IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 1:24-cv-22142-DPG

FANNY B. MILLSTEIN and
MARTIN KLEINBART,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

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

Wells Fargo's Objections to the Magistrate Judge's Report and Recommendations ("Objections" or "Obj.") recycles arguments from its Motion to Dismiss and misrepresents the well-pled allegations in Plaintiff's First Amended Complaint ("FAC"). Those well-pled allegations demonstrate Wells Fargo aided and abetted a Ponzi scheme resulting in over $300 million in losses to the Class. Much like it did in its Motion to Dismiss and in the hearing before Chief Magistrate Judge Jonathan Goodman, Wells Fargo contends that this Court should disregard the multitude of specific and explicit allegations in the FAC which detail its actual knowledge and culpability in substantially assisting the Ponzi scheme. Judge Goodman rejected Wells Fargo's attempted misdirection and reached the correct result. This Court should adopt his Report and Recommendations.

The FAC alleges that Wells Fargo knew of, and substantially assisted, the Scheme through its roles as trustee, securities intermediary, and depository bank. Wells Fargo mischaracterized the FAC's allegations before Judge Goodman, claiming that the Plaintiffs' theory of liability was "based solely on allegations of atypical transactions and red flags." D.E. 25 at 1, 8-15. Not so. Yet, when the Class pointed to specific allegations demonstrating Wells Fargo knowingly assisted the perpetrators in designing atypical irrevocable life insurance trusts and deceiving lenders into providing $40 million in loans to further the Scheme, Wells Fargo misleadingly claimed that its role as trustee was irrelevant because "the first factual allegations of Ponzi scheme activity occurred in 2015" and that Plaintiffs "fail to adequately allege that [it] gained actual knowledge of the…fraud in its role as a securities intermediary." D.E. 41 at 3-4. Judge Goodman saw through this deliberate mischaracterization of the FAC.

As Judge Goodman correctly concluded in his 74-page Report and Recommendations, the FAC adequately alleges Wells Fargo possessed actual knowledge of, and substantially assisted, the

Scheme through three key roles. First, as trustee for the irrevocable life insurance trusts, Wells Fargo agreed to an atypical trust structure that allowed the perpetrators to circumvent industry prohibitions and secure the policies central to the Scheme. Wells Fargo then resigned as trustee, backdating the resignation forms to enable the perpetrators to obtain loans that kept the Scheme going for many more years, and intervened to push through insurer approvals necessary to secure those loans. Second, as securities intermediary for the policies at issue, Wells Fargo affirmatively misrepresented to lenders that there were no liens or security interests in the policies and routinely received grace notices indicating non-payment of the policy premiums, demonstrating misuse of funds by Seeman Holtz. Third, as depository bank for the entities involved in the Scheme, Wells Fargo enabled the Scheme by knowingly violating its own anti-money laundering policies in acknowledged infractions of its compliance procedures and knowing creation of inaccurate client profiles for the customer entities used to carry out the Scheme.

Unable to deceive Judge Goodman, Wells Fargo now attempts to mislead this Court. It selectively parses the facts Judge Goodman relied on, even though they must be considered as a whole. It rehashes the exact same arguments it made before Judge Goodman, which is improper in and of itself. And, Wells Fargo continues its brazen misdirection. Wells Fargo argues that the Scheme started in 2015, after its trustee services, Obj. at 14-15, despite the FAC's express allegations that the Scheme began in 2009, coinciding with Wells Fargo's role as trustee of the irrevocable life insurance trusts. FAC ¶¶1 & n.1, 44, 50, 54-56. Wells Fargo claims that the STOLI violations are inadequately pled and irrelevant because the insurers are not the victims, Obj. at 15-17, when the FAC specifically alleges those violations were the initial proof of Wells Fargo's knowledge of the Scheme. FAC ¶¶4, 33-35, 39-42, 52-53, 58-59. Wells Fargo asserts the atypical trust structure does not show knowledge and dismisses the backdating of resignation forms as a

"common business practice." Obj. at 17-18. However, the FAC alleges the trust structures were specifically designed to conceal STOLI violations and that Wells Fargo backdated the forms to prevent the Scheme from collapsing and to limit its own liability. FAC ¶¶61-69. Wells Fargo denies any knowledge that the policies were encumbered when it misrepresented this to lenders, Obj. at 19-20, despite the FAC's detailing exactly how Wells Fargo knew they were encumbered from its role as trustee. FAC ¶¶45-46. Wells Fargo argues that the grace notices did not signal misuse of funds, Obj. at 20, even though the FAC includes admissions from Wells Fargo's officers that the notices were "not normal." FAC ¶75. And Wells Fargo maintains that its compliance violations do not prove knowledge, Obj. at 20-21, despite the FAC's alleging these violations allowed the perpetrators to maintain the accounts necessary for the Scheme, with transactions that revealed the fraud. FAC ¶¶135, 137-38, 141-42, 149-150, 153-155, 156-162. Wells Fargo wants to challenge the facts alleged, but at this stage they must be accepted as true and construed in the light most favorable to Plaintiffs. Wells Fargo's Objections should be overruled, and the Report and Recommendations should be adopted.

I. RELEVANT FACTUAL BACKGROUND

The Scheme: The Scheme, which operated from 2009 through 2021, was perpetrated by Marshal Seeman, Eric Holtz, and Brian Schwartz (the "Scheme Operators") through a multitude of entities controlled by them, including National Senior Insurance ("NSI"), the Para Longevity Companies ("PLCs"), and the Centurion Companies, using Wells Fargo as their primary bank, trustee, and securities intermediary. FAC ¶¶1 & n.1, 3, 44, 50, 54-56. It involved the sale of promissory notes ("Notes"), offered by the PLCs and secured by life insurance policies issued to third parties insureds ("STOLIs"), with promises that the proceeds of those policies would be used to fund interest payments due to the investor Class members and eventually to return their

principal. *Id.* ¶4. Instead, the Scheme Operators used new Class member money to pay earlier investors and pilfered the funds. *Id.* ¶4. Throughout, Wells Fargo had both an insider's and top-level view of the Scheme. *Id.* ¶¶6-8. The hallmarks of a Ponzi were obvious and known to it, and the bank played a critical role in maintaining the Scheme. *Id.* ¶¶32-162.

Wells Fargo's Role as Trustee: The STOLIs that purportedly secured the Notes were the foundation of the Scheme. *Id.* ¶¶4, 33-35, 39-42, 52-53, 58-59. However, STOLIs are generally prohibited in the life insurance industry. *Id.* ¶¶52-53. The Scheme Operators needed a mechanism to prevent the insurers from discovering the STOLI violations. *Id.* ¶¶52, 54, 57. Therefore, they proposed to Wells Fargo that it serve as trustee ("Trustee") for certain irrevocable life insurance trusts ("ILITs") that allowed the Centurion Companies to actively conceal from the insurance companies: (1) the source of funds used to purchase the STOLIs; (2) that the Scheme Operators' entities were the actual STOLI beneficiaries; and (3) that the insureds were paid to purchase the STOLIs. *Id.* ¶¶51, 54, 57. Wells Fargo knew the ILIT structure was atypical and, as its outside counsel remarked, "unlike any ILIT… Wells Fargo agreed to serve as Trustee under." *Id.* ¶51.[1] Wells Fargo nevertheless agreed to serve as Trustee to build a banking relationship with the Centurion Companies and assist them with the Scheme. *Id.* ¶¶50, 54. Without Wells Fargo's assistance, the Scheme Operators would not have been able to purchase the STOLIs, which served as the foundation of the Scheme. *Id.* ¶68.

