UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 9:24-cv-80722-DPG

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,

Plaintiffs,

vs.

WELLS FARGO BANK, N.A.

Defendant.
_____/

DEFENDANT WELLS FARGO BANK, N.A.'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS COMPLAINT

INTRODUCTION

Wells Fargo's Motion to Dismiss ("Motion")[1] sets forth in detail why each of the Receiver's claims fails as a matter of law. The Receiver's Opposition (DE 35) does nothing to rebut Wells Fargo's arguments. First, the Receiver's standing arguments lack merit because (1) the Receiver fails to distinguish NSI from the fourteen Non-NSI Entities; and (2) the allegations concerning Hodge fail to establish that he was an innocent director, officer, or shareholder. Second, the Receiver fails to allege facts sufficient to show that Wells Fargo had *actual knowledge* of the Ponzi scheme—a fatal flaw for the Receiver's aiding and abetting claims. Third, Wells Fargo did not owe a general duty to the Receivership Entities, defeating the negligence claim. Finally, the Receiver's unjust enrichment claim fails due to the existence of an express contract and the lack of a direct benefit bestowed on Wells Fargo by the Receivership Entities. For these reasons, the Court should grant Wells Fargo's Motion and dismiss the Receiver's complaint in its entirety.

ARGUMENT

I. The Receiver Cannot Establish Standing.

A. The Receiver Fails to Establish Standing as to the 14 Non-NSI Entities.

The Receiver first attempts to establish standing to bring his claims on behalf of the Non-NSI Entities, which had no legitimate business operations, by conflating those entities with NSI, which is alleged to have legitimate business operations.[2] In making this argument, the Receiver effectively concedes that the Non-NSI Entities do not meet the *Isaiah* test for standing. The Complaint alleges that Seeman and Holtz "created the Para Longevity Companies and non-Receivership Para Longevity Companies to solicit funds from investors," Compl. ¶ 51, but instead

[1] Capitalized terms retain the same designations used in Wells Fargo's Motion to Dismiss unless specifically stated otherwise.

[2] Wells Fargo distinguished NSI in its Motion and is not moving to dismiss the Receiver's claims brought on behalf of NSI on standing grounds.

of using the funds for legitimate purposes, the funds "were used to pay back investors in earlier Para Longevity Companies and non-Receivership Para Longevity Companies." Compl. ¶ 12. The Non-NSI Entities "comingled and transferred investor money between the Wells Fargo bank accounts without any legitimate purpose or financial arrangement," Compl. ¶ 11, and the proceeds from the Non-NSI Entities' note sales "diverted to the Centurion Companies . . . lacked any written loan or repayment agreements, and were not repaid." Compl. ¶ 89. Thus, as alleged, the Non-NSI Entities were the conduits created, controlled, and used by Seeman and Holtz to perpetrate the alleged Ponzi scheme and, therefore, do not provide the Receiver with standing.[3]

The Receiver attempts to use NSI's alleged legitimate business operations to bootstrap a standing argument that would allow him to improperly seek damages on behalf of the Non-NSI Entities that, by his own admission, only existed for the purpose of committing fraud. This is understandable, as virtually all the damages the Receiver seeks were allegedly sustained by the Non-NSI Entities, but the Receiver cites no law supporting his argument that legitimate business operations for one entity can be imputed to fourteen other legally-distinct entities that the Receiver admits had no legitimate business operations. If anything, the Receiver's argument undercuts standing: if the Receivership Entities are not legally distinct but were a single, undifferentiated enterprise designed to defraud investors, then *none* of the entities were treated as legitimate

[3] In its Motion, Wells Fargo referred to the OFR Complaint and Consent Motion for their clear showing of the Perpetrators' control over the Receivership Entities. *See* Mot. at 7–8. The Receiver criticizes Wells Fargo for doing so, arguing that the Receiver merely "refers to the OFR's complaint" for background knowledge. Opp'n at 10. Such argument is disingenuous, as the Complaint includes an entire section on "The OFR Complaint" which details the allegations relating to the Ponzi Scheme. Compl. Section III.A. The Receiver also references the OFR litigation elsewhere in its Complaint. *See, e.g.*, Compl. ¶¶ 64, 87, 90. The Receiver cannot pick and choose which relevant allegations can be before this Court. *See, e.g.*, OFR Compl. ¶¶ 1, 26–41; *see also Fuller v. Suntrust Banks, Inc.*, 744 F.3d 685, 695–96 (11th Cir. 2014) (allowing courts to consider authentic documents referenced in the complaint when ruling on a motion to dismiss).

