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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 **REPLY IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT OR TO STRIKE AFFIRMATIVE DEFENSES** District Judge Dee Benson

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

Plaintiff Federal Election Commission ("FEC" or "Commission") has moved under Federal Rule of Civil Procedure 12(c) for partial judgment on the pleadings or in the alternative under Rule 12(f) to strike nine of the purported defenses that defendant Jeremy Johnson has pleaded in his answer. The FEC showed that Johnson's defenses cannot succeed as a matter of law, are insufficiently pleaded, are not actually affirmative defenses, or suffer some combination of these defects. In response, Johnson claims that he is "not required to plead facts" and instead can open the doors to discovery by simply pleading "truism[s]" based on things he "suspects" in hopes of finding a factual basis for his speculation. Rule 8, however, requires even a defendant

to plead enough facts to suggest that discovery will result in evidence of the allegation — and that was true even before the Supreme Court strengthened the pleading standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Johnson's conclusory allegations fall short of any pleading standard, and in the rare instances in which Johnson has pleaded facts, the defenses cannot succeed as a matter of law even assuming those facts were true. Johnson also claims that even those defenses that he admits are faulty should nonetheless remain in the case absent prejudice. But Rule 12(c) does not require a showing of prejudice, the Tenth Circuit has not required prejudice for a successful Rule 12(f) motion, and in any event, the FEC would in fact suffer prejudice if Johnson's defenses remain. Those baseless defenses seem designed to justify distracting and burdensome discovery into Johnson's indiscriminate accusations of government wrongdoing. In fact, Johnson asserts that he is the victim of wrongdoing by no less than three government entities and an appointed receiver involved in at least three different litigations, but the FEC is not involved in any case but this one. Granting the FEC's motion will prevent prejudice to the agency and conserve judicial resources by canceling the extravagant sideshow that Johnson appears to be planning.

I. ARGUMENT

A. Johnson Has Misstated the Standard of Review

The parties agree that this Court may strike an affirmative defense that cannot succeed as a matter of law and fact. (*See* FEC's Mot. for Partial J. on the Pleadings or in the Alternative to Strike Affirmative Defenses ("FEC Br.") at 3 (Docket No. 22); Def.'s Mem. Opposing Pl.'s "Mot. for Partial J. on the Pleadings or to Strike Affirmative Defenses" ("Def.'s Br.") at 1-2 (Docket No. 26).) This is the same familiar standard that courts routinely apply to motions to dismiss under Rule 12(b)(6). *See Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d

1138, 1160 (10th Cir. 2000) ("A motion for judgment on the pleadings under Rule 12(c) is treated as a motion to dismiss."); *Westar Energy, Inc. v. Lake*, No. 05-4116, 2007 WL 977556, at *5 (D. Kan. Mar. 30, 2007) (unpublished) ("A motion to strike an affirmative defense is evaluated under the materially same legal standard as a Rule 12(b)(6) motion.") As Johnson acknowledges, to survive a motion to dismiss one "must plead 'enough fact to raise a reasonable expectation that discovery will reveal evidence' of the allegation." (Def.'s Br. at 3 (quoting *Twombly*, 550 U.S. at 556).) Defenses must be sufficiently pleaded, because "[i]f a defendant cannot articulate the reasons that affirmative defenses apply to a dispute, it is costly, wasteful, and unnecessary to force plaintiffs to conduct discovery into those defenses." *Dodson v. Munirs Co.*, No. CIV. S-13-0399, 2013 WL 3146818, at *5 (E.D. Cal. June 18, 2013) (unpublished).

