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.

PLAINTIFF'S PARTIAL OBJECTIONS TO THE MAGISTRATE JUDGE'S ORDER ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AMENDED AFFIRMATIVE DEFENSES AND INCORPORATED MEMORANDUM OF LAW

Plaintiff Fanny B. Millstein, pursuant to 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a), objects in part to the Magistrate Judge's Order on Plaintiff's Motion to Strike Defendant's Amended Affirmative Defenses [D.E. 133] to the extent it applies a reduced pleading standard for affirmative defenses contrary to this Court's prior decisions and denies Plaintiff's motion to strike Wells Fargo's legally irrelevant negligence-based defenses. This Court previously and correctly held that the heightened pleading standard articulated by the Supreme Court in *Twombly* and *Iqbal* applies to affirmative defenses. But setting aside the question of the factual specificity required to sufficiently state an affirmative defense, Wells Fargo's negligence-based defenses fail as a matter of law. Plaintiffs allege Wells Fargo knowingly aided and abetted a massive Ponzi scheme. Aiding and abetting is an intentional tort, and intentional torts are not subject to apportionment of fault. Indeed, Wells Fargo previously and successfully argued that, to state a claim, Plaintiff had to plausibly allege actual knowledge. Therefore, Wells Fargo is estopped from now taking the position that Plaintiff's claims sound in negligence and, regardless, its negligence-based defenses are legally inapplicable to Plaintiff's intentional tort claims.[1] Finally, and independent of the legal infirmities of its negligence-based affirmative defenses, the facts Wells Fargo alleged in support of those defenses contain nothing more than barebones, conclusory allegations that are insufficient carry Wells Fargo's pleading burden. The Order is thus clearly erroneous and contrary to law, and allowing these incurable defenses to proceed will unnecessarily consume the parties' and the Court's time and resources in discovery and further proceedings litigating them.

[1] Plaintiff's counsel represented on the record that Plaintiff would not argue that any of her claims sound in negligence, not least because she cannot. Hearing Tr., Ex.1, 17:2-13 ("The Court has ruled on what the legal standard is and we are going to adhere to it because we have to."). That should have ended the matter. However, if the Defendant was concerned that it could not rely on this representation by an officer of the Court *and* its own successful articulation of bank liability case law, it could have asked the Magistrate Judge to accept Plaintiff's suggestion that she amend by interlineation to remove the references to negligence in her Amended Complaint. (*Id.*).

FACTS

Plaintiff's Claims: This lawsuit seeks damages against Wells Fargo for aiding and abetting a massive Ponzi scheme (the "Scheme"), as well as disgorgement of the bank's ill-gotten gains from its misconduct. Plaintiff and the proposed Class, most of whom are elderly and lost substantial life savings, are victims of a fraudulent enterprise resulting in over $300 million in losses to more than 1,000 investors. Wells Fargo aided and abetted the Scheme by providing various services to the Scheme Operators and the multitude of fraudulent entities they created and controlled. The bank had knowledge of and substantially assisted the Scheme through its roles as Trustee for certain irrevocable life insurance trusts that were part of the Scheme, Securities Intermediary for the life insurance policies at issue, and Depository Bank for the Scheme Operators and the fraudulent entities they controlled. Plaintiff sued Wells Fargo for Aiding and Abetting Breach of Fiduciary Duties (Count I), Aiding and Abetting Fraud (Count II), and Unjust Enrichment (Count III).

Wells Fargo's Motion to Dismiss Argues Plaintiffs Cannot Proceed on Negligence: Wells Fargo's motion to dismiss argued Plaintiff failed to plausibly allege its actual knowledge of or substantial assistance to the Scheme, as necessary to establish aider-and-abettor liability. D.E. 25 at 7-15; *see also* D.E. 41 at 3-9. Wells Fargo argued that "[m]erely stating that Wells Fargo must have known, or should have known, about the scheme…or that Wells Fargo did not follow applicable standards of care, does not establish the requisite *actual* knowledge." D.E. 25 at 1. Wells Fargo cited authority for the proposition that allegations a defendant "fail[ed] to adhere to an appropriate standard of care" or "fail[ed] to exercise reasonable care" are insufficient to plausibly allege the requisite actual knowledge. D.E. 25 at 11. And according to Wells Fargo, "[a]t most, Plaintiffs' allegations aver[ed] that Wells Fargo knew or should have been aware…."

D.E. 25 at 12. Plaintiff, for her part, agreed the applicable law requires her to plead actual knowledge, and argued her allegations satisfied that standard. D.E. 30 at 7-15.

This Court Denies Wells Fargo's Motion to Dismiss: In recommending that Wells Fargo's motion to dismiss be denied, Judge Goodman accepted Wells Fargo's argument regarding the level of scienter required for aiding and abetting, noting that "evidence establishing negligence, *i.e.* that a bank should have known, will not suffice." D.E. 53 at 44 (internal quotations omitted). He then concluded Plaintiff had, among other things, sufficiently alleged that Wells Fargo had actual knowledge of and substantially assisted the Scheme through its roles as Trustee, Securities Intermediary, and Depository Bank. D.E. 53, pp. 55-62, adopted D.E. 91. In its objections to Judge Goodman's report recommending its motion to dismiss be denied, Wells Fargo persisted with its argument that Plaintiffs had to allege more than negligent conduct to plausibly state a claim for aiding and abetting. D.E. 81, pp. 21-22 ("At bottom, Plaintiffs' FAC rests on assertions Wells Fargo knew or should have known.") (cleaned up). Plaintiff again responded that her allegations sufficiently pled actual knowledge, agreeing that was the applicable standard. D.E. 90 at 10-22. This Court then "conducted a *de novo* review of the [m]otion and the record and agree[d] with Judge Goodman's well-reasoned findings that Plaintiffs have adequately alleged" actual knowledge based on, as Judge Goodman found, her allegations regarding Wells Fargo's role as Trustee, Securities Intermediary, and Depository Bank. D.E. 91 at 2. The Court thus denied Wells Fargo's motion to dismiss. (*Id.*)

Plaintiffs Move to Strike Wells Fargo's Negligence-Based Defenses: In its Amended Answer and Affirmative Defenses [D.E. 106], Wells Fargo raises the following affirmative defenses, all of which seek to avoid or limit its liability based on the alleged negligence of Plaintiff or third parties: Second Affirmative Defense (Negligence by Third Parties), Eighth Affirmative