In its role as Trustee, Wells Fargo also received the life settlement applications and policies and knew the Centurion Companies were violating the STOLI provisions. *Id.* ¶¶55-59. Wells Fargo also knew the STOLIs were purchased for the benefit of the Class. *Id.* ¶60. From the

[1] Quotes in the FAC and set forth herein, including those attributed to Wells Fargo personnel, are from documents in the Class' possession.

account opening materials provided by Seeman, Wells Fargo knew the Centurion Companies operated as a "fund that buys life policies." *Id.* Wells Fargo received money from the Class, who sent checks to it for deposit in the Scheme Operators' accounts with the PLC fund noted on the memo line, and knew the Centurion Companies used those funds to, among other things, purchase and pay the premiums on the STOLIs. *Id.*

As Trustee, Wells Fargo knew the Scheme was in financial trouble. In April 2012, the Scheme Operators told Wells Fargo it had to resign as Trustee and assign the STOLIs to new lenders ("Lenders") because the underlying "loans [were] in default" and facing "formal foreclosure." *Id.* ¶¶62, 64. Despite knowing the STOLIs collateralized the Notes, Wells Fargo misrepresented to the new lenders that the STOLIs were unencumbered and helped the Scheme Operators by resigning as Trustee to facilitate the assignments to the Lenders. *Id.* ¶¶65, 71-72. Wells Fargo proceeded without the usual resignation process and agreed to backdate the resignation forms to limit its own liability. *Id.* ¶¶61, 67. And, when the insurance companies initially rejected the assignments due to potential STOLI violations, Wells Fargo intervened to push through the approvals necessary to secure the new loans from the Lenders to perpetuate the Scheme. *Id.* ¶¶61-62, 68-69.

Wells Fargo's Role as Securities Intermediary: After resigning as Trustee, Wells Fargo transitioned to the lucrative role of Securities Intermediary. *Id.* ¶61. As Securities Intermediary, Wells Fargo played a critical role in the transfer of the STOLIs to the Lenders. *Id.* ¶¶61, 70-73. In the Securities Account Agreements ("SAAs"), Wells Fargo stated there were no "liens" on the STOLIs, the Lenders had a "first priority lien on and security interests in" them, and it had "no actual knowledge of any claim to, or security interest in the" STOLIs. *Id.* ¶¶71, 72. These statements were false. Wells Fargo knew the Class had a security interest in the STOLIs because

they collateralized the Notes. *Id.* ¶¶60-61, 71-72. These misrepresentations allowed the Scheme Operators to secure loans from the Lenders to prevent the Scheme from collapsing. *Id.* ¶¶61-62.

Wells Fargo also knew the Scheme was in financial trouble based on its receipt of grace notices during its tenure as Securities Intermediary. *Id.* ¶75. And Wells Fargo knew that the Scheme Operators' failure to pay the premiums on the STOLIs and the resulting "consistent grace notices" was "not normal for accounts [it] administer[ed]" and reflected the Scheme Operators mismanagement of the funds. *Id.*

Wells Fargo as Depository Bank: The Scheme Operators maintained accounts at Wells Fargo that enabled the Scheme, and their account transactions revealed it. *Id.* ¶¶135, 137-38, 141-42, 149-150, 153-155, 156-162. Wells Fargo knowingly violated its own Know Your Customer ("KYC") policies by sending pre-filled applications, opening accounts without required paperwork, and providing blank forms for signatures. *Id.* ¶¶146, 148. It acknowledged these compliance violations, with one employee stating, "I need…to avoid a compliance violation." *Id.* ¶146. It also ignored inconsistent information about the PLCs' beneficial owners and business purpose provided by Seeman, thereby enabling thousands of questionable transactions involving the PLCs' accounts, including transfers to the Centurion Companies. *Id.* ¶¶138, 140-41. Wells Fargo knew there were no legitimate contracts or goods/services to justify these transfers. *Id.* ¶141-42. Ignoring due diligence procedures and KYC regulations, Wells Fargo created inaccurate client profiles with knowledge of the entities' true profiles, thereby facilitating the Scheme. *Id.* ¶¶144-51.

Wells Fargo also knowingly allowed obvious Ponzi-like activity in the Scheme Operators' accounts, such as the use of new investor funds to pay earlier ones. *Id.* ¶¶156-158. This type of activity was routine in the PLCs' Wells Fargo accounts, despite their stated purpose of purchasing

STOLIs and paying their premiums. *Id.* ¶159. It also knowingly ignored a host of "red flag" activity within the Scheme Operators accounts listed as indicia of money laundering in the FFIEC BSA/AML rules, despite having procedures in place to identify them. *Id.* ¶¶83-84, 87-134, 161. These KYC rules required Wells Fargo to identify and take appropriate action upon noticing a series of "red flags," and identify "lending activities" and "nondeposit account services" as high-risk for money laundering, necessitating heightened due diligence, including determining account purposes, ascertaining sources of funds and wealth, identifying account control persons and signatories, scrutinizing account holders' business operations, and obtaining explanations for account activity. *Id.* ¶¶77-86.

II. LEGAL STANDARDS

A. The Standard of Review for Objections to a Magistrate Judge's Report and Recommendations.

Under Fed. R. Civ. P. 72(c), this Court must conduct a *de novo* review of any portion of the magistrate judge's disposition to which a proper objection is made. To trigger *de novo* review, objections must "be sufficiently specific and not a general objection to the report." *Macort v. Prem, Inc.*, 208 Fed. Appx. 781, 784 (11th Cir. 2006). As the Eleventh Circuit has held, "a party that wishes to preserve its objection must…pinpoint the specific findings that the party disagrees with." *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009).

Failure to timely file specific objections results in waiver of the right to *de novo* review; in such instances, the district court reviews the magistrate judge's report for clear error. *Fernandez v. CMA CGM S.A.*, 683 F. Supp. 3d 1309, 1319 (S.D. Fla. 2023). The courts in this district have concluded that submitting objections that merely rehash arguments previously presented is improper. *See Macort*, 208 Fed. Appx. at 784. For example, in *Estrada v. FTS USA, LLC*, 2018 WL 1811907, at *1 (S.D. Fla. Mar. 16, 2018), this Court held that objections that "simply rehash

or reiterate the original briefs to the magistrate judge" need only be reviewed for clear error. Similarly, in *Alvarado v. Kijakazi*, 2023 WL 2548424, at *6, (S.D. Fla. Mar. 17, 2023), this Court held an objection "that does nothing more than state a disagreement" or "summarizes what has been presented before" is not a valid objection.

Therefore, to trigger *de novo* review, objections must be sufficiently specific, timely filed, and not merely a reiteration of prior arguments. Otherwise, this Court must review a magistrate judge's report for clear error.

B. The Standard of Review on a Rule 12(b)(6) Motion to Dismiss.

On a motion to dismiss, "the Court must accept the allegations…as true and construe them in a light most favorable to the plaintiffs." *Gevaerts v. TD Bank, N.A.*, 56 F. Supp. 3d 1335, 1337 (S.D. Fla. 2014). "All that is required is that there are 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* Moreover, Fed. R. Civ. P. 9(b) requires only that "circumstances constituting fraud" be pled with particularity; it "does not require Plaintiffs to plead with particularity the other elements of aiding and abetting fraud…." *Hobbs v. BH Cars, Inc.*, 2004 WL 1242838, at *4 n.9 (S.D. Fla. June 4, 2004); *accord Cabot E. Broward 2 LLC v. Cabot*, 2016 WL 8739579, at *4 (S.D. Fla. Oct. 25, 2016). Rather, "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 claims for aiding and abetting those torts. *Hobbs*, 2004 WL 1242838, at *4 n.9; *Cabot*, 2016 WL 8739579, at *4. Regardless, Plaintiffs' allegations satisfy either standard.

