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'S REPLY IN SUPPORT OF ITS MOTION TO CONSTRUE SOME AFFIRMATIVE DEFENSES AS DENIALS, AND TO STRIKE OTHERS

I. INTRODUCTION

Defendants Joseph LaForte, Joseph Cole Barleta, Lisa McElhone, Perry Abbonizio, Dean Vagnozzi, and Michael Furman's Joint Response to the Securities and Exchange Commission's motion to strike their affirmative defenses is as notable for what it does not contain as for what it does. For example, the response (DE 659):

- Fails entirely to address binding Eleventh Circuit case law holding that two of their affirmative defenses, waiver and laches, are not permitted against the government; and that a third, estoppel, is permitted only in circumstances where defendants can allege egregious conduct amounting to a constitutional violation;

- Fails to address case law from *this* district holding that one- line, legal conclusions are impermissible as affirmative defenses even under a lesser pleading standard than that articulated in *Bell Atlantic Corp. v. Twombly* , 550 U.S. 544 (2007), and *Ashcroft v. Iqbal* , 556 U.S. 662 (2009); and

- Fails to address why their legally conclusory defenses should be allowed to stand when all they will do is add to the parties' time and expense of litigating frivolous claims, and to the Court's time adjudicating them.

Instead, they rely primarily on one non-binding outlier cases to justify why the Defendant's affirmative defenses should stand. As described in more detail below, those opinions ignored binding Eleventh Circuit case law and other well-established pleading standards.

The response fails to rebut the legal and factual reasons cited in the Commission's motion (DE 627) why the Court should strike several of the Defendants' affirmative defenses and order them to replead the remainder. This is more than "make work" as the Defendants falsely claim. Response at 7. Contrary to the Defendants' statement that the Commission's motion "provides no benefit to the adjudication of this case" (*Id.*), the Commission's motion seeks to eliminate impermissible and unnecessary issues and arguments from the case, thereby saving the parties and the Court considerable time and expense of litigating and adjudicating these issues. As it stands now, it would be impossible to resolve claims on summary judgment because the bases for the affirmative defenses are not plead, the Defendants have not responded to discovery requests inquiring of the bases for the defenses,[1] and therefore the bases for the affirmative defenses – even generally – are unknown. We would have to accurately guess what the defenses could conceivable be based on and brief every conceivable basis hoping that one of them is what Defendants have in mind when they simply state the name of an affirmative defense in their pleadings. At trial, we would learn for the first time what the bases are for these affirmative defenses.

As set forth in the Commission's motion, 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. For the reasons cited

[1] We have conferred with defense counsel and we are seeking a hearing with Magistrate Judge Reinhart. We note here that even if we receive answers to interrogatories, Defendants Lisa McElhone and Joseph LaForte have asserted their Fifth Amendment rights in this case.

in the Motion and the remainder of this reply, the Court should strike the Defendants' affirmative defenses.

The SEC addresses the Defendants' arguments in the order in which they made them.

II. LACHES, ESTOPPEL, AND WAIVER

As discussed in the Commission's motion to strike, the Eleventh Circuit has held that **laches and waiver** *are 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."). *See also FTC v. On Point Global LLC*, Case No. 25046, 2020 WL 4505811 (SD Fla. Aug. 4, 2020) (""[T]he Katz Defendants, Mahon and Waltham assert a delay- or laches-based affirmative defense. FTC moves to strike these affirmative defenses because it cannot be used against the government in a civil suit brought to enforce a public right or protect a public interest. The Court agrees that these affirmative defenses are not properly brought against a governmental agency).[2]

The Defendants offer no explanation for why the Court should ignore this case law. The Court should follow the law in the Eleventh Circuit and strike the affirmative defenses of laches and waiver with prejudice. They fail to address the cases cited in the Motion. Instead, they cite a singular outlier case from this District and a case from the Middle District of Florida, as well as

[2] We cited other cases in the Motion, at pp. 12-13, holding identically.

case law that is not from the Eleventh Circuit. Allowing these affirmative defenses to stand would result in unnecessary expansion of the issues in the case – *i.e.*, discovery and future motion practice – when the Eleventh Circuit has already held those issues do not belong in a Commission enforcement action.

