

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

Case No.: 2013-cv-62381-BLOOM-VALLE

JAMAAL ANDERSON, JACOB BELL,
DERRICK GAFFNEY, TAVARES
GOODEN, FRANK GORE, SANTONIO
HOLMES, JEVON KEARSE, KENARD
LANG, RAY LEWIS, BRANDON
MERIWEATHER, SANTANA MOSS,
CLINTON PORTIS, LITO SHEPPARD,
FRED TAYLOR, and GERARD WARREN,

Plaintiffs,

v.

BRANCH BANKING AND TRUST
COMPANY, as successor in interest to
BankAtlantic, LLC,

Defendant.

**DEFENDANT, BRANCH BANKING AND TRUST COMPANY'S, ANSWER AND
AFFIRMATIVE DEFENSES TO PLAINTIFFS' FOURTH AMENDED COMPLAINT**

Defendant, Branch Banking and Trust Company, as successor in interest to BankAtlantic ("BankAtlantic"), hereby files its Answer and Affirmative Defenses to the Fourth Amended Complaint filed by Jamaal Anderson, Jacob Bell, Derrick Gaffney, Tavares Gooden, Frank Gore, Santonio Holmes, Jevon Kears, Kenard Lang, Ray Lewis, Brandon Meriweather, Santana Moss, Clinton Portis, Lito Sheppard, Fred Taylor and Gerard Warren (collectively, the "Plaintiffs")

[ECF No. 89]:

PARTIES

1. BankAtlantic is without knowledge as to the allegations contained in paragraph 1, and therefore, denies the same.

2. BankAtlantic is without knowledge as to the allegations contained in paragraph 2, and therefore, denies the same.

3. BankAtlantic is without knowledge as to the allegations contained in paragraph 3, and therefore, denies the same.

4. BankAtlantic is without knowledge as to the allegations contained in paragraph 4, and therefore, denies the same.

5. BankAtlantic is without knowledge as to the allegations contained in paragraph 5, and therefore, denies the same.

6. BankAtlantic is without knowledge as to the allegations contained in paragraph 6, and therefore, denies the same.

7. BankAtlantic is without knowledge as to the allegations contained in paragraph 7, and therefore, denies the same.

8. BankAtlantic is without knowledge as to the allegations contained in paragraph 8, and therefore, denies the same.

9. BankAtlantic is without knowledge as to the allegations contained in paragraph 9, and therefore, denies the same.

10. BankAtlantic is without knowledge as to the allegations contained in paragraph 10, and therefore, denies the same.

11. BankAtlantic is without knowledge as to the allegations contained in paragraph 11, and therefore, denies the same.

12. BankAtlantic is without knowledge as to the allegations contained in paragraph 12, and therefore, denies the same.

13. BankAtlantic is without knowledge as to the allegations contained in paragraph 13, and therefore, denies the same.

14. BankAtlantic is without knowledge as to the allegations contained in paragraph 14, and therefore, denies the same.

15. BankAtlantic is without knowledge as to the allegations contained in paragraph 15, and therefore, denies the same.

16. BankAtlantic admits the allegations contained in paragraph 16.

17. BankAtlantic admits the allegations contained in paragraph 17.

18. BankAtlantic admits only that Branch Banking and Trust Company is the successor in interest to BankAtlantic with respect to Plaintiffs' accounts. BankAtlantic specifically denies any liability arising from the accounts at issue.

VENUE AND JURISDICTION

19. BankAtlantic admits paragraph 19 for venue purposes only.

20. BankAtlantic admits paragraph 20 for jurisdictional purposes only. BankAtlantic specifically denies that Plaintiffs are entitled to the damages they seek.

21. BankAtlantic admits paragraph 21 for jurisdictional purposes only.

COMMON ALLEGATIONS

22. BankAtlantic admits the allegations contained in paragraph 22.

23. BankAtlantic admits that an agency relationship existed between Pro Sports Financial, Inc. ("Pro Sports") and each of the Plaintiffs. BankAtlantic further admits that Pro Sports provided Plaintiffs with certain financial and concierge services pursuant to that agency relationship. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 23, and therefore, denies the same.

24. BankAtlantic admits that Pro Sports was owned by Jeffrey Rubin ("Rubin"). Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 24, and therefore, denies the same.

25. BankAtlantic denies the allegations contained in paragraph 25.

26. BankAtlantic admits only that a sports and entertainment division existed within BankAtlantic. Otherwise, BankAtlantic denies the allegations in paragraph 26.

