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.,
Q RESORTS, INC.,
JAY PEAK HOTEL SUITES L.P.,
JAY PEAK HOTEL SUITES PHASE II L.P.,
JAY PEAK MANAGEMENT, INC.,
JAY PEAK PENTHOUSE SUITES L.P.,
JAY PEAK GP SERVICES, INC.,
JAY PEAK GOLF AND MOUNTAIN SUITES L.P.,
JAY PEAK GP SERVICES GOLF, INC.,
JAY PEAK LODGE AND TOWNHOUSES L.P.,
JAY PEAK GP SERVICES LODGE, INC.,
JAY PEAK HOTEL SUITES STATESIDE L.P.,
JAY PEAK GP SERVICES STATESIDE, INC.,
JAY PEAK BIOMEDICAL RESEARCH PARK L.P.,
AnC BIO VERMONT GP SERVICES, LLC,

Defendants, and

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

Relief Defendants.
_____/

DEFENDANT ARIEL QUIROS'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

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Defendant Ariel Quiros, by and through undersigned counsel, respectfully files the following opposition to Plaintiff Securities and Exchange Commission's Motion to Strike Affirmative Defenses (DE 278). In opposition, Mr. Quiros states the following:

I. INTRODUCTION

Defendant Ariel Quiros's Amended Answer to Plaintiff's Amended Complaint alleges just eight affirmative defenses, all of which are proper. Yet, by its Motion to Strike Affirmative Defenses, Plaintiff Securities and Exchange Commission – which brought a fifty-two count complaint – claims that Mr. Quiros should not be allowed to plead ***any*** of his affirmative defenses. For the reasons set forth herein, Plaintiff is wrong.

First, Plaintiff's Motion misstates the pleading standard applicable to affirmative defenses; at this stage, Mr. Quiros is only required to give Plaintiff notice of the defenses he intends to litigate. Second, Plaintiff ignores this Court's prior order, which expressly reserved Mr. Quiros's right to challenge Plaintiff's claims on statute of limitations grounds. Third, Plaintiff argues that good faith reliance and the bespeaks caution doctrine are denials rather than true affirmative defenses. However, even if this were correct (which it is not), it is not grounds to strike them. Fourth, contrary to Plaintiff's claims, equitable defenses and offers of rescission are recognized affirmative defenses. Fifth, Plaintiff tacitly concedes that failure to join indispensable parties, like Raymond James, is a valid affirmative defense, and provides no authority in support of Plaintiff's position that contribution and indemnity are invalid defenses. Sixth, Plaintiff's request to strike Mr. Quiros's defense that the complaint seeks an impermissible forfeiture is supported by nothing more than Plaintiff's *ipse dixit* that "the Amended Complaint does not seek a forfeiture of anything[.]" But the Amended Complaint seeks disgorgement, which by definition is a forfeiture,

and Mr. Quiros is entitled to plead that the patently inflated amount Plaintiff seeks to "disgorge" would be an impermissible forfeiture.

In sum, and as set forth in more detail below, both the case law and this Court's prior orders support Mr. Quiros's right to plead all eight of his affirmative defenses. The Court should deny Plaintiff's Motion in its entirety.

II. BACKGROUND

Plaintiff's Amended Complaint alleges a total of fifty-two counts, forty-six of which are brought against Mr. Quiros. Said counts claim that Mr. Quiros and others committed various purported acts of securities fraud related to seven limited partnership securities offerings. Amended Complaint (DE 120), *passim*. Mr. Quiros vigorously denies these allegations. (DE 253, 267.) On December 21, 2016, Mr. Quiros filed an Answer to the SEC's Amended Complaint. (DE 253.) On January 11, 2017, after meeting and conferring in good faith with the SEC, Mr. Quiros filed an Amended Answer, in which he dismissed all but eight of his affirmative defenses. (DE 267.) Nonetheless, this failed to satisfy the SEC, which has filed the instant Motion to Strike.

