Amy et al v. Curtis

2020 | Cited 0 times | N.D. California | October 26, 2020

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

AMY , et al.,

Plaintiffs, v. RANDALL STEVEN CURTIS,

Defendant.

Case No. 19-cv-02184-PJH

ORDER GRANTING FIRST MOTION TO STRIKE AND DENYING SECOND MOTION TO STRIKE Re: Dkt. Nos. 97, 121

Before the court are plaintiffs motions to strike. Dkts. 97, 121. The matters are papers and carefully considered their arguments and the relevant legal authority, and

good cause appearing, the court rules as follows.

BACKGROUND Fifteen plaintiffs, proceeding under pseudonyms, collectively bring this civil action against defendant Randall Curtis based on his criminal child pornography offenses in violation of title 18 U.S.C. § 2252. plaintiffs assert a single cause of action under 18 U.S.C. § 2255(a), which allows victims

of child pornography to recover civil damages against people who have committed a violation of certain enumerated statutes, including § 2252. Dkt. 81.

On September 6, 2016, the defendant was indicted in the U.S. District Court for the Northern District of California for knowingly possessing and transporting child pornography in violation of § 2252(a)(1) and (a)(4)(B), respectively. FAC ¶ 35. On July 13, 2017, defendant pleaded guilty to both counts. Id. ¶¶ 35 36. Judge Illston entered

judgment against him on June 8, 2018. Id. ¶ 36. As part of his sentencing, defendant and the government entered a stipulation that expressly required defendant to pay restitution to each of the plaintiffs in this case. Id. ¶ 37.

Id. ¶ 38. 1

The CVIP notified the government of its findings and plaintiffs subsequently received notice that their images were among those possessed by defendant. Id. ¶ 39.

After this court denied his motion to dismiss, (Dkt. 42), defendant filed an answer on September 26, 2019, (Dkt. 48). With leave of the court, plaintiffs filed their FAC on March 13, 2020. Dkt. 81. On April 10, 2020, defendant filed his amended answer esent motion to strike portions of the answer. Dkt. 97. After briefing on the first motion to strike was complete, plaintiffs filed a supplemental declaration that purported to respond to certain Defendant filed a supplemental Then, plaintiffs filed a second motion to strike seeking to strike supplemental

declaration. Dkt. 121.

DISCUSSION A. Legal Standard

from any pleading any insufficient defense or any redundant, immaterial, impertinent, or otion to strike is to avoid the expenditure of time and money that must arise from litigating spurious Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010) (quoting Fantasy, Inc. v. Fogerty, 984 F.2d 1524,

1 The FAC erroneously uses numbered paragraph 38 twice; the court refers to the second paragraph 38.

1527 (9th Cir. 1993), , 510 U.S. 517 (1994)).

the matter to be stricken could have no possible bearing on the subject matter of the

Colaprico v. Sun Microsystem, Inc., 758 F. Supp. 1335, 1339 (N.D. Cal. 1991) (citing Naton v. Bank of Cal., 72 F.R.D. 550, 551 n.4 (N.D. Cal. 1976)). When a court

Uniloc v. Apple, Inc., No. 18-CV-00364-PJH, 2018 WL 1640267 (N.D. Cal. Apr. 5, 2018) (quoting In re 2TheMart.com, Inc., Sec. Litig., 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000)). A court must deny the motion to strike if there is any doubt whether the allegations in the pleadings might be at issue in the action. In re 2theMart.com, 114 F. Supp. 2d at 965 (citing Fantasy, Inc., 984 F.2d at 1527). However, a motion to strike is proper when a defense is insufficient as a matter of law. Chiron Corp. v. Abbot Labs., 156 F.R.D. 219, 220 (N.D. Cal. 1994). B. Analysis

1. Whether Section 2255 Permits Affirmative Defenses Plaintiffs argument appli contend that title 18 U.S.C. § 2255(a) does not expressly provide for affirmative defenses

and they further argue that if Congress had intended to allow affirmative defenses, it had the power to do so. Mtn. at 10. Plaintiffs cite other statutory provisions that explicitly permit certain defenses and point out that no similar provision is mentioned in section 2255. Id. at 10 11. According to plaintiffs, Congress intended that statute as a remedial scheme for child victims of sex crimes and because Congress provided for liquidated damages, plaintiffs assert that it would be inappropriate to dilute liquidated damages through the affirmative defenses advanced by defendant. Id. at 11 12.