27. BankAtlantic denies the allegations contained in paragraph 27.

28. BankAtlantic admits the allegations contained in paragraph 28.

29. BankAtlantic is without knowledge as to the allegations contained in paragraph 29, and therefore, denies the same.

30. BankAtlantic denies the allegations contained in paragraph 30.

31. BankAtlantic admits only that Plaintiffs' accounts were included in the general deposits held at BankAtlantic. However, BankAtlantic denies that it enjoyed any benefit other than that which it obtained through an increase in its general deposits.

32. BankAtlantic is without knowledge as to the allegations contained in paragraph 32, and therefore, denies the same.

33. BankAtlantic denies the allegations contained in paragraph 33.

34. BankAtlantic is without knowledge as to the allegations contained in paragraph 34, and therefore, denies the same.

35. BankAtlantic denies the allegations contained in paragraph 35.

36. BankAtlantic denies the allegations contained in paragraph 36.

37. BankAtlantic denies the allegations contained in paragraph 37.

38. BankAtlantic admits only that Exhibit "A" speaks for itself. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 38, and therefore, denies the same.

39. BankAtlantic denies the allegations contained in paragraph 39.

40. BankAtlantic admits only that Exhibit "B" speaks for itself. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 40, and therefore, denies the same.

41. BankAtlantic admits that Exhibit "C" speaks for itself. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 41, and therefore, denies the same.

42. BankAtlantic admits that Exhibit "D" speaks for itself. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 42, and therefore, denies the same.

43. BankAtlantic denies the allegations contained in paragraph 43.

44. BankAtlantic admits that many of the disputed transactions were made relative to a casino project in Alabama known as Country Crossing. BankAtlantic specifically denies, however, that the disputed transfers were unauthorized.

45. BankAtlantic is without knowledge as to the allegations contained in paragraph 45, and therefore, denies the same.

46. BankAtlantic denies the allegations contained in paragraph 46.

47. BankAtlantic denies the allegations contained in paragraph 47.

48. BankAtlantic is without knowledge as to the unidentified transfers that Plaintiffs are referring to, and therefore, BankAtlantic denies the allegations contained in paragraph 48. BankAtlantic specifically denies, however, that any transfers were unauthorized.

49. BankAtlantic denies the allegations contained in paragraph 49.

50. BankAtlantic denies the allegations contained in paragraph 50.

GROUP A PLAINTIFFS

51. BankAtlantic denies the allegations contained in paragraph 51.

52. BankAtlantic denies the allegations contained in paragraph 52.

- (a) BankAtlantic denies the allegations contained in paragraph 52(a).
- (b) BankAtlantic denies the allegations contained in paragraph 52(b).
- (c) BankAtlantic denies the allegations contained in paragraph 52(c).
- (d) BankAtlantic denies the allegations contained in paragraph 52(d).
- (e) BankAtlantic denies the allegations contained in paragraph 52(e).
- (f) BankAtlantic denies the allegations contained in paragraph 52(f).
- (g) BankAtlantic denies the allegations contained in paragraph 52(g).
- (h) BankAtlantic denies the allegations contained in paragraph 52(h).
- (i) BankAtlantic denies the allegations contained in paragraph 52(i).

53. BankAtlantic admits only that the account documentation for the Group A Plaintiffs speak for itself. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 53, and therefore, denies the same.

54. BankAtlantic is without knowledge as to the allegations contained in paragraph 54, and therefore, denies the same.

55. BankAtlantic admits that the Group A Accounts were funded by other accounts held by Plaintiffs at BankAtlantic.

56. BankAtlantic denies the allegations contained in paragraph 56.

57. BankAtlantic denies the allegations contained in paragraph 57.

58. BankAtlantic denies the allegations contained in paragraph 58.

59. BankAtlantic denies the allegations contained in paragraph 59.

60. BankAtlantic admits only that the account documentation for each of the Group A Accounts speaks for itself. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 60, and therefore, denies the same.

61. BankAtlantic denies the allegations contained in paragraph 61.

62. BankAtlantic denies the allegations contained in paragraph 62, and therefore, denies the same.

63. BankAtlantic denies the allegations contained in paragraph 63, and therefore, denies the same.

64. BankAtlantic denies the allegations contained in paragraph 64, and therefore, denies the same.

65. BankAtlantic admits that each of the Group A Plaintiffs had prior accounts that they are not disputing. Otherwise, BankAtlantic denies the allegations contained in paragraph 65 and demands strict proof thereof.

