UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:24-cv-22142-GAYLES/GOODMAN

FANNY B. MILLSTEIN and
MARTIN KLEINBART,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

DEFENDANT WELLS FARGO BANK, N.A.'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE ON DEFENDANT'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

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Defendant Wells Fargo Bank, N.A. objects to Magistrate Judge Goodman's Report and Recommendation ("Report") recommending that this Court deny Wells Fargo's Motion to Dismiss the Amended Complaint in *Millstein v. Wells Fargo Bank, N.A.*, No. 1:24-cv-22142-DPG (S.D. Fla.) (the "Investor Action" brought by "Plaintiffs"). In support, Wells Fargo incorporates fully as if stated herein the record on the Motion to Dismiss.

INTRODUCTION

The crux of this case is like many others that follow the unearthing of a Ponzi scheme: Plaintiffs, with the benefit of hindsight, attempt to string together various interactions that a financial institution had with alleged fraudsters, wrap them around conclusory allegations of "knowledge," and insist they show that the bank knowingly and substantially assisted the fraud. The attempt should fail.

As the Report correctly observes, the bar for pleading an aiding and abetting claim ***is high***, requiring plaintiffs to plead with particularity both actual knowledge and substantial assistance. To satisfy actual knowledge, plaintiffs must come forward with specific, non-conclusory facts giving rise to a strong inference of *actual knowledge of the specific fraud at issue*. Anything less requires dismissal, and allegations merely suggesting a bank "could" or "should have" known fail as a matter of law, as do mere allegations of "suspicious" or "unusual" conduct only suggestive of "something amiss." Substantial assistance likewise requires more than allegations of passive conduct; plaintiffs must proffer facts sufficient to suggest affirmative assistance on the part of the bank, or a failure to act when required to do so, in furtherance of the scheme.

The Report properly articulates and applies the above standard to the now dismissed claim that Daniel Stermer (the "Receiver") brought on behalf of the entities owned by Marshall Seeman,

Eric Holtz, and Brian Schwartz (collectively, the "Perpetrators"),[1] finding his conclusory allegations that Wells Fargo "must" or "should have" known "inadequate under Florida law." Report at 49. The Report then all but abandons the standard, and reaches a contrary result, when faced with substantially similar allegations from Plaintiffs. There, instead of examining Plaintiffs' Amended Complaint (the "FAC") for *specific facts* that would support the inference of actual knowledge, the Report repeatedly credits and adopts the investors' conclusory claims that Wells Fargo "knew" without probing further, relying upon seven "pinpointed" allegations that the Plaintiffs have characterized, from the superior vantage point of the present, as "suspicious" and "nonroutine" and therefore indicative of actual knowledge. These alleged "suspicious" occurrences—most of which predate or are unrelated to the underlying fraud for which Plaintiffs seek relief—are equally consistent with an absence of knowledge. Consequently, they cannot support the *ipse dixit* and *post hoc* characterization Plaintiffs adopt.

A review of the "pinpointed" allegations exposes this flaw. The FAC's allegations involve three disparate banking services offered by Wells Fargo, including as a corporate trustee, securities intermediary, and depository bank. Wells Fargo performed each of these roles for different time periods, some before and some after the alleged Ponzi scheme commenced. Critically, the "pinpointed" allegations do not reflect actual knowledge of *the Ponzi scheme which Plaintiffs allege occurred*. An example helps illustrate this point. The Report focuses on Wells Fargo's role as a trustee of certain life insurance policies. But Wells Fargo resigned from its trustee role years before the Ponzi scheme is alleged to have occurred. What is more, in its discussion of the trustee role, the Report focuses on knowledge of an alleged fraud committed *not* on the investor Plaintiffs

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[1] *See Stermer v. Wells Fargo Bank, N.A.*, Case No.: 9:24-cv-80722-DPG ("*Stermer*"), which was voluntarily dismissed on February 12, 2025. *Stermer*, ECF Nos. 66-67.

but rather on insurance companies who are not parties to this case or victims for whom the class seeks to represent. Any alleged knowledge of a separate fraud on nonparties, which fraud predated the activities that resulted in losses to the Plaintiffs, cannot suffice to satisfy the knowledge requirement for the aiding and abetting claims here.

Nor is the Report's substantial assistance finding supported. Indeed, the Report derives this finding from alleged actions before the Ponzi scheme occurred, or alternatively, from Wells Fargo's mere inaction as a depository bank. Neither can support an aiding and abetting claim under well-established Florida law. Lastly, the Court should reject the Report's recommendation that the unjust enrichment claim should be permitted to proceed. Specifically, Plaintiffs fail to allege that Wells Fargo was unjustly enriched; instead, the allegations simply establish that Wells Fargo received fees for banking services it provided. Plaintiffs attempt to recover the fees and interest paid by the alleged fraudster entities, for banking services rendered, by advancing a "pass-through conduit" theory. This theory has been roundly rejected by the Eleventh Circuit and so should be rejected here too.

Wells Fargo therefore asks that this Court decline to adopt the Report's recommendation with respect to Wells Fargo's Motion to Dismiss and dismiss Plaintiffs' FAC with prejudice.

BACKGROUND

I. The Relevant Allegations

The Scheme: The litigation stems from a Ponzi scheme orchestrated by the Perpetrators. ECF No. 3 (hereinafter, the "FAC") ¶ 2. The Perpetrators created the Para Longevity Companies ("PLCs") "to solicit funds from investors through the sale of notes, purportedly to fund the purchase and payment of premiums for [Stranger-Originated Life Insurance ("STOLI")] policies." FAC ¶ 33. The Perpetrators, through the PLCs, promised the investors "that the proceeds from the death benefits of STOLIs would be used to fund the interest payments due to those investors

and eventually return their principal." FAC ¶ 4. Starting in 2015, the Perpetrators began using the funds received from investors to "pay existing investors, and further looted significant sums through improper, exorbitant, or fictitious fees and expenses." FAC ¶¶ 5, 139, 144, 157-58, 161.

***Wells Fargo's Limited, Non-Fiduciary Role Providing Depository Services*:** The PLCs maintained twenty-nine depository accounts at Wells Fargo, the first of which was opened in 2011 ("Depository Accounts"). FAC ¶ 143. Plaintiffs claim that Wells Fargo was on notice of the alleged misuse and improper transfer of the Depository Account funds by virtue of its Know Your Customer ("KYC"), AML/BSA, and transaction monitoring policies and practices, and alleged deviations from the Wells Fargo account opening procedures. FAC ¶¶ 78-134. Plaintiffs claim that Wells Fargo breached these procedures when from 2015 onward it: (1) pre-filled certain PLCs' account applications for Seeman's execution; and (2) disregarded unusual or atypical transaction activity conducted with the Depository Accounts, which they claim should have been identified through account monitoring. FAC ¶¶ 137-62.

Importantly, Plaintiffs do not allege: (1) Wells Fargo had knowledge of the Perpetrators' program to solicit investors to purchase notes backed by life insurance policies; (2) Wells Fargo provided any other services to the PLCs, the entities that issued the notes, or otherwise had involvement in the note program; (3) Wells Fargo's KYC, AML/BSA, or monitoring obligations imposed a duty upon Wells Fargo to inquire into the nature or terms of the notes sold by the PLCs; (4) Wells Fargo ever reviewed or discussed the terms of the notes, their offering materials, or their investors with the Perpetrators or the PLCs; or (5) Wells Fargo ever acted in a fiduciary capacity. To the contrary, Plaintiffs admit "Seeman *never provided* [Wells Fargo with] … the sources of revenues of the PLCs," FAC ¶ 138 (emphasis added), and concede that the entities were merely described on account applications as "fund[s] that buy[] life policies." FAC ¶ 139.