Defense (Co-Liability), Ninth Affirmative Defense (Fault of Others), Twelfth Affirmative Defense (Lack of Causation), Fifteenth Affirmative Defense (Consent), Sixteenth Affirmative Defense (Assumption of Risk), Seventeenth Affirmative Defense (Ratification), Eighteenth Affirmative Defense (Recovery), Nineteenth Affirmative Defense (Set-Off), Twentieth Affirmative Defense (Plaintiff's Negligence), and Twenty-Third Affirmative Defense (Waiver). *See* D.E. 106, pp.43, 47, 49, 51-52, 54, 56; D.E. 120, pp.5, 7-10, 13-15. Plaintiff moved to strike these defenses on the basis that Florida law does not permit a party to avoid or reduce its liability for an intentional tort based on contributory negligence or comparative fault (*i.e.*, the alleged negligence of the plaintiff or of allegedly negligent third parties). D.E. 112, pp.4-5, 7-8, 12-13, 15-16; D.E. 122, pp.4-5, 7-9. Wells Fargo admitted it only raised these defenses "to the extent Plaintiffs' claims are premised on Wells Fargo's alleged negligent conduct" and that they all "speak in some way to the negligence…of Plaintiffs and third-parties (sic)," but argued they should nevertheless be allowed to raise them "[t]o the extent Plaintiffs continue to maintain Wells Fargo should be liable for negligent conduct" and "because Plaintiffs are alleging negligent conduct…and have pleaded negligent conduct here." D.E. 106, pp. 43, 47, 49, 51-52, 54, 56; D.E. 120, pp.5, 10, 13, 15. Wells Fargo's entire argument in this regard was based on the fact that three (3) of the thirteen (13) subparagraphs in the Amended Complaint listing potential common issues for class certification contain references to standards of care and negligence. D.E. 120, p.7; *see also* D.E. 3, ¶173(i-k). It also asserted that the alleged breach of fiduciary duty underlying Count I could sound in negligence. D.E. 120, p.7.

The Hearing Before The Magistrate Judge: At the hearing before Judge Goodman, Plaintiff argued that her claims were intentional torts, this Court properly concluded Plaintiff had to allege actual knowledge, and Wells Fargo was estopped from arguing Plaintiff's claims sounded

in negligence. D.E. 112, p.5, 13; D.E. 122, pp.4-5; Hrg. Tr., Ex. 1, 16:6-17:1. Plaintiffs also acknowledged the Court's resolution of the motion to dismiss was correct, that she could not proceed on her claims on a negligence theory as a matter of law, and that she fully intended to adhere to the law and the Court's ruling. Hrg. Tr., Ex.1, 17:2-13 (raising amendment by interlineation but noting this "seems like an exercise in futility and an unnecessary expenditure of time"). Wells Fargo admitted Plaintiff's claims were intentional torts, it had asserted negligence-based defenses in an abundance of caution in the event Plaintiff were to proceed with a negligence theory, and it would be "happy to drop all the negligence-based defenses" if Plaintiff removed the references to standards of care and negligence from the list of potential questions for class certification. Hrg. Tr., Ex.1, 17:17-18:8.

The Order Applies a Reduced Pleading Standard and Denies Plaintiff's Motion to the Extent it Sought to Strike Wells Fargo's Negligence-Based Defenses: The Order applies a reduced pleading standard to Wells Fargo's affirmative defenses on the basis that this Court's prior rulings applying a heightened standard were on *de* novo review and not binding on it. D.E. 133 at 5. Beyond that, it sets forth the reason for denying the motion to strike the negligence-based defenses in the discussion of Wells Fargo's affirmative defense of Negligence by Third Parties.[2] It acknowledges "Florida's apportionment statute…does not apply in intentional tort cases" but states "the Amended Complaint contains some allegations which appear to assert negligence-type conduct," citing to the three (3) subparagraphs in the list of potential common issues for class certification cited by Wells Fargo. D.E. 133, p.13. It then concludes "it would be risky to

[2] The Order then refers back to this reason when denying some of Wells Fargo's other negligence-based defenses, but not others. *Compare* D.E. 133, pp.17-19, 24 (referring to this reason when denying the motion to strike the affirmative defenses of Co-Liability, Fault of Others, Assumption of Risk, and Set-Off) *with* D.E. 133, pp.21-22, 26-27 (not referring to this reason when denying the motion to strike as to the affirmative defenses of Lack of Causation or Plaintiffs' Negligence).

substantively conclude now that Wells Fargo cannot ever assert the defense." *Id.* In connection with another negligence-based defense, the Order states "Plaintiffs are free to seek a summary judgment ruling on the applicability of this defense after more discovery is provided." *Id.* at 24.

STANDARD OF REVIEW

The district court must set aside any part of an order issued by a magistrate judge regarding a non-dispositive matter that is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); S.D. Fla. Magistrate Judge Rule 4. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Matter of Application of O'Keeffe*, 184 F. Supp. 3d 1362, 1366 (S.D. Fla. 2016) (quotation omitted), aff'd *sub nom. In re O'Keeffe*, 660 Fed. Appx. 871 (11th Cir. 2016). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Id.* (sustaining objections to magistrate judge's non-dispositive order and setting order aside).

ARGUMENT

Most respectfully, Judge Goodman's order is clearly erroneous and contrary to law. First, Plaintiff's claims for aiding and abetting (and unjust enrichment based on the same misconduct) are intentional torts, and Florida law is clear that Wells Fargo's intentional tort claims are not subject to apportionment of fault. Moreover, Wells Fargo took the position in response to Plaintiff's motion to strike that Plaintiff's claims sounded in negligence after taking the position in its motion to dismiss that Plaintiff's claims require actual knowledge. Wells Fargo is thus judicially estopped from now arguing Plaintiff's claims sound in negligence. Wells Fargo's negligence-based defenses should therefore have been stricken because they are legally

inapplicable to Plaintiff's claims.[3] Third, even if the negligence-based defenses were legally relevant (and they are not), the Order applies a reduced pleading standard for affirmative defenses, and this Court has previously (and correctly) held that they are subject to the heightened pleading standard set forth in *Twombly* and *Iqbal*. The Order contains no reason for why this Court should reverse itself, other than disagreement with those members of this Court and others that have concluded *Twombly* and *Iqbal* apply. This Court adopted the heightened pleading standard on *de novo* review of other magistrate judges' orders, and there is no reason to believe that this Court did that with anything less than full *de novo* consideration of the issue and agreed with their legal conclusions. Finally, even if the Court were to reach the factual sufficiency of Wells Fargo's negligence-based defenses, Wells Fargo failed to carry its burden for pleading them.

A. Wells Fargo Cannot Raise Negligence-Based Defenses Against Plaintiff's Intentional Tort Claims.

Florida law is clear: A defendant cannot raise either the plaintiff's alleged negligence nor the alleged negligence of third parties to avoid or reduce its liability for intentional tort claims. Florida Statute 768.81 governs apportionment of fault among tortfeasors. It generally provides that any contributory fault chargeable to the plaintiff diminishes proportionally the amount awarded to them as damages, and also that the defendant may allocate any or all fault for the plaintiff's injuries to third parties on the basis of their percentage of the fault. § 768.81(2), (3); *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 301 (Fla. 2017) ("The comparative fault statute reduces defendants' liability by the percentage of fault of other culpable parties.").

