

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

Case Number: 1:24-cv-22142-GAYLES/GOODMAN

**FANNY B. MILLSTEIN and
MARTIN KLEINBART,**

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE DEFENDANT'S AMENDED AFFIRMATIVE DEFENSES**

INTRODUCTION

Defendant's Response makes three erroneous arguments. First, Defendant argues "Plaintiffs' entire Motion is predicated on a misstatement of the legal standard for affirmative defenses," Resp. at 1, because it advocates for the application of stricter pleading standards under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). But as this Court has acknowledged, "there is a split among the district courts in this Circuit regarding the proper pleading standard for an affirmative defense." *Bakshi v. Carnival Corp.*, 2023 WL 6376730, at *2 (S.D. Fla. Aug. 23, 2023). And one of the judges that has adopted the heightened pleading standard for affirmative defenses is Judge Gayles. *GPM Indus., Inc. v. United States Citizenship & Immigration Services*, 2022 WL 4181544, at *1 (S.D. Fla. Sept. 13, 2022) (overruling defendants' objection that magistrate judge erred by "applying the heightened pleading standard to Defendants' affirmative defenses"). Regardless, the defenses at issue here fail to meet even the lower pleading standard urged by Defendant because they are either entirely conclusory or fail to allege sufficient facts to give Plaintiffs fair notice of the grounds on which they rest.

Second, Defendant attempts to salvage its patently infirm negligence-based defenses by insisting Plaintiffs' claims sound in negligence. But Plaintiffs' claims are that Defendant "commit[ed] the intentional tort[s] of aiding and abetting a breach of fiduciary duty" and fraud. *Goldberg for Jay Peak, Inc. v. Raymond James Fin., Inc.*, 2017 WL 7791564, at *5 (S.D. Fla. Mar. 27, 2017), quoting *Elandia Int'l, Inc. v. Ah Koy*, 690 F. Supp. 2d 1317, 1331 (S.D. Fla. 2010). And pursuant to Florida law, defenses based of contributory fault and apportionment of damages "do[] not apply to any action...based upon an intentional tort." §768.81(4). "The Legislature explicitly provided that...negligence may not serve as a...defense to an intentional tort..." *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 304 (Fla. 2017). Defendant's belated suggestion that Plaintiffs' claims can purportedly be read to encompass negligent breach of fiduciary duties thus fails as a matter of law, as do all of its negligence-based defenses.

Third, recognizing a host of its defenses are not affirmative defenses at all, Defendant urges this Court to nevertheless retain them as "specific denials." However, while "some district courts have held that the appropriate remedy...is to treat the purported defenses as denials...Here...the purported affirmative defenses are subject to striking as redundant because they reiterate earlier denials." *Aidone v. Nationwide Auto Guard, L.L.C.*, 295 F.R.D. 658, 662 n.2 (S.D. Fla. 2013); see also Fed. R. Civ. P. 12(f) (authorizing court to strike, *inter alia*, redundant matter).

LEGAL STANDARDS

Contrary to Defendant’s assertion, Plaintiffs are not “wrong on the legal standard” for pleading affirmative defenses. Resp. at 1; *see Bakshi*, 2023 WL 6376730, at *2 (collecting cases acknowledging the Eleventh Circuit has not resolved this split among the district courts). Rather, Plaintiffs submit that the standard articulated in *Twombly* and *Iqbal* should be applied here because Judge Gayles has previously adopted it. *GPM Indus., Inc.*, 2022 WL 4181544, at *1 (overruling defendants’ objection that magistrate judge erred by “applying the heightened pleading standard to Defendants’ affirmative defenses”); *see also MCM Entm’t, Inc. v. Diaz World Trade Group, Inc.*, 2024 WL 2833649 (S.D. Fla. Jan. 30, 2024) (“This Court has previously endorsed the view that affirmative defenses...must be plausibly alleged in accordance with *Twombly* and *Iqbal*...We see no reason to deviate from our analysis there, and so we hold [they] must be plausibly alleged...”), report and recommendation adopted, 2024 WL 2833860 (S.D. Fla. Feb. 27, 2024). And this is as it should be – where the Defendant bears the burden of proof it should be held to the same standard.

