discussed above with the fact that a majority of courts have agreed with this position, we hold that there is no separate standard for complaints and affirmative defenses in connection with Rule 8.

Even if the Court does not apply *Twombly* to the Affirmative Defenses, then the Defendants' Affirmative Defenses are insufficient. They are one- or two-line conclusory statements with no facts in support that simply name a defense. For example, the Defendants assert reliance on advice of counsel or professionals as Affirmative Defenses, and provide no facts indicating who the counsel or professionals are or which counts of the Complaint the reliance defense is relevant to.[16] Similarly, Vagnozzi, Furman, and Abbonizio assert "unconstitutionality" as an Affirmative Defense, with no indication as to what they claim is the constitutional violation

[16] For example, if they received legal advice about registering the securities and are thus asserting a reliance on advice of counsel defense to the Section 5 claim in Count VII, this should be stricken with prejudice because reliance on advice of counsel is not a defense to this claim. Eleventh Circuit Civil Pattern Jury Instruction for Section claims.

or even which constitutional amendment is at issue. Each of the Affirmative Defenses merely states the defense, and nothing more. The Defendants assert "good faith," "reliance on advice of professionals," "reliance on advice of counsel," and "justifiable reliance," which appear to be the same defense repeated multiple times. Or, it is possible the "good faith" defense is the same as the Defendants' "lack of scienter" defense. We cannot tell because the pleadings are utterly bare-boned. Because there is no detail and no allegation other than to identify generally the defense, the pleadings are meaningless. We cannot distinguish them from one another (as in the case of justifiable reliance, good faith, reliance on advice of counsel, and reliance on advice of professionals, and lack of scienter). We also cannot tell which defense applies to which claim. We are left to guess which constitutional amendments are at issue. We are left to guess the grounds for the equitable defenses such as estoppel. There are no facts alleged, and no detail tying these defenses to this case. Such defenses "fall woefully short" because they "literally give Plaintiff no notice" as to how they apply to the case. They are "merely a conclusory statement that violates even the most basic principles of Rule 8(c) that requires a party to 'affirmatively state any avoidance or affirmative defense.'" *Gomez,* 411 F.Supp.3d at 1339.

Discovery ends in less than three months. Rather than forcing the Commission to go on an expedited fishing expedition in discovery that will expend significant time and resources of all parties (and potentially the Court's scarce time and resources also) on potentially irrelevant and frivolous issues, the Court should strike all of the Affirmative Defenses it does not strike with prejudice or construe as denials (as requested in the prior sections of this Motion) and order the Defendants to re-plead any Affirmative Defenses it does not strike with prejudice or construe as a denial. Otherwise, by the time we conduct discovery to ascertain what the Affirmative Defenses are exactly, which claims they apply to, and what specifically is being alleged, we will have little

to no time to conduct depositions and discovery efforts concerning the Affirmative Defenses. The trial in this case has already been continued once at the Defendants' request, and we do not want to further postpone or seek to postpone the trial. If the Court does not require the Defendants to re-plead the Affirmative Defenses and does not strike the frivolous Affirmative Defenses, the Commission will be severely prejudiced in preparing for trial in this case, as discussed above. This case has been pending for eleven months, and there is insufficient time to discover that which should have been plead and then to conduct discovery concerning what exactly the Defendants are claiming in their Affirmative Defenses.

Accordingly, for any Affirmative Defense not stricken with prejudice or construed as a denial, the Court should strike it without prejudice to re-plead with the required level of specificity.

June 21, 2021

Respectfully submitted,

By: Amie Riggle Berlin
Amie Riggle Berlin
Senior Trial Counsel
Florida Bar No. 630020
Direct Dial: (305) 982-6322
Email: berlina@sec.gov
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1800
Miami, Florida 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154

CERTIFICATE OF CONFERRAL

Undersigned Counsel conferred with Defendant's counsel, and we continuing conferral efforts. If we resolve any issue raised herein, we will notify the Court immediately.

s/Amie Riggle Berlin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 21st day of June 2021 via cm-ecf on all defense counsel and via email on the *Pro Se* Defendant in this case.