***Wells Fargo's Limited Role as Corporate Trustee Predating the Ponzi Scheme*:** From 2009 to 2012, a separate unit of Wells Fargo served as a trustee on Irrevocable Life Insurance Trusts ("ILITs") held for the benefit of the "Centurion Companies," which were "entities . . . created by [the Perpetrators] to own or service" life insurance policies. FAC ¶¶ 3 n. 2, 50. Plaintiffs allege that the ILITs held life insurance policies procured by insured persons and assigned to the Centurion Companies in violation of language continued within the applications for those life insurance policies and the policies constituted STOLIs. FAC ¶¶ 52-53. Notably, Plaintiffs do not cite provisions of any applications or other documents related to the specific insurance policies they alleged were held in an ILIT. Instead, Plaintiffs' allegations of issues with the application language and STOLI violations are based on two "exemplar policies" not alleged to have been held by any of the ILITs for which Wells Fargo served as trustee. FAC ¶¶ 52 n. 6, 53 n. 7, 55, 58. Plaintiffs allege "upon information and belief" that Wells Fargo received life insurance applications and policies that contained similar STOLI provisions but provide no factual support for this key assertion. FAC ¶ 55. In any event, Plaintiffs do not allege that Wells Fargo, in its role as trustee, reviewed policies, policed against purported STOLI violations, or sought to confirm accuracy in the applications for insurance. *Id.* Simply stated, Plaintiffs repeatedly insist that Wells Fargo, as trustee, "knew" the policies were issued in violation of STOLI prohibitions but fail to cite a single relevant policy provision and allege no specific facts demonstrating that Wells Fargo was aware that such prohibitions existed or had been breached.

Plaintiffs nonetheless allege, in purely conclusory fashion, that Wells Fargo was aware of the "STOLI arrangements" through its role as trustee. FAC ¶¶ 52-59. The only facts on which Plaintiffs rely are: (1) an email from Wells Fargo's counsel, acknowledging that a *proposed* structure for an ILIT would be "unusual" insofar as it would afford a level of discretion to the

trustee more typically assumed in the context of a personal trust; and (2) its receipt of documents assigning the insured's interest in the life insurance policies to the Centurion Companies. FAC ¶¶ 50-69. As shown below, these facts do not suffice to demonstrate knowledge.

Plaintiffs also do not allege that the Ponzi scheme that resulted in their losses occurred in the brief 3-year period when Wells Fargo served as ILIT trustee. In addition to the STOLI related allegations, Plaintiffs allege that the policies held by the ILITs were pledged as collateral to, and paid for by, Plaintiffs pursuant to the PLC notes that Wells Fargo was not privy to. FAC ¶¶ 5, 60-61. Plaintiffs claim that Wells Fargo had knowledge of Plaintiffs' "first lien interest" in the policies because the Centurion Companies "received their money from [Plaintiffs] who regularly sent their checks to Wells Fargo to be deposited into the Wells Fargo Centurion Companies' bank accounts with the fund identified on the memo line for deposit." FAC ¶ 60. Plaintiffs do not explain how Wells Fargo, as ILIT trustee, would have become apprised of these checks, which were deposited at a later date with a separate business unit at Wells Fargo.

Plaintiffs allege that, despite Wells Fargo's *supposed* awareness of Plaintiffs' first lien interest in the policies, Wells Fargo assisted the Centurion Companies in assigning the policies to a group of lenders ("Lenders"), to the detriment of Plaintiffs. Plaintiffs claim that Wells Fargo achieved this by "backdating" and executing trustee resignation forms that were submitted to insurance companies. FAC ¶¶ 61-67. While Plaintiffs repeatedly claim that the resignation forms were "backdated," the actual text of the contemporaneous email states that the resignation was simply *made effective* as of an earlier date. FAC ¶ 66. The allegations do not explain how the resignation provided Wells Fargo with any knowledge that Plaintiffs had a first lien interest in the policies, much less knowledge of the Ponzi scheme, or how the use of an earlier effective date in any way furthered a fraudulent scheme that is alleged to have begun years later. In any event,

Plaintiffs concede that insurers then initiated inquiries into whether the assignments necessitating resignation constituted "possible STOLI violations," that such concerns were then resolved without issue, and that the policies were ultimately assigned to the Lenders with the consent of insurers. FAC ¶¶ 68-69.

***Wells Fargo's Role as a Securities Intermediary*:** Years after resigning as trustee, Wells Fargo assumed the role of securities intermediary over certain life insurance policies pursuant to Securities Account Control and Custodian Agreements ("Securities Account Agreements") entered between Wells Fargo, the Centurion Companies, and the Lenders. FAC ¶¶ 70-71. Under the terms of the Securities Account Agreements, Wells Fargo represented and warranted to Lenders that it had "no actual knowledge of any claim to," or "security interest in," the assigned policies. FAC ¶¶ 70-72. Despite these unequivocal representations, Plaintiffs allege that Wells Fargo must have been aware that Plaintiffs had priority security interests in the assigned policies as a result of its prior work as a trustee over the ILITs. FAC ¶¶ 70-72. Plaintiffs offer no allegations about who at Wells Fargo learned this, when it was learned, or how it was conveyed.

The Security Account Agreements also imposed a duty upon Wells Fargo to make premium payments on the policies on the Centurion Companies' behalf. FAC ¶ 73. Plaintiffs allege Wells Fargo became aware that Plaintiffs' security interests were in jeopardy when it received recurrent grace notices in connection with late premium payments. FAC ¶ 75. Plaintiffs do not allege the policies ever lapsed and admit Wells Fargo did not have knowledge of "how the Centurion Companies could fund the policy premiums." FAC ¶ 76. More importantly, Plaintiffs do not allege, nor could they, that Wells Fargo had any responsibility in any of its roles to assess the Centurion Companies' ability to pay policy premiums; it simply was not Wells Fargo's job.