Defendant attempts to sidestep this issue by asserting “this Court” has held a lower “notice” pleading standard applies. Resp. at 1-2. But what Defendant is really saying is that this Court recommended application of that standard in *Bakshi*. Resp. at 2. But *Bakshi* was a report and recommendation for “Judge Scola[, who] has determined that *Twombly* does not apply to the pleading of affirmative defenses.” *Id.* at *2-3.¹ And while Plaintiff recognizes this Court’s prerogative to recommend to Judge Gayles that he reconsider his previous holdings, this Court also has the discretion to make a different recommendation here. *See Sec. & Exch. Comm’n v. Kornfeld*, 2021 WL 5178834, at *16 (S.D. Fla. Sept. 28, 2021) (Goodman, M.J.) (“The Undersigned acknowledges that my initial R & R relied heavily on [a particular authority] but Judge Moreno’s referral has caused me to reconsider that reliance, and I now conclude that it is not particularly helpful here...”), report and recommendation adopted, 2021 WL 5178491 (S.D. Fla. Nov. 8, 2021).

Defendant also attempts to mislead this Court into concluding that, when a purported defense simply challenges a plaintiff’s inability to prove its case, the appropriate remedy is always “to treat it as specific denial.” Resp. at 1-3. Not so. Rather, where the “purported defenses are reiteration of Defendants’ denials...[they] should be stricken as redundant.” *Aidone*, 295 F.R.D.

¹*Archer W.-De Moya Jt. Venture v. Ace Am. Ins. Co.*, 2023 WL 11802486 (S.D. Fla. July 12, 2023), was a consent case and thus has no bearing on what should be recommended to Judge Gayles.

at 661. Striking redundant denials couched as affirmative defenses has the salutary effect of “weeding out legally insufficient defenses at an early stage of a complicated lawsuit [and] may [thus] be extremely valuable to all concerned in order to avoid the needless expenditures of time and money.” *Id.* at 660; *see also Gammons v. Royal Caribbean Cruises Ltd.*, 558 F. Supp. 3d 1220, 1227 (S.D. Fla. 2021) (“A motion to strike is intended to clean up the pleadings, removing irrelevant or otherwise confusing materials... the Court finds the allegations immaterial and strikes the language [at issue.]”); Fed. R. Civ. P. 1 (The federal rules “should be construed, administered, and employed...to secure the just, speedy, and inexpensive determination of every action...”).

ARGUMENT

A. Defendant Fails To Explain How Plaintiffs’ Alleged Knowledge Of “Numerous Potential Risks And Conflicts Of Interest” Provided Them With Knowledge Of The Scheme.

Ponzi schemes like the one here invariably involve a “single written prospectus which was given to each Plaintiff [as part of a] fraudulent scheme against a large number of individuals.” *Bruhl v. Price Waterhousecoopers Intern.*, 257 F.R.D. 684, 694 (S.D. Fla. 2008). Defendant fails to explain how standard, garden-variety risk disclosures in the Note offerings and purchase agreements could have or did put Plaintiffs on notice that this was a Ponzi scheme. Motion at 3. Defendant’s assertion that this purported defense “comes directly *from Plaintiff’s own complaint*,” Resp. at 6, is a red herring. There is no dispute that Plaintiffs and the Class received standardized offerings and purchase agreements containing materially-identical risk disclosures. But Defendant failed to cite a single authority for the proposition that these boilerplate provisions are relevant to whether Plaintiff knew this was a Ponzi scheme. Thus, to the extent the defenses at issue are predicated on Plaintiffs’ alleged knowledge of “numerous potential risks and conflicts of interest,” they should be stricken as legally irrelevant. *Wyndham Vacation Ownership, Inc. v. Square One Dev. Group, Inc.*, 2022 WL 21374382, at *2, *4 (M.D. Fla. Feb. 2, 2022) (“Because the first portion of the sixth affirmative defense states a claim that is irrelevant to the Plaintiff’s Complaint...the undersigned will strike that portion of the defense... Plaintiffs seek to strike [the eighteenth affirmative] defense as legally irrelevant...The Court finds [this] affirmative defense is ‘clearly invalid’ as a matter of law...As such, [it] will be stricken.”).²

² Defendant claims “more information is likely to become known through discovery to support these defenses,” Resp. at 6, but that does not permit it to allege defenses for which it has no factual basis now. *Luxottica Group S.P.A. v. Cash Am. E., Inc.*, 198 F. Supp. 3d 1327, 1331 (M.D. Fla.

