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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (LGB) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Substantively Consolidated Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff, Plaintiff, v. ABU DHABI INVESTMENT AUTHORITY, Defendant.	Adv. Pro. No. 11-02493 (LGB)

MEMORANDUM OF LAW IN SUPPORT OF
TRUSTEE'S MOTION TO STRIKE AN AFFIRMATIVE DEFENSE

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Irving H. Picard, as Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS"), under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa-*lll*, and the substantively consolidated chapter 7 estate of Bernard L. Madoff ("Madoff"), respectfully submits this memorandum of law in support of the Trustee's motion to strike an affirmative defense under Federal Rule of Civil Procedure 12(f) and Federal Rule of Bankruptcy Procedure 7012.

I. PRELIMINARY STATEMENT

On June 26, 2025, this Court held that section 106 of the Bankruptcy Code abrogates the sovereign immunity of Defendant Abu Dhabi Investment Authority ("Defendant"), ruling from the bench that in light of section 106, "there is no question of fact, and no substantial question of law that would allow the [sovereign immunity] Defense to succeed." *See Picard v. Abu Dhabi Inv. Auth.*, Adv. Pro. No. 11-02493 (LGB) (Bankr. S.D.N.Y. June 26, 2025), Tr. of Hr'g, Dkt. No. 169, at 51:18-20. This Court further ruled that the Trustee would be prejudiced if Defendant were allowed to assert sovereign immunity as a defense. *Id.* at 51:17-22. As such, this Court granted the Trustee's Motion (Dkt. Nos. 158-160, the "Motion to Amend/Strike") to (i) amend the complaint to reinstate a $100 million claim previously dismissed on the basis of sovereign immunity and (ii) strike ADIA's sovereign immunity defense as to the $200 million claim pending before the Court. *Id*. at 41:25-51:24 (the "Decision to Amend/Strike").

On August 14, 2025, Defendant filed an Answer to the Trustee's Amended Complaint (the "Second Answer") that reasserted as its first affirmative defense (and elsewhere in the Second Answer) that Defendant has sovereign immunity (the "Immunity Defense"). Dkt. No. 181. Because this assertion is inconsistent with this Court's prior orders, Defendant's Immunity Defense should be stricken from the Second Answer as to both of the transfers.

II. BRIEF PROCEDURAL HISTORY

The Trustee filed his complaint commencing this action against Defendant in August 2011. Dkt. No. 1 (the "Initial Complaint"). In May 2022, Defendant moved to dismiss the Complaint. Dkt. No. 109. In October 2022, this Court denied Defendant's motion to dismiss, Dkt. No. 126, and in November 2022, Defendant appealed this Court's decision, solely as to the denial of its motion to dismiss based on exceptions under the Foreign Sovereign Immunities Act (the "FSIA"). Dkt. No. 132.

In March 2024, the District Court affirmed this Court's decision as to the $200 million transfer and reversed this Court's decision as to the $100 million transfer, in each case based on the District Court's interpretation of the FSIA. *See Picard v. Abu Dhabi Inv. Auth.*, Case No. 22-cv-09911 (ALC) (S.D.N.Y.) ("Appeal Dkt."), Appeal Dkt. No. 22. That order was subsequently amended in June 2024, whereby the District Court clarified that jurisdictional discovery as to the $100 million was not warranted and directed the Bankruptcy Court to dismiss the claims arising out of the $100 million redemption. Appeal Dkt. No. 25.

In August 2024, Defendant filed its Answer to the Initial Complaint, in which it asserted the Immunity Defense. Dkt. No. 150.

On February 26, 2025, this Court issued *Picard v. Bureau of Lab. Ins.*, Adv. Pro. No. 11-02732 (LGB) (Bankr. S.D.N.Y. Feb. 26, 2025), Tr. of Hr'g, Dkt. No. 158 ("*BLI*"), holding Section 106(a) of the Bankruptcy Code abrogates the foreign sovereign immunity of a defendant in a Section 550 and 551 recovery action, and that such defense is therefore futile.