II. The Report's Recommendations

A. The Aiding and Abetting Recommendations

The Report recommends that this Court dismiss the Receiver's aiding and abetting claims for failure to adequately plead actual knowledge, finding the Receiver's rote and conclusory allegations that Wells Fargo "should have known" of the fraud "inadequate under Florida law." Report at 48-51. It then departs from this conclusion and recommends that this Court deny dismissal of the FAC, even though the claims rest on substantially similar allegations. *Compare* Report at 24 ("For the most part, the gist of the allegations asserted by the Receiver largely mirror the Retirees' allegations. . ."), *with* 55 (concluding that there are allegations made by Plaintiffs that "are less conclusory, more detailed and focused" than the Receiver's allegations). In reaching this result, the Report "pinpoints" seven allegations in the FAC:

(1) ***Statement Regarding Unusual ILIT Structure.*** The FAC alleges Wells Fargo's outside counsel stated that the ILIT structure *proposed by the Centurion Companies* in connection with Wells Fargo's trustee services was "unlike any ILIT" for which Wells Fargo had previously served as Trustee. FAC ¶ 54;

(2) ***Purpose of ILIT Structure.*** The FAC alleges that the reason the proposed ILIT structure was "so unusual" was to hide STOLI violations, including prohibitions on: (1) the assignment of the policies to the Centurion Companies; (2) the payment of policy premiums to the Centurion Companies; and (3) the sale of the policies to, or payment for the policies by, the Centurion Companies. FAC ¶¶ 52-53 (citing "exemplar STOLI policies" for which Wells Fargo served as a securities intermediary);

(3) ***Receipt of Grace Notices.*** The FAC alleges Wells Fargo, in its capacity as securities intermediary,[2] notified the Centurion Companies that its repeated failure to pay policy premiums was leading to "consistent grace notices." FAC ¶ 75;

(4) ***Superseding Lien Interest.*** The FAC alleges Wells Fargo, in its capacity as securities intermediary, represented and warranted to the Lenders that there were

[2] The Report erroneously states that Wells Fargo received such grace notices "as Trustee." Report at 57. The FAC in fact alleges that the grace notices were received by Wells Fargo in its capacity as securities intermediary for life insurance policies subject to the Securities Account Agreements. FAC ¶ 75.

no liens on the policies, and that Wells Fargo had "no actual knowledge of any claim that any person" had an interest in the policies despite knowing that these statements were all false. FAC ¶¶ 71-75, 154-55;

(5) ***Agreement to "Backdate" Form.*** The FAC alleges that Wells Fargo, at the direction of the Centurion Companies and in its capacity as trustee of the ILITs, facilitated the assignment of the life insurance policies to the Lenders, by agreeing to "backdate" trustee resignation forms as "effective as of August 10, 2012," despite this being a departure from its normal processes, and by then addressing insurer's concerns about potential STOLI violations arising from proposed assignments. FAC ¶¶ 67-69;

(6) ***Violation of KYC Policy.*** The FAC alleges Wells Fargo, as a depository bank, violated its own KYC policies by sending pre-filled applications, opening accounts without required paperwork, and providing blank forms for signatures despite acknowledging that such practices could lead to a "compliance violation." FAC ¶¶ 146, 148;

(7) ***Creation of Inaccurate Client Profiles.*** The FAC alleges Wells Fargo failed to follow basic due diligence practices and comply with applicable KYC regulations by creating incorrect and incomplete client profiles. FAC ¶¶ 151.

Report at 56-58. From these seven allegations, the Magistrate Judge concludes that Plaintiffs "plausibly allege[d] that Wells Fargo had actual knowledge of the wrongdoing." Report at 59, 62.

The Report then draws upon the same allegations to reach its finding of substantial assistance, reasoning that the allegations reflect more than a "mere failure to act" and instead suggest that, relying on its "actual knowledge," Wells Fargo "helped the Scheme Operators further the scheme." *Id.* at 59-62. The Report therefore recommends that this Court deny Wells Fargo's motion to dismiss Plaintiffs' aiding and abetting claims. *Id.* at 62.

B. The Unjust Enrichment Recommendations

The Report further recommends that this Court deny dismissal of Plaintiffs' unjust enrichment claim, reasoning that: (1) specific depository contracts governing the PLCs and Wells Fargo's relationship have not been established; and (2) Wells Fargo received a direct, and unjust

benefit, from fees earned from the PLCs' deposits. Report at 69-73. In arriving at this conclusion, the Magistrate Judge relies upon the below allegations:

(1) Wells Fargo provided banking services to the PLCs through various bank accounts used to carry out the Ponzi scheme. FAC ¶ 201;

(2) The funds held in the PLCs' bank accounts conferred benefits upon Wells Fargo in the form of deposits from which Wells Fargo generated income. Wells Fargo knowingly and voluntarily accepted, and retained, the deposits and those benefits. FAC ¶ 202;

(3) Because Wells Fargo aided and abetted the fraud and breaches of fiduciary duties by the Scheme Operators and the entities they controlled, it would be inequitable for Wells Fargo to retain the benefits it generated from PLCs' bank accounts, which otherwise contained those funds that are due and owing to Plaintiffs and the members of the Class. FAC ¶ 203.

Report at 23-24. The Report does not address whether these allegations have been alleged with sufficient particularity under Rule 9(b). *See* Report 69-73.

LEGAL STANDARD

I. The Pleading Standard on a Rule 12(b)(6) Motion to Dismiss[3]

A complaint must be dismissed if it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient. *Id.*

Although a court must accept all well-pleaded factual allegations as true, it need not accept "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts." *Bodie-Jernigan v. Sch. Bd. of Broward Cnty., Fla.*, 2024 WL 3806880, at *2 (S.D. Fla. July 30, 2024) (quoting *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1262 (11th Cir. 2004)).

[3] Objections to a magistrate judge's report are afforded *de novo* review. *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

"[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement,'" and dismissal is required "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S at 678–82; *see also Peng v. Mastroianni*, 2020 WL 11564646, at *6 (S.D. Fla. Oct. 26, 2020) (dismissing aiding and abetting claims, as plaintiff did not "present any facts from which a claim for aiding and abetting can be plausibly supported. Conclusory statements are entitled to little weight and will not prevent dismissal.").

II. <u>The High Bar for Pleading Actual Knowledge in an Aiding and Abetting Claim</u>

Claims that banks aided and abetted customer fraud turn on an examination of whether the plaintiff adequately plead that the bank *actually knew* of the underlying fraud. It is well-settled that banks do "not owe to noncustomers a duty to protect them from fraud." Report at 42 (citing *Herrera v. TD Bank, N.A.*, 682 F. Supp. 3d 1271, 1275 (S.D. Fla. 2023) (quoting *Chang v. JP Morgan Chase Bank*, 845 F.3d 1087, 1094 (11th Cir. 2017))). Rather, banks have "the right to assume that individuals who have legal authority to handle an entity's accounts do not misuse the entity's funds." *Id.* (quoting *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1205 (11th Cir. 2003)). The law thus imposes "significant hurdles" on plaintiffs who seek to circumvent these limitations by bringing an aiding and abetting claim. *Id.* Plaintiffs must allege: "(1) an underlying violation on the part of the primary wrongdoer; (2) actual knowledge of the underlying violation by the alleged aider and abettor; and (3) the rendering of substantial assistance in committing the wrongdoing by the alleged aider and abettor." *Id.* at 42-43.

As to knowledge, plaintiffs must plead actual knowledge of the *specific fraud at issue*. *Rosenfeld Gallery, LLC v. Trust Bank*, 719 F. Supp. 3d 1270, 1277 (S.D. Fla. Feb. 28, 2024) ("[T]o establish that a bank substantially assisted a fraudulent scheme to steal trust funds, knowledge of the underlying fraud is the crucial element."); *Wiand v. Wells Fargo Bank, N.A.*, 938 F. Supp. 2d

1238, 1244 (M.D. Fla. 2013) ("[T]he circumstantial evidence must demonstrate that the aider-and-abettor actually knew of the underlying wrongs committed."). "Conclusory statement[s] that a defendant actually knew" will not suffice. *Platinum Estates, Inc. v. TD Bank, N.A.*, 2012 WL 760791, at *3 (S.D. Fla. Mar. 8, 2012). Rather, plaintiffs must provide "*specific facts that give rise to a strong inference of actual knowledge regarding the underlying fraud*." Report at 43, 45 (emphasis added). Allegations suggesting only that a "defendant should have known that something was amiss" are insufficient as a matter of law. *Id.* at 43.

