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.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO CONSTRUE SOME AFFIRMATIVE DEFENSES AS DENIALS, AND TO STRIKE OTHERS

Defendants Joseph LaForte, Joseph Cole Barleta, Lisa McElhone, Perry Abbonizio, Dean Vagnozzi, and Michael Furman jointly file this opposition to the Securities and Exchange Commission's ("SEC" or Commission") Motion to Construe Some Affirmative Defenses as Denials, and to Strike Others (DE 627) ("Motion").

I. BACKGROUND

The Commission filed its Amended Complaint on August 10, 2020 (DE 119). The Defendants filed their respective Answers and Affirmative Defenses (DE 607-09, 615, 617, 658). The Commission has moved to strike various affirmative defenses (DE 627). As explained further below, the Commission's Motion fails to satisfy the stringent requirements of Rule 12(f) to justify the need for such a drastic measure.

II. STANDARD

A. Legal Standard for Reviewing Motions to Strike Under Rule 12(f)

Motions to strike are to be used sparingly. *See SEC v. 1 Glob. Capital LLC*, 331 F.R.D. 434, 437 (S.D. Fla. 2019) ("despite the Court's broad discretion, a motion to strike is considered a drastic remedy and is often disfavored"); *Sparta Ins. Co. v. Colareta*, No. 13-60579-CIV, 2013 WL 5588140, at *1 (S.D. Fla. Oct. 10, 2013) (striking defenses from a pleading 'is a drastic remedy to be resorted to only when required for the purposes of injustice'") (citation omitted); *FTC v. U.S. Work Alliance, Inc*., No. 1:08-cv-2053, 2009 WL 10669724, at *1 (N.D. Ga. Feb. 24, 2009) ("partly because of the practical difficulty of deciding cases without a factual record, it is well established that the action of striking a pleading should be sparingly used by the courts") (citations omitted). Because of this, courts agree that a pleading should not be stricken unless the "stricken material has 'no possible relation to the controversy.'" *Sparta Ins. Co.*, 2013 WL 5588140, at *1; *Gonzalez v. Midlaw Credit Management, Inc.,* No. 6:13-cv-1576, 2013 WL 5970721, at *1 (M.D. Fla. Nov. 8, 2013) (explaining "because this is a difficult standard to satisfy, '[m]otions to strike are generally disfavored by the Court and are often considered time wasters.'") (citations omitted). Consequently, an affirmative defense may only be stricken "where they fail to give the plaintiff fair notice of the nature of the defense or where they are clearly insufficient as a matter of law." *See Sparta Ins. Co.*, 2013 WL 5588140, at *4 (explaining that "a defense is insufficient as a matter of law only if: (1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law.").

B. Pleading Standard

Pursuant to Rule 8 of the Federal Rules of Civil Procedure, a defendant must "state in *short and plain terms* its defenses to each claim asserted against it." *Id.* (emphasis added). While the Eleventh Circuit has not ruled otherwise, *see Bluegreen Vacations Unlimited, Inc., & Bluegreen Vacations Corp., v. Timeshare Termination Team, LLC, et al.*, No. 20-CV-25318, 2021 WL 2476488, at *2

(S.D. Fla. June 17, 2021) (explaining that the Eleventh Circuit has yet to resolve the split in opinion regarding whether affirmative defenses are subject to the heightened pleading standard delineated in *Twombly* and *Iqbal*), it *has* stressed the importance of applying a liberal interpretation to the notice requirement found in Rule 8(c):[1]

> we must avoid hypertechnicality in pleading requirements and focus, instead, on enforcing the actual purpose of the rule. The purpose of Rule 8(c) is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it.

Hassan v. U.S. Postal Serv., 842 F.2d 260, 263 (11th Cir. 1988) (permitting defendant to raise an affirmative defense at trial that he did not even plead because he provided the plaintiff with notice); *accord Hewitt v. Mobile Research Technology, Inc.*, 285 F. App'x. 694, 696 (11th Cir. 2008).