In response, defendant argues that plaintiffs cite no authority that section 2255 disallows affirmative defenses. Opp. at 4 5. According to defendant, while the statute itself does not include a list of applicable affirmative defenses, most statutes do not provide such defenses. Id. at 4.

The court agrees with defendant. Plaintiffs cite no authority for the proposition that section 2255 disallows affirmative defenses. Significantly, Federal Rule of Civil Procedure 8(c) requires a party to state any avoidance or affirmative defense. The presumption, therefore, is that affirmative defenses are available as a general rule and unless Congress clearly intended to displace Rule 8(c), a defendant can at least plead that defense.

The statutes and cases cited by plaintiffs are not to the contrary. Rather, the examples cited by plaintiffs involve provisions where Congress enumerated a specific exception to conduct proscribed by a statute or, in the case of Tourgeman v. Nelson & Kennard, 900 F.3d 1105, 1110 (9th Cir. 2018), where Congress affirmatively shifted the burden of persuasion on an element from the plaintiff to defendant. For example, the Fair Labor Standards Act contains a provision that authorizes a court to reduce liquidated damages where the employer shows that it acted in good faith and had reasonable grounds for believing that act in question was not a violation of the statute. 29 U.S.C. § 260. That provision simply enumerates a specific exception or affirmative defense to the otherwise allowable liquidated damages.

In sum, plaintiffs have not demonstrated that section 2255 per se bars affirmative defenses.

2. ly Pleaded As an initial matter, the parties briefly spar over whether an affirmative defense must meet the Twombly/Iqbal pleading standard. Mtn. at 9 10; Opp. at 4 n.4. The Ninth Circuit has not explicitly held whether the requirements of Twombly and Iqbal apply to the pleading of affirmative defenses. Generally, courts in this district have extended the Twombly/Iqbal standard to evaluate the pleading of affirmative defenses, Barnes v. AT & T Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. 2010) (collecting cases), and this court has followed suit, Perez v. Wells Fargo & Co., No. 14-CV-0989-PJH, 2015 WL 5567746, at *3 (N.D. Cal. Sept. 21, 2015).

Defendant disagrees, citing t Kohler v. Flava

Enterprises, Inc., 779 F.3d 1016 (9th Cir. 2015). The plaintiff in Kohler argued that he did not receive adequate notice because the defendant did not properly plead the affirmative defense. Id. at 1019.

The court found the defense to be sufficient and cited Wright &

Id. (quoting 5 Wright & Miller, Fed. Prac. & Proc., § 1274 (3d ed. 1998)). The court did not cite Twombly or Iqbal and dealt with the issue in passing.

District courts are split on whether Kohler, in fact, squarely held that Twombly/Iqbal does not apply to affirmative defenses. See Stationary (Shanghai) Ltd., 2017 WL 1330598, at *3 (N.D. Cal. Apr. 11, 2017) (discussing split). As noted by defendant, district courts in the Eastern District routinely apply the fair notice standard. See Sherwin-Williams Co. v. Courtesy Oldsmobile-Cadillac, Inc., 2016 WL 615335, at *3 (E.D. Cal. Feb. 16, 2016) (collecting cases). Kohler, courts in this district continue to require affirmative defenses to meet the Twombly/Iqbal Fishman v. Tiger Nat. Gas Inc., 2018 WL 4468680, at *3 (N.D. Cal. Sept. 18, 2018) (emphasis added) (quoting J&K IP Assets, LLC v. Armaspec, Inc.,

has permitted (over objection) an affirmative defense that asserted a mere legal Id.; see also Finjan, Inc. v. Bitdefender Inc., 2018 WL 1811979, at *3 (N.D.

Twombly/Iqbal] standard to affirmative defenses, reasoning that Kohler did not

include Perez v. Gordon & Wong Law Grp., P.C., 2012 WL 1029425, at *8 (N.D. Cal. Mar. 26, 2012) (citations omitted).

defense. / / /

a. First Affirmative Defense: Failure to State a Claim e defense is that the FAC fails to state facts sufficient to constitute a cause of action. Answer ¶ 52. Plaintiffs argue that that defense should be stricken because the court denied add any facts or claims to the allegations. Mtn. at 13. Defendant responds that the FAC removed factual allegations and those deletions, and the resulting claims, are properly subject to legal challenge at the summary judgment stage. Opp. at 5 6.