businesses, and the entire case should be dismissed because the Receiver does not have standing to recover damages for the illegitimate enterprise. *See Wiand v. ATC Brokers Ltd.*, 96 F.4th 1303, 1311 (11th Cir. 2024) (holding entities lacked standing under *Isaiah* because, among other things, plaintiff failed to allege that the entities were "separate and distinct from the Ponzi scheme").

B. The Receiver's Allegations Do Not Support His Argument that Hodge Was an Innocent Director, Officer, or Shareholder of the Non-NSI Entities.

The Receiver next leans on Hodge to establish standing for the Non-NSI Entities, arguing that Hodge was an "innocent decision-making insider" and "innocent control person." Opp'n at 7, 8, 9. This argument fails because the complaint does not allege that Hodge was "innocent." Nor does it allege that Hodge was an officer, director, or stockholder in a position to thwart the alleged scheme, as is required by the well-settled precedent.

First, while the Complaint describes the *investors* as "innocent," *see* Compl. ¶¶ 228, 238, no such description is used for Hodge. Instead, the Receiver relies solely on an alleged statement by one of the alleged Perpetrators that "described Hodge as 'the most conservative lawyer I've ever met.'" Compl. ¶ 74. But being a "conservative" lawyer comes nowhere close to the level of innocence required by governing law. The Receiver knows how to plead innocence; he did so with respect to the investors, but deliberately failed to do so with respect to Hodge. The Receiver's effort to side-step the clear requirement of innocence lacks merit.

Second, the law is clear that there must be an innocent *officer, director or shareholder*, not just an "innocent decision-making insider." The Receiver relies on *Freeman v. Dean Witter Reynolds, Inc.*, for the premise that "the receiver must allege the presence of one innocent decision-maker within the company." 865 So. 2d 543, 551 (Fla. 2d DCA 2003). But the court's holding in *Freeman* is more specific—that the torts of the wrongdoers cannot be separated from the corporation itself when there is not "at least one honest member of the board of directors or an

innocent stockholder[.]" *Id.*; *see also Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1306 (11th Cir. 2020) (noting *Freeman's* holding that unless there is an innocent *director or stockholder*, the insiders' fraud is imputed to the corporation). Similarly, while the *Wiand* court observed that "the receiver must allege the presence of innocent decision-makers within the corporation," the court still takes its cue from *Perlman* and *Isaiah*, which both find that there must be an innocent *director or shareholder*. *Wiand*, 96 F. 4th at 1310; *Perlman v. PNC Bank*, 38 F. 4th 899, 901 (11th Cir. 2022).[4] Hodge, as in-house counsel, was neither of these. Moreover, *Wiand* acknowledged that "the allegation of a single innocent shareholder is *necessary* but not *sufficient*" for standing, and "the receiver still lacks standing when the now-receivership estate 'was *controlled* exclusively by persons engaging in its fraudulent scheme.'" *Wiand*, 96 F. 4th at 1311.

Lastly, even if Hodge's role as in-house counsel is facially sufficient to establish prima facie standing, Hodge did not have the power "to thwart the wrongdoing" perpetrated through the Non-NSI Entities, as required to show that the tortfeasors' wrongs are not imputed to the Non-NSI Entities. *Pearson v. Deutsche Bank AG*, 2023 U.S. Dist. LEXIS 49783, at *41 (S.D. Fla. Mar. 23, 2023). "Hodge's primary role was to establish tax efficient structures and security intermediary relationships for the Centurion Companies and ensur[e] general legal compliance in the execution and performance of contracts of the Receivership Entities." Compl. ¶ 73. While the Receiver alleges that "Hodge worked closely with Schwartz and believed that Schwartz was using his prudent business judgment in managing the financial affairs and obligations of the Centurion Companies," Compl. ¶ 76, there is no such allegation concerning any actions Hodge performed

