UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS,
WILLIAM STENGER,
JAY PEAK, INC., et al.,

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC.,
GSI OF DADE COUNTY, INC.,
NORTH EAST CONTRACT SERVICES, INC.,
Q BURKE MOUNTAIN RESORT, LLC,

Relief Defendants.
_____/

PLAINTIFF'S MOTION TO STRIKE ARIEL QUIROS' AFFIRMATIVE DEFENSES

I. Introduction

Plaintiff Securities and Exchange Commission moves the Court pursuant to Federal Rule of Civil Procedure 12(f) to strike all eight of Defendant Ariel Quiros' affirmative defenses from his Amended Answer. There are four reasons the defenses are improper. First, affirmative defenses three and five allege equitable or other defenses not available against the Commission in an enforcement action. Second, affirmative defenses two and four are general denials of liability, which are distinct from affirmative defenses. Third, affirmative defenses one, six, and eight address matters the Court has already ruled on or are irrelevant to the Commission's Amended Complaint. And fourth, each one of the eight affirmative defenses is defective because it fails to comply with the pleading requirements of Federal Rule of Civil Procedure 8.

Accordingly, the Commission asks the Court to strike all eight of Quiros' affirmative defenses from his Amended Answer.

II. Factual And Procedural Background

The Court is well acquainted with the allegations of the Amended Complaint and the evidence from the extensive preliminary injunction briefing. In summary, this action alleges that Quiros and others committed a massive fraud on hundreds of foreign investors through the U.S. Citizenship and Immigration Service's EB-5 Immigrant Investor Program by, among other things, looting more than $50 million of the $350 million raised from investors to create jobs and build and operate a Vermont ski resort. The Amended Complaint (DE 120) alleges numerous violations of the anti-fraud provisions of the federal securities laws, including Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act").

The Court has already granted significant emergency relief, including a temporary restraining order, asset freeze, and preliminary injunction against Quiros, and the appointment of a receiver over the Jay Peak entities. After the Court denied Quiros' motion to dismiss (DE 239), Quiros filed his Answer on December 21, 2016 (DE 253). It included 34 affirmative defenses. After the Commission conferred with Quiros about those affirmative defenses, he filed an Amended Answer on January 12, 2017 (DE 267), reducing the number of affirmative defenses to eight.

III. Legal Argument

A. General Standards For Striking Affirmative Defenses

Federal Rule of Civil Procedure 12(f) allows the Court to strike any legally insufficient defense. *Florida Software Sys., Inc. v. Columbia/HCA Healthcare Corp.*, No. 97-2866-CIV,

1999 WL 781812 at *1 (M.D. Fla. Sept. 16, 1999); *J&J Sports Productions, Inc. v. Mendoza-Govan*, No. C10-05123, 2011 WL 1544886 at *1 (N.D. Cal. April 25, 2011). 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) (striking 12 of 14 affirmative defenses and awarding Rule 11 sanctions because the defenses were frivolous). *See also SEC v. The Electronics Warehouse, Inc.* 689 F. Supp. 53, 73 (D. Conn. 1988) (equitable defenses against the government are strictly limited); *SEC v. Gulf & Western Industries, Inc.*, 502 F. Supp. 343, 345 (D.D.C. 1980) (striking the defense of unclean hands and others); *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").

Furthermore, 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 by 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).

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"); *SEC v. BIH Corp.*, No. 2:10-cv-577, 2013 WL 1212769 at *1 (M.D. Fla. March 25, 2013) ("Affirmative defenses are subject to the general pleading requirements of Rule 8 . . . must give the plaintiff 'fair notice' of the nature of the defense and the grounds on which it rests" and "state a plausible defense"); *Cano v. South Florida Donuts, Inc.*, No. 09-81248-CIV, 2010 WL 326052 at *1 (S.D. Fla. Jan. 21, 2010) ("Courts do not tolerate shotgun pleading of affirmative defenses and strike vague and ambiguous defenses that do not address any particular count, allegation, or legal basis of a complaint"), *citing Byrne v. Nezhat*, 261 F.3d 1075, 1128-29 (11th Cir. 2001); *Microsoft Corp. v. Jesse's Computers & Repair, Inc.*, 211 F.R.D. 681, 684 (M.D. Fla. 2002) (affirmative defenses are subject to Rule 8 pleading requirements and "must do more that make conclusory allegations"). Against those standards, all of Quiros' affirmative defenses are insufficient and the Court should strike them.