Under this exacting standard, it is not enough to merely allege that a bank's action, or inaction, was atypical, irregular, negligent, or even improper. *Perlman v. Wells Fargo Bank, N.A.*, 559 F. App'x 988, 993 (11th Cir. 2014) (allegations of "atypical transactions and procedural oddities" were not enough to give rise to inference of actual knowledge); *Otto Candies, LLC v. Citigroup, Inc.*, 2023 WL 6418135, at *6-7 (S.D. Fla. Aug. 25, 2023) (declining to infer actual knowledge from Citigroup's termination of an employee "believed [to be] directly involved in the fraud" since such termination may have stemmed from "lax supervision, circumvention of [the company's] controls, violations of [its] Code of Conduct, or otherwise"). Nor may actual knowledge be inferred from the Bank's disregard of so-called "obvious red flags" that do not, in and of themselves, serve as evidence of the fraud. *Id.*, at *7 (plaintiffs did not sufficiently allege that Citigroup had actual knowledge by merely suggesting that Citigroup "disregarded red flags or atypical activities or transactions").

ARGUMENT

I. Plaintiffs' Aiding and Abetting Claims Are Not Adequately Alleged

Wells Fargo respectfully submits that the Report errs, and thus should not be adopted, in its analysis of Plaintiffs' aiding and abetting claims. Specifically, the Report erroneously applies

a constructive knowledge standard, inferring knowledge from allegations of "suspicious," "unusual," or "atypical" conduct, which are insufficient under well-settled law. It then deems any failure to act upon knowledge to be evidence of "affirmative assistance."

A review of the allegations demonstrates that they do *not* push Plaintiffs' theory—that Wells Fargo actually knew of, and substantially assisted, a Ponzi scheme—past the line between "possible" and "plausible." Instead, these allegations—drawn from three distinct and non-overlapping functions Wells Fargo served—demonstrate, *at most*, that the Perpetrators made unusual requests that deviated from industry "best practices" from time-to-time over the course of a multi-year relationship. But whether it be the Centurion Companies' efforts to structure an ILIT as a personal trust, tardiness in paying premiums on insurance policies, or occasional deviations from standard account-opening policies, Plaintiffs have alleged nothing more than what the Receiver alleged in his now-dismissed complaint: namely, that with the benefit of hindsight, Wells Fargo *should have* been suspicious, made inquiry, and somehow forced the Perpetrators to disclose their scheme. That is far different from alleging facts indicative of *actual knowledge* of an underlying Ponzi scheme and *concrete acts* in furtherance of such scheme.

A. The "Pinpointed" Allegations Do Not Give Rise to Actual Knowledge of the Underlying Ponzi Scheme

As outlined above, the Report "pinpoints" seven allegations concerning three different Wells Fargo roles: (1) ILIT trustee (where Plaintiffs make allegations regarding the ILIT's "unusual structure," purpose, and Wells Fargo's resignation as trustee – allegations 1, 2, and 5); (2) securities intermediary (where Plaintiffs make allegations concerning receipt of grace notices and purported knowledge of the Class's superseding lien interest – allegations 3 and 4); and (3) depository (where the allegations concern alleged KYC policy violations and inaccurate client profiles – allegations 6 and 7).

1. The ILIT Allegations Do Not Show Actual Knowledge

The Report ascribes knowledge to Wells Fargo based on its 3-year tenure as trustee for ILITs created by the Centurion Companies (allegations 1, 2, and 5). Even though Wells Fargo's trustee role ended long before Plaintiffs allege they were defrauded, they still contend the role is relevant because Wells Fargo objected to an "unusual" structure for a proposed ILIT, the insurance policies violated prohibitions against STOLI, and Wells Fargo resigned from its trustee role using a form Plaintiffs characterize as "backdated." Report at 56-58. These allegations do not suffice to show actual knowledge or substantial assistance.

i. The Ponzi Scheme Occurred After the ILIT Services

Critically, the time period of the alleged Ponzi scheme does not overlap with the period when Wells Fargo served as ILIT trustee, making these allegations irrelevant to the aiding and abetting claims. *See Tuckman v. Wells Fargo Bank, N.A.*, 2020 WL 13413838, at *5 (S.D. Fla. Mar. 25, 2020) (dismissing aiding and abetting claims where "Wells Fargo's knowledge and involvement predate[d] Plaintiff's claims and d[id] not involve him"). Plaintiffs allege that Wells Fargo served as trustee "[a]s early as 2009" and resigned in 2012. FAC ¶¶ 50, 62. While Plaintiffs now opportunistically contend that the scheme started in 2009, according to the FAC, the first *factual* allegations of Ponzi scheme activity occurred in 2015. *Millstein*, ECF No. 30 at 2; FAC ¶¶ 139, 144, 148, 157-58, 161.

It is thus irrelevant that Wells Fargo objected to the structure the Centurion Companies proposed for the ILITs (particularly since plaintiffs do not allege the proposed structure was ever actually used) or that the insurance policies at issue allegedly violated rules against STOLI (which, as shown below, is not adequately pled). *See* Report at 57; *Tuckman*, 2020 WL 13413838, at *5; *Berdeaux v. OneCoin Ltd.*, 561 F. Supp. 3d 379, 412 (S.D.N.Y. 2021) (plaintiffs failed to plead facts the bank had actual knowledge of underlying fraud "at the time it allegedly facilitated

transfers of proceeds of the fraud"). The Court should therefore give no credence to any allegations arising from Wells Fargo's role as ILIT trustee.

ii. The Purported STOLI Violations Are Not Pled and Irrelevant

The alleged ILIT transactions are also not probative of knowledge insofar as the alleged underlying STOLI violations are not only inadequately pled but are an irrelevant red herring.

As an initial matter, Plaintiffs have not actually pled that the specific policies held by Wells Fargo as trustee violated any state law or insurer prohibitions on STOLI. Rather, they have asked this Court to infer STOLI violations from two exemplar policies that were *not* alleged to have been held in an at issue ILIT. FAC ¶¶ 52-59 (referring to the Blythe and Conte policies for language in an application, and applying that language to the Yakovakis policy held in the ILIT, without any allegations the policies are the same). This "unwarranted deduction[] of fact" is not appropriate. *Meyer v. Colavita USA Inc.*, 2011 WL 13216980, at *5 (S.D. Fla. Sept. 13, 2021). Nor can an alleged STOLI policy be presumed where, as here, Plaintiffs have not alleged how and when the policies were originated, what law governs each applicable policy, or whether a court has ever found that the policy constitutes a STOLI violation. There is no blanket prohibition on an insured selling her life insurance policy to a third party, an investor purchasing a policy, or participation in an investment in a policy. Courts routinely acknowledge that STOLI allegations present fact intensive inquiries with varying outcomes dependent on law and jurisdiction. *See PHL Variable Ins. Co. v. Bank of Utah*, 780 F.3d 863, 867 (8th Cir. 2015) ("The fact patterns in many [STOLI] cases [are] similar. . ., but each decision necessarily turn[s] on the governing statutes and judicial precedents of a particular State."); *cf. Kramer v. Phoenix Life Ins. Co.*, 15 N.Y. 3d 539, 552-53 (2010) (deeming alleged "STOLI" policy valid under specific provisions of New York Insurance

Law). The Court should not accept Plaintiffs' *ipse dixit* assertion, much less their purely conclusory representation that Wells Fargo was aware of alleged unproven STOLI violations.

