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

FEDERAL ELECTION COMMISSION, Plaintiff, v. JEREMY JOHNSON, Defendant.	**DEFENDANT'S MEMORANDUM OPPOSING PLAINTIFF'S "MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS OR TO STRIKE AFFIRMATIVE DEFENSES"** Civil No. 2:15-cv-00439-DB District Judge Dee Benson

Defendant hereby submits the following memorandum in opposition to Plaintiff's motion to strike nine of the defenses referenced in Defendant's answer.

INTRODUCTION

The FEC has moved to strike defenses 1-7 and 10, along with paragraph 51 of Defendant's responses to the FEC's specific allegations (8th Defense). Motions to strike defenses are generally disfavored – indeed, are considered a "drastic" and "severe" remedy.[1] Accordingly, courts have applied a three-pronged test for evaluating such motions, requiring plaintiffs to show that: 1) there is no possible set of facts that might allow the defense to

[1] *Alarid*, *infra*, 2015 U.S. Dist. LEXIS 143710 *5 (citations omitted).

succeed; 2) there is no question of law that might allow the defense to succeed; and (3) the plaintiff would be prejudiced by inclusion of the defense. *See, e.g., SEC v. Alexander*, 248 F.R.D. 108, 109 (E.D.N.Y. 2007), and cases cited.

As one court has summarized the first requirement, "a motion to strike which alleges the legal insufficiency of an affirmative defense will not be granted unless it appears to a *certainty* that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." *Barnes v. A T & T Pension Benefit Plan*, 718 F.Supp. 2d 1167, 1170 (N.D. Cal. 2010) (emphasis added).

While Plaintiff wishes to hold Defendants to a higher pleading standard, Rule 8 only requires that Defendants, in responding to a pleading, "state" their affirmative defenses. F.R.Civ.P. 8(c)(1). As its language shows, Defendants are not required to state every fact supporting each of their defenses, nor are they required to provide detail concerning their defenses to the asserted claims. Contrary to the assumption underlying the FEC's motion, there are no pleading requirements for defenses comparable to those imposed on complaints under *Twombly* and *Iqbal*.[2]

The issue before the Supreme Court in *Twombly* was what threshold a plaintiff must meet in asserting its claims under Federal Rule of Civil Procedure 8(a)(2), which requires a plaintiff to provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see also Twombly*, 550 U.S. at 555.

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[2] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), or *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). There are certain limited exceptions, such as the stated requirement of factual specificity for certain "special matters" (affirmative defenses), *e.g.*, Rule 9(a) (requiring defendant who challenges standing to sue to "state any supporting facts that are peculiarly within the party's knowledge").

With this requirement in mind, the Court explained that to make this "showing" of entitlement to relief (as opposed to "affirmatively stat[ing]" entitlement to relief), a plaintiff must plead "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the allegation. *Id.* at 556. *Iqbal* echoed this interpretation of Rule 8(a)(2) for pleading claims. *Iqbal*, 556 U.S. ---, 129 S. Ct. 1937, 1953 (2009).

While the Tenth Circuit has not definitively spoken on the issue, courts within the circuit have likewise held that the plausibility or specificity requirements of *Twombly* and *Iqbal* under Rule 8(a)(2) do not apply to defenses under Rule 8(c). *See, e.g., Alarid v. Biomet, Inc.*, 2015 U.S. Dist. LEXIS 143710 (D. Colo., October 22, 2015); *Wells v. Hi Country Auto Group*, 982 F.Supp.2d 1261 (D.N.M. 2013); *Falley v. Friends Univ.*, 787 F.Supp.2d 1255, 1257-59 (D. Kan. 2011), and cases cited.[3]

As the court wrote in *Wells*,

> what Plaintiff seems to be arguing here [is that] Defendants failed to present facts regarding their affirmative defenses. Plaintiff's argument is based upon the incorrect premise that the heightened pleading standard set forth in *Iqbal* and *Twombly* applies to affirmative defenses. As the Court noted above, Defendants are not required to set forth detailed factual allegations in support of their affirmative defenses.