On April 25, 2025, the Trustee filed his Motion to Amend/Strike, based on *BLI* and on Supreme Court precedent in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023) ("*Coughlin*") and *United States v. Miller*, 145 S. Ct. 839 (2025)

("*Miller*"). Dkt. Nos. 158-160. Defendant opposed on May 14, 2025, Dkt. No. 162, and the Trustee filed a reply on June 4, 2025. Dkt. No. 167. Following oral argument, this Court issued from the bench the Decision to Amend/Strike. Dkt. No 169. The parties submitted an Order memorializing the Court's rulings at the hearing, which was entered on July 2, 2025. Dkt. No. 170.

On July 11, 2025, the Trustee filed an Amended Complaint, Dkt. No. 172, and on August 14, 2025, Defendant filed the Second Answer, reasserting the Immunity Defense. Dkt. No. 181.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(f), made applicable here by Federal Rule of Bankruptcy Procedure 7012, the court may strike an insufficient defense from a pleading. Fed. R. Civ. P. 12(f). "An affirmative defense is insufficient if, as a matter of law, the defense cannot succeed under any circumstances." *In re Sterling Die Casting Co., Inc.* 118 B.R. 205, 207 (Bankr. E.D.N.Y. 1990).

"[M]otions to strike serve a useful purpose by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues that would not affect the outcome of the case." *Simon v. Mfrs. Hanover Trust Co*., 849 F. Supp. 880, 882 (S.D.N.Y. 1994) (internal quotation omitted). "To succeed on a motion to strike, the plaintiff must show that: (1) there is no question of fact which might allow the defense to succeed; (2) there is no question of law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by inclusion of the defense." *Sec. Exch. Comm'n v. KPMG LLP*, No. 03 Civ. 671 (DLC), 2003 WL 21976733, at *2-4 (S.D.N.Y. Aug. 20, 2003) (granting motion to strike the affirmative defenses of estoppel, waiver, and unclean hands). For the first two prongs of the analysis, "courts apply the same standard applicable to a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Coach, Inc. v. Kmart Corp.*, 756 F. Supp. 2d 421, 425 (S.D.N.Y. 2010).

"[I]f an affirmative defense is not available as a matter of law, the first part of the inquiry is complete," meaning that "there are no substantial questions of law or fact that might allow the defense to succeed." *Wausau Bus. Ins. Co. v. Horizon Admin. Servs. LLC*, 803 F. Supp. 2d 209, 213 (E.D.N.Y. 2011); *see also Sec. Exch. Comm'n v. Toomey*, 866 F. Supp. 719, 722 (S.D.N.Y. 1992) ("[w]hen '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.'") (quoting *FDIC v. Eckert Seamans Cherin & Mellott*, 754 F. Supp. 22, 23 (E.D.N.Y. 1990)). When an affirmative defense is unavailable as a matter of law, the only remaining inquiry is whether the plaintiff would be prejudiced if the defense remained in the pleadings. *See Wausau*, 803 F. Supp. 2d at 213.

IV. ARGUMENT

This Court has already held that Defendant's Immunity Defense is futile in light of section 106 of the Bankruptcy Code and that the Trustee would be prejudiced if forced to litigate it. Specifically, in the Decision to Amend/Strike, the Court held that:

> Based upon the Supreme Court decisions in *Coughlin* and *Miller*, and the *BLI* decision, there is no question of fact, and no substantial question of law that would allow the Defense to succeed. The Trustee would be prejudiced by having to incur the cost of discovery and litigation regarding the sovereign immunity defense. Accordingly, the Court rules that the motion should be granted, and the sovereign immunity affirmative defense should be stricken.

Decision to Amend/Strike at 51:17-24.

As to futility, this Court similarly held in *BLI* that "550 and 551 are clearly covered in 106, and therefore sovereign immunity is clearly abrogated with respect to 550 and 551 and [the] claim is brought under those." *BLI* at 49:6-8.