Plaintiffs have failed to allege *facts* showing Wells Fargo had knowledge of the purported STOLI violations. After asking the Court to *assume* the policies for which Wells Fargo served as trustee contained prohibitions on STOLI, Plaintiffs *assume* Wells Fargo "would have been aware" of those (assumed) prohibitions because it held copies of policies and applications and further "would have known" the Centurion Companies were violating the prohibitions. *See* FAC ¶ 55. But these are not facts, they are simply suppositions. There are no allegations that Wells Fargo was required, in its role as corporate trustee, to review and verify information contained in individual policies and applications, much less that Wells Fargo in fact did so and became aware of the assumed STOLI violations. Nor is it alleged that Wells Fargo as corporate trustee had a duty to investigate, or did investigate, the actions of the Centurion Companies to assess their conformity to specific policy provisions or application representations. But from these ephemeral suggestions, Plaintiffs assert "know[ledge] that the Centurion Companies were violating the insurance companies' STOLI policies." *Id.* ¶ 56.

Moreover, the alleged STOLI violations do not demonstrate actual knowledge of the Ponzi scheme. *At most*, these allegations suggest that Wells Fargo knew of violations of rules put in place by non-party insurers. But it is not enough to allege that an aider and abettor had knowledge of "a wrong;" rather, a plaintiff must allege actual knowledge of *the* predicate tort forming the basis for plaintiff's claim. *Wang v. Revere Cap. Mgmt., LLC*, 2023 WL 2198570, at *5 (S.D. Fla. Feb. 15, 2023) (to plead actual knowledge, plaintiff must adequately allege the existence of a fraud and actual knowledge of that underlying fraud), *report and recommendation adopted,* 2023 WL 2183382 (S.D. Fla. Feb. 22, 2023); *Tuckman*, 2020 WL 13413838, at *5 (dismissing aiding and

abetting claim where plaintiff failed to allege actual knowledge of the tort committed upon him rather than other non-party victims). Plaintiffs do not allege that they themselves were victims of the purported STOLI violations. To the contrary, Plaintiffs allege they knowingly invested in the life settlement policies issued to third party insureds, the core attribute of STOLI. FAC ¶¶ 33-40, 52. At base, even if Plaintiffs' allegations are true, they show that Wells Fargo had knowledge of a different wrong – this is insufficient.

iii. The "Unusual" ILIT Allegations Do Not Show Knowledge

Last, the Report makes much of the "unusual" and "nonroutine" nature of the ILIT transactions, including the "unusual" design of the proposed ILIT structure and Wells Fargo's supposed "backdating" of a resignation form, but neither allegation gives rise to an inference of actual knowledge when placed in context. *See* FAC ¶¶ 50-69; Report at 56-57.[4]

First, Plaintiffs flagrantly distort the nature of Wells Fargo's concern with the proposed ILIT structure. They claim that the structure was unusual in that it "was designed by the Scheme Operators to prevent insurance companies" from discovering STOLI violations. FAC ¶ 54. Plaintiffs have no allegations to support this statement or to then attribute knowledge of the Centurion Companies' motive to Wells Fargo. As is clear from the alleged quote, Wells Fargo was concerned that the proposed structure contemplated it performing duties (particularly fiduciary ones) that were outside the scope of a corporate trustee role, *not* that the structure was designed to facilitate STOLI violations. FAC ¶ 51. The Report erred in accepting Plaintiffs' manufactured motive while ignoring the substantive allegations in the FAC. What is more, Plaintiffs do not and cannot allege that the "unusual" ILIT structure was ultimately implemented. *See id.* ¶¶ 50-69. At

[4] The Report claims that "Wells Fargo created an ILIT structure which its outside counsel described as 'unlike any ILIT…Wells Fargo agreed to serve as Trustee under,'" Report at 56, but there is no allegation to that effect in Plaintiffs' FAC. FAC ¶¶ 50-69.

bottom, the allegation that the Centurion Companies *proposed* an "unusual" trust structure does not support the conclusion that Wells Fargo had knowledge of the Ponzi scheme.

Second, Plaintiffs misleadingly portray the ILIT resignation forms as "backdated," when in fact, the resignation was merely "made effective" as of an earlier date per the agreement of the parties, a common business practice. *Id.* ¶¶ 68-69; *see e.g.*, *Farani v. File*, 2022 WL 884851, at *6 (S.D. Miss. Mar. 24, 2022) (deeming "backdated" insurance policy, which was "made effective" as of an earlier date, enforceable since parties knowingly bargained for that term), *aff'd*, 2023 WL 2092771 (5th Cir. Aug. 9, 2023). And by Plaintiffs' own allegations, after the resignation forms were submitted to insurers, concerns about a STOLI violation were raised and resolved without issue, thus undercutting the notion that proposed assignments were in any way improper or violated STOLI rules. *Id.* ¶¶ 68-69.

At bottom, Plaintiffs fail to explain how the "unusual" proposed structure or use of a "backdated" resignation form somehow should have caused Wells Fargo to conclude a massive yet to begin Ponzi scheme was occurring as opposed to merely reflecting routine business operations. *See id.*; *Rusty115 Corp. v. Bank of Am., N.A.*, 2023 WL 6064518, at *6-8 (S.D. Fla. Sep. 18, 2023) (deeming mere allegations that defendant "should have identified anomalies concerning the Trust Account" insufficient to support inference of actual knowledge of Ponzi Scheme). The Report thus misplaces focus on misstated ILIT allegations that do not align with the relevant time period and omit allegations necessary to demonstrate actual knowledge.

2. The Securities Intermediary Allegations Do Not Show Actual Knowledge

The Report's actual knowledge finding next relies on allegations pertaining to Wells Fargo's role as a securities intermediary (allegations 3 and 4); namely, that it "knew" that: (1) representations made to lenders regarding the policies' unencumbered status "were all false;" and

(2) the Perpetrators did not properly use the Plaintiffs' funds to pay policy premiums because Wells Fargo received grace notices indicating non-payment of premiums. Report at 57-58. These allegations assume Wells Fargo knew about the Ponzi scheme and then work backward, ascribing fraudulent intent to conduct that would otherwise be consistent with a securities intermediary performing its routine contractual duties. These boot-strapping allegations thus fall short.

