No. _____

October Term 2019

IN THE SUPREME COURT OF THE UNITED STATES

DIANA BERBER,

Petitioner,

v.

WELLS FARGO BANK, N.A., and MARSHA PAINTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, CASE NO. 19-10661

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July 7, 2020

QUESTION PRESENTED

Throughout the four years of proceedings in this case before the U.S. District Court for the Southern District of Florida ("the District Court") and the U.S. Court of Appeals for the Eleventh Circuit ("the Eleventh Circuit"), and until February 20, 2020, Respondent Wells Fargo Bank, N.A., and its publicly-traded parent, Wells Fargo & Co. ("Wells Fargo"), insisted that the rights of its employee, Petitioner Diana Berber ("Ms. Berber"), had not been violated by Wells Fargo's retail sales practices.

In a stunning about-face, on February 20, 2020, Wells Fargo publicly confessed to its many years of retail sales practices wrong-doing by executing three agreements with the United States Government: (1) a *Deferred Prosecution Agreement* with the U.S. Department of Justice ("the DOJ"); (2) a *Settlement Agreement* with the Civil Division of the DOJ; and (3) a *Settlement Agreement* with the U.S. Securities and Exchange Commission ("the SEC"). Pursuant to the foregoing agreements, Wells Fargo paid $2,500,000,000.00 to the DOJ and $500,000,000.00 to the SEC in fines, penalties and restitution to investors.

Ms. Berber, on February 24, 2020, moved in the Eleventh Circuit for leave to file a second amended petition for rehearing en banc which cited and relied upon Wells Fargo's executions of the foregoing agreements. On March 24, 2020, the Eleventh Circuit denied all of Ms. Berber's petitions for rehearing en banc.

Did the Eleventh Circuit, by denying Ms. Berber's petitions for rehearing en banc, so far depart from the accepted and usual course of judicial administration as to call for an exercise of this Court's supervisory jurisdiction?

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PARTIES TO THE PROCEEDINGS BELOW

The Petitioner, Ms. Berber, was the Plaintiff in the District Court and the Appellant in the Eleventh Circuit.

Respondents, Wells Fargo and Marsha Painter, were the Defendants in the District Court and the Appellees in the Eleventh Circuit.

PETITION FOR A WRIT OF CERTIORARI

Ms. Berber prays that a Writ of Certiorari issue to review the decision of the Eleventh Circuit in Case No. 19-10661.

CITATIONS TO OPINIONS BELOW

The January 8, 2020, opinion of the Eleventh Circuit in this cause, reported as *Berber v. Wells Fargo Bank, N.A.*, 798 Fed. Appx. 476, 2020 WL 91065, 2020 U.S. App. LEXIS 410, is attached to this Petition as Attachment "A."

The May 24, 2018, order of the District Court granting Wells Fargo's motion to dismiss Count II of Ms. Berber's Fourth Amended Complaint (Florida RICO) is unpublished, a copy of which is attached to this Petition as Attachment "B."

The January 2, 2019, order of the District Court granting Wells Fargo's motion for summary judgment as to Count I of Ms. Berber's Fourth Amended Complaint (Florida Private Whistleblower Act) is unpublished, a copy of which is attached to this Petition as Attachment "C."

STATEMENT OF JURISDICTION

Ms. Berber invokes this Court's jurisdiction to grant this petition for a Writ of Certiorari to the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1). The Eleventh Circuit denied Ms. Berber's petition for rehearing en banc, amended petition for rehearing en banc and motion for leave to file a second amended petition for rehearing en banc on March 24, 2020, and issued its judgment as mandate on April 1, 2020. Pursuant to this Court's order of March 19, 2020, concerning the COVID-19 public health emergency, Ms. Berber has 150 days from March 24, 2020, in which to petition this Court for the issuance of a Writ of Certiorari to the Eleventh Circuit.

INTRODUCTION

From July, 2013, to March 18, 2014, Ms. Berber was employed as a personal banker in the Wells Fargo branch located at 3600 North Ocean Boulevard, Fort Lauderdale, Florida 33308. On March 18, 2014, her employment was involuntarily terminated by means of a letter signed by her branch manager, Respondent Marsha Painter, which in pertinent part stated:

> We have reviewed your overall performance as a Personal Banker. We have determined that you have not met the performance expectations regarding daily activities to attain sales goals required in this position.
>
> Based on the reason listed above we will terminate your employment with Wells Fargo effective March 18, 2014.

On October 2, 2016, Ms. Berber filed a civil action against Wells Fargo and Ms. Painter in the Circuit Civil Division, Eleventh Circuit Court, Miami-Dade County, Florida, which was assigned Case No. 16-25612 (CA 02) ("Case No. 16-25612"). Citing the diverse citizenship of the parties, Wells Fargo and Ms. Painter[1] removed Case No. 16-25612 to the District Court, which assigned the civil action Case No. 16-CV-24918 ("Case No. 16-24918"). In the ensuing litigation before the District Court and Eleventh Circuit, Wells Fargo successfully contended that Ms. Berber's employment had been involuntarily terminated because she had acted incompetently as a Wells Fargo retail sales representative.

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[1] Wells Fargo and Ms. Painter successfully contended that Ms. Painter had been fraudulently joined to defeat subject-matter jurisdiction under 28 U.S.C. § 1332, diversity of citizenship. *See, Berber v. Wells Fargo Bank, N.A.*, 760 Fed. Appx. 684, 2019 WL 126749, 2019 U.S. App. LEXIS 515 (11th Cir. 2019).

While Ms. Berber's amended petition for rehearing en banc was pending before the Eleventh Circuit, on February 21, 2020, Wells Fargo issued a news release ("the Wells Fargo news release") in which Wells Fargo announced that Wells Fargo, on February 20, 2020, had entered into three (3) settlement agreements with the United States Government concerning Wells Fargo's unlawful retail sales practices:

(1) a deferred prosecution agreement with the DOJ;

(2) a civil settlement agreement with the DOJ; and

(3) an administrative order with the SEC.

In accordance with the foregoing agreements, Wells Fargo paid $2,500,000,000.00 to the DOJ and $500,000,000.00 to the SEC in fines, penalties and investor restitution.

Each of the foregoing agreements was supported by an identical "Statement Of Facts." Pertinent excerpts from that statement follow:

> 13. In contrast to the Company's public statements and disclosures about needs-based selling, Executive A implemented a volume-based sales model in which employees were directed, pressured, and/or caused to sell large volumes of products to existing customers, often with little regard to actual customer need or expected use. From at least as early as 2002 to approximately 2013, Community Bank leadership, including Executive A, directly and/or indirectly encouraged, caused, and approved sales plans that called for aggressive annual growth in a number of basic banking products, such as checking and savings accounts, debit cards, credit cards and bill pay accounts.
>
> 14. By approximately 2010, in light of existing product penetration, shifting demand, macroeconomic conditions, and regulatory developments that made certain products, such as checking accounts- less profitable, the sales plans were regarded in various parts of the Community Bank as far too high to be met by selling products that customers

> actually wanted, need, or would use. Nevertheless, the number of products sold continued to be a significant criterion by which the performance of employees, ranging from tellers and bankers to [Regional Bank Executive]s, was evaluated. Throughout the Community Bank, managers responded to the increasing difficulty of growing sales by exerting extreme pressure on subordinates to achieve sales goals, including explicitly directing and/or implicitly encouraging employees to engage in various forms of unlawful and unethical conduct to meet increasing sales goals. Many employees believed that a failure to meet their sales goals would result in poor job evaluations, disciplinary action, and/or termination. Though there had been evidence of employees struggling to ethically meet sales goals as early as 2002, the problem became significantly more acute beginning in 2010 as the sales plans diverged further from market opportunity and managers responded by increasing pressure on employees to sell products that customers did not want or need and would not use.
>
> 15. The Community Bank's onerous sales goals and accompanying management pressure led thousands of its employees to engage in (1) unlawful conduct to attain sales though fraud, identity theft, and the falsification of bank records, and (2) unethical practices to sell products of no or low value to the customer, while believing that the customer did not actually need the account and was not going to use the account.

Statement Of Facts, pp. A-5 to A-6.

The Deferred Prosecution Agreement between Wells Fargo and the DOJ, in the section entitled *Wells Fargo's Acceptance of Responsibility,* provides:

> 4. Wells Fargo admits, accepts, and acknowledges that it is responsible under United States law for the acts of its officers, directors, employees, and agents set forth in the Statement of Facts. Wells Fargo agrees that the factual statements contained within the Statement of Facts are true and accurate. Wells Fargo agrees that the acts and omissions described in the Statement of Facts are sufficient to establish violations by Wells Fargo of Title 18, United

States Code, Sections 1005 and 1028A.