III. LEGAL STANDARDS

"Motions to strike [are] generally disfavored by the court." *Exhibit Icons, LLC v. XP Cos., LLC*, 609 F. Supp. 2d 1282, 1300 (S.D. Fla. 2009) (*citing Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1400 (7th Cir. 1991)). "The reason is that courts consider striking a pleading to be a 'drastic remedy to be resorted to only when required for the purposes of justice.'" *XP Cos.*, 609 F. Supp. 2d at 1400 (*quoting Augustus v. Bd. Of Pub. Instruction of Escambia Cnty., Fla.*, 306 F.2d 862, 868 (5th Cir. 1962)). An affirmative defense will only be stricken if it is "***insufficient as a matter of law***," which requires that: "(1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law." *Microsoft Corp. v. Jesse's Computers Repair*, 211 F.R.D. 681,

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683 (M.D. Fla. 2002) (citation omitted) (emphasis added); *see also Reyher v. Trans World Airlines*, 881 F. Supp. 574, 576 (M.D. Fla. 1995) ("An affirmative defense will be held insufficient as a matter of law only if it appears that the defendant cannot succeed under any set of facts which it could prove."). "Because this is a difficult standard to satisfy, motions to strike are generally disfavored by the Court and are often considered time wasters." *PNC Bank, N.A. v. Family Internal Med., P.A.*, 2014 U.S. Dist. LEXIS 70538, *4 (M.D. Fla. May 22, 2014). "Indeed, a motion to strike will usually be denied unless the allegations bear no possible relation to the controversy and could cause prejudice to one of the parties." *Smith v. The Vill. Club., Inc.*, 2016 U.S. Dist. LEXIS 62302, *6 (M.D. Fla. Apr. 20, 2016). In addition, "when a party incorrectly labels a negative averment as an affirmative defense rather than as a specific denial, the proper remedy is not to strike the claim, but rather to treat it as a specific denial." *SEC v. BIH Corp.*, 2013 U.S. Dist. LEXIS 41317, *8 (M.D. Fla. Mar. 25, 2013).

The Rule 8 pleading standard is liberal: "In responding to a pleading, a party must state in short and plain terms its defenses to each claim asserted against it." F.R.C.P. 8(b)(1)(A); *see, e.g., PNC Bank,* 2014 U.S. Dist. LEXIS 70538, at *7 ("Applying the liberal federal pleading requirements, the Court finds that Defendants' fifth affirmative defense is sufficiently pled."). Moreover, "[i]n responding to a pleading, a party must affirmatively state any [] affirmative defense[.]" F.R.C.P. 8(c). "The purpose of an affirmative defense is to give the opposing party notice of an issue so that the party is prepared to properly litigate the issue." *Losada v. Norwegian Ltd.*, 296 F.R.D. 688, 691 (S.D. Fla. 2013). Therefore, "so long as Defendants' affirmative defenses give Plaintiffs notice of the claims Defendants will litigate, the defenses will be appropriately pled under Rules 8(b) and (c)." *See Ramnarine v. CP RE Holdco 2009-1, LLC*, 2013

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U.S. Dist. LEXIS 60009, *9 (S.D. Fla. Apr. 26, 2013) (rejecting argument that affirmative defenses must satisfy the more exacting *Twombly/Iqbal* pleading standards applicable to complaints).[1]

IV. ARGUMENT

A. Plaintiff Cannot Credibly Claim That Mr. Quiros's Affirmative Defenses Do Not Give Plaintiff Fair Notice Of His Defenses.

Plaintiff's characterization of Mr. Quiros's affirmative defenses as inadequately pled "shotgun pleadings" is not well taken.[2] Notably, Plaintiff does not even attempt to argue that any of Mr. Quiros's defenses "bear no possible relation to the controversy and could cause prejudice to one of the parties." *Smith*, 2016 U.S. Dist. LEXIS 62302, at *6. As set forth below, Mr. Quiros's eight affirmative defenses are related to this action, and Plaintiff does not (and cannot) argue that it is ***prejudiced*** by defenses, which allege, *e.g.*, that Plaintiff waited too long to bring this action. Mr. Quiros is not required to discover the facts needed to prove his affirmative defenses at the pleading stage. *See Reyher,* 881 F. Supp. at 576 ("An affirmative defense will be held insufficient as a matter of law only if it appears that the defendant cannot succeed under any set of facts which it could prove."). Rather, Mr. Quiros is merely required to put Plaintiff on notice of his defenses, which he has done. The Court should reject Plaintiff's argument that Mr. Quiros's affirmative defenses are inadequately pled.

