UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-CV-80722-GAYLES/GOODMAN

DANIEL J. STERMER, as Receiver for
NATIONAL SENIOR INSURANCE, INC.,
D/B/A SEEMAN HOLTZ,
CENTURION ISG SERVICES, LLC
EMERALD ASSETS 2018, LLC,
INTEGRITY ASSETS 2016, LLC,
INTEGRITY ASSETS, LLC,
PARA LONGEVITY 2014-5, LLC,
PARA LONGEVITY 2015-3, LLC,
PARA LONGEVITY 2015-5, LLC,
PARA LONGEVITY 2016-3, LLC,
PARA LONGEVITY 2016-5, LLC,
PARA LONGEVITY 2018-3, LLC,
PARA LONGEVITY 2018-5, LLC,
PARA LONGEVITY 2019-3, LLC,
PARA LONGEVITY 2019-5, LLC,
PARA LONGEVITY VI, LLC,
SH GLOBAL, LLC N/K/A PARA LONGEVITY V, LLC,

Plaintiff,

v.

WELLS FARGO BANK, N.A.,

Defendant.
_____/

RECEIVER'S RESPONSE TO DEFENDANT WELLS FARGO BANK, N.A.'S MOTION TO DISMISS COMPLAINT WITH INCORPORATED MEMORANDUM OF LAW (ECF NO. 30)

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Daniel J. Stermer, in his capacity as Receiver for the Plaintiffs (the "Receiver"), files this Response ("**Response**") to Defendant, Wells Fargo Bank, N.A.'s ("Wells Fargo") Motion to Dismiss Complaint with Incorporated Memorandum of Law (ECF No. 30) ("Motion"):

I. BACKGROUND

This action stems from a nationwide Ponzi scheme resulting in hundreds of millions of dollars in losses. In his Complaint,[1] the Receiver alleges that Wells Fargo aided and abetted the Ponzi scheme (the "Para Longevity Scheme") primarily orchestrated by Marshal Seeman, Eric Holtz, and Brian Schwartz, resulting in the loss of more than $300,000,000. (Compl. ¶ 1.)

Contrary to Wells Fargo's efforts to minimize its role, asserting it merely provided "routine banking services" (Mot. at 1), the Receiver's Complaint clearly alleges that Wells Fargo wore several hats, including, *inter alia*, as the trustee ("Trustee") of certain irrevocable life insurance trusts ("ILITs") that owned certain viatical life insurance policies, and as the securities intermediary ("Securities Intermediary") for viatical life insurance policies, and that it opened 31 bank accounts for the Receivership Entities[2] (including 15 for the Plaintiff Para Longevity Companies). (Compl. ¶¶ 5, 193, 198.)

For his claims, the Receiver alleges that the perpetrators of the fraud, with the substantial assistance and knowledge of Wells Fargo, diverted money from the legitimate businesses (*i.e.*, National Senior Insurance, Inc. d/b/a Seeman Holtz ("NSI")) to fund the purchase of viatical life insurance policies, to pay insurance premiums to maintain policies owned by others, and to pay interest to investors to perpetuate the Ponzi scheme. (*Id.* ¶ 68.)

[1] A copy of the Complaint (hereinafter "Compl."), filed originally in the state court prior to removal, is attached hereto as **Exhibit A** for the Court's convenience.

[2] Capitalized terms not otherwise defined herein are given the meaning stated in the Complaint.

Similarly, the Receiver alleges that Plaintiff Para Longevity Companies were damaged by rogue insiders pilfering their assets, with the substantial assistance and knowledge of Wells Fargo. Investors were misled regarding the profitability of the Para Longevity Companies, the ownership of the life insurance policies and other assets securing their investments, and the perfection of security interests in those assets by third parties, *i.e.*, the Centurion Companies and their lenders, DZ Bank and Teleios. (*Id.* ¶¶ 100-114.)

As described in the Complaint, the Para Longevity Companies sold unregistered securities in the form of secured promissory notes ("Notes"), that were purportedly secured by viatical life insurance policies. (*Id.* ¶ 2.) Wells Fargo agreed to act as Securities Intermediary and hold those policies in a securities account. (*Id.* ¶ 98.)

Wells Fargo knew, based on the submissions of various Wells Fargo-required bank documents, made when opening their bank accounts, that its clients—the Para Longevity Companies—should have owned and maintained the life insurance policies. Instead Wells Fargo knowingly and willfully allowed the insurance policies to be pledged to and encumbered by DZ Bank and Teleios for the benefit of the Centurion Companies (not the Para Longevity Companies), through its role as Securities Intermediary, through which it controlled those policies. (*Id.* at 114.)