> 5. Wells Fargo shall not, through any of its officers, employees, attorneys, consultants, or agents, or any other person authorized to make statements on behalf of Wells Fargo, make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by Wells Fargo set forth above or of the facts contained in the Statement of Facts. Any such contradictory statement shall, subject to the cure rights of Wells Fargo described below in this Paragraph, constitute a breach of this Agreement, and Wells Fargo thereafter shall be subject to prosecution as set forth in Paragraphs 17 through 21 of this Agreement. If the [United States Attorneys Offices] determine that Wells Fargo has made a public statement contradicting its acceptance of responsibility or any fact contained in the Statement of Facts, the [United States Attorneys Offices] shall so notify Wells Fargo. Thereafter, Wells Fargo may avoid a breach of this Agreement by publicly repudiating the statement within five days after such notification. Wells Fargo shall be permitted to raise defenses and to assert affirmative claims in other proceedings relating to the matters set forth in the Statement of Facts provided that such defenses and claims do not contradict, in whole or in part, any statement contained in the attached Statement of Facts. This Paragraph does not apply to any statement made by any present or former officer, director, employee, or agent of Wells Fargo in the course of any criminal, regulatory, or civil case initiated against such individual unless such individual is speaking on behalf of Wells Fargo.

Deferred Prosecution Agreement, p. 4.

The Wells Fargo news release quoted its recently installed Chief Executive Officer, Mr. Charles Scharf, as stating:

> The conduct at the core of today's settlements- and the past culture that gave rise to it- are reprehensible and wholly inconsistent with the values on which Wells Fargo was built. Our customers, shareholders and employees deserved

> more from the leadership of this Company. Over the past three years, we've made fundamental changes to our business model, compensation programs, leadership and governance. While's today's announcement is a significant step in bringing this chapter to a close, there's still more work we must do to rebuild the trust we lost. We are committing all necessary resources to ensure that nothing like this happens again, while also driving Wells Fargo forward.

Mr. Scharf's observation that "there's still more work we must do to rebuild the trust we lost" is accurate in at least one aspect: to date, Wells Fargo has not paid a penny in compensation to employees, such as Ms. Berber, who were fired between 2002 and 2016 for refusing to engage in the fraudulent retail sales practices necessitated by Wells Fargo's unconscionably high retail sales quotas and whose personal and professional lives were thereby damaged or ruined.

The Eleventh Circuit had it within its power to throw a lifeline to Ms. Berber by granting her motion for leave to file a second amended petition for rehearing en banc, which was filed after and relied upon the three (3) foregoing February 20, 2020, settlement agreements between Wells Fargo and the United States Government. Instead, on March 24, 2020, the Eleventh Circuit threw a lifeline to Wells Fargo by denying Ms. Berber's petition for rehearing en banc, amended petition for rehearing en banc and motion for leave to file a second amended petition for rehearing en banc.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

From July, 2013, to March 18, 2014, Ms. Berber was employed as a personal banker in the Wells Fargo branch located at 3600 North Ocean Boulevard, Fort Lauderdale, Florida 33308. On March 18, 2014, her employment was involuntarily terminated by means of a letter signed by Ms. Painter which in pertinent part stated:

> We have reviewed your overall performance as a Personal Banker. We have determined that you have not met the performance expectations regarding daily *activities* to attain sales goals required in this position.
>
> Based on the reason listed above we will terminate your employment with Wells Fargo effective March 18, 2014.

Ms. Berber, on March 3, 2018, in Case No. 16-24918 filed her Fourth Amended Complaint against Wells Fargo and Ms. Painter. In Count I of her Fourth Amended Complaint, Ms. Berber sought compensatory damages, punitive damages and injunctive relief against Wells Fargo and Ms. Painter under Florida's Private Whistleblower Act, §§ 448-101-448-105, Florida Statutes ("the FPWA"). Ms. Berber, in Count II of her Fourth Amended Complaint, prayed for treble damages against Wells Fargo and Ms. Painter under Florida's Civil Remedies For Criminal Practices Act, §§ 772.101-772.104, Florida Statutes ("Florida RICO").

Wells Fargo, on March 20, 2018, partially answered Ms. Berber's Fourth Amended Complaint by denying liability under the FPWA. Further, on March 20, 2018, Wells Fargo and Ms. Painter moved to dismiss Count II of Ms. Berber's Fourth Amended Complaint for failure to state a claim for relief under Florida RICO. In that submission, Wells Fargo also moved to strike Ms. Berber's claim for punitive damages

relating to Count I of the Fourth Amended Complaint.

Ms. Berber, on May 1, 2018, responded in opposition to Wells Fargo's motion to strike Ms. Berber's claim for punitive damages under the FPWA. Also on May 1, 2018, Ms. Berber opposed the motion of Wells Fargo and Ms. Painter to dismiss Count II of the Fourth Amended Complaint.

Wells Fargo and Ms. Painter, in support of their March 20, 2018, motions to dismiss and strike, filed a reply memorandum of law on May 8, 2018.

The District Court, on May 9, 2018, dismissed Ms. Painter from the civil action, without prejudice.

On May 24, 2018, the District Court issued an order dismissing Count II of Ms. Berber's Fourth Amended Complaint for failure to state a claim upon which relief could be granted and striking Ms. Berber's claim for punitive damages under Count I of her Fourth Amended Complaint. (Attachment "B")

On August 27, 2018, Wells Fargo moved for a summary judgment dismissing Count I of Ms. Berber's Fourth Amended Complaint. In support of that motion, Wells Fargo filed Ms. Painter's affidavit, which depicted Ms. Berber as an incompetent retail sales representative of Wells Fargo. Ms. Berber opposed that motion on September 3, 2018, which opposition was supported by an affidavit in which Ms. Berber described the retail sales quotas-based pressures to engage in fraudulent and unethical retail sales practices to which she had been subjected as a Wells Fargo personal banker. Wells Fargo filed a reply in support of its summary judgment motion on September 3, 2018

The District Court, on January 2, 2019, issued an order granting Wells Fargo's motion for summary judgment dismissing Count I of Ms. Berber's Fourth Amended Complaint. (Attachment "C")

On February 7, 2019, the District Court entered a final judgment in favor of Wells Fargo and Ms. Painter and against Ms. Berber on all claims. Ms. Berber's notice of appeal to the Eleventh Circuit was filed on February 19, 2019. The Eleventh Circuit assigned Case No. 19-10661 to Ms. Berber's appeal.

The Eleventh Circuit, on January 8, 2020, in Case No. 19-10661, by means of an unpublished opinion, affirmed the District Court's judgment in favor of Wells Fargo. Ms. Berber, on January 22, 2020, petitioned for rehearing en banc. An amended petition for rehearing en banc was filed by Ms. Berber on January 27, 2020.

On February 21, 2020, Wells Fargo announced that on February 20, 2020, it had entered into the three foregoing (3) settlement agreements with the United States Government. Citing those three (3) settlement agreements, on February 24, 2020, Ms. Berber moved for leave to file a second amended petition for rehearing en banc. In that petition, Ms. Berber argued that she would not have suffered the summary dismissal of Count I of her Fourth Amended Complaint (the FPWA) had Wells Fargo, prior to January 2, 2019, "fessed up" to the illegality with which its retail sales practices had been infused.

Nevertheless, on March 24, 2020, the Eleventh Circuit denied Ms. Berber's petition for rehearing en banc, amended petition for rehearing en banc and motion for leave to file a second amended petition for rehearing en banc.

REASON FOR GRANTING THE PETITION

From October 2, 2016, (when Ms. Berber filed her lawsuit), until February 21, 2020, (when Wells Fargo publicly "fessed up" to the illegality of its retail sales practices), Wells Fargo obstructed Ms. Berber's efforts to secure a measure of relief by successfully blaming Ms. Berber for her ruined personal and professional lives.

The remedy for this egregious miscarriage of justice lies within the bosom of this Court: (1) grant Ms. Berber's petition for a Writ of Certiorari, (2) set aside the Eleventh Circuit's judgment, and (3) remand Ms. Berber's cause to the Eleventh Circuit with directions that the cause be further remanded to the District Court for jury trial.

CONCLUSION

Ms. Berber's petition for Writ of Certiorari should be granted. The Eleventh Circuit's judgment in Case No. 19-10661 should be set aside. Ms. Berber's cause should be remanded to the Eleventh Circuit with directions that Ms. Berber's cause be further remanded to the District Court for jury trial.

Respectfully submitted,

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July 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing petition have been electronically served this 27 day of July, 2020, on:

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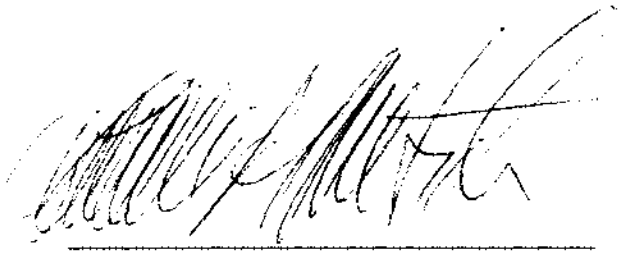

LAWRENCE R. METSCH

ATTACHMENT “A”

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10661
Non-Argument Calendar

D.C. Docket No. 1:16-cv-24918-JEM

DIANA BERBER,

Plaintiff - Appellant,

versus

WELLS FARGO, NA,
MARSHA PAINTER,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(January 8, 2020)

Before WILSON, WILLIAM PRYOR, and MARCUS, Circuit Judges.

