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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

FEDERAL ELECTION COMMISSION, Plaintiff, v. JEREMY JOHNSON, Defendant.	Case No. 2:15-cv-00439-DB **MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS OR TO STRIKE AFFIRMATIVE DEFENSES** District Judge Dee Benson

PLAINTIFF FEDERAL ELECTION COMMISSION'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE TO STRIKE AFFIRMATIVE DEFENSES

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Plaintiff Federal Election Commission ("Commission" or "FEC") moves for partial judgment on the pleadings or in the alternative to strike nine of the purported defenses (defenses 1-7, 8 (¶ 51), and 10) that defendant Jeremy Johnson has pleaded in his answer. *See* Fed. R. Civ. P. 12(c), (f). The Commission's complaint alleges that Johnson violated the Federal Election Campaign Act by using the names of other persons to contribute to federal candidates in amounts far in excess of applicable contribution limits. In response, Johnson has pleaded nearly a dozen "defenses" in a transparent attempt to expand the issues subject to discovery and sow confusion about the dispute before the Court. In fact, in his initial disclosures, Johnson has already stated his intent to pursue discovery relating to these purported defenses from no less than nine attorneys and investigators at the United States Attorney's Office for the District of Utah. Those defenses, however, cannot succeed as a matter of law, are insufficiently pleaded, are not actually affirmative defenses, or suffer some combination of these defects. Johnson's defenses assert, without support, an array of purported misdeeds by multiple government agencies. Johnson claims that the FEC did not attempt to conciliate the matter prior to suit, that FEC counsel should be disqualified, and that Johnson cannot afford to defend himself, despite being represented by counsel. And he inappropriately pleads evidentiary objections. This Court should deny Johnson's improper bid to derail this case with frivolous defenses designed to justify pointless, burdensome discovery and divert the attention of the Court away from the serious violations of law actually at issue in the Commission's complaint. Granting the Commission's motion would maintain the focus of the case on Johnson's violations of federal election law.

I. BACKGROUND

Plaintiff Federal Election Commission is an independent agency of the United States government that is responsible for the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA"), 52 U.S.C. §§ 30101-46. *See id.* §§ 30106(b)(1), 30107(a), 30109. The Commission is authorized to investigate possible violations of FECA, *id.* § 30109(a)(1)-(2), and to file civil lawsuits in the United States district courts to enforce FECA, *id.* §§ 30107(e), 30109(a)(6).

On June 19, 2015, the Commission filed this suit alleging that Jeremy Johnson violated FECA. (*See* Compl. (Docket No. 1).) As the complaint explains, in 2009 and 2010, FECA provided that no person could contribute in excess of $2,400 per election to any federal candidate. (*Id.* ¶ 10.) FECA also provides that no person shall make a contribution "in the name of another person." (*Id.* ¶ 11.) Johnson violated both of these provisions when, in 2009 and 2010, he used "straw donors" to contribute approximately $100,000 to Mark Shurtleff's United States Senate campaign, about $50,000 to Mike Lee's Senate campaign, and about $20,000 to Senator Harry Reid's re-election campaign. (*Id.* ¶ 2.)

On October 8, 2015, this Court denied Johnson's motion to dismiss and granted the Commission's motion to waive the local counsel requirement of DUCivR 81-1.1(d). (Docket No. 16.) On October 19, 2015, Johnson filed his answer, which pleads ten defenses. (*See* Answer (Docket No. 17).) A week later, on October 26, 2015, the parties held their attorney planning meeting pursuant to Rule 26(f). The parties then filed their attorney planning meeting report (Docket No. 21) and exchanged initial disclosures on November 10, 2015. Johnson's initial disclosures identify several government attorneys and investigators who purportedly have

information relating to Johnson's alleged defenses. (*See* Def.'s Initial Disclosures ¶¶ A.2, A.4 (attached as Exh. A).)