The Receiver has also exhaustively pled, with examples, that Wells Fargo, among other things, willfully failed to act upon the numerous "red flags" in the Para Longevity Companies' bank accounts, knowingly assisted in the unlawful activities harming them, and:

- failed in its duties to Know Your Customer ("KYC"). (*Id.* ¶ 132; ¶ 138.r.);
- enabled the intricate web of transfers which assisted Seeman, Holtz, and Schwartz in stealing money and misusing funds of the legitimate Receivership Entities, i.e., NSI, and by and among the Para Longevity Companies to defraud them (*id.* ¶ 133);

- assisted in at least 5,100 transfers between the Plaintiff Para Longevity Companies and the same U.S. Bank account for one of the Centurion Companies, CISG, for no legitimate purpose (*id.* ¶ 138.b.);

- assisted in the transfers among the Para Longevity Companies for purposes unrelated to the limited description of the Para Longevity Companies' businesses i.e., a "fund that buys life policies" because Wells Fargo knew, as both the bank to these companies and as Securities Intermediary for the policies actually purchased, that none of the Para Longevity Companies actually directly purchased life policies (*id.* ¶ 138.d.);

- assisted in the transfers of over $50,000,000 through over 400 transfers from new Para Longevity Companies' accounts to old Para Longevity Companies' accounts and their investors with no legitimate business purpose and for purposes unrelated to the "account holder's business" (*id.* ¶ 138.e.);

- assisted in the transfers of more than $24,000,000 by and between the Plaintiffs' accounts at Wells Fargo with no legitimate business purpose (*id.* ¶ 138.f.);

- processed more than $378,000,000 in intercompany transfers between Wells Fargo bank accounts opened by Seeman and Holtz during the operation of the Ponzi scheme (*id.*);

- processed round dollar transactions in the amounts of $50,000, $100,000, $200,000, etc., with extensive frequency within the Plaintiffs' accounts (*id.* ¶ 138.l.);

- processed wire transfers that Wells Fargo, through its personnel, knew were not for the benefit of the Para Longevity Companies (*id.* ¶ 138.n.) (June 26, 2018, Seeman to Beatriz Dezayas of Wells Fargo, email);

- Wells Fargo knew that in December 2017, DZ Bank had foreclosed on the assets in the securities intermediary account for Centurion SPV I and yet, months later, agreed to serve as Securities Intermediary for Centurion SPV II, whose assets were also later foreclosed on (*id.* ¶ 138.s.);

- knew that within the various Wells Fargo bank accounts that at least 120 transfers were annotated as "mistake" or "mistaken" (*id.* ¶ 138.u), and that the Ponzi operators were engaged in "round-trip transactions" with the same U.S. Bank account for one of the Centurion Companies, CISG, without consideration or other contractual or legitimate business purpose, using funds obtained by new investors in the Para Longevity Scheme to pay old investors in different Para Longevity Companies to perpetuate the Ponzi scheme (*id.* ¶ 138.w.);

- failed to follow its own procedures to open and operate Plaintiffs' bank accounts, despite being obligated to by the 2015 Consent Order with the U.S. Office of the Comptroller of the Currency ("OCC") in *In re Wells Fargo*, No. AA-EC-201-79 (Nov. 19, 2015) through at least January 2021, (*id.* ¶¶ 139-189), including by filling out account applications for Seeman (*id.* ¶ 202), failing to obtain any answers, or willfully accepting false answers,

from Seeman about the Para Longevity Companies, which were necessary for Wells Fargo to "know-its-customer", including the identities of the beneficial owners of those businesses (*id.* ¶ 203-211) (October 2015, Blanca Dunmyer, Officer, Wells Fargo, email; June 28, 2017, Michael Salamone, Senior Relationship Manager, Vice President, Wells Fargo, emails);

- continued to serve as Securities Intermediary with knowledge that the "consistent grace notices" issued by Wells Fargo were "**not normal for accounts we administer**" (*id.* ¶ 190-192) (September 24, 2018, Paul Fritz, Assistant Vice President, Wells Fargo Corporate Trust Services, Longevity Group, email); and

- served as the Securities Intermediary for the Centurion Companies after resigning as Trustee for the ILITs in 2013 as a result of the unauthorized attempt by Schwartz to sell life insurance policies controlled by the ILITs over which Wells Fargo was Trustee (*id.* ¶ 198).

In sum, the Receiver states that "Wells Fargo was so deeply entrenched in the operations of the Receivership Entities as Trustee, Securities Intermediary, banker, and credit card issuer, that it had a unique combination of access and knowledge of the fraudulent activities." (*Id.* ¶ 115.)

The Receiver also alleges that, among its other knowing assistance to the Ponzi scheme, Wells Fargo continued to serve as Securities Intermediary to the Centurion Companies, which were separate from the Para Longevity Companies and NSI, after the foreclosure of the life insurance policies pledged to DZ Bank. (*Id.* ¶¶ 96-116.) Because Wells Fargo acted as the Securities Intermediary for the policies and managed the books that determined the entitlement holders of those policies' payouts, Wells Fargo knew that the Para Longevity Companies did not purchase or own any viatical life insurance, did not have a security interest in the policies, and did not have an interest in the death benefits in the policies. Yet Defendant continued to knowingly assist the rogue insiders of the Ponzi scheme by transferring and remitting hundreds of millions of dollars through the bank, from one account to another, both inside and outside the bank, for purposes it knew were not legitimate or in line with the business purposes for which those accounts were opened.