982 F.Supp.2d at 1267.

With respect to the second element (legal sufficiency), "even when the defense presents a purely legal question, the courts are very reluctant to determine disputed or substantial issues of law on a motion to strike; these questions quite properly are viewed as determinable only after

[3] As one court noted, "applying *Twombly* and *Iqbal* to affirmative defenses would also invite many more motions to strike, which achieves little." *Falley*, 787 F.Supp.2d at 1259; *see also Wells*, 982 F.Supp.2d at 1267 ("Motions to strike, in most cases, waste everyone's time. There is a reason why they are generally disfavored.") (citations omitted).

discovery and a hearing on the merits." *Alarid*, 2015 U.S. Dist. LEXIS 143710 *5, *quoting Salcer v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984), *vacated on other grounds*, 478 U.S. 1015 (1986), and 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1381 at 800-01 (2012). One reason for this caution is that resolving such questions summarily "would be to run the risk of offering an advisory opinion on an abstract and hypothetical set of facts." *Salcer*, 744 F.2d at 929. Thus,

> [t]he court's discretion is narrowly circumscribed on a motion to strike affirmative defenses. We may strike only those defenses so legally insufficient that it is beyond cavil that defendants could not prevail upon them. A court should not grant a motion to strike a defense unless the insufficiency of the defense is clearly apparent. The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where the factual background for a case is largely undeveloped.

FTC v. AMG Servs., 2014 U.S. Dist. LEXIS 152864, *25-26 (D.Nev. 2014) (brackets and internal quotation marks omitted).

As to the requirement of prejudice, a moving party must show that the defenses asserted are so unrelated to the claims at issue that their presence in the proceeding will be prejudicial. Wright & Miller, *supra*, at § 1380.

One purpose of the FEC's motion in this case is apparently to prevent Defendant from conducting any discovery in the future that the FEC believes might be irrelevant. A motion to strike is not the proper vehicle by which to address discovery. If the FEC believes that any of Defendant's written discovery requests or other discovery is improper under Rule 26, Plaintiff

can make that objection in response to those requests, rather than ask the Court to speculate now at the inception of the case.[4]

Finally, if a motion to strike is granted, in the absence of prejudice to the opposing party, leave to amend should be freely given. *Wyshak v. City Nat. Bank*, 607 F.2d 824, 826 (9th Cir. 1979).

While Defendant has more confidence in the Court's ability to multitask, the FEC's motion is both premature and legally insupportable in any event. The FEC correctly recognizes that its motion cannot be granted unless the defense "can be summarily resolved as a matter of law" (FEC Mem., p. 3), yet asks the Court to rule prematurely on issues of law for which is there no controlling authority. Nor does the FEC acknowledge the effect of the relief sought in its complaint to the applicability of particular defenses, as discussed further below.

ARGUMENT REGARDING SPECIFIC DEFENSES[5]

1. First defense

Defendant's first defense states:

> Most or all of the Federal Election Commission's complaint is based upon illegally obtained and inadmissible evidence. Further, this information was provided to the FEC by an agency of the United States, the United States Attorney's Office for the District of Utah, that was operating under a conflict of interest.

[4] *See, e.g., Neilson v. Union Bank of Cal., N.A.*, 209 F.Supp.2d 1101, 1152 (C. D. Cal. 2003) (noting that one reason that motions to strike are disfavored is "because of the limited importance of pleading in federal practice").

[5] The FEC's motion skips around, starting with Defendant's 6th defense, then ¶ 51 of the 8th defense, then 5th, 4th, 7th, 1st, 2nd, 3rd, and 10th. Defendant addresses the challenged defenses in a more orderly fashion, *i.e.*, 1, 2, 3, 4, 5, 6, 7, 8, and 10.