PER CURIAM:

Diana Berber appeals from the district court's orders granting summary judgment on one count, granting a motion to dismiss on another, and striking a claim

for punitive damages from her complaint, in a lawsuit she filed involving allegedly fraudulent consumer practices by her former employer, Wells Fargo, NA. On appeal, Berber argues that the district court erred in: (1) granting summary judgment on her state law retaliation claim, which she brought under the Florida Whistleblower Act ("FWA"), Fla. Stat. §§ 448.101-105; and (2) dismissing her claim under the "Florida RICO" statute, Fla. Stat. § 772.103, for failure to state a claim. Berber also requests that this Court certify a question of statutory interpretation to the Florida Supreme Court, relating to the availability of punitive damages under the FWA. After thorough review, we affirm the district court's rulings, and reject as moot the certification request.

I.

We review a district court's decision granting summary judgment de novo. Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 949 (11th Cir. 2000). We construe all facts and draw all reasonable inferences in favor of the non-moving party. Id. If, after we do so, no genuine dispute of material fact remains, summary judgment is proper. Id.

We also review the district court's grant of a motion to dismiss de novo. Boyd v. Warden, Holman Correctional Facility, 856 F.3d 853, 863–64 (11th Cir. 2017). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v.

Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679. While we do accept plausible allegations as true, we need not do the same for mere legal conclusions: a complaint "must include enough facts to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Boyd, 856 F.3d at 864 (quoting Twombly, 550 U.S. at 555).

II.

The relevant facts, which are either undisputed or resolved in favor of Berber, who is the non-moving party, are these. Diana Berber was hired by Wells Fargo as a Personal Banker in Fort Lauderdale, Florida in July 2013. Her employment continued until her termination on March 18, 2014. In her termination letter, Wells Fargo explained that Berber had not met performance expectations for her position, and had not performed what were termed "daily activities to attain sales goals."

Two years after her termination, Berber filed this lawsuit in Florida state court alleging a violation of the FWA and the Florida RICO statute. Wells Fargo removed to the United States District Court for the Southern District of Florida under diversity jurisdiction. 28 U.S.C. § 1332(a). In between Berber's termination and initial complaint, the federal government's Consumer Financial Protection Bureau

("CFPB") investigated Wells Fargo for fraudulent sales practices, and Wells Fargo ultimately reached a settlement with the CFPB. Berber generally claims she was fired for refusing to participate in these sales practices, which allegedly included opening accounts and applying for credit cards on behalf of consumers without their action or consent. The district court dismissed Berber's Florida RICO allegation for failure to state a claim, and later granted summary judgment on her FWA retaliation claim. This timely appeal follows.

III.

First, we are unpersuaded by Berber's argument that the district court erred in granting summary judgment on her FWA claim. The FWA provides, in relevant part, that "[a]n employer may not take any retaliatory personnel action against an employee because the employee has . . . (3) [o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." Fla. Stat. § 448.102. A retaliation claim under the FWA is guided by the same analysis as a Title VII federal claim. See, e.g., Sierminski, 216 F.3d at 950. Accordingly, a plaintiff claiming retaliation under the FWA must establish a prima facie case by demonstrating: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action;[1] and (3) the two are causally related. See Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir.

[1] The adverse employment action prong is not at issue in this case.

1998). The burden then switches to the defendant to offer a legitimate reason for the adverse action; if the defendant can do so, the plaintiff then must prove that the proffered reason is "mere pretext" for prohibited, retaliatory conduct. Id.; see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

In the operative complaint, which has been amended four times, Berber claims she was terminated in violation of the FWA in retaliation for refusing to increase her sales figures through the fraudulent opening of accounts for consumers, based on the allegations Wells Fargo settled after her termination. However, Berber admits she never was personally asked to engage in any fraudulent sales practices or directly encouraged to do so; she was not even aware any fraud was taking place at the time. She says she was inappropriately judged on her lower sales record against coworkers with high sales, whom she "suspected" of engaging in fraud, but offers no support for her suspicion that her coworkers in fact engaged in fraudulent practices.

Berber seems to be arguing that she was indirectly pressured to engage in fraud, because the sales goals were so high as to be otherwise unattainable. But she admits she was unaware that the sales conduct was potentially illegal, and that she never reported any activity to management or outside of the company. Berber also admits she never refused a request to engage in fraud. Berber says she "refused to participate" in opening accounts for individuals who may not have needed them, but admits there was "never an instance" where she was asked to engage in any type of

fraudulent activity. Instead, she felt vaguely "pressured to generate sales." The district court granted summary judgment on Berber's FWA claim, holding that Berber failed to demonstrate that she "objected or refused to participate" in any illegal activity. We agree.

A key element for any retaliation claim is to identify precisely the protected activity that is being retaliated against. Berber's claim fails here because there is nothing in the record that creates a genuine issue of material fact that Berber ever "refused" to do anything. She was never asked to commit fraud, never spoke out against any alleged fraud being committed at the company, and, at the time, never even knew the practices in question might be illegal. She also did not know fraud was being committed by her coworkers, but "suspected" it was. At most, Berber has alleged she felt "pressured" to increase her sales goals, but importantly, this pressure was never characterized as pressure to commit fraud. It is a momentous leap to claim that a failure to respond to general pressure to increase sales somehow transforms into an active refusal to commit fraud under the FWA.

As for Berber's suggestion that passive inaction is sufficient to qualify as a "refusal" or objection under the FWA (or Title VII), we are unpersuaded. Berber focuses on the phrase "refused to participate," claiming she refused to engage in fraud to increase sales. However, the word "refuse" (when, as here, it's used with an infinitive, like "to participate") is defined as: "to show or express a positive

unwillingness to do or comply with." Webster's Third New International Dictionary 1910 (2002). Under no interpretation of the facts did Berber express any "positive unwillingness" to participate in the alleged fraud. At most, she felt vaguely "pressured" to increase her sales, and she did not engage in illegal acts to alleviate this pressure. This can hardly be characterized as a "positive unwillingness" to engage in fraud, when she did not claim she was being specifically pressured to commit fraud in the first place.

The flaw in Berber's interpretation is also revealed by the purpose of the FWA. The Florida Supreme Court has ruled that the FWA aims to achieve the same goal as a similar Florida law regarding public employees: "to encourage the elimination of public corruption by protecting public employees who 'blow the whistle.'" Arrow Air v. Walsh, 645 So. 2d 422, 424 (Fla. 1994) (quotations omitted).[2] That is, the FWA is aimed at encouraging employees to speak out and act when they witness illegality. Standing by and taking no action does not increase illegal activity, but it also clearly does not "eliminate" it.

Under both the plain meaning of the word "refuse," as well as the FWA's goal to encourage the active elimination of illegality, Berber's argument about passive

[2] Like the private employee provision at issue here, the public employee counterpart lacks the language in the FWA as well, protecting employees who "refuse to participate" in activity prohibited by the law. Fla Stat. § 112.3187(7).

inaction falls flat.[3] Thus, because Berber has not identified any protected activity she took to "object or refuse to participate [in]" against illegal activity, she has failed to establish a prima facie case of retaliation under the FWA.

But even if Berber had established a prima facie case of retaliation, she has failed to rebut Wells Fargo's proffered legitimate reasons for her termination as pretext. Berber appears to argue that because she was unable to meet the sales goals, it was impossible to meet the goals without engaging in fraud. However, many other legitimate explanations exist: higher effort by her coworkers, more time invested, pre-existing relationships with potential customers, or simply an aptitude for sales. Berber has offered nothing to support the idea that the sales goals were only attainable through fraudulent means. Without offering more specificity, Berber has not rebutted the proffered reason for her termination: she failed to meet her sales goals.

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[3] Berber's cited authority is unpersuasive. In Kearns v. Farmer Acquisition Co., a car salesman was terminated after complaining to management that the dealership was not inspecting its cars before sale, among other questionable practices. 157 So. 3d 458 (Fla. Dist. Ct. App. 2015). However, we can easily identify the objection the plaintiff took: he repeatedly and explicitly made complaints about the illegality of the actions. Id. at 461–62. Thus, that case does not help Berber's argument. Her second citation, Aery v. Wallace Lincoln-Mercury, LLC, is unpersuasive for the same reason: the plaintiff there had a sit-down meeting with management to discuss an illicit part-switching scheme. 118 So. 3d 904, 907–08 (Fla. Dist. Ct. App. 2013). Lastly, Berber's citation to United States v. Stein fares no better: Stein stands for the proposition that an affidavit need not be disregarded merely because it is self-serving, but rather the self-serving element should be weighed alongside the rest of the affidavit by the finder of fact. 881 F.3d 853, 858 (11th Cir. 2018). Here, we are not weighing evidence at all: even after taking any genuine factual dispute in Berber's favor, she still has not alleged any active refusal or action taken in opposition to illegality.

Indeed, if anything, the record reveals additional legitimate justifications for her firing. For example, Berber was cited for arriving to work late, failing to arrange appointments with potential customers, and failing to organize out-of-office events to generate sales. When we consider these reasons as a whole (all of which relate to sales, the stated reason for her termination), Berber has not shown a genuine dispute of material fact indicating that her failure to meet sales goals was a pretext for her termination. Because Berber has no proof that fraud was required to meet the bank's demands, and because ample evidence supports a legitimate reason for her termination, we affirm the district court's grant of summary judgment on this claim.

