

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

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

FANNY B. MILLSTEIN and
MARTIN KLEINBART,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

_____ /

**ORDER ON PLAINTIFFS' MOTION TO STRIKE
DEFENDANT'S AMENDED AFFIRMATIVE DEFENSES**

Defendant Wells Fargo Bank, N.A. ("Defendant" or "Wells Fargo") filed its Amended Answer and Affirmative Defenses [ECF No. 106], asserting twenty-two¹ affirmative defenses and a purported reservation of right to assert additional affirmative defenses if discovery indicated they are available. In response, Plaintiffs Fanny B. Milstein and Martin Kleinbart (collectively, "Plaintiffs") filed a motion to strike almost all of those affirmative defenses and the so-called reservation of rights. [ECF No. 112].

¹ Wells Fargo designates its defenses from First through Twenty-Fifth, but it withdrew three defenses (the First, the Thirteenth and the Fourteenth). So, to provide one illustration of the consequences, the defense labeled "the Twenty-Fifth" is *actually* the Twenty-Second defense.

Wells Fargo filed an opposition response and Plaintiffs filed a reply. [ECF Nos. 120; 122]. United States District Judge Darrin P. Gayles referred [ECF No. 42] all pretrial matters to me, and I held a hearing on the motion [ECF No. 127].

For the reasons outlined below, the Undersigned **denies** Plaintiffs' motion.

General Factual Background

Plaintiffs contend that Wells Fargo aided and abetted both a Ponzi scheme fraud and breaches of fiduciary duty – and did so with knowledge of the fraudsters' misconduct. Plaintiffs, who are two retirees, are seeking to pursue a class action and, among other relief requested, separately contend that Wells Fargo must disgorge its gains from its purported misconduct.

But Wells Fargo says it was involved in mere routine banking transactions and was not aware of the fraud. In response, Plaintiffs say that Wells Fargo “not only knew of the scheme, but played an active role in its operation.”

The First Amended Complaint (“FAC”) alleges that the scheme which Wells Fargo supposedly aided and abetted resulted in the loss of more than \$300 million by more than 1,000 investor victims (*i.e.*, the purported class), most of whom were elderly and lost substantial life savings. [ECF No. 3, ¶ 1]. Kleinbart is said to be 82 years old (as of the June 6, 2024 filing of the FAC) and Millstein was 79 years old (as of the same filing date of more than a year ago), and they both describe themselves as victims of the fraud.

Applicable Legal Standards and Analysis

Pleadings Standard for Affirmative Defenses

The first issue to address is the appropriate pleadings standard for affirmative defenses. The parties disagree on this issue, which is an open question in our Circuit.

The Court, either on its own or on a motion made by a party, is permitted to strike from a pleading “an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f)(1)–(2). “Courts ‘have broad discretion when considering a motion to strike,’ however, ‘striking defenses from a pleading’ remains a ‘drastic remedy to be resorted to only when required for the purposes of justice’ and only when the stricken material has ‘no possible relation to the controversy.’” *FAST SRL v. Direct Connection Travel, LLC*, 330 F.R.D. 315, 317 (S.D. Fla. 2018) (quoting *Guarantee Ins. Co. v. Brand Mgmt. Serv., Inc.*, No. 12-61670, 2013 WL 4496510, at *2 (S.D. Fla. Aug. 22, 2013)).

There is a split among the district courts in this Circuit regarding the proper pleading standard for an affirmative defense. See *Jennings v. Carnival Corp.*, No. 22-CV-20205, 2022 WL 1913249, at *2 n.2 (S.D. Fla. May 17, 2022), *report and recommendation adopted*, No. 1:22-CV-20205, 2022 WL 1908949 (S.D. Fla. June 3, 2022) (recognizing split in authority “regarding the pleading standard required for affirmative defenses”); *Thompson v. Carnival Corp.*, No. 20-22217-CIV, 2021 WL 7542956, at *2 (S.D. Fla. May 24, 2021) (“Before we consider the merits of the motion to strike, [the] [p]laintiff argues that [Bell

Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)] applies to affirmative defenses. We acknowledge that there is a split of authority in the Eleventh Circuit on the question presented.”); *Andean Life, LLC v. Barry Callebaut U.S.A. LLC*, No. 20-20765-CIV, 2020 WL 1703552, at *2 (S.D. Fla. Apr. 8, 2020) (“[N]o United States Court of Appeals has decided the question on whether the plausibility standard enunciated in *Twombly* and [*Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)] applies to affirmative defenses[.]”); *Ramnarine v. CP RE Holdco 2009-1, LLC*, No. 12-61716-CIV, 2013 WL 1788503, at *1 (S.D. Fla. Apr. 26, 2013) (“Courts have developed two schools of thought regarding the pleading standard required for affirmative defenses, and the Eleventh Circuit has not yet resolved the split in opinion.”).

The Undersigned agrees with the reasoning of those cases applying a lower pleading standard to affirmative defenses. *See, e.g., Northrop & Johnson Holding Co., Inc. v. Leahy*, No. 16-CV-63008, 2017 WL 5632041, at *2 (S.D. Fla. Nov. 22, 2017) (discussing difference between the language of Fed. R. Civ. P. 8(a) and (b)).

In their Reply, Plaintiffs highlight how Judge Gayles adopted the opposite approach in *GPM Indus., Inc. v. United States Citizenship & Immigr. Servs.*, No. 21-CIV-24007, 2022 WL 4181544, at *1 (S.D. Fla. Sept. 13, 2022) and *MCM Ent., Inc. v. Diaz World Trade Grp., Inc.*, No. 22-CV-23189, 2024 WL 2833860, at *1 (S.D. Fla. Feb. 27, 2024). [ECF No. 122, pp. 2–3]. However, in neither of those cases did Judge Gayles explicitly mention

or discuss a preference on this issue. Both opinions merely address his *de novo* review of the magistrate judge's report and recommendation on the parties' objections.

Additionally, Judge Gayles' is not tethered to his prior rulings as they are not binding -- even on himself. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.6, 131 S. Ct. 2020, 2033 n.6, 179 L. Ed. 2d 1118 (2011) (quoting 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1] [d], p. 134–26 (3d ed. 2011)).

Therefore, the Undersigned is **respectfully recommending** that Judge Gayles **follow** the recent trend of courts holding affirmative defenses to a lower pleading standard. *See Mad Room, LLC v. City of Miami*, No. 21-cv-23485, 2024 WL 2776173, at *1 (S.D. Fla. May 30, 2024) ("Recent opinions within this district have reinforced that affirmative defenses need not "satisfy the strictures of *Twombly* and *Iqbal*.").