The FEC asks the Court to strike this defense because it is not a true affirmative defense but instead an "evidentiary argument." (FEC Mem., p. 14.) How is the FEC prejudiced by getting a heads up on this argument? It does not say. Under the FEC's own premise, striking the defense will not eliminate the issue from the case – indeed, the FEC acknowledges that "[t]he parties will have the opportunity to raise any evidentiary objections during summary judgment briefing" (id., p. 15) – so the utility of the FEC's motion is unclear.

Absent a showing of material prejudice, there is no reason to strike the argument, which was simply designed to put the government on notice of an important problem with its case.[6] It also explains the basis for one item requested in Defendant's prayer for relief, i.e., "An order requiring the FEC to return all illegally obtained evidence and to destroy all copies thereof[.]"

2. Second defense

Defendant's second defense states:

> Material portions of the Federal Election Commission's complaint are based upon information provided to the government by Mr. Johnson in connection with a criminal investigation, which information was provided under promises of immunity and confidentiality.

The FEC argues that, like the first defense, this is not an actual defense but rather an evidentiary argument. (FEC Mem., p. 14.) Again, the FEC fails to allege, let alone demonstrate, any prejudice from this single sentence in Defendant's Answer. In common vernacular, a challenge to the type or admissibility of evidence is often referred to as a defense, even if it is one that is resolved later when a plaintiff attempts to use the improper evidence.

[6] The FEC does not dispute that a defendant may raise the defense (or argument) of illegally obtained evidence in a civil case when the government seeks to impose a civil penalty or other punishment.

3. Third defense

Defendant's third defense states:

> The prosecution of this case is inequitable and a violation of due process because records with which Mr. Johnson could defend himself, including emails, have been destroyed by the appointed receiver in another case, *FTC v. Johnson*. The FEC, as part of the United States, is bound by the conduct and spoliation of evidence by or on behalf of other agencies of the United States, including the Federal Trade Commission and the United States Attorney's Office.

With respect to this defense, the FEC says that "Johnson's claim that evidence was spoliated is not an affirmative defense." (FEC Mem., p. 15.) Of course, Defendant did not necessarily say that it was (*see* Answer, characterizing Third Defense as a "Defense" rather than "Affirmative Defense"). But in any event, what is the prejudice from including this sentence?

The FEC mentions in passing that Defendant "pleads no basis for these claims," but Defendant is not required to plead facts in a defense. *See supra*. The FEC also says that, even if another agency of the United States did spoliate evidence, it would have no bearing on this case because another agency would be a "third party". The FEC cites no controlling case law (or any case law) in support of this contention, as required to strike a defense, and with respect, the FEC may be an "agency" – *i.e.*, an agent – but it is of the same entity, the executive branch of the United States government.

4. Fourth defense

Defendant's fourth defense states:

> The prosecution of this case is inequitable and a violation of due process because Mr. Johnson is unable to access funds with which to meaningfully defend himself due to the 5-year-old *FTC v. Johnson* litigation, in which Mr. Johnson's assets have been frozen, seized, and disposed of by or on behalf of another agency of the United States.

With respect to this defense, the FEC says, "Johnson's claim that he is financially unable to defend himself fails because there is no right to counsel in a civil case." (FEC Mem., p. 12.) This is not an accurate characterization of the defense. Defendant does not claim that a party's general inability to afford a defense would necessarily be inequitable or a violation of due process (although it might implicate or affect the Eighth Amendment's protections against excessive penalties (fines)). Defendant claims that *the Plaintiff itself* – the United States government – wrongfully seized his funds and thereby prevented him from being able to pursue an appropriate defense. If established, this type of (mis)conduct would certainly seem to qualify as both inequitable and a violation of due process. While it certainly enhances one's win-loss record to cut off a defendant's access to funds first and then sue him, if an inability to defend one's self adequately is due to the government's wrongful conduct, then the defendant has not received "due" process. The FEC cites no case law involving comparable circumstances, thus failing to establish that the law is clear and undisputed as required to strike a defense.