[4] Though the Receiver points to *Martinez v. Spear Safer CPAs & Advisors* as a case where "the entity's general counsel" was identified as an honest individual, Opp'n at 9, the case comes to no such conclusion. 2007 U.S. Dist. LEXIS 110959 (S.D. Fla. June 26, 2007). Rather, the *Martinez* court merely states that "Plaintiff has identified honest individuals within MBC to whom Defendant could have reported the insiders' misconduct."

for the Non-NSI Entities. There is no allegation that Hodge made a single decision for the Non-NSI Entities or acted on their behalf. In fact, the OFR Consent Motion states that Seeman and Schwartz—*not Hodge*—"control the [Receivership Entities]." Consent Mot., at ¶ 5. And the OFR Complaint lists the Receivership Entities controlled by the Perpetrators—*not Hodge*. OFR Compl. ¶¶ 26–41. Thus, the Complaint fails to allege that Hodge exercised control over the Non-NSI Entities enabling him to "thwart the wrongdoing." Accordingly, the Receiver's attempt to establish standing for the Non-NSI Entities through Hodge fails.

II. The Receiver's Arguments Concerning Actual Knowledge Are Inadequate.

A. The Receiver Conflates Wells Fargo's Roles as Corporate Trustee, Securities Intermediary, and Depository Bank, But None of These Roles, Independently or Together, Show Actual Knowledge.

The Receiver first attempts to meet his high burden of pleading that Wells Fargo had actual knowledge of the fraud by claiming that 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." Opp'n at 7. Wells Fargo's role as trustee is irrelevant to the alleged fraud, though, and the Receiver's conclusory allegations do not show that Wells Fargo's role as securities intermediary or depository bank actually did, or even could have, provided it with knowledge of the fraud.

The time period of the alleged fraud does not overlap at all with the period during which Wells Fargo served as trustee. The Receiver specifically alleges that Wells Fargo served as trustee "between December 2007 and August 2012," and formally resigned as trustee in 2013. Compl. ¶ 198; *see also* Opp'n at 13. The Receiver also alleges that the fraud did not start until 2015. *See* Compl. ¶¶ 83, 93. Wells Fargo, in its role as trustee that ended by 2013 at the latest, could not have had knowledge of an alleged fraud that, according to the Receiver, began in 2015.

Nor can Wells Fargo's role as a securities intermediary for the Centurion Companies give rise to actual knowledge of the alleged fraud perpetrated through the Non-NSI Entities. A securities intermediary has a limited role, akin to an escrow agent, in which the bank only acts when a contractual trigger occurs, at which point the bank follows specific instructions given by its customer. Wells Fargo's role as securities intermediary here was, accordingly, very narrow; it processed transactions for the Centurion Companies when contractually required to do so.

Likewise, Wells Fargo's role as depository bank for the Non-NSI Entities, as the Receiver acknowledges, was limited to processing routine banking transactions[5] initiated by authorized users of the bank accounts.[6] Depository banks generally have no knowledge of what is being purchased with funds from its customers' accounts. Wells Fargo, in its role as banker here, would not have known what products—life insurance policies or otherwise—the alleged fraudsters were purchasing using money from their bank accounts.

The Receiver alleges in his complaint that Wells Fargo "knowingly and willfully allowed [the life insurance policies] to be pledged and encumbered," Compl. ¶ 114, but he does not—and cannot—explain how such knowledge would be gained. The Receiver does not allege how Wells Fargo, in its discrete roles as securities intermediary and banker, somehow knew that the alleged fraudsters were using policies pledged to Wells Fargo as security for the investors' notes. *See* Compl. ¶¶ 131, 167. The Receiver does not, and cannot allege, that, in its role as banker, Wells Fargo knew *which* policies Seeman Holtz acquired with funds from deposit accounts. It therefore had no way to know that policies purchased for the benefit of investors were the same policies as were pledged to third-party lenders in connection with the securities intermediary role. What is

[5] *See* infra Section II.B.
[6] *See* infra Section III.

more, the Receiver affirmatively alleges (correctly) that Wells Fargo never discovered the Seeman Holtz fraudulent scheme. *See* Mot. at 11. His aiding and abetting claims must both be dismissed.

