UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JULY 23, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 96C00027
PEDRO DOMINGUEZ, Respondent.	)	Judge Robert L. Barton, Jr.

ORDER DENYING COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S EXCESSIVE FINES DEFENSE AND DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Motion to Strike Excessive Fines Defense

In its answer to the complaint Respondent contends that Complainant's claims are barred by the Excessive Fines Clause of the Eighth Amendment to the United States Constitution, citing *Austin v. United States,* 509 U.S. 602 (1993). Respondent states that, as part of a criminal sentence imposed on him by the United States District Court in *United States v. Pedro Dominguez*, No. L–93–181–S (W.D. Tex. Aug. 5, 1994), a fine of $15,000 was imposed and he should not be required to pay any additional fines. Respondent asserts that the fines sought in this civil fraud proceeding serve no remedial purpose, are meant only to inflict further punishment, and are excessive.

On April 18, 1996, Complainant moved to strike the defense based on the Excessive Fines Clause, *inter alia*, claiming that Respondent had failed to factually support this defense.[1] Complainant notes that

[1] Complainant also moved to strike Respondent's defense based on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and Respondent moved for summary decision in his favor on the basis of this double jeopardy defense. In a separate order issued on July 1, 1996, I denied Respondent's motion for summary decision based on the Double Jeopardy Clause and granted Complainant' s motion to strike this defense.

Section 68.9(c)(2) of the Rules of Practice and Procedure requires a respondent to include a statement of facts supporting each affirmative defense. 28 C.F.R. §68.9(c)(2). Complainant did not move to strike the defense as being legally deficient, only that it was not factually supported as required by the Rules of Practice.

Complainant is correct that Section 68.9(c)(2) requires a statement of facts and that affirmative defenses have been stricken when not so supported. *United States v. Chi Ling*, 5 OCAHO 723, at 4 (1995); *see also United States v. Makilan*, 4 OCAHO 610, at 4 (1994). However, motions to strike affirmative defenses are generally not favored in the law and are only granted when the asserted affirmative defenses lack any legal or factual grounds. *See United States v. Task Force Security*, *Inc.*, 3 OCAHO 563, at 4 (1993). An affirmative defense should be stricken only if there is no prima facie viability of the legal theory on which the defense is based or if the supporting statement of facts is wholly conclusory. *Id.*

Section 68.9(c)(2) does not provide any elaboration as to how detailed the statement of facts must be and thus that matter is left to the sound discretion of the Judge. In this case, Respondent has provided an adequate statement of facts in his answer. Moreover, the defense also has been explained in Respondent's brief in support of his motion for summary decision and his opposition to the motion to strike. Therefore, Complainant's motion to strike the affirmative defense based on the Excessive Fines Clause is denied.

Motion for Summary Decision

Respondent has moved for summary decision in this case, in part based on the Excessive Fines Clause. Respondent contends that the Eighth Amendment prohibits imposition of "excessive fines," citing *Austin v. United States,* 509 U.S. 602 (1993). Respondent notes that, according to the Supreme Court in *Austin,* "[t]he Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Id.* at 609–10 (quoting *Browning-Ferris*, 492 U.S. 257, 265 (1989)). Respondent notes that Complainant is seeking the payment of a maximum fine pursuant to a civil money penalty statute and is not seeking to make itself whole. Respondent further contends that the government is not seeking to recoup ill–gotten gains and is not attempting to require Respondent to pay loses it may have incurred as a result of Respondent's conduct. Finally, Respondent asserts that the government is not seeking restitution to compensate Respondent's victims,

if any, of his criminal conduct; rather the government is simply attempting to punish Respondent.

However, Respondent's motion for summary decision is inappropriate and premature. Unlike Double Jeopardy, which bars successive prosecutions as well as multiple punishments, *United States v. Ursery*, 64 U.S.L.W. 4565, 4567 (U.S. June 24, 1996), the Excessive Fines Clause bars excessive punishment. The question of whether the penalty sought by the Government would in fact violate the Excessive Fines Clause must be left for the hearing when evidence and testimony will be presented on the issue of the appropriate penalty as well as liability. Indeed, as Complainant notes, the amount of penalty is left to the sound discretion of the trial judge. C. Resp. 3. In *United States v. Valley Steel Products Co.*, 765 F. Supp. 752 (Ct. Int'l Trade 1991), the government sought to impose penalties on a buyer of steel pursuant to 19 U. S. C. §1592(c)(1) for aiding and abetting false statements in connection with importations. The defendant moved to strike the request for penalties, arguing in part that the full penalty sought, over $13 million, would violate the Excessive Fines Clause. However, the court concluded that it could not declare, as a matter of law, that the fine was excessive. *Id.* at 754. The court also stated:

> Moreover, no fine has yet been assessed, and the trial has not even begun. For the Court, at this stage, to suggest what a proper fine might be would be wholly inappropriate and would constitute an unconstitutional advisory opinion. The amount of the penalty to be assessed is within the sound discretion of the Court, but only after a violation of section 592 has been proven. . . . If and when a penalty is assessed, then the issue of whether the penalty is excessive may be raised.

Id. See also United States v. Alexander, 32 F.3d 1231, 1237 (8th Cir. 1994) ("A review of the excessive fine issue must be based upon the analysis and record finally developed by the district court"); *United States v. 13143 S.W. 15th Lane*, 872 F. Supp. 968 (S.D. Fla. 1994) (excessive fines issue is not ripe for review until after judgment of forfeiture has been entered); and *United States v. $633,021.67 in U.S. Currency,* 842 F. Supp. 528 (N.D. Ga. 1993) (pre-trial determination of yet-to-occur forfeiture would be premature). Therefore, I conclude that Respondent's motion for summary decision based on the Excessive Fines Clause is premature and is denied.

ROBERT L. BARTON, JR.
Administrative Law Judge