We are also unconvinced by Berber's argument that the district court erred in dismissing her claim under Florida's RICO statute, which alleged that an enterprise of Wells Fargo, its parent company, and Berber's supervisor committed fraud on customers, resulting in Berber's injury through her termination. Florida's RICO statute is largely modeled after the federal version and requires similar elements: (1) conduct of (2) an enterprise (3) through a pattern (4) of criminal activity. Fla. Stat. § 772.103; see also, e.g., Gross v. State, 765 So. 2d 39, 42 (Fla. 2000) ("Given the similarity of the state and federal statutes, Florida courts have looked to the federal courts for guidance in construing RICO provisions."); Bortell v. White Mts. Ins. Grp., Ltd, 2 So. 3d 1041, 1047 (Fla. 4th DCA 2009). Like the federal version, Florida courts have required a showing of proximate cause between the claimed

injury and the predicate criminal act. See Bortell, 2 So. 3d at 1047; see also Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992).

Here, the district court dismissed Berber's argument for failure to state a claim -- that is, the failure to plausibly allege proximate cause between her injury (termination) and the predicate criminal act (committing fraud on customers). While the sometimes-nebulous proximate cause analysis has frustrated courts for generations, the facts as pled are beyond any reasonable definition of proximate cause.

In Wells Fargo, we explained that for a statutory claim arising under the Fair Housing Act, foreseeability of injury alone is not sufficient to satisfy proximate cause. Instead, we must also identify "some direct relation between the injury asserted and the injurious conduct alleged." City of Miami v. Wells Fargo & Co., 923 F.3d 1260, 1264 (11th Cir. 2019) (citing Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017)). That is, "while foreseeability ensures 'cause,' 'some direct relation' ensures that the cause is sufficiently 'proximate.'" Wells Fargo, 923 F.3d at 1272. We ask if there is "a direct, logical, and identifiable connection between the injury sustained and its alleged cause. If there is no discontinuity to call into question whether the alleged misconduct led to the injury, proximate cause will have been adequately pled." Id. at 1264. Further, the analysis will "depend[] in

part on the 'nature of the statutory cause of action.'" Id. at 1272 (citing Bank of Am., 137 S. Ct. at 1306).

Specific to RICO, the Supreme Court has long required that there be "some direct relation" between the claimed violation and resulting injury. Holmes, 503 U.S. at 268. In Holmes, the Supreme Court explained that "[a]llowing suits by those injured only indirectly would open the door to massive and complex damages litigation," so "RICO's remedial purposes would more probably be hobbled than helped" by a relaxed proximate cause standard. Id. at 274. The Supreme Court reiterated this standard of causation in Anza, a RICO case where the plaintiff claimed injury resulting from a competitor failing to charge sales tax. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 453–55 (2006). In Anza, again, the Supreme Court concluded that proximate cause was lacking, because the "direct victim" of the RICO violation was the state tax collector, not the plaintiff. Id. at 458. The Court explained that the cause of the alleged harm (losing business due to a competitor's lower prices) was "entirely distinct from the alleged RICO violation (defrauding the State)," and that any connection between the two was "attenuated." Id. at 458–59. Accordingly, our case law is clear: for a RICO claim, the plaintiff must identify "some direct relation" between the injury and alleged RICO violation.

Viewing Berber's allegation in the most generous light possible, she fails to state a claim for relief. Berber argues the following chain under Florida RICO: The

predicate conduct was that Wells Fargo allegedly committed fraud on its customers by opening unrequested accounts in their name. The "enterprise" was between Wells Fargo, its parent company, and Berber's supervisor.[4] The "pattern" was ongoing fraud against customers. The "injury" was Berber's termination and its corresponding consequences.

Even under a generous construction of proximate cause, Berber's injury was disconnected from the alleged conduct against Wells Fargo customers. At best, Berber's termination was an unrelated consequence many steps down the causal chain. Compare her claim to the facts in Wells Fargo. There, the casual chain was easy to identify: Redlining leads to higher foreclosures. Higher foreclosures lead to less tax revenue. Or, compare to Anza: A company fails to pay enough taxes, letting them sell their own products for less, leading to a competitor's loss of revenue. 547 U.S. at 453–55. That causal chain was far simpler than Berber's, and even there the Supreme Court found it insufficient. Here, Berber says that as a side effect of the fraud on customers, she was fired for not similarly committing fraud. This is, at best, a tenuous causal chain, and her own actions relating to coming into work late

[4] The district court noted that an "enterprise" likely does not exist between Berber's supervisor, Wells Fargo N.A. (subsidiary), and Wells Fargo & Company (parent). The definition of "enterprise" under both federal and Florida RICO is a hotly disputed area of law among the federal circuits. Since Berber's claim fails on other grounds, we need not address this issue. See United States v. Goldin Indus., 219 F.3d 1271, 1276 n.7 (11th Cir. 2000) (declining to rule on whether a parent-subsidiary relationship qualifies as an enterprise).

and failing to conduct sales events likely sever whatever thin connection might have existed.

Berber argues that Wells Fargo somehow lowers the bar to find proximate cause. We are unpersuaded: the Supreme Court required us to increase our scrutiny of proximate cause by analyzing not only foreseeability, but also whether there was "some direct relation." See Wells Fargo, 923 F.3d at 1264 ("The [Supreme] Court held that the standard that this panel had applied -- foreseeability -- was not enough on its own to demonstrate proximate cause."). Further, RICO claims have long required "some direct relation" between the injury and alleged RICO violation. See Holmes, 503 U.S. at 268. Berber's claim fails because allegedly defrauding banking customers neither foreseeably leads to firing an employee, nor does it have any direct relation. Despite its ever-expanding scope, RICO was never intended to allow for sprawling civil causes of action. The Supreme Court in Anza expressly said there was "no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly." 547 U.S. at 460. Creative utilization of RICO notwithstanding, under no interpretation could we envision the intent of the law to allow for liability under Berber's remote casual chain.[5] Accordingly, even

[5] Berber's other authority is also unhelpful. In Burgese v. Starwood Hotels & Resorts Worldwide, Inc., a district court case in the Third Circuit, hotel staff had been involved in a prostitution scheme, and the plaintiff brought a RICO claim after being assaulted by prostitutes in the hotel lobby. 101 F. Supp. 3d 414, 418 (D.N.J. 2015). Regardless of the accuracy of the proximate cause analysis in that case, Berber's causal chain is far less direct than the resulting injury there. Id. at 426.

under a generous pleading standard, Berber has failed to plead a plausible claim under RICO. We again must affirm.

Last, Berber asks us to certify a question about the availability of punitive damages under the FWA to the Florida Supreme Court. Since we've rejected Berber's FWA retaliation claim, we deny this request as moot. But even if we had ruled otherwise, we would still deny the request. Certification to a state supreme court is warranted when "substantial doubt exists about the answer to a material state law question." Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1039 (11th Cir. 2014) (citation omitted). As the district court explained, the answer here is clear: The FWA explicitly outlines the types of relief available, and punitive damages did not make the list. See, e.g., Branche v. Airtran Airways, Inc., 314 F. Supp. 2d 1194, 1197 (M.D. Fla. 2004); Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1332, 1333 (S.D. Fla. 2004).[6]

Berber also offers K.T. v. Royal Caribbean Cruises, Ltd., 931 F.3d 1041 (11th Cir. 2019). But K.T. was not a RICO case, and the Court found proximate cause when a cruise ship breached its duty to guard an underage, intoxicated passenger from going to a cabin with a group of men. Again, the causal chain there (overserving and failing to protect an underage passenger) was at least somewhat related to the resulting injury (sexual assault). Those facts are distinct from Berber's.

[6] Berber cannot claim that punitive damages were intended to be included as a residual catchall, because the statute already contains one, allowing "[a]ny other compensatory damages allowable at law." Fla. Stat. § 448.103 (emphasis added).

AFFIRMED.[7]

[7] In addition, we DENY Berber's motion to take judicial notice of the Wells Fargo settlement as irrelevant, because even if we assume Wells Fargo settled claims of fraud, our evaluation of Berber's claims does not change.

ATTACHMENT “B”

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO.: 16-24918-CIV-MARTINEZ-GOODMAN

DIANA BERBER,

Plaintiff,

vs.

WELLS FARGO BANK, N.A.,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNT 2 OF PLAINTIFF'S FOURTH AMENDED COMPLAINT (FLORIDA RICO) and GRANTING MOTION TO STRIKE PUNITIVE CLAIM ASSERTED IN COUNT 1 OF FOURTH AMENDED COMPLAINT (FLORIDA WHISTLEBLOWER ACT)

THIS CAUSE is before the Court on the Defendant Wells Fargo Bank, N.A. ("Wells Fargo")'s Motion to Dismiss Count 2 (Florida RICO) of Plaintiff's Fourth Amended Complaint ("the Complaint") and Motion to Strike the Punitive Damage Claim asserted in Count 1 (Florida Whistleblower Act) of Plaintiff's Fourth Amended Complaint filed March 20, 2018 [ECF 187]. Following careful review of the motion, together with Plaintiff's Responses in Opposition [ECF 218, 220] and the Defendant's Reply [ECF 223], the Court concludes that the Complaint fails to sufficiently allege proximate cause under the Florida RICO statute, and also fails to allege sufficient facts from which the existence of a distinct RICO "enterprise" could plausibly be inferred. In light of these deficiencies, the Court grants the motion to dismiss the Florida RICO count for failure to state a claim upon which relief may be granted.