This standard dictates that, unlike the pleading requirements for a claim for relief under Federal Rule of Civil Procedure 8(a), which must comply with *Twombly* and *Iqbal*, when a party responds to a pleading, it must only "state in short and plain terms its defenses to each claim asserted against it." Fed. R. Civ. P. 8(b); *see also Bakshi v. Carnival Corp.*, No. 23-CV-21839-CIV, 2023 WL 6376730, at *2 (S.D. Fla. Aug. 23, 2023), *report and recommendation adopted*, No. 23-21839-CIV, 2023 WL 6376729 (S.D. Fla. Sept. 29, 2023); *Gonzalez v. Scottsdale Ins. Co.*, No. 20-20747-CIV, 2020 WL 1891328, at *1 (S.D. Fla. Apr. 16,

2020) (“The *Twombly/Iqbal* jurisprudence does not govern affirmative defenses.”); *Laferte v. Murphy Painters, Inc.*, Case No. 17-CIV-60375, 2017 WL 2537259, at *2 (S.D. Fla. June 12, 2017) (“[A]ffirmative defenses are not subject to the heightened pleading standard elucidated in *Twombly* and *Iqbal*” and “[t]he straightforward construction of Rule 8 delineates different standards for pleadings generally, and those applicable defenses.” (emphasis added)).

An affirmative defense is “one that admits to the complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification, or other negating matters. A defense that simply points out a defect or lack of evidence in the plaintiff’s case is not an affirmative defense.” *Adams v. Jumpstart Wireless Corp.*, 294 F.R.D. 668, 671 (S.D. Fla. 2013) (internal citations omitted).

Moreover, “an affirmative defense must be stricken when the defense is comprised of no more than ‘bare-bones, conclusory allegations’ or is ‘insufficient as a matter of law.’” *Northrop & Johnson Holding Co., Inc.*, 2017 WL 5632041, at *3 (quoting *Adams*, 294 F.R.D. at 671 and *Home Mgmt. Sols., Inc. v. Prescient, Inc.*, No. 07-20608-CIV, 2007 WL 2412834, at *2 (S.D. Fla. Aug. 21, 2007)).

“A defense is insufficient as a matter of law if, on the face of the pleadings, it is patently frivolous, or if it is clearly invalid as a matter of law.” *Romero v. S. Waste Sys., LLC*, 619 F. Supp. 2d 1356, 1358 (S.D. Fla. 2009) (quoting *Morrison v. Exec. Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005)).

Affirmative defenses are also “subject to the general pleading standard of Fed. R. Civ. P. 8(a), which requires a ‘short and plain statement’ of the asserted defense.” *Romero*, 619 F. Supp. 2d at 1358. They must include enough detail to provide the opposing party with **sufficient notice** of the theory underlying the defense. *See Edelman v. MSC Cruises, S.A.*, No. 24-CV-23060, 2025 WL 1220122, at *2 (S.D. Fla. Apr. 28, 2025) (stating that a party need only provide “fair notice of the nature of the defense and the grounds upon which it rests” and explaining that “an affirmative defense is sufficiently pled if ‘a plaintiff has notice that an affirmative defense will be raised at trial.’” (quoting *Hewitt v. Mobile Research Tech., Inc.*, 285 F. App’x. 694, 696 (11th Cir. 2008) (citing *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988))).

The Undersigned’s view about the appropriate pleading standard is bolstered by the reality that the Eleventh Circuit has previously “stressed providing notice as the purpose of Rule 8(c): ‘the purpose of Rule 8(c) is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate.’” *Ramnarine*, 2013 WL 1788503, at *3 (quoting *Hassan*, 842 F.2d at 263). Moreover, “when one considers that a defendant must answer the complaint within 21 days, imposing a different standard for defenses is not unfair.” *Id.* (citation omitted).

Framed by this group of legal principles, the Undersigned will analyze the challenged affirmative defenses by, among other considerations, using the non-heightened pleadings standard and determining whether a particular affirmative defense provides adequate notice to Plaintiffs about the nature of the specific defense.

Failure to State a Claim

“Failure to state a claim is not an affirmative defense,” especially when a case has “survived the motion-to-dismiss stage.” *Havana Docks Corp. v. Carnival Corp.*, 592 F. Supp. 3d 1088, 1194 (S.D. Fla. 2022) (quoting *Affiliati Network, Inc. v. Wanamaker*, No. 18-22576-CIV, 2019 WL 7376766, at *8 (S.D. Fla. Nov. 25, 2019), *aff’d* 847 F. App’x 583 (11th Cir. 2021) (granting summary judgment on failure to state a claim defense)).

However, this type of incorrectly-asserted affirmative defense does not necessarily mean that an Order striking it is required. Instead, a Court is free to treat it as a denial. See *Bakshi*, 2023 WL 6376730, at *6; *Home Mgmt. Sols., Inc. v. Prescient, Inc.*, No. 07-20608-CIV, 2007 WL 2412834, at *2 (S.D. Fla. Aug. 21, 2007); see also, e.g., *Wight v. Bluman*, No. 9:20-CV-81688, 2021 WL 2783878, at *3 (S.D. Fla. July 2, 2021) (same); *Wyne v. Carnival Corp.* No. 22-21638-Civ, 2022 WL 6127876, at *2 (S.D. Fla. Oct. 7, 2022) (“[T]he appropriate remedy is not to strike the [] affirmative defense, but to treat it as a specific denial.”); *Bruce v. Ocwen Loan Servicing, LLC*, No. 8:12-cv-1561-T-24-MAP, 2012 WL 4867224, *2 (M.D. Fla. Oct. 15, 2012) (“While these defenses appear to be denials of [the] [p]laintiff’s claims, rather than true affirmative defenses, the Court finds that there is no prejudice to

[the] [p]laintiff by allowing them to remain.”); *Zeron v. C & C Drywall Corp., Inc.*, No. 09-60861-CIV, 2009 WL 2461771, *2 (S.D. Fla. Aug. 10, 2009) (same).

Overall Perspective

“[S]triking defenses from a pleading remains a drastic remedy[,] to be resorted to only when required for the purposes of justice’ and only when the stricken material has ‘no possible relation to the controversy.’” *Archer Western-De Moya Joint Venture v. Ace Am. Ins. Co.*, No. 22-CV-21160, 2023 WL 11802486 (S.D. Fla. July 12, 2023) (citing *FAST SRL*, 330 F.R.D. at 317 (quoting *Guarantee Ins. Co.*, 2013 WL 4496510, at *2)).

The Role of Future Discovery

It is often premature to require a defendant to support its defenses with “detailed and specific factual assertions which may be established later on in discovery.” *See, e.g., TRG Oasis (Tower One), Ltd. v. Crum & Forster Specialty Ins. Co.*, No. 22-21346-CIV, 2022 WL 4631917, at *4 (S.D. Fla. Sept. 14, 2022), *report and recommendations adopted*, No. 22-21346-CIV, 2022 WL 4599056 (S.D. Fla. Sept. 30, 2022); *see also Lawton-Davis v. State Farm Mut. Auto. Ins. Co.*, No. 6:14-CV-1157-ORL-37GJK, 2015 WL 12839263, at *2 (M.D. Fla. Aug. 19, 2015) (“[W]ith discovery ongoing, the [c]ourt finds that it is too early to know whether [the] [d]efendant’s defenses and denials are ‘insufficient’ as a matter of law, and thus [the] [p]laintiffs’ Rule 12(f) motion is due to be denied as premature.”).