As to prejudice, this Court's holding is consistent with case law finding that prejudice exists where a party would have to expend time and resources litigating a defense that already has been established as futile. *See, e.g., Sec. Exch. Comm'n v. McCaskey*, 56 F. Supp. 2d 323, 326 (S.D.N.Y.

1999) ("[a]n increase in the time, expense and complexity of a trial may constitute sufficient prejudice to warrant granting a plaintiff's motion to strike.").

The Decision to Amend/Strike did not specify whether its reasoning for striking the $200 million claim also should be applied to the $100 million claim as reinstated by the Court in that same decision. Regardless, because this Court has made clear that the Immunity Defense is insufficient as a matter of law, the same analysis would apply equally to all of the Trustee's subsequent transfer recovery claims pursuant to section 550 and 551 of the Bankruptcy Code due to section 106 abrogation.

Accordingly, Defendant's reassertion of the Immunity Defense in its Second Answer should be rejected here, as to both the $200 million and $100 million claims. The Trustee otherwise would be prejudiced by unnecessary and wasteful litigation addressing the Immunity Defense, which is rendered meritless by section 106. This expenditure of time and expense would be particularly wasteful given this Court's previous ruling striking the same defense. *See*, *e.g.*, *Burns v. Imagine Films Ent., Inc.*, 198 F.R.D. 593, 603 (W.D.N.Y. 2000) (finding that a previously stricken defense as to discovery sanctions could not simply be re-asserted).

Finally, the fact that Defendant is appealing this Court's order[1] does not change its obligation to file an answer that is consistent with that order now. Should Defendant be successful on appeal, an amended answer can be filed at that time. But what Defendant cannot do is re-assert that defense now. *See, e.g., Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.*, No. 17 Civ. 124 (LLS), 2020 WL 1031271, at *2 (S.D.N.Y. Mar. 2, 2020) (striking defense that plaintiff asserted for appeal preservation purposes after the Second Circuit rejected that defense); *Knoll, Inc. v. Moderno, Inc.*, No. 11 CIV. 488 (AKH), 2012 WL 3613896, at *5 (S.D.N.Y. Aug. 22, 2012)

[1] As referred to in the Second Answer at n.1 and elsewhere.

(refusing to allow defendants to file a proposed amended pleading raising a stricken defense "to preserve the issues raised in [the] ... affirmative defense on appeal"); *Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York*, 278 F. Supp. 2d 313, 333-335 (N.D.N.Y. 2003) (striking laches and immunity defenses asserted after court ruled as a matter of law that such defenses did not apply, where defenses were asserted "for the purpose of preservation only" and "based solely on defendants' speculation that the Supreme Court will come to a different conclusion"); *Bureau of Consumer Fin. Prot. v. Fair Collections & Outsourcing, Inc.*., No. GJH-19-2817, 2021 WL 2685251, at *5 (D. Md. June 30, 2021) (explicitly rejecting the argument that a stricken defense had to be re-asserted to be preserved for appeal, and commenting that including such defenses unnecessarily consumes court resources).

It is also unnecessary for Defendant to reassert the defense for preservation purposes, as the prior asserted defense remains part of the record based on Defendant's motion to dismiss, its appeal, its first answer, and its opposition to the Motion to Amend/Strike, so Defendant does not lose any appeal rights by striking it now. *Quincy Bioscience Holding Co., Inc.*, 2020 WL 1031271, at *2 n.1 ("Non-repetition of a wrongly lost point is not a waiver of the right to assert it on appeal"); *Knoll*, 2012 WL 3613896, at *5 ("Because [the stricken] defense is already a matter of record, however, Defendants' argument [as to preservation] is without merit"); *Colon v. Goord*, 115 F. App'x 469, 470 (2d Cir. 2004) ("Defendants have not waived their statute of limitations defense by failing to raise it in their motion under Rules 12(c) and 56. Statute of limitations is an affirmative defense that is preserved by assertion in a party's first responsive pleading.").

V. CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that this Court grant his motion to strike Defendant's affirmative defense that the Trustee lacks subject matter jurisdiction based on sovereign immunity.

Date: September 2, 2025
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