B. The Receiver's Argument that Wells Fargo Provided More than Routine Banking Services is Equally Unavailing.

The Receiver next attempts to plead actual knowledge by referencing a smattering of transactions in the Wells Fargo bank accounts that it alleges were atypical. But all of the transactions cited by the Receiver are routine banking transactions for a depository bank. The Receiver first alleges that Wells Fargo "knowingly assisted in the unlawful activities" because it "assisted in at least 5,100 transfers [and] assisted in the transfers of over $50,000,000 through over 400 transfers," "processed wire transfers," "processed more than $378,000,000 in intercompany transfers," and "processed round dollar transactions." Opp'n at 3; Compl. ¶ 138. But this Circuit has held that such transactions are routine banking activity that do not give rise to actual knowledge required for aiding and abetting. *See, e.g., Lawrence v. Bank of Am., N.A.*, 455 F. App'x 904, 907 (11th Cir. 2012) (allegations of "numerous deposits, withdrawals, and wire transfers involving large amounts of money" were insufficient for the inference of actual knowledge); *see also Perlman v. Wells Fargo Bank, N.A.*, 559 F. App'x 988, 993 (11th Cir. 2014) (allegations of "numerous transfers amongst the accounts," "thousands of deposits of even dollar amounts, [and] large cash deposits and withdrawals" did not raise a plausible inference of actual knowledge).

The Receiver next alleges that the Wells Fargo accounts were "overdrawn no less than *1,400 times* during the period those accounts were open which generated overdraft notifications." Compl. ¶ 15 (emphasis in original). But such overdrafts in ordinary deposit accounts cannot give rise to actual knowledge under Florida law. This court, in *Gevaerts v. TD Bank, N.A.*, 56 F. Supp. 3d 1335, 1342 (S.D. Fla. 2014), described the *only* circumstances in which overdrafts can be indicative of actual knowledge of fraud by a depository bank. The court denied the bank's motion

to dismiss after finding that the bank accounts at issue were *attorney trust accounts*, which would never have a non-fraudulent reason to be overdrawn. *Id.* at 1341. That is a far cry from the non-fiduciary deposit accounts at issue here, in which overdrafts, even if common, are not a clear indicator of fraud. Moreover, in *Gevaerts*, an employee of the bank was alleged to have engaged in unusual acts to aid the alleged fraudsters. *Id*. Here, the Receiver does not allege that Wells Fargo took any affirmative steps to assist the fraud other than providing routine banking services.[7]

III. Wells Fargo's Limited Duty To Confirm That Requested Transactions Are Authorized Does Not Give Rise To A Negligence Claim.

The Receiver argues that banks can be liable for negligence because they owe a duty to customers. Opp'n at 16–17. But, as the cases cited by the Receiver recognize, a bank's duty to a customer "extends *only* to confirming that the agent, at the time of the transaction, has the authority to make the transaction." *In re Rollguard Security LLC,* 591 B.R. 895, 925 (S.D. Fla. 2018) (emphasis added). The Receiver does not allege that transactions in the Wells Fargo accounts were *unauthorized*. And the law is clear that a bank does not have a duty to monitor accounts or investigate transactions more generally. *See Biondi v. Branch Banking & Trust Co.*, 2018 U.S. Dist. LEXIS 147363, at *7–8 (S.D. Fla. Aug. 28, 2018).[8] Thus, because Wells Fargo's only non-contractual duty owed to the Non-NSI Entities is not at issue, the Receiver's negligence claim is barred by the independent tort doctrine.[9]

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[7] Similarly egregious allegations were levied in *Pearson v. Deutsche Bank AG*, where it was alleged that the bank's vice president emailed another bank employee "regarding the improper use of custodial accounts," and that bank employee instructed the perpetrators on "how to circumvent Defendants' anti-money laundering and 'Know Your Customer' rules." 2023 U.S. Dist. LEXIS 49783, at *70, *7 (S.D. Fla. Mar. 23, 2023). There are no allegations here that Wells Fargo took affirmative steps to perpetrate the scheme.

[8] Nor does Wells Fargo have a heightened duty "above its ordinary obligations" because, as discussed above, Wells Fargo did not have knowledge of the underlying fraud. Opp'n at 17.

[9] The Receiver criticizes Wells Fargo for not attaching all the account agreement to its Motion but does not dispute that the accounts were governed by the same agreements.