Given that discovery is still ongoing here, “if, after the close of discovery, Plaintiffs believe there is no evidence to support a particular defense, then they can challenge it at the summary judgment stage.” *TRG Oasis (Tower One), Ltd.*, 2022 WL 4631917, at *4, *see also Gonzalez*, 2020 WL 1891328, at *2 (declining to strike affirmative defense because more information “could become known during discovery”) (quoting *JazAtlanta 519 LLC v. Beazley Underwriting, Ltd.*, No. 18-cv-60498, 2018 WL 4743634, *1 (S.D. Fla. Oct. 2, 2018)). *Cf. Bakshi*, 2023 WL 6376730, at *4 (“[The] [d]efendant’s argument about the need for additional discovery has merit.”).

Substantial Disputes Over Dispositive Legal Questions

Motions to strike affirmative defenses which are based on potentially dispositive questions of law are typically inappropriate. *See, e.g., PNC Bank, N.A. v. Haghighi Family and Sports Medicine, P.A.*, No. 3:16-cv-1226, 2017 WL 7311870, at *2 (M.D. Fla. June 2, 2017) (“[W]hen there is no showing of prejudicial harm to the moving party, the courts generally are not willing to determine disputed and substantial questions of law upon a motion to strike.” (citing *Augustus v. Bd. of Pub. Instruction of Escambia Cnty, Fla.*, 306 F.2d 862, 868 (5th Cir. 1962) (“[T]hese questions quite properly are viewed as determinable only after discovery and a hearing on the merits.” (citing *Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354, 1360 (M.D. Fla. 2008) (quoting 5A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1380 (2d ed. 1990))).

“Even when the defense presents a purely legal question, the courts are **very reluctant** to determine disputed or substantial questions of law on a motion to strike.” *Resolution Trust Corp. v. Youngblood*, 807 F. Supp. 765, 769 (N.D. Ga. 1992) (citations omitted). (emphasis added) “Under such circumstances, the court may properly, and . . . **should, defer** action on the motion and leave the sufficiency of the allegations for determination on the merits.” *Augustus*, 306 F.2d at 868 (emphasis supplied).

The Amended Affirmative Defenses to the FAC (and the Rulings on Them)

**FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)**

Withdrawn.

[ECF No. 106, p. 43].

**SECOND AFFIRMATIVE DEFENSE
(Negligence By Third Parties)**

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

Wells Fargo asserts that any damages awarded to Plaintiffs is subject to apportionment pursuant to section 768.81, Florida Statutes, and *Fabre v. Marin*, 623 So. 2d 782 (Fla. 1993). All at-fault persons or entities are unknown to Wells Fargo, and discovery remains ongoing. At this time, the potential at-fault parties include, but are not limited to, the following in

addition to Plaintiffs themselves: Marshal Seeman; Eric Holtz; Alan Hodge; National Senior Insurance, Inc. (“NSI”) d/b/a Seeman Holtz Insurance Services, Inc; Integrity Assets 2016, LLC; Integrity Assets, LLC; Integrity Longevity Investments, LLC; Integrity Longevity Investments, LLC; Anthony Lombardo; Para Longevity 2012, LLC; Para Longevity 2012-5 LLC; Para Longevity 2014, LLC; Para Longevity 2014-5, LLC; Para Longevity 2015-3, LLC; Para Longevity 2015-5, LLC; Para Longevity 2016-3, LLC; Para Longevity 2016-5, LLC; Para Longevity 2018-3, LLC; Para Longevity 2018-5, LLC; Para Longevity 2019-3, LLC; Para Longevity 2019-5, LLC; Para Longevity 2019-7, LLC; Para Longevity Investments, LLC; Para Longevity VI, LLC; Para Longevity Holdings VI LLC; Paraveda Investments V, Inc.; Brian Schwartz; Seeman Holtz Global LLC; Seeman Holtz Property and Casualty, LLC; Seeman Holtz Wealth Management; Seeman-Holtz Consulting Corp.; SH Global, LLC N/K/A Para Longevity V, LLC; Signal Point Capital, LLC; Frederick Tan; and Neal Mellert.

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

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

Id. at. 43-45.

The Undersigned **denies** the motion. Plaintiffs contend that Florida's apportionment statute for third parties applies only in negligence cases and does not apply in intentional tort cases and argue that their Amended Complaint is for only intentional torts. While true, it overlooks the reality that the Amended Complaint contains some allegations² which appear to assert negligence-type conduct. Given that this language comes directly from Plaintiffs' **own** Amended Complaint, it would be risky to substantively conclude now that Wells Fargo cannot ever assert the defense here.

**THIRD AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)**

Plaintiffs failed to take proper and reasonable steps to avoid, minimize, or mitigate Plaintiffs' alleged damages and, to the extent of such failure, the damages allegedly incurred by Plaintiffs, if any, should be reduced accordingly or eliminated entirely. This is including but not limited to because upon information and belief, Plaintiffs (i) failed to appropriately investigate their investment(s) and potential investments prior to doing business with NSI; and (ii) failed to adequately monitor their investment, especially since they knew or should have known that any investment, including the Notes and the PLC's business model were and/or are subject to numerous potential risks and conflicts of interest. Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 45.

² Plaintiffs' Amended Complaint explicitly alleges that "questions of law and fact" which "are common to the claims of Plaintiffs and the entire Class" include: "i. Whether Defendant owed Plaintiffs and the Class a *duty of reasonable care* applicable to banks and financial institutions;" "j. Whether Defendant *breached its duty of reasonable care* applicable to banks and financial institutions;" and "k. Whether Defendant was *negligent* in substantially assisting the Scheme" See [ECF No. 3, ¶ 173 (emphasis added)].

The Undersigned **denies** the motion to strike this affirmative defense. This defense gives Plaintiffs adequate notice of Wells Fargo's position, enabling Plaintiffs to prepare to litigate the defense.

**FOURTH AFFIRMATIVE DEFENSE
(Unclean Hands)**

Plaintiffs' claims are barred, in whole or in part, by the doctrine of unclean hands. This is including but not limited to because upon information and belief, certain of the Plaintiffs and/or the purported class benefited from the scheme alleged in the Complaint, including by receiving benefits related to their respective investments over the course of their business relationship with NSI, including at rates higher than alternative investment options. Moreover, certain of the Plaintiffs and/or the purported class, including Martin Kleinbart, engaged in multiple investments with NSI over the course of their relationship. Further, Wells Fargo anticipates that and/or some of the purported class may have been aware of any STOLI policies to the extent such policies exist and knowingly invested in STOLI policies. Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 45–46.

