UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK BILELLO, individually and on behalf of all others similarly situated, Plaintiff; v. JPMORGAN CHASE RETIREMENT PLAN, JPMORGAN CHASE DIRECTOR OF HUMAN RESOURCES as administrator of the JPMorgan Chase Retirement Plan, Defendants.	Via ECF Civ. No. 07-CV-7379 (DLC)(THK)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE

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I. INTRODUCTION AND BACKGROUND

By Order dated August 12, 2009, the Court allowed Plaintiff to file a corrected second amended complaint ("SAC"), in conjunction with granting in part and denying in part Defendants' motion to dismiss. *Bilello v. JPMorgan Chase Ret. Plan*, No. 07-7379, 2009 WL 2461005 (S.D.N.Y. Aug. 12, 2009) ("August 12 Opinion"). Plaintiff thereafter filed the SAC on August 19, 2009 (Dkt. No. 87). On September 14, 2009, Defendants filed their Answer and Affirmative Defenses (Dkt. No. 91) via ECF. Plaintiff now moves to strike Defendants' affirmative defenses, pursuant to Federal Rule of Civil Procedure 12(f).

II. ARGUMENT

Rule 12(f) provides that upon a "motion made by a party . . . within 20 days after being served with the pleading . . . [t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "In deciding a Rule 12(f) motion, a court must accept the matters well-pleaded as true and should not consider matters outside the pleadings." *County Vanlines Inc. v. Experian Info. Solutions, Inc.*, 205 F.R.D. 148, 152 (S.D.N.Y. 2002) (internal quotations and citation omitted). A three-part test determines whether a Rule 12(f) motion will be granted in this district:

> First, there may be no question of fact which might allow the defense to succeed. . . . Second, there may be no substantial question of law, a resolution of which could allow the defense to succeed. . . . Third, [the] plaintiff must show that it is prejudiced by the inclusion of the defense.

Id. at 153 (quoting *SEC v. Toomey*, 866 F. Supp. 719, 722 (S.D.N.Y. 1992)) (alteration in original); *see also Rochester Gas and Elec. Corp. v. Delta Star, Inc.*, No. 06-6155, 2009 WL 368508, at *5 (W.D.N.Y. Feb. 13, 2009) (same). Further, as noted by this Court,

> Although motions to strike are not favored, *see William Z. Salcer[, Panfeld, Edelman] v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984), *vacated on other grounds*, [478 U.S. 1015 (1986)], "where the defense is insufficient as a

> matter of law, the defense should be stricken to eliminate the delay and unnecessary expense from litigating the invalid claim." *Simon v. Mfrs. Hanover Trust Co.*, 849 F. Supp. 880, 882 (S.D.N.Y. 1994). . . .

SEC v. KPMG LLP, No. 03-671, 2003 WL 21976733, at *2 (S.D.N.Y. Aug. 20, 2003) (Cote, J.); *see also FDIC v. Eckert Seamans Cherin & Mellott*, 754 F. Supp. 22, 23 (E.D.N.Y. 1990) (striking affirmative defenses on the finding that "[t]he extensive pre-trial discovery available to [the defendant] in these affirmative defense could take many months").

Here, the parties are embarking on discovery. The parties exchanged initial disclosures on October 2, 2009 according to the schedule set by the Court at a September 15 scheduling conference, *see* September 16 Order (Dkt. No. 92). The parties will be conducting targeted discovery over approximately the next two months, as directed by the Court, and thereafter filing summary judgment motions, *id.* It will dramatically increase Plaintiff's discovery burden—and the costs for all parties—if Plaintiff is forced, through interrogatories, depositions, and document discovery to "unearth" each of the factual theories—if any—on which Defendants' boilerplate affirmative defenses rely. Plaintiff is entitled to adequate advance notice of Defendants' theories of defense. Without such, Defendants' conclusory assertions must be stricken.

Moreover, "[i]ncreased time and expense of trial may constitute sufficient prejudice to warrant granting plaintiff's Rule 12(f) motion." *Toomey*, 866 F. Supp. at 722 (citations omitted). While this case is young with respect to the operative pleadings, as this Court well knows, there has been substantial litigation on a multitude of legal issues in this action. Given the parties' and the Court's considerable efforts to narrow and refine the issues in this case, Defendants' inclusion of ten boilerplate, redundant, and/or legally baseless affirmative defenses creates palpable prejudice to Plaintiff, requiring significant resources, time, and discovery—potentially on issues that the Court has already resolved. *See Ali v. Mukasey*, 529 F.3d 478, 490 (2d Cir.

2008) (law of the case doctrine "counsels a court against revisiting its prior rulings in subsequent stages of the same case absent 'cogent' and 'compelling' reasons such as 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice'" (citation omitted)).