[3] Again, if there were any question whether Wells Fargo could rely on its own successful arguments, Plaintiff's representations regarding the proper legal standard for its claims, *and* this Court's rulings on the same, the simplest resolution is to have Plaintiff amend by interlineation to remove references to negligence in its complaint. While that elevates form over substance, it is cheaper and less burdensome than full-fledged discovery on irrelevant negligence-based defenses.

Critically, the statute only applies to "negligence actions." § 768.81 (1). That is because, at common law, the doctrines of contributory negligence and joint and several liability developed in the context of negligence actions.[4] And consistent with common law, the statute expressly provides that it "does not apply…to any action based upon an intentional tort…" § 768.81 (1), (4); *Schoeff v. R.J. Reynolds Tobacco Co*., 232 So. 3d 294, 304 (Fla. 2017) ("At common law, intentional torts [were] not reduced by comparative fault."). A plaintiff's or third party's negligence therefore cannot operate to avoid or reduce a defendant's liability for an intentional tort under Florida law. *Schoeff*, 232 So. 3d at 305 (§ 768.81 does not operate to reduce or apportion liability for an intentional tort).

Plaintiff's claims for aiding and abetting (and for unjust enrichment based on the same misconduct) are intentional torts. As the parties and the Court all correctly accepted during the proceedings on Wells Fargo's motion to dismiss:

> Liability [for aiding and abetting] requires proof that the defendant knowingly aided the commission of a tort. ***Negligence will not suffice; nor is it enough to prove that the defendant should have known of the primary actor's wrongful conduct but did not***. The defendant's knowledge must be actual.

Restatement (Third) of Torts: Liab. for Econ. Harm § 28 TD (2018) (emphasis added); *see also Goldberg for Jay Peak, Inc. v. Raymond James Fin., Inc*., 2017 WL 7791564, at *5 (S.D. Fla. Mar. 27, 2017) (setting forth the elements under Florida law for "the intentional tort of aiding and abetting"), quoting *Elandia Int'l, Inc. v. Ah Koy*, 690 F. Supp. 2d 1317, 1331 (S.D. Fla. 2010). Indeed, in the proceedings below, Wells Fargo studiously avoided denying that aiding and abetting

[4] At common law, a plaintiff's contributory negligence barred all recovery, and all negligent defendants were held jointly and severally liable for the total of the plaintiff's damages. *Fabre v. Marin*, 623 So. 2d 1182, 1184 (Fla. 1993). Florida courts receded from these doctrines toward a system based on apportionment of all parties' comparative fault. *Id.* Florida's system of comparative fault and apportionment is now codified in § 768.81. *Schoeff*, 232 So. 3d at 301.

are intentional torts. Instead, it seized on stray references to standards of care and negligence in the list of potential common issues for class certification in the Amended Complaint, suggesting in wholly conclusory fashion that those meant Plaintiff's claims somehow sounded in negligence. *See* D.E. 106, pp. 43, 47, 49, 51-52, 54, 56; D.E. 120, pp.5, 7, 10, 13, 15.[5] The Magistrate Judge's Order adopts this flawed and unsupported argument. But the mere fact that a complaint contains the word "negligence" does not and cannot convert an intentional tort into a negligence-based one. Were it otherwise, Plaintiff would happily proceed with her case against Wells Fargo under that easier-to-meet standard. That Wells Fargo is trying to have it both ways simply exposes its hypocrisy and, as discussed below, runs afoul of principles of judicial estoppel.

Yet despite acknowledging that negligence-based defenses do "not apply in intentional tort cases," the Order concludes that, because "the Amended Complaint contains some allegations which appear to assert negligence-type conduct,…it would be risky to substantively conclude now that Wells Fargo cannot ever assert the defense." D.E. 133 at 13. But the inclusion of those references does not change that Plaintiff's claims are, and always will be, intentional torts. *See United States v. Smelser*, 87 F.2d 799, 800–01 (5th Cir. 1937) ("Our Supreme Court says a cause of action comprises what a plaintiff must prove to obtain judgment."). The Order fails to acknowledge this and erroneously permits Wells Fargo to persist with a legally inapplicable defense. Indeed, it fails to explain or cite any authority explaining how or why it would be "risky" to eliminate this defense now, when no amount of discovery can ever cure it, and would be wasteful and unnecessary. The Order should thus be reversed as clearly erroneous and contrary to law. *See*

[5] Wells Fargo also noted that the alleged breach of fiduciary duty underlying Count I could sound in negligence. D.E. 120, p.7. But that does not change the fact that aiding and abetting is an intentional tort, even if the underlying wrongful conduct is merely negligent. Restatement (Third) of Torts: Liab. for Econ. Harm § 28 TD (2018) ("Aiding and abetting cannot itself be merely negligent, but the acts that are aided and abetted can be.").

United Mktg. Sols., Inc. v. Fowler, 2011 WL 837112, at *4 (E.D. Va. Mar. 2, 2011) (The "Magistrate Judge[‘s Order] cited no authority, and the Court can find no cases, supporting such a proposition. Therefore, the Court sustains [the] objection because [the] Order is clearly erroneous and contrary to law."); *see also Matter of Application of O'Keeffe*, 184 F. Supp. 3d 1362 at 1371 ("[T]he Magistrate Judge's determinations…are not factually or legally supportable…Accordingly, the Court concludes that the Magistrate Judge's Order is clearly erroneous and contrary to law."); *Fed. Deposit Ins. Corp. v. Eckert Seamans Cherin & Mellott*, 754 F. Supp. 22, 23 (E.D.N.Y. 1990) ("Where the defense is insufficient as a matter of law, the defense should be stricken to eliminate the delay and unnecessary expense from litigating the invalid claim.").

B. Wells Fargo is Judicially Estopped from Asserting that Plaintiff's Claims Sound in Negligence.

Judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Allapattah Services, Inc. v. Exxon Corp*., 372 F. Supp. 2d 1344, 1367 (S.D. Fla. 2005), quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). "The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings." *Id.*, quoting *American Nat'l Bank of Jacksonville v. Federal Dep. Ins. Corp*., 710 F.2d 1528, 1536 (11th Cir.1983).

Judicial estoppel "protect[s] the integrity of the judicial system…by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *In re Air Safety Intern., L.C*., 336 B.R. 843, 862 (S.D. Fla. 2005), quoting *New Hampshire v. Maine*, 532 U.S. at 750. The circumstances under which judicial estoppel may appropriately be invoked are "not reducible to any general formulation of principle." *Id.* However, three factors are typically considered in determining whether to apply judicial estoppel:

> (1) whether the present position is clearly inconsistent with the earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and (3) whether the party advancing the inconsistent position would derive an unfair advantage.