In accordance with this reasoning, courts in this Circuit have consistently found that defendants are not required to aver detailed facts in their affirmative defenses. *See 1 Glob. Capital LLC*, 331 F.R.D. at 437 ("the language of Rule 8(a) requires the party to "show" that they are entitled to relief, while Rule 8(b) does not"); *Sparta Ins. Co*, 2013 WL 5588140, at *3 (agreeing that "if the drafters of Rule 8 had intended for the "showing" requirement to apply to the pleading of defenses, they knew how to say it, as demonstrated by Rule 8(a), and would have written that requirement into Rules 8(b) and (c)) (internal citation omitted); *Adams v. JP Morgan Chase Bank, N.A.*, No. 3:11-CV-337-J-37MCR, 2011 WL 2938467, at *1 (M.D. Fla. July 21, 2011) ("if it is not even required that a defendant plead an affirmative defense (so long as the plaintiff has notice of the defense), it cannot be necessary for a defendant to include factual allegations supporting each affirmative defense); *Blanc v. Safetouch, Inc.*, No. 3:07-cv-1200, 2008 WL 4059786, at *1 (M.D. Fla. Aug. 27, 2008) ("under federal standards of notice pleading, it is not always necessary to allege the evidentiary

[1] Rule 8(c) of the Federal Rules of Civil Procedure asserts "in responding to a pleading, a party must affirmatively state any avoidance or affirmative defense."

facts constituting the defense. The pleading need only give fair notice of the asserted defense(s) 'so that opposing parties may respond, undertake discovery, and prepare for trial.'") (citations omitted); *Floyd v. SunTrust Banks, Inc.*, No. 1:10-CV-2620-RWS, 2011 WL 2441744, at *8 (N.D. Ga. June 13, 2011) ("when one considers that a defendant must answer the complaint within 21 days, imposing a different standard for defenses is not unfair."). Because Defendants' affirmative defenses are legally sufficient and provide the required notice to the Commission, the Court should deny the Commission's Motion.

III. <u>ARGUMENT</u>

A. <u>The Defendants' Affirmative Defenses Are Valid.</u>

1. Defendants' Equitable Defenses of Laches, Estoppel, and Waiver are Legally Sufficient and Consistent with the Fair Notice Standard.[2]

The Commission posits that the Court should strike the Defendants' affirmative defenses of laches, estoppel, and waiver because they are not available against the government in an enforcement action and because Defendants have advanced no basis to satisfy the elements of estoppel. *See* Motion at 12–14. First, an overgeneralized restatement of the law is an insufficient basis to justify a draconian remedy. Second, at this stage of the pleading, Defendants are not required to "aver detailed facts." *See Gonzalez*, 2013 WL 5970721, at *2.

This Circuit has made clear that a court may only strike an affirmative defense if it is insufficient as a matter of law. With respect to the affirmative defenses of laches, waiver, or estoppel, the Commission cannot meet this standard. *See United States Commodity Futures Trading Comm'n v. Mintco LLC*, No. 15-CV-61960, 2016 WL 3944101, at *7 (S.D. Fla. May 17, 2016) (declining to strike defendant's defense of laches because "it has been contemplated that laches can be asserted

[2] This section applies to Defendants' laches defenses (Vagnozzi #6, McElhone #4, LaForte #4, Barleta #4, Furman #16, and Abbonizio #16); estoppel defenses (Vagnozzi #4, McElhone #5, LaForte #5, Furman #14, and Abbonizio #14); and waiver defenses (Vagnozzi #5, McElhone #6, LaForte #6, Barleta #6, Furman #15, and Abbonizio #15).