II. SUMMARY OF THE ARGUMENT

Wells Fargo glosses over the allegations of the Complaint, which establish the Receiver's right to relief and render Wells Fargo's arguments fatally flawed. *First*, with respect to Counts I (Aiding and Abetting Breach of Fiduciary Duties) and II (Aiding and Abetting Fraud), Wells Fargo misstates and misdirects the Court regarding the damages the Receiver seeks. The Receiver seeks to recover on behalf of the Plaintiffs, the specifically named Para Longevity Companies and NSI, for their injuries caused by Wells Fargo's willful conduct. These injuries and damages are separate and distinct—legally and factually—from the injuries and damages claimed in the separate class action complaint filed by the investors. *Second*, Wells Fargo ignores the Complaint's clear allegations that Plaintiff-entity NSI operated a legitimate insurance agency business and was victimized by rogue insiders with Wells Fargo's knowledge and material and substantial assistance. *Third*, the Complaint also states that NSI and the Para Longevity Companies were not so wholly dominated by the rogue insiders that the innocent control person, in-house counsel and compliance officer Alan Hodge ("Hodge"), could not have stopped the fraud and breaches of fiduciary duties committed by the rogue insiders. At base, the presence of (i) NSI as a legitimate business, and (ii) Hodge as an innocent control person, materially distinguishes this case from those which Wells Fargo seeks to rely upon, namely, *Wiand*,[3] *Isaiah*,[4] and *Perlman*.[5] *Last*, in its attack on Counts III (Negligence) and IV (Unjust Enrichment), Wells Fargo's Motion similarly misses the mark because Wells Fargo ignores the actual allegations in the Complaint; the Receiver has sufficiently alleged and stated both claims.

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[3] *Wiand v. ATC Brokers Ltd.*, 96 F.4th 1303 (11th Cir. 2024) ("*Wiand*").

[4] *Isaiah v. JPMorgan Chase Bank, N.A.*, 960 F.3d 1296 (11th Cir. 2020) ("*Isaiah*").

[5] *Perlman v. PNC Bank*, 38 F.4th 899 (11th Cir. 2022) ("*Perlman*").

III. LEGAL STANDARD

The Court is well-familiar with the standard of review on a motion to dismiss under *Twombly* and *Iqbal*. The standard on a Rule 12(b)(6) motion is not whether plaintiff will prevail, but whether the allegations are sufficient to allow plaintiff to conduct discovery to prove their allegations. *See Jackam v. Hosp. Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir. 1986).

With respect to the Receiver's aiding and abetting fraud and breach of fiduciary duty claims, the Receiver has more than met the pleading standards necessary to state those causes of action, including under Rule 9(b). Here, as listed above, the Complaint specifically alleges Wells Fargo's many roles, dating back to 2007, and its knowledge and substantial assistance to the operators of the Ponzi scheme, from at least 2012 until the scheme was made public by the OFR in 2021. *Cont'l 332 Fund, LLC v. Albertelli*, 317 F. Supp. 3d 1124, 1141 (M.D. Fla. 2018) ("But where "the alleged fraud occurred over an extended period of time and the acts were numerous, the specificity requirements are applied less stringently." *Lawrence Holdings, Inc. v. ASA Int'l, Ltd.*, No. 8:14-CV-1862-T-33EAJ, 2014 WL 5502464, at *11 (M.D. Fla. Oct. 30, 2014). This is true where defendants possess factual information about the ongoing conduct of their business. *Id.* at *13. States of mind like intent and knowledge may also be alleged generally. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997).").

IV. ARGUMENT

A. Wells Fargo Did Far More Than Provide "Routine Banking Services."

The Parties clearly view Wells Fargo through different lenses. The Complaint alleges Wells Fargo's substantial assistance went well beyond "routine banking services" (Mot. at 1.) and explains the multiple, intricate roles Wells Fargo knowingly played in the Ponzi scheme. Besides failing to actually address the extensive factual allegations in the Complaint (the only subject for this Motion), Wells Fargo argues the Complaint should be dismissed because it does not

adequately plead Wells Fargo's knowledge of the misconduct giving rise to the Receiver's claims. (Mot. at 2.) Wells Fargo's attempt to ignore the well-pled allegations in the Complaint should fail. While Wells Fargo may wish to ignore these allegations, and may even deny them in an Answer, the Court must accept them as true when ruling on the Motion.

The Complaint is replete with the details of the various roles Wells Fargo played, how and when Wells Fargo knew about the scheme, and aided and abetted its operators. Wells Fargo's work and assistance as Trustee, Securities Intermediary, and banker, gave it actual knowledge of the financial transactions and purposes of various businesses involved in and victimized by the fraud. (*See, e.g.,* Compl. ¶¶ 5, 7-13, 98-110, 112-113-115, 118, 122, 124, 126, 128-130, 193.) Wells Fargo learned that the Para Longevity Companies' and NSI's assets were being pilfered and that the insurance policies for which it served as Securities Intermediary were pledged as collateral to other lenders, e.g., DZ and Teleios. (*Id.* ¶¶ 8, 9, 10, 98-110, 112-113, 126, 128-130.) Wells Fargo not only knew that the Para Longevity Companies were each a "fund that buys life policies" (*id.* ¶ 206) but it also knew that Centurion had pledged and encumbered the insurance policies – not the Para Longevity Companies. (*Id.* ¶¶ 4, 8, 109, 114.)

The idea that one of the world's largest banks was not aware that the fraudsters commingled both investors' funds and operational funds and were diverting NSI's and the Para Longevity Companies' funds to perpetuate the scheme, or that hundreds of millions of dollars flowed through the Para Longevity Companies' accounts for illegitimate purpose is simply implausible.