The Undersigned **denies** the motion on this ground. Defendant provides adequate notice of the defense here. Plaintiffs may, of course, seek additional detail through discovery.

**FIFTH AFFIRMATIVE DEFENSE
(In Pari Delicto)**

Plaintiffs' claims are barred, in whole or in part, by the doctrine of in pari delicto. This is including but not limited to because upon information and belief, certain of the Plaintiffs and/or the purported class benefited from the scheme alleged in the Complaint, including by receiving benefits related to their respective investments over the course of their business relationship with NSI, including at rates higher than alternative investment options.

Moreover, certain of the Plaintiffs and/or the purported class, including Martin Kleinbart, engaged in multiple investments with NSI over the course of their relationship. Further, Wells Fargo anticipates that Plaintiffs and/or some of the purported class may have been aware of any STOLI policies to the extent such policies exist and knowingly invested in STOLI policies. Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 46.

Similar to its assertion of the unclean hands defense, Wells Fargo's assertion of the In Pari Delicto defense is also sufficient.

SIXTH AFFIRMATIVE DEFENSE (Laches)

Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches. Specifically, upon information and belief, Plaintiffs unreasonably delayed asserting their claim against Wells Fargo. Specifically, the issue date for the Note for Fanny B. Millstein is January 13, 2017. *See* Amended Compl. ¶ 163. The issue dates for the Notes for Martin Kleinbart are September 14, 2017, October 23, 2018, February 8, 2019, February 8, 2019, and September 12, 2019. Importantly, the OFR action was initiated in 2021. *See id.*, ¶ 11. Plaintiffs, however, failed to initiate this lawsuit until 2024. This delay was and/or is detrimental to Wells Fargo because it has negatively impacted Wells Fargo's ability to defend this case due to the passage of time and/or the death of the schemers with actual responsibility for all of Plaintiffs' damages. Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 46–47.

The Undersigned **denies** the motion, which adequately puts Plaintiffs on notice. *See generally Jones v. Kohl's Dep't Stores, Inc.*, No. 15-CIV-61626, 2015 WL 12781195, at *2 (S.D. Fla. Oct. 16, 2015) (denying motion to strike “[the] [d]efendant’s single sentence defense” of laches, unclean hands, and waiver because these are “sufficient—boilerplate

but well-recognized [] valid defenses,” and noting that “[t]o the extent [the] [p]laintiff requires greater factual detail for these defenses, [the] [p]laintiff[s] may acquire those facts through discovery”).

**SEVENTH AFFIRMATIVE DEFENSE
(Estoppel)**

Plaintiffs are estopped by the action of law or by conduct from maintaining the Amended Complaint filed in this case. This is including but not limited to because, Plaintiffs through their investment(s) with NSI authorized and/or represented to Wells Fargo that NSI could take action on their behalf and for their benefit (despite knowing their investment could be lost, or its value decreased). Upon information and belief, Plaintiffs benefitted from such investments. However, it was not until their investment was lost that they sought to recoup it from Wells Fargo. Due to Plaintiffs’ failures to timely alert Wells Fargo and/or monitor their own investments, they are estopped from maintaining their claims against Wells Fargo. Discovery remains ongoing and more facts may be revealed in support of this defense.

[ECF No. 106, p. 47].

Wells Fargo has provided its defense of estoppel in short and plain terms, which is sufficient. *Guarantee Ins. Co.*, 2013 WL 4496510, at *5 (denying a motion to strike affirmative defenses of **estoppel**, waiver, laches, and unclean hands even though they contained no factual support and were alleged in general terms).

**EIGHTH AFFIRMATIVE DEFENSE
(Co-Liability)**

Wells Fargo alleges that any injury or damages which may have been sustained by Plaintiffs were proximately caused by the acts, errors or omissions of persons or entities other than Wells Fargo, and for whom Wells Fargo is not responsible. Wells Fargo asserts this defense to the extent Plaintiffs' claims are premised on Wells Fargo's alleged negligent conduct (*see* Amended Compl. ¶ 73 and ¶ 173). *See Doherty v. Allianz Life Ins. Co. of N. Am.*, No. 218CV377FTM29NPM, 2019 WL 5268721 (M.D. Fla. Oct. 17, 2019).

All at-fault persons or entities are unknown to Wells Fargo, and discovery remains ongoing. At this time, the potential at-fault parties include, but are not limited to, the following in addition to Plaintiffs themselves: Marshal Seeman; Eric Holtz; Alan Hodge; National Senior Insurance, Inc. ("NSI") d/b/a Seeman Holtz Insurance Services, Inc; Integrity Assets 2016, LLC; Integrity Assets, LLC; Integrity Longevity Investments, LLC; Integrity Longevity Investments, LLC; Anthony Lombardo; Para Longevity 2012, LLC; Para Longevity 2012-5 LLC; Para Longevity 2014, LLC; Para Longevity 2014-5, LLC; Para Longevity 2015-3, LLC; Para Longevity 2015-5, LLC; Para Longevity 2016-3, LLC; Para Longevity 2016-5, LLC; Para Longevity 2018-3, LLC; Para Longevity 2018-5, LLC; Para Longevity 2019-3, LLC; Para Longevity 2019-5, LLC; Para Longevity 2019-7, LLC; Para Longevity Investments, LLC; Para Longevity VI, LLC; Para Longevity Holdings VI LLC; Paraveda Investments V, Inc.; Brian Schwartz; Seeman Holtz Global LLC; Seeman Holtz Property and Casualty, LLC; Seeman Holtz Wealth Management; Seeman-Holtz Consulting Corp.; SH Global, LLC N/K/A Para Longevity V, LLC; Signal Point Capital, LLC; Frederick Tan; and Neal Mellert. Discovery remains ongoing and more facts may be revealed in support of this defense.

Specifically, the scheme at the heart of Plaintiffs' claims was perpetrated by the above schemers, not Wells Fargo. As alleged in the Amended Complaint, the Seeman and Holtz entities—not Wells Fargo—"created the PLCs to solicit funds from investors through the sale of Notes purportedly to fund the purchase and payment of premiums for STOLIs;" "lured" Plaintiffs "to invest in the Notes issued by the PLCs;" and "diverted money from legitimate business operations . . . [i]nstead of paying Plaintiffs and the Class from the funds generated by the death benefits of the STOLIs

securing their PLC Notes.” *See* Amended Compl. ¶¶ 33, 35, 42. Moreover, upon information and belief, Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs business model are subject to numerous potential risks and conflicts of interest. *See id.* ¶ 37 (“each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters.”). Discovery remains ongoing and more facts may be revealed in support of this defense.

[ECF No. 106, pp. 47–48].

The Undersigned **denies** the motion. Because Plaintiffs mention Wells Fargo’s purported negligent conduct in their First Amended Complaint, Wells Fargo has the right to allege affirmative defenses speaking to the culpability of Plaintiffs and others. Moreover, each of these defenses provides Plaintiffs with sufficient notice and the factual bases for Wells Fargo’s defenses. Discovery can be used to obtain further factual detail.