II. ARGUMENT

The Court should dismiss or strike the First through Seventh, Eighth (paragraph 51), and Tenth Defenses in the answer because they are legally insufficient. Federal Rules of Civil Procedure 12(c) and 12(f) each allow this Court to remove an insufficient defense from the answer. Under Rule 12(c), a court may grant judgment on the pleadings "[a]fter the pleadings are closed." Judgment on a pleaded affirmative defense is warranted where the "non-moving party can prove no set of facts which would form the basis for relief" and thus the defense is "insufficient as a matter of law." *FDIC For & on Behalf of Heritage Bank & Trust v. Lowe*, 809 F. Supp. 856, 858-59 (D. Utah 1992) (dismissing defenses under Rule 12(c)). Similarly, under Rule 12(f), a court may "strike from a pleading an insufficient defense." A defense is insufficient under Rule 12(f) where it "can be summarily resolved as a matter of law." *Wilkinson v. Utah*, 860 F. Supp. 2d 1284, 1287 (D. Utah 2012) (striking defenses under Rule 12(f)).

When deciding whether to strike a defense, "courts should consider the purpose of Rule 12(f), which is to minimize delay, prejudice and confusion by narrowing the issues for discovery and trial." *United States v. Badger*, No. 2:10-CV-00935, 2013 WL 1309165, at *4 (D. Utah Mar. 31, 2013) (unpublished) (internal quotation marks omitted); *see, e.g.*, *FEC v. Adams*, 558 F. Supp. 2d 982, 991 (C.D. Cal. 2008) (striking defenses pleaded against the FEC where the "discovery of additional facts will not validate the challenged affirmative defenses").

A. Johnson Has Failed to Adequately Plead Selective Prosecution (Sixth Defense)

The Court should strike Johnson's Sixth Defense, which states in its entirety that "Mr. Johnson is being selectively prosecuted in this lawsuit for improper purposes." (Answer 2.) That claim is inadequately pleaded.

The Supreme Court has long held that a federal agency's exercise of prosecutorial discretion is "presumptively unreviewable." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *see also United States v. Armstrong*, 517 U.S. 456, 463-64 (1996) (explaining that the executive's "broad discretion" to enforce the law is entitled to a "presumption of regularity" (internal quotation marks omitted)). The executive's decision whether to sue involves a balancing of "multifarious" factors that lie within its expertise and "'are not readily susceptible to the kind of analysis the courts are competent to undertake.'" *Jennings v. City of Stillwater*, 383 F.3d 1199, 1214-15 (10th Cir. 2004) (quoting *Armstrong*, 517 U.S. at 465). Those factors include "the relative culpability of the defendants," the "optimal deployment of prosecutorial resources," the strength of a particular case, the "'government's enforcement priorities,'" and a particular case's "'relationship to the Government's overall enforcement plan.'" *Id.* (quoting *Armstrong*, 517 U.S. at 465). Accordingly, "[b]road discretion has been vested in executive branch officials to determine when to prosecute." *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1167 (10th Cir. 2003) (citing *Armstrong*, 517 U.S. at 464).

In FECA, Congress chose *not* to disturb the presumptive unreviewability of FEC decisions to bring civil enforcement actions. FECA does allow federal courts to review certain FEC decisions. *See* 52 U.S.C. § 30109(a)(8)(A) (authorizing "any party aggrieved" to petition a court to review the FEC's dismissal or delay of an administrative proceeding). But the FEC's decision whether to sue a respondent is not one of them. *See FEC v. Legi-Tech, Inc.*, 75 F.3d

704, 709 (D.C. Cir. 1996) (concluding that it has "no statutory authority to review the FEC's decision to sue"). The FEC's administrative enforcement process "is not an adjudication" and thus does not result in "any finding of liability" for courts to review. *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 19 (D.D.C. 1995). Instead, the Commission's power to file a *de novo* lawsuit in federal district court, such as in this case, is the "exclusive civil remedy" for the enforcement of FECA. 52 U.S.C. § 30107(e).