IV. The Receiver's Unjust Enrichment Claim Fails Due to the Existence of an Express Contract and the Lack of a Direct Benefit.

The Receiver argues that despite express contracts governing Wells Fargo's relationship with the Receivership Entities, the Receiver's unjust enrichment claim should survive because it arises "from Wells Fargo's role in the Ponzi scheme, not from the parties' banking agreements." Opp'n at 18. Not so. All of the Complaint's allegations relating to Wells Fargo's alleged support of the scheme are nothing more than routine banking services offered by Wells Fargo to its customers under express agreements. Because the allegations concerning Wells Fargo's conduct relate exclusively to Wells Fargo's performance under express contracts, the Receiver's unjust enrichment claim must fail under established Florida law. *See, e.g.*, *Spears v. SHK Consulting and Dev. Inc.*, 338 F. Supp. 3d 1272, 1278 (M.D. Fla. 2018) (under "well-established doctrine," a plaintiff cannot pursue unjust enrichment when a contract concerns the same matter).

Moreover, the damages the Receiver seeks for his unjust enrichment claim (disgorgement of fees) accrued and were paid pursuant to the express contracts between the Receivership Entities and Wells Fargo. Because Wells Fargo provided the contracted-for services, there was adequate consideration for the fees charged, and the Receiver's unjust enrichment claim fails. *See e.g.*, *Wiand v. Wells Fargo Bank, N.A.*, 86 F. Supp. 3d 1316, 1332 (M.D. Fla. 2015), *aff'd sub nom. Wiand v. Wells Fargo Bank, N.A., Inc.*, 677 F. App'x 573 (11th Cir. 2017) ("In sum, the Bank agreed to provide account services and loans to the [schemers], in exchange for which those entities agreed to pay account service fees and interest. The Receiver's claim for unjust enrichment therefore fails as a matter of law.").

Finally, the Receiver argues that he has alleged a direct benefit sufficient to support his unjust enrichment claim distinguishing *Hakim-Daccach*, which Wells Fargo cited for its holding that earning fees or interest on an account is "not a *direct* benefit as required under Florida law."

2017 U.S. Dist. LEXIS 193058, at *14 (S.D. Fla Nov. 21, 2017). The Receiver argues that *Hakim-Daccach* concerned only whether the plaintiff had alleged that the relevant funds "originated from him or belong[ed] to him." Opp'n at 19. While the Court discussed ownership of the funds, the Court expressly held that "even if an argument could be made that the bank benefits from the funds in [the relevant account] by way of earning fees or interest, this is not a *direct* benefit as required under Florida law." *Hakim-Daccach*, 2017 U.S. Dist. LEXIS 193058, at *14 (emphasis in original). The type of "benefit" that the Receiver claims here is thus not a "direct" benefit sufficient to support its unjust enrichment claim, regardless of the ownership of the funds.

The Receiver next points to *Lesti v. Wells Fargo Bank, N.A.* for the proposition that retention of fees can support an unjust enrichment claim under Florida law. 960 F. Supp. 2d 1311 (M.D. Fla. 2013). While *Lesti* and *Hakim-Daccach* do appear inconsistent on this point, *Hakim-Daccach* is the more reasoned opinion applying Florida law. Indeed, the *Lesti* opinion does not contain any analysis explaining how the retention of contractual fees can constitute a direct benefit to support an unjust enrichment claim. *See id.* at 1327. *Hakim-Daccach* on the other hand, which was decided four years after *Lesti*, contains a lengthy analysis of Florida law before determining that the retention of fees cannot support an unjust enrichment claim. *Hakim-Daccach*, 2017 U.S. Dist. LEXIS 193058, at *14. The Court should follow the precedent of *Hakim-Daccach* and hold that Wells Fargo did not receive a direct benefit from the Receiver in the form of retention of account fees sufficient to support the Receiver's unjust enrichment claim.

CONCLUSION

WHEREFORE, for the above reasons and authorities and those set forth in the motion to dismiss, Wells Fargo requests that the Court grant the motion and dismiss Receiver's complaint in its entirety with prejudice and grant such further relief as this Court deems just and proper.

Dated: August 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 26, 2024, a true copy of the foregoing was filed with the Court of Court using the CM/ECF system, which will send notice of the electronic filing to all counsel of record.

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