**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 16-CV-21301-GAYLES**

**SECURITIES AND EXCHANGE COMMISSION,**

**Plaintiff,**

**v.**

**ARIEL QUIROS, et al.,**

**Defendants, and**

**JAY CONSTRUCTION MANAGEMENT, INC., et al.,**

**Relief Defendants.**
_____/

**PLAINTIFF'S REPLY TO SUPPORT MOTION TO STRIKE AFFIRMATIVE DEFENSES**

## I. Introduction

Defendant Ariel Quiros' response to the Securities and Exchange Commission's motion to strike his affirmative defenses misstates the pleading standards applicable to affirmative defenses and cites irrelevant cases that do not support his arguments. Quiros wrongly claims he can simply list defenses as one- or two-sentence conclusory statements and leave the Commission and the Court to figure out the bases during discovery. This theory contravenes well-established case law holding that a defendant must plead facts to support an affirmative defense and its elements. It also would be a drain on the Court's and the Commission's resources figuring out if Quiros' defenses are frivolous and forcing the Court to rule on additional motions. Furthermore, many of Quiros' defenses are not affirmative defenses, but at best general denials. The law supports striking Quiros' eight affirmative defenses from his Amended Answer, and requiring him to replead any that survive with more facts.

## II. Pleading Standards

Quiros asserts throughout his response that he can list a defense with no supporting facts whatsoever. *See, e.g.*, Response at 2: "Mr. Quiros is only required to give Plaintiff notice of the defenses he intends to litigate." He relies primarily on one case to support this incorrect statement, *Ramnarine v. CP RE Holdco 2009-1, LLC*, Case No. 12-61716-CIV, 2013 WL 1788503 at *1-3 (S.D. Fla. April 26, 2013), which held that the pleading standards of Fed.R.Civ.Pro 8(a) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), do not apply to affirmative defenses.

However, Quiros ignores the fact that *Ramnarine* represents a minority opinion, and that a majority of cases hold that Rule 8(a), *Twombly*, and *Iqbal* apply to affirmative defenses. *See, e.g., Electronic Communication Technologies, LLC v. Clever Athletics Co.*, Case No. 9:16-cv-81466, 2016 WL 7409710 at *1 (S.D. Fla. Dec. 19, 2016) (like complaints, *Twombly* and *Iqbal* require an affirmative defense "to articulate enough facts to raise a plausible right to relief"); *Losada v. Norwegian (Bahamas) Ltd.*, 296 F.R.D. 688. 690-91 (S.D. Fla. 2013) (*Twombly* and *Iqbal* standards apply); *SEC v. BIH Corp.*, No. 2:10-cv-577, 2013 WL 1212769 at *1 (M.D. Fla. March 25, 2013) (same); *Castillo v. Roche Labs., Inc.*, No. 10-20876-CIV, 2010 WL 3027726 at *1-4 (S.D. Fla. Aug. 2, 2010) (majority of District Courts hold heightened pleading standards of *Twombly* and *Iqbal* apply to affirmative defenses).

Quiros may not, as he argues, state a defense with no supporting facts. *New York Discount Plus, Inc. v. Scottsdale Ins. Co.*, No. 13-24231-CIV, 2014 WL 467235 at *1-2 (S.D. Fla. Feb. 5, 2014) ("affirmative defenses that fail to recite more than bare-bones conclusory allegations are legally insufficient and will be stricken" and striking defenses of waiver, estoppel, laches, unclean hands and acquiescence because they contained no facts in support); *Electronic*

*Communication*, 2016 WL 7409710 at *2 (striking defenses because they were "nothing more than conclusory allegations"); *Castillo*, 2010 WL at *3 ("purpose of pleading sufficient facts in an affirmative defense 'is to give fair notice to the opposing party that there is some plausible, factual basis for the assertion and not simply to suggest that it might apply to the case'" and discussing added litigation costs and docket clutter of conclusory affirmative defenses); *SEC v. Sarivola*, Case No. 95 CIV.9270, 1996 WL 304371 at *1 (S.D.N.Y. June 6, 1996) ("Courts must not . . . be unmindful that the discovery process can by unduly and unnecessarily delayed" by meritless affirmative defenses).