NINTH AFFIRMATIVE DEFENSE (Fault of Others)

If Plaintiffs suffered or sustained any loss, injury, damage, or detriment, the same was directly and proximately caused and contributed to by the breach, conduct, acts, omissions, activities, carelessness, recklessness, negligence, and/or intentional misconduct or intervening acts of other third parties, and not by Wells Fargo. Wells Fargo asserts this defense to the extent Plaintiffs’ claims are premised on Wells Fargo’s alleged negligent conduct (*see* Amended Compl. ¶ 73 and ¶ 173). *See Doherty v. Allianz Life Ins. Co. of N. Am.*, No. 218CV377FTM29NPM, 2019 WL 5268721 (M.D. Fla. Oct. 17, 2019).

All at-fault persons or entities are unknown to Wells Fargo, and discovery remains ongoing. At this time, the potential at-fault parties include, but are not limited to, the following in addition to Plaintiffs themselves: Marshal Seeman; Eric Holtz; Alan Hodge; National Senior Insurance, Inc. (“NSI”) d/b/a Seeman Holtz Insurance Services, Inc; Integrity Assets 2016, LLC; Integrity Assets, LLC; Integrity Longevity Investments, LLC; Integrity

Longevity Investments, LLC; Anthony Lombardo; Para Longevity 2012, LLC; Para Longevity 2012-5 LLC; Para Longevity 2014, LLC; Para Longevity 2014-5, LLC; Para Longevity 2015-3, LLC; Para Longevity 2015-5, LLC; Para Longevity 2016-3, LLC; Para Longevity 2016-5, LLC; Para Longevity 2018-3, LLC; Para Longevity 2018-5, LLC; Para Longevity 2019-3, LLC; Para Longevity 2019-5, LLC; Para Longevity 2019-7, LLC; Para Longevity Investments, LLC; Para Longevity VI, LLC; Para Longevity Holdings VI LLC; Paraveda Investments V, Inc.; Brian Schwartz; Seeman Holtz Global LLC; Seeman Holtz Property and Casualty, LLC; Seeman Holtz Wealth Management; Seeman-Holtz Consulting Corp.; SH Global, LLC N/K/A Para Longevity V, LLC; Signal Point Capital, LLC; Frederick Tan; and Neal Mellert. Discovery remains ongoing and more facts may be revealed in support of this defense.

Specifically, the scheme at the heart of Plaintiffs' claims was perpetrated by the above schemers, not Wells Fargo. As alleged in the Amended Complaint, the Seeman and Holtz entities—not Wells Fargo—“created the PLCs to solicit funds from investors through the sale of Notes purportedly to fund the purchase and payment of premiums for STOLIs;” “lured” Plaintiffs “to invest in the Notes issued by the PLCs;” and “diverted money from legitimate business operations [i]nstead of paying Plaintiffs and the Class from the funds generated by the death benefits of the STOLIs securing their PLC Notes.” *See* Amended Compl. ¶¶ 33, 35, 42. Moreover, upon information and belief, Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs business model are subject to numerous potential risks and conflicts of interest. *See id.* ¶ 37 (“each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters.”). Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 49-50.

The Undersigned *denies* the motion for the same reasons noted in the paragraph above, denying the motion for the eighth affirmative defense.

**TENTH AFFIRMATIVE DEFENSE
(Speculative Damages)**

Wells Fargo alleges any damage or loss Plaintiffs did incur as a result of any act or conduct by Wells Fargo would be speculative at best and thus too uncertain for recovery. This is including but not limited to because it is unclear that Plaintiffs' investments would have made money or been successful even absent the purported scheme. *See* Amended Compl. ¶ 37 ("each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters."). Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 50.

The Undersigned **denies** the motion. Plaintiffs are on notice of the defense to the extent that they can prepare to address it. Also, they can propound discovery if they would like the specific facts underling the defense.

**ELEVENTH AFFIRMATIVE DEFENSE
(Good Faith Conduct/Conformance with Applicable Standards)**

Wells Fargo at all times acted in good faith and in conformance with all applicable government and industry standards, rules and regulations, thus precluding any recovery by Plaintiffs against Wells Fargo. Specifically, Wells Fargo acted in accordance with acceptable standards in the banking industry, including through its opening of the PLC accounts and "Know Your Customer" due diligence. Wells Fargo also acted in accordance with the governing trust agreements as Trustee for the James S. Yakovakis, Albert Cohen, and William G. Walters trusts. For example, despite Plaintiffs' allegations in Paragraph 67 of the Amended Complaint that Wells Fargo backdated its resignation as trustee, Plaintiffs fail to disclose that the governing resignation documents specifically provide that each party is deemed to have signed the agreement as of the effective date. Moreover, Wells Fargo never made any representations regarding life settlement policies as Plaintiffs claim in Paragraph 72 of the Complaint. For example, the language cited in the Complaint refers to Pledged Accounts. Plaintiffs fail to acknowledge, however, that the Pledged Account is defined in the Securities Account Agreement and references four specific bank

accounts, not life settlement policies as the Plaintiffs allege. To the contrary, Wells Fargo was specifically indemnified for its role in the Securities Account Agreements and held harmless in connection with its role. Moreover, the governing trust agreements and Securities Account Agreements specifically limited Wells Fargo's duties and responsibilities, contradicting Plaintiffs' allegations. Wells Fargo's role was administrative in nature, and Wells Fargo was wholly unaware of Plaintiffs' investments and alleged collateral for those investments. In sum, Wells Fargo's conformance with applicable industry standards (and good faith at all times) precludes Plaintiffs' claims. Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 50–51.

Given that notice is the critical concept when addressing the sufficiency of an affirmative defense, this defense is adequate and the Undersigned therefore **denies** the motion.

TWELFTH AFFIRMATIVE DEFENSE (Lack of Causation)

The damages complained of were the result of the intervening and superseding actions of others and were not proximately caused by the actions or omissions of the Wells Fargo. *See e.g.*, Amended Compl. ¶¶ 32–42. Wells Fargo asserts this defense to the extent Plaintiffs' claims are premised on Wells Fargo's alleged negligent conduct (*see* Amended Compl. ¶ 73 and ¶ 173). *See Doherty v. Allianz Life Ins. Co. of N. Am.*, No. 218CV377FTM29NPM, 2019 WL 5268721 (M.D. Fla. Oct. 17, 2019).