5. Fifth defense

Defendant's fifth defense states:

> Upon information and belief, the Federal Election Commission has reviewed privileged communications between Mr. Johnson and counsel for Mr. Johnson (either in his personal or representative capacity), in which event it should be disqualified from prosecuting this case.

With respect to this defense, the FEC says that "Johnson's claim that FEC attorneys should be disqualified fails as a matter of law." (FEC Mem., p. 12.) Again, the FEC jumps the gun. Defendant has not asserted a "claim," but rather simply stated a truism: If, as Defendant suspects, the FEC has reviewed privileged materials – then Defendant will seek disqualification

or an evidentiary hearing through an appropriate motion.[7] Defendant fully recognizes that this issue cannot be resolved without certain discovery – nor can it be for the FEC.

6. Sixth defense

Defendant's sixth defense states:

Mr. Johnson is being selectively prosecuted in this lawsuit for improper purposes.

With respect to this defense, the FEC states that "Johnson has failed to adequately plead selective prosecution" and that there is no authority to review the FEC's decision to sue. (FEC Mem., p. 4.) The former incorrectly assumes an obligation under Rule 8(c) to include specific factual allegations, which is not required. Defendant is required only to state the defense, not to lay out facts or evidence as with a complaint. The latter is, by the FEC's own description, fact-specific – there is a "presumption" of regularity. (FEC Mem., p. 4.) Where there is a presumption, there is the potential of a rebuttal, which cannot be cut off before the case even begins. A similar presumption of regularity extends to other types of prosecution, yet it is well settled that parties may attempt to show that prosecution was due to an improper criteria or exercise of constitutional rights.

If there were such a requirement, the FEC's own complaint sets forth enough allegations to suggest selection prosecution (or, stated differently, selective enforcement). As currently framed, the complaint alleges that others acted similarly to Johnson or even directed or assisted

[7] The FEC makes a factual denial that it has reviewed any privileged material. In the same spirit, Defendant makes a factual assertion that materials believed to have been obtained by the FEC have been reviewed and appear to contain privileged material.

Johnson, yet are not named as defendants in the suit.[8] If the Court concludes that Defendant is required to plead his defenses with greater specificity, the ruling should be without prejudice to amend.

7. Seventh defense

Defendant's seventh defense states:

> The Federal Elections Commissions' claims are barred by the statute of limitations, 28 U.S.C. § 2462.

With respect to this defense, the FEC argues that "Johnson's assertion that the FEC claims are time barred is insufficient as a matter of law." (FEC Mem., p. 13.) The FEC's argument is two-pronged:

First, the FEC states that it is seeking legal relief, including a civil penalty, "only for Johnson's illegal act that occurred on or after May 20, 2010…. 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." (FEC Mem., p. 14 n.6.) While it is nice for the FEC to offer that informal assurance, it is contained nowhere in the FEC's Complaint. Indeed, the complaint appears to expressly seek penalties for contributions that the FEC either admits occurred prior to May 20, 2010 or which may have been earlier depending on the date(s).[9]

[8] After the filing of Defendant's Answer, the FEC filed a motion to add one other defendant, John Swallow. Defendant filed his answer, and the FEC filed its motion to strike, based upon the existing Complaint, however, and the motion must therefore be decided on that Complaint and not some potential amended pleading that has not been filed.

[9] The FEC's May 2012 Guidebook for Complainants and Respondents on the FEC Enforcement Process, states that "Complaints should be as factually specific as possible (e.g., by providing the date or approximate dates that the activities at issue occurred)". See http://www.fec.gov/em/respondent_guide.pdf. Yet the FEC's complaint in this case is