against the government in certain, limited circumstances"); *SEC v. Calmes*, No. 09-80524-CIV, 2010 WL 11505260, at *6 (S.D. Fla. Nov. 19, 2010) (declining to strike defendant's defense of estoppel because the defense "may be relevant" when the defendant meets the "very high burden to establish the defense of estoppel against the government"); *SEC v. Spartan Sec. Group, LTD*, No. 8:19-CV-448-T-33, 2019 WL 3323477, at *2 (M.D. Fla. July 24, 2019) (declining to strike defendant's defense of waiver and estoppel because "it does not follow that Defendants' second affirmative defense is insufficient as a matter of law simply because such defense is only available in extreme circumstances"); *U.S. Work Alliance, Inc.*, 2009 WL 10669724, at *1 (finding that the Supreme Court did not "craft a blanket bar" to asserting this defense against the government, and thus, "the court will not take the drastic step of striking an equitable defense that might have merit after discovery").[3]

The Commission's objection on the ground of sufficiency[4] also fails because Defendants' affirmative defenses as pled provide the Commission with notice of the defenses they plan to explore and develop in discovery, which is all that is required. *See Calmes*, 2010 WL 11505260, at *6 (finding defendant's pleading to be sufficient and explaining that "although the Commission believes that [defendant] does not have evidence to support the elements of the defense of estoppel, the Commission's position amounts to no more than its belief"); *McGlothan v. Walmart Stores, Inc.*, No. 6:06-CV-94-ORL-28JGG, 2006 WL 1679592, at *1 (M.D. Fla. June 14, 2006) (explaining defense averred as "this claim is barred by the statute of limitations" is sufficiently plead and provides fair

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[3] *See SEC v. Cuban*, 798 F. Supp. 2d 783, 791 (N.D. Tex. 2011) (explaining that although the SEC pointed to a number of cases that seemed to support the conclusion that said equitable defense was unavailable against the government, "these decisions cite each other without explaining their reasoning . . . and others reach this result without explaining in more than conclusory terms the rationale for holding that the defense is unavailable as a matter of law"); *See generally United States v. Admin. Enter. Inc.*, 46 F.3d 670, 672–73 (7th Cir. 1995) ("[t]here is no dearth of statements that laches cannot be used against the government . . . [yet] the availability of laches in at least some government suits is supported by Supreme Court decisions . . . that refuse to shut the door *completely* to the invocation of laches or estoppel (similar doctrines) in government suits.") (emphasis added).

[4] *See, e.g.*, Motion at 15 ("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").

notice); *Jackson v. City of Centreville*, 269 F.R.D. 661, 662 (N.D. Ala. 2010) (finding that the affirmative defenses defendant raised such as waiver and estoppel were "at minimum, legal theories contained in FRCP 8(c)(1)" that put the plaintiff on notice as to what it will argue); *FTC v. Hang-Ups Art Enterprises, Inc.*, No. CV-95-0027, 1995 WL 914179, at *4 (C.D. Cal. Sept. 27, 1995) (declining to strike an affirmative defense where defendant simply asserted, "plaintiff's claims are barred by the doctrine of laches."). Accordingly, the Court should deny the Commission's Motion to Strike Defendants' affirmative defenses related to laches, waiver, and estoppel.

2. The Notes are Not Securities Affirmative Defense is Directly Related to the Controversy.[5]

The Commission contends that the Defendants' affirmative defense averring that the notes are not securities should be stricken because the Court addressed this subject once before in its Order Denying Defendants' Motion to Dismiss ("Order") (DE 583). *See* Motion at 8. The Commission's argument fails for two reasons.

First, the Commission fails to take into consideration that a pleading should not be stricken unless the "stricken material has '*no possible relation* to the controversy." *Sparta Ins. Co.*, 2013 WL 5588140, at *1 (emphasis added). Here, the question of whether the notes are securities goes to the heart of this case. *See Spartan Sec. Group, LTD*, 2019 WL 3323477, at *2 (rejecting the SEC's argument that it should strike defendant's affirmative defense because it "relates directly to the SEC's claims and that the SEC has failed to show it would experience undue prejudice if the Court did not strike the defense, the Court declines to strike Defendants' first affirmative defense").[6]

[5] This section applies to Defendants' notes are not securities defenses (McElhone #7, LaForte #7, Barleta #7, Furman #18, and Abbonizio #18).