III. ARGUMENT

A. Wells Fargo's Objections are Insufficient to Trigger *De Novo* Review.

The first fourteen (14) pages of Wells Fargo's Objections consist of background and legal standards. None of this triggers *de novo* review. *Macort*, 208 Fed. Appx. 784–85. Beyond that,

Wells Fargo simply rehashes the arguments it made before Judge Goodman, effectively recycling its prior positions that he found unavailing. The following table illustrates this redundancy:

Wells Fargo's Argument	**Argument Presented in Wells Fargo's Motion to Dismiss**	**Rehash of the Same Argument in Wells Fargo's Objections**
The Scheme occurred after Wells Fargo's trustee services.	D.E. 41 at 3-4 ("The time period of the alleged Ponzi scheme does not overlap with the period when Wells Fargo served as ILIT trustee…")	Obj. at 14-15 ("[T]he time period of the alleged Ponzi scheme does not overlap with the period when Wells Fargo served as ILIT trustee…")
The STOLI violations are inadequately pled and irrelevant.	D.E. 41 at 4-5 (Plaintiffs "do not allege Wells Fargo, as ILIT trustee, was required to or did track the policies…")	Obj. at 15-17 ("Nor is it alleged that Wells Fargo as corporate trustee had a duty to [or did] investigate…specific policy provisions…")
The atypical trust structure does not show Wells Fargo's knowledge.	D.E. 41 at 3 ("It is thus irrelevant…that the ILIT structure was 'atypical'…"	Obj. at 17-18 ("The 'Unusual' ILIT Allegations Do Not Show Knowledge…").
There are no allegations Wells Fargo knew the policies were encumbered when it represented otherwise.	D.E. 41 at 8 ("[T]here are no factual allegations showing that Wells Fargo could discern whether there was overlap between the policies that were the subject of the representation it made…and the polices involved in the ILITs…")	Obj. at 19-20 ("Plaintiffs fail to allege that Wells Fargo[]…was aware that polices had been pledged…the fraud…was entirely distinct from the ILITs…")
The numerous grace notices for the life insurance policies that Wells Fargo received did not plainly signal the misuse of funds.	D.E. 41 at 7 ("grace notices…are not clear indications of fraud…")	Obj. at 20 ("grace notices…did not plainly signal misuse of funds…").
The allegations of Wells Fargo's compliance violations are insufficient to establish knowledge of the Scheme.	D.E. 25 at 10-12 ("over this lengthy period of time involving many accounts . . . [the] activity . . . would hardly be unusual or suspicious . . . contravention of reasonable care, due diligence, and industry standards does not give rise to an inference of actual knowledge"	Obj. at 20-21 ("it is not enough to allege that a bank failed to adhere to an appropriate standard of care…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"

Wells Fargo's effort to recycle its prior arguments from its Motion to Dismiss now in its Objections

is insufficient to trigger *de novo* review. *Estrada*, 2018 WL 1811907, at *1 (objections that "simply rehash or reiterate the original briefs" only trigger "review…for clear error").

That Wells Fargo may have expanded on these arguments in its Objections similarly does not trigger *de novo* review because, regardless of how embellished, that "does nothing more than state a disagreement" with Judge Goodman's conclusions. *Alvarado*, 2023 WL 2548424, at *6 (stating disagreement is not an "objection" triggering *de novo* review). And regardless, to the extent Wells Fargo now expands its arguments, "parties are not to be afforded a 'second bite at the apple' when they file objections to a R & R." *Estrada*, 2018 WL 1811907, at *1; *see also Fernandez*, 683 F. Supp. 3d at 1319 (even where objections do trigger *de novo* review, "the district court retains discretion to not reach [an] argument…that…was not first presented to the magistrate judge").

Even under *de novo* review, Judge Goodman's conclusions withstand scrutiny. The FAC presents well-pled allegations detailing Wells Fargo's involvement in and knowledge of the Scheme. Therefore, Wells Fargo's objections should be overruled, and the Report and Recommendations adopted in full.

B. The Pinpointed Allegations Establish Wells Fargo's Actual Knowledge of the Scheme.

"[A]ctual knowledge of another's wrongful conduct is nearly universally found based upon circumstantial evidence." *Cabot*, 2016 WL 8740484, at *4; *Amegy Bank Nat. Ass'n v. Deutsche Bank Alex.Brown*, 619 Fed.Appx. 923, 931 (11th Cir. 2015) ("It is difficult to imagine what…would constitute direct evidence of…knowledge of wrongful conduct."); *Chang v. JPMorgan Chase Bank, N.A.*, 845 F.3d 1087, 1097 (11th Cir. 2017) ("Chang's allegations support an inference that Padgett-Perdomo knew that Gordon was misappropriating money."); *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1009 (11th Cir. 1985) (knowledge "must usually

be inferred"). "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 grant of motion to dismiss claims for aiding and abetting). In order to determine whether a defendant's actual knowledge of an underlying scheme can be inferred from circumstantial evidence, the plaintiff's allegations must be viewed as a whole. *Todd Benjamin Int'l, Ltd. v. Grant Thornton Int'l, Ltd.*, 682 F. Supp. 3d 1112, 1137 (S.D. Fla. 2023) (denying motion to dismiss claims for aiding and abetting where plaintiffs "specific allegations as a whole" established "a strong inference of actual knowledge").

Wells Fargo nevertheless attempts to dissect the seven (7) categories of allegations that Judge Goodman properly concluded, taken as a whole, plausibly allege that Wells Fargo had actual knowledge of the Scheme. Obj. at 13-21. These attempts fail. But whether viewed individually or collectively, the allegations Judge Goodman relied upon easily support an inference of actual knowledge under the circumstances of this case. *Woods*, 765 F.2d at 1009 ("the surrounding circumstances…[are] critical"); *Perlman v. Bank of Am., N.A.*, 2011 WL 13108060, at *6 (S.D. Fla. Dec. 22, 2011) ("the exact level [of knowledge] necessary for liability remains flexible and must be decided on a case-by-case basis").

1. *Plaintiffs' ILIT Allegations Demonstrate Wells Fargo's Actual Knowledge.*

i. The ILIT services were integral to the Scheme and occurred at its inception.

The FAC alleges that both the Scheme and Wells Fargo's appointment as trustee over the ILITs commenced simultaneously in 2009. FAC ¶¶1 & n.1, 44, 50, 54-56; (Cf. ¶44) ("From at least 2009 until the OFR uncovered the Scheme in 2021, Wells Fargo provided substantial assistance and services in furtherance of the Scheme, including through its roles as Trustee, Securities Intermediary, and Depository Bank."). The FAC further asserts that the STOLI policies,

which purportedly secured the Notes, were foundational to the Scheme, and the Scheme Operators and Wells Fargo used the ILITs to conceal the true beneficiaries of the STOLI policies from the insurers. *Id.* ¶¶4, 33-35, 39-42, 52-54, 57-59. As the FAC detailed, Wells Fargo agreed to use an ILIT structure "'unlike any ILIT'" for which Wells Fargo had agreed to serve as Trustee, because it was designed by the Scheme Operators to prevent the insurance companies from discovering the STOLI violations. *Id.* ¶54.