Due to the broad discretion that courts afford to the executive's prosecutorial discretion, a defendant who accuses the government of selective prosecution must meet a "rigorous" standard to justify "ask[ing] a court to exercise judicial power over a 'special province' of the Executive." *Armstrong*, 517 U.S. at 464 (quoting *Heckler*, 470 U.S. at 832). That defendant must prove that "the Government's selection of him for prosecution was invidious or in bad faith and was based on impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights." *United States v. Salazar*, 720 F.2d 1482, 1487 (10th Cir. 1983); *see Armstrong*, 517 U.S. at 463 ("Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one.").

The Court should strike the Sixth Defense because Johnson has not adequately pleaded selective prosecution. The Supreme Court in *Armstrong* "imposed a substantially more 'demanding' pleading burden on . . . claims of selective law enforcement." *Jennings*, 383 F.3d at 1214 (quoting *Armstrong*, 517 U.S. at 463-64)). This is due to the "heavy burden" that discovery on a selective prosecution claim imposes on the government. *United States v. James*, 257 F.3d 1173, 1178 (10th Cir. 2001). Such discovery "will divert prosecutors' resources" and "may disclose the Government's prosecutorial strategy." *Armstrong*, 517 U.S. at 468. As a result, "the

showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." *Id.* at 464.

Under *Armstrong*'s demanding pleading burden, a defendant is entitled to discovery "only if he presents 'some evidence tending to show the existence of the essential elements'" of a selective prosecution claim. *James*, 257 F.3d at 1178 (quoting *Armstrong*, 517 U.S. at 468). There are two essential elements. First, the defendant must plead and demonstrate "discriminatory effect." *Armstrong*, 517 U.S. at 465. In other words, the defendant must show that he was "singled out for prosecution while others similarly situated generally have not been proceeded against for the type of conduct forming the basis of the charge." *United States v. Furman*, 31 F.3d 1034, 1037 (10th Cir. 1994). Second, the defendant must also plead and show "discriminatory purpose." *Armstrong*, 517 U.S. at 465. Discriminatory purpose exists if the government's prosecution was "invidious or in bad faith and was based on impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights." *Salazar*, 720 F.2d at 1487.

Here, Johnson has failed even to sufficiently plead either element, let alone demonstrate that there is "some evidence tending to show the existence" of the elements. *Armstrong*, 517 U.S. at 468. His defense states in its entirety: "Mr. Johnson is being selectively prosecuted in this lawsuit for improper purposes." (Answer 2.) That statement does not sufficiently allege the "discriminatory effect" element because it does not claim that the FEC failed to prosecute similarly situated persons who allegedly violated the FECA provisions Johnson violated. *See Furman*, 31 F.3d at 1037; *see also Haskett v. Flanders*, No. 13-CV-03392, 2015 WL 128156, at *7 (D. Colo. Jan. 8, 2015) (unpublished) (stating that a selective prosecution claim must "allege that a similarly situated individual of a different class could have been but was not prosecuted for

an offense for which Plaintiff was prosecuted"). Johnson's conclusory assertion that he is "being selectively prosecuted" falls short. *Cf. id.* (dismissing selective prosecution claim asserting a mere "general allegation that a plaintiff has received a different standard of police protection than is typically afforded to citizens").