B. Affirmative Defenses 3 And 5 Are Not Available Against The Government

Quiros' third affirmative defense states in its entirety that "The SEC's claims are barred under such equitable defenses as the evidence demonstrates, including but not limited to the doctrines of acquiescence and laches." DE 267 at 40. His fifth affirmative defense, entitled "Rescission Offer" states the Commission's claims are barred "in whole or in part, because amended offering documents were issued for certain of the securities offerings, which contained offers of rescission whereby investors had the opportunity to remit their securities for a full refund without penalty." Neither of these defenses is available as a matter of law against the Commission in an enforcement action.

As to the third affirmative defense, Quiros cites no facts in support of the claim that the equitable defenses of laches and acquiescence apply here, such as how the Commission engaged

in delay or what it purportedly acquiesced to.[1] However, even if he had, the Court should strike this defense as it is well-settled law that equitable defenses such as laches and acquiescence are unavailable against the government in an enforcement action. *SEC v. Silverman*, 328 Fed. Appx. 601, 605 (11th Cir. May 19, 2009) (unpublished, *per curiam*) (affirming District Court finding that laches was not available affirmative defense because "where, as in this case, a government agency brings an enforcement action to protect the public interest, laches is not a defense"); *U.S. v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002, 2013 WL 6017329 at *12 (M.D. Fla. Nov. 13, 2013) (equitable defenses of laches and estoppel not available against United States); *FTC v. North East Telecommunications, Ltd.*, No. 96-6081-CIV, 1997 WL 599357 at *3 (S.D. Fla. June 23, 1997) (agreeing with FTC argument that laches is not available against the government in a civil suit to enforce a public right or protect a public interest), *citing United States v. Summerlin*, 310 U.S. 414, 416 (1940), and *United States v. Alvarado*, 5 F.3d 1425, 1427 (11th Cir. 1993). The Court should therefore strike Quiros' third affirmative defense.

Affirmative defense five, alleging rescission, suffers from the same infirmity. It apparently alleges (without any factual or legal support) that because the Defendants in the case purportedly offered some *investors* their money back, the *Commission* cannot sue Quiros for securities law violations. This equates the Commission's interests and standing with investors, which as shown immediately above is an incorrect statement of the law. The Commission brings this action to enforce a public right alleging violations of the securities laws, and the question of whether Quiros and the other Defendants in the case offered some unnamed group of investors their money back has no bearing on whether Quiros violated the federal securities laws by making misrepresentations or omissions of material facts with scienter.

[1] As a result, neither this defense nor affirmative defense five meets the Rule 8 pleading requirements, which we discuss in more detail in Section E below.

At best, Quiros' rescission claim *may* go to whether investors justifiably relied on any statements of actions of Quiros or suffered damages. However, it is well established that investor reliance, loss causation, and damages are not elements the Commission must prove under Securities Act Section 17(a) or Exchange Act Section 10(b). *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012); *BIH*, 2013 WL 1212769 at *5 (striking numerous affirmative defenses relating to reliance and investor losses). *See also SEC v. Kirkland*, Case No. 6:06-cv-00183, Slip. Op. at 3-4 (M.D. Fla. Sept. 6, 2006) (attached as Exhibit A) (striking affirmative defenses claiming defendant had settled lawsuits with investors as irrelevant to Commission's claims). Because Quiros' fifth affirmative defense addresses elements that are not part of the Commission's case, it is both irrelevant and insufficient as a matter of law. *Microsoft*, 211 F.R.D. at 683 (Court can strike affirmative defenses that are patently frivolous on their face or clearly invalid as a matter of law). The Court should strike it.

C. Affirmative Defenses 2 and 4 Are Not Affirmative Defenses

An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove its case by a preponderance of the evidence. *BIH*, 2013 WL 1212769 at *1. A defense that is merely a denial of the plaintiff's *prima facie* case is not an affirmative defense. *Id.* at *3; *In re Rawson Food Servs., 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"); *Ford Motor Co. v. Transport Indemnity Co.* 795 F.2d 538, 546 (6th Cir. 1986) ("some defenses negate an element of the plaintiff's *prima facie* case; these defenses are excluded from the definition of affirmative defense in Fed.R.Civ.P. 8(c)"); *Halifax Hospital*, 2013 WL 6017329 at *12 (striking defenses of failure to state a claim on which relief may be granted and failure to plead fraud with particularity because they were "failure of pleading"

defenses, not affirmative defenses); *North East Telecommunications*, 1997 WL 599357 at *3 (striking affirmative defense of failure to state a claim).