James River Ins. Co. v. Fortress Sys., LLC, 899 F. Supp. 2d 1331, 1333-34 (S.D. Fla. 2012), quoting *Jaffe v. Bank of Am., N.A.*, 395 Fed.Appx. 583, 587 (11th Cir.2010). Here, all three factors dictate Wells Fargo should be judicially estopped from now taking the position that Plaintiff's claims sound in negligence.

First, Wells Fargo's present position that Plaintiff's claims sound in negligence (and that it should therefore be allowed to raise negligence-based defenses) is clearly inconsistent with its earlier position taken in its motion to dismiss that Plaintiff's claims require actual knowledge. D.E. 25 at 7-15; *see also* D.E. 41 at 3-9. Wells Fargo now takes the position that Plaintiff's claims are purportedly premised on the bank's alleged "negligent conduct," and argues it should therefore be allowed to proceed with the defenses at issue because they all "speak in some way to the negligence…of Plaintiffs and third-parties (sic)." D.E. 106, pp. 43, 47, 49, 51-52, 54, 56; D.E. 120, pp.5, 10, 13, 15. Previously, however, Wells Fargo took the position that "[m]erely stating that Wells Fargo must have known, or should have known, about the scheme…or that Wells Fargo did not follow applicable standards of care, does not establish the requisite *actual* knowledge." D.E. 25 at 1; *see also* D.E. 25 at 11 (citing authority for the proposition that allegations a defendant failed to "adhere to an appropriate standard of care" or "exercise reasonable care" are insufficient).

Second, Wells Fargo succeeded in persuading the Court to accept its earlier position that Plaintiff could not proceed on a negligence theory. In his report recommending Wells Fargo's motion to dismiss be denied, Judge Goodman agreed that "evidence establishing negligence, *i.e.* that a bank should have known, will not suffice." D.E. 53 at 44 (quotations omitted). In its

objections to that report, Wells Fargo persisted with its argument that Plaintiff had to allege more than negligent conduct to plausibly state a claim for aiding and abetting. D.E. 81, pp. 21-22. This Court accepted that standard and "agree[d] with Judge Goodman's well-reasoned findings that Plaintiffs have adequately alleged" actual knowledge. D.E. 91 at 2. Allowing Wells Fargo to now argue negligence is at issue would thus undermine the foundation of the Court's prior ruling. *James River Ins. Co.*, 899 F. Supp. 2d at 1335 (judicially estopping defendants who had successfully persuaded the Court of a prior position from advancing an inconsistent position).

Third, Wells Fargo would derive an unfair advantage from now advancing the inconsistent position that Plaintiff's claims sound in negligence. Plaintiff agreed in good faith the applicable law requires her to establish actual knowledge (and represented she would not proceed on any negligence theory). She must now divert substantial resources to discovery concerning Wells Fargo's negligence-based defenses, only to then move for summary judgment on defenses that are clearly inapplicable as a matter of law. *See Allapattah Services, Inc.*, 372 F. Supp. 2d at 1371 (judicially estopping defendant from advancing inconsistent position where doing so would place have placed an "undue burden" on class members); *see also Matter of Brizo, LLC*, 437 F. Supp. 3d 1212, 1220 (S.D. Fla. 2020) (judicially estopping party from advancing inconsistent position where "the parties have engaged in costly, protracted litigation for over a year" based on prior position), aff'd 2021 WL 5029390 (11th Cir. Oct. 29, 2021).

Despite that all relevant factors weigh in favor of judicially estopping Wells Fargo from now suggesting Plaintiff's claims sound in negligence, the Magistrate Judge's Order does not address Plaintiff's judicial estoppel argument and allows Wells Fargo to now advance an inconsistent position that will result in unnecessary protracted and costly discovery. The Order is thus both clearly erroneous and contrary to law. *See Thaxton-Brooks v. Baker*, 2015 WL

12868228, at *11 (N.D. Ga. Mar. 2, 2015) ("The Magistrate Judge erred by failing to address this argument."); *see also Matter of Application of O'Keeffe*, 184 F. Supp. 3d at 1366 ("A finding is 'clearly erroneous' when…the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed…An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure.").

C. The Order Applies the Wrong Pleading Standard for Affirmative Defenses.

Even if there were a legal basis for allowing Wells Fargo to proceed on its negligence-based defenses (and there is not), those defenses are inadequately pled. There is a split of authority in the Eleventh Circuit regarding the pleading standard that applies to affirmative defenses. "[M]any courts have held that affirmative defenses are subject to the heightened pleading standard set forth in the Supreme Court cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)." *Gomez v. Bird Auto., LLC*, 411 F. Supp. 3d 1332, 1336 (S.D. Fla. 2019) (collecting cases). The courts that have concluded a reduced "notice" standard should apply have relied on subtle differences in between the language of Rule 8(a) – which apply to the pleading of claims – and Rules 8(b) and (c) which apply to affirmative defenses. *Id.* But three countervailing considerations dictate the heightened standard should apply:

> First, *Iqbal's* extension of the *Twombly* pleading standard was premised on *Twombly's* holding that the purpose of Rule 8 – in general – was to give parties notice of the basis for the claims being sought. Importantly, the Supreme Court discussed Rule 8 at large and never limited its holding solely to complaints. [The] subtle difference in wording (i.e. "show" and "state") between Rule 8(a) and 8(b) is unpersuasive because the purpose of pleading sufficient facts is to give fair notice to the opposing party that there is a plausible and factual basis for the assertion and not to suggest that it might simply apply to the case. This was the foundation for the decisions in *Twombly* and *Iqbal* and it applies equally to complaints and affirmative defenses. Second "it neither makes sense nor is it fair to require a plaintiff to provide defendant with enough notice that there is a plausible, factual basis for his claim under one pleading standard and then permit the defendant or counter-defendant under another pleading standard simply to suggest that some defense may possibly apply in the case. And third, when defendants are permitted

> to make boilerplate defenses, they clutter the docket; they create unnecessary work, and in an abundance of caution require significant unnecessary discovery.

Id. at 1337–38 (cleaned up, quotations omitted). This Court has agreed with that reasoning, and previously held the *Twombly/Iqbal* standard applies to affirmative defenses. *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);[6] *see also 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").