Second, Johnson also has not sufficiently pleaded the "discriminatory purpose" element. His pleading does not claim that he was singled out on the basis of race, religion, or the exercise of constitutional rights. *See Salazar*, 720 F.2d at 1487. Johnson merely asserts that he was prosecuted for "improper purposes." (Answer 2.) But claims of prosecution "for insufficient, or unjustifiable, or unfair, or just plain bad reasons" are not enough. *United States v. Am. Elec. Power Serv. Corp.*, 258 F. Supp. 2d 804, 808 (S.D. Ohio 2003) (striking selective enforcement defense and stating that "[t]he Court is aware of no precedent for such an affirmative defense being pursued successfully in a civil enforcement action by a federal government agency . . . without also claiming membership in a constitutionally protected class or intent to punish for exercise of constitutionally protected rights"); *see Adams*, 558 F. Supp. 2d at 994 (dismissing selective prosecution defense against the FEC for failure to present "any evidence or argument" that defendant was sued due to race, religion, or exercise of constitutional rights); *Mims v. United States*, No. 2:06CV00492, 2006 WL 2037573, at *3-4 (D. Utah July 18, 2006) (unpublished) ("Ms. Mims fails to allege that the government prosecuted her in bad faith or based on an impermissible basis, such as race or religion."); *cf. United States v. Bryant*, 5 F.3d 474, 475 (10th Cir. 1993) (affirming district court's denial of an evidentiary hearing on selective prosecution

claim where defendant pleaded only "bald assertions" and "[m]ere speculation" of "selective prosecution based on race").[1]

B. Johnson's Claim That the FEC Did Not Attempt to Conciliate Fails as a Matter of Law (Eighth Defense)

In the answer's Eighth Defense, Johnson denies that the FEC attempted to correct his violations through conciliation. (Compl. ¶ 51; Answer ¶ 51.) But this defense fails as a matter of law, because Johnson's answer otherwise admits facts that show the FEC met the Supreme Court's requirements for attempting to conciliate in the enforcement context under statutes like FECA. And Johnson could not prove that the FEC did not attempt to conciliate in any event.

FECA requires the Commission, after finding that there is probable cause to believe that a respondent violated FECA, to "attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved." 52 U.S.C. § 30109(a)(4)(A)(i). If that attempt fails to produce a conciliation agreement acceptable to the Commission, the FEC may then sue the respondent in federal district court to enforce FECA. *Id.* § 30109(a)(6)(A). These provisions require the FEC only to "attempt" to conciliate — meaning that the FEC need only

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[1] Johnson's selective prosecution defense is also subject to being stricken because selective prosecution "is not a defense on the merits to [a] . . . charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *Armstrong*, 517 U.S. at 463-64; *see also United States v. Leggett & Platt*, 542 F.2d 655, 658 (6th Cir. 1976) (stating that the "purported defense of 'discriminatory enforcement' is, as a matter of law, no defense"). Cases involving "a plaintiff asserting a[] . . . claim of selective enforcement against a defendant" are distinct from those involving the "issue *when raised as a defense*," where the issue is "peripheral." *FEC v. Friends of Lane Evans*, No. 2:07-cv-4419, slip op. at 2 (C.D. Ill. Jan. 14, 2009), *available at* http://www.fec.gov/law/litigation/evans_dc_order.pdf (rejecting discovery related to a selective prosecution defense to FEC claims). This is the latter type of case. Even if Johnson had "[p]roof of selective enforcement," it would "not negate the Commission's allegations" or "serve as a defense to the charges." *Id.*; *see also, e.g.*, *United States v. Hazel*, 696 F.2d 473, 475-76 (6th Cir. 1983) ("[N]o purpose would be served by conducting a full evidentiary hearing on a charge which, even if proved, is immaterial and insufficient as a matter of law to support dismissal for selective prosecution").

"come to the conciliation table." *FEC v. Club For Growth, Inc.*, 432 F. Supp. 2d 87, 92 (D.D.C. 2006). The FEC "is not bound to accept a conciliation agreement which it finds unacceptable." *FEC v. Nat'l Rifle Ass'n*, 553 F. Supp. 1331, 1339 (D.D.C. 1983); *see also Adams*, 558 F. Supp. 2d at 982 ("[T]he Act . . . does not require the FEC to continue negotiations until a conciliation agreement is reached.").