Wells Fargo urges this Court to overlook these specific allegations in the FAC, instead falsely claiming that the Scheme began in 2015. *Cf. Gevaerts*, 56 F. Supp. 3d at 1337 (plaintiffs' allegations must be taken as true and viewed in the light most favorable to them). The paragraph Wells Fargo cites to support its assertion that the Ponzi scheme began in 2015 is one that provides *examples* of Wells Fargo's improprieties and complicity. Obj. at 14, citing FAC ¶139 ("For example…Wells Fargo…request[ed] Seeman explain the nature of the business…"), ¶144 ("For example…account opening applications…were pre-filled with an incorrect industry description [and] no business description…"), ¶148 ("Wells Fargo emailed forms…that were entirely blank…"), ¶¶157-58 ("For example, [funds deposited by Investor 1 into a Wells Fargo account were used to pay Investor 2]…Other examples of later investors' funds being used to pay earlier investors include…"), ¶161 ("The following are just some examples of the litany of improper activities and transactions, identified as 'red flags'…that occurred in the Accounts…"). Wells Fargo's suggestion that it is "thus irrelevant" that it objected to the proposed ILITs structure or that the policies allegedly violated rules against STOLIs consequently fails. And, Wells Fargo's involvement in the ILIT structure and the alleged violations of STOLI regulations demonstrates its actual knowledge and substantial assistance in the Scheme.

ii. The STOLI violations are adequately pled.

The FAC specifically details how the Scheme's foundation rested on the use of STOLI policies, which are generally prohibited in the insurance industry. FAC ¶¶4, 33-35, 39-42, 51-54, 57-59. It further alleges the Scheme Operators enlisted Wells Fargo to serve as Trustee for the ILITs to actively conceal from the insurers the source of funds used to purchase the policies, the true beneficiaries, and the fact that the insureds were paid to purchase them. *Id*. Additionally, the FAC specifically explains, using exemplar policies procured by the Centurion Companies, that policy applications contained specific questions designed to prevent STOLI arrangements. The FAC notes that "the life settlement policies held in the ILITs for which Wells Fargo served as the Trustee contained STOLI provisions similar to those exemplars," and that Wells Fargo, in its capacity as Trustee, would have received the policy applications and terms and conditions. *Id.* ¶¶52-55. Finally, the FAC provides detailed allegations regarding various agreements signed by the insured under one of the policies held in an ILIT for which Wells Fargo served as Trustee, which revealed that the policies were, in fact, STOLI arrangements. *Id.* ¶¶58-59. Collectively, these allegations support an inference that Wells Fargo was aware of the Centurion Companies' violations of insurance companies' STOLI prohibitions. FAC ¶¶54–57.

Wells Fargo asserts in disjointed fashion that, "Plaintiffs have not actually pled that the specific policies held by Wells Fargo as trustee violated any state law or insurer prohibitions." Obj. at 15. With regard to the insurer prohibitions, that is simply not true. Wells Fargo attacks Plaintiffs' reliance on exemplar applications, arguing that an inference of STOLI violations within the ILITs therefrom would be an "unwarranted deduction of fact," but the authority it cites is inapposite. *Compare Meyer v. Colavita USA Inc*., 2011 WL 13216980 (S.D. Fla. Sept. 13, 2011) (plaintiffs claiming they purchased inferior olive oil alleged only the existence of an inconclusive study of a

small sample of oils purchased in California). And this ignores well-settled law that, even assuming a heightened pleading standard applies to show Wells Fargo's knowledge (which it does not), "when specific factual information about the fraud is peculiarly within the defendant's knowledge or control…a plaintiff's complaint may be plead upon information and belief." *U.S. ex rel. Heater v. Holy Cross Hosp., Inc*., 510 F. Supp. 2d 1027, 1033 (S.D. Fla. 2007) (cleaned up).

Wells Fargo's string cites for the proposition that there "is no blanket prohibition" on STOLIs fare no better, since the issue in those cases was whether the policies violated applicable law. *PHL Variable Ins. Co. v. Bank of Utah*, 780 F.3d 863, 866 (8th Cir. 2015) (insurer sought to have policy declared void *ab initio* as contrary to public policy); *Kramer v. Phoenix Life Ins. Co*., 15 N.Y.3d 539, 546–47 (2010) (insured's widow sought to have proceeds paid to her on basis that policies violated New York law). Here, the fact that the STOLIs violated the terms and conditions imposed by insurance carriers put Wells Fargo on notice of the Scheme Operators fraudulent intent. FAC ¶¶52-53; *Miami Leak Detection & Services LLC v. Great Lakes Ins. SE*, 699 F. Supp. 3d 1326, 1330 (S.D. Fla. 2023) ("Insurers may impose conditions or limits on liability in their policies where there are no statutory provisions to the contrary or inconsistencies with public policy.").

Also, contrary to Wells Fargo's arguments, Plaintiffs do not have to allege Wells Fargo had a duty to, or did in fact, review the life insurance policy materials to adequately plead Wells Fargo's knowledge of them. Obj. at 16. The alleged circumstances of Wells Fargo's receipt of the policy materials reflecting the insurer's STOLI prohibitions and the contracts with the insureds showing the STOLI violations, *Id.* ¶¶54-55, 58-59, are sufficient to raise the inference. *Woods*, 765 F.2d at 1009 ("the surrounding circumstances…[a]re critical…because…knowledge must usually be inferred").

Further, knowledge of the underlying Scheme need not arise from the STOLI violations

alone, and Plaintiffs do not have to be the "victims" of the STOLI violations, Obj. at 16-17, as that is not their theory of the case. Rather, the FAC alleges Wells Fargo's knowledge of the Scheme arises from the combination of its insider roles as Trustee of the ILITs, Securities Intermediary, and depository bank, and that the investors were victimized by the sale of Notes purportedly backed by the STOLIs. *Id.* ¶¶6-8; *Todd Benjamin Int'l, Ltd.*, 682 F. Supp. 3d at 1137 (plaintiffs "allegations as a whole" established "a strong inference of actual knowledge"). Wells Fargo's reliance on authorities dismissing claims against banks engaged in routine banking transactions or that had no role in the fraud is therefore misplaced, because Wells Fargo's conduct here was anything but routine. *Wang v. Revere Capital Mgmt., LLC*, 2023 WL 2198570, at *2, 4-5 (S.D. Fla. Feb. 15, 2023) (claim against bank that provided loan to fraudster); *Tuckman v. Wells Fargo Bank, N.A.*, 2020 WL 13413838, at *5 (S.D. Fla. Mar. 25, 2020) ("Plaintiff fails to indicate what actions Wells Fargo actually took against him.").

iii. The atypical ILIT allegations demonstrate knowledge and Wells Fargo's decision to backdate the resignation forms underscores it.

The FAC alleges in detail the questions insurers included in the life insurance policy applications to prevent STOLI arrangements and how the ILIT structure concealed from the insurers the source of funds used to purchase the policies, the policies' true beneficiaries, and that the insureds were paid to purchase them. FAC ¶¶53-54, 57-58. Wells Fargo's assertion that Plaintiffs have no allegations to support their statement that the ILIT structure was designed to prevent the insurance companies from discovering the violations, Obj. at 17, should therefore be summarily rejected, as should its suggestion that Wells Fargo's knowledge of this purpose cannot be inferred. Obj. at 17; *Gilison*, 303 So. 3d at 1003 ("a defendant has knowledge of an underlying fraud if it has a general awareness that its role was part of an overall improper activity"). And its self-serving interpretations of its outside counsel's comment regarding the unusual ILIT structure

and whether it was ultimately implemented, Obj. at 17-18, do not constitute pertinent objections. *Sawinski v. Bill Currie Ford, Inc.*, 866 F.Supp. 1383, 1385 (M.D.Fla.1994) (court does not consider "weight of evidence" on motion to dismiss).