Plaintiff submits the *Gomez* line of cases reflect the better-reasoned view, and the Order offers no persuasive reason for why this Court should deviate from its prior holdings that the heightened pleading standard applies. The Order states that the Court's prior rulings "merely state [its] *de novo* review of the magistrate judge's report and recommendation on the parties' objections." D.E. 133 at 5. But a "*de novo* determination requires the district judge to…make his own determination…without being bound to adopt the findings and conclusions of the magistrate." *Badger Auctioneers, Inc. v. Ali*, 2018 WL 4193689, at *2 (M.D. Fla. July 20, 2018) (quotations

[6] Magistrate Judge Torres, who authored *Gomez*, also authored *MCM Entm't, Inc.*, which this Court adopted. In *MCM Entm't, Inc.*, Judge Torres stated "this Court has previously endorsed the view that affirmative defenses, like complaints, must be plausibly alleged in accordance with *Twombly* and *Iqbal*, citing to *Thompson v. Carnival Corp.*, 2021 WL 7542956, at *2-4 (S.D. Fla. May 24, 2021). In *Thompson*, Judge Torres set forth the same detailed analysis as in *Gomez* regarding the three considerations that weigh in favor of applying the heightened *Twombly/Iqbal* pleading standard to affirmative defenses.

omitted); *see also Henry v. Comm'r of Soc. Sec.*, 802 F.3d 1264, 1267 (11th Cir. 2015) (under *de novo* standard, reviewing court neither defers to nor considers any errors in the lower court's opinion). And the fact that the Court did not re-do the analysis in adopting those reports does not undermine or call those decisions into question. *Gonzalez v. McDonough*, 2008 WL 731305, at *1 n.3 (S.D. Fla. Mar. 18, 2008) ("Where a Report sets forth a thorough and well-reasoned analysis, the District Judge need not comment when adopting it.").[7] Beyond that, the Order observes that this Court's prior rulings are not binding upon it. D.E. 133 at 5. That is true. But neither it nor Wells Fargo set forth any reason why this Court should reconsider and reject its prior position. *See Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002) ("[T]here are three major grounds which justify reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice.").[8]

D. Wells Fargo's Negligence-Based Defenses Are Insufficiently Pled.

Sections A and B above set forth two independent legal bases to reverse the Order to the extent it denies Plaintiff's motion to strike Wells Fargo's negligence-based defenses as a matter of law, and the Court's inquiry should end there. But even if the Court were to reach the factual sufficiency of those defenses (which it need not resolve this appeal), the defenses fail on this basis as well, whether the pleading standard is *Twombly/Iqbal* or the Rule 8 standard that existed before

[7] Again, *MCM Entm't, Inc.*, *supra*, which this Court adopted, relies on *Thompson*, 2021 WL 7542956, at *2-4, for the proposition that the heightened pleading standard should apply, and *Thompson* sets forth the same detailed analysis articulated in *Gomez, supra*, regarding why.

[8] The Order cites *Mad Room, LLC v. City of Miami*, 2024 WL 2776173, at *1 (S.D. Fla. May 30, 2024) with a parenthetical that reads: "Recent opinions within this district have reinforced that affirmative defenses need not "satisfy the strictures of *Twombly* and *Iqbal*." D.E. 133 at 5. This appears to be a scrivener's error. *Mad Room* acknowledges the split and states the Court "side[s] with those judges who've held that an affirmative defense needn't satisfy the strictures of *Twombly* and *Iqbal*." *Id.* *Mad Room* thus is simply a recent decision going one of the two competing ways.

those decisions were issued by the Supreme Court. "Affirmative defenses will be stricken if they fail to recite more than bare-bones conclusory allegations." *Gomez v. Bird Auto., LLC*, 411 F. Supp. 3d 1332, 1335 (S.D. Fla. 2019); *see also* D.E. 133 at 6 ("[A]n affirmative defense must be stricken when the defense is comprised of no more then 'bare-bones, conclusory allegations.'") (citations omitted). Affirmative defenses are therefore properly stricken for "lack of factual support" where the are "vague, conclusory, and otherwise fail to describe how they apply to the facts of this case." *Gomez*, 411 F. Supp. 3d at 1338. Here, all of Wells Fargo's negligence-based defenses suffer from this infirmity.

Wells Fargo's affirmative defenses rooted in the alleged negligence of third parties are all wholly conclusory and factually insufficient. Its Second Affirmative Defense (Negligence by Third Parties) simply asserts that Plaintiff's recovery should be barred or reduced in proportion to the amount of negligence attributable to other allegedly culpable parties. D.E. 106 at 43. That is nothing more than a recitation of the legal standard for apportionment of fault in negligence cases. And the fact that Wells Fargo has identified these allegedly-culpable third parties and noted that the scheme at the heart of Plaintiff's claims was perpetrated by them, D.E. 103 at 44-45, adds nothing, because Wells Fargo's pleading is devoid of any facts identifying what applicable duties and standards of care these third parties allegedly breached, or how they breached them. Wells Fargo's related Eighth Affirmative Defense (Co-Liability), Ninth Affirmative Defense (Fault of Others), and Twelfth Affirmative Defense (Lack of Causation) all similarly attempt to avoid or limit its liability based on the alleged negligence of third parties. But they are all based on materially-identical conclusory assertions and thus all fail for the same reason. D.E. 106 at 47-50.

Wells Fargo's affirmative defenses premised on Plaintiff's (and the Class members') alleged negligence are similarly conclusory and factually insufficient. Wells Fargo tries to salvage

its Fifteenth Affirmative Defense (Consent), Sixteenth Affirmative Defense (Assumption of Risk), Seventeenth Affirmative Defense (Ratification), Eighteenth Affirmative Defense (Recovery), Nineteenth Affirmative Defense (Set-Off), Twentieth Affirmative Defense (Plaintiff's Negligence), and Twenty-Third Affirmative Defense (Waiver) on the basis that they all "include language regarding the investment risks known to Plaintiffs...and thus speak[]…to the negligence and culpability of Plaintiffs…in the investment scheme." D.E. 120 at 5 & 9 (asserting these defenses sound in Plaintiff's alleged "lack of due diligence, failure to monitor their own investments and knowledge of the…STOLI policies" and thus "rest[] on Plaintiffs' own culpability"). But like its affirmative defenses based on the alleged fault of third parties, these defenses based on Plaintiff's alleged fault similarly fail to allege any facts identifying what applicable duties and standards of care Plaintiff allegedly breached or how she breached them, much less how she could have (even in the exercise of the utmost care) discovered a massive, fraudulent Ponzi scheme that was concealed from her. D.E. 106 at 53-56, 57.

CONCLUSION

Accordingly, the Court should sustain Plaintiff's partial objections and strike Wells Fargo's negligence-based defenses.

Dated: July 23, 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 July 23, 2025, on all counsel or parties of record on the Service List below.

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EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 24-CV-22142-DPG

FANNY B. MILLSTEIN and MARTIN KLEINBART,

Plaintiffs,

vs.