Defendants' conclusory affirmative defenses—only one of which even reaches three lines in length—contain no factual support or context, much less any explanation. Instead, they are formulaic recitations of generic legal doctrines. These conclusory assertions cannot satisfy the relevant pleading standard under either Rule 8 or *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937 (2009). Nor do they meet the pleading standard applied by this Court in this case. *See Bilello v. JPMorgan Chase Ret. Plan*, No. 07-Civ.-7379, 2009 WL 1108576, at *2 (S.D.N.Y. Apr. 24, 2009) ("April 24 Opinion") (describing the "'flexible plausibility standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible'" (quoting *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008)); *Bilello v. JPMorgan Chase Ret. Plan*, 607 F. Supp. 2d 586, 591 (S.D.N.Y. 2009) ("April 10 SOL Opinion") (same); August 12 Opinion, 2009 WL 2461005, at *5-6 (setting forth *Twombly-Iqbal* standards precluding "labels and conclusions," "formulaic recitation" of elements, and "legal conclusions"). Notably, Defendants also fail to meet their own formulation of the pleading standard. *See, e.g.*, Motion to Dismiss (Dkt. No. 26), at 16; MTD Reply (Dkt. No. 29), at 4-5; Supp. MTD Reply (Dkt. No. 74), at 2; Opp. to Pl's Mot. To Amend (Dkt. No. 79), at 9 n.8, 14.

While there is some disagreement among district courts as to whether *Twombly* and *Iqbal* apply to affirmative defenses, *Sun Microsystems, Inc. v. Versata Enters., Inc.*, 630 F. Supp. 2d 395, 408 n.8 (D. Del. 2009) (noting district court disagreement and citing cases), there is a

"substantial body of authority for the proposition that they do," *Shinew v. Wszola*, No. 08-14256, 2009 WL 1076279, at *2-5 (E.D. Mich. Apr. 21, 2009); *see also Children First Found., Inc. v. Martinez*, No. 04-927, 2007 WL 4618524, at *4 (N.D.N.Y. Dec. 27, 2007) (Rule 12(b)(6) and Rule 12(f) are "'mirror images' of one another"); *In re Mission Bay Ski & Bike, Inc.*, Nos. 07 B 20870 & 08 A 55, 2009 WL 2913438, at *6 (Bankr. N.D. Ill. Sept. 9, 2009) (applying *Twombly* and *Iqbal* to affirmative defenses); *Torres v. TPUSA, Inc.*, No. 08-618, 2009 WL 764466, at *1 (M.D. Fla. Mar. 19, 2009) (same). Regardless, under *any* construction of Federal Rules of Civil Procedure 8(b) and 8(c), which govern the pleading of denials and affirmative defenses, Defendants simply fail to provide *notice* to Plaintiff about what their affirmative defenses really are. Defendants must provide some factual basis for their defenses and their conclusory assertions fail to meet their notice pleading obligations. *See Sun Microsystems*, 630 F. Supp. 2d at 408-09 (striking defenses supported by either "conclusory" allegations or, worse, *no* allegations); *Shinew*, 2009 WL 1076279, at *2-3 (denying defendants' motion to amend affirmative defenses asserted in a "'grocery list'" of legal doctrines "with no effort to state facts which might support them" and doing so on the basis that a "party should not have to deal with an extraneous issue in a lawsuit unless it is specifically brought to his attention" (quoting *Davis v. Sun Oil Co.*, 148 F.3d 606, 614 (6th Cir. 1998))); *Stoffels v. SBC Comm., Inc.*, No. 05-233, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008) (striking defenses where no *grounds* pled); *Mission Bay*, 2009 WL 2913438, at *6 (same).

A. First and Second Affirmative Defenses (Failure to State a Claim).

Defendants' First and Second Affirmative Defenses claim that Plaintiff "fails to state a claim upon which relief can be granted" and that Plaintiff fails to state a claim "under the ERISA," respectively. Given that all of Plaintiff's claims invoke ERISA, these defenses are

redundant. *See Brown v. Royal Caribbean Cruises, Ltd.*, No. 99-11774, 2000 WL 34449703, at *7 (S.D.N.Y. Aug. 24, 2000). While Plaintiff in no way concedes that he has failed to state a claim, only one of these two repetitive defenses, if any, should survive this motion. Moreover, given the considerable motions practice and analysis by the Court to date on "failure to state a claim" arguments, these one-sentence allegations fail to provide Plaintiff notice regarding what claims that remain in the case he has allegedly failed to state and how. Because the First and Second Affirmative Defenses are insufficient under Rule 8 pleading standards, they should be stricken.