As to **estoppel**, the Eleventh Circuit has repeatedly held that an estoppel claim against the government will 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). 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 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). Against this controlling case law and the cases cited in the Motion (which the Defendants do not address), they offer, with respect to estoppel, the non-binding opinion of a judge from the Middle District of Florida regarding estoppel.

As for the sufficiency of the pleadings, the Defendants ignore the case law cited in the Motion. They rely on cases where Courts decided to ignore controlling case law and allow defendants to plead a one-line conclusory statement masquerading as an affirmative defense and cases from outside of this Circuit. This Court should not follow suit and should strike the factually-devoid affirmative defense of estoppel. If it chooses to allow the Defendants to re-plead the

estoppel defense, it should require Defendants to plead facts showing alleged "egregious misconduct" by the Commission (which we do not believe for a minute the Defendants can do). Otherwise, the Court will be allowing the Defendants to clutter the case with unnecessary facts and legal issues that will only require Court adjudication later.

The Defendants re-frame the issue in their Response by arguing that they need not meet the pleading standards under *Twombly* and *Iqbal* while failing to address the numerous cases from *this* District holding that one-line, legal conclusions are impermissible as affirmative defenses even under a lesser pleading standard than that articulated in *Twombly* and *Iqbal*. Instead, the Defendants offer nothing more than the same outlier case from this District relied upon throughout their Response and some cases from outside of this District. As Magistrate Judge Reinhart has so concisely explained:

> Affirmative defenses are insufficient as a matter of law if they do not meet the general pleading requirements of Rule 8(a) of the Federal Rule of Civil Procedure, which requires 'a short and plain statement' of the defense." *Id.* "On the other hand, the party raising the affirmative defense 'must do more than make conclusory allegations.' " *Morrison v. Executive Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005) (J. Ryskamp). "Where the affirmative defenses are no more than 'bare bones conclusory allegations, [they] must be stricken.' " *Id.*

Sapphire International Group, Inc. v. Allianz Global Risks US Insurance Co., Case No. 18-cv-80101, 2019 WL 2211873, at *2 (Feb. 1, 2019).

Perhaps illustrating how established and clear this principle is, in *SEC v. Thunderbird*, Case No. 20-cv-22901-Gayles (SD Fla. March 2021) (Exhibit A hereto), the Court recently granted the Commission's motion to strike affirmative defenses in a paperless Order:

> Affirmative Defenses 4 through 11 are too conclusory. Even if affirmative defenses are not subject to the pleading standards of Bell Atlantic Corp. v. Twombly , 550 U.S. 544, 553 (2007) and Ashcroft v. Iqbal , 556 U.S. 662, 680 (2009), Defendants' conclusory one-line stat ements do not provide enough factual or legal detail to even comply with the pleading requirements of Federal Rule of Civil Procedure 8. Indeed, without more, Defendant s fail to provide Plaintiff with sufficient notice of how Defendants' affirmative defenses apply to this action. Accordingly, Defendants' affirmative defenses are stricken without prejudice.

Accordingly, the Court should strike the laches and waiver and affirmative defenses with prejudice and strike the estoppel affirmative defense without prejudice. Discovery in this case ends on September 10, 2021 – just a little more than a month from now. Therefore, if the Court permits the Defendants to re-plead the estoppel affirmative defense, they should be required to file any Amended Answer and Affirmative Defenses soon with no extensions provided. The victims cannot obtain relief until and unless a Judgment is entered against the Defendants, and therefore we do not want to seek any enlargement of the dispositive motion deadlines or trial date. However, the Commission will need to conduct discovery once we learn what the basis for the affirmative defenses are, which we would need to complete before the September 10 deadline.

III. "THE NOTES ARE NOT SECURITIES" AFFIRMATIVE DEFENSE

The Defendants focus solely on the issue that the Court found the notes are securities in its prior rulings and when the Court found jurisdiction in this Commission enforcement action. The response indicates that the Defendants do not understand that the Commission is seeking to strike *affirmative defenses*. They fail to offer a single case where "not a security" was found to be an affirmative defense, and ignore the cases cited in the Motion.