For example, the FEC's First Cause of Action states, in its entirety: "Defendant Jeremy Johnson knowingly and willfully violated 52 U.S.C. § 30116(a)(1)(A) by contributing 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 Majority Leader Harry Reid's Senate campaign during the 2009-2010 election cycle." (Compl., ¶ 56.) The Second Cause of Action is identical, except that it refers to Section 30122. (*Id.*, ¶ 58.) Immediately thereafter, the FEC then requests a civil penalty against Johnson "for each knowing and willful violation" of those two statutes. (*Id.*, p. 13, Prayer for Relief ¶ E.) At a minimum, the FEC should be required to amend its complaint to expressly state the limitation, and to include a copy of or quote from the tolling agreement upon which it relies for its accrual date, if Defendant's statute of limitations defense is to be struck before the case even gets started.[10]

The FEC also argues that its claims for equitable relief (*e.g.*, a permanent injunction) are not barred by Section 2462. (FEC Mem., p. 13.) This is another issue where the law is not clear and undisputed, as required to strike an affirmative defense. The FEC relies solely on two district court rulings from the District of Columbia, while acknowledging that "some

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surprisingly coy about dates, referring only to the "2009-2010 campaign [or election] cycle" (*e.g.*, Compl., ¶¶ 1, 10, 16), or occasionally "2009" and/or "2010" (*e.g.*, Compl., ¶¶ 2, 17).

[10] Additionally, while the FEC's Complaint alludes to a tolling agreement, it is neither attached nor quoted in full in the Complaint. A plaintiff seeking to avoid or extend a statute of limitations by citing a tolling agreement must, of course, prove the scope of that agreement.

jurisdictions apply section 2462 to a plaintiff's concurrent claims for legal and equitable relief." *See, e.g., Federal Election Commission v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996).[11]

The FEC cites *United States v. Telluride Co.*, 146 F.3d 1241, 1245-46 (10th Cir. 1998), but that case actually support's Defendant's position. In *Telluride*, the government argued that equitable relief is outside the scope of § 2462 as a matter of law. While agreeing that actions for equitable relief typically are not actions for penalties or fines, the Tenth Circuit concluded that equitable relief could constitute a penalty in a particular case:

> Dictionaries generally define "penalty" as relating to punishment. *See, e.g., Black's Law Dictionary* 1020 (5th ed.1979) (defining penalty as "involv[ing] idea of punishment"); *Webster's Third New International Dictionary* 1668 (1981) (defining penalty as "punishment for [a] crime or offense"). Telco relies on the United States Supreme Court's definition of a penalty in *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423, 35 S.Ct. 328, 59 L.Ed. 644 (1915), as "something imposed in a punitive way for an infraction of a public law." Similarly, in *Huntington v. Attrill*, 146 U.S. 657, 673-74, 13 S.Ct. 224, 36 L.Ed. 1123 (1892), the Court concluded whether a law is penal depended on "whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act." In an analogous case to the present one, the D.C. Circuit defined penalty for purposes of § 2462 as "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *See Johnson*, 87 F.3d at 488. Based on these definitions, we interpret a penalty for purposes of § 2462 as a sanction or punishment imposed for violating a public law which goes beyond compensation for the injury caused by the defendant.

Id.

More recently, the U. S. Supreme Court observed that penalties, which go beyond compensation, "are intended to punish, and label defendants wrongdoers." *Gabelli v. SEC*, 568 U.S. --- (2013). The FEC does not attempt to apply the *Telluride* standard to the facts of this case or to the relief it has requested, nor would it be appropriate to do so at this early stage of the

[11] The *Williams* court believed that the statute might be subject to equitable tolling under a "discovery" principle. That possibility was later foreclosed by the U. S. Supreme Court in *Gabelli*, *infra*.

case. It is both unclear what compensable "injury" was caused by Defendant's alleged actions, and whether the requested relief is intended to punish and label Defendant a wrongdoer. *See, e.g., SEC v. DiBella*, 409 F.Supp.2d 122, 127-28 & n.3 (D. Conn. 2006) (noting that section 2462 applied to SEC claims for civil penalties, a permanent injunction, and an officer and director bar, but not to its claim for disgorgement).