B. Defendant’s Second Affirmative Defense Should Be Stricken Because It Cannot Raise Negligence-Based Defenses Against Plaintiffs’ Intentional Tort Claims.

Florida law is clear. Defenses based on comparative fault and apportionment of damages cannot be raised as defenses to intentional torts. Fla. Stat. § 768.81(4) (“This section does not apply to any action...based upon an intentional tort.”); *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 304 (Fla. 2017) (“The Legislature explicitly provided that... negligence may not serve as a...defense to an intentional tort...”). It is equally well settled that aiding and abetting is an intentional tort. *See Goldberg for Jay Peak, Inc.*, 2017 WL 7791564, at *5 (referring to “the intentional tort of aiding and abetting...”).³ Indeed, whether Plaintiffs alleged sufficient actual knowledge on the part of Defendant was the focus of its motion to dismiss and, as this Court correctly stated, “evidence establishing negligence, *i.e.* that a bank ‘should have known,’” is insufficient to prove aiding and abetting liability. [D.E. 53 at 44]. That the Amended Complaint contains references to negligence in the list of potential common issues for class certification does not convert Plaintiffs’ aiding and abetting claims (and its unjust enrichment claim based on the same alleged knowing substantial assistance of the Ponzi scheme), which are intentional torts, into negligence-based claims. *See* Fla. Stat. § 768.81(1)(c) (“‘Negligence action’ means...a civil action for damages based upon a theory of negligence...The substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action”); *see also Morrison v. Executive Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1320 (S.D. Fla. 2005) (striking affirmative defenses that were not cognizable under relevant statutory scheme). If Wells Fargo was prepared to agree that Plaintiffs’ claims sound in negligence, it should have done so at the motion to dismiss stage and saved this Court time and Plaintiffs effort. It did not, instead insisting

2016) (“Either Defendant has a good faith basis to support this [defense], consistent with Rule 11, or it does not. As Defendant concedes that it presently does not, the motion is granted, and the defense is stricken. If and when Defendant has grounds to support the defense, it may seek leave to amend.”); *Daley v. Scott*, 2016 WL 3517697, at *3 (M.D. Fla. June 28, 2016) (“because Rule 15 allows for appropriate amendments counsel should therefore feel no need to window-dress pleadings early for fear of losing defenses later”) (cleaned up) (striking various defenses).

³ Defendant ineffectually attempts to distinguish *Goldberg for Jay Peak* on the basis that it did not arise in the context of a motion to strike affirmative defenses or discuss “what needs to be alleged...for a Negligence by Third Parties defense [sic],” Resp. at 8, n.5, but studiously avoids asserting that aiding and abetting is not an intentional tort because it knows that is not the law. What “needs to be alleged” for a defense based on the purported negligence of third parties is thus irrelevant, since such defenses cannot be raised against intentional torts.

“[m]erely stating that Wells Fargo must have known, or should have known, about the scheme due to purportedly atypical transactions in bank accounts, or that Wells Fargo did not follow applicable standards of care, does not establish the requisite *actual* knowledge.” [D.E. 25 at 6]. Defendant’s suggestion that the *underlying* breach of fiduciary duty *could* sound in negligence, Resp. at 7-8, similarly misses the mark; that does not change that the claims against Defendant are for aiding and abetting the scheme (and being unjustly enriched by that same intentional misconduct), aiding and abetting is an intentional tort, and Florida law precludes negligence-based defenses against an intentional tort. It is that simple.