B. The Receiver Has Standing Under Rule 12(b)(1) to Bring Common Law Tort Claims.

The Receiver has standing to bring common law tort claims because the Receiver alleges the existence of an honest and innocent decision-making insider to whom the fraudulent conduct could have been reported, who had the ability to stop it, and from whom it was concealed: Alan

Hodge. (Compl. ¶¶ 72-82.) Further, the Receiver alleges that NSI was a legitimate insurance services business (*id.* ¶¶ 49, 62), which was not directly involved in the commission of the Ponzi Scheme, but whose funds and resources were depleted in furtherance of the Ponzi Scheme by rogue actors. (*Id.* ¶¶ 62, 68, 133.)

For a receiver to state a cause of action against a third party for aiding and abetting common law torts of certain insiders, the receiver must allege the presence of one innocent decision-maker within the company to whom fraudulent conduct could be reported. *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 551 (Fla. 2d DCA 2003). This rule "depend[s] on some duty by the defendants to blow the whistle on the [perpetrators] by disclosing these matters to the [company]. . . . As a result, a theory based on a duty to disclose misconduct to that corporation during a time prior to the receivership simply cannot stand [where] no honest person existed within the corporation to whom such conduct could be reported." *Id*. Unless an entity in receivership had at least one such person who could put an end to the fraud, "the fraud and intentional torts cannot be separated from those of the corporation itself and the corporation cannot be said to be an entity separate and distinct from the individual tortfeasors." *Isaiah*, 960 F.3d at 1306 (affirming dismissal where complaint alleged receivership entities were "wholly dominated by persons engaged in wrongdoing"). In such a case, a receiver would lack standing to pursue tort claims because the receivership entity's "primary existence was as a perpetrator of the Ponzi scheme, [and] cannot be said to have suffered injury from the scheme it perpetrated." *Id*. (quoting *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1203 (11th Cir. 2003)).

The Eleventh Circuit recently provided further guidance on the application of this rule when it held "[t]o establish that a receivership estate is separate and distinct from a Ponzi scheme, the receiver must allege the presence of innocent decision-makers within the corporation to whom

fraudulent conduct could be reported." *Wiand*, 96 F.4th at 1310-11. In *Wiand*, the receiver's complaint relied on the innocence of six minority shareholders with nonvoting preferred stock but did not allege that the *controlling individuals* were innocent. *Id*. The court held that "six duped minority shareholders, and nonvoting investors, do not amount to an *innocent decision-maker*." *Id*. (emphasis added).

Conversely, in *Martinez v. Spear Safer CPAs & Advisors*, ruling on a motion for summary judgment, this Court found that the receiver had "demonstrated an issue of disputed fact as to whether [the receivership entity] was merely a sham corporation . . . like the corporation in *Freeman*," or an honest corporation, because the receiver had "identified honest individuals within [the receivership entity] to whom Defendant could have reported the insiders' misconduct." No. 06-cv-60727, 2007 WL 9700782, at *4 (S.D. Fla. June 26, 2007). Specifically, the Court accepted that the defendant could have raised its concerns to the receivership entity's general counsel, Dan Goldman, who was an innocent insider. *Id*. (citing deposition testimony in receiver's response). Under these facts, the Court concluded that *Freeman* did not bar the receiver's tort claims.

Similarly, in the instant case, the Complaint alleges that Hodge, who was in-house counsel and chief of compliance for the Receivership Entities, was an innocent decision-making insider. (Compl. ¶¶ 72-82.) Hodge was responsible for ensuring general legal compliance in the execution and performance of contracts and obligations of the Receivership Entities, including the Para Longevity Companies. (*Id*. ¶ 72-73, 80.) One of the primary fraudsters, Seeman, described Hodge as "the most conservative lawyer I've ever met," (*id*. ¶ 74), and for that reason, material information concerning the Para Longevity Scheme was concealed from Hodge. (*Id*. ¶ 78.) If Wells Fargo had reported the Para Longevity Scheme, Hodge would have and could have taken the necessary steps to reverse the improper conduct or stop the Ponzi scheme. (*Id*. ¶ 82.)

These facts, which must be accepted as true, establish the existence of an innocent decision-making insider within the Receivership Entities to whom misconduct could have been reported, and therefore, "the fraudulent acts of its principals, the Ponzi schemers, should not be imputed to the [Receivership] Entities themselves." *Isaiah*, 960 F.3d at 1307.

Furthermore, the Receiver alleges that NSI was a legitimate insurance services company that sold life insurance and other legitimate insurance products for decades. (Compl. ¶ 49.) Instead of selling insurance products, the rogues insiders diverted NSI's clients from NSI to purchase Notes from the Para Longevity Companies. (*Id*. ¶ 62.) And, to satisfy the continually increasing cash needs to support the Para Longevity Scheme, NSI's funds were diverted to pay the premiums on life settlement policies, or to pay interest to Note purchasers. (*Id*. ¶¶ 68, 89.) It is undisputed that the Receiver has standing based on the allegations that NSI suffered harm separate and distinct from the Para Longevity Companies which were used to perpetrate the Para Longevity Scheme. (Mot. at 6, n.2.) ("Wells Fargo is not moving to dismiss NSI's claims for lack of standing. . . .")