B. Third Affirmative Defense (Standing).

Defendants assert "lack of standing" as their Third Affirmative Defense. As an initial matter, with respect to Article III standing, "the contention that plaintiff lacks standing is not an affirmative defense." *Amidax Trading Group v. S.W.I.F.T. SCRL*, No. 08-5689, 2009 WL 1110788, at *2 (S.D.N.Y. Apr. 23, 2009). Moreover, Plaintiff has demonstrated standing for all claims remaining in this action. *Bilello v. JPMorgan Chase Ret. Plan*, 592 F. Supp. 2d 654, 669 (S.D.N.Y. 2009) ("January 6 Statutory Standing Opinion") (finding Plaintiff has standing under ERISA); *Bilello v. JPMorgan Chase Ret. Plan*, 603 F. Supp. 2d 590, 595 (S.D.N.Y. 2009) ("March 9 Opinion") (denying Defendants' request for certification of standing question for interlocutory appeal); June 8 Order (Dkt. No. 78), at 1 (dismissing claims for which Plaintiff lacks standing under *Kendall v. Employees Ret. Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009), and Article III); August 12 Opinion, 2009 WL 2461005, at *7-8 (rejecting standing challenges). Thus, to the extent that Defendants may be challenging some aspect of standing that has not yet been fully litigated, Defendants' vague assertion of this defense does not provide

Plaintiff any notice of what this theory might be. This defense should be stricken for failure to satisfy Rule 8.

C. Fourth Affirmative Defense (Rule 23).

Defendants' Fourth Affirmative Defense claims that "Plaintiff has failed to comply with the requirements of Rule 23." This is a procedural argument, not an affirmative defense. *See Hernandez v. Balakian*, No. 06-1383, 2007 WL 1649911, at *9 (E.D. Cal. June 1, 2007). The Federal Rules of Civil Procedure provide a mechanism to resolve whether or not Plaintiff satisfies Rule 23. Accordingly, inclusion of this defense is superfluous. Nor do Defendants state any basis for this defense: they fail to specify any facts that might defeat class treatment, and they do not specify the Rule 23 "requirements" with which they believe Plaintiff has failed to comply. Thus, this assertion fails to put Plaintiff on notice about the contours of the Fourth Affirmative Defense and therefore fails to satisfy Rule 8. For all of these reasons, it should be stricken.

D. Fifth Affirmative Defense (Statutes of Limitations).

Defendants assert that Plaintiff's claims are barred "by the applicable statutes of limitations" in the Fifth Affirmative Defense. This Court has already exhaustively analyzed multiple statute of limitations arguments in this case. *See* April 10 SOL Opinion, 607 F. Supp. 2d at 591-600; August 12 Opinion, 2009 WL 2461005, at *8-9, 14, 17. Without any factual basis given in support of this Affirmative Defense, Plaintiff does not know if Defendants are merely repeating statute of limitations defenses that have already been addressed by the Court, or if they are asserting new defenses based on new factual arguments. As pled, this defense fails to satisfy Rule 8 and should be stricken.

E. Sixth Affirmative Defense (Administrative Exhaustion).

Defendants claim as their Sixth Affirmative Defense that "Plaintiff has failed to properly exhaust the required administrative review procedures." This Court has already ruled that Plaintiff's "statutory claims raising questions requiring the interpretation of ERISA, rather than the interpretation and application of terms of an ERISA plan" are not subject to ERISA's exhaustion requirements. April 10 Order (Dkt. No. 56), at 2.[1] Defendants provide no indication whether they are simply realleging theories of exhaustion that this Court has already addressed, or whether they assert new theories. Either way, the Affirmative Defense as pled is conclusory, lacks any alleged facts to support it, is legally insufficient, and should be stricken.

F. Seventh Affirmative Defense (Prejudice or Harm).

Defendants vaguely allege that "Plaintiff has failed to adequately plead prejudice or harm resulting from any allegedly inadequate disclosure" in their Seventh Affirmative Defense. Not only does this defense appear redundant with Defendants' "standing" defense, it is vague and fails to satisfy Rule 8. This issue also has already been addressed by prior orders of this Court. January 6 Statutory Standing Opinion, 592 F. Supp. 2d 654; March 9 Opinion, 603 F. Supp. 2d 590; June 8 Order (Dkt. No. 78); August 12 Opinion, 2009 WL 2461005. If Defendants have any continued (or new) basis for asserting this affirmative defense, they must provide Plaintiff with the facts supporting it. As pled, this Affirmative Defense is conclusory, legally insufficient, and should be stricken.