66. BankAtlantic denies the allegations contained in paragraph 66.

67. BankAtlantic denies the allegations contained in paragraph 67.

68. BankAtlantic denies the allegations contained in paragraph 68.

69. BankAtlantic denies the allegations contained in paragraph 69.

70. BankAtlantic denies the allegations contained in paragraph 70.

71. BankAtlantic specifically denies that any of the referenced transactions were improper or unauthorized. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 71, and therefore, denies the same.

72. BankAtlantic admits only that the referenced tolling agreements speak for themselves. Otherwise, BankAtlantic is without knowledge as to the allegations in paragraph 72, and therefore, denies the same.

73. BankAtlantic admits only that Exhibit "E" speaks for itself. BankAtlantic specifically denies that Plaintiffs are entitled to relief for the subject transactions.

74. BankAtlantic admits only that Exhibit "E" speaks for itself. BankAtlantic specifically denies that Plaintiffs are entitled to relief for the subject transactions.¹

75. BankAtlantic admits only that the referenced transactions, and related documentation, speak for themselves. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 75, and therefore, denies the same.

76. BankAtlantic denies the allegations contained in paragraph 76.

77. BankAtlantic is without knowledge as to the allegations contained in paragraph 77, and therefore, denies the same.

78. BankAtlantic denies the allegations contained in paragraph 78.

79. BankAtlantic denies the allegations contained in paragraph 79.

80. BankAtlantic denies the allegations contained in paragraph 80.

81. BankAtlantic denies the allegations contained in paragraph 81.

GROUP B PLAINTIFFS

¹ BankAtlantic denies the existence of any unauthorized transfer. BankAtlantic further denies Plaintiffs' reservation of the right to amend to the extent that such reservation implies Plaintiffs are entitled to amendment other than as provided by the Federal Rules of Civil Procedure or by order of this Court.

82. BankAtlantic denies paragraph 82 to the extent it asserts that the referenced accounts were unauthorized.

83. BankAtlantic admits the allegations contained in paragraph 83.

- (a) BankAtlantic admits the allegations contained in paragraph 83(a).
- (b) BankAtlantic admits the allegations contained in paragraph 83(b).
- (c) BankAtlantic admits the allegations contained in paragraph 83(c).
- (d) BankAtlantic admits the allegations contained in paragraph 83(d).
- (e) BankAtlantic admits the allegations contained in paragraph 83(e).
- (f) BankAtlantic admits the allegations contained in paragraph 83(f).

84. BankAtlantic is without knowledge as to the allegations contained in paragraph 84, and therefore, denies the same.

85. BankAtlantic is without knowledge as to the allegations contained in paragraph 85, and therefore, denies the same.

86. BankAtlantic admits only that there was an agency relationship existing between Pro Sports and Plaintiff. Otherwise, BankAtlantic denies the allegations contained in paragraph 86 and demands strict proof thereof.

87. BankAtlantic denies the allegations contained in paragraph 87.

88. BankAtlantic denies the allegations contained in paragraph 88.

89. BankAtlantic denies the allegations contained in paragraph 89.

90. BankAtlantic denies the allegations contained in paragraph 90.

91. BankAtlantic denies the allegations contained in paragraph 91.

92. BankAtlantic is without knowledge of the allegations contained in paragraph 92, and therefore, denies the same.

93. BankAtlantic admits only that the referenced tolling agreements speak for themselves. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 93, and therefore, denies the same.

94. BankAtlantic admits only that Exhibit "F" speaks for itself. BankAtlantic specifically denies that Plaintiffs are otherwise entitled to relief for the subject transactions.

95. BankAtlantic admits only that Exhibit "F" speaks for itself. BankAtlantic specifically denies that Plaintiffs are otherwise entitled to relief for the subject transactions.

96. BankAtlantic admits only that the referenced transactions speak for themselves. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 96, and therefore, denies the same.

97. BankAtlantic denies the allegations contained in paragraph 97.

98. BankAtlantic is without knowledge as to the allegations contained in paragraph 98, and therefore, denies the same.

99. BankAtlantic denies the allegations contained in paragraph 99.

100. BankAtlantic denies the allegations contained in paragraph 100.

101. BankAtlantic denies the allegations contained in paragraph 101.

COUNT I-NEGLIGENCE AS TO GROUP A PLAINTIFFS

102. BankAtlantic realleges and incorporates paragraphs 1 through 81 as if fully set forth herein.

103. BankAtlantic admits the allegations contained in paragraph 103.

104. BankAtlantic states that paragraph 104 is a legal conclusion to which no response is required. To the extent that paragraph 104 is construed to contain any factual allegation, BankAtlantic is without knowledge as to such allegation, and therefore, denies the same.