Next, Wells Fargo argues, incorrectly, that the Receivership Entities were "wholly dominated" by the perpetrators of the Ponzi scheme by pointing to the arguments made by the OFR in its separate complaint and a motion, which resulted in the appointment of the Receiver. (Mot. at 8, n.4.) Wells Fargo mistakenly argues the OFR's allegations have been incorporated by reference into the Complaint, but they have not, and it would be improper to veil the Receiver with the OFR's claims against others as binding facts against the Receiver in this case.

Although the Receiver refers to the OFR's complaint, to show how he initially learned of certain information related to the Ponzi scheme, the allegations giving rise to his claims were determined based on the Receiver's wholly independent investigation conducted during the course of his appointment as Corporate Monitor and now Receiver. "[I]n cases where the plaintiff attaches

or incorporates a document for purposes other than the truthfulness of the document, it is inappropriate to treat the contents of that documents as true." *Goines v. Valley Cmty. Services Bd.*, 822 F.3d 159, 167 (4th Cir. 2016) (citing *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 455 (7th Cir. 1998) (explaining that "Rule 10(c) does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading simply because the documents were attached to the complaint to support an alleged fact")). "[I]f a plaintiff attaches or references a report prepared by a third-party to show how he learned of certain facts alleged in his complaint, he does not automatically adopt all of the factual conclusions contained in the report." *Id*. Indeed, Wells Fargo is not a party to the OFR's case (which is an enforcement action regarding the sale of unregistered securities), and the Court should decline Wells Fargo's invitation to ignore the Receiver's own investigation and analysis of the acts giving rise to his claims.

C. Wells Fargo's Knowledge is Sufficiently Pled.

The Receiver sufficiently alleges that Wells Fargo had actual knowledge of the underlying wrongdoing. "A defendant has knowledge of an underlying fraud if it has a general awareness that its role was part of an overall improper activity." *Gilison v. Flagler Bank*, 303 So. 3d 999, 1003 (Fla. 4th DCA 2020) (reversing dismissal of aiding and abetting claim) (citing *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1009 (11th Cir. 1985)). Under the Federal Rules of Civil Procedure, "knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). This includes a defendant's knowledge of the underlying fraud in aiding and abetting claims. *See Belin v. Health Ins. Innovations, Inc.*, No. 19- 61430-CIV, 2019 WL 9575236, at *9 (S.D. Fla. Oct. 22, 2019), *report and recommendation adopted*, No. 19-61430-CIV, 2019 WL 9575230, at *1 (S.D. Fla. Dec. 30, 2019). Proving Wells Fargo's knowledge does not require a confession or a smoking gun: "actual knowledge of another's wrongful conduct is nearly universally found based upon circumstantial evidence." *Cabot E. Broward 2 LLC v. Cabot*, No.

16-61218-CIV, 2016 WL 8740484, at *4 (S.D. Fla. Dec. 2, 2016) (citing *Amegy Bank Nat'l Ass'n v. Deutsche Bank Alex. Brown*, 619 Fed. App'x 923, 931 (11th Cir. 2015)). Participation and knowledge can be inferred by the way an employee alters the financial institution's normal ways of doing business in a way that benefits the fraudster. *See, e.g.*, *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975) ("[I]f the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability."); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1120 (C.D. Cal. 2003) (finding that banks' use of atypical banking procedures to service Ponzi schemer's accounts raised inference of knowledge and accommodation by altering normal ways of doing business).

Here, Paul Fritz, Assistant Vice President, Wells Fargo Corporate Trust Services, explained that the manner in which the securities account was operated was "**not normal for accounts we administer**," which demonstrates Wells Fargo's knowledge and alteration of its normal ways of doing business for the Ponzi schemers. (Compl. ¶ 191.) Further, the Receiver has exhaustively pled that the transfers by and between the Para Longevity Companies lacked any legitimate business justification. (*Id.* ¶¶ 11, 138, 226, 227, 228, 229, 234, 236, 238.)

Wells Fargo relies on cases such as *Lawrence v. Bank of America, N.A.*, 455 Fed. App'x 904 (11th Cir. 2012) to argue that red flags involving routine services are insufficient to allege actual knowledge. (Mot. at 12-13.) Those cases explain that "Florida law does not require banking institutions to investigate transactions." *Lawrence*, 455 Fed. App'x at 907. In *Lawrence*, the court concluded that allegations that a depository bank "should have known" of fraudulent activity based on atypical activity and a failure to investigate red flags was insufficient to allege actual knowledge. *Id.* Here, the Receiver alleges that Wells Fargo possessed actual knowledge of the wrongful conduct. Unlike in *Lawrence*, Wells Fargo was not merely a general depository bank

providing routine banking services. Instead, Wells Fargo was intimately involved in the viatical life insurance policies scheme, serving as Trustee, then Securities Intermediary, *and* on the other side, as banker for the funds which raised the hundreds of millions to fuel the Ponzi scheme. (Compl. ¶ 9 ("Wells Fargo was uniquely positioned not only to see both sides of the Para Longevity Scheme . . . .")).