The Supreme Court recently held that for a federal agency to meet its duty "to attempt conciliation before filing suit," the agency need only (1) "inform the [respondent] about the specific allegation," and (2) "try to engage the [respondent] in some form of discussion (whether written or oral), so as to give the [respondent] an opportunity to remedy" the alleged offense. *Mach Mining, LLC v. EEOC*, --- U.S. ---, 135 S. Ct. 1645, 1649, 1655-56 (2015).[2] A court may exercise only "relatively barebones review" to determine whether an agency has satisfied these two requirements — "and nothing else." *Mach Mining*, 135 S. Ct. at 1656. A court may *not* review any of the agency's "strategic decisions" in conciliation, including "whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of [a respondent's] counter-offers." *Id.* at 1654. Nor may a court review the agency's choices regarding "the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief." *Id.* This barebones review respects the "expansive discretion" that statutes like FECA give to an agency "to decide how to conduct conciliation efforts and when to end them." *Id*. at 1656; *see, e.g., Club For Growth, Inc.*, 432 F. Supp. 2d at 91

[2] In *Mach Mining*, the Supreme Court reviewed the Equal Employment Opportunity Commission's statutory duty to attempt to conciliate, which is nearly identical to the FEC's. *See* 42 U.S.C. § 2000e-5(b) (requiring the EEOC to "endeavor to eliminate" alleged violations of Title VII using "informal methods of conference, conciliation, and persuasion" before filing suit). Courts evaluating the FEC's duty to attempt to conciliate have routinely followed the "instructive" guidance of decisions evaluating the EEOC's similar duty. *Nat'l Rifle Ass'n*, 553 F. Supp. at 1344; *see also Club For Growth, Inc.*, 432 F. Supp. 2d at 91 (same); *Adams*, 558 F. Supp. 2d at 990 (same).

(affording "high deference" to the FEC's conciliation attempts). Moreover, barebones review is necessary to preserve the confidentiality required to promote candor in settlement negotiations in general, *Mach Mining*, 135 S. Ct. at 1655, and the confidentiality required by FECA in particular, *see* 52 U.S.C. § 30109(a)(4)(B)(i) (barring "action[s]" and "information derived" from conciliation from being "made public" without the respondent's written consent).

An agency may satisfy this low bar merely by providing "a sworn affidavit from the [agency] stating that it has performed the obligations" required "but that its efforts have failed." *Mach Mining*, 135 S. Ct. at 1656. Fact-finding on the issue is not necessary unless, in response to the agency, the defendant is able to provide "credible evidence of its own . . . indicating that the [agency] did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim." *Id.*

In this case, an affidavit is unnecessary since admissions in Johnson's answer demonstrate that the Commission has satisfied the *Mach Mining* standard. First, Johnson has admitted that the Commission notified him, by letter dated April 20, 2015, of its finding that there was probable cause to believe he violated FECA. Compl. ¶ 51; Answer ¶ 51; *cf. Mach Mining*, 135 S. Ct. at 1655-56 (describing how the EEOC "typically" satisfies the first requirement with "a letter announcing its determination of 'reasonable cause'"). Second, Johnson further admits that on May 15, 2015 — in the midst of the post-probable cause, pre-suit conciliation period — he agreed to toll the statute of limitations for 30 days. (Compl. ¶ 52; Answer ¶ 52.) It would make little sense for Johnson and the FEC to agree to extend the time available to attempt to conciliate unless the FEC was in fact trying to engage in some form of discussion giving Johnson an opportunity to remedy his alleged offenses.