105. BankAtlantic denies the allegations contained in paragraph 105.

106. BankAtlantic denies the allegations contained in paragraph 106.

107. BankAtlantic denies the allegations contained in paragraph 107.

COUNT II- BREACH OF CONTRACT AS TO GROUP B PLAINTIFFS

108. BankAtlantic realleges and incorporates paragraphs 1 through 50 and 82 through 101 as if fully set forth herein.

109. BankAtlantic admits the allegations contained in paragraph 109.

110. BankAtlantic admits the contractual documents related to Plaintiffs' accounts speak for themselves. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 110, and therefore, denies the same.

111. BankAtlantic admits that it possesses the signature card and Depositor's Agreement applicable to each Plaintiffs' account. BankAtlantic further admits that such documents speak for themselves. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 111, and therefore, denies the same.

112. BankAtlantic admits only that the attached Exhibit "G" speaks for itself. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 112, and therefore, denies the same.

113. BankAtlantic admits only that the attached Exhibit "H," and any other documents referenced in paragraph 113, each speak for themselves individually. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 113, and therefore, denies the same.

114. BankAtlantic admits only that the Depositor's Agreement speaks for itself. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 114, and therefore, denies the same.

115. BankAtlantic admits only that the Depositor's Agreement speaks for itself. Otherwise, BankAtlantic is without knowledge as to the allegations contained in paragraph 115, and therefore, denies the same.

116. BankAtlantic denies the allegations contained in paragraph 116.

117. BankAtlantic denies the allegations contained in paragraph 117.

118. BankAtlantic denies the allegations contained in paragraph 118.

119. BankAtlantic denies the allegations contained in paragraph 119.

120. BankAtlantic admits only that the referenced Exhibit "I" speaks for itself. Otherwise, BankAtlantic denies the allegations contained in paragraph 120 and demands strict proof thereof.

121. BankAtlantic denies the allegations contained in paragraph 121.

COUNT III- REFUND OF UNAUTHORIZED AND INEFFECTIVE FUNDS TRANSFER
(GROUP A PLAINTIFFS)

122. BankAtlantic realleges and re-incorporates paragraphs 1 through 81 as if fully set forth herein.

123. BankAtlantic states that paragraph 123 is a legal conclusion to which no response is required. To the extent that paragraph 123 is construed to contain any factual allegation, BankAtlantic is without knowledge as to such allegation, and therefore, denies the same.

124. BankAtlantic denies the allegations contained in paragraph 124.

125. BankAtlantic denies the allegations contained in paragraph 125.

126. BankAtlantic denies the allegations contained in paragraph 126.

127. BankAtlantic denies the allegations contained in paragraph 127.

128. BankAtlantic denies the allegations contained in paragraph 128.

**COUNT IV-REFUND OF UNAUTHORIZED AND INEFFECTIVE FUNDS TRANSFER
(GROUP B PLAINTIFFS)**

129. BankAtlantic realleges and incorporates paragraphs 1 through 50 and 82 through 101 as if fully set forth herein.

130. BankAtlantic states that paragraph 130 is a legal conclusion to which no response is required. To the extent that paragraph 130 is construed to contain any factual allegation, BankAtlantic is without knowledge as to such allegation, and therefore, denies the same.

131. BankAtlantic denies the allegations contained in paragraph 131.

132. BankAtlantic denies the allegations contained in paragraph 132.

133. BankAtlantic denies the allegations contained in paragraph 133.

134. BankAtlantic denies the allegations contained in paragraph 134.

135. BankAtlantic denies the allegations contained in paragraph 135.

136. BankAtlantic denies the allegations contained in paragraph 136.

DEMAND FOR JURY TRIAL

137. BankAtlantic denies that Plaintiffs are entitled to a trial by jury.

AFFIRMATIVE DEFENSES

A. Defenses Applicable to Group A and B Plaintiffs

First Affirmative Defense

Counts I and II of the Fourth Amended Complaint, to the extent that they seek the recovery of any instrument or item as defined under Florida Statute §§ 673.1021 and 674.104 respectively, are barred by Plaintiffs' failure to comply with the conditions precedent to suit set forth in Florida Statute § 674.406(6). Section 674.406 imposes a duty upon a bank customer to

review all account statements and to notify the bank of any unauthorized signature within 180 days of the customer's account statements having been made available. *Gerber v. City Nat'l Bank of Fla.*, 619 So. 2d 328, 329 (Fla. 3d DCA 1993). "The customer's failure to timely discover and report the forgeries, bars his claim as a matter of law." *Lowenstein v. Barnett Bank of S. Fla., N.A.*, 720 So. 2d 596, 597 (Fla. 3d DCA 1998).