## III. Specific Affirmative Defenses

### *A. Affirmative Defense 3 – Laches And Acquiescence Are Barred Against The Government*

The Commission presented cases in its motion showing that, as a matter of law, a defendant may not assert laches against the Commission in an enforcement action. Quiros' response presents no cases to the contrary. *U.S. v. Delgado*, 321 F.3d 1338 (11th Cir. 2003), a criminal case Quiros cited, holds that "there have been *rare* exceptions" to the general rule that laches is unavailable against the government in "*certain* civil actions." *Id.* at 1349 (emphasis added). However, the only cases *Delgado* mentioned or Quiros cited are EEOC civil suits.

None of these cases contradict the express holding of *SEC v. Silverman*, 328 Fed. Appx. 601, 605 (11th Cir. May 19, 2009) (unpublished, *per curiam*),[1] the only case the undersigned found in the Eleventh Circuit addressing laches in a Commission civil suit. *Silverman* post-dated *Delgado*, noted *Delgado*, and still held that laches "should not be used to prevent the Government from protecting the public interest" and is unavailable in a Commission enforcement action. *Id.* at 605. *See also United States ex rel. Freedman v. Suarez-Hoyos*, No.

[1] Because it was not selected for publication, *Silverman* is not binding authority. However, it is persuasive authority pursuant to Fed.Rule.App.Pro. 32.1 and 11th Circuit Rules 36-2 and 36-3. An 11th Circuit decision addressing the exact issue is far more persuasive than any case Quiros cited.

8:04-cv-933, 2012 WL 4344199 at *7 (M.D. Fla. Sept. 21, 2012) (laches not available against government in civil False Claims enforcement action, citing *Silverman* and *Delgado*); *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).

Thus, it is clear the "rare exceptions" referred to in *Delgado* are extremely limited as *Silverman*, *Freedman*, and *FTC* found, and do not apply in a Commission enforcement action under *Silverman*. The Court should therefore strike Quiros' third affirmative defense.[2]

*B. Affirmative Defense 5 -- Rescission*

Quiros' response on this issue fails entirely to address the Commission's argument and cases. His main argument is the unpersuasive statement that "rescission is a viable affirmative defense." Response at 10. He cites two cases in support, one of which did not even involve rescission.[3] The remaining case, *Electronic Specialty Co. v. International Controls Corp.*, 295 S. Supp. 1063 (S.D.N.Y. 1968), only emphasizes the reasons why the defense is not available as a matter of law here. It involved investors as plaintiffs who were the subject of a rescission offer, and the court in that case held that because the investors had the opportunity to undo the transactions, *they* could not later sue in a private action for damages.

However, this is not a private action for damages. This is a government action alleging violations of the securities laws seeking injunctions, disgorgement of ill-gotten gains, and civil

[2] If the Court does not strike these defenses, it should, at a minimum, require Quiros to replead them with supporting facts. *BIH*, 2013 WL 1212769 at *5; *Scottsdale*, 2014 WL 467235 at *2.

[3] In *Weisman v. Darneille*, 79 F.R.D. 389 (W.D.N.Y. 1978), the defendants *after* the plaintiff filed suit as a purported class representative, offered the plaintiff his claimed damages, mooting the lawsuit.

penalties. Quiros has cited no case holding that the Commission stands in the same shoes as investors or is barred from bringing an enforcement action because the defendants purportedly offered *some* investors their money back. As we stated in our motion, at best Quiros' rescission claim *may* go to whether some investors justifiably relied on any 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 Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934. *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). 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, and the Court should strike it.

*C. Affirmative Defense 6 – Contribution Or Indemnity*

Quiros offers a minimal defense of his claim that he may legally allege he is entitled to indemnity or contribution from Raymond James. His *ipso facto* argument is that since he "indisputably" may allege that Raymond James is an indispensable party (which as we discuss in Section D is not the case), he may also plead he is entitled to indemnity or contribution from the firm. Response at 11-12. However, Quiros fails to dispute the relevance of the on-point case law we cited in our motion. Multiple defendants can be responsible for violations of the securities laws. *See* Motion at 9 (citing cases). Therefore, any attempt to claim that one party can indemnify another for securities violations is wrong and frivolous.

Furthermore, it is questionable whether indemnity and contribution are even affirmative defenses. *FDIC v. Niblo,* 821 F. Supp. 441, 456-57 (N.D. Tex. 1993) (striking affirmative defenses of contribution and indemnity in FDIC action). As discussed in *Niblo,* contribution and

indemnity are not affirmative defenses, but claims for recovery which must be pleaded and proved *separately*. *Id.* at 456-57. *See also U.S. v. Sensient Colors, Inc.*, 580 F. Supp. 2d 369, 379-80 (D.N.J. 2008) (striking affirmative defense of contribution against the government because it "is not a defense to joint and several liability under CERCLA").