a] defense which demonstrates that plaintiff has not met its Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002) (citing Flav O Rich v. Rawson Food Serv., Inc. (In re Rawson Food Serv., Inc.), 846 F.2d 1343, 1349 (11th Cir. 1988)). Barnes, 718 F. Supp. 2d at 1174 (citation omitted); see Espitia v. Mezzetti Fin. Servs.,

Inc., 2019 WL 359422, at *5 (N.D. Cal. Jan. 29, 2019) (same).

of this rule and must be stricken.

b. Second Affirmative Defense: Third Party Liability physical injury suffered by plaintiffs was caused by the acts or omissions of parties other

than defendant. Answer ¶ 53. Plaintiffs argue that section 2255 precludes a third party liability defense because each person who possesses child sex abuse images of a victim owes that victim either actual or statutory damages and there is no limit on the number of violations by different offenders which may be compensated. Mtn. at 13.

Defendant contends that plaintiffs cite no authority that precludes him from challenging that any 6. Defendant asserts that the real issue here is whether section 2255 requires plaintiffs to prove that they are both victims and suffered personal injury as separate elements. Id. at 7. He advances three arguments in support of his reading that the elements are

separate ould read the second clause that each person out of the statute and the terms are not a doublet, akin to Id. Second, defendant asserts no controlling case holds that any plaintiff is, in fact, a victim of the underlying criminal conviction and that such victim necessarily suffered personal injury based on possession. Id. at 8. Third, the original complaint alleged that each plaintiff was and will continue to suffer personal injury due to distribution and possession of child abuse images and, according to defendant, the allegations invite a challenge to the fact that the injuries were caused by others, not defendant. Id. at 8 9.

Plaintiffs assert a single cause of action under 18 U.S.C. § 2255(a). That statute provides in relevant part:

Any person who, while a minor, was a victim of a violation [of certain predicate statutes] and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, . . . shall recover the actual damages such person sustains or liquidated damages in the amount of $150,000, and the cost of the action, including incurred. 18 U.S.C. § 2255(a). There is no disagreement among the parties that defendant violated one of the predicate statutes 18 U.S.C. § 2252 for recovery under § 2255. Further, any person seeking to recover under the statute must demonstrate that he or she is a victim of that predicate statute in order to recover either actual damages or liquidated damages. While plaintiffs initially sought punitive damages in their complaint, their amended complaint now only seeks liquidated damages and disclaims any actual damages. FAC ¶¶ 46 47.

The remaining dispute is whether, in addition to demonstrating they are victims, plaintiffs must also prove that they suffered violation. If the answer to that question is in the affirmative, then, presumably, defendant could present evidence that a third party caused plaintiffs to suffer a personal injury.

In Doe v. Boland, 698 F.3d 877 (6th Cir. 2012), the Sixth Circuit addressed this

precise issue. There, a defendant pleaded guilty to violating title 18 U.S.C. § 2252A for knowingly possessing a visual depiction that was modified to appear that an identifiable minor was engaged in

sexually explicit conduct. Id. at 880. Two victims brought suit under section 2255 and the district court awarded liquidated damages without inquiring into their actual damages. Id. at 882 83. On appeal, the defendant conceded that the argued that they also had to demonstrate that they Id. at 881. The defendant also argued that the victims needed to demonstrate actual damages even though the district court awarded liquidated damages. Id. at 882.

With respect to the first argument, the Boland court acknowledged that courts generally construe statutes to avoid surplusage, ference other context- illuminating words. Id. need not occur simultaneously because a child might have one claim as soon as a video or image was created, as well as a second claim against a distributor many years later. Id. Cast in this light, the statute s separate references to victim and personal injury show only that minor victims may sue for injuries they incur later in life; the statute does not create one category of victims and another category of people who suffer personal injuries. Id. Second, the presumption against surplusage does not apply to doublets wo ways of saying the same thing that reinforce its meaning Id. (citing Freeman v.

Quicken Loans, Inc., 566 U.S. 624, 635 (2012)). The court determined that section 2255 contains such a doublet because, by definition, a victim is someone who suffers an injury. Id. at 882.

With respect to demonstrating actual damages, the Boland court acknowledged that most tort plaintiffs must demonstrate actual damages but section 2255 2

provided for

2 Congress amended section 2255 twice after the Sixth Circuit issued its opinion and changed the language regarding statutory damages. The 2012 version of the statute actual damages and the following sentence provided a minimum damages amount: Any person as

statutory minimum damages. Id. The point of a minimum-damages requirement is to allow victims of child pornography to recover without having to endure potentially damaging damages hearings. Id. Applying that reasoning here, as long as a plaintiff demonstrates that she or he is a victim under § 2255 and only seeks liquidated damages, then that person need not also prove actual damages.