First, the fact that Wells Fargo represented that the policies were unencumbered merely reinforces that Wells Fargo had no basis to suspect that the pledged policies served as collateral for commitments made to investors. *See Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) ("[C]ourts may infer from the factual allegations in the complaint obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." (citing *Iqbal*, 556 U.S. at 682)). Plaintiffs fail to allege that Wells Fargo's representations were knowingly false and that it was aware that policies had already been pledged. FAC ¶¶ 70-72 (alleging, in conclusory fashion, that "Wells Fargo knew [the] representation was false"). While Plaintiffs allege Wells Fargo served historically as trustee for ILIT trusts that held individual policies, they do not allege, nor could they, that Wells Fargo served as trustee or in any other role for the PLC securitization program that ultimately was at the heart of the fraud and was entirely distinct from the ILITs for which Wells Fargo served as trustee. Indeed, Plaintiffs do not so much as suggest that Wells Fargo had knowledge of the investments or the funds that held the policies, much less that Wells Fargo knew which policies had previously been pledged as collateral. The Report nonetheless adopts Plaintiffs' conclusory allegations that Wells Fargo knew third party investors had security interests in the insurance policies. Report at 57 ("These statements were all false because Wells Fargo knew the Class had a first priority lien interest in the STOLIs . . ."). Neither the Report, nor Plaintiffs' allegations, ever explain or allege

how or *when* Wells Fargo came to be apprised of Plaintiffs' first priority lien interest in the insurance policies and, indeed, there are no facts alleged that would permit the inference. *See* FAC ¶ 60 (alleging only that Plaintiffs sent checks to be deposited in Centurion Company *deposit accounts* with the "fund identified on the memo line for deposit").[5] These unsupported conclusions are therefore inadequate as a matter of law. *See Otto Candies*, 2023 WL 6418135, at *7 (deeming allegation that Citigroup approved false documentation insufficient to support actual knowledge finding since plaintiffs did not allege *how* the bank knew the documents to be false).

Second, the alleged grace notices received in Wells Fargo's capacity as securities intermediary did not plainly signal misuse of funds obtained through a separate and remote Ponzi scheme. A grace notice simply tells a policy owner when a policy will lapse *if* the insurance company does not receive payment. *Giles v. Transamerica Life Ins. Co.*, 2023 WL 113859, at *2 (M.D. Fla. Jan. 5, 2023). The receipt of a grace notice does not support the notion that life insurance policy premiums were not ultimately paid, nor do Plaintiffs even allege as much.

3. The Depository Allegations Do Not Show Actual Knowledge

Finally, the Report premises its actual knowledge finding on allegations as to Wells Fargo's KYC obligations as a depository bank, specifically, alleged policy violations in connection with the "pre-fill[ing] applications, opening accounts without required paperwork, and providing blank forms for signatures" and the creation of inaccurate client profiles. Report at 58. But it is not enough to allege that a bank "failed to adhere to an appropriate standard of care or to follow relevant policies, procedures, or regulations." Report at 45-46. That is all that these allegations do. Indeed, courts, including this Court, routinely recognize that alleged compliance shortfalls or irregularities do not give rise to a strong inference of actual knowledge of an underlying fraud.

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[5] Notably, Plaintiffs do not allege that investors recorded a security interest in the policies that Wells Fargo could have discovered through a lien search or that such a search was conducted.

Perlman, 559 F. App'x at 993 (allegations of "atypical transactions and procedural oddities" were not enough to give rise to inference of actual knowledge). Given the broad scope and long tenure of Wells Fargo's relationship with the PLC entities, it is unsurprising that there may have been occasional deviations from account opening policies and procedures by prefilling information that was already known to a banker. It is well-recognized that such conduct hardly rises to the level of evidence of awareness of fraud. *Isaiah v. JPMorgan Chase Bank, N.A.*, 2017 WL 5514370, at *3 (S.D. Fla. Nov. 15, 2017) ("Allegations that a bank failed to adhere to an appropriate standard of care or to follow relevant policies, procedures, or regulations are … insufficient.") (citing *Groom v. Bank of Am.*, 2012 WL 50250, at *1 (M.D. Fla. Jan. 9, 2012)).

B. At Bottom, Plaintiffs' FAC Rests on Assertions Wells Fargo Must Have Known of the Ponzi Scheme

Ultimately, whether reviewed individually or in concert, the allegations in Plaintiffs' FAC fail allege that Wells Fargo actually knew of the Ponzi scheme. Instead, like many other cases arising in the aftermath of a fraud, the FAC here attempts to assert aiding-and-aiding abetting liability on Wells Fargo through a hodgepodge of allegations, drawn from different functions at the bank, involving different people at different times, that (with the benefit of hindsight), show Wells Fargo *could* have known of wrongdoing. But hindsight-oriented allegations of atypical activity do not amount to an allegation of actual contemporaneous knowledge of the underlying fraud at issue. *See Perlman*, 559 F. App'x at 993 ("[M]erely alleging that a bank should have known of a Ponzi scheme based solely on a series of purportedly atypical transactions is not sufficient to survive *Twombly*." (citing *Lawrence v. Bank of Am., N.A.,* 455 Fed. Appx. 904, 907 (11th Cir. 2012)); *B-Smith Enters., LP v. Bank of Am., N.A.*, 2021 WL 8316764, at *2 (S.D. Fla. Dec. 27, 2021) ("Plaintiff's argument that Defendant had actual knowledge of [] breach of fiduciary duty because it honored the 'nonroutine' transactions is incorrect as a matter of law"),

aff'd, 2023 WL 2034419 (11th Cir. Feb. 16, 2023); *see also Isaiah,* 2017 WL 5514370, at *4 ("[E]ven if JPMC detected suspicious activity on the accounts as alleged, this only demonstrates knowledge of the symptoms of the Ponzi scheme, not JPMC's actual knowledge of the scheme itself."). The crucial connective tissue missing here is specific factual allegations *demonstrating* how these discrete "unusual" or "atypical" transactions or events necessarily gave rise to actual knowledge of the Ponzi scheme; the claims should therefore be dismissed. *Rusty 115 Corp. v. Bank of America, N.A.*, 2024 WL 1619697, at *9-14 (S.D. Fla. Apr. 15, 2024) ("The aiding and abetting causes of action fail because the Proposed Amended Complaint does not allege facts…that plausibly imply that BOA knew that Wright Bros. was committing the underlying torts.").

C. Plaintiffs Have Not Adequately Alleged Substantial Assistance

The Report's substantial assistance recommendation falters for much of the same reason as its knowledge analysis. *See* Report at 59-62. Drawing on the "pinpointed" allegations deemed sufficient to show actual knowledge, the Report concludes that those same events demonstrate that Wells Fargo "helped" further the Ponzi scheme, specifically pointing to Wells Fargo's resignation as ILIT trustee and later representation to the Lenders, as securities intermediary, that there were no liens on the policies. *See* Report at 60. As demonstrated above, however, the ILIT trustee role predated the fraud by many years and is therefore irrelevant,[6] and Plaintiffs have failed to plead any allegations demonstrating Wells Fargo knew its lien representation was false. Plaintiffs'

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[6] Of course, Wells Fargo's resignation from the trustee role – *i.e.*, withdrawing from an active role – is even further removed from the fraud of which Plaintiffs complain. But, as a baseline, an alleged aider and abettor cannot "help further a fraud" that does not yet exist. *See Davis v. Chapon*, 2015 WL 10791962, at *3 (M.D. Fla. Aug. 11, 2015) ("In order to state a claim for aiding and abetting common law fraud, a plaintiff must allege the existence of an underlying fraud."). Thus, alleged events and occurrences that predated the Ponzi scheme, including Wells Fargo's resignation as trustee and representations and warranties made in the Securities Account Agreement entered in 2014 fail from the very start. Report at 60.

allegations merely show that at most Wells Fargo, in all of its roles, served as a "passive conduit" for the fraud; this is insufficient as a matter of law. Report at 47.