All at-fault persons or entities are unknown to Wells Fargo, and discovery remains ongoing. At this time, the potential at-fault parties include, but are not limited to, the following in addition to Plaintiffs themselves: Marshal Seeman; Eric Holtz; Alan Hodge; National Senior Insurance, Inc. ("NSI") d/b/a Seeman Holtz Insurance Services, Inc; Integrity Assets 2016, LLC; Integrity Assets, LLC; Integrity Longevity Investments, LLC; Integrity Longevity Investments, LLC; Anthony Lombardo; Para Longevity 2012, LLC; Para Longevity 2012-5 LLC; Para Longevity 2014, LLC; Para Longevity 2014-5, LLC; Para Longevity 2015-3, LLC; Para Longevity 2015-

5, LLC; Para Longevity 2016-3, LLC; Para Longevity 2016-5, LLC; Para Longevity 2018-3, LLC; Para Longevity 2018-5, LLC; Para Longevity 2019-3, LLC; Para Longevity 2019-5, LLC; Para Longevity 2019-7, LLC; Para Longevity Investments, LLC; Para Longevity VI, LLC; Para Longevity Holdings VI LLC; Paraveda Investments V, Inc.; Brian Schwartz; Seeman Holtz Global LLC; Seeman Holtz Property and Casualty, LLC; Seeman Holtz Wealth Management; Seeman-Holtz Consulting Corp.; SH Global, LLC N/K/A Para Longevity V, LLC; Signal Point Capital, LLC; Frederick Tan; and Neal Mellert.

These at-fault persons and/or entities are the cause of Plaintiffs' loss, not Wells Fargo, and Plaintiffs would not have lost their investment but for the actions of NSI and the other Seeman Holtz entities. Specifically, the scheme at the heart of Plaintiffs' claims was perpetrated by the above Fabre Defendants, not Wells Fargo. As alleged in the Amended Complaint, the Seeman and Holtz entities—not Wells Fargo—"created the PLCs to solicit funds from investors through the sale of Notes purportedly to fund the purchase and payment of premiums for STOLIs;" "lured" Plaintiffs "to invest in the Notes issued by the PLCs;" and "diverted money from legitimate business operations [i]nstead of paying Plaintiffs and the Class from the funds generated by the death benefits of the STOLIs securing their PLC Notes." *See* Amended Compl. ¶¶ 33, 35, 42. Moreover, upon information and belief, Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs business model are subject to numerous potential risks and conflicts of interest. *See id.* ¶ 37 ("each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters."). Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 51–53.

The Undersigned **denies** the motion. Any defendant (and their counsel) confronted with this defense (as asserted by Wells Fargo here) knows the nature of the defense and is surely on adequate notice. So the Undersigned **denies** the motion.

**THIRTEENTH AFFIRMATIVE DEFENSE
(Lack of Malice)**

WITHDRAWN

Id. at 53.

**FOURTEENTH AFFIRMATIVE DEFENSE
(Lack of Standing)**

WITHDRAWN

Id.

**FIFTEENTH AFFIRMATIVE DEFENSE
(Consent)**

Plaintiffs' claims are barred because Plaintiffs consented to any alleged conduct in the Amended Complaint, including but not limited to their knowing investment in the PLCs through the sale of promissory notes in order to obtain an investment windfall. *See* Amended Compl. ¶ 37 ("each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters."). Further, Wells Fargo anticipates that Plaintiffs and/or some of the purported class may have been aware of any STOLI policies to the extent such policies exist. Discovery remains ongoing and more facts may be revealed in support of this defense.

Id.

Wells Fargo is not required to include in its affirmative defense the specific "information which Plaintiffs could have uncovered that would have revealed the existence of the Ponzi scheme." That level of additional detail is for discovery, and it does not render the defense strike-worthy. So the Undersigned **denies** the motion.

**SIXTEENTH AFFIRMATIVE DEFENSE
(Assumption of Risk)**

Plaintiffs, themselves and/or through their agent(s), acted with full knowledge and understanding of the relevant facts and circumstances surrounding the transactions and relations at issue in their litigation and assumed any and all risks associated therewith. *See* Amended Compl. ¶ 37 (“each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters.”). Plaintiffs are therefore barred from obtaining the relief sought in the Amended Complaint. This is including because upon information and belief, Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs business model are subject to numerous potential risks and conflicts of interest. Wells Fargo asserts this defense to the extent Plaintiffs’ claims are premised on Wells Fargo’s alleged negligent conduct (*see* Amended Compl. ¶ 73 and ¶ 173). *See Doherty v. Allianz Life Ins. Co. of N. Am.*, No. 218CV377FTM29NPM, 2019 WL 5268721 (M.D. Fla. Oct. 17, 2019). Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 54.

Plaintiffs again seek to strike a defense because they say it relates to negligence, not intentional conduct. But, as noted, Plaintiffs’ First Amended Complaint asserts negligence. Plaintiffs are free to seek a summary judgment ruling on the applicability of this defense after more discovery is provided, but the defense puts Plaintiffs on adequate notice.

**SEVENTEENTH AFFIRMATIVE DEFENSE
(Ratification)**

The Amended Complaint, and each purported cause of action alleged therein, is barred by the conduct, actions, and inactions of Plaintiffs, and/or the persons on whose behalf they purport to bring this action, under the doctrine of ratification. *See* Amended Compl. ¶ 37 (“each of the Note offerings that described the purported investment opportunity, risk of loss,

and other material matters.”). Upon information and belief, Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs business model are subject to numerous potential risks and conflicts of interest. Further, Wells Fargo anticipates that Plaintiffs and/or some of the purported class may have been aware of any STOLI policies to the extent such policies exist. Discovery remains ongoing and more facts may be revealed in support of this defense.

Id.

The Undersigned denies the motion because the defense is sufficient to put Plaintiffs on notice.

**EIGHTEENTH AFFIRMATIVE DEFENSE
(Recovery)**

Plaintiffs’ claims are barred, in whole or in part, because they have received or may receive returns or recoveries on their losses and therefore have not suffered damages or their damages have been reduced. This is including but not limited to because upon information and belief, Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs business model are subject to numerous potential risks and conflicts of interest. Upon information and belief, Plaintiffs also received the benefits of such investments through payments received from third parties, returns received on their investments, and or other tangible/intangible benefits that will be explored throughout discovery. Furthermore, upon information and belief, Plaintiffs will recover from their efforts in the related proceeding, *Millstein v. Holtz*, No. 21-cv-61179 (S.D. Fla. 2021). Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 55.

This is sufficient to put Plaintiffs on notice. The recovery defense is not, as Plaintiffs argue a mere denial of the allegations in the First Amended Complaint. The Undersigned **denies** the motion.

**NINETEENTH AFFIRMATIVE DEFENSE
(Set-Off)**

Should Plaintiffs recover any damages from Wells Fargo, then Wells Fargo is entitled to contribution, set-off, and/or indemnification, either in whole or in part, from all persons or entities whose negligence and/or fault proximately contributed to Plaintiffs' damages. This is including but not limited to because upon information and belief, Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs business model are subject to numerous potential risks and conflicts of interest. *See* Amended Compl. ¶ 37 ("each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters"). Additionally, upon information and belief, Plaintiffs also received the benefits of such investments through payments received from third parties, returns received on their investments, and or other tangible/intangible benefits that will be explored throughout discovery. Discovery remains ongoing and more facts may be revealed in support of this defense.