As in *Sensient Colors*, whether Quiros has a separate, actionable claim against Raymond James for contribution or indemnity is irrelevant to whether he committed securities fraud violations. Just as in that case, contribution is not a defense to joint liability under the securities laws. And, as in *Niblo*, Quiros may plead indemnity or contribution against Raymond James in a separate case, but the issue of whether he has such a claim is superfluous to the facts and legal issues governing whether *he* committed securities fraud. *Sensient Colors*, 580 F. Supp. 2d at 375 (motions to strike affirmative defenses save "the time and expense which would otherwise be spent in litigating issues which would not affect the outcome of the case"). The Court should therefore strike Quiros' sixth affirmative defense.[4]

*D. Quiros Cannot Plead Raymond James Is An Indispensable Party*

Quiros wrongly asserts in his response that the Commission does not challenge his seventh affirmative defense, failure to join Raymond James as an indispensable party. Response at 11. He justifies this defense on the sole basis that the Commission's complaint mentions Raymond James, and that the Receiver sued Raymond James in a separate action. *Id.* But mentioning a party in a complaint or the fact that someone else has sued that party is a far cry from saying that party is *indispensable* to a lawsuit. And here, Quiros cannot show under any set of facts that Raymond James is indispensable.

A party is indispensable, i.e., *required*, only if:

[4] If the Court does not strike this defense, under the authorities discussed in Section II, the Court should require Quiros to replead this affirmative defense with facts showing he is entitled to contribution and indemnity and who from. *Niblo*, 821 F. Supp. at 457.

> (1) in his absence, completed relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the act in his absence may (i) as a practical matter impair or impeded his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Fed.R.Civ.Pro 19(a); *Challenge Homes, Inc. v. Greater Naples Care Center, Inc.*, 669 F.2d 667, 669-70 (11th Cir. 1982) (reversing District Court decision to dismiss case for failure to join corporate CEO as indispensable party because, among other reasons, corporation could be granted complete relief as to the lease in question and CEO had no interest in the lease).[5] *See also Developers Sur. And Indemnity Co. v. Harding Village, Ltd.*, No. 06-21267-CIV, 2007 WL 465519 at *4-5 (S.D. Fla. Feb. 9, 2007) (denying motion to dismiss for failure to join indispensable party because Court could grant complete relief without the party).

Quiros cannot show that the Court cannot award complete relief to the Commission or that Raymond James' interest would be somehow impaired if Raymond James is not a party in this case. As we explained in the previous section and in our motion, the Commission can sue and obtain relief against multiple parties for the same violations of the securities laws and it is not required to sue all possible parties. *See* cases at Page 9 of our motion. The Court can determine whether *Quiros* violated the securities laws and should be enjoined or ordered to disgorge *his* ill-gotten gains irrespective of any potential Raymond James liability, because both could be liable for violating the securities laws and subject to sanctions, without regard to the other's liability. *Id.* Furthermore, because Raymond James is not a party to this lawsuit, there will be no collateral estoppel or res judicata effect from any findings in this case. *Challenge Homes*, 669 F.2d at 670. Accordingly, Quiros has not asserted and cannot assert a viable

[5] As a threshold matter, Quiros has not pleaded *any* facts showing how Raymond James would be an indispensable party under those standards. As discussed in Section II, he may not simply state Raymond James is an indispensable party and leave it for everyone to later figure out how or why. If the Court does not strike the defense, it should require Quiros to replead it.

affirmative defense of failure to join an indispensable party, and the Court should strike it.

*E. Affirmative Defense 1 – The Statute Of Limitations*

Quiros' response either misstates or misunderstands the Commission's argument about the statute of limitations in the motion to strike. As we explicitly acknowledged, the Court ruled that the five-year statute of limitations applies to some of the *remedies* the Commission seeks under *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016) and Supreme Court precedent. Motion at 8. Quiros' claim that we said otherwise is baseless. Response at 6-7.