C. Defendant’s Third, Fifteenth, Seventeenth, Twentieth, And Twenty-Third Affirmative Defenses Are Insufficiently Pled.

All of these defenses fail to the extent they sound in Plaintiffs’ allegedly negligent failures to investigate or discover the fraud for the reasons set forth in § B and as stated in *Schoeff*, 232 So.3d at 304 (“intentional torts are not reduced by comparative fault”). Beyond that, Defendant’s second defense (failure to mitigate) otherwise fails to plead any facts supporting it, and should also be stricken for that reason. *Brooklands, Inc. v. Sweeney*, 2015 WL 4983680, at *3 (S.D. Fla. Aug. 21, 2015) (“Because the ‘failure to mitigate damages’ affirmative defense does not set forth a ‘short and plain statement’ adequately explaining its factual basis, the Court shall strike the defense...”). Its fifteenth and seventeenth defenses (consent and ratification) fail to plead any facts explaining how Plaintiffs’ alleged knowledge of the nature of the investments or the STOLIs could constitute consent to being the victims of a Ponzi scheme and should thus also be stricken. *Gomez v. Bird Auto., LLC*, 411 F. Supp. 3d 1332, 1339–40 (S.D. Fla. 2019) (striking *en masse* affirmative defenses that were “vague, conclusory...and otherwise fail[ed] to give sufficient factual support”). The twentieth defense (Plaintiffs’ negligence) is barred as a matter of law for the reasons set forth in § B and as stated in *Schoeff, supra.*; see also *Morrison*, 434 F. Supp. 2d at 1320 (striking affirmative defenses that were not cognizable). And Wells Fargo’s twenty-third defense (waiver) fails to explain how Plaintiffs’ knowledge that they were participating in investments that carried some risk could constitute a waiver of their claims against Defendant for aiding and abetting a fraudulent scheme that was hidden from them. *Home Mgmt. Sols., Inc. v. Prescient, Inc.*, 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007) (striking “defense of waiver” because it “is based upon the intentional relinquishment of a known right...[and defendant] does not plead the specific elements of waiver or provide any factual support to give Plaintiff fair notice of its defense”).

Further, to the extent Defendant suggests facts supporting these defenses would allegedly be “entirely within Plaintiffs’ possession” and that it should therefore be able to attempt to develop some basis for them in discovery, Resp. at 9-10, that is simply improper. *Luxottica Group S.P.A.*, 198 F. Supp. 3d at 1331 (“Either Defendant has a good faith basis to support this [defense]...or it does not...the defense is stricken. If and when Defendant has grounds to support the defense, it may seek leave to amend.”); *accord Daley*, 2016 WL 3517697, at *3.

D. Defendant’s Fourth And Fifth Defenses Are *Factually* Insufficient And That Is Appropriate For A Motion to Strike.

Defendant must allege sufficient facts that would give rise to their defenses of unclean hands and *in pari delicto* in order to show these defenses are legally relevant. *See Wyndham Vacation Ownership, Inc.*, 2022 WL 21374382, at *2, *4 (striking legally irrelevant defenses) *see also Castillo v. Roche Labs, Inc.*, 2010 WL 3027726, at *3 (S.D. Fla. Aug. 2, 2010) (“[T]he purpose of pleading sufficient facts in an affirmative defense ‘is to give fair notice to the opposing party that there is some plausible, factual basis for the assertion and not simply to suggest some possibility that it might apply to the case.’”). Stated another way, to sufficiently plead a legally relevant affirmative defense, a defendant must allege sufficient facts which, if proven, would establish the elements of the defense. *See Watts v. Florida International University*, 495 F.3d 1289, 1295-96 (11th Cir. 2007) (a pleading must include sufficient facts from which there are “plausible grounds to infer...the necessary element[s]” of the claim). Defendant erroneously implies that Plaintiffs’ arguments would somehow require it to “prove every element of the defenses in its Answer.” Resp. at 11. Not so. Plaintiffs’ Motion explains Defendant failed to even plead sufficient facts of any alleged wrongdoing by the Plaintiffs or that Defendant was injured thereby, as required to plausibly allege the elements of their defenses of unclean hands and *in pari delicto*. Motion at 8-9. Therefore, these defenses should be stricken. *Aidone*, 295 F.R.D. at 661 (striking defense of unclean hands as legally insufficient where defendant failed to cite any authority establishing that facts alleged would give rise to defense of unclean hands).

