

**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.

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**WELLS FARGO BANK, N.A.'S OPPOSITION TO PLAINTIFFS'  
MOTION TO STRIKE DEFENDANT'S AMENDED AFFIRMATIVE DEFENSES**

## INTRODUCTION

“Unlike the pleading requirements for a claim for relief under Federal Rule of Civil Procedure 8(a), which must comply with *Twombly* and *Iqbal*, when a party responds to a pleading, it need only ‘state in short and plain terms its defenses to each claim asserted against it.’” *Archer W. - De Moya Joint Venture v. Ace Am. Ins. Co.*, No. 1:22-CV-21160, 2023 WL 11802486, at \*1 (S.D. Fla. July 12, 2023) (Goodman, M.J.) (quoting Fed. R. Civ. P. 8(b)). Plaintiffs’ entire Motion is predicated on a misstatement of the legal standard for affirmative defenses, a tacit acknowledgement that under the more relaxed standard that actually applies, they cannot prevail. As this Court has held, “[t]he pleading standard for affirmative defenses requires only that the defense state in short and plain terms that ‘the opposing party has **notice** of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it.’” *Id.* at \*3 (emphasis in original) (quoting *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988)). Each of Wells Fargo’s affirmative defenses meets that standard.

Even if a higher pleading standard were to apply, Wells Fargo has more than satisfied it by sufficiently stating the legal and factual grounds for each defense. *See Home Management Solutions, Inc. v. Prescient, Inc.*, No. 07-20608-CIV, 2007 WL 2412834, at \*2 (S.D. Fla. Aug. 21, 2007) (even where heightened pleading standard is applied, a “defense is insufficient as a matter of law only if: (1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law”).

Finally, to the extent that Wells Fargo’s affirmative defenses include denials, as explained in *Home Management Solutions*—a case that Plaintiffs cite *eight times* in their brief—“the proper remedy is not [to] strike the claim, but rather to treat it as a specific denial.” *Id.* at \*3; *see also e.g., Wight v. Bluman*, No. 9:20-CV-81688, 2021 WL 2783878, at \*3 (S.D. Fla. July 2, 2021) (same).

Plaintiffs are wrong on the legal standard and wrong that Wells Fargo has not provided sufficient factual bases in support of its affirmative defenses. Wells Fargo has more than satisfied Fed. R. Civ. P. 8, and Plaintiffs are indeed conducting an “empty academic exercise.” “[S]triking defenses from a pleading remains a drastic remedy,” *Archer W.*, 2023 WL 11802486, at \*1, and the Court should reject this flagrant attempt to hamstring Wells Fargo’s ability to defend Plaintiffs’ meritless claims.

### LEGAL STANDARD

Plaintiffs’ Motion ignores the liberal pleading standard for affirmative defenses that this Court has endorsed. “Courts have broad discretion when considering a motion to strike, however, striking defenses from a pleading remains a drastic remedy to be resorted to only when required for the purposes of justice and only when the stricken material has no possible relation to the controversy.” *Archer W.*, 2023 WL 11802486, at \*1 (internal quotations and citations omitted). Although “[t]here is a split among the district courts in this Circuit regarding the proper pleading standard for an affirmative defense,” this Court has held that “a defendant need only ‘state in short and plain terms its defenses to each claim asserted against it.’” *Bakshi v. Carnival Corp.*, No. 23-CV-21839-CIV, 2023 WL 6376730, at \*2 (S.D. Fla. Aug. 23, 2023) (Goodman, M.J.) (quoting Fed. R. Civ. P. 8(b)(1)(A)), *R&R adopted*, No. 23-21839-CIV, 2023 WL 6376729 (S.D. Fla. Sept. 29, 2023).

And while the Eleventh Circuit has not explicitly resolved the split, it “has repeatedly emphasized that the purpose of Rule 8(c) is simply to provide the plaintiff with notice of an affirmative defense that may be raised at trial.”<sup>1</sup> *Adams v. JP Morgan Chase Bank, N.A.*, No. 3:11-CV-337-J-37MCR, 2011 WL 2938467, at \*3 (M.D. Fla. July 21, 2011) (citing *Hassan*, 842 F.2d at 263); *see also Modified Atmosphere Enters. LLC v. Fresh Express Inc.*, No. 6:20-CV-1702-PGB-LRH, 2021 WL 2954289, at \*1 (M.D. Fla. Mar. 22, 2021) (finding the “‘Eleventh Circuit’s longstanding practice of permitting unpled affirmative defenses to be raised at trial so long as the plaintiff had prior notice of the defendant’s intent to raise them’ support[s] the conclusion that the *Twombly-Iqbal* plausibility standard does not apply to affirmative defenses”). A defendant need not “set forth detailed factual allegations’ so long as the defendant ‘give[s] the plaintiff ‘fair notice’ of the nature of a defense and the grounds on which it rests.’” *Bakshi*, 2023 WL 6376730, at \*2 (quoting *Tsavaris v. Pfizer, Inc.*, 310 F.R.D. 678, 682 (S.D. Fla. 2015)).

Plaintiffs’ Motion further ignores the holdings of this Court that endorse that an affirmative defense should not be stricken simply because it is more appropriately characterized as a denial of an element of a cause of action. “When an affirmative defense is mislabeled and is more properly a denial, **the Court should not strike the claim but should treat it as a specific denial.**” *Bakshi*,

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<sup>1</sup> Plaintiffs’ detailed discussions of each of the affirmative defenses they attack demonstrate that they fully appreciate the nature and import of such defenses. Ironically then, Plaintiffs’ own arguments demonstrate the notice purpose of Rule 8(c) has been satisfied.