The Boland Also persuasive, several district courts 3

that have encountered this same issue have adopted Boland See, e.g., N.S. v. Rockett, 2018 WL 6920125, at *7 (D. Or. Oct. 19, 2018), report and recommendation adopted, 2018 WL 6920112 (D. Or. Nov. 28, Boland violation has, by virtue of that victimhood, suffered personal injury under § ; Doe v.

Bruno required to show specific injuries, it is the victimhood alone and not any resulting effects that forms the basis of a § 2255 action. Thus, a plaintiff need only show that he (internal quotations and citation omitted)). In fact, defendant has cited no case that has arrived at his desired reading of the

statute. The court agrees with Boland and the district courts that have considered the issue.

ntiffs need only demonstrate that they were victims in order to receive liquidated damages and do not also need to demonstrate that they suffered a personal injury. From that premise, it follows that the acts or omissions of third parties is irrelevant, assuming plaintiffs .

described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value. 2255(a) (2012). The current version of the shall recover the actual damages such person sustains or liquidated damages in the amount of $150,000. . . 18 U.S.C. § 2255 (2018). The changes in the language do not detract from the reasoning behind the Boland 3 Judge Ill 8th order collects further authorities. Dkt. 106 at 14.

c. Third Affirmative Defense: Causation as the cause-in- fact or proximate cause of any damages recoverable by plaintiffs. Answer ¶ 54. Plaintiffs

and not an affirmative defense. Mtn. at 14. Defendant ac causation is an element of their case. Opp. at 10.

The court agrees affirmative defense. As stated, met Zivkovic, 302 F.3d at 1088.

d. Fourth Affirmative Defense: Accord & Satisfaction that fourteen of the plaintiffs 4

have already been paid in full for all monies due and, therefore, the parties have achieved a full accord and satisfaction. Answer ¶ 55. Plaintiffs assert that satisfaction affirmative defense is insufficiently pled. Mtn. at 17. They argue that there has been no agreement entered into between plaintiffs and defendant and that Id. at 18.

Defendant r better suited for resolution at summary judgment. Opp. at 10. According to defendant, the facts surrounding his affirmative defense should be allowed to develop further before dispositive motion practice. Id. For example, defendant cites correspondence between counsel for both sides relating to negotiated restitution payments to plaintiffs during nal case. See id. at 10 12. Defendant contends that because plaintiffs worked closely with the government in the criminal case, it remains an open question

4 Compare Answer ¶ 55 with FAC ¶¶ 3 29.

whether defendant may establish, as a factual matter, the elements of accord and satisfaction. Id. at 12 13. Reply at 5 7.

Both parties offer extrinsic evidence purporting to demonstrate the extent to which criminal restitution litigation. Opp. at 10 12; Reply at 5 7; see also Dkts. 111-1 to 111-3; Dkt. 112; Dkt. 120. This

back and forth is not required the affirmative defense fails for two reasons. First, it does not allege sufficient factual content to Second, even considering potentially constituting accord and satisfaction, defendant has not established such an affirmative defense is available as a matter law.

In Doe v. Hesketh, 828 F.3d 159, 162 (3d Cir. 2016), the Third Circuit examined -filed civil claim by a victim under § The court reasoned that the text of the statute was unambiguous and cases in which a victim has not been compensated in the past by a Id.

at 168. The court also found persuasive the fact that the procedures governing mandatory restitution, 18 U.S.C. § 3664(j), provided that restitution is reduced by any amount later recovered as compensatory damages for the same lo Id. The court stated victim who had received restitution could file a subsequent civil action, but also provided Id. at 169.

The Hesketh court also reasoned that if a restitution award barred a later-filed claim under § Id. (citation omitted). Thus, the court held that 18 U.S.C. § 2255 permits a victim to bring a civil claim for the violation of a predicate statute even where that victim has previously received criminal restitution for the same violation

of that statute for her purported full damages. Id. at 171.

While not controlling, Hesketh persuasive. Applying here, any restitution received by plaintiffs pursuant to the

mandatory criminal restitution statute, 18 U.S.C. § 2259, does not bar them from pursuing and recovering a § 2255 claim for violation of the same predicate statute. Any amount that defendant might eventually pay to plaintiffs as liquidated damages offsets any previously paid restitution. 18 U.S.C. § 3664(j)(2).