Quiros' affirmative defenses two and four are merely denials of liability. The second affirmative defense alleges Quiros is not liable because he relied in good faith on "opinions, information, reports or statements prepared or presented by one or more officers or employees" of Raymond James.[2] His fourth affirmative defense alleges that the Commission is barred from recovery for any misleading projections based on the bespeaks caution doctrine.[3]

Both of these defenses attack the Commission's *prima facie* case, and as such are not affirmative defenses. The reliance on Raymond James claim essentially alleges Quiros did not display the requisite scienter to violate the securities laws. This is not an affirmative defense. *United States v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996) (alleging reliance on a professional "is simply a means of demonstrating good faith and represents possible evidence of any intent to defraud"); *LG Phillips LCD Co. v. Tatung Co.* 243 F.R.D. 133, 137 (D. Del. 2007) (defense alleging good faith is not a true affirmative defense because it merely negates an element of the plaintiff's *prima facie* case), *quoting Sanden v. Mayo Clinic*, 495 F.2d 221, 224 (8th Cir. 1974).

Similarly, the bespeaks caution doctrine addresses the materiality element of the Commission's case. That doctrine holds that when offering documents contain "meaningful cautionary statements and specific warnings of the risks involved, that language may be sufficient to render the alleged omissions or misrepresentations immaterial as a matter of law." *Saltzberg v. TM Sterling/Austin Assoc.*, 45 F.3d 399, 400 (11th Cir. 1995). In other words, it operates as a bar to liability based on statements not being material. As the cases set forth above

[2] Quiros appears to be trying to expand the reliance on a professional defense that has been applied to lawyers and auditors. The Commission is unaware of any court ever recognizing a "reliance on a broker" defense.

[3] These defenses also fail to meet the Rule 8 pleading standards, as set forth in Section E.

hold, a denial of liability is not an affirmative defense. The Court should strike affirmative defenses two and four as a result.

Affirmative Defenses 1, 6, and 8 Are Not Proper Affirmative Defenses

Affirmative defenses one, six, and eight fail as a matter of law because they address irrelevant issues and would not bar the Commission's recovery even if proved.[4] The first affirmative defense alleges the Commission's claims are barred in whole or in part by the "applicable" statute of limitations. Although the Amended Answer does not provide any more detail, such as what statute of limitations, we assume Quiros is discussing the five-year statute of limitations in 28 U.S.C. § 2462, which the Eleventh Circuit recently held barred claims for the *remedy* of disgorgement more than five years old (at the time the action is filed). *SEC v. Graham*, 823 F.3d 1357, 1363-64 (11th Cir. 2016).

The Court already addressed this argument both in its orders granting the Commission's request for a preliminary injunction against Quiros (DE 238) and denying Quiros' motion to dismiss (DE 239). The Court did not find that the five-year statute of limitations acted in any way as a bar to any of the 52 counts of the Amended Complaint or to Quiros' liability. The Court held that, at best, the statute may bar part of the Commission's disgorgement remedy, but that it was premature to decide that issue. DE 238 at 35-38. Because the Court has ruled the statute of limitations does not bar any of the Commission's claims, the Court should now strike it as an affirmative defense. *BIH*, 2013 WL at *4 (striking affirmative defenses the Court had already addressed in denying a motion to dismiss). Another reason the Court should strike the affirmative defense is that even if Quiros were to prevail on this issue, it would not require judgment in his favor. *Id.* at *1 (an affirmative defense is generally a defense that, if established,

[4] As discussed in Section E, these defenses also fail to meet the pleading standards of Rule 8.

requires judgment for the defendant even if the plaintiff can prove its case by a preponderance of the evidence); *Kirkland*, Ex. A at 3-4 (striking defense that went solely to potential amount of disgorgement and therefore was not proper affirmative defense).[5]

