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.
_____/

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT ARIEL QUIROS'S SECOND AND THIRD AFFIRMATIVE DEFENSES FROM SECOND AMENDED ANSWER

Defendant Ariel Quiros ("Mr. Quiros") files this response in opposition (the "Response") to Plaintiff Securities and Exchange Commission's ("SEC") Motion to Strike Defendant Ariel Quiros's Second and Third Affirmative Defenses (the "Affirmative Defenses") from Second Amended Answer [ECF #352], and states:

INTRODUCTION

Plaintiff's Motion does not satisfy the stringent requirements of Rule 12(f) necessary to warrant the drastic remedy of striking affirmative defenses. Instead and ironically, Plaintiff, with its 83-page, 52-Count Amended Complaint, argues that the Court should strike two of Mr. Quiros's three remaining defenses (after 31 defenses were already withdrawn after pressure from Plaintiff's counsel) because this Court should be mindful of "caseload pressure and budgetary restrictions on governmental enforcement agencies" and the increased time and expense and unnecessary delay

that may result from parties seeking to establish meritless affirmative defenses. *See* Motion at p.4. The Motion is unwarranted and lacks merit, and, therefore, should be denied outright without further waste of the parties' or the Court's time and resources.

RELEVANT BACKGROUND

Plaintiff filed its Amended Complaint on May 17, 2016. [ECF #120]. As noted above, the Complaint is extensive, asserting fifty-two counts against the Defendants, forty-six of which include claims against Mr. Quiros. In his first Answer to the Amended Complaint, Mr. Quiros asserted thirty-four affirmative defenses. [ECF #253]. He has since amended his Answer twice, after conferring with Plaintiff's counsel, and now only three defenses remain. Each of the remaining defenses sets forth viable affirmative defenses which put the Plaintiff on notice of defenses Mr. Quiros intends to pursue prior to and at trial.

Mr. Quiros's Second Amended Answer and Affirmative Defenses is now at issue. [ECF #348]. Plaintiff asks the Court to strike two of the three remaining Affirmative Defenses. The two Affirmative Defenses at issue, state as follows:

SECOND AFFIRMATIVE DEFENSE

> Defendant 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 professionals, including attorneys, accountants, and financial services providers, and, therefore, lacked scienter and acted in good faith.

THIRD AFFIRMATIVE DEFENSE

> Defendant Quiros is entitled to receive contribution from others and/or a set-off against the claims asserted in the Amended Complaint because the claims are based, in whole or in part, on alleged losses to purported victims whose alleged losses were caused by others, including financial services providers, accountants, and professionals, and whose alleged losses have been repaid in whole or in part by Defendant Quiros and others.

See Second Amended Answer to Amended Complaint [ECF #348], Aff. Def. Nos. 2 and 3.

The Motion should be denied.

MEMORANDUM OF LAW

A. Motions to Strike Affirmative Defenses Are Disfavored and Rarely Granted.

Rule 12(f) of the Federal Rules of Civil Procedure permits a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," granting courts broad discretion in making this determination. Fed. R. Civ. P. 12(f); *see also Hilson v. D'more Help, Inc*., 15-CIV-60155-Bloom; 2015 WL 5308713 *1 (S. Dist. Fla. Sept. 10, 2015); *Morrison v. Executive Aircraft Refinishing, Inc*., 434 F. Supp. 2d. 1314, 1318-19 (S.D. Fla. 2005) As courts throughout the Southern District have observed, motions to strike affirmative defenses pursuant to Rule 12(f) "are considered drastic, granted sparingly and often disfavored." *Hilson*, 2015 WL 5308713 at *1; *see also Exhibit Icons, LLC v. XP Companies, LLC*, 609 F.Supp. 2d 1282, 1300 (S.D. Fla. 2013) (Judge Marra).

Under Rule 12(f), "[**a] motion to strike will usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties**." *Hilson*, 2015 WL 5308713 at *1 (emphasis added) (citing *Harty v. SRA/Palm Trails Plaza, LLC*, 755 F. Supp. 2d 1215, 1218 (S.D. Fla. 2010) (internal quotation and citation omitted); *see also BB In Tech. Co. v. JAF, LLC*, 242 F.R.D. 632, 641 (S.D. Fla. 2007) (same); *Home Mgmt. Solutions, Inc. v. Prescient, Inc.*, 2007 WL 2412834, at *1 (S.D. Fla. Aug. 21, 2007) (same); *Action Nissan, Inc. v. Hyundai Motor Am.*, 617 F. Supp. 2d 1177, 1187 (M.D. Fla. 2008) (same)).