Each of Plaintiffs' account statements was made available to them through various means, including availability through Pro Sports, availability through BankAtlantic, receipt of account statements through requests by counsel, and/or personal receipt of their monthly statements. Plaintiffs had a statutory duty to review their statements and report any allegedly unauthorized transaction within 180 days. Plaintiffs, however, failed to comply with their statutory duty to timely report any allegedly unauthorized transaction. As such, Plaintiffs' claims are barred as a matter of law under Florida Statute § 674.406(6).

Second Affirmative Defense

Counts I and II of the Fourth Amended Complaint, to the extent that they seek the recovery of any instrument or item as defined under Florida Statute §§ 673.1021 and 674.104 respectively, have been waived by Plaintiffs' failure to comply with the conditions precedent to suit set forth in Florida Statute § 674.406(6). Section 674.406 imposes a duty upon a bank customer to review all account statements and to notify the bank of any unauthorized signature within 180 days of the customer's account statements having been made available. *Gerber*, 619 So. 2d at 329. "The customer's failure to timely discover and report the forgeries, bars his claim as a matter of law." *Lowenstein*, 720 So. 2d at 597.

Each of Plaintiffs' account statements were made available to them through various means, including availability through Pro Sports, availability through BankAtlantic, receipt of

account statements through requests by counsel, and/or personal receipt of their monthly statements. Plaintiffs had a statutory duty to review their statements and report any allegedly unauthorized transaction within 180 days. Plaintiffs, however, failed to comply with their statutory duty to timely report any allegedly unauthorized transaction. As such, Plaintiffs' claims have been waived as a matter of law under Florida Statute § 674.406(6).

Third Affirmative Defense

Counts I and II of the Fourth Amended Complaint, to the extent that they seek the recovery of any instrument or item as defined under Florida Statute §§ 673.1021 and 674.104 respectively, are barred by Plaintiffs' failure to comply with the conditions precedent to suit set forth in Florida Statute § 674.406(3), (4)(b). Section 674.406 imposes a duty upon a bank customer to review all account statements and to notify the bank of any unauthorized signature repeated by the same wrongdoer within 30 days of the customer's account statements having been made available.

Each of Plaintiffs' account statements were made available to them through various means, including availability through Pro Sports, availability through BankAtlantic, receipt of account statements through requests by counsel, and/or personal receipt of their monthly statements. Plaintiffs had a statutory duty to review their statements and report any allegedly unauthorized signature repeated by the same wrongdoer within 30 days of Plaintiffs' account statements having been made available. Plaintiffs, however, failed to comply with their statutory duty to timely report any allegedly unauthorized transaction. As such, Plaintiffs' claims are barred as a matter of law under Florida Statute § 674.406(4).

Fourth Affirmative Defense

Counts I and II of the Fourth Amended Complaint, to the extent that they seek the recovery of any instrument or item as defined under Florida Statute §§ 673.1021 and 674.104 respectively, are waived due to Plaintiffs' failure to comply with the conditions precedent to suit set forth in Florida Statute § 674.406(3), (4)(b). Section 674.406 imposes a duty upon a bank customer to review all account statements and to notify the bank of any unauthorized signature repeated by the same wrongdoer within 30 days of the customer's account statements having been made available.

Each of Plaintiffs' account statements were made available to them through various means, including availability through Pro Sports, availability through BankAtlantic, receipt of account statements through requests by counsel, and/or personal receipt of their monthly statements. Plaintiffs had a statutory duty to review their statements and report any allegedly unauthorized signature repeated by the same wrongdoer within 30 days of Plaintiffs' account statements having been made available. Plaintiffs, however, failed to comply with their statutory duty to timely report any allegedly unauthorized transaction. As such, Plaintiffs' claims have been waived as a matter of law under Florida Statute § 674.406(4).

Fifth Affirmative Defense

All Counts of the Fourth Amended Complaint, to the extent that they seek the recovery of funds transfers or wire transfers as defined under Florida Statute § 670.102, are barred by Plaintiffs' failure to notify BankAtlantic of the allegedly unauthorized transaction within the statute of repose set forth in Florida Statute § 670.505. Section 670.505 imposes a duty upon a bank customer to notify the bank of any unauthorized wire transfer within one (1) year after the customer receives notification reasonably identifying the transfer. "This section is in the nature

of a statute of repose for objecting to debits made to the customer's account.” Fla. Stat. § 670.505 cmt.