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[1] *Ramnarine* explained: "Courts have developed two schools of thought regarding the pleading standard required for affirmative defenses, and the Eleventh Circuit has not yet resolved the split in opinion. Some courts have held that 'affirmative defenses are subject to the heightened pleading standard set forth in [*Towmbly/Iqbal*] …. Other courts, however, have held that the heightened pleading standard of Twombly and Iqbal does not apply to affirmative defenses." *Ramnarine*, 2013 U.S. Dist. LEXIS 60009 at *4-5. After extensive analysis of both schools of thought, *Ramnarine* concluded that "the difference in the language between Rule 8(a) and Rules 8(b) and (c) requires a different pleading standard for claims and defenses." *Cano v. S. Florida Donuts, Inc.*, 2010 U.S. Dist. LEXIS 8386, *3 (S.D. Fla. Jan. 21, 2010), cited by Plaintiff, states that "affirmative defenses must comply with the pleading requirements of F.R.C.P. 8(a)[.]" But *Cano*, which was decided three years before *Ramnarine*, did not cite any authority at all in support of this assumption, and did not explain why Rule 8(a) should apply instead of Rules 8(b) and (c). The Court should follow *Ramnarine*, which is more recent and much better reasoned.

[2] *BIH* makes plain that, it is actually this Motion to Strike that is a commonly-used "shotgun" tactic by Plaintiff. In *BIH*, the SEC argued that the court should strike ***thirty-four*** of a defendant's ***thirty-five*** affirmative defenses. 2013 U.S. Dist. LEXIS 41317, at *22. Of those thirty-four, the court ***denied*** the SEC's motion as to ***fifteen***, including some of the affirmative defenses at issue here. *Id.*

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B. The Statute Of Limitations Affirmative Defense Remains Viable.

Plaintiff makes the audacious claim that Mr. Quiros is foreclosed from asserting the statute of limitations affirmative defense because "[t]he Court already addressed this argument…." (Motion at 8.) But both of the rulings that Plaintiff cites for this proposition – the Court's Order granting Plaintiff's motion for preliminary injunction (DE 238) and the Court's order denying Mr. Quiros's motion to dismiss (DE 239) – ***expressly reserved Mr. Quiros's right to argue that the Plaintiff's claims are time-barred***. (*See* DE 238 at 38 ("Quiros may refute any tolling of the statute of limitations, following discovery, in a dispositive motion or at trial." (citation omitted)); DE 239 at 3 ("it is premature to address whether the SEC's claims are time-barred.").) Indeed, Plaintiff conceded that the Court recognized it was "***premature***" to decide whether the statute of limitations barred its disgorgement remedy. (Motion at 8.) Thus, it is preposterous for Plaintiff to now argue that the Court's preliminary treatment of this affirmative defense forever bars Mr. Quiros from raising it.

Indeed, Plaintiff's Motion acknowledges that, under Eleventh Circuit law, the five-year statute of limitations in 28 U.S.C. § 2462 may apply to some of Plaintiff's claims. (Motion at 8 (*citing SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016)).) In *Graham*, the case cited by the SEC, the Eleventh Circuit held that a five-year statute of limitations applies to SEC claims for declaratory relief and disgorgement. *See Graham*, 823 F.3d at 1362-64. Thus, there "the SEC [was] time-barred from proceeding with its claims for declaratory relief and disgorgement because, under the plain meaning of 28 U.S.C. § 2462, these remedies are a penalty and a forfeiture, respectively." *Graham*, 823 F.3d at 1364.[3] Here, Plaintiff alleges that some purported improprieties occurred between 2006 and January 2011, *i.e.*, over five years before Plaintiff filed

[3] In *Graham*, the SEC conceded that 28 U.S.C. § 2462 "bar[red] its claim for civil money penalties[.]" *Graham*, 823 F.3d at 1360.

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this action. (Amended Complaint, ¶¶ 15-16.) Thus, under *Graham*, Mr. Quiros is absolutely entitled to challenge Plaintiff's claims on statute of limitations grounds, and, in his Answer, to plead statute of limitations as an affirmative defense. Plaintiff's attempt to escape *Graham* by arguing that the Court has already made a dispositive ruling on the statute of limitations is blatant overreach and should not be countenanced.

C. Plaintiff Provides No Valid Reason For Striking Mr. Quiros's Defenses Of Reliance In Good Faith On Raymond James And Bespeaks Caution.

Plaintiff claims that Mr. Quiros's good faith reliance and bespeaks caution doctrine defenses should be stricken because they are not proper affirmative defenses. (Motion at 6-7.) Yet the case law strongly supports that both of these are bars to liability, and Plaintiff's motion to strike them is yet another attempt to raise form above substance to prevent Mr. Quiros from defending himself.