2023 WL 6376730, at \*6 (emphasis in original); *see also, e.g., Ohio Nat'l Life Assur. Corp. v. Langkau*, No. 3:06-cv-290-J-20MCR, 2006 WL 2355571, at \*2 (M.D. Fla. Aug. 15, 2006) (“The federal courts have accepted the notion of treating a specific denial that has been improperly denominated as an affirmative defense as though it was correctly labeled. This is amply demonstrated by the fact that research has not revealed a single reported decision since the promulgation of the federal rules in which an erroneous designation resulted in any substantial prejudice to the pleader.”); *Wyne v. Carnival Corp.* No. 22-21638-Civ, 2022 WL 6127876, at \*2 (S.D. Fla. Oct. 7, 2022) (“[T]he appropriate remedy is not to strike the [ ] affirmative defense, but to treat it as a specific denial.”); *Bruce v. Ocwen Loan Servicing, LLC*, No. 8:12-cv-1561-T-24-MAP, 2012 WL 4867224, \*2 (M.D. Fla. Oct. 15, 2012) (“While these defenses appear to be denials of Plaintiff’s claims, rather than true affirmative defenses, the Court finds that there is no prejudice to Plaintiff by allowing them to remain.”); *Zeron v. C & C Drywall Corp., Inc.*, No. 09-60861-CIV, 2009 WL 2461771, \*2 (S.D. Fla. Aug. 10, 2009) (same); *Home Management Solutions*, 2007 WL 2412834, at \*3 (same); *Ramnarine v. CP RE Holdco, 2009-1, LLC*, No. 12-61716, 2013 WL 1788503, at \*4 (S.D. Fla. Apr. 26, 2013) (same).

### ARGUMENT

#### **A. Wells Fargo Has Provided Plaintiffs With Sufficient Notice and Factual Bases in Support of its Second, Third, Eighth, Ninth, Tenth, Twelfth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, and Twenty-Third Affirmative Defenses**

Plaintiffs first argue that Wells Fargo has failed to adequately plead each of these affirmative defenses relating to the “potential risks and conflicts of interest” associated with their Seeman Holtz investments. Pls.’ Mot. Strike at 3. As shown above, “a defendant is not obligated to ‘set forth detailed factual allegations’ so long as the defendant ‘give[s] the plaintiff ‘fair notice’ of the nature of a defense and the grounds on which it rests.” *Bakshi*, 2023 WL 6376730, at \*2 (quoting *Tsavaris*, 310 F.R.D. at 682). Here, Wells Fargo has provided Plaintiffs with fair notice of Wells Fargo’s second (Negligence by Third Parties), third (Failure to Mitigate Damages), eighth (Co-Liability), ninth (Fault of Others), tenth (Speculative Damages), twelfth (Lack of Causation), sixteenth (Assumption of the Risk), seventeenth (Ratification), eighteenth (Recovery), nineteenth (Set-Off), twentieth (Plaintiffs’ Negligence), and twenty-third (Waiver) affirmative defenses and

included ample factual bases—more than what is needed at this stage—for those defenses. For example, Wells Fargo’s second affirmative defense says:

*SECOND AFFIRMATIVE DEFENSE  
(Negligence By Third Parties)*

*The negligence or other culpable conduct of other persons, forces, and/or things over which Wells Fargo is not responsible proximately caused or contributed to the alleged injuries and damages of Plaintiffs and, therefore, any recovery of Plaintiffs is barred or must be reduced in proportion to the amount of the negligence or other culpable conduct attributable to such other persons, entities, forces, and/or things. Wells Fargo asserts this defense to the extent Plaintiffs’ claims are premised on Wells Fargo’s alleged negligent conduct (see Amended Compl. ¶ 73 and ¶ 173). See Doherty v. Allianz Life Ins. Co. of N. Am., No. 218CV377FTM29NPM, 2019 WL 5268721 (M.D. Fla. Oct. 17, 2019).*

*Wells Fargo asserts that any damages awarded to Plaintiffs is subject to apportionment pursuant to section 768.81, Florida Statutes, and Fabre v. Marin, 623 So. 2d 782 (Fla. 1993). All at-fault persons or entities are unknown to Wells Fargo, and discovery remains ongoing. At this time, the potential at-fault parties include, but are not limited to, the following in addition to Plaintiffs themselves: Marshal Seeman; Eric Holtz; Alan Hodge; National Senior Insurance, Inc. (“NSI”) d/b/a Seeman Holtz Insurance Services, Inc; Integrity Assets 2016, LLC; Integrity Assets, LLC; Integrity Longevity Investments, LLC; Integrity Longevity Investments, LLC; Anthony Lombardo; Para Longevity 2012, LLC; Para Longevity 2012-5 LLC; Para Longevity 2014, LLC; Para Longevity 2014-5, LLC; Para Longevity 2015-3, LLC; Para Longevity 2015-5, LLC; Para Longevity 2016-3, LLC; Para Longevity 2016-5, LLC; Para Longevity 2018-3, LLC; Para Longevity 2018-5, LLC; Para Longevity 2019-3, LLC; Para Longevity 2019-5, LLC; Para Longevity 2019-7, LLC; Para Longevity Investments, LLC; Para Longevity VI, LLC; Para Longevity Holdings VI LLC; Paraveda Investments V, Inc.; Brian Schwartz; Seeman Holtz Global LLC; Seeman Holtz Property and Casualty, LLC; Seeman Holtz Wealth Management; Seeman-Holtz Consulting Corp.; SH Global, LLC N/K/A Para Longevity V, LLC; Signal Point Capital, LLC; Frederick Tan; and Neal Mellert.*

*Specifically, the scheme at the heart of Plaintiffs’ claims was perpetrated by the above Fabre Defendants, not Wells Fargo. As alleged in the Amended Complaint, the Seeman and Holtz entities—not Wells Fargo—“created the PLCs to solicit funds from investors through the sale of Notes purportedly to fund the purchase and payment of premiums for STOLIs;” “lured” Plaintiffs “to invest in the Notes issued by the PLCs;” and “diverted money from legitimate business operations . . . [i]nstead of paying Plaintiffs and the Class from the funds generated by the death benefits of the STOLIs securing their PLC Notes.” See Amended Compl. ¶¶ 33, 35, 42. Moreover, upon information and belief, Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs business model are subject to numerous potential risks and conflicts of interest. See id. ¶ 37 (“each*