The FAC cites communications detailing Wells Fargo's decision to backdate resignation forms, wherein the bank agreed not only to backdate the forms but also to bypass the standard approval process in exchange for a comprehensive liability release for its role as Trustee. FAC ¶¶62-67. This occurred after Wells Fargo learned that the Scheme was on the verge of financial collapse and despite concerns raised by its outside counsel regarding the propriety of the resignations. *Id.* ¶¶61-67. Setting aside the factual question of whether backdating documents and bypassing established approval processes is a "common business practice," Obj. at 18, it is reasonable to infer that Wells Fargo's willingness to engage in such actions in exchange for liability protection stems from its awareness of potential exposure due to its involvement in a Ponzi scheme nearing collapse. *Cabot*, 2016 WL 8740484, at *4 ("actual knowledge of another's wrongful conduct is nearly universally found based upon circumstantial evidence"); *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."); *Bansal v. TD Ameritrade, Inc.*, 2024 WL 3009423, at *5-6 (S.D. Fla. June 7, 2024) (denying motion to dismiss where defendant, *inter alia*, "violated its own polices" and made "exceptions to its…procedures"). Wells Fargo's argument that the approval of life insurance beneficiary assignments undermines Plaintiffs' STOLI allegations overlooks the FAC's detailed account of Wells Fargo's involvement in securing those assignments, and is nothing more than a self-serving factual interpretation. *Restless Media GmbH v. Johnson*, 704 F. Supp. 3d 1288, 1298 (S.D. Fla. 2023) ("Defendants' attempt to contest…Defendants' involvement in the alleged scheme

is a factual dispute inappropriate for resolution at this stage of the litigation."). And its insistence that the ILITs predated the Scheme, Obj. at 18, contradicts the FAC's allegations. § III, B.1.i.

2. *Plaintiffs' Allegations Regarding Wells Fargo's Conduct as Securities Intermediary Demonstrate Its Actual Knowledge.*

The FAC details the basis for Plaintiffs' claim that Wells Fargo knew the Class members had first priority lien rights in the STOLIs and therefore knew its contrary representations to the Lenders were false. FAC ¶¶71-72 ("Wells Fargo was aware through its work as Trustee over the ILITs [that] the Class members had [a] first priority lien in the life settlement policies…however…Wells Fargo [knew its representations to the contrary were] false… Wells Fargo falsely represented…[it had] no actual knowledge of any claim to, or security interest in the Pledged Accounts"). The FAC specifically details how Wells Fargo, in its capacity as Trustee, received the life insurance policy applications, the resulting STOLI policies, and the various agreements signed with the insureds revealing the STOLI violations, and thus knew the ILITs were structured to conceal the STOLI violations from the insurers. § III, B.1.i-iii. The FAC further details how Wells Fargo knew the Centurion Companies operated as a "fund that buys life policies," received money from investors in the form of checks reflecting the monies were for deposit into those "funds," and knew the Centurion Companies used that investment to, among other things, purchase the policies and pay the premiums. FAC ¶60. These allegations support an inference that, as the FAC alleges, Wells Fargo "knew…the STOLIs…purchased were for the benefit of the Class." *Id.*

Wells Fargo nevertheless persists with its self-serving attempts to spin the allegations, suggesting "the fact that [it] represented that the polices were unencumbered merely reinforces that [it] had no basis to suspect that the policies served as collateral for commitments made to investors." Obj. at 19. But "a question of fact…cannot be decided on a motion to dismiss." *Healy*

v. NCL (Bahamas) Ltd., 733 F. Supp. 3d 1227, 1236 (S.D. Fla. 2024)) (cleaned up). It similarly persists with its insistence that "the fraud…was entirely distinct from the ILITs," Obj. at 19, despite the detailed allegations that the STOLIs were the heart of the Scheme and that the Scheme Operators asked Wells Fargo to serve as Trustee for the ILITs because they needed a mechanism to prevent the insurers from discovering the source of funds used to purchase the policies, the true beneficiaries of the policies, and the fact that the insureds were paid to purchase them. § III, B.1.i. And it recycles its fanciful assertion that Plaintiffs "[n]ever explain or allege *how* or *when* Wells Fargo came to be appraised of Plaintiffs' first priority lien interest in the insurance policies," Obj. at 19-20, despite allegations that Wells Fargo learned that the Class had first priority liens and security interests in the STOLIs in its capacity as Trustee for the ILITs. FAC ¶60. At bottom, what Wells Fargo really argues is that the Trustee allegations are insufficient to "permit the inference" it knew the policies were encumbered. Obj. at 20. But that "does nothing more than state a disagreement" with Judge Goodman's conclusions. *Alvarado*, 2023 WL 2548424, at *6; *see also Perlman*, 2011 WL 13108060, at *6 ("the exact level [of knowledge] necessary for liability remains flexible and must be decided on a case-by-case basis").

Wells Fargo's authority for the proposition of what a grace notice does and that the insurer's issuance of graces notices on the STOLIs do "not support the notion that life insurance policy premiums were not ultimately paid," Obj. at 20, is an impertinent waste of a case cite. There is no dispute about what a grace notice does or about whether the premiums on the STOLIs were ultimately paid. Indeed, the FAC explains in specific detail that part of the Scheme involved finding money to pay the premiums on the STOLIs to keep it from collapsing. FAC ¶¶5, 33, 42, 45-46, 57, 59, 60-61, 65, 77, 159-60. The import of the graces notices is, of course, that Wells Fargo knew and acknowledged the Scheme Operators' failure to pay the premiums on the STOLIs

and the resulting "consistent grace notices" were "not normal" and demonstrated the misuse of Class member funds. *Id.* ¶75; *see also Smith v. First Union Nat. Bank*, 2002 WL 31056104, at *5 (S.D. Fla. Aug. 23, 2002) (denying summary judgment because disputed fact remained as to whether bank employee had knowledge of fund's "wrongful purpose based on…her unexplained failure to report the suspicious activity").

3. *Plaintiffs' Depository Bank Allegations Demonstrate Wells Fargo's Actual Knowledge.*

The FAC explains in detail how the FFIEC BSA/AML rules required Wells Fargo to "know its customers" and have procedures to identify and take appropriate action once put on notice of account activity listed as indicia of money laundering. FAC ¶¶77-86. It further alleges that Wells Fargo knowingly violated its own legally-imposed procedures (indeed, even acknowledging the violations and creating inaccurate client profiles) and thereby facilitated the Scheme by accepting inconsistent and incomplete answers regarding the beneficial owners of the PLCs, the nature of their businesses, and the sources of their revenues, ignoring their due diligence requirements and the KYC regulations by not following typical account opening procedures, and sending the Scheme Operators pre-filled applications with incorrect industry descriptions and no business descriptions. *Id.* ¶¶138, 140-42, 144-51. The caselaw is well settled that this conscious disregard of Wells Fargo's own anti-money laundering procedures and monitoring systems is sufficient to establish knowledge. *Gevaerts*, 56 F. Supp. 3d at1341–42 (S.D. Fla. 2014) (denying motion to dismiss where plaintiff alleged existence of systems to detect and report complained-of fraud); *Pearson v. Deutsche Bank AG,* 2022 WL 951316, at *8 (S.D. Fla. Mar. 30, 2022) (denying motion to dismiss where "[f]acts surrounding [bank's] maintenance of anti-money laundering and monitoring systems…provide[d] circumstantial evidence of actual knowledge" of fraud); *Perlman*, 2011 WL 13108060, at *7-9 (denying motion to dismiss "in light of…factual allegations

that bank employed precautions to preclude money laundering and to comply with the Bank Secrecy Act).