G. Eighth Affirmative Defense (Waiver, Estoppel, and Laches).

Defendants assert, in conclusory fashion, that "the doctrines of waiver, estoppel and/or laches" support their Eighth Affirmative Defense. Defendants fail to plead *any* factual basis for

[1] Although the Court's April 10 Order regarding exhaustion predates the SAC, its holding is equally applicable to the SAC, which continues to assert questions regarding the interpretation of ERISA.

these novel theories. Even if they had pled any facts, these defenses are insufficient as a matter of law and should be stricken on that additional basis, as described below.

1. Waiver

The affirmative defense of waiver generally involves the "voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable." *Beth Israel Med. Ctr. v. Horizon Blue Cross and Blue Shield of New Jersey, Inc.*, 448 F.3d 573, 585 (2d Cir. 2006) (alteration omitted); *see also KPMG*, 2003 WL 21976733, at *3. Defendants have pled no facts to indicate what their "waiver" theory is. This defense is also redundant with the "statute of limitations" defense and should be stricken on that basis as well. *Solis v. Couturier*, No. 08-2732, 2009 WL 2022343, at *2 (E.D. Cal. July 8, 2009). Moreover, as discussed with respect to the Fifth Affirmative Defense, the Court has already addressed the statute of limitations defense raised by Defendants' Rule 12(b)(6) motion, and the Fifth Affirmative Defense fails under Rule 8.

2. Estoppel

The federal doctrine of equitable estoppel applies when "the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct." *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001). "The elements of the defense include proof that the plaintiff made a misrepresentation of fact to the defendant with reason to believe that the defendant would rely upon it; that the defendant did reasonably rely upon it; and that the defendant was harmed by the reliance." *KPMG*, 2003 WL 21976733, at *2 (citing *Kosakow*, 274 F.3d at 725). Whether the defense of estoppel applies is ordinarily a question of fact. *Id.*

Here, Defendants have pled *no* facts to support their estoppel defense. This Court therefore cannot even undertake the sort of factual analysis that it employed in *KPMG*. Without any factual support whatsoever, this defense is insufficient and should be stricken. *See Solis*, 2009 WL 2022343, at *2.

3. Laches

"The prevailing rule . . . is that when a plaintiff brings a federal statutory claim seeking legal relief, laches cannot bar that claim, at least where the statute contains an express limitations period within which the action is timely." *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 260 (2d Cir. 1997). While laches is generally available for actions in equity, when Congress provides a limitation period, "a court should not apply laches to overrule the legislature's judgment as to the appropriate time limit to apply for actions brought under [a] statute." *Price v. Fox Entm't Group, Inc.*, No. 05-5259, 2007 WL 241387, at *3 (S.D.N.Y. Jan. 26, 2007) (quoting *Lyons P'ship v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001) ("a court is not free to shorten the limitations period, even when a plaintiff seeks equitable relief")). Accordingly, although ERISA provides for equitable relief, Congress's provision of a statute of limitations for ERISA actions precludes any laches defense. *See* 29 U.S.C. § 1113. Moreover, Plaintiff's non-fiduciary-breach ERISA claims are subject to New York's six-year statute of limitations. April 10 SOL Opinion, 607 F. Supp. 2d at 592. Because all of Plaintiff's claims are subject to defined statutes of limitations, laches is not an available defense. *Solis*, 2009 WL 2022343, at *2 (no laches defense available as a matter of law in ERISA action). Given the impossibility that this defense could succeed as a matter of law, it should be stricken.

H. Ninth Affirmative Defense (Harmless Error or Cure).

Defendants assert that "any alleged inadequacies constituted harmless error or were cured by other adequate disclosures" in their Ninth Affirmative Defense. This defense is devoid of factual allegations, context, or justification. As such, it should be stricken for failure to satisfy Rule 8.

I. Tenth Affirmative Defense (Reliance).

Defendants claim that Plaintiff "has failed to adequately plead reliance on any alleged misstatement or omission of Defendants" in their Tenth Affirmative Defense. Plaintiff has no such obligation. As this Court has already held, misleading statements and omissions are evaluated under *objective* standards. August 12 Opinion, 2009 WL 2461005, at *17-18 (describing liability standard for fiduciary breach; quoting *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997); *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 84 (2d Cir. 2001)). Plaintiff has pled "likely prejudice" (SAC ¶ 139) as a result of Defendants' omissions and misrepresentations, which is the applicable standard, and Defendants do not claim otherwise. Not only does Plaintiff have no obligation to plead reliance, Defendants have failed to supply any basis for the proposition that he does. This conclusory defense should be stricken for failure to satisfy Rule 8 and insufficiency as a matter of law.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court strike Defendants' First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Affirmative Defenses. A proposed order is attached to Plaintiff's motion.

RESPECTFULLY SUBMITTED this 5th day of October, 2009.

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