Affirmative defenses six and eight address matters irrelevant to the Amended Complaint and should similarly be stricken. The sixth affirmative defense claims Quiros is entitled to indemnity or contribution from third parties, including Raymond James. However, as a matter of law, Quiros may not escape liability or other consequences for his securities law violations, regardless of whether anyone else may have violated the law. *See, e.g., City of Pontiac Gen. Employees' Retirement Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012) (multiple people may be the "maker" of a false statement and can be jointly responsible for Exchange Act Section 10(b) violations); *In re Pfizer Inc. Sec. Lite*., 936 F. Supp. 2d 252, 268–69 (S.D.N.Y. 2013) (multiple individual defendants had ultimate authority over company press releases and thus could be considered "makers" of statements for purposes of Section 10(b) liability); *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 796-98 (11th Cir. 2015) (Securities Act Section 17(a)(2) liability can be based on false statements of others); *SEC v. Tambone*, 550 F.3d 106, 127 (1st Cir. 2008) (same). Because Raymond James' actions do not have any bearing on Quiros' liability, the sixth affirmative defense is irrelevant and the Court should strike it.

Quiros' eighth affirmative defense is likewise frivolous. He alleges the Amended Complaint alleges an impermissible forfeiture (without being any more specific as to how or to what counts or claims this defense applies). However, the Amended Complaint at no point seeks

[5] The amount of disgorgement is not an issue the jury will decide. Disgorgement is a remedy within the exclusive province of the Court to determine if the jury finds Quiros committed some of all of the securities law violations alleged in the Amended Complaint. *See, e.g., SEC v. Bankatlantic Bancorp*, Case No. 12-cv-60082, Jury Instructions, DE 414, at 13.

forfeiture of anything, and forfeiture is not an element of the Commission's case. As discussed above with regard to the first affirmative defense, a defense that solely addresses the Commission's entitlement to potential remedies is not a proper affirmative defense. *BIH*, *Kirkland*. The Court should therefore strike affirmative defense eight.

E. None of Quiros' Affirmative Defenses Are Properly Pled

As discussed above, affirmative defenses are subject to the pleading requirements of Rule 8 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 . . . must give the plaintiff 'fair notice' of the nature of the defense and the grounds on which it rests" and "state a plausible defense"); *Cano*, 2010 WL 326052 at *1 ("Courts do not tolerate shotgun pleading of affirmative defenses and strike vague and ambiguous defenses that do not address any particular count, allegation, or legal basis of a complaint"); *Microsoft*, 211 F.R.D. at 684 (affirmative defenses are subject to Rule 8 pleading requirements and "must do more that make conclusory allegations"). This includes meeting the plausibility standard for pleadings set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). *BIH*, 2013 WL 1212769 at *1.

Here, all of Quiros' affirmative defenses makes bare-bones, conclusory allegations, without factual support, without identifying what allegations or counts of the Amended Complaint they address, and without giving any indication of how they would excuse Quiros from a judgment against him. Under the case law set forth above, the Court should strike all eight affirmative defenses, which are listed below.

First Affirmative Defense: "The SEC's claims are barred in whole or in part by the applicable statutes of limitations." DE 267 at 40. This defense fails to allege *any* facts

demonstrating a plausible defense. It does not identify which statutes of limitations bar any claims, what claims the statutes allegedly bar, or the factual or legal basis for alleging the specific statutes would defeat Quiros' liability for securities law violations.

Second Affirmative Defense: "Quiros is not liable in whole or in part because he relied in good faith upon the information, opinions, reports or statements prepared or presented by one or more officers or employees of Raymond James & Associates, Inc. ("Raymond James")." *Id.* Again, Quiros makes conclusory allegations with no factual or legal support. He does not identify any specific information, statements or opinions that Raymond James provided him, let alone how or why he relied on them or how that would allow him to avoid liability in this case. He does not identify specific individuals on whom he relied. Furthermore, by including such broad and vague terms as "information, opinions, reports or statements" and "one or more officers or employees," it is clear this is nothing more than an impermissible shotgun pleading designed to clutter the case with extraneous issues.

Third Affirmative Defense: "The SEC's claims are barred under such equitable defenses as the evidence demonstrates, including but not limited to the doctrines of acquiescence and laches." *Id.* This pleading is identical to the second affirmative defense in that it alleges broad, conclusory language that makes it clear Quiros is simply throwing affirmative defenses out there to see what sticks – "*such* equitable defenses *as the evidence demonstrates, included but not limited to . . .*" The case law above makes it clear that affirmative defenses must be much more specifically pled. Here, even for the two equitable defenses Quiros names, he includes no facts alleging how the purported laches or acquiescence occurred, or how the Commission's actions caused him prejudice. The entire defense is impermissibly vague and conclusory.