C. The FAC is Predicated Upon Allegations of Wells Fargo's Actual Knowledge of the Scheme.

"[A]typical transactions and transactions that lack a business justification can itself support an inference of knowledge on the part of the Bank" for purposes of aider-and-abettor liability. *Perlman*, 2011 WL 13108060, at *8, citing *Woodward*, 522 F.2d at 97; *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1120 (C.D. Cal. 2003) ("the Banks utilized atypical banking procedures to service [the fraudster's] accounts, raising an inference that they knew of the Ponzi scheme and sought to accommodate it"). Regardless, allegations that "go beyond" the mere existence of "red flags" or atypical transactions "support a plausible inference of actual knowledge by [a bank] of [a] Ponzi scheme." *Perlman*, 559 Fed. Appx. at 996; *see also Pearson*, 2022 WL 951316, at *8 (denying motion to dismiss claims for aiding and abetting against bank where "[p]laintiffs' allegations in this case go beyond merely failing to investigate red flags"). And where a bank has systems in place to detect improper activities that it is under an obligation to monitor or report, allegations that it had knowledge of the impropriety due to the existence of those systems are sufficiently plausible to withstand a motion to dismiss. *Gevaerts*, 56 F. Supp. 3d at 1341–42 (denying motion to dismiss where plaintiff alleged existence of fraud detection and reporting systems); *Pearson,* 2022 WL 951316, at *8 (same); *Perlman*, 2011 WL 13108060, at *7-9 (same).

Here, as Judge Goodman correctly concluded, the FAC alleges facts establishing all three of these indicia of actual knowledge of the Scheme on the part of Wells Fargo. First, as Trustee, Wells Fargo agreed to the ILIT structure "unlike any ILIT…Wells Fargo [ever] agreed to serve as Trustee under before," knew the atypical structure was designed to hide from the insurers the STOLIs that were the backbone of the Scheme, backdated the Trustee resignation forms and

proceeded without the usual resignation process in exchange for a broad waiver of liability, and then intervened to push through the approvals by the insurance companies that the Scheme Operators needed in order to be able to assign the STOLI policies to the Lenders after the insurance companies initially rejected the assignments. FAC ¶¶51-54, 67-69. These atypical transactions lack business justification and support an inference of actual knowledge. *Perlman*, 2011 WL 13108060, at *8; *Woodward*, 522 F.2d at 97; *Bansal*, 2024 WL 3009423, at *5-6; *Neilson*, 290 F. Supp. 2d at 1120. Second, as Securities Intermediary, despite knowing the Class members had first priority lien interests in the STOLIs, Wells Fargo represented to the Lenders there were no liens and that the Lenders had first priority to facilitate the $40 million loan that the Scheme Operators so desperately needed to prevent the Scheme from collapsing. FAC ¶¶71-73, 154-55. Indeed, Wells Fargo knew in its role as Securities Intermediary that the Centurion Companies consistently received grace notices from the insurance companies that issued the STOLIs and that its business practices were "not normal." FAC ¶¶74-75. These actions go beyond the mere existence of "red flags" or atypical transactions and also support an inference of actual knowledge. *Perlman*, 559 Fed. Appx. at 996; *Pearson*, 2022 WL 951316, at *8. Third, as depository bank, Wells Fargo was legally obligated to "know its customers" and to have procedures to identify and take appropriate action once put on notice of account activity listed as indicia of money laundering. FAC ¶¶77-86. Yet, Wells Fargo knowingly violated its own KYC policies when opening accounts for the Scheme Operators, acknowledged those violations, and knowingly created inaccurate client profiles. *Id.* ¶¶135, 146, 148, 152. These facts surrounding Wells Fargo's maintenance (and disregard) of its own anti-money laundering and monitoring systems similarly support an inference of actual knowledge. *Gevaerts*, 56 F. Supp. 3d at 1341–42; *Pearson,* 2022 WL 951316, at *8; *Perlman*, 2011 WL 13108060, at *7-9.

D. The FAC Adequately Alleges Substantial Assistance.

"Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so…thereby enabling the breach to occur." *Gevaerts*, 56 F.Supp. 3d at 1342. "To determine whether a defendant provided substantial assistance, courts examine a variety of factors including the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, [and] his relation to the other and his state of mind." *Pearson*, 2023 WL 2610271, at *26 (quotation omitted). A bank substantially assists a financial fraud when it provides services that allow perpetration of the fraud and fails to take actions that would stop it. *See Gevaerts*, 56 F. Supp. 3d at 1342; *TD Ameritrade*, 2024 WL 3009423, at *6; *Cabot*, 2016 WL 8740484, at *5.

Here, Judge Goodman correctly concluded the FAC sufficiently alleges Wells Fargo substantially assisted the Scheme by: a) using an expediated resignation process and backdating the forms to resign as Trustee, which facilitated the assignment of the STOLIs; b) intervening on behalf of the Scheme Operators when the forms were initially rejected by the insurance companies, which convinced the insurers to process them; and, c) knowingly misrepresenting to the Lenders they had first-priority lien and security interests in the STOLIs, which assisted the Scheme Operators in borrowing $40 million secured by the STOLIs to perpetuate the Scheme. Report at 60-61, citing FAC ¶¶67-73, 154-55. And as the FAC alleged, the resignations that facilitated the assignments, the intervention that caused the insurers to accept them, and the misrepresentations that allowed the Scheme Operators to borrow the $40 million were critical to the continuation of the Scheme because, at that point, the Scheme was in financial trouble and the Scheme Operators needed the loans to prevent it from collapsing. FAC ¶¶62-73. The FAC sufficiently alleges Wells Fargo "provided advice and assistance to the [Scheme Operators] that allowed them to conceal

their fraud and continue their scheme." *Pearson*, 2022 WL 951316, *3; *see also Gevaerts*, 56 F. Supp. 3d at 1342 (denying motion to dismiss where plaintiff alleged bank provided substantial assistance by, *inter alia*, "providing letters that 'vouched' for [the perpetrator] during the course of [the] alleged fraud"); *TD Ameritrade*, 2024 WL 3009423, at *6 (denying motion to dismiss where plaintiff alleged TD Ameritrade "facilitated the operation of a commodity pooling scheme and of a Ponzi scheme…pursuant to [the perpetrator's] instructions and transfer orders"); *Cabot*, 2016 WL 8740484, at *5 (denying motion to dismiss where plaintiff alleged that "despite…actual knowledge, [defendant] 'not only kept quiet…[but] helped [the perpetrators] continue… [the scheme]…by helping to create false and fraudulent Investor Reports' ").