[6] The Commission also notes that it would experience prejudice because it would have to litigate issues already litigated (to its satisfaction) once before. However, boilerplate restatements of prejudice are insufficient to invoke the use of such a drastic, "draconian remedy." *Fabing v. Lakeland Reg'l Med. Ctr., Inc.*, No. 8:12-CV-2624-T-33, 2013 WL 593842, at *2 n.2 (M.D. Fla. Feb. 15, 2013). This is especially true where the Commission has not demonstrated how this affirmative defense is "patently frivolous," "clearly invalid as a matter of law," or has "no possible relation to the controversy." *See Sparta Ins. Co*, 2013 WL 5588140, at *4.

Second, this Court only examined whether the notes are securities only within the four corners of the Complaint, that is, taking the allegations as true and construing them in the light most favorable to the Plaintiff. The Court should not prematurely strike this affirmative defense without giving the Defendants the benefit of discovery. *See Adams*, 2011 WL 2938467, at *1 (explaining that "whereas plaintiffs have the opportunity to conduct investigations prior to filing their complaints, defendants, who typically only have twenty-one days to respond to the complaint, do not have such a luxury"); *U.S. Work Alliance, Inc*., 2009 WL 10669724, at *1 (declining to strike an affirmative defense that may have merit after discovery and finding that "a motion to strike is not appropriate unless the claims or defenses are completely meritless"); *Gutierrez v. Imt Integral Medizintechnik AG*, No. 3:14CV271, 2014 WL 11512206, at *2 (N.D. Fla. Dec. 29, 2014) (declining to strike an affirmative defense because "defendants should have an opportunity to develop their affirmative defenses through discovery."); *FTC v. BF Labs Inc.*, No. 4:14-CV-00815-BCW, 2015 WL 12806580, at *3 (W.D. Mo. Aug. 28, 2015) (declining to strike defendant's affirmative defense before the Defendants "have the benefit of some discovery").

Moreover, this Court has only specifically analyzed whether the promissory notes at issue fall within one of the judicially exempt categories enumerated in *Reves*.[7] After the Court found that they did not, the Court proceeded to analyze the promissory notes under the family resemblance factors elucidated in *Reves*. *See* Order at 12–19. This Court did *not* consider whether the notes at issue were exempt from the registration requirement under the Securities Act (15 U.S.C. 77b(a)(1)). *See 1 Glob. Capital LLC*, 331 F.R.D. at 438 (finding that though the Court ruled on whether the notes fall squarely within the enumerated exceptions found in *Reves*, the Court did not examine whether the notes were commercial in nature such that the notes were exempt as securities under 15 U.S.C. § 78c(a)(10) and

[7] *See Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990).

from the registration requirement under 15 U.S.C. § 77b(a)(1)). Accordingly, the Court should deny the Commission's motion to strike this affirmative defense.

B. Defendants Should not be Required to Re-Plead Their Affirmative Defenses.

The Commission also argues that certain affirmative defenses, to the extent they are not stricken, are insufficiently pled because they "provide no facts indicating who the counsel or professional are or which counts of the Complaint the reliance defense is relevant to." *See* Motion at 17.[8] However, the level of specificity demanded here by the Commission is neither required nor necessary to provide fair notice of Defendants' affirmative defenses. *See Spartan Sec. Group, LTD*, 2019 WL 3323477, at *1 (rejecting the SEC's "arguments based upon *Twombly and its progeny*") (citations omitted); *Jackson*, 269 F.R.D. at 663 (Rule 8(c) only requires responders to "state."); *see e.g.*, *Calmes*, 2010 WL 11505260, at *6 (declining to strike defendant's affirmative defense that asserted that defendant "relied upon opinions provided by counsel"); *1 Glob. Capital LLC*, 331 F.R.D. at 440 (declining to strike the defense of good faith where defendant simply asserted that he relied on "competent personnel" in his course of conduct).