More importantly, the Receiver alleges that Wells Fargo knew about the scheme operated by the rogue insiders as early as 2012, when it decided to terminate its role as Trustee of the ILITs. (Compl. ¶ 198.) However, despite knowledge of the insiders' misconduct, Wells Fargo willingly became the Securities Intermediary for Centurion SPV I in 2014 (*id.* ¶ 101) which resulted in the foreclosure by DZ Bank of all of the life settlement policies and annuities it held in 2017. (*Id.* ¶ 102.) Despite that knowledge, Wells Fargo then agreed, again, to serve as Securities Intermediary for Centurion SPV II in 2018, and again, that entity's assets were later foreclosed on by Teleios. (*Id.* ¶¶ 104-108.) Wells Fargo knowingly and falsely represented and warranted in the Securities Account Control and Custodian Agreement that it did not have "actual knowledge of any other claim to, or interest in," any of the insurance policies over which it was Securities Intermediary. (*Id.* ¶¶ 108, 130.) That representation was knowingly false because Wells Fargo opened and operated the Para Longevity Companies' bank accounts for years with the knowledge that those businesses were "funds that buy life insurance policies" (*id.* ¶ 206.) And it opened and operated those businesses' bank accounts—in violation of its own policies and regulatory requirements—to perpetuate the scheme. (*Id.* ¶ 123, 132-189, 201-213.)

At base, the Receiver has established plausible claims for aiding and abetting fraud and breach of fiduciary duty. In a similar case involving a viaticated life insurance policy scheme, Judge Robin Rosenberg analyzed the sufficiency of a complaint against TD Bank and found:

> While it is true that some of Plaintiffs' allegations concern normal, routine banking services, Plaintiffs' allegations do encompass other activity.
>
> Plaintiffs' implicit contention is therefore that (i) because TD Bank had an obligation to report overdraws of attorney trust accounts to the New Jersey bar, (ii) TD Bank had systems in place to detect such overdraws for reporting purposes and (iii) due to such systems TD Bank had actual knowledge of the overdraws. The Court finds this contention to be plausible. Accordingly, the Court finds that Plaintiffs' allegations of actual knowledge satisfy the *Twombly* motion to dismiss standard.

Gevaerts v. TD Bank, N.A., 56 F. Supp. 3d 1335, 1341-42 (S.D. Fla. 2014).

Here, as discussed above, the Receiver's Complaint establishes more. And recently, addressing nearly the same arguments Wells Fargo advances in the Motion, another Court in this district articulated the standard applied to aiding and abetting claims in this Circuit and similarly denied the defendant's motion to dismiss:

> "Actual knowledge may be shown by circumstantial evidence." However, "[w]hen showing actual knowledge through circumstantial evidence, 'the circumstantial evidence must demonstrate that the aider and abettor actually knew of the underlying wrongs committed.'"
>
> "While the element of actual knowledge may be alleged generally, the plaintiff still must accompany that general allegation with specific allegations of specific facts that give rise to a strong inference of actual knowledge regarding the underlying fraud." Moreover, the substantial assistance element of an aiding and abetting claim "occurs when a defendant affirmatively assists, helps conceal, or fails to act when required to do so, thereby enabling the breach to occur."

Bansal v. TD Ameritrade, Inc., No. 23- 81539-CIV, 2024 WL 3009423, at *5 (S.D. Fla. June 07, 2024) (denying motion to dismiss) (internal citations omitted). There, the Court found, in pertinent part, that the allegations in the complaint were sufficient to plead aiding and abetting fraud and aiding and abetting breach of fiduciary duty because the bank "violated its own policies," made "exceptions to its inbound wire procedures and accepted at least that many third-party wires from investors," "received wires from Plaintiffs totaling over $6.4 million specifically earmarked for investment in Bluprint. Thus, Defendants had actual knowledge that the [the accounts] held pooled

Bluprint investor funds," and "[r]ather than stop Mr. Patel or decline to help him misuse Bluprint investor money, both Defendants executed his instructions to misappropriate investor money." *Id.* at *5-6.

Here, the Receiver's allegations go even further and explain Wells Fargo's obligations under the 2015 Consent Order, knowledge of the thousands of overdrafts in the bank accounts, the extensive systems Wells Fargo purportedly had in place to detect and report fraud, the extensive commingling of funds within the bank accounts, the round-tripping of funds, the sources of funds deposited in the bank being diverted for improper purposes, the failures by Wells Fargo to KYC and otherwise comply with its own policies and procedures, coupled inextricably with the numerous roles Wells Fargo occupied during the Ponzi scheme it aided and abetted.

In response to these extensive allegations, Wells Fargo asserts, conclusorily, that "the facts the Receiver characterizes as 'red flags' do not appear to be very remarkable." (Mot. at 13.) And follows that these "red flags" "would actually be typical to see." *Id*. However, whether the "red flags" alleged are unremarkable to Wells Fargo, or "typical" for its account management, do not negate its actual knowledge of the scheme, and otherwise should be a determination for a factfinder, and not determined at this stage of the case. *See Bansal*, 2024 WL 3009423, at *8 ("But without the benefit of full discovery, the statement that 'no such things happened' is premature."). Moreover, Wells Fargo attempts to cherry pick allegations out of context and to point to the Complaint's section titles (Mot. at 11) rather than addressing the other 250-plus paragraphs of the Complaint a nullity. The Court should not be persuaded by Wells Fargo's cursory attempts to avoid the well-pled claims of its actual knowledge of the fraud, as plausibly stated in the Complaint.