*of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters.”).*

*Pursuant to Nash v. Wells Fargo, 678 So. 2d 1262 (Fla. 1996), Wells Fargo will seek to amend these Affirmative Defenses as soon as practical upon identifying any other potential non-party Fabre Defendant. Wells Fargo notices its intent to include on the verdict form all persons or entities shown during discovery or investigation to have been at fault, in whole or in part, for the damages alleged to have been suffered by Plaintiffs.*

Wells Fargo’s eighth, ninth, and twelfth, affirmative defenses contain substantially similar factual underpinnings. Wells Fargo’s third, tenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, and twenty-third affirmative defenses similarly include language regarding the investment risks known to Plaintiffs, including for example the following:

*Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs’ business model are subject to numerous potential risks and conflicts of interest. See Amended Compl. ¶ 37 (“each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters”).*

Each of the affirmative defenses cited by Plaintiffs speaks in some way to the negligence and culpability of Plaintiffs and third-parties in the investment scheme perpetrated by the Seeman Holtz entities.<sup>2</sup> Wells Fargo lists the many ways that the Seeman Holtz entities, Seeman Holtz individuals, and others, are responsible for the alleged Ponzi scheme, particularly because:

*the Seeman and Holtz entities—not Wells Fargo—“created the PLCs to solicit funds from investors through the sale of Notes purportedly to fund the purchase and payment of premiums for STOLIs;” “lured” Plaintiffs “to invest in the Notes issued by the PLCs;” and “diverted money from legitimate business operations . . . [i]nstead of paying Plaintiffs and the Class from the funds generated by the death benefits of the STOLIs securing their PLC Notes.” See Am. Compl. ¶¶ 33, 35, 42.*

Wells Fargo Affirmative Defense (“WF AD”) #2. Wells Fargo then goes on to allege that, as stated in the Amended Complaint, Plaintiffs invested in the PLCs through the sale of promissory notes with “each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters.” *See, e.g.,* WF AD #2 (quoting Am. Compl. ¶ 37), 8, 9, 10, 12,

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<sup>2</sup> The Seeman Holtz entities include, but are not limited to, the entities identified in Footnotes 1 and 2 of the Amended Complaint.

16, 17, 19, 20, and 23.<sup>3</sup> Accordingly, Wells Fargo has identified the factual and legal basis for these defenses.

Notably, the substance of Wells Fargo's allegations comes directly *from Plaintiffs' own complaint*. Plaintiffs' own allegations thus provide Plaintiffs with the bases for Wells Fargo's defenses. This is more than enough to provide Plaintiffs notice of Wells Fargo's affirmative defenses and the factual bases upon which they rest, whether under a heightened pleading standard or a notice pleading standard. *Compare Home Management Solutions*, 2007 WL 2412834, at \*2 (S.D. Fla. Aug. 21, 2007) (applying a heightened standard and explaining that "[a] defense is insufficient as a matter of law only if: (1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law.") *with RooR v. Wellington Elite Trading, Inc.*, No. 16-61895-CIV, 2017 WL 5953291, at \*2 (S.D. Fla. May 31, 2017) (Goodman, M.J.) ("[I]f Defendant's affirmative defenses give Plaintiff notice of its affirmative defenses, then the Undersigned will consider those affirmative defenses properly pled and will not strike them for failure to meet an inapplicable heightened pleading standard.").

Further, more information is likely to become known through discovery to support each of these defenses, as Wells Fargo explains in its Answer, since the relevant facts are in Plaintiffs' custody and control. There are more than five months left in fact discovery; documents are still being produced; and depositions are about to take place. Accordingly, at this stage in the case, "it would be unreasonable to require" Wells Fargo to support its defenses "with detailed and specific factual assertions which may be established later on in discovery." *See e.g., TRG Oasis (Tower One), Ltd. v. Crum & Forster Specialty Ins. Co.*, No. 22-21346-CIV, 2022 WL 4631917, at \*4 (S.D. Fla. Sept. 14, 2022), *R&R adopted*, No. 22-21346-CIV, 2022 WL 4599056 (S.D. Fla. Sept. 30, 2022); *see also Lawton-Davis v. State Farm Mut. Auto. Ins. Co.*, No. 6:14-CV-1157-ORL-37GJK, 2015 WL 12839263, at \*2 (M.D. Fla. Aug. 19, 2015) ("[W]ith discovery ongoing, the Court finds that it is too early to know whether Defendant's defenses and denials are 'insufficient' as a matter of law, and thus Plaintiffs' Rule 12(f) motion is due to be denied as premature.").

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<sup>3</sup> Wells Fargo's third (Failure to Mitigate Damages) and eighteenth (Recovery) affirmative defenses do not include the quoted language from the Amended Complaint, but both include fair notice of the defense and factual bases in support, including that Plaintiffs failed to adequately investigate and monitor their investments and that the notes and the PLC's business model were subject to numerous potential risks and conflicts of interest. *See* WF AD #3, 18.

“If, after the close of discovery, Plaintiffs believe there is no evidence to support a particular defense, then they can challenge it at the summary judgment stage.” *TRG Oasis*, 2022 WL 4631917, at \*4; *see also Gonzalez v. Scottsdale Ins. Co.*, No. 20-20747-CIV, 2020 WL 1891328, at \*2 (S.D. Fla. Apr. 16, 2020) (declining to strike affirmative defense because more information “could become known during discovery”) (quoting *JazAtlanta 519 LLC v. Beazley Underwriting, Ltd.*, No. 18-cv-60498, 2018 WL 4743634, \*1 (S.D. Fla. Oct. 2, 2018); *Bakshi*, 2023 WL 6376730, at \*4 (“Defendant’s argument about the need for additional discovery has merit.”). But at this stage, Wells Fargo has given fair notice to Plaintiffs and provided sufficient factual bases in support of its defenses.