Fourth Affirmative Defense: "To the extent the Amended Complaint is based on any predictions, expressions of opinion or forward looking statements, the SEC is barred from recovery in whole or in part by the bespeaks caution doctrine." *Id.* The introductory language of this defense – *to the extent* – undercuts its validity. By alleging to the extent there were any projections or forward looking statements, Quiros is acknowledging that he is not alleging any actual projections, opinions or forward-looking statements subject to the bespeaks caution doctrine. To properly plead this defense under the case law set forth above, Quiros would have to have alleged the specific statements or projections to which he was referring as well as the specific cautionary language he alleges would immunize him from liability. As he has not done this, the Court should strike this defense.

Fifth Affirmative Defense: "The SEC's claims are barred, in whole or in part, because amended offering documents were issued for certain of the securities offerings, which contained offers of rescission whereby investors had the opportunity to remit their securities for a full refund without penalty." DE 267 at 41. Quiros has not alleged what offering documents he is referring to, the exact language he alleges would preclude the Court from entering a judgment against him, or how that language would purportedly provide him any defense against liability. The defense does not meet the plausibility requirements of Rule 8 and *Bell Atlantic* and *Iqbal.*

Sixth Affirmative Defense: "Quiros is entitled to receive contribution and/or indemnity from others for any liability he incurs, including but not limited to from Raymond James." *Id.* Quiros alleges he is entitled to receive contribution or indemnity from *others*, but does not specifically set out what other people or entities he is entitled to receive contribution or indemnity from, facts that show he is entitled to such contribution or indemnity, and, most importantly, why that even matters in the context of the securities law violations the Commission

has charged him with. Nor has he alleged such specific facts with regard to Raymond James. The defense is wholly conclusory.

Seventh Affirmative Defense: "The SEC's claims are barred in whole or in part because it failed to join indispensable parties such as Raymond James." *Id.* Here, Quiros is apparently referring to Rule 19 of the Federal Rules of Civil Procedure, which discusses required joinder of parties. There are specific requirements for someone to be considered an indispensable party, including the threshold requirement "in that person's absence, the court cannot accord complete relief among existing parties." Fed.R.Civ.P. 19. Quiros has not pled any facts showing how or why Raymond James or any other party is allegedly indispensable, i.e., complete relief among the parties the Commission did sue cannot occur. This is another bare-bones conclusory legal claim, which is far from the standards required for pleading affirmative defenses.

Eighth Affirmative Defense: "The SEC's claims fail because the Amended Complaint seeks an impermissible forfeiture." *Id.* As with the previous seven affirmative defenses, there are no facts to support this one. Quiros does not explain which facts or counts in the Amended Complaint allege a forfeiture, what allegedly the Amended Complaint is trying to forfeit, how this alleged forfeiture is impermissible, and why that could cause the Amended Complaint to fail as a matter of law. Once again it is clear Quiros is pleading the affirmative defense without any real basis for it, which is an impermissible tactic. *Cano*, 2010 WL 326052 at *1.

To the extent the Court does not strike any of the eight defenses for the substantive reasons set forth in Sections A through D above, the Court should strike them all due to Quiros' failure to meet the pleading requirements of Rule 8 as set forth in this section.

IV. Conclusion

For all of the reasons set forth in this motion, the Commission asks the Court to strike all eight of Quiros' affirmative defenses.

V. Conferral

Pursuant to Local Rule 7.1.3, the Commission conferred with counsel for Quiros before filing this motion in an attempt to narrow the issues by asking Quiros if he would withdraw any of his affirmative defenses. Quiros declined to do so an indicated he would oppose this motion.

A proposed order is being submitted in connection with this motion.

Respectfully submitted,

February 1, 2017

By: s/Robert K. Levenson__
Robert K. Levenson, Esq.
Senior Trial Counsel
Florida Bar No. 0089771
Direct Dial: (305) 982-6341
Email: levensonr@sec.gov

By:s/ Christopher E. Martin
Christopher E. Martin, Esq.
Senior Trial Counsel
SD Fla. Bar No. A5500747
Direct Dial: (305) 982-6386
Email: martinc@sec.gov

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
801 Brickell Avenue, Suite 1800
Miami, Florida 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 1, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document

is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Robert K. Levenson
Robert K. Levenson, Esq.