Plaintiffs received actual notice of any allegedly unauthorized wire or funds transfer through various means, including but not limited to, delivery of account statements to Pro Sports, delivery of account statements directly to Plaintiffs, delivery of account statements to counsel for Plaintiffs, and independent investigation of their financial affairs unrelated to their account statements. Plaintiffs were under a statutory duty to report any allegedly unauthorized wire transfer within 1 year of receiving notice of such transfer. Plaintiffs, however, failed to timely notify BankAtlantic of the allegedly unauthorized wire transfers within one year after receiving notice of the disputed wire transfers. As such, Plaintiffs’ claims are barred as a matter of law under Florida Statute § 670.505.

Sixth Affirmative Defense

All Counts of the Fourth Amended Complaint, to the extent that they seek the recovery of funds transfers or wire transfers as defined under Florida Statute § 670.102, have been waived by Plaintiffs’ failure to notify BankAtlantic of the allegedly unauthorized transaction within the statute of repose set forth in Florida Statute § 670.505. Section 670.505 imposes a duty upon a bank customer to notify the bank of any unauthorized wire transfer within one (1) year after the customer receives notification reasonably identifying the transfer. “This section is in the nature of a statute of repose for objecting to debits made to the customer's account.” Fla. Stat. § 670.505 cmt.

Plaintiffs received actual notice of any allegedly unauthorized transfers through various means, including but not limited to, delivery of account statements to Pro Sports, delivery of account statements directly to Plaintiffs, delivery of account statements to counsel for Plaintiffs, and independent investigation of their financial affairs unrelated to their account statements. Plaintiffs were under a statutory duty to report any allegedly unauthorized wire transfer within 1 year of receiving notice of such transfer. Plaintiffs, however, failed to timely notify BankAtlantic of the allegedly unauthorized wire transfers within one year after receiving notice of the disputed wire transfers. As such, Plaintiffs' claims have been waived as a matter of law under Florida Statute § 670.505.

Seventh Affirmative Defense

All Counts of the Fourth Amended Complaint are barred by the doctrine of actual agency. The existence of an actual agency relationship is established when: (1) the principal acknowledges that the agent will act for him; (2) the agent accepts the undertaking; and (3) the principal exercises control over the actions of the agent. *Goldschmidt v. Holman*, 571 So. 2d 422, 424 (Fla. 1990). "A principal is responsible for the acts of his agent." *Benson v. Seestrom*, 409 So. 2d 172, 173 (Fla. 2d DCA 1982); *Miccosukee Tribe of Indians of Fla. v. Cypress*, 12-CV-22439, 2013 WL 2158422 (S.D. Fla. May 17, 2013) (actual authority of agent binds principal). In this matter, Plaintiffs granted actual authority to Pro Sports and its employees to transfer funds into and out of their accounts held with BankAtlantic. Accordingly, each of the transactions of which Plaintiffs now complain were made by their agent acting within the course and scope of his or her authority. Thus, each transaction identified by Plaintiffs was authorized, and Plaintiffs are barred from recovery as a result.

Eighth Affirmative Defense

All Counts of the Fourth Amended Complaint have been waived under the doctrine of actual agency. The existence of an actual agency relationship is established when: (1) the principal acknowledges that the agent will act for him; (2) the agent accepts the undertaking; and (3) the principal exercises control over the actions of the agent. *Goldschmidt*, 571 So. 2d at 424. “A principal is responsible for the acts of his agent.” *Benson*, 409 So. 2d at 173; *Miccosukee Tribe of Indians of Fla.*, 2013 WL 2158422 (actual authority of agent binds principal). In this matter, Plaintiffs granted actual authority to Pro Sports and its employees to transfer funds into and out of their accounts held with BankAtlantic. Accordingly, each of the transactions of which Plaintiffs now complain was made by their agent acting within the course and scope of his or her authority. Thus, each transaction identified by Plaintiffs was authorized, and Plaintiffs have waived any right to a recovery as a result.

Ninth Affirmative Defense

All Counts of the Fourth Amended Complaint are barred by the doctrine of apparent agency. Apparent agency exists when: (1) the principal makes a representation as to the authority of an agent; (2) a third party relies on that representation; and (3) the third party changes its position in reliance on the principal’s representation. *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 121 (Fla. 1995). Apparent authority may arise by express representations or by silence. *Borg-Warner Leasing v. Doyle Elec. Co., Inc.*, 733 F.2d 833, 836 (11th Cir. 1984).