**B. Plaintiffs Allege Negligence Liability Against Wells Fargo and Therefore Wells Fargo Is Entitled to Assert Negligence Based Defenses**

Plaintiffs next argue that Wells Fargo has failed to adequately plead its second affirmative defense, Negligence by Third Parties, because Plaintiffs’ claims are based on intentional torts. Pls.’ Mot. Strike at 4. Notwithstanding that self-serving characterization of their pleading, Plaintiffs’ Amended Complaint explicitly alleges that “questions of law and fact” which “are common to the claims of Plaintiffs and the entire Class” include: “i. Whether Defendant owed Plaintiffs and the Class a *duty of reasonable care* applicable to banks and financial institutions;” “j. Whether Defendant *breached its duty of reasonable care* applicable to banks and financial institutions;” and “k. Whether Defendant was *negligent* in substantially assisting the Scheme . . . .” *See* Am. Compl. ¶ 173 (emphasis added). Plaintiffs’ pleading thus makes clear that their theories of recovery depend on establishing Wells Fargo’s supposed negligence and failure to adhere to the appropriate standard of care.

Moreover, Plaintiffs are incorrect on the law in Florida when they argue that the offenses underlying their aiding and abetting claims are intentional torts. *See* Pls.’ Mot. to Strike at 5 n.2. “Breach of fiduciary duty can certainly be an intentional tort,” but this does not “preclude the existence of a negligent breach of fiduciary duty claim.” *Aviation One of Fla., Inc. v. Airborne Ins. Consultants Pty.*, No. 6:13-cv-1243-Orl-41DAB, 2016 WL 11563312, at \*3 (M.D. Fla. Feb. 11, 2016) (further citing to *Daniel v. Coastal Bonded Title Co.*, 539 So. 2d 567, 568 (Fla. 5th DCA 1989) as “recognizing both intentional and negligent breach of fiduciary duty claims.”), *aff’d*, 722

F. App'x 870 (11th Cir. 2018). Once again, it is clear from Plaintiffs' own pleading and theories of recovery that they have put the concept of negligence in play.

“[S]triking defenses from a pleading remains a drastic remedy to be resorted to only when required for the purposes of justice and only when the stricken material *has no possible relation to the controversy.*” *Archer W.*, 2023 WL 11802486, at \*1 (internal quotations and citations omitted) (emphasis added). Here, Wells Fargo's affirmative defense plainly relates to the controversy at issue because Plaintiffs' explicit allegations in the Amended Complaint include allegations about Wells Fargo's supposedly negligent conduct.<sup>4</sup> Accordingly, Wells Fargo has the right to offer affirmative defenses speaking to the culpability of non-party *Fabre* defendants. Further, to the extent that Plaintiffs are disputing the nature and elements of the breach of fiduciary duty or other causes of action, “[m]otions to strike affirmative defenses cannot be used to decide disputed and substantial questions of law.” *PNC Bank, N.A. v. Haghghi Fam. & Sports Med., P.A.*, No. 3:16-CV-1226-J-32MCR, 2017 WL 7311870, at \*2 (M.D. Fla. June 2, 2017).<sup>5</sup>

**C. Plaintiffs' Arguments Regarding Wells Fargo's Third, Fifteenth, Seventeenth, Twentieth, and Twenty-Third Affirmative Defenses Ignore the Relevant Pleading Standard and the Fact that Plaintiffs Themselves Possess the Information Needed to Understand the Defenses**

Plaintiffs argue that Wells Fargo's third (Failure to Mitigate Damages), fifteenth (Consent), seventeenth (Ratification), eighteenth (Recovery), twentieth (Plaintiffs' Negligence), and twenty-third (Waiver) affirmative defenses fail because Wells Fargo has not provided fair notice of the defenses and has not “allege[d] what information Plaintiffs could have uncovered that would have revealed the existence of the Ponzi scheme.” Pls.' Mot. Strike at 7. Plaintiffs again have overlooked the purpose of affirmative defenses, which “is to give the opposing party notice of an issue so that party can prepare to properly litigate the issue.” *Amerikooler, LLC v. Americooler, Inc.*, No. 17-24420-CV, 2018 WL 6528019, at \*1 (S.D. Fla. Apr. 11, 2018). The purpose is not to

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<sup>4</sup> In meet and confer discussions preceding the filing of Plaintiffs' motion, Wells Fargo offered to remove its negligence-based defenses if Plaintiffs would agree to remove the negligence-based language in their complaint. Plaintiffs declined to do so.

<sup>5</sup> Plaintiffs cite *Goldberg for Jay Peak, Inc. v. Raymond James Fin., Inc.*, No. 16-21831-CIV, 2017 WL 7791564, at \*5 (S.D. Fla. Mar. 27, 2017) to argue that aiding and abetting liability is an intentional tort. But that case is an order on a motion to dismiss and does not discuss motions to strike, affirmative defenses, or what needs to be alleged at this stage for a Negligence by Third Parties defense.

“set forth detailed factual allegations,” *Bakshi*, 2023 WL 6376730, at \*2, and Plaintiffs’ attacks on the level of detail of facts alleged in support of Wells Fargo’s affirmative defenses should be saved for summary judgment. *See TRG Oasis*, 2022 WL 4631917, at \*4 (“If, after the close of discovery, Plaintiffs believe there is no evidence to support a particular defense, then they can challenge it at the summary judgment stage.”).<sup>6</sup>

Plaintiffs’ own arguments concede that Wells Fargo has satisfied the relevant affirmative defense pleading standard. In particular, Plaintiffs acknowledge that Wells Fargo has put them on notice that its defenses are based on Plaintiffs’ failure to “(a) conduct their own due diligence into the Ponzi Scheme or the Ponzi Operators and (b) monitor their investments after they invested.” Pls.’ Mot. Strike at 7. Plaintiffs thus have acknowledged that Wells Fargo has *already provided* the factual basis for its defenses (to wit, plaintiffs’ lack of due diligence, failure to monitor their own investments and knowledge of the supposedly illegal STOLI policies), which provide sufficient grounds for its defenses resting on Plaintiffs’ own culpability, including Wells Fargo’s third (Failure to Mitigate Damages), fifteenth (Consent), seventeenth (Ratification), eighteenth (Recovery), twentieth (Plaintiffs’ Negligence), and twenty-third (Waiver) affirmative defenses. *Jackson v. Frontier Commc’ns*, No. 6:20-CV-839-WWB-EJK, 2022 WL 17539684, at \*3 (M.D. Fla. Dec. 8, 2022) (“To the extent Plaintiff requires greater factual detail for these defenses, Plaintiff[s] may acquire those facts through discovery.”). What is more, the details here are entirely within Plaintiffs’ possession. If Plaintiffs’ counsel needs to know more about their clients’