Rather than the Commission, it is Quiros who is misrepresenting the reach of *Graham* and misstating the Court's preliminary injunction ruling. *Id.* *Graham* plainly holds that the Commission's requests for injunctive relief are not subject to any statute of limitations, and the Court, as we stated in more detail in our motion, has held that none of the Commission's 52 counts and none of the facts on which we base Quiros' liability for securities fraud are therefore subject to the statute of limitations. So Quiros' first affirmative defense, claiming that the Commission's claims are barred *in whole*, is improper as a matter of law and *was* decided by the Court in its preliminary injunction ruling. In addition, the defense, as pled, is too vague and devoid of facts under the authorities set forth in Section II. *See also Castillo*, 2010 WL 3027726 at *4 ("an affirmative defense simply stating that a plaintiff's claims are barred by the statute of limitations is insufficiently pled" because it contains no factual basis).

The Court should strike the defense insofar as it purports to assert the statute of limitations bars all of the Commission's claims because the Court has already decided that issue. *BIH*, 2013 WL 1212769 at *4 (striking affirmative defenses because the issues had been previously raised and decided). The Court should make Quiros replead the remainder of the defense to specify what claims and remedies it pertains to and facts that support it.

*F. Affirmative Defense 4 – Bespeaks Caution*

The only case Quiros cites in his response on this issue, *SEC v. Merchant Capital, LLC*, 483 F.3d 747 (11th Cir. 2007), does not address the question of whether bespeaks caution is a valid affirmative defense. Response at 8. Rather, the case simply addresses the facts around whether certain documents in the case contained specific, meaningful cautionary language so as to render projections immaterial. *Id.* at 767. Thus, Quiros has cited no authority demonstrating that bespeaks caution is an affirmative defense. Rather, as we discussed in our motion, bespeaks caution is simply an element of the fact-finder's determination of whether projections are material. Motion at 7-8. As such, because it denies an element of the Commission's case, it is not an affirmative defense. *Id.* at 6-7, citing cases and incorporating the discussion here.

A number of cases cited in that discussion hold that the Court should strike affirmative defenses that are merely denials. *See, e.g., Halifax Hospital*, 2013 WL 6017329 at *12. Quiros correctly notes that *BIH* treated those defenses as denials rather than striking them completely. While we believe the better course is to strike such defenses, even if the Court agrees with *BIH* and treats the bespeaks caution defense as a general denial, it should require Quiros to replead with general denials listed separately from any affirmative defenses that survive. *Electronic Communication*, 2016 WL 7409710 at *2.

*G. Affirmative Defense 2 – Reliance On Raymond James*

Quiros correctly notes in his response that under Section 20(a) of the Exchange Act, pleading and proving good faith is a proper affirmative defense to the Commission's claims of control person liability. Response at 7-8. Therefore, reliance on Raymond James *might* be a valid affirmative defense to those claims – but not as pled. As it stands, Quiros' second affirmative defense suffers from two infirmities. First, it is not limited to control person liability. As to the 46 of 52 claims that do not assert control person liability, we stand on the argument in

our motion that the defense is a general denial rather than an affirmative defense, and the Court should strike the defense as to those claims (all counts except Counts 5, 12, 20, 28, 36, and 44). Motion at 7-8. Second, there are no facts in support of the defense, such as how or why Quiros contends he was entitled to rely on Raymond James, what he relied on Raymond James for, and how that demonstrates his good faith. For the reasons discussed in Section II, the Court should require Quiros to replead the affirmative defense as to the six control person counts identified above with more facts so we and the Court can evaluate its viability.

*H. Affirmative Defense 8 – Forfeiture*

Quiros' final affirmative defense as pled is impermissibly conclusory. It states no facts and ignores the fact that the Complaint does not allege forfeiture. In his response, Quiros attempts to link the defense to his claims that the amount of disgorgement the Commission has identified is overstated. Response at 12-13. This argument does not save the defense, however, because the defense does not bar any of the counts of the Amended Complaint or operate as a bar to Quiros' liability. It doesn't even defeat the Commission's right to disgorgement. If the Commission proves Quiros' liability for securities fraud at trial, he will have a chance to present evidence on disgorgement and attempt to demonstrate what the appropriate amount is. Claiming that our disgorgement is too high and therefore operates as a forfeiture is merely verbiage without any legal meaning. Accordingly, the Court should strike this affirmative defense.

## IV. Conclusion

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

Respectfully submitted,

March 6, 2017

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on March 6, 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.

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