Plaintiffs made representations to BankAtlantic that Pro Sports and its employees had the authority to conduct transactions into and out of their accounts held at BankAtlantic. Moreover, BankAtlantic changed its position in reliance upon such representations by allowing Plaintiffs’ accounts to be opened and transactions to occur as a result of Plaintiffs’ representations. Accordingly, all transactions that Plaintiffs allege to be improper were made by Pro Sports and

its employees with the apparent authority to conduct those transactions. As such, all transactions made by Pro Sports and its employees were authorized under the doctrine of apparent agency, and Plaintiffs are barred from recovery as a result.

Tenth Affirmative Defense

All Counts of the Fourth Amended Complaint have been waived by the doctrine of apparent agency. Apparent agency exists when: (1) the principal makes a representation as to the authority of an agent; (2) a third party relies on that representation; and (3) the third party changes its position in reliance on the principal's representation. *Mobil Oil Corp.*, 648 So. 2d at 121. Apparent authority may arise by express representations or by silence. *Borg-Warner Leasing*, 733 F.2d at 836.

Plaintiffs made representations to BankAtlantic that Pro Sports and its employees had the authority to conduct transactions into and out of their accounts held at BankAtlantic. Moreover, BankAtlantic changed its position in reliance upon such representations by allowing Plaintiffs' accounts to be opened and transactions to occur as a result of Plaintiffs' representations. Accordingly, all transactions that Plaintiffs allege to be improper were made by Pro Sports and its employees with the apparent authority to conduct those transactions. As such, all transactions made by Pro Sports and its employees were authorized under the doctrine of apparent agency, and Plaintiffs have waived any recovery as a result.

Eleventh Affirmative Defense

All Counts of the Fourth Amended Complaint are barred by the doctrine of sub-agency. Under agency law, one who is appointed by an agent to perform the agent's functions, under the agent's control, is a "subagent." *Tianellos*, 860 F. Supp. at 1521 (citing Restatement (Second) of Agency § 5). Plaintiffs granted both actual and apparent authority to Pro Sports to make

transfers into and out of their accounts held at BankAtlantic. All of Pro Sports' employees acted as the subagents of Pro Sports within the scope of their authority in conducting any transactions. Consequently, all actions taken by employees of Pro Sports were authorized under the doctrine of sub-agency, and Plaintiffs are barred from recovery as a result.

Twelfth Affirmative Defense

All Counts of the Fourth Amended Complaint have been waived by the doctrine of sub-agency. Under agency law, one who is appointed by an agent to perform the agent's functions, under the agent's control, is a "subagent." *Tianellos*, 860 F. Supp. at 1521 (citing Restatement (Second) of Agency § 5). Plaintiffs granted both actual and apparent authority to Pro Sports to make transfers into and out of their accounts held at BankAtlantic. All of Pro Sports' employees acted as the subagents of Pro Sports within the scope of their authority in conducting any transactions. Consequently, all actions taken by employees of Pro Sports were authorized under the doctrine of sub-agency, and Plaintiffs have waived any recovery as a result.

Thirteenth Affirmative Defense

Counts I and II of the Fourth Amended Complaint, to the extent that they seek the recovery of any instrument as defined under Florida Statute § 673.1021, are barred by Florida Statute § 673.4061, which provides that a customer is estopped from recovering under an altered or forged instrument if that customer's own negligence substantially contributed to the alteration or forgery. Fla. Stat. § 673.4061 cmt. 1. In this matter, Plaintiffs negligently failed to monitor their accounts, the transactions into and out of those accounts, and the actions of their agent, Pro Sports. Moreover, Plaintiffs negligently granted full access to each and every aspect of their financial affairs to Pro Sports. Plaintiffs' failure to monitor or exercise any control over their

accounts held at BankAtlantic, or their financial affairs in general, substantially contributed to any alleged alteration or forgery. Therefore, Plaintiffs are estopped from asserting alteration or forgery of any instrument and are precluded from recovery.

Fourteenth Affirmative Defense

Counts I and II of the Fourth Amended Complaint, to the extent that they seek the recovery of any instrument as defined under Florida Statute § 673.1021, have been waived under Florida Statute § 673.4061, which provides that a customer is estopped from recovering under an altered or forged instrument if that customer's own negligence substantially contributed to the alteration or forgery. Fla. Stat. § 673.4061 cmt. 1. In this matter, Plaintiffs negligently failed to monitor their accounts, the transactions into and out of those accounts, and the actions of their agent, Pro Sports. Moreover, Plaintiffs negligently granted full access to each and every aspect of their financial affairs to Pro Sports. Plaintiffs' failure to monitor or exercise any control over their accounts held at BankAtlantic, or their financial affairs in general, substantially contributed to any alleged alteration or forgery. Therefore, Plaintiffs have waived the right to assert the alteration or forgery of any instrument and are precluded from recovery.