SERVICE LIST

SEC v. Ariel Quiros, et al.
Case No. 16-CV-21301-GAYLES

Scott B. Cosgrove, Esq.
James R. Bryan, Esq.
León Cosgrove, LLC
255 Alhambra Circle, Suite 800
Coral Gables, Florida 33133
Telephone: (305) 740-1975
Facsimile: (305) 437-8158
Email: scosgrove@leoncosgrove.com
Email: jbryan@leoncosgrove.com
Local counsel for Defendant Ariel Quiros

David B. Gordon, Esq. (pro hac vice)
Mitchell Silberberg & Knupp, LLP
12 East 49th Street, 30th Floor
New York, New York 10017
Telephone: (212) 509-3900
Facsimile: (212-509-7239
Email: dbg@msk.com
Counsel for Defendant Ariel Quiros

John S. Durrant, Esq. (pro hac vice)
Mitchell Silberberg & Knupp, LLP
11377 West Olympic Boulevard
Los Angeles, CA 90064-1683
Telephone: (310) 312-2000
Facsimile: (310) 312-3100
Email: jsd@msk.com
Counsel for Defendant Ariel Quiros

Michael Goldberg, Esq.
Jonathan Robbins
AKERMAN LLP
Las Olas Centre II, Suite 1600
350 East Las Olas Blvd.
Fort Lauderdale, FL 33301-2229
Telephone: (954) 463-2700
Facsimile: (954) 463-2224
Email: mgoldberg@akerman.com
Email: jrobbins@akerman.com
Court-appointed Receiver and counsel for the Court-appointed Receiver

Roberto Martinez, Esq.
Stephanie Anne Casey, Esq.
Colson Hicks Eidson
255 Alhambra Circle, Penthouse
Coral Gables, FL 33134
Telephone: (305) 476-7400
Email: bob@colson.com
Email: scasey@colson.com
Counsel for Defendant William Stenger

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-vs-

Case No. 6:06-cv-183-Orl-28KRS

PATRICK KIRKLAND, TROPICAL VILLAGE, INC., CLARITY DEVELOPMENT CORPORATION, and SENIOR ADULT LIVING CORPORATION,

Defendants,

SUNSET BAY CLUB, INC., SUMMERHILL VENTURES, INC., PELICAN BAY CLUB, INC., and ISLEWORTH ADULT COMMUNITY, INC.,

Relief Defendants.

ORDER

This cause is before the Court on Plaintiff's objection to United States Magistrate Judge Karla R. Spaulding's Report and Recommendation (Doc. 145) ("Report") granting in part and denying in part Plaintiff's motion to strike certain of Defendant Kirkland's affirmative defenses (Doc. 90). The Magistrate Judge recommended that Mr. Kirkland's Ninth Affirmative Defense, alleging due process violations, be stricken from his answer. The Magistrate Judge would deny Plaintiff's motion to strike the Eighth Affirmative Defense of unclean hands, and the Fourth, Seventh, and a portion of the Sixth Affirmative Defenses,

relating to Defendant Kirkland's settlements and releases obtained from investors and any potential order of disgorgement. Plaintiff SEC filed an Objection to the Magistrate Judge's Report (Doc. 156), but Defendant Kirkland has not responded to that Objection, nor has Defendant filed an Objection to the Report.

After an independent de novo review of the record pertaining to this matter, the Court agrees with the statement of law as presented in Plaintiff's objection. For the following reasons, the Report and Recommendation is adopted in part and reversed in part. Defendant's Ninth Affirmative defense is stricken. Defendant's Eighth, Fourth, Seventh, and part of the Sixth Affirmative Defenses are also stricken.

