IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION FILE
	:	NO. 1:18-CV-05774-AT
NANCY ZAK, et al.,	:	
	:	
Defendants.	:	

ECOVEST PARTIES'[1] RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Rather than proceed with attempting to prove its unsupported and legally defective claims, the Government has instead filed a wasteful motion to strike defenses that may never be implicated because the Government will be unable to prove its claims. Motions to strike defenses are disfavored because they delay litigation on the merits and seek premature resolution of disputed issues. Indeed, courts levy this "draconian sanction" only in exceptional circumstances where a defense is frivolous or does not satisfy minimal notice pleading standards. Neither of these exceptional circumstances is present here.

---

[1] The EcoVest Parties are EcoVest Capital, Inc. ("EcoVest"), Alan N. Solon, Robert M. McCullough, and Ralph R. Teal, Jr.

Each challenged defense is grounded in bedrock legal principles that the Government certainly understands. The Government will be free to argue on summary judgment or at trial that it is somehow immune from basic legal doctrines like the statute of limitations, the Constitution's prohibition on excessive fines, and estoppel. But such substantial questions of law should not be resolved on a motion to strike. The Government's motion should be denied.

BACKGROUND

On December 18, 2018, the Government filed its Complaint falsely accusing the EcoVest Parties (and two others) of misconduct related to tax deductions for conservation easements. ECF No. 1. On February 20, 2019, the EcoVest Parties filed their Answer and Affirmative Defenses, setting forth in detail the factual and legal disputes between the parties, including disputes regarding the Government's unsupported allegations that appraisals were grossly inflated; the repeated false claim that the EcoVest Parties knowingly made false statements; and the spurious claim that it is somehow unlawful for partnerships to make conservation easement donations. ECF No. 15. In addition to contesting the Government's false allegations, the EcoVest Parties listed defenses that may defeat the Government's claims in the unlikely event that the Government proves some of its false

allegations. These defenses rely on black-letter legal doctrines, including laches, estoppel, the statute of limitations, and the Eighth Amendment.

On March 13, 2019, the Government filed its motion to strike, seeking a ruling that the bedrock legal principles mentioned above cannot possibly have any application to this case. ECF No. 24.

APPLICABLE LEGAL STANDARD

Motions to strike affirmative defenses are "disfavored." *Cox v. Stone Ridge at Vinings, LLC*, No. 1:12-cv-02633, 2012 WL 12931994, at *1 (N.D. Ga. Oct. 23, 2012). Courts generally consider them "'time wasters' that will 'usually be denied.'" *Id. quoting Carlson Corp./Southeast v. Sch. Bd. of Seminole Cnty., Fla.*, 778 F. Supp. 518, 519 (M.D. Fla. 1991). As the Fifth Circuit cautioned long ago, "the action of striking a pleading should be sparingly used by the courts. . . . It is a drastic remedy . . . ." *Augustus v. Bd. of Pub. Instruction of Escambia Cnty.*, 306 F.2d 862, 868 (5th Cir. 1962) (internal quotation marks omitted)[2]; *see also Northrop & Johnson Holding Co. v. Leahy*, No. 16-cv-63008, 2017 WL 5632041,

[2] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1206 (11th Cir. 1981), the Eleventh Circuit Court of Appeals held that decisions of the Fifth Circuit handed down prior to the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit, district courts and the bankruptcy courts in this circuit.

at *1 (S.D. Fla. Nov. 22, 2017) (striking defenses is "draconian sanction" (citation omitted)).

This Court has articulated two circumstances in which a defense may be stricken as legally insufficient: "when (1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law." *Cox*, 2012 WL 12931994, at *2 (internal citation and quotation marks omitted). Motions to strike, however, "should not be used to resolve disputed issues of fact or decide substantial questions of law." *FDIC v. Stovall*, No. 2:14-cv-00029, 2014 WL 8251465, at *1 (N.D. Ga. Oct. 2, 2014). Indeed, "[a] motion to strike 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." *Resolution Trust Corp. v. Youngblood*, 807 F. Supp. 765, 769 (N.D. Ga. 1992) (emphasis added) (citation and internal quotation marks omitted).

While a defendant must provide fair notice of its defenses, this is not a high pleading bar. *Twombly's* pleading requirements do not apply. *Fed. Nat'l Mortg. Ass'n v. Prowant*, No. 1:14-cv-3799, 2016 WL 5539644, at *2 (N.D. Ga. Mar. 22, 2016); *Stovall*, 2014 WL 8251465, at *4 ("The court holds that Rule 8 establishes a very low standard for adequately pleading affirmative defenses, and the Supreme Court's decisions in *Twombly* and *Iqbal* do not alter that minimal standard.").