While leave to amend should generally be freely granted when necessary in the interests of justice under Fed. R. Civ. P. 15(a), in this case Plaintiff's Florida RICO claim, based on

predicate acts of alleged consumer fraud perpetrated against bank automobile loan customers, will be dismissed with prejudice because the Court deems re-pleading to be futile. Plaintiff's allegations regarding the harm she allegedly suffered (wrongful termination, a miscarriage and emotional pain and suffering) as a result of Defendant's alleged misdeeds do not support a viable theory of proximate causation under the Florida RICO statute. Because the Court sees no possibility for Plaintiff to amend to correct this deficiency, it finds amendment futile and shall dismiss Count 2 of the Fourth Amended Complaint with prejudice.

The Court shall also grant the Defendant's motion to strike the punitive damage demand asserted in Count 1 under the Florida Whistleblower Act. This Court has already ruled that punitive damages are not available under the Florida Whistleblower Act [ECF 121] and affirms that ruling here. *See Branche v. Airtran Airways, Inc.*, 314 F. Supp. 2d 1194, 1196 (M.D. Fla. 2004) ("the [Florida] legislature chose not to provide for punitive and non-compensatory damages in enacting Section 448.103 (2) and this Court cannot judicially extend the remedies available beyond what the legislature has chosen.").

I. FACT BACKGROUND

The following facts are taken from the Plaintiff's Fourth Amended Complaint [ECF 176]. The Court assumes them to be true for purposes of deciding this motion and construes them in the light most favorable to the Plaintiff as the non-moving party.

The Plaintiff, Diana Berber, was previously employed as a personal banker at the Wells Fargo bank branch located at 3600 North Ocean Blvd, Fort Lauderdale, Florida, between July, 2013 and March, 2014. During this time frame, she reported to Marsha Painter as Bank Manager. Plaintiff contends she was continuously pressured to open additional checking, savings and credit card accounts for existing Wells Fargo customers, and to recruit new

customers for such services, and was humiliated and criticized by Ms. Painter because she failed to meet her new account quotas. Plaintiff claims she was ultimately fired on March 18, 2014 because she objected to, or refused to participate in, illegal consumer sales practices perpetrated by Wells Fargo in connection with the opening of new accounts, in violation of 12 U.S.C. §5536 [ECF 176 ¶¶ 33-39] and that her alleged retaliatory discharge violated the Florida Whistleblower Act, § 448.102(3), Fla. Stat. (Count 1).

She also alleges that the Defendant Wells Fargo, N.A., acting in concert with Ms. Painter, engaged in a "pattern of criminal activity" between July, 2013 and March 18, 2014, by defrauding Wells Fargo automobile loan borrowers, and by "willfully blinding themselves to the commission of frauds by their employees" [ECF 176 ¶51]. She contends Wells Fargo, N.A. and Ms. Painter "generated proceeds" directly or indirectly from this pattern of criminal activity, and that the proceeds were used to further the operation of Wells Fargo & Company, the parent company to Wells Fargo, N.A.. In addition, Plaintiff alleges that she relied on indeterminate promises to be treated "fairly and in good faith" made by her employer, and that the Defendant breached those promises when it fired her in March, 2014 after she voiced objection to Wells Fargo's questionable sales practices.

As a proximate result of this alleged pattern of criminal activity, Plaintiff contends she has suffered economic loss, a miscarriage and mental anguish and loss of capacity of the enjoyment of life [ECF 176 ¶ 55].

II. Standard of Review

To withstand a motion to dismiss under Fed. R. Civ. P. 12(b) (6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed. 2d 868 (2009) (quoting

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 663, 129 S. Ct. 1937. "[A]n unadorned the-defendant-unlawfully harmed me accusation" does not suffice. *Id.* at 678, 129 S. Ct. 1937.

In reviewing a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true, construing them in the light most favorable to the plaintiff and drawing all reasonable inferences in plaintiff's favor. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). However, the court need not accept an inference when there is "an obvious alternative explanation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567, 127 S. Ct. 1955, 167 .Ed. 2d 929 (2006).

Because Plaintiff's RICO claim in this case is based on an alleged pattern of criminal activity consisting of fraud, her substantive RICO allegations must comply not only with the plausibility criteria articulated in *Twombly* and *Iqbal*, but also with the Fed. R. Civ. P. Rule 9(b)'s heightened pleading standard. *Ambrosia Coal & Constr.. Co v. Pages Morales*, 482 F.3d 1309, 1316 (11th Cir. 2007). That is, with regard to fraud-based RICO claims, "the pleader must state the time, place and specific content of the false representations as well as the identities of the parties to the representation and manner in which the statements misled the plaintiffs." *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1380-81 (11th Cir. 1997); *Alan Neumann Prods, Inc. v. Albright*, 862 F.2d 1388, 1392-93 (9th Cir. 1989).

III. Analysis

Plaintiff's Fourth Amended Complaint [ECF 176] asserts claim for violation of the Florida Whistleblower Act, § 448.102(3), Fla. Stat. (Count 1) and for violation of the Florida

Civil Remedies for Criminal Practices Act, Fla. Stat., § 772.101 *et seq.*, Florida's equivalent of the federal Racketeer Influenced and Corrupt Organizations Act ("Florida RICO") (Count 2). At issue here is the sufficiency of the Plaintiff's Florida RICO claim, which alleges the Defendant's violation of certain federal and state laws as a predicate "pattern of criminal activity" for purposes of imposing treble-damage RICO liability.

Section 772.104, Florida Statutes, provides in relevant part:

> Any person who proves by clear and convincing evidence that he or she has been injured by reason of any violation of s. 772.103 shall have a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of $200, and reasonable attorney's fees and court costs in the trial and appellate courts.

Fla. Stat. § 772.104(1).

Under Section 772.103(3), in turn, it is "unlawful for any person ... [e]mployed by, or associated with, any enterprise to conduct or participate ... in such enterprise[1] through a pattern[2] of criminal activity[3]..."

Thus, in order to plead a violation of RICO under the Florida statute, a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of criminal activity. The RICO statutes[4] have been construed to also require that a plaintiff plead (1) distinctness, as to the RICO

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[1] An enterprise is defined by the statute as "any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity." 772.102, (3), Fla. Stat. It includes "illicit as well as licit enterprises and governmental, as well as other, entities." *Id.*

[2] A "pattern of criminal activity' is defined as "engaging in at least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents." Fla. Stat. § 772.102(4).

[3] "Criminal activity" is defined at Fla. Stat. 772.102 (1) by reference to numerous Florida statutes, including, as relevant here, crimes chargeable by indictment or information under Ch. 817, relating to fraudulent practices, false pretenses, fraud generally and credit card crimes, (772.102(1).22).

[4] Since Florida RICO is patterned after federal RICO , Florida courts have traditionally looked to federal authorities for guidance in interpreting and applying the Florida statute. Accordingly federal decisions are generally accorded great weight in the interpretation of Florida RICO. *Wilson v. State*, 596 So.2d 775 (Fla. 1st DCA 1992); *Boyd v.*

"person" and the "enterprise," *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L.Ed. 2d 198 (2001); *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1271 (11th Cir. 2000) (en banc); *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co.*, 881 So.2d 565 (2004), and (2) proximate causation of the claimed injury by the predicate criminal conduct. *Holmes v. Sec Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Further, the "pattern" element is interpreted to require, "in addition to similarity and interrelatedness of racketeering activities, proof that a continuity of particular criminal activity exists." *State v. Lucas*, 600 So.2d 1093, 1094 (Fla. 1992).

A. Personal Injury Claimants

Unlike the federal RICO statute, on which it was patterned, the Florida RICO Act generally allows recovery for "any person who has been injured" by reason of a pattern of predicate criminal activity; the Florida statute does not expressly limit recovery – as does the federal statute -- to persons who have suffered injury to their "business or property," language which has been interpreted to exclude economic losses arising out of personal injuries. *See Grogan v. Platt*, 835 F.2d 844, 847-48 (11th Cir. 1988). There is limited authority addressing the import of this distinction. At least one reported decision, however, has found the Florida RICO statute to diverge on this point and to allow recovery of personal injury and related pecuniary losses flowing from criminal activity. *Burgese v. Starwood Hotels & Resorts Worldwide, Inc.*, 101 F. Supp. 3d 414 (D. N. J. 2015) (hotel patron randomly attacked in lobby), citing *Townsend v. City of Miami*, Case No. 03-21072 (S.D. Fla. 2007).

Assuming, *arguendo*, that Florida RICO is properly interpreted more broadly than federal RICO in this regard, and that recovery of damages for personal injuries suffered "by reason of" a

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State, 578 So.2d 718 (Fla. 3d DCA), *rev. den.*, 51 So.2d 1310 (1991); *State v. Nishi*, 521 So.2d 252 (Fla. 3d DCA), *rev den.*, 531 So.2d 1355 (Fla. 1988

systematic violation of one or more of the enumerated criminal statutes is authorized under Florida RICO, the Court concludes that the Plaintiff's RICO claim in this case fails to state a cause of action because it does not adequately allege proximate cause or the existence of a RICO enterprise distinct from the RICO person. And, to the extent the RICO claim is based on an alleged pattern of fraud-based criminal activity, it is fatally deficient for failure to describe the underlying acts of fraud with the specificity required under Rule 9(b).