The Commission's argument that Defendants' advice of counsel, advice of professional advisors, and reasonable care defenses are repetitive fares no better. The Defendants' advice of counsel and advice from professionals, respectively, differentiate between advice received from counsel as distinguished from that of other professionals such as certified public accountants, accountants, auditors, and tax advisors. Both categories of such advice are critical in this case. Defendants' reasonable care defense clearly relates to the exercise of reasonable care and good faith exercised by Defendants in following professional advice such that they did not have any reasonable

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[8] It appears that the Commission's attacks with respect to these defenses are limited to Count VII, Section 5(a) and 5(c). *See* Ex. A (DE 627-1). Defendants are not raising these affirmative defenses as to this Count. However, it is nonetheless relevant as to the imposition of remedies (e.g., penalty or bar). *See Calmes*, 2010 WL 11505260, at *5.

grounds to believe that any misstatement or omissions of material fact existed in any statements, reports, and/or filings he allegedly issued or uttered were made with scienter. *See SEC v. BIH Corp.*, No. 2:10-CV-577-FTM-29, 2013 WL 1212769, at *7 (M.D. Fla. Mar. 25, 2013) (declining to strike three affirmative defenses that related to the defense of good faith and defendant's reliance legal counsel).

IV. <u>CERTAIN DEFENSES RELATED TO ABBONIZIO AND FURMAN</u>

A. <u>Abbonizio and Furman Agree that Certain Defenses Can be Construed as Denials and Others Stricken.</u>

The Commission argues that certain of Abbonizio's and Furman's affirmative defenses should not be treated as affirmative defenses but rather, as denials. Abbonizio and Furman agree and specifically noted in their respective Answers that "[t]he denomination of any matter below as a defense is not an admission that Defendant bears the burden of persuasion, burden of proof, or burden of producing evidence with respect to any such matter." (DE 615 at 36, 617 at 31). Accordingly, the Court can treat Abbonizio's and Furman's lack of scienter defense (third defense), mistake defense (fifth defense), acts of others defense (eighth defense), and misrepresentations as not material defense (thirteenth defense) as denials. *See EEOC v. Univ. of Miami*, 19-CV-23131, 2020 WL 2739711, at *7 (S.D. Fla. May 22, 2020) (proper remedy when defendant claims that plaintiff's complaint fails on facts alleged is to treat claim as a denial rather than to strike the defense).

Additionally, Abbonizio and Furman agree to remove four other defenses while reserving their rights to make appropriate arguments later in this proceeding—failure to state a claim (first defense), statute of limitations (second defense), justifiable reliance (seventh defense), and constitutionality defense (eleventh defense).

As to the statute of limitations defense, the Court previously held that "[i]f the SEC's claims included violations occurring outside the five-year limitations period, it would be appropriate for the

Court to partially dismiss the claims to the extent they seek time-barred relief." (DE 47). Based on the Court's motion to dismiss ruling and the Commission's representation, Abbonizio and Furman understand that the Commission is not currently seeking relief for violations that may have occurred outside the five-year limitations period. Abbonizio and Furman reserve their right to raise the statute of limitations argument should the Commission change its position.

Abbonizio and Furman agree to an order striking the justifiable reliance defense because this defense is adequately subsumed by their lack of scienter defense (third defense), reliance of advice of counsel defense (seventeenth defense), reliance on professionals defense (sixth defense), and good faith defense (fourth defense) which are all adequately pled as described above.