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<sup>6</sup> Notably, courts have denied motions to strike the defense of failure to mitigate damages when far fewer details were alleged. For example, in *Crosby v. City of Titusville*, the defendants merely alleged that “Plaintiffs have failed to mitigate their alleged damages, and as such, should be barred from recovering those damages which could and should have been mitigated by Plaintiffs.” No. 6:24-cv-922-CEM-RMN, ECF No. 30 (M.D. Fla. Sept. 23, 2024). The court there denied the plaintiffs’ motion to strike because the defense was “enough” to put “Plaintiffs on notice.” *Crosby*, 2025 U.S. Dist. LEXIS 8933, at \*9 (M.D. Fla. Jan. 16, 2025); *see also Sembler Family P’ship #41 v. Brinker Fla., Inc.*, No. 8:09-cv-1212-T-24MAP, 2008 WL 5341175, at \*4 (M.D. Fla. Dec. 19, 2008) (denying plaintiff’s motion to strike a defense “in which Defendants allege[d] that Plaintiff’s claim for damages is barred because Plaintiff failed to undertake appropriate steps to mitigate its damages” since the allegations are “sufficient to put Plaintiff on notice of their mitigation defense”); *Herman v. Seaworld Parks & Entm’t., Inc.*, No. 8:14-CV-3028-T-35EAJ, 2015 WL 12859432, at \*4 (M.D. Fla. June 16, 2015) (denying motion to strike accord and satisfaction, failure to mitigate, and set-off because “[o]n their face, it does not appear that these defenses are frivolous or clearly invalid as a matter of law” and plaintiffs “may properly [challenge the merits] on a motion for summary judgment”).

own pre-investment diligence, monitoring of investments, or awareness of the illegality of the investments they made, they should talk to their clients—not burden the Court with wasteful motion practice.

Plaintiffs also argue that Wells Fargo’s “twentieth affirmative defense alleges Plaintiffs were contributorily negligent, but Plaintiffs’ claims are based on intentional torts.” Pls.’ Mot. Strike at 7. As stated above, Plaintiffs’ allegations in the Amended Complaint explicitly reference Wells Fargo’s supposedly negligent conduct—and Plaintiffs have flatly rejected Wells Fargo’s invitation to withdraw these references. *See supra* 7–8. To the extent that Plaintiffs continue to maintain Wells Fargo should be liable for negligent conduct, Wells Fargo has the right to allege affirmative defenses based on their own fault.

Finally, Plaintiffs argue “the twenty-third affirmative defense [waiver] alleges Plaintiffs ‘knowing[ly] participat[ed]’ in a Ponzi scheme, and so it must be pleaded with particularity. *See* Fed. R. Civ. P. 9(b).” Pls.’ Mot. Strike at 8. But “[a]ffirmative defenses are excused from complying with Fed. R. Civ. P. 9’s ‘particularity’ requirements ‘where the substance of the pleading is sufficient,’” that is, meets the pleading standard of Fed. R. Civ. P. 8. *Su v. Arise Virtual Sol. Inc.*, No. 23-61246-CV, 2024 WL 5414720, at \*1 (S.D. Fla. Apr. 23, 2024) (quoting *Myers v. C. Fla. Investments, Inc.*, 592 F.3d 1201, 1224-25 (11th Cir. 2010)). Wells Fargo alleges, similarly to other defenses, that Plaintiffs have waived claims against Wells Fargo because of their awareness of the risks associated with investing in the PLCs. WF AD, #23. Wells Fargo’s pleading is sufficient under the law. *See MSP Recovery Claims, Series LLC v. Atl. Specialty Ins. Co.*, No. 6:20-CV-553-RBD-EJK, 2021 WL 4935726, at \*2 (M.D. Fla. Oct. 6, 2021) (“The Court agrees that ‘accord and satisfaction’ and ‘waiver,’ stated in ‘short and plain terms,’ is sufficient to provide Plaintiff notice.”); *Mt. Hawley Ins. Co. v. Boca Bayou Condo. Ass’n, Inc.*, No. 18-cv-81656, 2019 WL 7837288, at \*3 (S.D. Fla. Dec. 20, 2019) (finding that waiver affirmative defense which stated that “Plaintiff, by its own actions and conduct in the underlying case, has waived any right to deny coverage under the policy” gave sufficient notice of defense), *R&R adopted*, No. 18-cv-81656, 2020 WL 1441921 (S.D. Fla. Mar. 25, 2020).

#### **D. Questions of Law Regarding Wells Fargo’s Fourth and Fifth Affirmative Defenses of Unclean Hands and In Pari Delicto Are Not Appropriate in a Motion to Strike**

Plaintiffs argue Wells Fargo’s defenses of unclean hands and *in pari delicto* fail because Wells Fargo has not alleged what wrongdoing class members engaged in and has not asserted that it was harmed by Plaintiffs’ conduct. Pls.’ Mot. Strike at 8. To sustain the defenses here, Wells

Fargo need only provide notice of the defenses and the factual bases in support; it need not actually plead and prove every element of the defenses it in its Answer. *See RooR*, 2017 WL 5953291, at \*2.