E. Defendant’s Sixth And Twenty-First Defenses Are Insufficiently Pled.

Defendant’s laches and limitations defenses should be stricken because they fail to allege sufficient facts from which their elements could plausibly be inferred. Motion at 10 (“Defendant has not alleged that Plaintiffs inexcusably delayed filing this action or how the passage of time or the death of two of the three Scheme Operators has negatively impacted Wells Fargo’s ability to

defend this case, as necessary to establish laches... Nor has Defendant alleged that Plaintiffs were on notice of Defendant's knowledge and substantial assistance of the Scheme more than four years prior to commencing this action for limitations purposes."). Defendant's erroneous suggestion that "Plaintiffs are seeking a ruling on a potentially dispositive, substantial question of law...at this stage," Resp. at 12, is a transparent attempt to deflect attention from the reality that it failed to plausibly allege sufficient facts to establish the elements of these defenses and that they should be stricken on that basis. *Gomez*, 411 F. Supp. 3d at 1339–40 (S.D. Fla. 2019) (striking *en masse* affirmative defenses that were "vague, conclusory...and otherwise fail[ed] to give sufficient factual support"); *Am. Home Assur. Co. v. Weaver Aggregate Transp., Inc.*, 2011 WL 4346576, at *4 (M.D. Fla. Sept. 16, 2011) ("[Defendant] avers delay and prejudice but has failed to plead facts to support these legal conclusions. Therefore, this defense [of laches] will be stricken."); *Aidone*, 295 F.R.D. at 662 (striking affirmative defense based on statute of limitations as insufficiently pled); *Castillo*, 2010 WL 3027726, at *3 (same). Defendant's suggestions that it should be excused from adequately alleging its defenses because Plaintiffs allegedly have superior knowledge, Resp. at 12, speaks volumes. See *Luxottica Group S.P.A.*, 198 F. Supp. 3d at 1331.

F. Defendant's Seventh Affirmative Defense Is Insufficiently Pled.

Defendant's estoppel defense fails to allege Plaintiffs made any representations to Defendant upon which Defendant relied to its detriment or because of which it changed position with regard to any material matter. Motion at 11. It has thus failed to plausibly allege the elements of estoppel, and this defense should be stricken. *Gomez*, 411 F. Supp. 3d at 1339–40; *Castillo v. Roche Labs. Inc.*, 2010 WL 3027726, at *3. Defendant's Response does nothing to address this deficiency. Rather, Defendant asserts that the Court in *Guarantee Ins. Co. v. Brand Mgmt. Svc., Inc.*, 2013 WL 4496510 (S.D. Fla. Aug. 22, 2013), denied "a motion to strike affirmative defense[] of estoppel . . . even though they contained no factual support and were alleged in general terms." Resp. at 12-13. That is not true. Rather, the Court in that case denied the motion to strike as moot because the defendant had amended. *Guarantee Ins. Co.*, 2013 WL 4496510, at *7 (S.D. Fla. Aug. 22, 2013). Defendant's estoppel defense should be stricken.

G. Defendant's Eighth, Ninth, And Twelfth Defenses Should Be Stricken Because Defendant Cannot Raise Negligence-Based Defenses Against Plaintiffs' Intentional Tort Claims.

Defendant's eighth (co-liability), ninth (fault of others), and twelfth (lack of causation) defenses all sound in negligence. Therefore, they should all be stricken for the reasons set forth in

§ B and as stated in *Schoeff, supra.*; *see also Morrison*, 434 F. Supp. 2d at 1320.

H. Defendant’s Tenth Defense Of Speculative Damages Should Be Stricken As A Denial.

“[A]s most courts have found, allegations that a plaintiff’s damages are speculative do not constitute affirmative defenses because those statements are merely allegations that Plaintiff has not met its burden of proof.” *NR Group 3 Contractors, Inc. v. Group 3 Contractors, LLC*, 2017 WL 7792718, at *4-5 (S.D. Fla. Sept. 26, 2017). Therefore, this defense should be stricken. *Solidida Group, S.A. v. Sharp Elecs. Corp.*, 2012 WL 12863887, at *1 (S.D. Fla. Aug. 31, 2012) (striking defense of speculative damages because it constitutes a denial); *Gomez*, 411 F. Supp. 3d at 1339-40 (striking defenses that “merely identifie[d] a defect in Plaintiff’s complaint”); *Aidone*, 295 F.R.D. 662-64 (striking various defenses that constituted denials as redundant).