B. Distinctness of Enterprise

To establish liability under RICO, one must allege and prove the existence of two distinct entities: (1) a "person" and (2) an "enterprise" that is not simply the same "person" referred to by a different name. *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 161, 121 S. Ct. 2087; *Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 229 (5th Cir. 2003).

In this case, with regard to the "enterprise" element, Plaintiff apparently proceeds on theory that Defendant Wells Fargo N.A., and Ms. Painter are RICO "persons" who participated in a RICO "enterprise" consisting of Wells Fargo & Company, the corporate parent of Wells Fargo N.A.. Thus, the current motion requires the Court to determine whether the alleged RICO persons, Wells Fargo, N.A. and Ms. Painter, are sufficiently distinct from the alleged RICO enterprise, Wells Fargo & Company, to support civil RICO liability. For reasons stated below, the Court concludes that they are not.

Most circuits have held that a parent company and its subsidiaries cannot form an "enterprise" for RICO purposes unless there is some suggestion that the vehicle of corporate separateness was deliberately used to facilitate unlawful activity. For example, in *Bucklew v. Hawkins, Ash, Baptie & Co., LLP,* 329 F.3d 923 (7th Cir. 2003), where "the enterprise alleged to have been conducted through a pattern of racketeering activity ... [was] a wholly owned

subsidiary of the alleged racketeer," the court explained that a separate incorporation did not constitute "sufficient distinctness to trigger RICO liability... unless the enterprise's decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity." *Id.* at 934. The Sixth Circuit has similarly held that although "a parent corporation and its subsidiaries [typically] do not satisfy the distinctness requirement," they may incur RICO liability "when the parent corporation uses the separately incorporated nature of its subsidiaries to perpetrate a fraudulent scheme." *In re ClassicStar Mare Lease Litig.*, 727 F.3d 473, 493 (6th Cir. 2013); *Bessett v. Avco Financial Services, Inc.* 230 F.3d 439, 449 (1st Cir. 2000) ("In most cases, a subsidiary that is under the complete control of the parent company is nothing more than a division of the one entity. Without further allegations, the mere identification of a subsidiary and a parent in a RICO claim fails the distinctiveness requirement"); *Cruz v FXDirectDealer, LLC*, 720 F.3d 115 (2d Cir. 2013). *See also Fogie v. THORN America, Inc.* 190 F.3d 889, 898 (8th Cir. 1999).[5]

Under this line of authority, the distinctiveness inquiry in a parent-subsidiary context, for RICO purposes, focuses on whether the fact of separate incorporation facilitated the alleged unlawful activity. *See e.g. In re Countrywide Financial. Corp Mort Mktg & Sales Practices Litig*, 601 F. Supp. 2d 1201, 1213-15 (S.D. Cal. 2009) (adopting *Bucklew* test in absence of controlling Ninth Circuit precedent); *Chagby v Target Corp.*, No. CV 08-4425-GHK (PJWx), 2009 WL 398972 at *1 n. 2 (C.D. Cal. 2009) ("If, as alleged, Target Corp and its subsidiaries are a RICO enterprise, then every corporation that has subsidiaries and commits fraud is an enterprise for RICO purposes. That is not the law"); *UIIT4less, Inc v. FedEx Corporation*, 157

[5] The Eleventh Circuit Court of Appeals has not squarely addressed this issue, see *United States v. Goldin Industries, Inc.*, 219 F.3d1271, 1276 n. 7 (11th Cir. 2000)(expressly reserving question of whether "wholly-owned subsidiaries conducting a pattern of racketeering activity through an enterprise comprised only of themselves and the parent corporation" could be RICO defendants).

F. Supp. 3d 341, 352 (S.D.N.Y. 2016) ("Limiting RICO liability in the parent-subsidiary context to circumstances in which separate incorporation facilitates the racketeering is []consistent with the text and purposes of the RICO statute").

In this case, the Complaint does not allege that Wells Fargo N.A.'s separate incorporation from Wells Fargo & Company facilitated the alleged fraudulent sales practices, and thus does not sufficiently allege that these corporations are distinct in a manner relevant to RICO liability. As Plaintiff thus fails to allege a RICO person distinct from the RICO enterprise, she fails to state a claim on which relief may be granted.

C. . Proximate Cause

In considering whether a plaintiff has sufficiently pleaded proximate cause in a RICO claim, "the central question .. is whether the alleged violation led directly to the plaintiff's injuries." *Anza v Ideal Steel Supply Corp.*, 547 U.S. 451, 461, 126 S. Ct. 1991, 164 L.Ed.2d 720 (2006). A link that is "too remote" "purely contingent," or "indirect" is insufficient. *Id.* at 457, 126 S. Ct. 1991. *See also Southeast Laborers Health & Welfare Fund v. Bayer Corp.*, 444 Fed. Appx. 401, 410 (11th Cir. 2011).

A plaintiff's injury is too attenuated from the RICO violation where, for example, the cause of the plaintiff's asserted harms arises from a set of actions "entirely distinct from the alleged RICO violation." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006). In *Anza*, for example, the plaintiff and defendant sold steel mill products and related supplies and services. *Id.* at 453. The plaintiff alleged that defendant "adopted a practice of failing to charge the requisite New York sales tax to cash-paying customers," allowing the defendant to "reduce it prices without affecting its profit margin." *Id.* The plaintiff alleged that defendant submitted fraudulent tax return to the New York State Dept. of Taxation and Finance to conceal is conduct.

Id. Based on this alleged fraud, plaintiff asserted two RICO claims. Proximate cause was ultimately found lacking because plaintiff's asserted harms arose from a "set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State). *Id* at 458.

In this case, Defendant challenges the sufficiency of Plaintiff's proximate cause allegations, correctly observing that while the alleged RICO violations, premised on fraudulent consumer sales activity, might logically be tied to economic injury suffered to Wells Fargo customers, these violations are not logically related to the injuries allegedly suffered by Plaintiff (wrongful discharge and associated economic loss, miscarriage and resulting emotional injuries). The Court agrees that the Complaint does not sufficiently allege proximate cause where it shows no logical connection between the Defendant's alleged fraudulent consumer sales activity and the injuries allegedly suffered by Plaintiff as a result of her alleged wrongful termination from employment. Because Plaintiffs' asserted injuries arise from a set of actions entirely distinct form the alleged predicate RICO violations, proximate cause is lacking as a matter of law. Further, as no amendment could correct this pleading deficiency, the Court finds amendment to be futile and shall dismiss Count 2 with prejudice. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997) .

IV. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED:**

1. The Defendant's Motion to Dismiss Count 2 of the Plaintiffs' Fourth Amended Complaint [DE 187] is **GRANTED** and Plaintiff's Florida RICO claim (Count 2) is **DISMISSED WITH PREJUDICE**.

2. The Defendant's motion to strike the punitive damage claim from the Florida Whistleblower Act claim (Count 1) is **GRANTED** and the demand for punitive damages is **STRICKEN** from the Plaintiff's Fourth Amended Complaint

DONE AND ORDERED in Chambers at Miami, Florida this 24 day of May, 2018.

Jose E. Martinez
United States District Judge

cc. all counsel

ATTACHMENT “C”

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

Case Number: 16-24918-CIV-MARTINEZ-GOODMAN

DIANA BERBER,

Plaintiff,

vs.

WELLS FARGO BANK, N.A. and
MARSHA PAINTER,

Defendants.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on Defendant, Wells Fargo Bank, N.A.'s Motion for Summary Judgment with Supporting Memorandum of Law (the "Motion") [ECF No. 252]. Defendant filed a Statement of Facts in Support of its Motion for Summary Judgment [ECF No. 253]. Plaintiff, Diana Berber, filed a Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment of Dismissal [ECF No. 256] and an Affidavit in Opposition to Defendant's Motion for Summary Judgment of Dismissal [ECF No. 255]. Defendant filed a Reply in Support of its Motion for Summary Judgment [ECF No. 257]. The Court has considered the Motion, the response thereto, the record in this action, and is otherwise fully advised in the premises.

The Court notes as a preliminary manner that Local Rule 56.1 provides that "[a] motion for summary judgment and the opposition thereto shall be accompanied by a statement of material facts as to which it is contended that there does not exist a genuine issue to be tried or there does exist a genuine issue to be tried, respectively." S.D. Fla. R. 56.1. Moreover, Rule 56.1 further provides how such statements of material facts should be formatted:

> Statements of material facts submitted in opposition to a motion for summary judgment shall correspond with the order and with the paragraph numbering

> scheme used by the movant, but need not repeat the text of the movant's paragraphs. Additional facts which the party opposing summary judgment contends are material shall be numbered and placed at the end of the opposing party's statement of material facts.

Id. Lastly, Rule 56.1(b), titled "Effect of Failure to Controvert Statement of Undisputed Facts," states as follows: "[a]ll material facts set forth in the movant's statement filed and supported as required above will be deemed admitted unless controverted by the opposing party's statement, provided that the Court finds that the movant's statement is supported by the evidence in the record." S.D. Fla. R. 56.1(b). A review of the record in this matter reflects that Plaintiff's opposition to Defendant's Motion for Summary Judgment is not accompanied by a statement of material facts in opposition. To date, Plaintiff has only filed an Affidavit and has not filed a statement of material facts in opposition, as required by Rule. 56.1. Accordingly, this Court will deem all material facts set forth in Defendant's Statement of Facts in Support of its Motion for Summary Judgment admitted, provided that such facts are "supported by the evidence in the record." S.D. Fla. R. 56.1(b).