WELLS FARGO BANK, N.A.,

Defendant.
_____/

Miami, Florida

June 25, 2025

Pages 1 to 27

DISCOVERY HEARING
BEFORE THE HONORABLE JONATHAN GOODMAN
UNITED STATES MAGISTRATE JUDGE
(TRANSCRIPT OF DIGITAL AUDIO RECORDING)

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(PROCEEDINGS TRANSCRIBED FROM DIGITAL AUDIO RECORDING.)

THE COURT: Good afternoon, folks. It's Jonathan Goodman. We're here for a 3 o'clock hearing.

Let's go ahead, Trina, and call the case, please.

COURTROOM DEPUTY: The United States District Court is now in session, the Honorable Chief Magistrate Jonathan Goodman presiding.

Calling case Millstein versus Wells Fargo Bank, N.A., case number 24-22142-CV-Gayles.

Counsel, please state your appearances for the record, starting with the plaintiff.

MR. BUCKNER: Good afternoon, Judge, David Buckner, Scott Silver, Peter Spett, Joshua Katz for plaintiffs.

THE COURT: All right. For the defense.

MS. ROTTMANN: Good afternoon, Your Honor, Emily Rottmann and Jarrod Shaw for defendant Wells Fargo Bank, N.A.

THE COURT: Understood.

All right. Welcome. Just to remind you folks of the rules governing Zoom hearings. No one is allowed to record or rebroadcast the hearing.

If you need a transcript, please contact the clerk's office.

Number two, please state your name before speaking. That way if anyone orders the transcript, the court reporter will know who is speaking.

And three, please hesitate for half a second before speaking to minimize the chances of inadvertently interrupting the person speaking before you.

Finally, remember the rule of one speaker per side per issue. So, once you've designated your oral advocate for that issue, you've made that designation.

So, folks, let's start off with the discovery hearing, which was tacked on to the hearing under a notice of Zoom discovery hearing having to do with a 30(b)(6) deposition.

Let me hear first from the plaintiff, and then we will hear from the defense.

MR. BUCKNER: Judge, we actually spoke. We had a deposition yesterday in this matter. Mr. Shaw and I spoke and I think we've -- we either are going to have it worked out -- well, we don't have it worked out, but I think we will have it worked out. We are continuing to talk but I think we can work out that issue.

THE COURT: What if I told you that I did 15 hours of research between yesterday and today on this 30(b)(6) issue?

MR. BUCKNER: I would feel very badly.

THE COURT: No need to feel badly, that didn't happen.

All right. Well, good. So, we can get into the motion to strike affirmative defenses, which is now fully briefed.

Let me hear first from the plaintiff.

MR. BUCKNER: This is David Buckner, obviously, Judge.

I'll keep it brief because, you're right, this has been fully briefed and I think the briefing lays out the issues fairly well.

Obviously, to the extent the Court has questions, I'm happy to answer them, but just in a nutshell, obviously, we are all aware that there is a split within the Southern District of Florida whether the Twombly and Iqbal standard applies.

Judge Gayles applies it. I know that other judges do not.

I think Judge Torres in the Gomez matter, Gomez versus Bird Automotive set out the reasons why it applies and should apply, and I think his reasons are compelling. Even leaving aside the fact that Judge Gayles applies the standard, the Twombly and Iqbal standard to affirmative defenses.

Keeping it brief, you know, the Supreme Court's ruling, which I took time enough to reread, was punishment in and of itself. In Twombly, it lays out the logic behind that decision, obviously, and one of the things it says is the whole point of Rule 8 is to put parties on notice, but it's also to save party resources.

And I think with regard to affirmative defenses, it applies -- as they say, the sauce for the goose is sauce for the gander, it applies equally to affirmative defense.

No party should have to waste time trying to discover what the source and nature of the other side's position is when

they bear the burden and, of course, on affirmative defenses, the defense bears the burden.

That's particularly important in class actions, and I'll tell you why.

In the normal cases, some of the other cases on the other side of issue pointed out, the parties could resolve affirmative defenses at summary judgment and any that didn't bear out for which there were insufficient facts to survive summary judgment would go by the wayside. So, they wouldn't have to be handled at trial.

That doesn't solve the underlying issue of having to take discovery on issues that are really not well-founded, but at least arguably in the normal case, that can be dealt with in summary judgment.

The problem in class actions is that the defense often argues, and I say this from personal experience, the defense often argues that individualized issues embodied in the affirmative defenses preclude class certification. So, before you could even get to summary judgment in most cases because you have to get through class certification first, you have to deal with these. So, sooner or later, the Court has to address the merits of these and I think where the defense does not have a valid basis for asserting an affirmative defense, it shouldn't be allowed to proceed forward with it, both because we will have to spend time trying to take discovery on it and

because of what it will do in the class action context.

But even leaving aside the Twombly standard, even prior to Twombly and Iqbal, courts can strike affirmative defenses if they're not valid as a matter of law or if they're completely unsupported, even absent Twombly and Iqbal, and for that, that concept is particularly poignant here because we have a number of affirmative defenses that are based on a negligence theory.

Your Honor will remember we argued at length in front of you on the motion to dismiss. The defense took the position that, inappropriately so, that we, the plaintiffs in this case, have to show actual knowledge on the part of Wells Fargo, in order to hold them liable for the aiding and abetting claims that we brought against them.

So, the idea that they can now come back around and say, well, but there is a negligence theory of aiding and abetting breach of fiduciary duty or aiding and abetting fraud. There is a negligence theory behind that that would allow them to plead these negligent affirmative defenses. That just doesn't hold water.

They took the position that we had to prove actual knowledge. They prevailed on that before this Court, convinced Your Honor, and again, appropriately so, that is the law in the Eleventh Circuit. So, there is no reason for these negligent affirmative defenses to survive at all, even absent Twombly and Iqbal and the pleading standards that they impose.

Finally, Your Honor, the third set of defenses that we moved to strike are the ones that are simply denials, and with regard to those, I think that there is just no basis for a denial as an affirmative defense in the first place.

The case law is clear that denials are not affirmative defenses and it just clutters up the case and gives the parties more work to do. I appreciate the defense argument that Judge Torres in the Home Management case declined to strike affirmative defenses that were merely denials. I would point out simply that the Home Management case is 2007. Judge Torres, subsequently, obviously saw the light on this, and in the Gomez decision started striking affirmative defenses that are not truly affirmative defenses but are mere denials.

Now, again, and again now, we can get into the individual requests themselves, but I think -- and I'm happy to do that if Your Honor wants to, but I think that's all well laid out. I think with regard to these affirmative defenses, most of them are deficient because they don't lay out sufficient facts.

You know, if they have a good-faith basis for it they should lay it out. If they don't, they shouldn't be able to pursue it.