Asserted defenses need only put a plaintiff on notice of their nature and basic facts. *Cox*, 2012 WL12931994, at *2 ("[T]he Court reviews affirmative defenses to ensure they provide fair notice of the nature of the defense and the grounds upon which it rests." (citing *Navarro v. Santos Furniture Custom Design, Inc.*, 372 Fed. Appx. 24, 27 (11th Cir. 2010))).

ARGUMENT

The "draconian sanction" sought by the Government's motion to strike is plainly unwarranted here. None of the challenged defenses is "patently frivolous" or "clearly invalid as a matter of law." And none was insufficiently pleaded. The Government has not met its burden of demonstrating otherwise.

I. THE CHALLENGED DEFENSES ARE NOT "PATENTLY FRIVOLOUS" OR "CLEARLY INVALID."

A. The Statute of Limitations Defense Should Not Be Stricken.

Despite the Government's protestations to the contrary, at least one statute of limitations applies to this case. Federal law has long included a five-year statute of limitations for any suits "for the enforcement of **any** civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462 (emphasis added). In 2017, the Supreme Court held that this limitation period "applies to claims for disgorgement imposed as a sanction for violating a federal securities law." *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017). Courts have applied *Kokesh* and section

2462 beyond the context of securities enforcement. *See, e.g.*, *United States v. Luminant Generation Co.*, 905 F.3d 874, 884-85 (5th Cir. 2018) (section 2462 bars demand under the Clean Air Act); *CTFC v. Gramalegui*, No. 15-cv-02313, 2018 WL 4610953, at *30 (D. Col. Sept. 26, 2018) (section 2462 bars demand for restitution by the Commodity Futures Trading Commission).

Here, the Government cannot meet its burden of showing that the statute of limitations defense is "clearly invalid as a matter of law." The Complaint seeks disgorgement with interest based on conduct dating back to 2009 or earlier. ECF No. 1 at ¶¶ 5, 7, 69. Additionally, the key section of the Tax Code under which the Government seeks relief is headed "Imposition of penalty," so section 2462—which time bars suits for "any civil fine, penalty, or forfeiture"—should control. *See* 26 U.S.C. § 6700(a); 28 U.S.C. § 2462. Under these circumstances, there is at least a substantial question as to the applicable statute of limitations, meaning the defense should not be stricken. *See Stovall*, 2014 WL 8251465, at *1.

B. The Laches Defense Should Not Be Stricken.

The Eleventh Circuit and other courts have found that laches is a viable defense against the Government where, as here, the Government seeks equitable relief. *See United States v. Delgado*, 321 F.3d 1338, 1349 (11th Cir. 2003) (noting "exceptions" to general rule that laches does not lie against Government). In

EEOC v. Dresser Industries, Inc., 668 F.2d 1199 (11th Cir. 1982), the Eleventh Circuit affirmed an order dismissing a government suit based on laches, holding that laches applied where the statute of limitations did not. *Id.* at 1200, 1204; *see also NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990) ("The principles of equitable jurisprudence are not suspended merely because a government agency is the plaintiff.").[3]

In short, the Government cannot meet its burden of showing "to a certainty that [it] would succeed despite any state of the facts which could be proved in support of the defense." *See Resolution Trust*, 807 F. Supp. at 769 (citation omitted). Nearly a decade elapsed between the first real estate projects cited in the Complaint and when the Government filed suit. The EcoVest Parties should have the opportunity to demonstrate that the Government unjustifiably delayed in bringing its case.

---

[3] The Government's argument that laches cannot apply because its case is supposedly brought "in the public interest" is foreclosed by controlling precedent. *See Dresser Industries*, 668 F.2d 1199 (laches applicable to suit by EEOC); *see also Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (EEOC acts in the public interest); *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997) (same).

C. The Estoppel Defense Should Not Be Stricken.

Estoppel is a valid defense when one party detrimentally relied on another party's misrepresentation or failure to disclose a material fact. *See FDIC v. Harrison*, 735 F.2d 408, 410 (11th Cir. 1984). The Government claims that this hornbook defense cannot possibly apply here. The law is to the contrary. The Eleventh Circuit has expressly stated that, for purposes of ruling on an appeal from a dismissed complaint, "just as we accept the validity of the plaintiff's factual assertions, we must also accept the validity of the plaintiff's theory of a cause of action, including the theory that estoppel lies against the government when acting in its sovereign capacity, if it engages in affirmative misconduct." *Chiles v. Thornburgh*, 865 F.2d 1197, 1202 (11th Cir. 1989); *but cf. United States v. Vonderau*, 837 F.2d 1540 (11th Cir. 1988).