Nevertheless, Johnson incorrectly claims that he is "not required to plead facts in a defense." (Def.'s Br. at 7.) Instead, he insists that he can bootstrap his way into discovery by pleading "truism[s]" and things he "suspects." (*Id.* at 8.) Rule 8, however, does not allow this. First, Johnson does not dispute that *Twombly*'s heightened pleading standard applies to claims for relief. (*Id.* at 2-3.) Some of Johnson's purported affirmative defenses are actually claims for relief, as the FEC has pointed out (*see* FEC Br. at 8 n.1 (Sixth Defense), 12 n.5 (Fifth Defense)) and as Johnson has admitted in response (*see* Def.'s Br at 6 (admitting that the First Defense is "the basis for one item requested in Defendant's prayer for relief"), 8-9 (admitting that the Fifth Defense will require "an appropriate motion")). Second, to the extent Johnson has pleaded any actual affirmative defenses, Rule 8 requires that they contain more than mere conclusory allegations regardless of whether *Twombly* applies. Even before *Twombly* strengthened Rule 8's pleading requirement in 2007, defendants asserting affirmative defenses were still required to "do more than simply make allegations" and plead "a short and plain statement of the facts."

Sprint Commc'ns Co., L.P. v. Theglobe.com, Inc., 233 F.R.D. 615, 618 (D. Kan. 2006) (internal quotation marks omitted). In any event, "most courts hold[] that the more rigorous *Twombly*/*Iqbal* standard does apply to affirmative defenses." *Constr. Indus. Laborers Pension Fund v. Explosive Contractors, Inc.*, No. 12-2624-EFM, 2013 WL 3984371, at *1 & n.9 (D. Kan. Aug. 1, 2013) (unpublished) (citing cases).[1]

Johnson cannot save his deficient defenses by claiming that the FEC would not be prejudiced if they remained in his answer. Prejudice is not required for a Rule 12(c) motion for judgment on the pleadings. *See FDIC ex rel. Heritage Bank & Trust v. Lowe*, 809 F. Supp. 856, 857-59 (D. Utah 1992) (dismissing affirmative defenses under Rule 12(c) without requiring prejudice). And under Rule 12(f), "the Tenth Circuit has not included prejudice among the elements a litigant must show to prevail on a motion to strike." *Lane v. Page*, 272 F.R.D. 581, 598 (D.N.M. 2011) (citing *Burrell v. Armijo*, 603 F.3d 825, 836 (10th Cir. 2010)). Indeed, courts have held that prejudice is not required because "Rule 12(f) says nothing about a showing of prejudice and allows a court to strike material sua sponte." *See Atl. Richfield Co. v. Ramirez*, 176 F.3d 481, 1999 WL 273241, at *2 (9th Cir. 1999) (unpublished table decision).

In any event, the FEC would be prejudiced if Johnson were permitted to derail this litigation with pointless, burdensome discovery into his scattershot accusations of government wrongdoing. In fact, the very "purpose of Rule 12(f) . . . 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; emphasis added). If Johnson's defenses remain, he will likely use them to shift the focus of this proceeding away

[1] In addition to Rule 8's pleading requirement, Johnson's alleged selective prosecution defense (Sixth Defense) and conciliation defense (Eighth Defense) each carry their own special, enhanced pleading burdens (*see* FEC Br. at 5, 10), which Johnson does not even argue he can satisfy, *see infra* pp. 5-7.

from Johnson's serious violations of federal law. Furthermore, unnecessary discovery regarding his defenses "may disclose the Government's prosecutorial strategy" and "will divert prosecutors' resources," as well as the Court's. *United States v. Armstrong*, 517 U.S. 456, 468 (1996) (explaining need for a heightened pleading burden for selective prosecution claims).[2]

B. Johnson's Response Confirms That He Has Inadequately Pleaded Selective Prosecution (Sixth Defense)

Johnson has failed to offer any valid reason why the Court should not strike his conclusory selective prosecution defense. Johnson admits that the FEC's exercise of prosecutorial discretion is entitled to a presumption of regularity. (Def.'s Br. at 9; *cf.* FEC Br. at 4-5.) And Johnson does not dispute that the Supreme Court and Tenth Circuit have said that as a result, to even obtain discovery on a claim of selective prosecution, a defendant must satisfy "a substantially more 'demanding' pleading burden." *Jennings v. City of Stillwater*, 383 F.3d 1199, 1214 (10th Cir. 2004) (quoting *Armstrong*, 517 U.S. at 465); *see* Def.'s Br. at 9-10. Under that burden, Johnson must present "some evidence" tending to show that he was (1) singled out for prosecution while others similarly situated were not; and (2) prosecuted based on race, religion, or the desire to prevent the exercise of constitutional rights. (*See* FEC Br. at 6 (quoting *Armstrong*, 517 U.S. at 468).) Johnson's Sixth Defense falls far short. (*Id.* at 6-8.)