And with regard, like I said, to the negligence claims, those are just not supported as a matter of law. And with that, unless Your Honor has questions, we'll let Ms. Rottmann

or Mr. Shaw take over.

THE COURT: I do have a question of Wells Fargo. I will just ask the question and Ms. Rottmann or Mr. Shaw will be the designated spokesperson, but before I asked the question, I noticed that on my screen here everybody is identified, their faces are on the screen. Except, there is somebody cryptically identified as iPad 2. Who is iPad 2?

MR. BUCKNER: I don't know, Your Honor.

THE COURT: Do you see on your screen iPad 2?

MR. BUCKNER: Yes, we do.

THE COURT: iPad 2, would you turn your camera on and show yourself and identify yourself, please?

iPad 2, are you there? Are you a member of the media?

Are you a potential class member?

Are you a witness, just a interested citizen?

It's a public hearing. You are certainly --

MS. WATT: Judge, can you hear me?

THE COURT: Yes.

MS. WATT: I'm sorry, my name is Carol Lee Watt. I'm a victim of the Seeman Holtz alleged fraud case.

THE COURT: All right. Welcome. I just wanted to know who was there because iPad 2 seemed like sort of a vague description, but now you have told us who you are. That's fine. Thank you so much.

MS. WATT: Thank you. Sorry about that.

I couldn't get my button to work.

THE COURT: That's a frequent problem for all of us using computers. No worries.

MS. WATT: Thank you.

THE COURT: Sure.

Here is my question for Wells Fargo.

You will notice that in the reply memorandum, the plaintiffs acknowledge the split between the courts that require the heightened pleading standard and those who don't and then the plaintiffs say, however, as it turns out, Judge Gayles is one of those judges who follows the heightened pleading standard. And in support of that position, the plaintiffs cite two cases, GPM Industries versus U.S. Citizenship and Immigration Services, and MCM Entertainment versus Diaz World Trade Group.

Now, here is my question:

Do you take the position that these two Judge Gayles opinions are conclusory type adoptions of a report and recommendation and do not contain sufficient independent analysis of whether the heightened pleading standard applies to affirmative defenses?

And the reason I ask you that is, you didn't get the opportunity to file a supplemental memorandum. We had a motion to response and reply, and in the reply that's when the plaintiff mentioned these two Judge Gayles cases and made the

argument that, well, this case is in front of Judge Gayles, and, therefore, Judge, we ought to follow Judge Gayles' viewance.

So, I read those two cases and they are both based on important recommendations from magistrate judges. One of them was at the time Magistrate Judge Damian, who is now a district court judge, and one is Judge Torres.

But in any event, what are your thoughts about the level of analysis in the two Judge Gayles' orders adopting those R and Rs.

Who will be speaking for Wells Fargo on that issue?

MS. ROTTMANN: That will be me, Emily Rottmann.

Thank you, Your Honor.

First, I don't know that they're significant analysis. I don't want to suggest that Judge Gayles adopted them without considering them, but I don't think they are significant analysis of this issue.

For example, if you look at GPM, it does really talk about affirmative defenses must be stricken when a defense is comprised of no more than bare-bones conclusory allegations or is insufficient as a matter of law, and it talks -- and the other decision cited talks significantly about how it's a drastic remedy. It's something not typically used.

And, again, while it references that standard, it also talks about how it's a drastic remedy that's rarely used.

So, I think that's important.

Going back to GPM, I think it's also important. In my reading of it, the two defenses that were considered were, first, failure to state a claim, which we have withdrawn as one of our defenses here. And, secondly, simply the reservation of rights to amend further.

So, I think that those -- I don't know that they were significant analysis of exactly how the standard should be applied to here where we have included facts. So, I would suggest that the Court -- I think we're sufficient under either standard, but I certainly think that we meet what you have previously adopted and recommended up to district judges, which is a standard something shy of Iqbal, Twombly, notice is sufficient.

And I contrast that from, for example, with Florida state court which is a heightened-fact pleading standard. That's not the standard in federal court whether at the motion to dismiss stage, motion to strike, what have you. And we certainly provided sufficient facts to put them on notice of the issues here.

Moreover, I'd note that the MCM decision or the initial report noted that if it was to be granted and something would be stricken, it would be without prejudice, typically with leave to amend to add additional facts as appropriate.

THE COURT: Well, Mr. Buckner, do you think that I have

the discretion to recommend to Judge Gayles that he not adopt the heightened standard to affirmative defenses, notwithstanding GPM Industries and MCM Entertainment?

Your microphone is on mute, so I can't hear anything you're saying.

MR. BUCKNER: My apologies, David Buckner is speaking now.

You certainly have the discretion. It's a report and recommendation. You can make whatever recommendation you want to Judge Gayles, and, so, yes, you can certainly recommend to him that he not adopt Twombly and Iqbal.

I would point out that the defense has found no case where he did something other than Twombly, than adopt Twombly and Iqbal as the standard for Rule 8, both as to defenses and as to affirmative pleadings by the plaintiff, but you can certainly do as you see fit, Judge.

THE COURT: You know, this comes up from time to time over the past 15 years.

Let's say there is no binding U.S. Supreme Court law. There is no binding Eleventh Circuit law. District court opinions are not binding on anybody, not even the judge who issued that very opinion, and over the past 15 years, from time to time, I have actually changed positions on certain prior orders and I went one way and then maybe three years later I said, upon reconsideration, I'm going to take the opposite

approach. But every once in a while I will be in a situation where there is no established law. My own personal opinion is, A, I don't have the case on consent but the district judge who referred the motion to me adopts position B, which is contrary to my position. And so, I wonder, well, gee, do I recommend to the district judge what I personally happen to think is right or do I just say to the district judge, you've ruled this way before so that's what it's going to be.

It's sort of a little bit of a dicey situation.

MR. BUCKNER: Thirdly, and I know that wasn't really a question to me, but I do think, you know, look, we've obviously read your jurisprudence on this. We know where you have come out in the past.

It is an interesting question. You know, Rule 8 does say a short plain statement both with regard to defenses and with regard to affirmative claims for relief. So, you know, there is a very good argument, I think, beyond the prudential argument that it really would apply in the same way across plaintiffs and defendants. But, you're correct, obviously, the Supreme Court hasn't spoken. The Eleventh Circuit hasn't spoken, and I'm not sure -- you know, I struggle to imagine a situation where this would actually get to those courts because I suspect -- you know, Ms. Rottmann is certainly correct.

Courts typically give defendants leave to amend if they find that they haven't plead sufficient facts as we would

expect to get leave to amend if we had been found to not have plead sufficient facts in our affirmative case on our amended complaint.

Now, that's different than the situation that should adhere here to the affirmative defenses related to a negligence cause of action because there is no set of facts under which those are ever going to be relevant as a matter of law. So, those I don't think should be stricken without prejudice. They should be stricken with prejudice so we can start to focus this case in and not spend a lot of time taking discovery.