Id.

Plaintiffs argue that set-off is an affirmative defense in contract actions, but not tort actions. But, as noted above, the First Amended Complaint does in fact assert negligence-type theories, so the defense may well be appropriate. The Undersigned **denies** the motion.

**TWENTIETH AFFIRMATIVE DEFENSE
(Plaintiffs' Negligence)**

Any alleged damages which may have been sustained by Plaintiffs as described in the Amended Complaint were due solely to, caused wholly by,

and were the direct and proximate result of the negligence and carelessness of the Plaintiffs, including but not limited to Plaintiffs' own negligent financial practices and their failures to exercise ordinary care related to same. Specifically, upon information and belief, Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs business model are subject to numerous potential risks and conflicts of interest. *See* Amended Compl. ¶ 37 ("each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters"). Plaintiffs failed to conduct any due diligence related to their investments, or monitor such investments once made. Discovery remains ongoing and more facts may be revealed in support of this defense.

Id. at 56.

This defense is sufficiently factual, with discovery ongoing, to constitute notice of the defense. The Undersigned finds that Wells Fargo provided adequate factual assertions to generate the requisite notice, and I **deny** the motion. *Lawton-Davis*, 2015 WL 12839263, at *2 ("[W]ith discovery ongoing, the [c]ourt finds that it is too early to know whether [the] [d]efendant's defenses and denials are 'insufficient' as a matter of law, and thus [the] [p]laintiffs' Rule 12(f) motion is due to be denied as premature.").

**TWENTY-FIRST AFFIRMATIVE DEFENSE
(Statute of Limitations)**

Plaintiffs' claims are or may be barred in whole or in part by the applicable statutes of limitations. The issue date for the Note for Fanny B. Millstein is January 13, 2017. *See* Amended Compl. ¶ 163. The issue dates for the Notes for Martin Kleinbart are September 14, 2017, October 23, 2018, February 8, 2019, February 8, 2019, and September 12, 2019. *See e.g., Goodwin v. Sphatt*, 114 So. 3d 1092, 1094–95 (Fla. 2d DCA 2013) (finding breach of fiduciary duty and fraud are subject to a four-year statutes of limitation). Wells Fargo therefore asserts that to the extent any such investments commenced earlier than four years from the date this lawsuit was initiated, they are barred by the statute of limitations.

[ECF No. 106, p. 56].

Plaintiffs argue Wells Fargo's defenses for laches and statute of limitations should be stricken because "Plaintiffs' claims accrued when Plaintiffs knew, or reasonably should have known, of their existence." [ECF No. 112, p. 10]. In effect, they are seeking a ruling on a potentially dispositive, substantial question of law which is not appropriate at this stage. Furthermore, the defense puts Plaintiffs on notice of the defense. The Undersigned **denies** the motion. *Marino v. Broward Sheriff's Off.*, No. 20-60980-CIV, 2021 WL 9347050, at *3 (S.D. Fla. Dec. 6, 2021) (finding defendant's statute of limitations defenses "contain sufficient facts . . . to put [the] [p]laintiffs on notice that [the] [d]efendants believe the claims to be outside the limitations period").

**TWENTY-SECOND AFFIRMATIVE DEFENSE
(No Benefit Directly Conferred)**

Plaintiffs' claims are or may be barred to the extent they are predicated on benefits that Plaintiffs conferred no direct benefit on Wells Fargo to support a claim for unjust enrichment. Specifically, any benefit Wells Fargo received was in the form of fees on the account (which were not paid in many instances), and those fees were paid by someone other than Plaintiffs. Moreover, any fees received by Wells Fargo were contracted for work performed by Wells Fargo. Discovery remains ongoing and more facts may be revealed in support of this defense.

[ECF No. 106, p. 57].

Plaintiffs argue that Wells Fargo's affirmative defense, no benefit directly conferred on Wells Fargo, should be stricken because it is not an affirmative defense and was previously raised in Wells Fargo's motion to dismiss. [ECF No. 112, p. 17]. However,

courts have refused to strike affirmative defenses on this basis. *See Rosada v. John Wieland Homes & N'hoods, Inc.*, No. 3:09-cv-653-J-20MCR, 2010 WL 1249841, at *3 (M.D. Fla. Mar. 25, 2010) (refusing to strike an affirmative defense even though the court previously rejected similar argument in denying the motion to dismiss); *CI Int'l Fuels, LTDA v. Helm Bank, S.A.*, No. 10-20347-CIV, 2010 WL 11597659, at *2 (S.D. Fla. Aug. 23, 2010) (denying motion to strike based on the argument the defense was previously raised in a motion to dismiss because the plaintiffs failed to show the defense had “no relationship to the controversy,” “may confuse,” or may “otherwise prejudice” the plaintiffs).

The Undersigned **denies** the motion.

**TWENTY-THIRD AFFIRMATIVE DEFENSE
(Waiver)**

Plaintiffs have waived all claims against Wells Fargo through their own conduct and willing participation in the investments at-issue in the Complaint, including but not limited to Plaintiffs’ actual and/or constructive knowledge of the risk associated with the financial investments. *See* Amended Compl. ¶ 37 (“each of the Note offerings that described the purported investment opportunity, risk of loss, and other material matters”). Upon information and belief, Plaintiffs invested in the PLCs through the sale of promissory notes knowing that the Notes and the PLCs business model are subject to numerous potential risks and conflicts of interest. Additionally, Plaintiffs failed to perform any due diligence regarding the investments, the Seeman Holtz entities, the PLCs, and/or any other involved parties prior to investing the PLCs. Plaintiffs knowing participation in this scheme, including but not limited through their opportunity and obligation to conduct pre-investment due diligence and/or monitor their investments once made operates as a waiver of their claims. Discovery remains ongoing and more facts may be revealed in support of this defense.

[ECF No. 106, p. 57].

The Undersigned **denies** the motion because this affirmative defense gives ample notice that Wells Fargo is asserting a waiver defense. Plaintiffs can propound discovery to obtain the specific facts which Wells Fargo believes are relevant to its waiver theory. *See MSP Recovery Claims, Series LLC v. Atl. Specialty Ins. Co.*, No. 6:20-CV-553-RBD-EJK, 2021 WL 4935726, at *2 (M.D. Fla. Oct. 6, 2021) (“The [c]ourt agrees that ‘accord and satisfaction’ and ‘waiver,’ stated in ‘short and plain terms,’ is sufficient to provide [the] [p]laintiff notice.”); *Mt. Hawley Ins. Co. v. Boca Bayou Condo. Ass’n, Inc.*, No. 18-cv-81656, 2019 WL 7837288, at *3 (S.D. Fla. Dec. 20, 2019) (finding that waiver affirmative defense which stated that “[the] [p]laintiff, by its own actions and conduct in the underlying case, has waived any right to deny coverage under the policy” gave sufficient notice of defense), *report and recommendations adopted*, No. 18-cv-81656, 2020 WL 1441921 (S.D. Fla. Mar. 25, 2020).