That stated, an affirmative defense may be stricken if the defense is "insufficient as a matter of law." *Exhibit Icons, LLC*, 609 F.Supp. 2d at 1300 (*citing Microsoft Corp. v. Jesse's Computers & Repair, Inc.*, 211 F.R.D. 681, 683 (M.D.Fla.2002); *Anchor Hocking Corp. v. Jacksonville Elec.*

Auth., 419 F. Supp. 992, 1000 (M.D. Fla. 1976)). **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**. *Id.* (emphasis added); *Ramnarine v. CP RE Holdco 2009-1, LLC*, No. 12-61716-CIV, 2013 WL 1788503, at *1 (S.D. Fla. Apr. 26, 2013) (Judge Rosenbaum).

The Affirmative Defenses at issue here clearly do not rise to the level of having no possible relation to the controversy or being patently frivolous or clearly invalid and, therefore, do not warrant striking under Rule 12(f) and the law in this District.[1]

B. **Mr. Quiros Has Met the Pleading Standard For Affirmative Defenses Under Rule 8.**

Plaintiff argues that neither of the two Affirmative Defenses at issue satisies the applicable pleading standards of Rule 8. There are "two schools of thought regarding the pleading standard required for affirmative defenses, and the Eleventh Circuit has not yet resolved the split in opinion." *Ramnarine*, 2013 WL 1788503, at *1. Courts in this District have held that affirmative defenses are subject to the liberal pleading standard of Rule 8(c).[2] Whereas other Courts in this District have held that affirmative defenses should be subject to the same general pleading standards of complaints set forth in Rule 8(a).[3]

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[1] Plaintiff relies almost exclusively on cases from other Circuits and Districts regarding the standard for striking affirmative defenses under Rule 12(f) and ignores the very high standard set out by Courts in this District.

[2] *See, e.g., U.S. v. Mintco LLC*, 2016 WL 3944101 *3 (S.D. Fla. 2016) ("This Court concludes that affirmative defenses are not subject to the heightened pleading standard elucidated in *Twombly* and *Iqbal*. The straightforward construction of Rule 8 delineates different standards for pleadings generally, and those applicable to defenses."); *see also Ramnarine*, 2013 WL 1788503, at *1–3 (recognizing two schools of thought on pleading standard for defenses, refusing to apply the *Iqbal/Twombly* standard to defenses and denying plaintiff's motion to strike affirmative defenses); *Hilson*, 2015 WL 5308713 at *1.

[3] *E.g., Losada v. Norwegian, Ltd.*, 296 F.R.D. 688, 690 (S.D. Fla. 2013); *New York Discount Plus v. Scottsdale Ins. Co.*, 2014 WL 467235 at *1 (S.D. Fla. 2014).

It is of no consequence which standard applies here because the Affirmative Defenses at issue satisfy even the more heightened pleading standard of Rule 8(a). Mr. Quiros's Second and Third Affirmative Defenses do not simply recite bare-bones conclusory allegations.

The Second Affirmative Defense spells out Defendant Quiros's intent to defeat Plaintiff's claims on the grounds that "he relied in good faith upon the information, opinions, reports, or statements prepared or presented by one or more professionals, including attorneys, accountants, and financial services providers, and, therefore, lacked scienter and acted in good faith." Aff. Def. No. 2. If the applicable standard were the Rule 9 requirement applicable to fraud claims, then, perhaps, Mr. Quiros would be required to specifically identify the specific opinions, report or statements or to name the professionals, but that is not the applicable standard.[4] Rather, according to all of the cases cited by Plaintiff in support of their Motion to Strike, Plaintiff need only be given notice of the defense asserted and the grounds upon which it rests.[5] Affirmative Defense Number 2 clearly puts Plaintiff on notice that Mr. Quiros intends to defend the claims against him on grounds that elements of the offenses are not satisfied because he acted in good faith by relying on the advice of the identified professionals. No more is required, and the Motion should be denied as to Affirmative Defense 2 insofar as the Motion is based on the argument that the Defense does not satisfy Rule 8.

[4] While Mr. Quiros is not prepared to name all third parties at this time, he continues to investigate potential third-party actions and to assist the Receiver in building a case against third parties. And the settlement by Raymond James & Associates strongly suggests, if not evidences, that they are a liable third party upon whose advice Mr. Quiros relied to the detriment of the Defendants and himself. Plaintiff, therefore, cannot claim to have insufficient notice of the misconduct of third parties underlying the Second Affirmative Defense.