B. Abbonizio's and Furman's Lack of Causation Defense Should Not Be Stricken.

Abbonizio's and Furman's respective twelfth defenses state that "Plaintiff's claims against Defendant cannot be maintained because superseding or intervening events, not caused by Defendant, caused some or all of the alleged damages." The Commission argues that this defense should be stricken because loss causation is not an element that the Commission must prove under the Securities Act. *See* Motion at 11-12. Where, as here, the Government fails to allege prejudice and the defense is relevant to the extent it claims that someone other than Abbonizio and/or Furman are responsible for the alleged conduct, the Court should decline to strike the defense. *See SEC v. Esposito*, No. 1:16-cv-10960, 2017 WL 5615571, at *3 (D. Mass. Nov. 21, 2017) ("[T]he SEC is correct that it need not show causation or damages in order to prove … liability. Because the SEC again fails to adequately allege prejudice, however, the Court will also not strike this defense. Further, this defense may be relevant to the extent it claims that someone other than [defendant] … is responsible for the alleged conduct and harm, and [defendant] will be allowed to present evidence to such effect.").

C. <u>Abbonizio's and Furman's Relief-Based Defenses Should Not Be Stricken.</u>

Abbonizio and Furman assert two defenses related to the Commission's requests for relief—their respective ninth defense ("Plaintiff's claims fail because the Amended Complaint seeks an impermissible forfeiture") and respective tenth defense ("Plaintiff cannot recover damages because any such recovery would be a windfall resulting in unjust enrichment to Plaintiff or a party Plaintiff purports to seek to reimburse").

The Court should decline to strike these defenses for two reasons.

First, the Commission has failed to adequately allege prejudice if these defenses are allowed to stand. *See Spartan Sec. Group, LTD*, 2019 WL 3323477, at *2 (rejecting the SEC's argument that it should strike defendant's affirmative defense because it "relates directly to the SEC's claims and that the SEC has failed to show it would experience undue prejudice if the Court did not strike the defense, the Court declines to strike Defendants' first affirmative defense").

Second, the Court should allow these affirmative defenses to stand because both defenses adequately put the SEC on notice that Abbonizio and Furman intend to defend against any remedies the SEC seeks in violation of a recent Supreme Court decision, *Liu v. SEC*, 140 S.Ct. 1936, 1940 (2020). In *Liu*, the Court held that a disgorgement award is only permissible under the SEC's authority if it "does not exceed a wrongdoer's net profits and *is awarded for victims*." *Id.* (emphasis added). Most courts and commentators post-*Liu* agree that disgorgement cannot be used to collect money to be paid into the U.S. treasury; it can only be used to award victims. *SEC v. Penn*, No. 14-CV-581 (VEC), 2021 WL 1226978, at *13 (S.D.N.Y. Mar. 31, 2021) ("Pursuant to *Liu*, for disgorgement to constitute permissible equitable relief, the SEC is generally required 'to return a defendant's gains to wronged investors for their benefit' and that disgorgement awards 'must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains.') (citation omitted); *Fed. Trade Comm'n v. Elec. Payment Sols. of Am. Inc.*, 482 F. Supp. 3d 921, 928 (D. Ariz. 2020) ("Thus,

pursuant to *Liu*, a disgorgement order must be crafted so that its effect is 'restitutionary.' That is, to be an equitable form of relief, a disgorgement award must be awarded to victims."). Here, Abbonizio's and Furman's defenses should be allowed to stand to the extent the Commission seeks remedies inconsistent with *Liu*.

V. CONCLUSION

For all of the foregoing reasons, the Commission's Motion fails to demonstrate that striking Defendants' affirmative defenses is warranted, and thus, the Motion should be denied. Alternatively, in the event the Court determines that any of the affirmative defenses at issue are inadequate, Defendants respectfully request that the Court permit them to replead or amend the defenses to comply with the Court's findings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2021, a true and correct copy of the foregoing response was served via CM/ECF on all counsel or parties of record.

/s/ Joel Hirschhorn
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