"Substantial assistance occurs when a defendant affirmatively assists, helps conceal, or fails to act when required to do so, thereby enabling the [fraud] to occur." *FW Distribut., LLC v. J.P. Morgan Chase Bank, N.A.*, 2024 WL 4665255, at *10 (S.D. Fla. Nov. 4, 2024) (quoting *Pearson v. Deutsche Bank AG*, 2022 WL 951316, at *8 (S.D. Fla. Mar. 30, 2022)). "Mere inaction will constitute substantial assistance only if the defendant *owes a fiduciary duty directly to the plaintiff*." *In re Bal Harbour Quarzo, LLC*, 623 B.R. 903, 920 (Bankr. S.D. Fla. 2020) (emphasis added).

Here, the pinpointed allegations are inadequate to demonstrate "affirmative assistance" because they do not establish actions in furtherance of, or for the purposes of, concealing the Ponzi scheme itself. "Substantial assistance requires an affirmative step on the part of the aider-and-abettor that is a 'substantial factor' in causing the breach of duty." Report at 46-47 (quoting *In re Palm Beach Finance Partners, L.P.*, 517 B.R. 310, 348-49 (Bankr. S.D. Fla. 2013)). But per Plaintiffs' own allegations, the alleged Ponzi scheme committed *by the PLCs* (not the Centurion Companies) involved using Note funds to "pay existing investors" and the "pilfering" of such funds by the Perpetrators. FAC ¶¶ 5, 8, 139, 144, 157-58, 161. The PLCs exclusively used depository accounts to engage in this conduct. *Id.* ¶ 143 (alleging only that the PLCs used depository accounts to carry out the Ponzi scheme). Yet, the Report points to services provided by Wells Fargo *not* for the benefit of the PLCs that committed the fraud at issue, but rather for a third party to the scheme (the Centurion Companies), as the "clearcut examples" that support a substantial assistance finding. Facts related to Wells Fargo's resignation as trustee from the ILITs and representations made as securities intermediary for policies pledged to third-party lenders had

nothing to do with the fraud Plaintiffs complain of and were not a "substantial factor" in the PLCs' misuse of Plaintiffs' funds. *See FW Distribut.*, 2024 WL 4665255, at *12 ("Even assuming the Chase credit cards prevented the [] scheme from fizzling out quicker than it did, there are no allegations that the cards were a necessary or even an important component of the [] scheme such that the Court could [infer] . . . *substantial* assistance.").

Finally, while Plaintiffs seek to hold Wells Fargo liable for its inaction as the bank where the PLCs held funds, Plaintiffs cannot do so because no duty was alleged or owed. *Id.*, at *13; *Meridian Trust Co. v. Batista,* 2018 WL 4693533, at *5-6 (S.D. Fla. Sept. 26, 2018) ("[A] bank does not owe a duty of care to non-customers regarding the opening or maintenance of its accounts."). Alleged ministerial services, including pre-filling forms and preparing customer profiles, do not constitute "affirmative assistance." *Lawrence v. Bank of Am., N.A.*, 2010 WL 3467501, at *5 (M.D. Fla. Aug. 30, 2010) ("[T]hese allegations simply support that BoA provided [fraudsters] with basic banking services available to BoA customers" and not "affirmative assistance"), *aff'd*, 455 F. App'x 904, 906 (11th Cir. 2012). Thus, Wells Fargo's provision of basic ministerial services to the PLCs does not suffice to show substantial assistance. *FW Distrib.*, 2024 WL 4665255, at *12 ("[W]ithout a fiduciary obligation on the part of Defendants, Plaintiff is unable to rely on the Defendants' inaction to show substantial assistance.").

Just as the pinpointed allegations fail to demonstrate actual knowledge, so too they fail to establish substantial assistance. This Court therefore should dismiss Plaintiffs' aiding and abetting claims.

II. <u>The Unjust Enrichment Claims Are Not Tenable Under Rule 9(b) and Florida Law</u>

The Report errs in one other respect, its treatment of Plaintiffs' unjust enrichment claims. *See* Report at 69-73. Plaintiffs seek disgorgement of interest and fees collected by Wells Fargo from deposits made by the PLCs (not Plaintiffs). Plaintiffs do not allege with any specificity *how,*

or when, Wells Fargo came in possession of its funds. The fees and interest were in fact paid by the PLCs in exchange for banking services rendered, pursuant to deposit account agreements that Plaintiffs were not a party to. The Report deems such allegations adequate because: (1) the involvement of a third party (who passes on the benefit) does not preclude an unjust enrichment claim; and (2) specific contracts governing the PLC's depository accounts, or adequate consideration, "ha[ve] not been established." Report at 69-73. However, the claim fails as a matter of law because: (1) Plaintiffs have not alleged with particularity that a direct benefit was conferred on Wells Fargo; and (2) the fees that Wells Fargo earned on the accounts were bargained for in a transaction that had adequate consideration.

To state an unjust enrichment claim, Plaintiffs must plead facts showing that (1) they conferred a direct benefit on Wells Fargo; (2) Wells Fargo had knowledge of the benefit; (3) Wells Fargo accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for Wells Fargo to retain the benefit without paying value for it. *Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 714 F.3d 1234, 1237 (11th Cir. 2013). In addition, when an unjust enrichment claim "'sound[s] in fraud,'" it is "subject to Rule 9(b)'s requirements." *Omnipol, A.S. v. Multinational Defense Services LLC*, 32 F. 4th 1298, 1307 n.11 (11th Cir. 2022) (quoting *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1127 (11th Cir. 2019)). Here, Plaintiffs fail to plead with the requisite particularity that a direct benefit was conferred unjustly.

A. Plaintiffs' Unjust Enrichment Claims Are Inadequately Pled

The Eleventh Circuit has long held that an unjust enrichment claim cannot stand where, as here, a plaintiff seeks to recover a benefit conferred by another party pursuant to a separate agreement to which the plaintiff is not a party. *See Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1337 (11th Cir. 2012) (affirming dismissal of unjust enrichment claim seeking to recover fees paid pursuant to contract that plaintiff was not a party to). The Report circumvents this rule by recasting

the account interest and fees as benefits conferred by Plaintiffs through an intermediary (the PLCs). *See* Report at 71. This "pass-through conduit" theory runs afoul of Florida law.

"Florida law requires that the plaintiff 'directly confer' a benefit in order to state a claim for unjust enrichment[.]" *City of Miami v. Eli Lilly & Co.*, 2022 WL 198028, at *9 (S.D. Fla. Jan. 21, 2022) (quoting *Kopel v. Kopel*, 229 So. 3d 812, 818 (Fla. 2017)). But "a party is not directly benefited by the plaintiff when the only benefit it received was for performing a service for a different party under a different, albeit arguably related, contract." *Coffey v. WCW & Air, Inc.*, 2018 WL 4154256, at *8-10 (N.D. Fla. Aug. 30, 2018) (citing *Virgilio*, 680 F.3d at 1337); *cf. Hamilton v. Suntrust Mortg. Inc.,* 6 F. Supp. 3d 1312, 1317 (S.D. Fla. 2014) (distinguishing from *Virgilio* and finding a direct benefit conferred where plaintiffs did not "seek to recover any money that [the intermediary] may have paid to the . . . [d]efendants for other services under entirely separate contracts.").