D. <u>The Receiver Has Properly Pled Count III for Negligence.</u>

It is well-settled that "the independent tort doctrine does not bar claims where the plaintiff has alleged conduct that is independent from acts that breached the contract and does not itself

constitute breach of the contract at issue." *Matonis v. Care Holdings Grp., L.L.C.*, 423 F. Supp. 3d 1304, 1311 (S.D. Fla. 2019); (*see also* Mot. at 16.) But the Complaint does not assert a claim for breach of contract, the contracts between the parties were not attached to the Complaint, and Wells Fargo has not provided any details about the contracts it purportedly relies on. "As such, it is impossible for the Court to determine at this early stage of litigation whether the basis of the action for [negligence] is really a breach of [contract]." *Strickland v. Burch*, No. 3:13-CV-1383-J-32JBT, 2014 WL 3417611, at *2 (M.D. Fla. July 14, 2014) (rejecting Wells Fargo's attempt to dismiss plaintiff's conversion claim based on the independent tort doctrine); *Pearson v. Deutsche Bank AG*, No. 21-22437-CIV, 2023 WL 5905958 (S.D. Fla. Sept. 11, 2023), *appeal dismissed* (Mar. 22, 2024), *appeal dismissed*, No. 23-13327-JJ, 2024 WL 1512841 (11th Cir. Mar. 22, 2024) (analyzing contractual language to reject defendant's argument that negligence claim was barred by an Agency Agreement). For this reason alone, the Court should reject Wells Fargo's speculative argument that would require the Court to make unfounded assumptions about the contents of the unidentified contracts which should not be considered on a motion to dismiss.

Moreover, Wells Fargo incorrectly suggests that negligence actions cannot be maintained as matter of course against banks because the relationship between a bank and its customer is contractual. (Mot. at 16) If this were so, then banks could never be held liable for negligence. Florida law, however, "recognizes that banks can be liable for negligence." *Ackner v. PNC Bank, Nat'l Ass'n*, No. 16-81648-CIV, 2017 WL 7726684, at *3 (S.D. Fla. Aug. 30, 2017) (collecting cases). This is because "[b]anks owe a duty to customers," *Wiand v. Wells Fargo Bank, N.A.*, 938 F. Supp. 2d 1238, 1247 (M.D. Fla. 2013), including "a duty to use ordinary care, presumptively in

all its dealings." *Journeys Acad., Inc. v. PNC Bank*, No. 2:13-CV-285-FTM-38, 2013 WL 3772483, at *2 (M.D. Fla. July 16, 2013).[6]

A bank assumes a higher duty over and above its ordinary obligations if it has actual knowledge of fraud being perpetrated. *See Barnett Bank of W. Fla. v. Hooper*, 498 So. 2d 923, 925 (Fla. 1986) (rejecting that a bank has not duty of disclosure when it has "actual knowledge of fraud being perpetrated upon a customer . . . or where a bank has established a confidential or fiduciary relationship with a customer"); *Gevaerts*, 56 F. Supp. 3d at 1343-44 (the bank's "authority essentially restates the general proposition that a bank has no duty to actively monitor accounts for wrongdoing" but the cases cited by the bank "do not address a bank's duties in the context when a bank has *actual knowledge* of a fiduciary's misappropriation of funds.").

Consistent with these legal authorities, the Receiver alleges Wells Fargo failed in its duty of ordinary and reasonable care (Compl. ¶ 246) and that Wells Fargo owed a heightened duty, due to its actual knowledge of the underlying wrongdoing, from the multiple roles it played in perpetuating the Ponzi scheme. (*see infra.* at Section IV.C.) In other words, the Complaint sufficiently alleges Wells Fargo owed, and breached, various common law and statutory duties that are owed to Plaintiffs regardless of what is set forth in the contracts between the parties (which is not before the Court).

[6] *See also Gilson v. TD Bank, N.A.*, No. 10-20535-CIV, 2011 WL 294447, at *9 (S.D. Fla. Jan. 27, 2011) (denying motion for summary judgment because there was a genuine issue of material fact about whether the bank acted negligently and recklessly "with regard to opening the accounts."); *Nguyen v. Raymond James & Assocs., Inc.*, No. 8:20-CV-195-CEH-AAS, 2021 WL 6091094, at *7-8 (M.D. Fla. Dec. 23, 2021) (rejecting application of the independent tort doctrine because plaintiffs negligence claim did "not depend on the contract between Raymond James and its client" but rather hinged "on industry standards and practices, evidenced by FINRA rules, which set the obligations imposed by Raymond James in its capacity as a broker-dealer to clients").