Here, Wells Fargo alleges in its affirmative defenses for unclean hands and *in pari delicto*:

*[U]pon information and belief, certain of the Plaintiffs and/or the purported class benefited from the scheme alleged in the Complaint, including by receiving benefits related to their respective investments over the course of their business relationship with NSI, including at rates higher than alternative investment options. Moreover, certain of the Plaintiffs and/or the purported class, including Martin Kleinbart, engaged in multiple investments with NSI over the course of their relationship. Further, Wells Fargo anticipates that Plaintiffs and/or some of the purported class may have been aware of any STOLI policies to the extent such policies exist and knowingly invested in STOLI policies. Discovery remains ongoing and more facts may be revealed in support of this defense.*

Wells Fargo has thus provided notice of its defenses and factual bases in support: that certain Plaintiffs benefited from the business relationship with NSI, in some instances while being aware of investments in STOLI policies to the extent such policies exist. Plaintiffs disagree that this demonstrates Plaintiffs' *wrongdoing*. But motions to strike are not the place to decide disagreements of facts and the law. *See PNC Bank, N.A.*, 2017 WL 7311870, at \*2. Wells Fargo has provided notice to Plaintiffs of its defenses, and again, because discovery is at early stages, more facts may become known to support these defenses. *TRG Oasis*, 2022 WL 4631917, at \*4; *see also Jones v. Kohl's Dep't Stores, Inc.*, No. 15-CIV-61626, 2015 WL 12781195, at \*2 (S.D. Fla. Oct. 16, 2015) (denying motion to strike "Defendant's single sentence defense" of laches, unclean hands, and waiver because these are "sufficient—boilerplate but well-recognized [ ] valid defenses," and noting that "[t]o the extent Plaintiff requires greater factual detail for these defenses, Plaintiff[s] may acquire those facts through discovery"). What is more, Plaintiffs do not need Wells Fargo to explain what Plaintiffs themselves knew or how they might have benefitted from the fraud at issue, since those facts are entirely within Plaintiffs' own knowledge.<sup>7</sup>

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<sup>7</sup>As Wells Fargo will show, unlike Plaintiffs, Wells Fargo did *not* know that insurance policies were to be purchased with proceeds from the notes Plaintiffs purchased. This is because Wells Fargo was not a party to and did not have any role in creating, marketing, selling or purchasing those notes.

**E. Wells Fargo’s Sixth and Twenty-First Affirmative Defenses of Laches and Statute of Limitations Provide Sufficient Notice of Wells Fargo’s Intended Defense**

Plaintiffs argue Wells Fargo’s defenses for laches and statute of limitations should be stricken because “Plaintiffs’ claims accrued when Plaintiffs knew, or reasonably should have known, of their existence.” Pls.’ Mot Strike 10. In other words, Plaintiffs are arguing that the “delayed discovery doctrine” applies, which states “that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action.” *Falcon v. Bank of Am., N.A.*, No. 1:21-CV-24250, 2022 WL 6745443, at \*3 (S.D. Fla. Aug. 19, 2022). Once more, Plaintiffs are seeking a ruling on a potentially dispositive, substantial question of law which is not appropriate at this stage. *See e.g., PNC Bank, N.A.*, 2017 WL 7311870, at \*2; *see also In re Tampa Checkmate Food Services, Inc.*, 221 B.R. 541, 544 (M.D. Fla. 1998) (holding that a motion to strike should only be granted if the plaintiff would succeed despite any set of facts, the affirmative defense does not present disputed and substantial questions of law which, if resolved, could support the defendant’s claim, and the plaintiff shows prejudice). It would be entirely inappropriate to decide that Wells Fargo cannot prove a statute of limitations or laches defense on a motion to strike before the completion of discovery.

Moreover, Plaintiffs—not Wells Fargo—“are in the best position to determine the factual basis for when their claims accrued,” and Wells Fargo’s pleading is sufficient to notify Plaintiffs that Wells Fargo intends to probe the basis for and then assert at the appropriate time a timeliness defense. *Marino v. Broward Sheriff’s Off.*, No. 20-60980-CIV, 2021 WL 9347050, at \*3 (S.D. Fla. Dec. 6, 2021) (finding defendant’s statute of limitations defenses “contain sufficient facts . . . to put Plaintiffs on notice that Defendants believe the claims to be outside the limitations period”). They thus have everything they might need to tee up, or oppose, a motion for summary judgment at the appropriate stage of the case.

**F. Wells Fargo Has Provided Sufficient Notice of Its Seventh Affirmative Defense of Estoppel**

Plaintiffs argue that Wells Fargo’s defense of estoppel must be stricken because it has not alleged facts to support each element of estoppel. Again, at this stage, Wells Fargo is only required to plead the defense “in short and plain terms” in order to provide notice to Plaintiffs. *Archer W.*, 2023 WL 11802486, at \*1; *see also Guarantee Ins. Co. v. Brand Mgmt. Serv., Inc.*, No. 12-CV-61670, 2013 WL 4496510, at \*5 (S.D. Fla. Aug. 22, 2013) (denying a motion to strike affirmative

defenses of estoppel, waiver, laches, and unclean hands even though they contained no factual support and were alleged in general terms).

Here, Wells Fargo has done more than provide general notice of the defense and has set out sufficient facts in support. As stated in the defense, “Plaintiffs through their investment(s) with NSI authorized and/or represented to Wells Fargo that NSI could take action on their behalf and for their benefit (despite knowing their investment could be lost, or its value decreased).” See WF AD #7. Wells Fargo has thus provided sufficient notice of this defense and the factual bases supporting it.

**G. Wells Fargo’s Eighth, Ninth, and Twelfth Affirmative Defenses, Co-Liability, Fault of Others and Lack of Causation, Properly Assert Negligence Based Defenses**

Plaintiffs move to strike these defenses on the basis that Plaintiffs’ claims do not invoke negligence. As explained above, Plaintiffs’ explicit allegations in the Amended Complaint include assertions about Wells Fargo’s purportedly negligent conduct. *See supra* 7-8. Because Plaintiffs are alleging negligent conduct, Wells Fargo has the right to allege affirmative defenses speaking to the culpability of Plaintiffs and others. Moreover, each of these defenses provides Plaintiffs with sufficient notice and the factual bases for Wells Fargo’s defenses. *Roos*, 2017 WL 5953291, at \*2.

**H. Plaintiffs’ Own Argument Acknowledges that Wells Fargo Has Already Disclosed an Adequate Factual Basis for Its Tenth Affirmative Defense, Speculative Damages**

Plaintiffs argue that Wells Fargo’s “tenth affirmative defense fails to provide any facts explaining how Plaintiffs’ claims for damages would be speculative.” Pls.’ Mot. Strike 13. This is wrong. As Plaintiffs’ own Motion quotes, Wells disclosed to them that their damages are speculative “because it is unclear that Plaintiffs’ investments would have made money or been successful even absent the purported scheme.” *See* WF AD #10 (“each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters” (quoting Am. Compl. ¶37)). These are the very facts that explain how the damages claim would be speculative. Wells Fargo need not *prove* at this stage that Plaintiffs’ investments would not have made money, and the allegations Wells Fargo made are more than enough to put Plaintiffs on notice of the defense.