I. Defendant’s Eleventh Defense Of Good Faith Is A Denial And Should Be Stricken.

“[A] party cannot act in good faith and simultaneously have knowledge of fraud.” *Perlman v. Wells Fargo Bank, N.A.*, 2014 WL 4449602, at *3 (S.D. Fla. Sept. 10, 2014). Defendant has not cited a single case for the proposition that its alleged compliance with industry standards is relevant to whether it had knowledge of the Ponzi scheme. Wells Fargo already denied knowledge. Motion at 15. Thus, regardless of the amount of factual detail regarding the standards Defendant allegedly acted in conformance with, this is not an affirmative defense and should be stricken. *See Perlman*, 2014 WL 4446902, at *3 (“But, Defendant has already denied Plaintiff’s knowledge allegation . . . making these affirmative defenses either redundant, or simply not affirmative defenses”); *Gomez*, 411 F. Supp. 3d at 1339-40 (striking defenses that constituted mere denials); *Aidone*, 295 F.R.D. 662-64 (same); *Wyndham Vacation Ownership, Inc.*, 2022 WL 21374382, at *2, *4 (striking legally irrelevant defenses).

J. Defendant’s Sixteenth Defense Should Be Stricken Because Defendant Cannot Raise Negligence-Based Defenses Against Plaintiffs’ Intentional Tort Claims.

Defendant’s sixteenth defense (assumption of risk) sounds in negligence, and should therefore be stricken for the reasons set forth in § B and as stated in *Schoeff, supra.*; *see also Morrison*, 434 F. Supp. 2d at 1320. Defendant has no response to the point that Florida abolished implied assumption of risk as an affirmative defense because none exist. Motion at 15; Resp. at 14.

K. Defendant’s Eighteenth Defense Should Be Stricken Because It Is A Denial.

“Denying an element of a plaintiff’s *prima facie* case, such as damages, does not give rise

to an affirmative defense.” *Solidida Group, S.A.*, 2012 WL 12863887, at *1, citing *In re Rawson Food Service, Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988). Defendant attempts to avoid this principle by couching this defense in terms of alleged “recovered money that negates [Plaintiffs’] damages.” Resp. at 15. This attempt fails because purported “‘defenses’ [that] merely negate an element of Plaintiff’s *prima facie* case ... do not qualify as affirmative defenses.” *Bernal v. All Am. Inv. Realty, Inc.*, 2006 WL 8431426, at *2 (S.D. Fla. Jan. 17, 2006), citing *In re Rawson Food Service, Inc.*, 846 F.2d at 1349. Therefore, this defense should be stricken. *Solidida Group, S.A.*, 2012 WL 12863887, at *1 (striking defense regarding damages as constituting denial).