I. BACKGROUND

Plaintiff's Florida Private Whistleblower Act[1] cause of action arises out of Defendant's alleged retaliatory termination of her employment because she "objected to, or refused to participate in, activities which were in violations of laws, rules, or regulations" [ECF No. 102 ¶ 36].[2] From July 2013 through March 2014, Defendant employed Plaintiff as a personal banker at a Wells Fargo Bank, N.A. ("WFBNA") branch located at 3600 North Ocean Boulevard, Fort Lauderdale, Florida. *See* Affidavit of Plaintiff Diana Berber [ECF No. 255 ¶ 3]. While employed at Wells Fargo, it is undisputed that there were issues with Plaintiff's job performance [ECF No.

[1] Florida Statutes § 448.101(3).

[2] This Court previously granted Defendant's Motion to Dismiss Count II of Plaintiff's Fourth Amendment Complaint (Florida RICO) and Defendant's Motion to Strike the Punitive Claim asserted in Count I of the Fourth Amendment Complaint (Florida Whistleblower Act) [ECF No. 230]. As a result, Plaintiff's Florida Whistleblower claim is the remaining cause of action in this case.

253 ¶¶ 8-9]. Specifically, Plaintiff once came to work late without providing notice [ECF No. 254-2 at 14:20-23], failed to meet sales goals (*id.* at 15:9-14), failed to schedule a sufficient number of appointments to assist Plaintiff in reaching sales goals (*id.* at 15:19-24), and failed to schedule a sufficient number of outside office events in order to generate sales by finding new customers to open accounts with Wells Fargo (*id.* at 16:10-25; 17:1). Plaintiff also confirmed she received a one out of five in a 2013 performance evaluation and also added, "I know all my reviews were horrifically low" [ECF No. 254-2, at 33:16-25; 34:1-5].[3]

Moreover, prior to her termination, Plaintiff was issued written discipline on occasion (*id.* at 9:8-12) and placed on a Performance Improvement Plan ("PIP")[4] as her performance in the foregoing areas were "below acceptable levels" (*id.* at 11:9-16). After Plaintiff was placed on her PIP on October 28, 2013, she was issued an Informal Warning on December 2, 2013 for the period of October 28 2013 through November 29, 2013, as her manager at the time, Ms. Marsha Painter, determined that she was still not meeting performance standards. *Id.* at 18:19-23.[5] Plaintiff does not contest that she failed to meet these job performance expectations. *Id.* at 19:20-25; 20:1-3; *see also* ECF No. 253 ¶ 15. Plaintiff also received a second "verbal/written warning for failing to meet performance standards and work expectations in the area of creating and approving wire transfers" on February 11, 2014 [ECF No. 253 ¶ 18]. Lastly, Plaintiff received a Final Warning of Performance, also referred to as the "Formal Warning Performance" on February 12, 2014, which outlined the following performance-related issues with Plaintiff: "(i) not consistently engaging behind the teller line with customers; (ii) not following up daily with

[3] A summation of Plaintiff's job performance is also found in Defendant's Statement of Facts in Support of its Motion for Summary Judgment [ECF No. 253 ¶¶ 8-9].

[4] As noted in Defendant's Statement of Facts in Support of its Motion for Summary Judgment, Plaintiff was "expected to, among other things, engage in the following activities to improve and sustain her performance to an acceptable level: (i) actively work behind the teller line with tellers building relationships with both team members and clients; (ii) pre-plan a weekly schedule of a variety of outside locations to visit; (iii) complete a full profile with all clients asking questions around needs and lifestyle; and (iv) make daily contacts with clients to thank them for banking with Wells Fargo" [ECF No. 253 ¶ 12].

[5] *See also* ECF No. 253 ¶ 16.

contacts received at events; (iii) not consistently presenting customer offers; (iv) not effectively planning outside activities, such as being prepared with a list of businesses to visit or follow up with contacts from outside events attended; and (v) not completing daily activities, such as making outbound calls to attempt to create an appointment pipeline" [ECF No. 253 ¶ 19; ECF No. 254-2, at 26:8-25; 27:1-12].

On March 18, 2014, Defendant sent Plaintiff a letter terminating her employment (hereinafter, "Termination Letter"), stating that she had "not met the performance expectations regarding daily activities to attain sales goals required in this position." [ECF No. 255 at p. 14]. Plaintiff stated that at the time she received the Termination Letter, she "did not know that [her] employment was being terminated in retaliation for [her] refusal to engage in 'activities' encompassing the fraudulent opening of additional checking, savings and credit card accounts for existing customers and new customers." *Id.* ¶ 6. Moreover, according to Plaintiff, during her time at this WFBNA branch, Plaintiff alleges that she was "pressured" by Ms. Painter, "to open additional checking, savings and credit card accounts for existing customers and to recruit new customers for whom checking, savings and credit card accounts could be opened." *Id.* ¶ 4. In addition to being pressured by Ms. Painter, Plaintiff also alleged that Ms. Painter "humiliated" and "harassed" her as a result of her failure to meet an "excessively high new account sales quotas," which Plaintiff was required to meet. *Id.* Despite the foregoing, Plaintiff was never asked to engage in a fraudulent activity [ECF No. 254-2, at 42:19-24; 50:20-23; 58:8-23], such as opening fake or fraudulent accounts (*id.* at 42: 6-13) or misleading a customer into opening an account (*id.* at 47:17-23). Defendant now moves for summary judgment on Plaintiff's remaining Florida Whistleblower cause of action.

II. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure states that "[a] party may move for summary judgment, identifying each claim or defense –or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). Rule 56 further provides that "[t]he

court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* Accordingly, "the plain language of Rule 56[a] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1982).

"The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clarks, Inc.*, 929 F.3d 604, 608 (11th Cir. 1991). Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. Thus, the nonmoving party "may not rest upon the mere allegations or denials of [her] pleadings, but...must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

III. DISCUSSION

A. Florida's Whistleblower Act

As the applicable law is state substantive law in this diversity action, the Florida Whistleblower Act ("FWA") governs. *Sierminski v. Transouth Financial Corp.*, 216 F.3d 945, 950 (11th Cir. 2000) (citing *Erie R.R. Co. v.* Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L.Ed. 1188 (1938)). The FWA provides that "[a]n employer may not take any retaliatory personnel

action against an employee because the employee has:

> (1) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy, or practice.
>
> (2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer.
>
> (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

See Fla. Stat. § 448.102. Plaintiff's remaining cause of action in this matter is premised on Defendant's alleged violation of Florida Statute section 448.102(3), namely, that Defendant terminated her because she "objected to, or refused to participate in, activities which were in violations of law, rules, or regulations." *See* Plaintiff's Fourth Amended Complaint [ECF No. 102 ¶ 36]. Thus, in order to rule on Defendant's Motion for Summary Judgment, this Court must first determine the requirements for a *prima facie* case under section 448.102(3).

When determining whether "the necessary causal link between the alleged retaliatory action and the objection to illegality has been established," the Eleventh Circuit has held that the analysis in Title VII retaliation cases applies, absent any other guiding case law. *Sierminski,* 216 F.3d at 950-951. Under this standard, "[o]nce plaintiff establishes a *prima facie* case by proving only that the protected activity and the negative employment action are not completely unrelated, the burden shifts to the defendant to proffer a legitimate reason for the adverse action." *Id.* at 950. "The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the 'legitimate' reason is merely pretext for prohibited, retaliatory conduct." *Id.* Nevertheless, plaintiff carries the initial burden of proof in "presenting sufficient evidence to allow a reasonable jury to determine that he has satisfied the elements of his *prima facie* case." *Eder v. Interline Brands, Inc.*, Case No. 10-CV-60470, 2011 WL 13214275, at *4 (S.D. Fla.

Nov. 18, 2011).

Other courts in this district have held that in order to establish a *prima facie* case under the FWA, a plaintiff must show: (1) that he or she objected to or refused to participate in any illegal activity, policy, or practice of the defendant or he or she engaged in statutorily protected activity; (2) he or she suffered an adverse employment action; and (3) the adverse employment action was causally linked to his or her objection or refusal." *Eder*, 2011 WL 13214275, at *4; *see also Fedolfi v. Banyan Air Services, Inc.*, Case No. 05-61634-CIV, 2006 WL 8436080, at *17 (S.D. Fla. Dec. 15, 2006); *Denarii Systems LLC v. Arab*, Case No. 12-24239-CIV, 2014 WL 2960964, at *3 (S.D. Fla. June 30, 2014). Accordingly, based on the plain language of the statute, this Court finds that the FWA "requires a plaintiff show that he or she refused to participate in or informed others of their employer's actual violation of law." *Fedolfi*, 2006 WL 8436080, at *17. While the language of the statute is unambiguous, the Court also notes that the Florida Supreme Court has read the statute to mean exactly what it reads. In *Walsh*, the Florida Supreme Court noted how the FWA "prohibits private sector employers from taking retaliatory personnel action against employees who 'blow the whistle' on employers who violate the law or against employees who refuse to participate in violations of the law and provides employees a civil cause of action for such retaliation." *Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 423 (Fla. 1994). In sum, a plaintiff is required to "blow the whistle" on an employer for violating the law or refuse to participate in violating the law and are terminated as a result.