To the extent this defense is a denial of the elements of Plaintiffs’ claims, Plaintiffs’ own authority, *Home Management Solutions*, explains that “the proper remedy is not [to] strike the claim, but rather to treat is as a specific denial.” 2007 WL 2412834, at \*3.

**I. Wells Fargo’s Eleventh Affirmative Defense, Good Faith, Provides Ample Factual Bases**

Plaintiffs are wrong to argue that Wells Fargo has not “provid[ed] supporting facts to apprise Plaintiff[s] of the grounds upon which [the affirmative defense of Good Faith Conduct/Conformance with Applicable Standards] rests.” Pls.’ Mot. Strike 14. Plaintiffs quote the entire defense, which includes the following factual allegations:

- Wells Fargo at all times acted in good faith and in conformance with all applicable government and industry standards, rules and regulations;
- Wells Fargo acted in accordance with acceptable standards in the banking industry, including through its opening of the PLC accounts and “Know Your Customer” due diligence;
- Wells Fargo also acted in accordance with the governing trust agreements as Trustee for the James S. Yakovakis, Albert Cohen, and William G. Walters trusts;
- The governing trust agreements and Securities Account Agreements specifically limited Wells Fargo’s duties and responsibilities, contradicting Plaintiffs’ allegations;
- Wells Fargo’s role was administrative in nature; and
- Wells Fargo was wholly unaware of Plaintiffs’ investments and alleged collateral for those investments.

*Id.* Far beyond merely denying that Wells Fargo had knowledge of Seeman Holtz’s Ponzi scheme, these averments provide ample information to Plaintiffs about the bases upon which Wells Fargo will demonstrate its good faith. And, again, to the extent this defense is a denial, as explained in *Home Management Solutions*, “the proper remedy is not [to] strike the claim, but rather to treat it as a specific denial.” 2007 WL 2412834, at \*3; *see also Wight*, 2021 WL 2783878, at \*3 (same).

**J. Wells Fargo’s Sixteenth Affirmative Defense, Assumption of Risk, Properly Asserts a Negligence-Based Defense**

Plaintiffs yet again argue a defense is inapplicable because it relates to negligent conduct. As explained above, Plaintiffs’ Amended Complaint relies on allegations about Wells Fargo’s supposedly negligent conduct. *See supra* 7–8. Accordingly, because Plaintiffs are alleging negligent conduct, Wells Fargo has the right to allege affirmative defenses speaking to the culpability of Plaintiffs. Wells Fargo has provided Plaintiffs with sufficient notice and the factual bases for this defense. *Roor*, 2017 WL 5953291, at \*2.

**K. Wells Fargo’s Eighteenth Affirmative Defense, Recovery, Is Not a Mere Denial**

Plaintiffs argue that Wells Fargo’s affirmative defense of Recovery should be stricken because it is a denial of the elements of Plaintiffs’ claims. Pls.’ Mot. Strike 15-16. This is

incorrect. As Plaintiffs quote, Wells Fargo’s defense alleges not that Plaintiffs did not suffer damages in the first instance, but that Plaintiffs *recovered* money that negates those damages. Wells Fargo has thus provided Plaintiffs sufficient notice of its affirmative defense of Recovery. *RooR*, 2017 WL 5953291, at \*2. And, again, if this defense is construed as a denial, the proper remedy is not to strike it. *See Home Management Solutions*, 2007 WL 2412834, at \*3; *see also Wight*, 2021 WL 2783878, at \*3 (same).

**L. Federal Courts Recognize Set-Off, Wells Fargo’s Nineteenth Affirmative Defense, as a Valid Affirmative Defense to Tort Actions**

Plaintiffs argue set-off is inapplicable because it only applies to contract actions and not tort actions. Pls.’ Mot. Strike at 16-17. Setting aside that this is a dispute of law that should not be resolved on a motion to strike, “multiple federal courts . . . have recognized [set-off] as a valid affirmative defense” to torts. *Kearney v. Valley Nat’l. Bank*, No. 8:21-CV-0064-KKM-TGW, 2022 WL 19754, at \*5 (M.D. Fla. Jan. 3, 2022); *see also e.g., Greenshields v. Fed. Ins. Co.*, 6:20-cv-1297-Orl-RBD-DCI, 2020 WL 9172954, at \*4 (M.D. Fla. Oct. 2, 2020); *Crabtree v. Cent. Fla. Invs., Inc. Deferred Comp. Plan*, 6:12-CV-656-Orl-36TBS, 2012 WL 6523078, at \*3 (M.D. Fla. Dec. 14, 2012). In *Kearney*, a negligence action, the defendant alleged “Plaintiffs’ claims are barred, in whole or in part, by Valley’s right to set off any amounts allegedly owed to Plaintiffs as against any amounts Plaintiffs owe Valley, including but not limited to any attorneys’ fees Valley has incurred in connection with the [relevant] account.” No. 8:21-CV-0064-KKM-TGW, ECF No. 69 (M.D. Fla. Sept. 30, 2020). The court there denied the plaintiffs’ motion to strike, finding that

the current form of this affirmative defense puts the Kearneys on notice that Valley National believes the Kearneys owe certain amounts that should reduce any liability Valley National may have to the Kearneys. This merits question is best resolved later, as there is nothing frivolous about it and the Kearneys fail to establish that it is clearly invalid as a matter of law.

*Kearny*, 2022 WL 19754, at \*5.

Similarly here, Wells Fargo provides notice to Plaintiffs of its affirmative defense of set-off. *RooR*, 2017 WL 5953291, at \*2. And, as explained above, *supra* 7–8, Plaintiffs have pleaded negligent conduct here, foreclosing their argument that this defense cannot be asserted because their claims sound solely in “intentional” torts. Thus, Wells Fargo has provided Plaintiffs with sufficient notice and the factual bases for this defense. *RooR*, 2017 WL 5953291, at \*2.