For the foregoing reasons, the c defense.

e. Fifth Affirmative Defense: Unjust Enrichment

because allowing recovery would result in unjust enrichment. Answer ¶ 56. Plaintiffs

argue that Congress contemplated a criminal convict liable for both restitution and civil damages and further assert that § 2255 includes mandatory language that the victim such that unjust enrichment is not available. Id. at 19 20.

Defendant contends that he continues to develop evidence addressing whether United States v. Clemans, 2018 WL 4794166 (E.D. Cal. Oct. 3, 2018), as an example where a district court rejected a request for restitution in a predicate criminal case because the victim had already been awarded

nearly $11 million in restitution. Defendant points out that his concern is especially relevant since the victim in Clemans is also a plaintiff in this case. Opp. at 13.

recover the actual damages such person sustains or liquidated damages in the amount of

2255(a).

command from Congress. See Serv. Emps. Int l Union v. United States, 598 F.3d 1110,

quotation marks and citations omitted)). The plain language of the statute does not indicate that the court can order an amount less than the liquidated damages amount, nor has defendant cited any authority holding as much.

Rather, defendant restitution and cites a district court case where the court declined to issue restitution because the victim had already received far more in restitution awards than her total disaggregated ongoing medical Clemans, 2018 WL 4794166, at *4. Restitution, however, is fundamentally different than statutory damages. As the district court in Clemans stated,

Id. totality of restitution cannot exceed the totality of actual loss suffered by the identified Id. at *4 (quoting United States v. Darbasie, 164 F. Supp. 3d 400, 406 (E.D.N.Y. 2016)). Since the plaintiff in Clemans had already been made whole, the court had a basis to deny restitution.

As discussed, Hesketh demonstrates that receipt of restitution does not bar the same victim from pursuing a section 2255 claim. 828 F.3d at 171. As stated in Boland,

amount of damages. See 698 of a sex crime, there is little point in forcing her to prove an amount of damages, only to . It follows that a liquidated damages award could exceed actual damages. In any event, defendant has

command. Thus, an unjust enrichment defense arguing that liquidated damages exceeds monies already received is insufficient as a matter of law.

defense.

f. Sixth, Seventh & Ninth Affirmative Defenses: Constitutional

Challenges re that title 18 U.S.C. § 2255(a) violates the Fifth, Eighth, and Seventh Amendments, respectively. Answer ¶¶ 57 58, 60. conclusory assertions. Mtn. at 20 22. With regard to the defense, plaintiffs argue that the Eighth Amendment does not apply when a defendant is sued civilly by private parties. Id. at 21. As to plaintiffs contend that the Seventh Amendment does not apply when Congress creates a cause of action. Id. at 22 23.

Defendant concedes that it is not clear whether his potential constitutional challenges to the statute constitute viable affirmative defenses and asserts that he

constitutionality under the cited constitutional amendments. Opp. at 15 & n.17.

As a general matter, other courts have permitted constitutional challenges to a statute to be pleaded as affirmative defenses. See G & G Closed Circuit Events, LLC v. Nguyen, 2010 WL 3749284, at *6 (N.D. Cal. Sept. 23, 2010); Sec. People, Inc. v. Classic Woodworking, LLC, 2005 WL 645592, at *5 (N.D. Cal. Mar. 4, 2005). In both opinions, the defendant provided sufficient factual allegations such that the court could discern whether the constitutional challenge was legally sufficient. In this case, there are no

constitutional challenges. For example whether he intends to bring a facial or as applied challenge to section 2255.

that files a pleading . . . drawing into question the constitutionality of a federal or state statute must promptly ional question and serve the notice on the Attorney General. Fed. R. Civ. P. 5.1(b) (c). Civil Local Rule 3-8(a) also requires defendant to serve notice on the United States Attorney for this district. Defendant has

not complied with either rule. See Haskins v. Cherokee Grand Ave., LLC, 2012 WL

adequately the constitutional issue and to comply with Civ. L.R. 3

For the foregoing reasons, the court STRIKES d ninth affirmative defenses.

g. Eighth Affirmative Defense: Set Off

obtained by plaintiffs for the damages they assert in this suit. Answer ¶ 59. Plaintiffs what basis he asserts the defense. Mtn. at 21. They argue that, if defendant is claiming

he should receive credit for payments, then the defense is legally insufficient. Id.