Johnson has further highlighted the insufficiency of his Sixth Defense by pointing out that the FEC has moved to add a co-defendant to this action, John Swallow (Def.'s Br. at 10 n.8), who made illegal contributions in the names of others along with Johnson (*see* Docket No. 25). As the FEC's proposed Amended Complaint details, the FEC's enforcement proceedings against

[2] Unnecessary discovery disputes under Rule 26 would not be an adequate substitute for an order striking insufficient defenses, as Johnson suggests (*see* Def.'s Br. at 4-5), since even discovery that is indisputably relevant to an insufficient defense creates pointless burdens. Granting the FEC's motion will spare the Court from having to resolve needless discovery disputes.

Swallow started a year and a half ago, at the same time as Johnson's. (Proposed Am. Compl. ¶¶ 50, 59 (Docket No. 25-1).) Johnson's proceedings ended sooner in part because Swallow agreed to toll the statute of limitations for a total of 204 days. (*Id.* ¶¶ 62, 64-65.) Johnson does not dispute that the FEC has been prosecuting Swallow and yet he asks this Court to ignore it (Def.'s Br. at 10 n.8), as if that would change the fact that, either way, Johnson's answer does not "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," as it must. *Haskett v. Flanders*, No. 13-CV-03392, 2015 WL 128156, at *7 (D. Colo. Jan. 8, 2015) (unpublished).

C. Johnson's Response Confirms That His Failure-to-Attempt-to-Conciliate Defense Fails as a Matter of Law (Eighth Defense ¶ 51)

Johnson has failed to adequately rebut the FEC's showing that his failure-to-attempt-to-conciliate defense fails as a matter of law. (*See* FEC Br. at 8-11; Def.'s Br. at 13-15.) Johnson does not dispute that for the FEC to satisfy its duty to attempt to conciliate, it need only have (1) informed Johnson about the specific allegations against him; and (2) tried to engage Johnson in some form of written or oral discussion to give him an opportunity to remedy his alleged offense. (FEC Br. at 9 (citing *Mach Mining, LLC v. EEOC*, --- U.S. ---, 135 S. Ct. 1645, 1649, 1655-56 (2015).) Johnson also does not dispute that the Supreme Court in *Mach Mining* said that an agency can clear this low bar by providing "'a sworn affidavit from the [agency] stating that it has performed the obligations' required 'but that its efforts have failed.'" (*Id.* at 10 (quoting 135 S. Ct. at 1656).) Johnson further does not contest that under *Mach Mining*, fact finding is not available unless in response 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.* (quoting 135 S. Ct. at 1656).)

The FEC provided the required declaration. (*See* Docket No. 22-2.) Johnson does not claim that the FEC's declaration fails to meet the *Mach Mining* standard. The FEC also pointed out that a declaration is ultimately unnecessary since Johnson's answer admits allegations in the Complaint that establish that the *Mach Mining* standard has been met. (FEC Br. at 10.) Johnson does not dispute this either. In addition, Johnson has provided no evidence (let alone "credible evidence") indicating that the FEC did not meet that standard, as required to trigger discovery.

The Court should therefore reject Johnson's claimed need to nevertheless take pointless discovery of "contemporaneous oral conversations." (Def.'s Br. at 14.) Johnson bases this need on his brief's opaque speculation that there could have been "misrepresentations" about, among other things, the statute of limitations. (*Id.*) Johnson does not explain what the FEC's knowledge about the statute of limitations at the time it filed the Complaint has to do with conciliation. (*See id.*) Even if true, his claim would not change the FEC's unrebutted showing and Johnson's admissions that the FEC met *Mach Mining*'s two requirements. Also, Johnson's hypothetical reveals his desire to discover what the FEC "knew" regarding its legal strategy (Def.'s Br. at 14), despite *Mach Mining*'s pointed instruction that courts are not to assess an agency's "strategic decisions" in conciliation, 135 S. Ct. at 1654-55. Finally, if the FEC had not informed Johnson about the allegations against him or failed to give him an opportunity to discuss those allegations, the person in the best position to know that would be Johnson himself — but he has provided no affidavit or other evidence.