Wells Fargo knows Judge Goodman's "knowledge analysis" also supports his conclusion that the FAC sufficiently alleges substantial assistance. Obj. at 22. It therefore persists with its conclusory assertions that its "ILIT trustee role predated the fraud…and is therefore irrelevant, and Plaintiffs have failed to plead any allegations demonstrating Wells Fargo knew its lien representation was false." Obj. at 22. Those assertions fail as detailed above. The FAC explained that the Scheme and Wells Fargo's appointment as Trustee over the ILITs commenced simultaneously; indeed, the FAC explained that the STOLIs were the backbone of the Scheme and that the Scheme Operators enlisted Wells Fargo to serve as Trustee over the ILITs to actively conceal the STOLI violations from the insurers. § III, B.1-2; *Pearson*, 2022 WL 951316, *8 ("the substantial assistance element for the aiding and abetting claim is met for the same reasons the actual knowledge element is met"); *Gevaerts,* 56 F.Supp.3d at 1343 ("Plaintiffs' allegations [of substantial assistance] must be considered in light of the alleged actual knowledge of TD Bank.").

Wells Fargo also knows allegations of "actions in furtherance of[] or for the purposes of[] concealing the Ponzi scheme" demonstrate affirmative assistance. Obj. at 23. It therefore

flagrantly mischaracterizes the Centurion Companies (the entities it helped to secure the assignments and the loans) as "a third party to the scheme" in an attempt to mislead this Court into believing "the alleged Ponzi scheme was committed by the PLCs" (the entities that issued the Notes). Obj. at 23. But that flatly contradicts the FAC. The Scheme was not "committed" by the PLCs, and the Centurion Companies were not "third parties." Rather, the FAC clearly explains that the Scheme was perpetrated by the "Scheme Operators" (Seeman, Holtz and Schwartz) "through a multitude of entities controlled by them…including the…PLCs…and the Centurion Companies." FAC ¶¶2-3.

Finally, Wells Fargo knows there are circumstances where it can be "liable for its inaction." Obj. at 24. It therefore attempts to cast its improprieties in "pre-filling forms and preparing customer profiles" as "ministerial services," with no corresponding duty to non-customers and no fiduciary duty to the PLCs. Obj. at 24. But this ignores the FAC's allegations that the FFIEC BSA/AML rules imposed affirmative legal obligations on Wells Fargo to "know its customers" and to have procedures to identify and take appropriate action once put on notice of indicia of money laundering, and that Wells Fargo's knowing violation of these rules facilitated the Scheme. *Id.* ¶¶ FAC 77-86. 138, 140-42, 144-51. The FAC thus sufficiently alleges that Wells Fargo "failed to act when required to do so." *Gevaerts*, 56 F. Supp. 3d at 1341–42 (denying motion to dismiss where plaintiff alleged existence of systems to detect and report fraud); *see also Pearson,* 2022 WL 951316, at *8 (S.D. Fla. Mar. 30, 2022) (denying motion to dismiss where plaintiff alleged bank's "maintenance of anti-money laundering and monitoring systems"); *Perlman*, 2011 WL 13108060, at *7-9 (denying motion to dismiss in light of factual allegations that bank employed precautions "to preclude money laundering and to comply with the Bank Secrecy Act").

E. Plaintiffs Have Adequately Plead Unjust Enrichment.

Wells Fargo's Objections to Judge Goodman's conclusion that the FAC states a claim for unjust enrichment similarly rehashes the same arguments it made in its Motion to Dismiss and does nothing more than state disagreement, which is insufficient to trigger *de novo* review. *Estrada*, 2018 WL 1811907, at *1 (objections that "simply rehash or reiterate the original briefs" only trigger "review…for clear error"); *Alvarado*, 2023 WL 2548424, at *6 (objection that "does nothing more than state a disagreement" is not an "objection" triggering *de novo* review). And regardless, its Objections would fail even on *de novo* review. Wells Fargo maintains Plaintiffs have not alleged they directly conferred a benefit on Wells Fargo, Obj. at 26, when the law is clear that a benefit passing through a third party will suffice. It contends the banking services it provided in exchange for the ill-gotten fees constitute adequate consideration precluding unjust enrichment, Obj. 28-29, yet ignores that Plaintiffs were not in contractual privity with Wells Fargo and that fees paid under a separate agreement can constitute an unjust benefit. Wells Fargo also persists with its assertion that Plaintiffs' unjust enrichment claim must satisfy Rule 9(b)'s heightened pleading requirements, Obj. at 28, but relies on a single case where, unlike here, the unjust enrichment claim was predicated on the same factual allegations as the underlying fraud. This Court should therefore overrule Wells Fargo's objections regarding Plaintiffs' unjust enrichment claim, and adopt the Report and Recommendations.

1. The Report Correctly Concludes Plaintiffs Allege They Conferred a Direct Benefit on Wells Fargo.

The FAC alleges that Wells Fargo substantially benefitted from the Scheme through, among other things, the income it earned from fees and its possession of the PLCs' deposit accounts. FAC ¶¶77, 143, 186. It further alleges the PLCs' only source of funds came from the Class members' purchase of the Notes. *Id.* ¶41. The FAC thus alleges the Class members' monies deposited into

the PLCs' accounts were used to pay Wells Fargo's fees, thereby conferring a benefit on Wells Fargo. *Id.* ¶¶201-202. These allegations satisfy the "direct benefit" element of Plaintiff's unjust enrichment claim. *Lesti v. Wells Fargo Bank, N.A.*, 960 F. Supp. 2d 1311, 1327 (M.D. Fla. 2013) (plaintiff stated unjust enrichment claim against bank that earned fees from accounts maintained by operators of Ponzi scheme); *TD Ameritrade, Inc.*, 2024 WL 3009423, at *13-14 (same). Regardless, "[w]hether [a defendant] did or did not receive a direct benefit from Plaintiff is a question of fact that cannot be resolved at the motion to dismiss…" *Sierra Equity Group, Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1229 (S.D. Fla. 2009).

As it did on its Motion to Dismiss, Wells Fargo ignores the authorities holding that bank fees confer a direct benefit on a depository bank in a Ponzi scheme for purposes of an unjust enrichment claim. Instead, it attempts to deflect attention from them through an extended discussion of *Virgilio v. Ryland Group, Inc.*, 680 F.3d 1329 (11th Cir. 2012), wherein the purchasers of allegedly defective homes suing the developer also brought a claim for unjust enrichment against the marketing agent, seeking disgorgement of the service fees the agent earned from the developer. Obj. at 25-27. But as the Eleventh Circuit explained, [t]he crux of [the] Plaintiff's argument [in *Virgilio*] is that they 'indirectly' conferred a benefit on Defendants…" *Id.* at 1337. Here, Plaintiffs do not allege an "indirect" benefit. Rather, Plaintiffs allege they deposited money into the PLCs accounts, and the PLCs then used that money to pay Wells Fargo's fees. FAC ¶¶14, 77, 143, 186, 201-202. And as Judge Goodman correctly concluded, "just because the benefit conferred by Plaintiffs on Defendant[] did not pass directly from Plaintiffs to Defendant---but instead through [the PLCs]---does not preclude an unjust enrichment claim." *Williams v. Wells Fargo Bank N.A.*, 2011 WL 4368980, at *9 (S.D. Fla. Sept. 19, 2011); *see also MerchACT, LLC v. Ronski*, 2022 WL 3682207, at *8 (S.D. Fla. Jan. 13, 2022) ("courts in this district have recognized

that an unjust enrichment claim may go forward where a benefit is conferred through another"); *Aceto Corp. v. TherapeuticsMD, Inc*., 953 F. Supp. 2d 1269, 1288 (S.D. Fla. 2013) (same); *Romano v. Motorola*, Inc., 2007 WL 4199781, at *2 (S.D. Fla. Nov. 26, 2007) (concluding direct benefit was conferred through intermediary).[2]