Mr. Quiros's second affirmative defense, good faith reliance, is a recognized defense to at least some of Plaintiff's claims in this action. The Securities Exchange Act of 1934 can impose "liability not only on the person who actually commits a securities law violation, but also on an entity or individual that controls the violator … 'unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.'" *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir. 2008) (*quoting* 15 U.S.C. § 78t(a)). Thus, "a controlling person is liable to the plaintiff jointly and severally with and to the same extent as a controlled person for the controlled person's acts, ***unless the controlling person can establish the affirmative defense of good faith and non-inducement***." *Laperriere*, 526 F.3d at 721 (emphasis added). *See also Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 384 n.19 (5th Cir. 2004) ("Section 20(a) liability is generally subject to the affirmative defense of lack of participation and good faith."); *Dellastatious v. Williams*, 242

F.3d 191, 194 (4th Cir. 2001) ("To determine whether the good-faith affirmative defense has been satisfied under section 20(a), defendants must show that they did not act recklessly."). Here, Plaintiff brings multiple claims against Mr. Quiros for violations of Section 20(a). (Amended Complaint, Count 5 (¶¶ 161-65), Count 12 (¶¶ 184-88), Count 20 (¶¶ 211-15), Count 28 (¶¶ 238-42), Count 36 (¶¶ 265-69), Count 44 (¶¶ 292-96).) All six of these counts allege that Mr. Quiros was a "control person" under 15 U.S.C. § 78t(a). *Id.* Thus, Mr. Quiros is entitled to assert his good faith reliance on Raymond James as an affirmative defense.

Likewise, the bespeaks caution doctrine is a proper affirmative defense. The Eleventh Circuit has explained that "in this circuit we adhere to the bespeaks caution doctrine in assessing the materiality of forward-looking statements." *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 767 (11th Cir. 2007). "The bespeaks caution doctrine is ultimately simply shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law." *Id.* In *Merchant Capital*, the Eleventh Circuit affirmed the district court's finding that certain offering documents did not contain material misrepresentations because, *inter alia*, the offering documents properly disclosed applicable risk factors. *Id.* at 767-68. Indeed, even Plaintiff acknowledges that this doctrine "operates as a bar to liability based on statements not being material." (Motion at 7.)

But even assuming that Plaintiff is correct, the authorities Plaintiff cites do not mandate that the Court ***strike*** Mr. Quiros's second and fourth affirmative defenses. As set forth in a case cited extensively by Plaintiff, when a defendant "labels a negative averment as an affirmative defense rather than as a specific denial, the proper remedy is not to strike the claim, but rather to treat it as a specific denial." *BIH*, 2013 U.S. Dist. LEXIS, at *8 (alterations omitted). Indeed, the *BIH* court denied the SEC's motion to strike several affirmative defenses, including good faith (*id.*

at *4) and that "no allegations made by the SEC constitute material misrepresentations" (*id.* at *6-7). Thus, even if the Court were to accept the Plaintiff's argument that good faith reliance and the bespeaks caution doctrine are not truly affirmative defenses, the Court should not strike them.

D. Mr. Quiros Is Entitled To Plead Equitable Defenses Against The Government.

Plaintiff claims that Mr. Quiros's equitable affirmative defenses "are unavailable against the government in an enforcement action." (Motion at 5.) Under Eleventh Circuit authority, however, Plaintiff is wrong.

In *United States v. Delgado*, the Eleventh Circuit pointed out that while laches is unavailable against the government in criminal cases, "[t]here have been rare exceptions to this rule in certain civil cases." 321 F.3d 1338, 1348 (11th Cir. 2003) (*citing Herman v. South Carolina Nat'l Bank,* 140 F.3d 1413, 1427 (11th Cir. 1998); *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 873-74 (1st Cir. 1995)). For instance, in *Herman*, the Eleventh Circuit explained that "this circuit permits laches to bar an EEOC suit only because Title VII contains no statute of limitations. Laches is an equitable doctrine designed to prevent unfairness to a defendant due to a plaintiff's delay in filing suit *in the absence of an appropriate statute of limitations*." *Herman*, 140 F.3d at 1427 (italics in original, citation omitted). Similarly, in *Texaco*, the First Circuit held laches could apply as against an enforcement action by the Puerto Rico Department of Consumer Affairs since "the government, when it seeks an equitable remedy is no more immune to the general principles of equity than any other litigant." *Texaco*, 60 F.3d at 879.