D. Johnson's Response Confirms That His Disqualification Defense Fails as a Matter of Law (Fifth Defense)

The Commission has established that Johnson's Fifth Defense cannot succeed as a matter of law. Johnson admits that the Fifth Defense is not actually an affirmative defense and thus will require its own separate motion for relief. (Def.'s Br. at 8-9; *cf.* FEC Br. at 12 n.5.) It cannot

succeed, however (whether styled as a motion or a defense), since Johnson does not dispute the FEC's observation that he has pleaded no valid factual basis for disqualification even taking as true his false assertion that the FEC reviewed his privileged communications. (*See* FEC Br. at 12.) Finally, consistent with Johnson's incorrect view that he need not plead facts, he candidly admits that the Fifth Defense is nothing but a "truism" based on something he "suspects." (Def.'s Br. at 8.) However, something more than Johnson's mere speculation is required to trigger time- and resource-consuming discovery. *See supra* pp. 3-4.

E. Johnson's Response Confirms That His Defense Alleging That He Cannot Defend Himself Fails as a Matter of Law (Fourth Defense)

Johnson's Fourth Defense also cannot succeed as a matter of law. That defense states that Johnson's due process rights have been violated because he is "unable to access funds with which to meaningfully defend himself." (Answer 2 (Docket No. 17).) Johnson, however, is in fact represented by counsel and does not claim otherwise. His defense fails on that basis alone.

Even if Johnson lacked counsel, he concedes that in "general" there is no right to an attorney in a civil action. (Def.'s Br. at 8.) Johnson, however, then attempts to create a new due process right to civil representation in cases where "*the Plaintiff itself* — the United States government — wrongfully seized" the defendant's funds for a lawyer. (*Id.*) But Johnson provides no citation for this purported right; he just reassures the Court that it "would certainly seem to qualify." (*Id.*) Even if this were the law, the plaintiff in this case — the FEC — did not seize Johnson's assets, wrongfully or otherwise. The United States District Court for the District of Nevada ordered Johnson's assets seized. Before that court, Johnson is a defendant in an action brought by the Federal Trade Commission alleging that Johnson "operate[d] a far-reaching Internet enterprise that deceptively enrolls unwitting consumers into memberships for products or services and then repeatedly charges [them]." Compl. ¶ 4, *FTC v. Johnson*, No.

2:10-cv-02203 (D. Nev. Dec. 21, 2010) (Docket No. 1). The district court froze Johnson's assets and appointed a receiver because it found good cause to believe that Johnson had violated the law, would continue to violate the law, and might attempt to dispose of or conceal his assets, thereby thwarting the court's ability to "grant effective final relief for consumers." Prelim. Injunction Ord. ¶¶ 4-6, *FTC v. Johnson*, No. 2:10-cv-02203 (D. Nev. Feb. 10, 2011) (Docket No. 130). Johnson offers no reason why that court's conclusion was "wrongful[]" or why he should be able to relitigate the issue in this unrelated case.[3]

F. Johnson's Response Confirms That His Statute of Limitations Defense Fails as a Matter of Law (Seventh Defense)

The Court should dismiss Johnson's statute of limitations defense since it cannot succeed as a matter of law. The applicable limitations period is five years. 28 U.S.C. § 2462. During his administrative enforcement proceedings, Johnson agreed to toll the limitations period for 30 days. (Compl. ¶ 52; Answer ¶ 52.) And as the FEC explained in its opening brief, it requests legal relief only for Johnson's illegal acts that occurred on or after May 20, 2010, which is five years and 30 days prior to the filing of the Complaint. (FEC Br. at 14 n.6.) In response, Johnson does not claim that the Commission has incorrectly calculated the running of the limitations period. (*See* Def.'s Br. at 10-13.) Nor does Johnson claim that his alleged violations occurred before that date. (*See id.*) His conclusory and insufficiently pleaded Seventh Defense makes no such factual claims either. (*See* Answer 2.) It should therefore be dismissed.