In any event, out of an abundance of caution, the Commission has attached to this motion a declaration of counsel with personal knowledge of the FEC's attempt to conciliate with Johnson. (*See* Decl. of Counsel in Supp. of FEC's Mot. for Partial J. on the Pleadings or in the Alternative to Strike Affirmative Defenses (attached).)[3] As that declaration states, the Commission informed Johnson about the specific allegations against him on many occasions. (*Id.* ¶¶ 4.a-d.) As the declaration also states, for 44 days, the Commission tried to engage, and did in fact engage, Johnson in written and oral discussions so as to give him an opportunity to remedy the allegations against him. (*Id.* ¶ 5.) Despite those efforts, the parties were unable to reach an acceptable conciliation agreement. (*Id.* ¶ 6.) Accordingly, this Court should strike Johnson's conciliation defense since it cannot succeed. *See, e.g.*, *EEOC v. Blinded Veterans Ass'n*, --- F. Supp. 3d ---, No. 14-2102, 2015 WL 5148737, at *7 (D.D.C. July 7, 2015) (holding that an EEOC declaration did "more than enough" to survive *Mach Mining*'s "barebones review").[4]

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[3] The Court may consider this declaration without converting the FEC's motion to a motion for summary judgment. Courts have relied upon FEC exhibits to reject Rule 12(b)(1) motions claiming that the FEC failed to attempt to conciliate. *See, e.g.*, *Club For Growth, Inc.*, 432 F. Supp. 2d at 89, 91-92. While a Rule 12(c) motion is normally treated as a Rule 12(b)(6) motion, courts may apply the Rule 12(b)(1) standard instead where appropriate. 5C Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1367 (3d ed. 2015). Under Rule 12(b)(1), this court has "wide discretion" to consider affidavits and "other documents" to resolve "disputed jurisdictional facts." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

[4] In any event, FECA's duty to attempt to conciliate is merely a condition precedent to the FEC's filing suit, not an affirmative defense for a defendant. Therefore, even if successful, Johnson's defense would not require dismissal of the FEC's claims; instead "the appropriate remedy" would be to stay the case and "order the [agency] to undertake the mandated efforts to obtain voluntary compliance." *Mach Mining*, 135 S. Ct. at 1656; *see also Gad v. Kan. State Univ.*, 787 F.3d 1032, 1041 (10th Cir. 2015) (explaining that conditions precedent to suit, such as the EEOC's duty to conciliate, are not affirmative defenses (citing *Mach Mining*, 135 S. Ct. at 1651)).

C. Johnson's Claim That FEC Attorneys Should Be Disqualified Fails as a Matter of Law (Fifth Defense)

The Court should strike Johnson's Fifth Defense, which asserts that the FEC should be "disqualified from prosecuting this case" because it allegedly reviewed privileged communications between Johnson and his counsel. (Answer 2.) This claim is utterly baseless — the FEC has not reviewed any privileged communications between Johnson and his counsel. In any event, the claim is also legally insufficient.

Johnson's purported defense fails as a matter of law because it asserts no valid factual basis for disqualification. Courts in this Circuit disqualify government attorneys only in "'limited circumstances' such as an 'actual conflict of interest because [the] appointed prosecutor also represented another party' or where there are 'bona fide allegations of bad faith performance of official duties by government counsel' or where the 'prosecutor . . . will act as a witness at trial.'" *United States v. Marquez*, 603 F. App'x 685, 689 (10th Cir. 2015) (quoting *United States v. Bolden*, 353 F.3d 870, 878-79 (10th Cir. 2003)). Johnson's Fifth Defense alleges no such circumstances.[5]

D. Johnson's Claim That He Is Financial Unable to Defend Himself Fails Because There Is No Right to Counsel in a Civil Case (Fourth Defense)

The Court should strike Johnson's Fourth Defense. It claims that this civil action violates due process because Johnson is financially unable to "meaningfully defend himself." (Answer

[5] Johnson's allegation also fails because, like a number of his other contentions (*see infra* Part II.F), it is not an affirmative defense. Even if this Court found that there were grounds for disqualification, it would not defeat the FEC's claims. As the Tenth Circuit has explained, "because disqualifying government attorneys implicates separation of powers issues, the generally accepted remedy is to disqualify a specific [government] Attorney, . . . not all the attorneys in the office." *Bolden*, 353 F.3d at 879 (internal quotation marks omitted). Even if all of the FEC's attorneys could be disqualified from this matter, the proper remedy would still not be dismissal. *See, e.g., id.* at 873 (describing how district court that erroneously disqualified an "entire USA's office" had then ordered that an Assistant U.S. Attorney from another district should prosecute the case).