Other courts have reached the same conclusion, even where the Government acts as sovereign. *See, e.g., United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973) ("[E]stoppel is available as a defense against the government . . . even if the government is acting in a capacity that has traditionally been described as sovereign."); *United States v. Jackson*, 2007 WL 1169695, at *5 (D. Id. Apr. 19, 2007) (denying Government's motion to dismiss affirmative defenses; "[t]he case

law clearly provides that estoppel may be applied against the government acting in its sovereign capacity" (internal quotation marks and citation omitted)).

Here, the Government's claims implicate nearly a decade of activity across dozens of projects and scores of IRS filings. The Government has long been aware of and accepted the very same conduct that the Complaint now claims was fraudulent. Under these circumstances, and depending upon how the facts develop, the Government may well be estopped from bringing its claims against the EcoVest Parties. In any event, it is too early to make any determination about the validity of the estoppel defense in this case.

D. The "Excessive Fines" Defense Should Not Be Stricken.

As noted, the Complaint seeks to disgorge every dollar the EcoVest Parties have ever made from dozens of real estate projects conducted over a decade—plus interest. In the recent *Kokesh* decision discussed *supra*, the Supreme Court held that "SEC disgorgement constitutes a penalty" because it seeks to redress a public wrong and operates for purposes of punishment and deterrence. *Kokesh*, 137 S. Ct. at 1642. In *United States v. Bajakajian*, 524 U.S. 321 (1998), the Supreme Court held that forfeiture of unreported currency was "a 'fine' within the meaning of the Excessive Fines Clause." *Id.* at 333. Additionally, one of the main Tax Code

sections under which the Government seeks relief is titled "Imposition of penalty." *See* 26 U.S.C. § 6700(a).

Both of the post-*Kokesh* decisions the Government cited in its motion that considered the disgorgement-as-fine issue assumed that disgorgement was (or could be) a fine for Eighth Amendment purposes. *See SEC v. Metter*, 706 Fed. Appx. 699, 703 (2d Cir. 2017) ("[W]e assume without deciding that, in light of the Supreme Court's recent decision in *Kokesh* . . . , the disgorgement liability imposed . . . **was a fine** within the meaning of the Excessive Fines Clause . . . ." (emphasis added)); *SEC v. Jammin Java Corp.*, 2017 WL 4286180, at *5 (C.D. Cal. Sept. 14, 2017) ("Thus the total 'fine' for Eight [sic] Amendment purposes is roughly $26 million."); ECF No. 24 at 13.

The potential argument under *Kokesh*, *Bajakajian*, *Metter*, and other precedent is more than strong enough to defeat an early-stage motion to strike. Given that the Government's own citations assumed that disgorgement could be an unconstitutional fine, there is no basis to conclude that the EcoVest Parties' position is "patently frivolous" or "clearly invalid." At the very least, the Excessive Fines defense is the type of "substantial question of law" that should not be resolved on an early motion to strike. *See Stovall*, 2014 WL 8251465, at *1.

E. The Lack of Statutory Authority Defense Should Not Be Stricken.

The EcoVest Parties have a compelling argument that the Government seeks monetary relief in excess of its authority. The Complaint purports to seek disgorgement under 26 U.S.C. § 7402. ECF No. 1 at ¶¶ 7, 227. That section, however, does not explicitly authorize disgorgement. As relevant here, it only authorizes "judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. § 7402(a).

The alleged conduct at issue falls under section 6700 of the Tax Code, which, unlike section 7402, specifically provides for disgorgement for people who are involved with certain entities and who also either (1) make a false statement about deductions or (2) make a "gross valuation overstatement." 26 U.S.C. § 6700(a). Section 6700(a) authorizes and caps monetary penalties for two sets of conduct. For one, the penalty and cap is the **lesser of** $1,000 or "100 percent of the gross income derived" from the conduct at issue. *Id.* For the other, it is "50 percent of the gross income derived" from the conduct at issue. *Id.* While the Government neglected to cite section 6700 for its disgorgement claim, it cited section 6700 for its injunction claims. *See, e.g.*, ECF No. 1 at ¶¶ 176-88.

The EcoVest Parties should be able to challenge the Government's authority to do an end-run around the statutory limits Congress imposed. In an analogous

case, the D.C. Circuit explained, "all of Congress's statutory amendments [to the Tax Code] would have been unnecessary" if the IRS could unilaterally extend the reach of Code sections. *Loving v. IRS*, 742 F.3d 1013, 1020 (D.C. Cir. 2014).