[5] *See Losada*, 296 F.R.D. at 690; *New York Discount Plus*, 2014 WL 467235 at *1; Castillo v. Roche Lab., Inc., 2010 WL 3027726 at *1.

The Third Affirmative Defense notifies Plaintiff that Mr. Quiros intends to defend against the claims against him on the grounds that the claims, which are all based on the alleged losses to purported victims, are based, in whole or in part, on alleged losses that were caused by others, including financial services providers, accountants, and professionals, and whose alleged losses have been repaid in whole or in part by Defendant Quiros and others. Again, the defense is spelled out, leaving only the specifics of the particular losses or the identity of the financial services providers, accountants, and professionals who are responsible for or who have or will repaid such losses. And, again, such additional specific details are not required by Rule 8, which is satisfied by this Affirmative Defense which clearly puts Plaintiff on notice of the defense and the bases for it. As such, as with Affirmative Defense Number 2, no more is required, and the Motion should be denied as to Affirmative Defense 3 insofar as the Motion is based on the argument that the Defense does not satisfy Rule 8.

Therefore, in light of the explanations provided in the Second and Third Affirmative Defenses, as pled, Plaintiff cannot reasonably argue that that the defenses fail to put them on notice of the issues Mr. Quiros intends to raise in this action.

Finally, even if this Court finds that the Affirmative Defenses are too vague to meet the standards of Rule 8, the appropriate remedy is to order a more definite statement of each defense rather than to strike them. *See XP Companies*, 609 F. 2d at 1300.

C. **The Affirmative Defenses Are Properly Asserted As Defenses to Avoid or Reduce Liability and/or Monetary Judgment.**

In the Motion, Plaintiff also argues that the Court should strike the Second Affirmative Defense because it is merely a denial of required elements of the SEC's claim against Mr. Quiros. Under applicable common law, however, a defense asserted for the broad purpose of eliminating

or diminishing the plaintiff's requested recovery is valid. *See Am. First Fed., Inc. v. Lake Forest Park, Inc.*, 198 F.3d 1259, 1264 (11th Cir. 1999) (citations omitted).

In Affirmative Defense No. 2 (Good Faith Reliance), Mr. Quiros asserts his right to avoid or reduce his liability for violations of securities laws, to the extent that (i) he lacked intent to commit those violations, and (ii) he relied on the advice of professionals, in good faith, in carrying out the conduct underlying the SEC's claims against him. Eleventh Circuit law supports the application of the affirmative defense of reliance on professional advice to defeat the SEC's claims for violations of Rule 10b-5. *See SEC v. Bankatlantic Bankcorp. Inc.*, 661 Fed.Appx. 629, 637 (11th Cir. 2016) (overturning summary judgment in favor of SEC and finding that the reliance-on-professional-advice defense requires that defendant establish disclosure of all relevant facts and reliance in good faith and that the jury must determine whether Defendant established that defense under proper instruction).

Eleventh Circuit law also supports the assertion of good faith reliance as a defense to control person liability claims brought under section 20(a) of the Securities Exchange Act of 1934.[6] *See Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir. 2008). In *Laperriere*, the Eleventh Circuit held that:

> Under section 20(a), 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.

Id.

Moreover, Mr. Quiros asserts the defense of good faith reliance to establish the liability of third parties for the alleged losses to investors that are the subject of this enforcement action for

[6] Counts 5, 12, 20, 28, 36, 44 of the Amended Complaint all assert control person liability against Mr. Quiros.

purposes of reducing the amount of any monetary judgment against Mr. Quiros for disgorgement and/or restitution in proportion to such third-party liability as stated in the Third Affirmative Defense for set off and contribution.[7] Therefore, the good faith reliance defense is properly asserted in this enforcement action to eliminate or diminish any liability of Mr. Quiros for violations of securities laws **and** to reduce any resulting monetary award that may be entered by this Court.

Further, even if the Court determines that the Second Affirmative Defense is only a specific denial of scienter, "[t]he proper remedy when a party mistakenly labels a denial as an affirmative defense is not to strike the claim but instead to treat it as a specific denial." *See See Ramnarine v. CP RE Holdco 2009–1, LLC,* 2013 WL 1788503, at *1–3 (S.D. Fla. April 26, 2013) (citing *Lugo v. Cocozella, LLC,* 2012 WL 5986775, *1 (S.D. Fla. Nov.29, 2012)). "And, whether regarded as a specific denial or an affirmative defense, Defendant's invocation . . . still put Plaintiff and the Court on notice of certain issues Defendant intends to assert against Plaintiff's claims.'" *Id.* (quoting *Inlet Harbor Receivers, Inc. v. Fid. Nat'l Prop. & Cas. Ins. Co.*, 2008 WL 3200691, *1 (M.D. Fla. Aug. 6, 2008)). Accordingly, Plaintiff's arguments for striking the Second Affirmative Defense must fail.