Given that Plaintiff contends that no statute of limitations bars its civil enforcement action (Motion at 8-9), and further seeks numerous equitable remedies against Mr. Quiros (such as Securities Act injunctive relief, Exchange Act injunctive relief, conduct-based injunctive relief, and disgorgement), Mr. Quiros is entitled to assert equitable defenses, such as laches, for Plaintiff's

failure to bring this action in a timely manner. The events in question began in 2006, and Mr. Quiros's involvement began in 2008.[4] Mr. Quiros's equitable defenses are not "invalid as a matter of law" (*Microsoft Corp.*, 211 F.R.D. at 683), and Plaintiff cites no controlling authority to the contrary. (*See* Motion at 4-5.) The Court should deny Plaintiff's motion to strike Mr. Quiros's third affirmative defense.

E. An Offer Of Rescission Is A Recognized Defense.

Citing the same unavailing cases relied on in support of its laches argument – which do not address offers of rescission at all – Plaintiff claims that Mr. Quiros's offer of rescission defense has "no bearing on whether Mr. Quiros violated the federal securities laws by making misrepresentations or omissions of material facts with scienter." (Motion at 5.) But that is irrelevant to whether an offer of rescission is a viable affirmative defense, which it absolutely is. For instance, in *Electronic Specialty Co. v. Int'l Controls Corp.*, the court dismissed as moot claims for securities fraud brought by a class of tendering stockholders because notwithstanding "the completeness and candor of disclosure, the tendering stockholders rejected the offer of rescission with knowledge[.]" 295 F. Supp. 1063, 1073 (S.D.N.Y. 1968). Similarly, in *Weisman v. Darneille*, the court dismissed a complaint for securities fraud where the "defendants tendered to plaintiff the full amount of plaintiff's individual damages sought in the complaint." 79 F.R.D. 389, 390 (W.D.N.Y. 1978). Here, offers of rescission were made to some of the investors whose investments form the basis of Plaintiff's purported claims, and Mr. Quiros is entitled to plead as much. *See*, *e.g.*, *Ramnarine*, 2013 U.S. Dist. LEXIS 60009, at *9 ("so long as Defendants' affirmative defenses give Plaintiffs notice of the claims Defendants will litigate, the defenses will

[4] Similarly, Mr. Quiros should be allowed to plead that the Plaintiff's decision not to file suit for several years was acquiescence by the Plaintiff; Plaintiff's Motion sets forth no authority in support of its request to strike Mr. Quiros's acquiescence defense.

be appropriately pled under Rules 8(b) and (c).”). Given that Plaintiff cites no authority barring the assertion of the offer of rescission defense in cases brought by the SEC, the Court should deny Plaintiff’s request to strike Mr. Quiros’s fifth affirmative defense.

F. Plaintiff Does Not Seriously Contest Failure To Join Indispensable Parties, Nor Does It Provide Any Authority For Why Mr. Quiros Is Not Entitled To Plead Contribution And Indemnity.

The Court should likewise deny Plaintiff’s request to strike Mr. Quiros’s sixth and seventh affirmative defenses because there is no legal authority for disallowing them.

Plaintiff does not challenge, because it cannot, that failure to join an indispensable party is a viable affirmative defense. The SEC’s only quibble with Mr. Quiros’s seventh affirmative defense is that it is supposedly not pled with specificity. (Motion at 13.) But Mr. Quiros’s defense plainly states that Raymond James is an indispensable party. Nor should this surprise Plaintiff: its Amended Complaint is replete with references to Raymond James, and Raymond James has been sued in a separate lawsuit filed by the Receiver appointed in this case (DE 13).[5] Given that Plaintiff tacitly acknowledges the viability of this defense, and further that the defense identifies an indispensable party, Mr. Quiros’s seventh affirmative defense is not “insufficient as a matter of law,” and it should not be stricken. *See Microsoft Corp.*, 211 F.R.D. at 683 (“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.”).

Similarly, none of the authorities cited by the Plaintiff addresses, let alone rejects, Mr. Quiros’s sixth affirmative defense of contribution and indemnity. (Motion at 9.)[6] Rather, Plaintiff

[5] *Michael I. Goldberg, as receiver, v. Raymond James Financial, Inc., et al.*, Case No. 1:16-cv-21831-JAL (S.D. Fla. May 20, 2016).