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[3] The FEC notes that underlying many of Johnson's defenses is a faulty assumption that the FEC is responsible for all of the various alleged wrongdoing he believes assorted parts of the executive and judicial branches have committed against him. However, "[g]overnment agencies do not merge into a monolith; the United States is an altogether different party from either the F.B.I. or the Department of Justice." *Hughes v. United States*, 701 F.2d 56, 58 (7th Cir. 1982). Also, as the FEC has detailed in previous filings, Congress created the FEC as an independent and nonpartisan agency to prevent any politically motivated civil enforcement of federal campaign finance law. (*See* Docket Nos. 4, 14.)

Johnson claims that the Court should require the Commission to amend the Complaint to state more specifically the dates upon which Johnson violated the law. (Def.'s Br. at 10-11 & n.9.) Under Rule 8, however, the FEC's Complaint has pleaded more than sufficient factual detail, and Johnson does not and could not contend otherwise. In support of his misguided effort to impose additional burdens on the FEC, Johnson also needlessly demands that the FEC "include a copy of or quote from the tolling agreement" in its complaint to "prove the scope of that agreement" (*id.* at 11 & n.10) — even though Johnson's answer already admits that on "May 15, 2015, Johnson signed an agreement tolling the statute of limitations for 30 days" (Compl. ¶ 52; Answer ¶ 52).[4] Johnson's limitations claims are thus entirely without merit.

G. Johnson's Response Confirms That His Evidentiary Arguments Regarding an Array of Alleged Government Wrongdoing Are Not Affirmative Defenses (First, Second, and Third Defenses)

In its opening brief (FEC Br. at 14), the FEC explained that a court may strike a purported affirmative defense that is 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 false affirmative defenses). Johnson does not dispute that courts can and have struck purported defenses on this basis. (Def.'s Br. at 5-7.) He also concedes that his First, Second, and Third Defenses are evidentiary arguments (*id.*), as the FEC had pointed out (FEC Br. at 14-15). Those defenses should thus be stricken.

The FEC need not show prejudice under Rule 12(c) or 12(f) for the Court to strike these defenses, *see supra* p. 4, as Johnson claims. In any case, these defenses are not benign, as

[4] Because the FEC no longer seeks equitable relief for the illegal contributions Johnson made to Mark Shurtleff's campaign in 2009 (*see* Redline of Proposed Am. Compl. ¶¶ 73, 75 (Docket No. 25-2)), Johnson's arguments regarding whether the statute of limitations applies to equitable relief are moot (*see* Def.'s Br. at 11-13).

Johnson asserts, since they could open the door to needless and wasteful discovery and threaten to focus this litigation on Johnson's indiscriminate allegations of government wrongdoing instead of his lawbreaking, the subject of the pending complaint. *See supra* pp. 2, 4-5.

H. Johnson Admits That His Failure to State a Claim Defense Is Redundant (Tenth Defense)

Finally, the Court should also strike Johnson's Tenth Defense. By its terms, Rule 12(f) allows the court to strike any "redundant" matter. Johnson relies upon cases stating that pleading failure to state a claim as an affirmative defense is "'redundant.'" (Def.'s Br. at 16 (quoting *Simon v. Mfrs. Hanover Trust Co.*, 849 F. Supp. 880, 882 (S.D.N.Y. 1994)).) Although some courts have nevertheless declined to strike the defense absent prejudice (*see id.*), other courts have struck the defense regardless (*see* FEC Br. at 16). This Court should follow the latter approach since Rule 12(f) says nothing about a prejudice requirement, *see supra* p. 4, while it does state that "redundant" material may be removed.

II. 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.

Respectfully submitted,

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January 11, 2016

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2016, I electronically filed Plaintiff Federal Election Commission's Reply in Support of its 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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