As set forth in the Motion, an affirmative defense is one that admits to the complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification or other negating matter." *Pujals ex rel. El Rey De Los Habanos, Inc. v. Garcia*, 777 F. Supp. 2d 1322, 1327 (S.D. Fla. 2011) (J. King). On top of the fact the Court has found jurisdiction in this case, that the notes at issue are securities is an element of *every single claim.* The Defendants ignore the Eleventh Circuit case law that a defense that negates an element of a claim 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.").

Thus, this is not an affirmative defense. Even if the Court finds that it has not determined this issue through prior findings of subject matter jurisdiction in this case, then the issue becomes whether the Commission can meet this element of its claims – thus rendering it double not an affirmative defense. The law is well-established law as to what an affirmative defense is. And what it isn't. The Defendants' response utterly ignores this.

III. THE DEFENDANTS' CLAIM THAT THEY SHOULD NOT HAVE TO RE-PLEAD

The Defendants rely on case law providing that defendants should have time conduct discovery before fully setting forth the facts underlying affirmative defenses, once again offer their red herring argument that *Twombly* and *Iqbal* do not apply, and assert that their reliance on advice of counsel and reliance on advice of professions are not duplicative. We address each in turn.

As to the first argument, the Defendants have the gall to rely on cases where the findings are based on defendants pleading at the outset of the case without the benefit of discovery. This case stands in dramatic contrast. Here, the Defendants have had a year to conduct discovery. The Commission filed its Complaint in July 2020. The Defendants filed their Answers in Affirmative Defenses in *June 2021.* They had the benefit of not filing Answers and Affirmative Defenses until discovery was well underway, and after expedited discovery and the receipt of the Commission's non-privileged documents in its investigative file at the onset of this case as well. In fact we are so close to the end of discovery that the Commission's concern is that we are able to conduct discovery once we do obtain sufficiently plead Affirmative Defenses. We will work on an expedited basis to complete it before the deadline.

As to the second argument, the Defendants are arguing about *Twombly* and *Iqbal* standards while ignoring entirely that the case law in this Circuit is clear that bare-bones shotgun affirmative defenses don't cut it. Our reply concerning that is in Section A above, and so we do not repeat it

again here. This dovetails perfectly into the Defendants' third argument, that the reliance affirmative defenses refer to different things and are not duplicative. The Commission did not know that – and how could we – because the affirmative defenses have zero detail whatsoever. Reliance on advice can be a partial affirmative defense to some of the charges. If the Defendants want to plead it, then the Court should strike the reliance affirmative defenses without prejudice to re-plead (on an expedited basis) with sufficient detail.

The Defendants do not address the remaining affirmative defenses we seek to strike. Nor do they address the fact that reliance affirmative defenses are not – as clearly stated in the Eleventh Circuit Pattern Jury Instructions – defenses to a Section 5 claim. Why? There is no scienter or negligence element for a Section 5 claim.

IV. CERTAIN DEFENSES OF FURMAN AND ABBONIZIO

A. Abbonizio and Furman Agree that Certain Defenses Can Be Construed as Denials and Others Stricken.

Furman and Abbonizio agree in the response that lack of scienter defense (third defense), mistake defense (fifth defense), acts of others defense (eighth defense), and misrepresentations as not material defense (thirteenth defense) should be treated denials (Response at p.9). They also agree the Court should strike failure to state a claim (first defense), statute of limitations (second defense), justifiable reliance (seventh defense), and constitutionality defense (eleventh defense). (Response at p.9).[3]

[3] Because Abbonizio and Furman discuss a five-year statute of limitations as being applicable, we note here that the five-year statute of limitations has been extended to 10 years. Specifically, per the Notice filed with the Court during the pendency of the Motion to Dismiss (DE 465), Congress enacted a January 1, 2021 amendment to Section 21(d) of the Securities Exchange Act of 1934, which among things, changes from 5 to 10 years the statute of limitations applicable to disgorgement when the conduct involves violations of, among others, Section 10(b) of the Exchange Act or Section 17(a)(1) of the Securities Act of 1933. The amendment is retroactive and applies to this case.

Accordingly, the Court should grant the Motion to treat the 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, and should strike the failure to state a claim (first defense), statute of limitations (second defense), justifiable reliance (seventh defense), and constitutionality defense (eleventh defense).