Virgilio is instructive on this point: there, a home purchaser pursued an unjust enrichment claim against a developer, seeking disgorgement of marketing service fees paid for by the seller. 680 F.3d at 1337. Such fees were paid, not pursuant to the purchase agreement between seller and purchaser, but under a separate services agreement between the seller and developer. *Id.* In seeking to avoid dismissal, the home purchaser argued that the seller served as a "merely a pass-through conduit," directly conferring monies paid by the purchaser at closing upon the developer. *Id.* The court rejected this characterization, holding that the seller, not the purchaser, conferred the benefit on the developer, notwithstanding "the [alleged] manner of . . . payment." *Id.*

Here, too, Plaintiffs seek to recover benefits conferred under a separate contract (*i.e.*, deposit agreements), by a separate party (the PLCs), for a separate service (the banking services). FAC ¶¶ 201-03. As in *Virgilio*, Plaintiffs argue, and the Report accepted, that a direct benefit was

conferred since "funds deposited into the PLCs paid Wells Fargo's fees." *Millstein*, ECF No. 30 at 19-20; Report at 71. But per *Virgilio*, the "manner of payment" does not give rise to a direct benefit.[7] *Virgilio*, 680 F.3d at 1337 ("We are unconvinced that the manner of [the third-party intermediary's] payment supports Plaintiffs' [claim]."). Rather, Plaintiffs must allege that they paid monies to the PLCs, and then onto Wells Fargo, for the same unjust benefit conferred *on the PLCs* (i.e., payment for the illusory notes). *See Virgilio*, 680 F.3d at 1337 (concluding that plaintiff would have an actionable unjust enrichment claim if developer received "partial payment for the houses [plaintiff] bought: instead of money for marketing services provided to seller"); *see also Williams*, 2011 WL 4368980, at *8-11 (finding direct benefit conferred where defendant received kickback payments, through intermediary, from premiums for force-placed insurance that plaintiff alleged were unjust). Here, Plaintiffs admit the PLCs paid the funds to cover a different benefit (*i.e.*, banking services and not the notes paid by Plaintiffs). FAC ¶ 202 ("The funds held in the PLCs' bank accounts conferred benefits upon Wells Fargo in the form of deposits from which Wells Fargo generated income, including but not limited to interest, transfer fees, service fees, transaction fees and online banking fees."). This admission is fatal. *See Virgilio*, 680 F.3d at 1337.

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[7] The Magistrate Judge points to authority that he contends support his alternative reading of *Virgilio*, but such cases involve the direct conferral of a benefit through an intermediary and are therefore readily distinguishable from *Virgilio* and the instant facts. Report at 70-71; *Williams v. Wells Fargo Bank N.A.*, 2011 WL 4368980, at *8-11 (S.D. Fla. Sep. 19, 2011) (direct benefit conferred where defendant received portion of alleged unjust premium payment from intermediary); *MerchACT, LLC v. Ronski*, 2022 WL 3682207, at *8 (S.D. Fla. Jan. 13, 2022) ("The SAC alleges that [the intermediary] conferred a benefit to [defendant] in the form of commission splits, and that [defendant] retained the benefit of such commission splits knowing that all commissions were to be split 50-50."); *Aceto Corp. v. TherapeuticsMD, Inc.*, 953 F. Supp. 2d 1269, 1275 (S.D. Fla. 2013) (direct benefit conferred where defendant unjustly obtained, and engaged in unauthorized use of, products subject to exclusive licensing agreement held by licensee plaintiff through third-party); *Romano v. Motorola, Inc.*, 2007 WL 4199781, at *2 (S.D. Fla. Nov. 26, 2007) (direct benefit conferred where unjust payment for defective phone was conducted through intermediary).

Moreover, even assuming that Plaintiffs' payment to the PLCs could be construed as a benefit conferred directly on Wells Fargo (they cannot), Plaintiffs have not alleged the claim with the requisite particularity under Rule 9(b). *See Omnipol*, 32 F.4th at 1308 (affirming dismissal of unjust enrichment claim where plaintiff failed to allege "key details" surrounding the alleged conferral of a benefit). Plaintiffs have not identified any specific transfers that were made by Plaintiffs, through the PLCs, to Wells Fargo. *See* FAC ¶¶ 201-03 (alleging only that bank accounts were used to carry out the Ponzi scheme and that a portion of funds held in those accounts were used to pay account interest and fees). The Report declines to address this pleading deficiency. *See* Report at 69-73. This, too, dooms Plaintiffs' unjust enrichment claim and warrants dismissal. *See Omnipol*, 32 F.4th at 1308 (holding plaintiffs failed to plead unjust enrichment by generally alleging that "some portion" of funds were transferred to "unidentified co-conspirators at an unknown time in an unknown way, and that those unnamed co-conspirators then, at an unknown time and in an unknown way, transferred the funds"); *see also Hakim-Daccach v. Knauf Int'l GmbH*, 2017 WL 5634629, at *4 (S.D. Fla. Nov. 22, 2017) ("Since [plaintiff] doesn't even know who deposited the funds, it would seem impossible for him [to] allege that he conferred the funds himself, even indirectly.").

B. Contractual Banking Fees Cannot Give Rise to an Unjust Enrichment Claim

Finally, the Report's recommendation on the unjust enrichment claim should be rejected because a defendant cannot be unjustly enriched by fees earned for services rendered. *See* Report at 73. Plaintiffs fail to state an unjust enrichment claim because their allegations establish that Wells Fargo, in fact, provided contracted-for services for which the fees at issue were paid. *See* FAC ¶¶ 46-47, 77, 135, 156, 201. "It is settled law in Florida that when a defendant has given adequate consideration to someone for the benefit conferred, a claim of unjust enrichment fails." *Wiand v. Wells Fargo Bank, N.A.*, 86 F. Supp. 3d 1316, 1332 (M.D. Fla. 2015), *aff'd*, 677 F. App'x

573 (11th Cir. 2017); *Biondi v. Branch Banking & Trust Co.*, 2018 WL 6566027, at *7 (S.D. Fla. Aug. 28, 2018) ("Florida law is clear that where there is a consideration or a contract for the benefit, there can be no claim for unjust enrichment."). It thus follows that earning fees or interest on an account is "not a *direct* benefit as required under Florida law." *Johnson v. Catamaran Health Sols., LLC*, 687 F. App'x 825, 830 (11th Cir. 2017).

And that is all that Plaintiffs allege. Plaintiffs allege that Wells Fargo "provided banking services" to the PLCs, which paid Wells Fargo account service fees and interest in return. FAC ¶¶ 201, 251. This establishes that Wells Fargo received the challenged account services fees in a bargained-for exchange. *See Wiand*, 86 F. Supp. 3d at 1332 ("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"). In other words, the PLCs received precisely the banking services for which they paid fees to Wells Fargo. The Report provides no support for its conclusion to the contrary. *See* Report at 73; *Wiand*, 86 F. Supp. 3d at 1332 (deeming banking services used in furtherance of Ponzi scheme to be adequate consideration sufficient to defeat unjust enrichment claim). Thus, the unjust enrichment claim fails. *American Safety Ins. Service, Inc. v. Griggs*, 959 So. 2d 322, 331-32 (Fla. 5th DCA 2007) ("When a defendant has given adequate consideration to someone for the benefit conferred, a claim of unjust enrichment fails.").

CONCLUSION

WHEREFORE, for the above reasons and authorities, Wells Fargo requests that this Court reject the Magistrate Judge's Report and Recommendation and dismiss Plaintiffs' FAC, in entirety, with prejudice and without leave to amend.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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