**M. Wells Fargo’s Twenty-Second Affirmative Defense, No Benefit Directly Conferred, May Be Raised Again as an Affirmative Defense**

Plaintiffs argue that Wells Fargo’s affirmative defense, no benefit directly conferred on Wells Fargo, should be stricken because it is not an affirmative defense and was previously raised in Wells Fargo’s motion to dismiss. Pls.’ Mot. Strike 17. However, courts have refused to strike affirmative defenses on this basis. *See Rosada v. John Wieland Homes & N’hoods, Inc.*, No. 3:09-cv-653-J-20MCR, 2010 WL 1249841, at \*3 (M.D. Fla. Mar. 25, 2010) (refusing to strike an affirmative defense even though the court previously rejected similar argument in denying the motion to dismiss); *CI Int’l Fuels, LTDA v. Helm Bank, S.A.*, No. 10-20347-CIV, 2010 WL 11597659, at \*2 (S.D. Fla. Aug. 23, 2010) (denying motion to strike based on the argument the defense was previously raised in a motion to dismiss because Plaintiffs failed to show the defense had “no relationship to the controversy,” “may confuse,” or may “otherwise prejudice” the Plaintiffs). Moreover, a ruling on a motion to dismiss does not mean that different facts—which could become known in discovery—would not provide for a different result. *Cf. In re Tampa Checkmate Food Servs*, 221 B.R. at 544 (motion to strike should only be granted if (i) the plaintiff would succeed despite any set of facts, (ii) the affirmative defense does not present disputed questions of law that could support the defendant’s claim, and (iii) the plaintiff shows prejudice).

Unjust enrichment requires that a benefit be conferred on the defendant, *Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 714 F.3d 1234, 1237 (11th Cir. 2013), and Wells Fargo has disclosed that the factual basis for its defense will be that Plaintiffs conferred no benefit directly to Wells Fargo. To the extent that these facts constitute a denial of elements of Plaintiffs’ claim, the defense should not be stricken but instead treated as a denial. *See Home Management Solutions*, 2007 WL 2412834, at \*3 (“[T]he proper remedy is not [to] strike the claim, but rather to treat it as a specific denial.”).

**N. Wells Fargo’s Twenty-Fourth Affirmative Defense, Existence of Contract, Provides Fair Notice to Plaintiffs**

Plaintiffs argue Wells Fargo has failed to provide Plaintiffs with fair notice of its affirmative defense of existence of contract because Plaintiffs are “guessing which deposit agreement” or provision Wells Fargo is referencing, and because the defense constitutes merely a denial of Plaintiffs’ claims. Pls.’ Mot. Strike at 18. Wells Fargo has adequately pled this affirmative defense. *See RooR*, 2017 WL 5953291, at \*2. As Plaintiffs quote in their brief, Wells Fargo is alleging that to the extent that any class members had an account or relationship with

Wells Fargo, that relationship is governed by a deposit agreement. Although Plaintiffs argue they do not know which deposit agreement Wells Fargo is referencing, Wells Fargo's defense puts them on notice of the agreements at issue by referencing applicable account agreements. Plaintiffs have sufficient information to identify the contracts at issue or explore the details in discovery.

And finally, to the extent this defense is a denial, as explained in *Home Management Solutions*, "the proper remedy is not [to] strike the claim, but rather to treat it as a specific denial." 2007 WL 2412834, at \*3; *see also Wight*, 2021 WL 2783878, at \*3 (same).

**O. Wells Fargo's Class Certification Challenge in its Twenty-Fifth Affirmative Defense Is a Valid Affirmative Defense**

Plaintiffs argue that Wells Fargo cannot properly assert an affirmative defense to the prerequisites for maintaining a class action. That is incorrect. A defense which challenges whether plaintiffs have satisfied the requirements of class certification is a valid affirmative defense. *See Goers v. L.A. Entm't Grp., Inc.*, No. 2:15-cv-412-FtM-99CM, 2016 WL 11518750, at \*3 (M.D. Fla. Jan. 27, 2016) (denying a motion to strike an affirmative defense challenging class certification because the defense was "sufficiently valid, sufficiently pled, and sufficiently places Plaintiff on notice on the legal theories on which Defendants intend to rely."). And, again, if this defense is construed as a denial, the proper remedy is not to strike it. *See Home Management Solutions*, 2007 WL 2412834, at \*3; *see also Wight*, 2021 WL 2783878, at \*3 (same). The Court should deny Plaintiffs' request to strike this defense.

**P. Wells Fargo's Reservation of Rights is Not an Affirmative Defense, and It Therefore Is Not Properly Included in Plaintiffs' Motion**

Plaintiffs argue that a reservation of rights clause is not an affirmative defense and should be stricken. But Wells Fargo "did not plead [its] reservation of the right to amend affirmative defenses as an affirmative defense." *See Ramnarine*, 2013 WL 1788503, at \*5-6. Wells Fargo was merely reserving its rights to plead additional affirmative defenses in the future. Accordingly, "the fact that a reservation of rights may not constitute an affirmative defense is not a basis for

striking a reservation of rights,” and Plaintiffs’ motion to strike Wells Fargo’s reservation of rights should be denied. *Id.*

**CONCLUSION**

Wells Fargo has more than satisfied the pleading requirements of Fed. R. Civ. P. 8(b) and provided Plaintiffs with fair notice of its defenses and the grounds on which they rest. *Bakshi*, 2023 WL 6376730, at \*2.

WHEREFORE, Wells Fargo asks the Court to deny Plaintiffs’ Motion to Strike Wells Fargo’s Affirmative Defenses and grant such other and further relief as this Court deems just and proper. Should the Court find any of Wells Fargo’s affirmative defenses deficient, Wells Fargo asks for leave to replead them.

Respectfully submitted on June 10, 2025.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 10, 2025, a true copy of the foregoing was filed with the Court using the CM/ECF system, which will send notice to counsel of record.

/s/ Emily Y. Rottmann

Attorney