B. Abbonizio's and Furman's Response Regarding Lack of Causation

Abbonizio and Furman acknowledge that lack of causation is not an issue or defense in a Commission enforcement case. Eleventh Circuit case law is clear on this point. *SEC v. Goble*, 682 F.3d 934, 942 (11th Cir. 2012); *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012). Therefore, they offer a creative – yet meritless – argument.

They argue the Commission did not "plead prejudice." In support, they rely on the only case they could find – from a district court in Massachusetts – that denied a motion to strike because the Commission did not argue in its motion to strike that it would be prejudiced if affirmative defenses were not stricken. This is not that case.

Here, the Commission's Motion argues that the Commission will be prejudiced if the affirmative defenses are not stricken, and how. (See Motion pp. 9-10, and to a lesser extent pp 4 & 19). Litigating affirmative defenses that are not – as a matter of law – applicable in a Commission enforcement action will prejudice not only the Commission, but will waste judicial resources. For example, if this defense stands, we would have to disprove it in our Motion for Summary Judgment in order to succeed. When it is not – as a matter of law – a defense at all to any claim asserted, thus imposing a burden on the Commission to litigate and the Court to adjudicate a defense that is not and cannot be a defense to any claim in this case. *See SEC v.*

Hoffman, 2014 WL 1478804 n.1 (M.D. Fla. Apr. 15, 2014) (striking causation affirmative defense, which is a common law tort defense not applicable in Commission cases).

C. Abbonizio and Furman's Argument That Relief-Based Defenses Should Remain

They argue that their ninth and tenth affirmative defenses concerning disgorgement should not be stricken because the Commission failed to argue it would be prejudiced if forced to litigate these issues as affirmative defenses, and the affirmative defenses put the Commission "on notice" that the Defendants will litigate disgorgement amounts. As to the first issue, we address prejudice in detail above and in the Motion. The only counter Defendants offer is that the Commission must litigate these issues anyway. They do not seem to grasp that if these are affirmative defenses, the Commission must disprove them on summary judgment next month.

As for notice the Defendants will challenge disgorgement calculations, the Defendants essentially concede that this is not an affirmative defense. Instead, they are just flagging for later that they will litigate disgorgement amounts (which occurs after and only if a Judgment is entered). They do not address the Motion, which acknowledges that they can argue disgorgement and challenge the calculations thereof when the time comes, making whatever arguments they desire about amounts – but it is not an affirmative defense to any claim. Using an 'affirmative defense" as a means of "flagging" a post-litigation issue is not proper and imposes unnecessary burdens on the Commission and the Court to address this on summary judgment.

V. CONCLUSION

For the reasons set forth in the Motion, the Court should grant the relief sought in the Motion. Because there are numerous affirmative defenses and Defendants and some defenses have been re-filed or abandoned since the Motion was filed, we attach, for the Court's convenience, an updated chart showing the relief sought and status as to each Defendant is summarized in Exhibit B hereto.

August 4, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 4th day of August 2021 via cm-ecf on all defense counsel and via email on the *Pro Se* Defendant in this case.

s/Amie Riggle Berlin

Jacqmein, Victoria

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U.S. District Court

Southern District of Florida

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Case Number: 1:20-cv-22901-DPG
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Docket Text:
PAPERLESS ORDER GRANTING [29] Plaintiff's Motion to Strike the Affirmative Defenses of Defendants Thunderbird Power Corp. and Richard Hinds. Affirmative Defenses 1 and 3 are denials of the elements of Plaintiffs cause of action and, therefore, are not proper affirmative defenses. Similarly, Affirmative Defense 2, a reservation of the right to assert all potential statutory defenses, is not a proper affirmative defense. Finally, Affirmative Defenses 4 through 11 are too conclusory. Even if affirmative defenses are not subject to the pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), Defendants' conclusory one-line statements do not provide enough factual or legal detail to even comply with the pleading requirements of Federal Rule of Civil Procedure 8. Indeed, without more, Defendants fail to provide Plaintiff with sufficient notice of how Defendants' affirmative defenses apply to this action. Accordingly, Defendants' affirmative defenses are stricken without prejudice. Signed by Judge Darrin P. Gayles (hs01)

1:20-cv-22901-DPG Notice has been electronically mailed to:

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