2.) But the Constitution does not grant civil litigants a right to counsel. *Johnson v. Johnson*, 466 F.3d 1213, 1217 (10th Cir. 2006) (*per curiam*). In any event, Johnson is in fact represented by counsel in this case, and his counsel has already moved to dismiss and opposed the FEC's motion for waiver of local counsel rules. (Docket Nos. 10, 13.) But even if Johnson were to claim later that he could no longer afford representation, that would not violate due process or any other part of the Constitution. *See Johnson*, 466 F.3d at 1217; *see also, e.g., Pinson v. Equifax Credit Info. Servs., Inc.*, 316 F. App'x 744, 748-49 (10th Cir. 2009) (rejecting civil litigants' contention "that the district court should have appointed new counsel sua sponte after they fired their previous attorneys"). In fact, Johnson is defending himself without counsel in the Federal Trade Commission civil litigation he references in his Fourth Defense. *See FTC v. Johnson*, No. 2:10-CV-02203, 2013 WL 2460359 (D. Nev. June 6, 2013).

E. Johnson's Assertion That the FEC's Claims Are Time Barred Is Insufficient as a Matter of Law (Seventh Defense)

The Court should strike Johnson's statute of limitations defense. With regard to the FEC's request for equitable relief (*see* Compl. 13), the statute of limitations does not apply. Under 28 U.S.C. § 2462, the government must file a suit seeking a "civil fine, penalty, or forfeiture" against an offender found in the United States "within five years from the date when the claim first accrued." By its terms, this limitations period "bars only legal relief" and not claims for equitable relief, such as declarative and injunctive remedies. *FEC v. Christian Coal.*, 965 F. Supp. 66, 70-71 (D.D.C. 1997) (holding that section 2462 does not apply to FEC claims for equitable relief); *see also Nat'l Republican Senatorial Comm.*, 877 F. Supp. at 21 (same). While some jurisdictions apply section 2462 to a plaintiff's concurrent claims for legal and equitable relief, the Tenth Circuit does not when, as here, "the Government . . . seeks equitable relief in its enforcement capacity." *United States v. Telluride Co.*, 146 F.3d 1241, 1248 (10th

Cir. 1998) (explaining that "any statute of limitations sought to be applied against the United States must receive a strict construction in favor of the Government" (internal quotation marks omitted)).[6]

F. Johnson's Purported First, Second, Third, and Tenth Defenses Are Not Affirmative Defenses

A pleaded defense is insufficient when it is not in fact an affirmative defense. An affirmative defense raises "additional new material that would defeat the plaintiff's otherwise valid cause of action." 5 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1270 (3d ed. 2015). A court may therefore strike a purported affirmative defense that is instead either (1) a mere denial of elements of the plaintiff's claim, or (2) a collateral claim that would "not act to preclude a defendant's liability" even if successful. *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1174-75 (N.D. Cal. 2010) (striking, under Rule 12(f), ten such false affirmative defenses).

1. Johnson's First and Second Defenses Are Evidentiary Arguments

The Court should strike Johnson's First and Second Defenses because they are objections to the admissibility of the FEC's evidence, not affirmative defenses. Just as a denial of an allegation in the complaint is not an affirmative defense, neither is a purported "defense which simply points out a defect or lack of evidence in a plaintiff's case." *Royal Caribbean Cruises,*

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[6] The Commission requests legal relief only for Johnson's illegal acts that occurred on or after May 20, 2010. A claim accrues for purposes of section 2462 "on the date that a violation first occurs." *Nat'l Parks & Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007). The FEC filed this suit on June 19, 2015. (Docket No. 1.) On May 15, 2015, Johnson signed an agreement with the FEC to toll the statute of limitations for 30 days. (Compl. ¶ 52; Answer ¶ 52.) Accordingly, the Commission's claims against Johnson for legal relief, including a civil penalty, are time barred only to the extent Johnson violated FECA more than five years and thirty days before the FEC filed the complaint (*i.e.*, on May 20, 2010 or earlier). Because the Commission does not seek civil penalties for conduct that occurred outside the statute of limitations, there is no claim for such legal relief for Johnson to defend.