E. The Receiver Has Properly Pled Count IV for Unjust Enrichment.

Wells Fargo raises three arguments in its attempt to dismiss the Receiver's unjust enrichment claim, none of which is availing. ***First***, Wells Fargo argues that the unjust enrichment claim fails because the Receiver has not alleged the lack of an adequate remedy at law under the parties' banking contracts. Florida courts and Courts in this district, have held, however, that "this doctrine does not apply to all claims for unjust enrichment . . . It is only when an express contract is proven that an unjust enrichment claim must fail in this way." *Martinez for Mut. Benefits Corp. v. Steinger*, No. 05-61471-CIV, 2006 WL 8432187, at *3 (S.D. Fla. July 5, 2006) (citing *Williams v. Bear Stearns & Co.*, 725 So. 2d 397 (Fla. 5th DCA 1998)); *Mobil Oil Corp. v. Dade County Esoil Mgmt. Co.*, 982 F. Supp. 873, 880 (S.D. Fla. 1997) ("Until an express contract is proven, a motion to dismiss claim for ... unjust enrichment [because an adequate legal remedy exists] is premature."). Thus, courts regularly deny a motion to dismiss based on failure to allege the lack of adequate remedy as premature. *Id.* Wells Fargo also argues that a party cannot sue for unjust enrichment if there is an express contract governing the subject matter of the dispute. (Mot. at 18.) Here, however, the Receiver's claims arise from Wells Fargo's role in the Ponzi scheme, not from the parties' banking agreements. As explained above, Wells Fargo was not merely providing routine banking services but instead was intimately involved in the viatical life insurance policies scheme, serving as Trustee, then Securities Intermediary, *and* banker for the funds which raised the hundreds of millions to fuel the Ponzi scheme. (Comp. ¶ 9.) The Receiver's claims arise from Wells Fargo's acts and duties beyond the provision of banking services and the banking agreements which do not govern the subject matter of the dispute.

Second, Wells Fargo argues that the unjust enrichment claim should be dismissed because the Receiver does not allege that the Plaintiffs conferred a benefit directly on Wells Fargo. (Mot. at 19.) Specifically, Wells Fargo argues that fees and interest earned on an account do not constitute

a direct benefit for the purpose of an unjust enrichment claim, citing *Hakim-Daccach v. Knauf Int'l GmbH*, No. 17-20495-CIV, 2017 WL 5634629, at *7 (S.D. Fla. Nov. 22, 2017). The Court in *Hakim-Daccach* did not hold that fees and interest can never constitute a direct benefit, however. Rather, the Court dismissed the plaintiff's claims for unjust enrichment because the plaintiff did not "allege sufficient facts establishing that the funds held in either escrow account ***originated from him or belong to him***, nor does he establish that it is inequitable for [the defendants] to retain the funds relative to [the plaintiff's] interests." *Id.* at *7 (emphasis added). The Court noted that the defendant's retention of interest earned on funds held in an escrow account did not constitute a "direct benefit" because the funds in the account did not come from the plaintiff nor did he have any direct ownership of them, *not* because fees and interest can never constitute a direct benefit.

In contrast, here, the Receiver specifically alleges that a direct benefit was conferred on Wells Fargo from deposits from which it earned interest, service fees, transaction fees, transfer fees, and online banking fees which were taken from funds deposited by the Receivership Entities. (Compl. ¶ 252.) Wells Fargo retained those benefits despite its role in the massive fraud and breach of fiduciary duty by Seeman, Holtz, and Schwartz, rendering the retention of the benefits inequitable. (*Id*. ¶ 253.) These allegations are sufficient to allege a direct benefit.

In *Lesti v. Wells Fargo Bank, N.A.*, for example, the court concluded that victims of Ponzi scheme sufficiently alleged an unjust enrichment claim against Wells Fargo where, like here, the fraudsters held accounts at Wells Fargo and the bank fees were paid using the victims' funds. 960 F. Supp. 2d 1311, 1327 (M.D. Fla. 2013). The court found:

> Here, plaintiffs allege: (1) PCOM conferred a benefit upon Wells Fargo by making wire transfers into and out of the Wells Fargo Accounts, thereby accruing significant transaction/service fees; (2) PCOM paid the fees with investor funds; (3) Wells Fargo knowingly accepted and retained the benefits; and (4) the circumstances are such that it would be inequitable for Wells Fargo to retain the

> benefits. At this stage in the litigation, the Court finds that plaintiffs have adequately pled a plausible cause of action for unjust enrichment.

Id. (internal citation omitted). The *Lesti* court did not find that the transaction and service fees accrued by Wells Fargo were not a direct benefit, or that the indirect receipt of the plaintiff's money was dispositive, and instead found "to hold otherwise would be to undermine the equitable purpose of unjust enrichment claims." *Id.* (quoting *Williams v. Wells Fargo Bank N.A.*, No. 11-21233, 2011 WL 4368980, at *9 (S.D. Fla. Sept. 19, 2011)); *see also MerchACT, LLC v. Ronski*, No. 20-82043-CIV, 2022 WL 3682207, at *8 (S.D. Fla. Jan. 13, 2022) ("[C]ourts in this district have recognized that an unjust enrichment claim may go forward where a benefit is conferred through another, finding that direct contact is not the equivalent of conferring a direct benefit.").

Third, Wells Fargo argues that the unjust enrichment claim should be dismissed because there was adequate consideration for the benefits it received. (Mot. at 20.) This is a red herring. Knowingly participating and enabling the perpetuation of a Ponzi scheme, to the injury of the Plaintiff companies, cannot factually or legally be considered "adequate consideration" because these Plaintiffs never agreed, by contract or otherwise, to have their accounts pilfered by the rogue insiders with Wells Fargo's help.

V. CONCLUSION

For the reasons stated above, the Motion to Dismiss should be DENIED. In the alternative, if the Court is inclined to dismiss any portion or the Complaint, the Receiver respectfully requests the Court grant the Receiver leave to amend his pleading.

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Respectfully submitted,

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