Having taken a lot of discovery on Fabre defense and all the potential Fabre defendants and how they could be responsible in cases that do not involve intentional tort but involve negligence, I can represent to this Court it's a serious undertaking of time and effort that serves no purpose here.

So, I think while I agree very much with Ms. Rottmann that whatever pleading standard you apply, if you find that the facts have not been sufficiently alleged, they should have another chance to plead them with regard to those counts that are not negligence based, that are not simply denials, I would never -- I'm not going to say never because God knows what I might do in the future. I would not argue that they shouldn't get leave to amend. She's correct about that.

THE COURT: Now, talk to me a little bit about this

issue of whether the lawsuit asserts only claims for intentional torts when there is some language in there, which according to the defendant, suggests a negligence claim. And, in fact, I think in your complaint you actually use the word negligence, don't you?

MR. BUCKNER: We do. And had the defense taken the position at the motion to dismiss stage that our claim sounded in negligence, I would have happily agreed because it would have been a lot easier for me, and would be much easier for me and my team going forward to establish negligence on the part of Wells Fargo than it is to establish actual knowledge. But they didn't take that position. They took the position consistent with Eleventh Circuit precedents, and I quoted it -- we quoted it in the reply, that the burden on us -- as they said, "Merely stating that Wells Fargo must have known or should have known about the scheme due to purportedly atypical transactions at bank accounts or that Wells Fargo did not follow applicable standards of care, does not establish the actual requisite actual knowledge." That's from their reply on the motion to dismiss that they filed.

They prevailed on that issue, and having prevailed on that issue, I would argue that they're estopped from now arguing that the negligence standard applies and, therefore, all the negligence theories of defense that they allege in their affirmative defenses apply as well, including things like

portion and things like that.

That being said, I can represent to this Court, whatever is in our complaint, we understand and will adhere to this Court's ruling that was accepted by -- you know, that was entered -- adopted by, excuse me, adopted by Judge Gayles, that we have to show that Wells Fargo had actual knowledge.

We understand that. That's the law, and so whatever might be in our complaint about negligence goes by the boards. I mean, I suppose we could sit here and amend by interlineation and say take out the word negligence, but that seems like an exercise in futility and an unnecessary expenditure of time.

The Court has ruled on what the legal standard is and we are going to adhere to it because we have to.

THE COURT: Ms. Rottmann.

MS. ROTTMANN: Thank you, Your Honor.

Again, consistent with our arguments at the motion to dismiss, I don't disagree, aiding and abetting is an intentional tort. We're not arguing that a negligence standard applies to it. My concern is that any common questions of law and fact that are in the existing complaint, the operative complaint that has survived a motion to dismiss are whether defendants owe plaintiffs in the class a duty of reasonable care, whether defendants breached its duty of reasonable care, whether defendant was negligent in substantially assisting. And, when we met and conferred on this issue, we said, you

know, take those out. We're happy to drop all the negligence-based defenses. Those are why those are in there, but if those allegations are in the operative complaint that survived a motion to dismiss, our concern in not raising the negligence-based defenses is that we find ourselves at class certification or some point beyond that stuck with negligence-based common questions of law and fact that we've got to address without the defenses that are related to those.

Also, going back briefly to Judge Gayles and the plausibility standard here, I note that even in MCM where there was a slightly more lengthy discussion on plausibility, it notes that affirmative defenses are a little bit different than a complaint because they're not in a vacuum. They're with the benefit of the complaint. So, plausibility is judged, you know, in relation to the allegations as they exist.

So, you got a kind of more -- it's a little bit different on an affirmative defense even under the standard of MCM if you go with that heightened pleading standard.

The Court noted that this isn't in a vacuum.

THE COURT: All right.

Mr. Buckner, anything further that you'd like to talk to me about concerning the meat and potatoes of the motion itself?

I know you submitted two memoranda, the initial motion and then the reply, but anything you want to emphasize, any

gloss that you want to put on your arguments?

MR. BUCKNER: I don't. I just want to respond to one thing Ms. Rottman said. She will not be seeing a class certification argument that we can certify a class on a negligence theory. I can represent that to you and to her. You can take it to the bank. There is no theory under which we would be able to do that anyway, so she won't be seeing that.

Other than that, we rest on our papers, Judge.

THE COURT: Ms. Rottmann, anything further that you or Mr. Shaw would like to call my attention to concerning the substantive motion to strike?

MS. ROTTMANN: The only other thing I'd note, is Mr. Buckner spoke about the denial issue and whether an affirmative defense that was perhaps more appropriately a denial should be treated as such or stricken.

We'd note that this view and a number of other judges have pretty consistently held. We didn't just cite one case on that issue. We cited I think five or six or seven where an affirmative defense that may be appropriately a denial is treated as such, rather than being stricken.

And some of the cases that plaintiff cite to on that issue, even when they were stricken, it was with leave to amend the answer so that those more specific denials could be wrapped into the answers as appropriate.

So, to the extent the Court is inclined to grant the

motion, we don't think that it's necessary or it should be. It's a drastic remedy that should be rarely used and you and Judge Gayles are both consistent on that point. We certainly think leave to amend is the appropriate remaining avenue.

Again, we have provided pretty significant allegations in here.

This isn't bare bones where we just use words like statute of limitations with no facts underpinning them.

THE COURT: So, nobody has raised the argument that denial is merely a river in Egypt?

All right, folks.

Mr. Silver, not even a pity laugh from you. Huh? Not even cracking a smile at that. It doesn't even reach that level. Huh? It's just so bad.

MR. BUCKNER: He's segregated, Judge. You just can't get through to him.

THE COURT: You know, he probably figures I'm so experienced at this point I don't need to suck up to any judge, especially retiring soon. And, by golly, if the joke is not funny, I'm not laughing.

MR. SILVER: I am always happy to throw out a laugh.

THE COURT: All right. Very well.

Folks, thank you very much for your help. I will be issuing a ruling soon. I appreciate your, as always, tiptop, top-notch memoranda.

I don't know who in your firm does the actual drafting. Maybe it's a team, but he or she sure does a nice job.

Always a pleasure to read your submissions, folks.

In any event, be well. We will be in recess now.

Bye, now.

MR. BUCKNER: Thank you, Judge.

(Proceeding were concluded.)

C E R T I F I C A T E

I, Patricia Diaz, Registered Professional Reporter, in and for the United States District Court for the Southern District of Florida, do hereby certify that I transcribed from digital audio recording the proceedings had the 25th day of June, 2025, in the above-mentioned court; and that the foregoing transcript is a correct and complete transcript of said digital audio recording.

July 21, 2025
DATE

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