[6] Citing *City of Pontiac Gen. Employees’ Retirement Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012), *In re Pfizer Inc. Sec. Lite.*, 936 F. Supp. 2d 252, 268–69 (S.D.N.Y. 2013), *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 796-98 (11th Cir. 2015), *SEC v. Tambone*, 550 F.3d 106, 127 (1st Cir. 2008).

appears to have cited these authorities for the unremarkable proposition that the securities laws allow the SEC to charge multiple parties with committing the same alleged securities violation. From there, Plaintiff leaps to the conclusion that a defendant may not assert contribution/indemnity as an affirmative defense. But Plaintiff does not explain why and, given that Mr. Quiros is indisputably allowed to plead that Plaintiff failed to bring in indispensable parties, such as Raymond James, Mr. Quiros should likewise be allowed to allege a right to contribution and indemnity against such other alleged violators. Further, since Plaintiff's claims are against a variety of individuals and entities, Plaintiff cannot seriously argue that the contribution and indemnity defenses "bear no possible relation to the controversy and could cause prejudice to one of the parties." *Smith*, 2016 U.S. Dist. LEXIS 62302, at *6.

G. Plaintiff's *Ipse Dixit* Claim That The Amended Complaint Does Not Seek A Forfeiture Is Simply Incorrect.

Plaintiff's attempt to preclude Mr. Quiros from asserting his eighth affirmative defense of impermissible forfeiture is yet another attempt to use semantics to preclude Mr. Quiros from defending himself. Taking an absurdly narrow view, Plaintiff asserts that "the Amended Complaint at no point seeks forfeiture of anything," but Plaintiff's claims tell a different story: Plaintiff seeks disgorgement from Mr. Quiros of at least $191.8 Million. (DE 152).[7] As the Court is aware, Mr. Quiros contends that plaintiff's disgorgement calculations are vastly overstated – (DE 153)[8] – particularly given that five out of seven of the construction projects at issue are fully built and operating. In light of what Mr. Quiros believes to be an inflated disgorgement figure, he should be allowed to argue that such a recovery by the SEC would be an impermissible forfeiture.

[7] Plaintiff's Proposed Findings of Fact and Conclusions of Law in Support of Motion for Preliminary Injunction Asset Freeze, and Other Relief, at p. 83.

[8] Proposed Findings of Fact and Conclusions of Law re Preliminary Injunction and Receivership Submitted by Defendant Ariel Quiros, at. 24.

As set forth in *Graham, supra*, disgorgement is a forfeiture "under the plain meaning of 28 U.S.C. § 2462." 823 F.3d at 1364. And Plaintiff cites no authority to the contrary.[9] Thus, the Court should deny Plaintiff's motion to strike Mr. Quiros's eighth affirmative defense.

H. In The Alternative, If The Court Is Inclined To Strike Any Of Mr. Quiros's Affirmative Defenses, Mr. Quiros Should Be Given Leave To Amend

"The court should freely give leave [to amend] when justice so requires." F.R.C.P. 15(a)(1)(B)(2); *see also Morrison v. Exec. Aircraft Refinishing, Inc.*, 434 F. Supp. 1314, 1319, 1321 (S.D. Fla. 2005) (granting leave to amend certain affirmative defenses which the court found to be insufficiently pled); *BIH*, 2013 U.S. Dist. LEXIS as *13-14 (same). For the reasons set forth above, the Court should not strike any of Mr. Quiros's eight affirmative defenses. But if it is inclined to do so, Mr. Quiros should be granted leave to amend.

V. CONCLUSION

Because Mr. Quiros is entitled to plead, and has adequately pled, each of his eight affirmative defenses, the Court should deny Plaintiff's Motion to Strike in its entirety.

[9] Instead, Plaintiff claims that "the Amended Complaint at no point seeks forfeiture of anything, and forfeiture is not an element of the Commission's case." Motion at 9-10. This is a non-sequitur by Plaintiff because affirmative defenses, by definition, are not elements of any plaintiff's case.

Dated: February 22, 2017

Respectfully submitted,

By: *s/ James R. Bryan*

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CERTIFICATE OF SERVICE

I hereby certify that on this on February 22, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing documents are being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in the manner stated in the service list attached.

s/ James R. Bryan
James R. Bryan

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US District Court, Southern District of Florida
Case No.: 16-cv-21301-DPG

Securities and Exchange Commission v. Ariel Quiros, et al.

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