One clue, however, to the punitive purpose of the relief sought here is found in the FEC's own complaint, which focuses entirely on alleged five-year-old infractions, and contains no discussion at all as to the elements normally considered when issuing a permanent injunction (*e.g.*, likelihood of recurrence). *See*, *e.g.*, *Johnson*, 87 F.3d at 488 (explaining that a sanction "would less resemble punishment if the SEC had focused on . . . the degree of risk [defendant] posed to the public"); *Proffitt v. FDIC*, 200 F.3d 855, 862 (D.C.Cir.2000) (holding that FDIC's action to remove bank director and bar him from the industry was time barred under § 2462, reasoning that the requested relief was punishment because it was "based solely on Proffitt's long past conduct and made no attempt to evaluate his present fitness or competence"; *see also Patel*, 61 F.3d at 141 (a general statement that defendant "used his position . . . to engage in misconduct… can in no way justify the prediction that future misconduct will occur").

The FEC's Complaint focuses solely on isolated events – from a single election cycle – that occurred more than five years earlier when Jeremy Johnson actually had money to allegedly spend on political campaigns, businesses to protect through such contributions, etc. Defendant has a legitimate argument that some or all of the FEC's claims are time barred under § 2462.

8. "Eighth defense" (¶ 51)

What the FEC refers to as Defendant's "eighth defense ¶ 51" is actually just a denial of paragraph 51 of the FEC's complaint. Defendant's denial reads:

> With respect to the specific paragraphs of the Federal Election Commission's complaint, Defendant hereby admits, denies, or denies for lack of personal knowledge, such paragraphs as follows:
>
> * * *
>
> 51. Admits that the FEC sent Mr. Johnson a letter dated April 20, 2015, which speaks for itself, and denies that the FEC "endeavored to correct Johnson's [alleged] violations through informal methods of conference, conciliation, and persuasion, for a period of not less than 30 days."

On this point, the FEC is not seeking to have the court strike an affirmative *defense* but instead a *denial* of one of the FEC's factual allegations on an element upon which the FEC bears the burden of proof. (FEC Mem., p. 8.) The FEC asks for this ruling based upon a couple of letters written by it, but without knowing what contemporaneous oral conversations took place, and without allowing Defendant to do what all other defendants in civil cases are allowed to do: put the plaintiff to his proof.

While a jury might find the FEC's letters persuasive on this element of the FEC's claims, it might also find that the letters were inconsistent with contemporaneous statements by the FEC and written simply to sanitize the process. For example, as pointed out above, a jury could conclude that the FEC filed a Complaint that demanded hundreds of thousands of dollars in penalties when it knew that no penalties could actually be sought (because the claims are time barred). Considering that evidence – what the FEC allegedly *(mis)represented* to a party – is different from intruding into the FEC's decision-making process as to adequacy of negotiation efforts. Indeed, if misrepresentations were made by the FEC, that would seem to have direct bearing under *Mach Mining, LLC v. EEOC*, --- U.S. ----, 135 S.Ct. 1645, 1649, 1655-56 (2015), cited by the FEC. (*See* FEC Mem., p. 9 stating that an agency must "inform the respondent about the specific allegation" and "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). A jury could find that misrepresentations by the FEC, or demands for huge penalties it knew could not be enforced, satisfied neither of these requirements.

The issue cannot be decided as a matter of law, and certainly not at this stage of the case. The proper mechanism for determining whether a party has factual support for a particular claim or defense is through the summary judgment process or trial.

9. Tenth Defense

Defendants' Tenth Defense states:

> Much of the FEC's complaint is stated in language that is conclusory and not statutory, such as the term "straw buyer." Further, the complaint fails to set forth any factual allegations that would support injunctive or other equitable relief. For these and other reasons, most or all of the complaint fails to state a claim upon which relief may be granted.