Defendant responds that plaintiffs offer no controlling authority that set off is

with his accord and satisfaction argument and his contentions regarding factual development of his criminal restitution litigation apply to this argument. Id. at 10 13.

First, defendant has not alleged sufficient facts to identify the source of the set off. See Gilmore v. Liberty Life Assurance Co. of Bos., 2013 WL 12147724, at *1 (N.D. Cal. Apr. 19, 2013). Second, provision requires an award of damages regardless of any conduct on the part of plaintiffs. See

Boland, 698 F.3d at 882 of a sex crime, there is little point in forcing her to prove an amount of damages, only to

Plaintiffs cite Allison v. Dolich, 2018 WL 834919, at *18 (D. Or. Feb. 12, 2018), where the court granted summary judgment in favor of the plaintiffs against the

were not seeking recovery of back wages under the Fair Labor Standards Act Id.

defense was therefore moot. Id. Defendant argues Allison supports his position because it was decided at summary judgment (rather on a motion to strike), but the procedural posture is not the relevant aspect of the case. Rather, Allison lends support to the proposition that where a plaintiff seeks statutory damages, set off does not apply.

Accordingly, the court STRIKES de 3. Request for Judicial Notice & Motion to Remove Document Plaintiffs filed a request for judicial notice of July 2017 plea agreement, a July 2018 stipulation regarding restitution in criminal case, and a September 2018 amended judgment and restitution list in the criminal case. Dkt. 98. Plaintiffs then filed an amended request that omits the first exhibit but maintains the request for the second and third exhibits. Dkt. 100. Plaintiffs also move to remove an incorrectly filed document, asserting that the plea agreement should have remained confidential. Dkt. 101. Defendant does not oppose the request for judicial notice.

Under Federal Rule of Evidence 201, a court may take judicial notice of an

(1) generally known . . . (2) or capable of accurate and ready determination by resort to The documents to be noticed are matters of public record and are thus judicially noticeable. The court Dkt. 100.

ffs

confidential and therefore argue that the document should be removed from the public record. Dkt. 101. Plea agreements, while restricted to participants of the case, are not treated as confidential unless a party seeks to file a document under seal. See Crim. L.R. 56-1. Therefore, the impetus to remove the document is unwarranted and the court 5

Dkt. 101.

5 question such that only case participants can access it.

4. Second Motion to Strike On September 17, 2020, plaintiffs filed their reply brief in support of their first motion to strike, (Dkt. 111), and the next day, filed a supplemental declaration in support of the reply, (Dkt. 112). In response, defendant filed a supplemental declaration of his own, (Dkt. 120), to which plaintiffs filed a subsequent motion to strike, (Dkt. 121).

Broadly speaking, this ancillary dispute involves factual representations in

prosecutors in the criminal matter may have committed any improper acts regarding 5. As plaintiffs later

under Crime Victims Rights Act. Dkt. 121 at 4.

criminal case concerning the accuracy supplemental declaration. Dkt. 120, ¶ supplemental declaration correspondence between plaintiffs and the prosecuting attorneys. Id. ¶ 5 & Ex. E.

Plaintiffs now move to strike the supplemental declaration because it lacks relevance to the first motion to strike, contains hearsay, is argumentative, and is untimely and improper. Dkt. 121 at 5 7.

The court begins with a few observations. First, as discussed above, the conduct

plaintiffs can recover statutory liquidated damages under title 18 U.S.C. § 2255. Second, the conduct of the counsel for the parties and the government has virtually no bearing on first motion to strike, which is whether any affirmative defense is insufficiently pled or insufficient as a matter of law.

reply is filed no additional memoranda, papers or letters may be filed without prior Court ents of recent decision. Civ. L.R. 7-3(d). Neither party requested approval from the court to file its respective supplemental declaration, (Dkts. 112, 120), and neither declaration falls within an exception provided by the Local Rules. Accordingly, the court STRIK

of any conduct by any party or non- ion pursuant to its inherent

strike. Dkt. 121.

CONCLUSION first motion to strike is GRANTED and first through ninth affirmative defenses are STRICKEN. The supplemental

second motion to strike is DENIED AS MOOT. IT IS SO ORDERED. Dated: October 26, 2020

/s/ Phyllis J. Hamilton PHYLLIS J. HAMILTON United States District Judge