As with the EcoVest Parties' other arguments, their statutory authority argument is not "patently frivolous" or "clearly invalid as a matter of law." It should survive the Government's motion to strike.

F. The EcoVest Parties' Reservation of Rights Is Proper.

The Government also moved to strike the EcoVest Parties' statement that they reserve their right to assert additional defenses if facts develop supporting such defenses. Because they are harmless and consistent with the Federal Rules, courts in this district have declined to strike such simple reservations of rights. *See, e.g.*, *Super98, LLC v. Delta Air Lines, Inc.*, No. 1:16-cv-1535, 2016 WL 11247639, at *2, *2 n. 3 (N.D. Ga. Sept. 28, 2016) (denying motion to strike; "the Court . . . does not construe Defendant's [reservation of rights] as an affirmative defense"); *Ekokotu v. Fed. Express Corp.*, No. 1:08-cv-3238, 2009 WL 10668643, at *6 (N.D. Ga. Mar. 26, 2009) ("The question of whether this reservation is effective does not need to be decided now, and there is no need at this stage of the litigation to strike this phrase . . . .").

Consistent with these decisions, the EcoVest Parties respectfully request that, rather than striking their reservation of rights statement, the Court either (1) decline to strike it or (2) construe it as a reservation of rights under the applicable Federal Rules of Civil Procedure and Local Rules, no more and no less.

II. THE GOVERNMENT HAS AMPLE NOTICE OF THE ECOVEST PARTIES' DEFENSES.

The Government challenged only one of the EcoVest Parties' defenses (estoppel) as failing to provide notice. ECF No. 24 at 2, 11. Contrary to the Government's argument, this age-old legal defense has been pleaded adequately.

This Court held in *Cox* that the following statement succeeded in putting the plaintiff on notice: "Plaintiff's claims against [Defendant] are barred by the doctrine of estoppel." *Cox*, 2012 WL 12931994, at *5. As the Court explained, a defendant "is not required to provide detailed factual support for its defenses," including estoppel. *Id.* The same principle applies here.

CONCLUSION

For the foregoing reasons, the EcoVest Parties respectfully request that the Court deny the Government's motion to strike. The EcoVest Parties' defenses should be preserved for resolution on a fully-developed record.

Dated: March 27, 2019

Respectfully submitted,

ANDERSEN, TATE & CARR, P.C.

/s/ Elizabeth L. Clack-Freeman

Thomas T. Tate
State Bar No. 698879
Elizabeth L. Clack-Freeman
Georgia Bar No. 126888
Attorneys for Defendants EcoVest Capital, Inc., Alan N. Solon, Robert M. McCullough, and Ralph J. Teal, Jr.

One Sugarloaf Centre
1960 Satellite Blvd., Suite 4000
Duluth, Georgia 30097
Tel: (770) 822-0900
Fax: (770) 822-9680
Email: ttate@atclaw.com
Email: lcfreeman@atclawfirm.com

Benjamin J. Razi (admitted *pro hac vice*)
Sean Akins (*pro hac vice* application forthcoming)
Marianna F. Jackson (*pro hac vice* application forthcoming)
Matthew V. Miller (*pro hac vice* application forthcoming)
Nicholas Pastan (*pro hac vice* application forthcoming)
COVINGTON & BURLING LLP
850 Tenth St. NW
Washington, DC 20001
Tel.: (202) 662-6000
Fax: (202) 662-6291
Email: brazi@cov.com
Attorneys for Defendants EcoVest Capital, Inc., Alan N. Solon, Robert M. McCullough, and Ralph J. Teal, Jr.

LR 7.1 D CERTIFICATION

This is to certify that the within and foregoing has been prepared with one of the font and point selections approved by the Court in LR 5.1C: Times New Roman 14 point.

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2019, I caused a true and correct copy of the foregoing to be served on the following counsel for Plaintiff via the Court's electronic filing system:

ANDERSEN, TATE & CARR, P.C.

/s/ Elizabeth L. Clack-Freeman

Thomas T. Tate
State Bar No. 698879
Elizabeth L. Clack-Freeman
Georgia Bar No. 126888
Attorneys for Defendants EcoVest Capital, Inc., Alan N. Solon, Robert M. McCullough and Ralph R. Teal, Jr.

One Sugarloaf Centre
1960 Satellite Blvd., Suite 4000
Duluth, Georgia 30097
Tel: (770) 822-0900
Fax: (770) 822-9680
Email: ttate@atclaw.com
Email: lcfreeman@atclawfirm.com