L. Defendant’s Nineteenth Defense Should Be Stricken Because Set-Off Is Not An Affirmative Defense To Tort Claims.

Set-off is not a valid affirmative defense to a tort claim. *See KMS Restaurant Corp.* 194 Fed. Appx. 591, 598 (11th Cir. 2006), quoting *Felgenhauer v. Bonds*, 891 So.2d 1043, 1045 (Fla. Dist. Ct. App. 2004) (“set-off is not an affirmative defense to be considered by the jury but is a determination regarding damages to be made by the court after the verdict is rendered”). And to the extent Defendant purports to seek some post-judgment contribution, set-off, and/or indemnification, those claims sound in negligence and are thus unavailable to reduce Defendant’s liability for its intentional tortious conduct for the reasons set forth in § B and as stated in *Schoeff, supra.*; *see also Morrison*, 434 F. Supp. 2d at 1320. Defendant cites *Kearney v. Valley National Bank*, 2022 WL 19754, at *5 (M.D. Fla. Jan. 3, 2022), for the proposition that multiple courts allegedly recognized set-off as a valid affirmative defense “to torts.” Resp. at 15. But *Kearney* does not say that. Rather, *Kearney* only generally stated in the context of a tort action that set-off was a valid affirmative defense, and the only two cases it cited were contract cases. *Kearney*, 2022 WL 19754, at *5, citing *Greenshields v. Fed. Ins. Co.*, 2020 WL 9172954 (M.D. Fla. Oct. 2, 2020) and *Crabtree v. Cent. Fla. Invs. Inc.*, 2012 WL 6523584 (M.D. Fla. Oct. 3, 2012)). The issue was not even properly presented to the court because “the Kearneys point[ed] to no specific authority establishing that ‘set off’ is not a legally valid affirmative defense” to a tort action. *Id.* at *5. Here, Plaintiffs have. Motion at 16. Further, *Kearney* is distinguishable because the defendant there claimed a set-off in the context of a negligence action against it, whereas here the claims against Wells Fargo are intentional torts.

M. Defendant’s Twenty-Second Defense Is A Denial And Should Be Stricken.

Defendant concedes unjust enrichment “requires that a benefit be conferred on the

defendant” and that this defense will be “that Plaintiffs conferred no benefit directly on Wells Fargo.” Resp. at 16. Therefore, this defense should be stricken as a denial. *Gomez*, 411 F. Supp. 3d at 1339-40 (striking defenses that constituted mere denials); *Aidone*, 295 F.R.D. 662-64 (same).

N. Defendant’s Twenty-Fourth Defense Should Be Stricken For Lack Of Fair Notice.

Defendant must provide “some statement of the underlying facts” giving Plaintiffs fair notice of this defense, “particularly when [as here] a defendant alleges more than nineteen defenses, due to the growing tendency to assert such boilerplate defenses.” *Castillo*, 2010 WL 3027726, at *3. Thus, this defense should be stricken because it fails to even identify the relevant contract(s) on which it is based. *Id.* at *3-*4 (striking defenses that failed to provide “to provide the requisite factual particularity”); *Gomez*, 411 F. Supp. 3d at 1339–40 (S.D. Fla. 2019) (striking defenses that “otherwise fail[ed] to give sufficient factual support”).

O. Defendant’s Twenty-Fifth Defense Is A Denial And Should be Stricken.

Defenses that contest a plaintiff’s ability to certify a class are denials and routinely stricken. Motion at 18-19. *Goers v. L.A. Entm’t Group, Inc.*, 2016 WL 11518750, at *1 (M.D. Fla. Jan. 27, 2016), Resp. at 17, does nothing to salvage this infirm defense because the plaintiff there did not argue it was a denial, but rather only that it was “conclusory.” *Id.* at *1.

P. Defendant’s Reservation Of Rights Should Be Stricken.

Courts routinely strike placeholder defenses that are devoid of any factual support, because Rule 15 allows a defendant to amend if it discovers a basis for them. *Luxottica Group S.P.A.* 198 F. Supp. 3d at 1331 (striking defenses because “[i]f and when Defendant has grounds to support the defense, it may seek leave to amend”); *Daley*, 2016 WL 3517697, at *3 (striking unsupported defenses “because Rule 15 allows for appropriate amendments”); *see also Gonzalez v. Spears Holdings, Inc.*, 2009 WL 2391233, at *4 (S.D. Fla. July 31, 2009) (striking reservation of rights). Defendant’s authority similarly recognizes that, because “amendment...rests within the Court’s discretion under Rule 15...reservation of rights within an answer is essentially meaningless.” *Ramnarine v. CP RE Holdco 2009-1, LLC*, 2013 WL 1788503, at *6 (S.D. Fla. Apr. 26, 2013). Defendant’s reservation of rights should be stricken. *Castillo*, 2010 WL 3027726, at *3 (striking factually insufficient defenses and noting “the growing tendency to assert...boilerplate defenses”).

CONCLUSION

Plaintiffs respectfully request that the Court strike Defendant’s affirmative defenses.

Dated: June 16, 2025.

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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 June 16, 2025, on all counsel or parties of record on the Service List below.

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