TWENTY-FOURTH AFFIRMATIVE DEFENSE
(Existence of Contract)

The named Plaintiffs and any alleged putative class counsel are not adequate representatives and/or members of the class to the extent named Plaintiffs or putative class members had an account or relationship with Wells Fargo that is governed by a deposit agreement.

[ECF No. 106, p. 58].

Wells Fargo is alleging that to the extent that any class members had an account or relationship with Wells Fargo, that relationship is governed by a deposit agreement. Although Plaintiffs argue they do not know which deposit agreement Wells Fargo is

referencing, Wells Fargo's defense puts them on notice of the agreements at issue by referencing applicable account agreements. Plaintiffs have sufficient information to identify the contracts at issue or explore the details in discovery. The Undersigned **denies** the motion.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE
(Class Defenses)**

Plaintiffs have not satisfied and cannot satisfy the requirements for certification of any type of class under Rule 23 of the Federal Rules of Civil Procedure, and this action may not be properly maintained as any type of class action or representative action because:

a. Plaintiffs have failed to plead and/or cannot establish the necessary procedural elements and requirements for treatment as any such an action, and such treatment is neither appropriate nor constitutional; and/or

b. Such an action is not an appropriate method for the fair and efficient adjudication of the claims described in the Amended Complaint; and/or

c. Common issues of fact or law which are of legal significance do not predominate, any common facts or law are insignificant compared to the individual facts and issues particular to Plaintiffs and the putative class members they may purport to represent, and/or individual issues predominate which will require a detailed, fact-specific and individualized inquiry that must be decided plaintiff-by-plaintiff; and/or

d. Plaintiffs are not "similarly situated" to any of the putative class members they may purport to represent, and their claims are not representative or typical of those of such putative class members, including but not limited to the fact that, upon information and belief, some Plaintiffs received the benefits of investments through payments received from third parties, returns received on their investments, and or other tangible/intangible benefits that will be explored throughout discovery; and/or

e. Plaintiffs are not a proper class representative or representative plaintiff, including but not limited to because Plaintiffs were not sufficiently involved in their own investments and/or Plaintiffs are not sufficiently involved in the prosecution of this matter; and/or

f. The named Plaintiffs and any alleged putative class counsel are not adequate representatives for any alleged putative class because they are not able to fairly and adequately represent and protect the interests of all of the putative class members they purport to represent; and/or

g. There is not a well-defined community of interest in the questions of law or fact affecting Plaintiffs and the putative class members they may purport to represent; and/or

h. Any alleged putative class is not ascertainable, nor is its members identifiable; and/or

i. To the extent any alleged putative class is ascertainable and its members are identifiable, the number of putative class members is too small to meet the numerosity requirement or is not so large that joinder of the individual members would not be impractical.

Id. at 58–59.

Plaintiffs argue that Wells Fargo cannot properly assert an affirmative defense to the prerequisites for maintaining a class action. A defense which challenges whether plaintiffs have satisfied the requirements of class certification is a valid affirmative defense. *See Goers v. L.A. Entm't Grp., Inc.*, No. 2:15-cv-412-FtM-99CM, 2016 WL 11518750, at *3 (M.D. Fla. Jan. 27, 2016) (denying a motion to strike an affirmative defense challenging class certification because the defense was “sufficiently valid, sufficiently pled, and sufficiently places [the] [p]laintiff on notice on the legal theories on which Defendants intend to rely”). The Undersigned **denies** the motion.

OTHER AFFIRMATIVE DEFENSES

Wells Fargo has insufficient knowledge or information upon which to form a belief as to whether it may have additional, as yet unstated, defenses available, including as it relates to other members of the putative class. Wells Fargo expressly reserves the right to assert additional defenses in the event that discovery indicates that such defenses are appropriate.

[ECF No. 106, p. 59].

Some courts hold that a reservation of rights clause is not an affirmative defense and should be stricken. *See Gonzalez v. Spears Holdings, Inc.*, No. 09-60501, 2009 WL 2391233, at *4 (S.D. Fla. July 31, 2009) (“Because the reservation of rights clause is not a viable defense, the Court will grant the motion to strike Defendants’ Eleventh Affirmative Defense.”). But Wells Fargo says it did not assert the clause as an actual affirmative defense. Instead, citing *Ramnarine*, 2013 WL 1788503, at *5–6, it says it was “merely reserving its right to plead additional affirmative defenses in the future.” [ECF No. 120, p. 17].

The *Ramnarine* Court³ denied a motion to strike a reservation of right (to assert additional affirmative defenses) provision because Defendants did not actually plead their reservation of the right to amend affirmative defenses as an affirmative defense. Therefore, “the fact that a reservation of rights may not constitute an affirmative defense is not a basis for striking a reservation of rights.” *Ramnarine*, 2013 WL 1788503 at *6.

³ United States Magistrate Judge Robin S. Rosenbaum, who is now a Circuit Court appellate judge on the Eleventh Circuit Court of Appeals, decided *Ramnarine*.

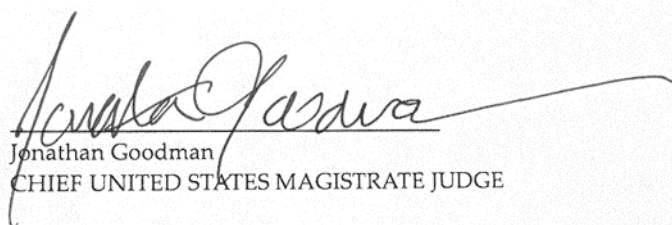
The purported reservation is not listed as the 26th affirmative defense. Nor is it labeled as an affirmative defense. The *Ramnarine* Court explained the significance, or lack of significance, of a reservation of rights in a persuasive way, and the Undersigned adopts it:

As to the propriety of reserving the right to amend, the decision regarding whether to allow amendment other than as of right rests within the Court's discretion under Rule 15(a)(2), Fed. R. Civ. P. Therefore, a reservation of rights within an answer is **essentially meaningless**. Indeed, its presence does not prejudice [the] [p]laintiff in any way or somehow confer a right to amend on [the] [d]efendants without the Court's approval. Accordingly, a motion to strike a reservation of rights **really does nothing** from the standpoint of [the] [p]laintiff's rights or strategic position. In short, it is **not necessary to strike** the reservation of rights. *See Centex Homes v. Mr. Stucco, Inc.*, 2008 WL 793587 (M.D. Fla. Mar. 25, 2008).

Id. (emphasis supplied).

The Undersigned **denies** this part of the motion to strike, as well.

DONE AND ORDERED in Chambers, in Miami, Florida, on July 9, 2025.



Jonathan Goodman
CHIEF UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

The Honorable Darrin P. Gayles
All Counsel of Record