The FEC states that "failure to state a claim" is not an affirmative defense. Again, it is hard to see how the FEC is prejudiced, or how such a motion serves to advance the case (as opposed to simply creating work for an opposing party). Nonetheless, Defendant must respectfully disagree. A plain reading of Rule 12 supports the interpretation that failure to state a claim is a defense that may be asserted in an answer.

Rule 12(b) states that "[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required." Rule 12(b) goes on to specifically enumerate "failure to state a claim upon which relief can be granted" as a defense that may be asserted by motion. Accordingly, Rule 12(b) recognizes failure to state a claim as a defense that may be asserted in a motion or in a responsive pleading. Furthermore, Rule 12(h) expressly states:

> (h) Waiving and Preserving Certain Defenses.
> ...

> (2) When to Raise Others. Failure to state a claim upon which relief can be granted ... may be raised:
> (A) in any pleading allowed or ordered under Rule 7(a)

An answer to a complaint is one of the pleadings allowed or ordered under Rule 7(a). Fed. R. Civ. P. 7(a)(2). Accordingly, Rule 12(h) clearly states that failure to state a claim is a defense that may be asserted in an answer.

Failure to state a claim is "widely accepted as a permissible affirmative defense. As another court has held in the same context, although the defense may be 'redundant, there is no prejudicial harm to plaintiff and the defense need not be stricken.'" *Simon v. Manufacturers Hanover Trust Co.*, 849 F. Supp. 880, 882 (S.D.N.Y. 1994); *see also County Vanlines, Inc. v. Experian Information Solutions, Inc.*, 205 F.R.D. 148, 153 ("it is well settled that the failure-to state-a-claim defense is a perfectly appropriate affirmative defense to include in the answer").

Because the FEC must present evidence to prove its claims — whether this defense is mentioned in the Answer or not — it cannot complain that it is prejudiced by the defense's supposed redundancy, or that its inclusion will unduly expand the scope of discovery. *See, e.g., Sun Microsystems, Inc. v. Versata Enterprises, Inc.*, 630 F. Supp. 2d 395, 407-08 (D. Del. 2009) ("even where the challenged material is redundant . . . a motion to strike should not be granted unless the presence of the surplusage will prejudice the adverse party") (citation omitted); *Securities and Exchange Committee v. Toomey*, 866 F. Supp. 719, 723 (S.D.N.Y. 1992) ("A plaintiff suffers no prejudice when the failure-to-state-a-claim defense is used in the pleadings.") (citing cases); *see also Mattox v. Watson*, No. CV 07-5006-RGK, 2007 WL 4200213, at *3 (C.D. Cal. Nov. 15, 2007) ("If Plaintiff is irritated by the erroneous appellation attached to the denial, Plaintiff should simply construe the second affirmative defense as a denial."). Plaintiff "will have

to invest the same money and resources researching Defendant's assertions . . . regardless of whether those allegations are pled as denials or as affirmative defenses." *Smith v. Wal-Mart Stores, Inc.*, No. C 06-2069 SBA, 2006 WL 2711468, at *10 (N.D. Cal. Sept. 20, 2006); *see Bahena v. Am. Voyager Indemnity Co.*, No. 8:07-cv-1057-T-24 MSS, 2007 WL 2121224, at *1 (M.D. Fla. July 24, 2007) (denying Rule 12(f) motion to strike improperly designated affirmative defenses).

CONCLUSION

The FEC's motion to strike is in some places a premature motion for summary judgment, and in other places a motion that does nothing to advance the case by attacking a few sentences here or there that do not prejudice the FEC. Because the FEC has not met the high burden required to strike defenses before facts are developed in the case, its motion should be denied.

DATED this 21st day of December, 2015.

CHRISTENSEN & JENSEN, P.C.

/s/ Karra J. Porter
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2015, I electronically filed with the Clerk of the Court of the foregoing **DEFENDANT'S MEMORANDUM OPPOSING PLAINTIFF'S "MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS OR TO STRIKE AFFIRMATIVE DEFENSES"** by using the Court's CM/ECF system, which sent notification of such filing to the following:

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