s/Amie Riggle Berlin

AFFIRMATIVE DEFENSE	COMMISSION'S ARGUMENTS AND *RELIEF SOUGHT*			
	Not An Aff. Defense *Construe as Denial*	**Rule 12(f) as to All Counts** *Dismiss with Prejudice*	**Rule 12(f) as to Count VII** *Dismiss with Prejudice as to Count VII*	**Rule 8; Shotgun Pleading** *Applicable to Affirmative Defenses (not denials) the Court does not dismiss with prejudice*
Failure to State Claim				
Vagnozzi (#1)		x		x
Furman (#1)		x		x
Abbonizio (#1)		x		x
Statute of Limitations				
Vagnozzi (#2)		x		
Furman (#2)		x		
Abbonizio (#2)		x		
Lack of Scienter				
Vagnozzi (#3)	x			
Furman (#3)	x			
Abbonizio (#3)	x			
Mistake				
Vagnozzi (#5)	x			
Furman (#5)	x			
Abbonizio (#5)	x			
Acts of Others				
Vagnozzi (#8)	x			
Furman (#8)	x			
Abbonizio (#8)	x			
Improper Forfeiture				
Vagnozzi (#9)		x		x[1]
Furman (#9)		x		x
Abbonizio (#9)		x		x
Unjust Enrichment				
Vagnozzi (#10)		x		x
Furman (#10)		x		x
Abbonizio (#10)		x		x
Unconstitutional				
Vagnozzi (#11)		x		x
Furman (#11)		x		x
Abbonizio (#11)		x		x

[1] Where dismissal with prejudice and without prejudice are both marked, we seek dismissal with prejudice and, in the alternative, without prejudice to re-plead. Because the same pleading standard is not applicable to denials, we have not sought dismissal without prejudice as to these for failure to sufficiently plead them.

AFFIRMATIVE DEFENSE	**COMMISSION'S ARGUMENTS AND *RELIEF SOUGHT***			
	Not An Aff. Defense *Construe as Denial*	**Rule 12(f) as to All Counts** *Dismiss with Prejudice*	**Rule 12(f) as to Count VII** *Dismiss with Prejudice as to Count VII*	**Rule 8; Or Shotgun Pleading** *Applicable to Affirmative Defenses (not denials) the Court does not dismiss with prejudice*
Lack of Causation				
Vagnozzi (#12)		x		
Furman (#12)		x		
Abbonizio (#12)		x		
Lack of Materiality				
Vagnozzi (#13)	x			
Furman (#13)	x			
Abbonizio (#13)	x			
Waiver				
Vagnozzi (#14)		x		
McElhone (#6)		x		
LaForte (#6)		x		
Barleta (#6)		x		
Furman (#15)		x		
Abbonizio (#15)		x		
Laches				
Vagnozzi (#15)		x		
McElhone (#4)		x		
LaForte (#4)		x		
Barleta (#4)		x		
Furman (#16)		x		
Abbonizio (#16)		x		
Estoppel				
Vagnozzi (#16)		x		x
McElhone (#5)		x		x
LaForte (#5)		x		x
Barleta (#5)		x		x
Furman (#14)		x		x
Abbonizio (#14)		x		x
Reliance on Advice of Counsel				
Vagnozzi (#3)			x	x
McElhone (#1)			x	x
LaForte (#1)			x	x
Barleta (#1)			x	x
Furman (#17)			x	x
Abbonizio (#17)			x	x

AFFIRMATIVE DEFENSE	COMMISSION'S ARGUMENTS AND *RELIEF SOUGHT*			
	Not An Aff. Defense *Construe as Denial*	**Rule 12(f) as to All Counts** *Dismiss with Prejudice*	**Rule 12(f) as to Count VII** *Dismiss with Prejudice as to Count VII*	**Rule 8; Or Shotgun Pleading** *Applicable to Affirmative Defenses (not denials) the Court does not dismiss with prejudice*
Reliance on Professionals[2]				
Vagnozzi (#)			x	x
McElhone (#2)			x	x
LaForte (#2)			x	x
Barleta (#2)			x	x
Furman (#6)			x	x
Abbonizio (#6)			x	x
Good Faith[3]				
Vagnozzi (#4)			x	x
McElhone (#3)			x	x
LaForte (#3)			x	x
Barleta (#3)			x	x
Furman (#4)			x	x
Abbonizio (#4)			x	x
Not Securities				
McElhone (#7)		x		
LaForte (#7)		x		
Barleta (#7)		x		
Furman (#18)		x		
Abbonizio (#18)		x		
Justifiable Reliance[4]				
Furman (#7)			x	x
Abbonizio (#7)			x	x

[2] It is possible that this is duplicative of the Reliance on Advice of Counsel Defense or one of the other vague scienter-based defenses asserted. If so, we would move to strike it as duplicative. However, due to the barebones nature of the pleadings, we cannot ascertain this.

[3] It is possible that this is duplicative of the Lack of Scienter, Justifiable Reliance, Reliance on Advice of Counsel Defense, and/or Reliance on Professionals Affirmative Defenses. If so, we would move to strike it as duplicative. However, due to the barebones nature of the pleadings, we cannot ascertain this.

[4] It is possible that this is duplicative of the Lack of Scienter, Good Cause, Reliance on Advice of Counsel Defense, and/or Reliance on Professionals Affirmative Defenses. If so, we would move to strike it as duplicative. However, due to the barebones nature of the pleadings, we cannot ascertain this.