The Third Affirmative Defense (Set Off, Contribution) asserts Mr. Quiros's rights of set off against any disgorgement or restitution judgment that may ultimately be entered by this Court. Plaintiff argues that because the defense appears to negate only damages and/or relief sought by Plaintiff, it is not an affirmative defense. However, despite the one Middle District decision relied on by Plaintiff in which the court determined that the defendant's specific affirmative defense

[7] The settlement by Raymond James & Associates reflects their participation in the alleged misconduct carried out through the Defendants.

based on limited settlements in that case was improper, Courts in this Circuit have not so broadly held that defenses eliminating damages are not available as affirmative defenses as Plaintiff suggests. In the instant case, where the significant purported losses to victims and/or profits gained by Mr. Quiros are the central theme of the entire Amended Complaint, Mr. Quiros's voluntary turnover of assets, ongoing cooperation with the SEC and Receiver, and intent to bring third-party actions for contribution requires that he preserve his rights to assert the defenses of setoff and contribution in order to defend against liability and to reduce any monetary awards that may be entered in this action.

In this District, Judge Bloom recently recognized the defenses of set off and contributory negligence as affirmative defenses properly asserted in enforcement actions. *See Mintco*, 2016 WL 3944101 at *9 (denying motion to strike defenses of setoff and contribution where "Defendants have argued, it is 'a third-party liability affirmative defense, in the nature of contributory negligence, a rule 8(c) affirmative defense.'"). In *Mintco*, the court, in denying the CFTC's motion to strike, refused to make a determination as to whether the set off defense sought to extinguish liability or reduce monetary judgment at the motion to strike phase of the case. *See id.* at *4. The court explained:

> "Plaintiff characterizes this defense as a 'set-off' defense and argues that it is not a defense as it does not preclude liability. At best, Plaintiff avers, this defense seeks to attack the method of calculating relief that the Court may ultimately award, but does not prevent Plaintiff from recovering. Plaintiff further argues that this defense should be stricken because Defendants have not alleged any legal or factual basis for this defense and the defense is inapplicable to this action. Again, the Court declines to draw a line between defenses limiting or eliminating damages and those precluding liability for purposes of defining affirmative defenses . . . ."

Id. Accordingly, the court refused to strike the defense, which provided notice to the plaintiff of the defendant's defense.

Here, the total amount that would be set off against any judgment against Mr. Quiros is yet undetermined and expected to grow throughout the pendency of this enforcement action. Indeed, Mr. Quiros has already turned over to the receivership estate assets and cash valued at more than $10 million, and he is in negotiations with the SEC and the Receiver to turn over additional assets worth tens of millions of dollars should a global settlement be reached.

Further, the Receiver is pursuing actions against third parties that may be jointly and severally liable with Mr. Quiros for the alleged losses suffered by investors. For example, the Court recently approved the $150 million settlement with Raymond James & Associates for claims based on allegedly joint conduct between that company and Mr. Quiros. And Mr. Quiros expects that both he and the Receiver will successfully pursue claims against other third parties, including, possibly, attorneys, accountants, and financial advisors for the Defendants that took on an active and intentional role in the business causing or contributing to the alleged violations of securities laws. All such recoveries will reduce any monetary judgment for restitution and/or disgorgement entered against Mr. Quiros in this enforcement action and may foreclose Plaintiff's ability to seek such relief from Mr. Quiros altogether. Thus, Mr. Quiros properly asserted the Third Affirmative Defense.

CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion fails to demonstrate that striking Mr. Quiros's affirmative defenses is warranted, and the Motion should, therefore, be denied.

WHEREFORE, Defendant Ariel Quiros respectfully requests that the Court deny Plaintiff's Motion to Strike the Second and Third Affirmative Defenses in its entirety. Alternatively, in the event the Court determines that either of the Affirmative Defenses is

inadequate, Defendant respectfully requests that the Court permit an opportunity to replead or amend the defenses to comply with the Court's findings.

Respectfully, Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via-e-mail via CM/ECF, on this 12th day of July, 2017, to all counsel of record.

/s/ Melissa D. Visconti
Melissa Damian Visconti