I. Unclean Hands

The Report correctly states the general disfavor with which courts view Motions to Strike. See Augustus v. Board of Public Instruction of Escambia County, 306 F.2d 862, 868 (5th Cir. 1962); see also SEC v. Gulf & Western Indus., Inc., 502 F. Supp. 343, 345 (D.D.C. 1980). However, it is equally true that generally, motions to strike are granted when the doctrine of unclean hands has been asserted against a government agency carrying out its congressionally mandated duties. SEC v. Rivlin, No. 99-1455, slip op., 1999 WL 1455758, at *5 (D.D.C. 1999) (citing Gulf & Western Indus., 502 F. Supp. at 348). Unclean hands may be asserted against the SEC only where "the agency's misconduct [was] egregious and the resulting prejudice to the defendant r[o]se to a constitutional level." SEC v. Rosenfeld, No. 97-1467, slip op., 1997 WL 400131, at *2 (S.D.N.Y. July 16, 1997) (quoting SEC v. Elecs. Warehouse, Inc., 689 F. Supp. 53, 73 (D. Conn. 1988)).

Here, Defendant Kirkland makes two allegations relating to his unclean hands defense. First, he alleges that the SEC acted in conjunction with state agents who violated ethical rules, including Rule 4-3.6 of the Florida Rules of Professional Conduct. (Doc. 106 at 8). Specifically, Kirkland alleges that the agents "encouraged investors to speak to the press, encouraged lawsuits, improperly assisted Plaintiff's attorneys in finding clients, [and] . . . engaged in improper behavior amounting to a vendetta." (Doc. 80 at 16). Secondly, Defendant Kirkland alleges that the SEC submitted declarations to the Court alleging that Kirkland made misrepresentations to purchasers even though some purchasers "indicated that no promises had been made to them." (Id.) Kirkland therefore alleges that the SEC submitted false declarations to the Court. Each of these allegations arise from the SEC's conduct in enforcing the securities laws and charging Defendant Kirkland with violating them. Thus, the unclean hands defense will only lie if the SEC's conduct actually prejudiced Defendant's ability to defend himself and if the misconduct has constitutional ramifications. Not only do Defendant's allegations fail to rise to the level of egregiousness that might implicate constitutional deprivations, but Defendant has also failed to demonstrate how his defense in this matter has been prejudiced as a result of the SEC's alleged improprieties. Defendant's unclean hands defense is stricken from his Amended Answer.

II. Settlements and Disgorgement

Defendant Kirkland's Fourth, Seventh, and part of his Sixth Affirmative Defenses each allege that the SEC's action is either barred altogether or that the remedy of disgorgement is unavailable because some of the investors' private suits have been settled. (Doc. 80 at 14-16). The equitable remedy of disgorgement aims to "deprive violators of their

ill-gotten gains," thus preventing unjust enrichment. SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1474 (2d Cir. 1996). While a court may properly consider any settlements and releases when "calculating the amount to be disgorged . . . .[disgorgement] is neither foreclosed nor confined by an amount for which injured parties were willing to settle." Id. at 1475. The fact that Defendant Kirkland has settled some of the private claims brought against him may be relevant if and when this Court fashions a disgorgement remedy, but the fact of settlement is no defense to the SEC's present claims.

Accordingly, it is **ORDERED** as follows:

1. The Report and Recommendation (Doc. 145) is **ADOPTED** and **CONFIRMED** insofar as it strikes Defendant's Ninth Affirmative Defense alleging due process violations.

2. Plaintiff's Motion to Strike Defendant's Fourth, Seventh, Eighth, and part of his Sixth Affirmative Defenses (Doc. 90) is **GRANTED**.

DONE and **ORDERED** in Chambers, Orlando, Florida this 6th day of September, 2006.

JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS,
WILLIAM STENGER,
JAY PEAK, INC., et al.

Defendants, and

JAY CONSTRUCTION MANAGEMENT, INC.,
GSI OF DADE COUNTY, INC.,
NORTH EAST CONTRACT SERVICES, INC.,
Q BURKE MOUNTAIN RESORT, LLC,

Relief Defendants.
_____/

ORDER GRANTING PLAINTIFF'S MOTION
TO STRIKE ARIEL QUIROS' AFFIRMATIVE DEFENSES

THIS CAUSE came before the Court upon Plaintiff Securities and Exchange Commission's Motion to Strike Ariel Quiros' Affirmative Defenses (DE ___) from his Amended Answer. Having considered the motion, the briefs, and the record, it is hereby:

ORDERED AND ADJUDGED that Plaintiff's Motion is hereby **GRANTED.** All eight of Defendant Ariel Quiros' affirmative defenses from his Amended Answer are hereby stricken.

DONE AND ORDERED this ____ day of _____ 2017, at Miami, Florida.

_____
DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel and Parties of Record