B. Plaintiff has failed to prove a *prima facie* case.

Here, Plaintiff has failed to establish a *prima facie* case under the FWA. First, it cannot be said that Plaintiff "objected to or refused to participate in any illegal activity, policy, or practice of the defendant." *Eder*, 2011 WL 13214275, at *4. By Plaintiff's own admission, in her Affidavit in Opposition to Defendant's Motion for Summary Judgment of Dismissal, she stated that at the time she received her termination letter, she "**did not know** that [her] employment was being terminated in retaliation for [her] refusal to engage in 'activities' encompassing the

fraudulent opening of additional checking, savings and credit card accounts for existing customers and new customers of the Branch for the purpose of meeting my excessively high new account sales quotas" [ECF No. 255 ¶ 6] (emphasis added). Moreover, Plaintiff also stated that it was not until September 2016, almost two and a half years after her termination,[6] when Defendant "announced that it has entered into monetary settlements with several governmental agencies premised upon WFBNA's improper retail sales practices (*i.e.*, the fraudulent opening of checking, saving and credit card accounts for existing and new customers of WFBNA)" that she "realized that [her] employment had been terminated in retaliation for [her] refusal to engage in 'activities' encompassing the fraudulent opening of additional checking, savings and credit card accounts for existing and new WFBNA customers." *Id.* ¶ 7. However, while employed by Defendant, Plaintiff stated that she was never asked to engage in a fraudulent activity [ECF No. 254-2, at 42:19-24; 50:20-23; 58:8-23]. She was never asked to open fake or fraudulent accounts (*id.* at 42: 6-13). She was not asked to mislead a customer into opening an account (*id.* at 47:17-23). Plaintiff is also not aware of any instances where her manager asked anyone else at her branch to engage in fraudulent activity. *Id.* at 42:25; 43:1-2. Thus, it cannot be said that there is a genuine issue of material fact as to whether Plaintiff objected to or refused to participate in any illegal activity, policy, or practice of the Defendant because, simply put, the record evidence in this case indisputably shows that Plaintiff never blew the whistle.

Moreover, Plaintiff's *prima facie* case is also fatal because, while she has suffered an adverse employment action, she has failed to carry her "burden of showing a causal link between the protected activity" and her termination. *Arab*, 2014 WL 2960964, at *3. The district court's decision in *Arab* is instructive on this issue. In *Arab*, the defendant/counter plaintiff alleged the plaintiff violated the FWA "by terminating him after he objected to an allegedly fraudulent contract the plaintiff entered into in Ecuador." *Id.* The district court entered summary judgment against the defendant / counter plaintiff on his FWA claim, finding that he failed "to carry his

[6] Plaintiff's termination letter is dated March 18, 2014 [ECF No. 255, at 15].

burden of showing a causal link between the protected activity and his termination." *Id.* The district court reasoned that the defendant / counter plaintiff "fail[ed] to specify who at Denarii he complained to and fails to show a causal link between his disapproval of the plaintiff's activities in Ecuador and his termination." *Id.* at *4. Like in *Arab*, it cannot be said that there is a causal connection between Plaintiff's "protected activity" and her termination. Here, there is no record evidence that Plaintiff complained to anyone employed by Defendant or objected to or refused to participate in a sanctioned illicit activity by Defendant. At most, Plaintiff alleges she was "pressured" by her manager to open additional checking, savings, and credit card accounts for customers and she "suspected" other personal bankers of engaging in fraudulent activity [ECF No. 255 ¶ 4]. Nevertheless, there is no record evidence that Plaintiff ever reported any of the foregoing to anyone employed by Defendant or that Plaintiff was ever required or asked to engage in any illicit activity [ECF No. 253 ¶ 31]. Hence, this Court further finds that Plaintiff has failed to meet her burden of proof in showing a causal link between her refusal to engage in fraudulent activity and her termination.

C. Plaintiff has failed to put forth evidence that the reasons for her termination are pretextual.

Even assuming, *arguendo*, that Plaintiff has met her burden in establishing a *prima facie* case under the FWA, Plaintiff has still failed to "prove by a preponderance of the evidence that the 'legitimate' reason is merely pretext for prohibited, retaliatory conduct." *Sierminski*, 216 F.3d at 950. In this case, the Court finds that Defendant has met its burden in proffering "a legitimate reason for the adverse action." *Id.* Specifically, Defendant has shown that Plaintiff was placed in a performance improvement plan as a result as of her subpar job performance, which included Plaintiff: (i) coming into work late without providing notice [ECF No. 254-2 at 14:20-23]; (ii) failing to meet sales goals (*id.* at 15:9-14); (iii) failing to schedule a sufficient number of appointments to assist Plaintiff in reaching sales goals (*id.* at 15:19-24); (iv) failing to schedule a sufficient number of outside office events in order to generate sales by finding new customers to

open accounts with Wells Fargo (*id.* at 16:10-25; 17:1); and (v) receiving a one out of five in a 2013 performance evaluation (*id.* at 33:16-25; 34:1-5). After being placed on her PIP, Plaintiff was subsequently issued two warnings on December 2, 2013 and February 11, 2014 when she failed to meet performance expectations [ECF No. 253 ¶¶ 16-18]. When asked about the issues raised by the first warning she received on December 2, 2013 in her deposition, Plaintiff did not contest that she failed to meet these job performance expectations [ECF No. 254-2 at 19:20-25; 20:1-3]. Lastly, on February 12, 2014, Plaintiff also received a Formal Warning Performance that outlined a multiple deficiencies with her job performance [ECF No. 253 ¶ 19; ECF No. 254-2, at 26:8-25; 27:1-12]. Once more, when asked about her Formal Warning Performance in her deposition, Plaintiff did not contest that she was not consistently engaging in sufficient sales activities and that her metrics did not meet the requirements for daily profits, partner referrals, DDA packages, and loans [ECF No. 254-2, at 26:13-25; 27:1-4].Tellingly, Plaintiff added that she was aware that, "by virtue of this Final Performance Warning, that if there wasn't improvement, there would be, you know, consequences, up to and including termination." *Id.* at 29:12-16. Plaintiff was subsequently terminated on March 18, 2014 after a review of her "overall performance as a Personal Banker" and determination by Defendant that she had "not met the performance expectations regarding daily activities to attain sales goals required in this position" [ECF No. 255, at 15]. Accordingly, after a review of the record in this action, this Court finds that—assuming *arguendo* Plaintiff has met its burden in establishing prima *facie* case—Defendant has sufficiently proffered a legitimate reason for Plaintiff's termination.

As a result of Defendant's proffering a legitimate reason for her termination, Plaintiff must prove by a preponderance of the evidence that Defendant's legitimate reason(s) are "merely pretext for prohibited retaliatory conduct." *Sierminski,* 216 F.3d at 950. This Court finds that Plaintiff has failed to meet her burden on this issue. Plaintiff has offered no record evidence to raise a genuine issue of material fact that the legitimate reason proffered by Defendant is pretext for prohibited retaliatory conduct. By Plaintiff's own admission at her deposition, she stated that

the sole reason for her termination was for her failure to meet Defendants' sales goals [ECF No. 254-2, at 57: 19-22]. Moreover, Plaintiff's argument that she was terminated by objecting to or refusing to engage in fraudulent activity, such as opening fake or fraudulent accounts for customers, is unavailing because she was never asked by anyone employed by Defendant to engage in any fraudulent activity [ECF No. 254-2, at 42:19-24; 50:20-23; 58:8-23]. Because she was never asked to engage in such an illicit activity, it logically follows that she could not report any illicit activity or "blow the whistle." Hence, for the foregoing reasons, the Court finds that Plaintiff has failed to prove by a preponderance of the evidence that Defendant's proffered legitimate reason(s) are pretextual.

IV. CONCLUSION

Accordingly, after careful consideration and for the reasons stated herein, it is

ORDERED and ADJUDGED that

1. Wells Fargo Bank, N.A.'s Motion for Summary Judgment with Supporting Memorandum of Law [ECF No. 252] is **GRANTED.**
2. Count I of Plaintiff's Fourth Amendment Complaint (FWA) is **DISMISSED with prejudice** for the reasons stated herein.
3. Wells Fargo Bank, N.A.'s Omnibus Motion in Limine to Exclude Irrelevant and Inadmissible Testimony and Evidence [ECF No. 259], Defendant's Motion for Leave to File *Daubert* Motion to Exclude the Testimony and Written Opinions of Dr. Vilor Shpitalnik [ECF No. 260], Defendant's Motion to Quash Unenforceable Trial Subpoenas [ECF No. 272], and Defendant's Motion for Continuance of Calendar Call and Trial Period [ECF No. 283] are **DENIED as MOOT.**
4. This case is **CLOSED.**

5. The calendar call scheduled in this matter on January 3, 2019 is hereby **CANCELLED.**

DONE AND ORDERED in Chambers at Miami, Florida, this 2 day of January, 2019.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Goodman
All Counsel of Record