Wells Fargo's assertion that Plaintiffs cannot state a claim for unjust enrichment because the fees were paid by a separate party under a separate contract, Obj. at 26, fares no better. As courts in this district have correctly recognized, "Defendant erroneously equates direct *contact* with direct benefit." *Williams*, 2011 WL 4368980 at *9, quoting *Romano*, 2007 WL 4199781, at *2; *see also In re Takata Airbag Products Liab. Litig*., 462 F. Supp. 3d 1304, 1328 (S.D. Fla. 2020) ("[a] plaintiff may confer a direct benefit through indirect contact with a defendant through an intermediary…Defendants do not cite any authority contradicting *Williams* or *Romano*…on this point."). Indeed, in all cases where the benefit passes through an intermediary, the ultimate payments conferring the benefit upon the defendant are necessarily made pursuant to a separate agreement to which the plaintiff is not a party.[3] And in cases such as this, where a depository bank aids and abets a Ponzi scheme, it is unjustly enriched by the "benefits conferred under a separate contract (*i.e.* deposit agreements), by a separate party (the [fraudsters]), for a separate service (the

[2] In a footnote, Wells Fargo attempts to distinguish *MerchACT*, *Aceto*, and *Romano* "from *Virgilio* and the instant facts" because those cases "involve the direct conferral of a benefit through an intermediary…" Obj. at 27 n.7. But here the Class conferred a direct benefit on Wells Fargo through intermediaries (the PLCs) because the funds held in the PLCs accounts were not used for their stated purposes. Indeed, unlike *Virgilio*, *MerchACT,* and *Aceto* both involved situations where, as here, an intermediary wrongfully took assets from plaintiffs and then conveyed them to the defendants. *See MerchACT*, 2022 WL 3682207, at *1-2 (third party misappropriated leads from plaintiff and conveyed them to defendant); *Aceto Corp.*, 953 F. Supp. 2d at 1272-77 (defendants improperly obtained plaintiff's prenatal vitamin products from a third party).

[3] If the plaintiff were a party to the contract, then the unjust enrichment claim would fail. *See Frayman v. Douglas Elliman Realty, LLC*, 515 F. Supp. 3d 1262, 1287 (S.D. Fla. 2021) ("Generally, no cause of action in unjust enrichment can exist where the parties' relationship is governed by an express contract.") (internal quotations omitted).

banking services)." Obj. at 26; *Lesti*, 960 F. Supp. 2d at 1327 (plaintiff sufficiently pled direct benefit based on allegations that "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" and "PCOM paid the fees with investor funds"); *TD Ameritrade, Inc.*, 2024 WL 3009423, at *13-14 (plaintiff sufficiently pled direct benefit based on allegations that "[t]he funds held in the accounts belonged to investors…[and] conferred benefits upon Defendants in the form of deposits from which Defendants generated income…").

2. Wells Fargo Never Provided Plaintiffs Any Consideration for Any Purported Services.

The fact that a defendant who receives a benefit from the plaintiff through an intermediary may have also provided the intermediary with some services in exchange for the benefit received does not transform it into "consideration" *vis a vis* the plaintiff defeating an unjust enrichment claim. Indeed, in the many cases holding plaintiffs adequately alleged a direct benefit through an intermediary, there was some form of payment for services to the intermediary transferring the benefit. *See, e.g. Williams*, 2011 WL 4368980, at *9 ("a payment arrangement existed between [defendants] and those Defendants that did have direct contact with Plaintiffs"); *Lesti*, 960 F. Supp. 2d at 1327 (defendant bank received fees for banking services used by Ponzi scheme); *TD Ameritrade, Inc.*, 2024 WL 3009423, at *13-14 (same). Wells Fargo nevertheless asserts Plaintiffs' unjust enrichment claim fails because Wells Fargo provided contractual services for the fees it earned—and which Plaintiffs are seeking to recover, relying primarily on *Wiand v. Wells Fargo, N.A.*, 86 F.Supp.3d 1316, 1332 (M.D. Fla. 2015). Obj. at 28-29. But unlike the plaintiff in *Wiand*, Wells Fargo and the Class were never in contractual privity – a critical distinction that Wells Fargo ignores. Rather, the plaintiff in *Wiand* was a court-appointed receiver for entities that were in contractual privity with Wells Fargo and the "account services' fees and interest payments made

by the [receivership] entities were the product of arms-length transaction between the parties." *Id.* at 1332.[4] Here, the Class is not asserting claims on behalf of the PLCs, the Class was never in direct privity with Wells Fargo, and it never received any benefit in exchange for the banking services Wells Fargo provided to the PLCs. *TD Ameritrade, Inc.*, 2024 WL 3009423, at *14 ("the inequitable circumstances prong of an unjust enrichment claim involves a defendant retaining a benefit without paying the value of the benefit to *the plaintiff* that conferred said benefit") (emphasis in original).

3. Plaintiffs' Averments Against Wells Fargo Do Not Sound in Fraud.

"[T]he particularity requirement in Rule 9(b) applies only to averments of fraud…" *JPMorgan Chase Bank, N.A. v. Hayhurst Mortg., Inc.*, 2010 WL 2949573, at *3 (S.D. Fla. Sept. 11, 2010) (citing 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1297, at 169 (3d ed. 2004)). Here, Plaintiffs do not allege Wells Fargo defrauded it; they allege the Scheme Operators did. Just as Rule 9(b) does not require Plaintiffs to plead with particularity Wells Fargo's actual knowledge of the fraud (although they have), it similarly does not require Plaintiffs to plead with particularity the fees and transfers by which it was unjustly enriched. *Id.* (Rule 9(b) pleading requirements did not apply to unjust enrichment claim because "[plaintiff] is not alleging [defendant] defrauded it"). Wells Fargo's reliance on *Omnipol, A.S. v. Multinational Def. Services, LLC*, 32 F.4th 1298 (11th Cir. 2022), for the proposition that some heightened pleading standard applies because Plaintiffs' unjust enrichment claim "sounds in fraud," Obj. at 25, 28, is misplaced. In *Omnipol* the unjust enrichment claim was based on the same fraudulent course of conduct underlying all of the other fraud-based claims. *Id.* at 1303-04; *see also*

[4] Wells Fargo cites *Biondi v. Branch Banking & Trust Co.*, 2018 WL 6566027, *1 (S.D. Fla. Aug. 28, 2018), but plaintiffs and the bank there were also in direct contractual privity.

JPMorgan Chase Bank, N.A. 2010 WL 2949573, at *3 (distinguishing cases that have applied Rule 9(b) to all claims on the basis that they all were "premised upon a course of fraudulent conduct").

Regardless, even if some heightened pleading standard applied (which it does not), "courts recognize that if the alleged fraud occurred over an extended period of time and the acts were numerous, the specificity requirements are less stringently applied." *Medalie v. FSC Securitis Corp.*, 87 F. Supp. 2d 1295, 1306-07 (S.D. Fla. Feb. 1, 2000). Here, Plaintiffs allege that the underlying fraud happened under Wells Fargo's watchful eyes for a decade, during which time it collected "interest, transfer fees, service fees, transaction fees and online banking fees." FAC ¶59. The details of those numerous transactional occurrences are known only to Wells Fargo, and are the subject of the parties' ongoing discovery.

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests the Court overrule Wells Fargo's Objections to Judge Goodman's Report and Recommendations and deny its Motion to Dismiss.

Dated: March 18, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on March 18, 2025, on all counsel or parties of record on the Service List below.

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