Ltd. v. Jackson, 921 F. Supp. 2d 1366, 1372 (S.D. Fla. 2013); *see also* 61A Am. Jur. 2d *Pleading* § 301 (2015) ("An affirmative defense which merely points out a defect or lack of evidence in the plaintiff's case is not an affirmative defense at all.").

Johnson's First Defense contends that the FEC's complaint is "based upon illegally obtained and inadmissible evidence." (Answer 1.) Johnson's Second Defense asserts that the FEC's complaint is based upon information that was subject to unspecified immunity and confidentiality. (*Id.*) These claims are baseless, but in any event, because they merely attack the FEC's ability to prove its claims, they should be stricken. The parties will have the opportunity to raise any evidentiary objections during summary judgment briefing, *see* DUCivR 7-1(b)(1)(B), or by motion in limine.

2. Johnson's Claim That Evidence Was Spoliated Is Not an Affirmative Defense (Third Defense)

The Court should strike Johnson's Third Defense because it alleges the "spoliation of evidence" (Answer 2), which "is not a substantive claim or defense but a rule of evidence" that potentially authorizes a court to impose sanctions, *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (internal quotation marks omitted); *see, e.g.*, *PHL Variable Ins. Co. v. Sheldon Hathaway Family Ins. Trust ex rel. Hathaway*, No. 2:10-CV-67, 2013 WL 6230351, at *8 (D. Utah Dec. 2, 2013) (unpublished) (rejecting spoliation defense in absence of authority that spoliation is "legally relevant as an affirmative defense"). Johnson does not even claim that evidence was spoliated by the FEC, but rather "other agencies of the United States." (Answer 2.) Johnson pleads no basis for these claims. But even if they were true, they would at best give Johnson possible grounds to seek sanctions against third parties. They do not form the basis for a legally valid affirmative defense here.

3. Johnson's Claim That the FEC Failed to State a Claim Is Not an Affirmative Defense (Tenth Defense)

Finally, the Court should strike Johnson's Tenth Defense, which contends that the complaint "fails to state a claim upon which relief may be granted." (Answer 7.) Failure to state a claim is not a valid affirmative defense because it alleges "a defect in the plaintiff's claim; it is not an additional set of facts that bars recovery notwithstanding the plaintiff's valid prima facie case." *Boldstar Technical, LLC v. Home Depot, Inc.*, 517 F. Supp. 2d 1283, 1292 (S.D. Fla. 2007) (striking a failure-to-state-a-claim defense); *see also Blakeney v. Karr*, No. C13-5076, 2013 WL 2446279, at *1 (W.D. Wash. June 5, 2013) (unpublished) (same); *J & J Sports Prods., Inc. v. Romero*, No. 1:11-CV-1880, 2012 WL 2317566, at *4 (E.D. Cal. June 18, 2012) (unpublished) (same); *Barnes*, 718 F. Supp. 2d at 1174 (same).[7]

III. CONCLUSION

For the foregoing reasons, the Commission requests that the Court dismiss or strike the answer's defenses one through seven, ten, and paragraph 51 of defense eight.

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[7] In any event, the FEC's complaint states claims upon which relief may be granted and Johnson chose not to contest the sufficiency of the complaint in his motion to dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2015, I electronically filed plaintiff Federal Election Commission's Motion for Partial Judgment on the Pleadings or in the Alternative to Strike Affirmative Defenses with the Clerk of the United States District Court for the District of Utah by using the Court's CM/ECF system, which sent notification of such filing to the following counsel:

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