Fifteenth Affirmative Defense

Counts I and II of the Fourth Amended Complaint, to the extent that they seek the recovery of any instrument as defined under Florida Statute § 673.1021, are barred by the doctrine of ratification as codified in Florida Statute § 673.4031. Section 673.4031(1) states that "[a]n unauthorized signature may be ratified for all purposes of this chapter." Under the Uniform Commercial Code ("U.C.C."), ratification may occur by express statement or conduct, retention of benefits, or negligence in failing to discover or disavow the signature. *European Am. Bank & Trust Co. v. Starcrete Int'l Ind., Inc.*, 613 F.2d 564, 566 (5th Cir. 1980) (applying

Florida law). Plaintiffs ratified all transactions into and out of their accounts held at BankAtlantic: (1) by representing to BankAtlantic that Pro Sports and its employees were authorized to conduct transactions on their behalf; (2) by their conduct in retaining the benefit of all transfers; and (3) through negligently failing to discover any allegedly unauthorized transfer. Because Plaintiffs ratified all transactions, Plaintiffs are barred from recovery.

Sixteenth Affirmative Defense

Counts I and II of the Fourth Amended Complaint, to the extent that they seek the recovery of any instrument as defined under Florida Statute § 673.1021, have been waived by the doctrine of ratification as codified in Florida Statute § 673.4031. Section 673.4031(1) states that “[a]n unauthorized signature may be ratified for all purposes of this chapter.” Under the U.C.C., ratification may occur by express statement or conduct, retention of benefits, or negligence in failing to discover or disavow the signature. *European Am. Bank & Trust Co.*, 613 F.2d at 566 (applying Florida law). Plaintiffs ratified all transactions into and out of their accounts maintained at BankAtlantic: (1) by representing to BankAtlantic that Pro Sports and its employees were authorized to conduct transactions on their behalf; (2) by their conduct in retaining the benefit of all transfers; and (3) through negligently failing to discover any allegedly unauthorized transfer. Because Plaintiffs ratified all transactions, Plaintiffs have waived any recovery.

Seventeenth Affirmative Defense

All Counts of the Fourth Amended Complaint are barred by the doctrine of ratification under Florida common law. “Ratification, as applied to the law of agency, is the adoption or affirmance by a principal of the acts of his agent, either expressly, as by a written act, or impliedly, as by acceptance of the benefits of the contract.” *Spurrier v. United Bank*, 359 So. 2d

908, 910 (Fla. 1st DCA 1978); *see also Smith v. Loftis*, 150 So. 645, 646–47 (Fla. 1933). Plaintiffs ratified all transactions into and out of their accounts held at BankAtlantic: (1) by representing to BankAtlantic that Pro Sports and its employees were authorized to conduct transactions on their behalf; (2) by their conduct in retaining the benefit of all transfers; and (3) through negligently failing to discover any allegedly unauthorized transfer. Because Plaintiffs ratified all transactions, Plaintiffs are barred from recovery.

Eighteenth Affirmative Defense

All Counts of the Fourth Amended Complaint have been waived under the doctrine of ratification under Florida common law. “Ratification, as applied to the law of agency, is the adoption or affirmance by a principal of the acts of his agent, either expressly, as by a written act, or impliedly, as by acceptance of the benefits of the contract.” *Spurrier*, 359 So. 2d at 910; *see also Smith*, 150 So. at 646–47. Plaintiffs ratified all transactions into and out of their accounts held at BankAtlantic: (1) by representing to BankAtlantic that Pro Sports and its employees were authorized to conduct transactions on their behalf; (2) by their conduct in retaining the benefit of all transfers; and (3) through negligently failing to discover any allegedly unauthorized transfer. Because Plaintiffs ratified all transactions, Plaintiffs have waived any recovery.

Nineteenth Affirmative Defense

All Counts of the Fourth Amended Complaint, to the extent that they seek the recovery of funds transfers or wire transfers as defined under Florida Statute § 670.102, are barred by actual authority under Florida Statute § 670.202(1). Section 670.202(1) states that “a payment order received by the receiving bank is the authorized order of the person identified as the sender if that person authorized the order or is otherwise bound by it under the law of agency.” Plaintiffs

expressly authorized their agents, Pro Sports and its employees, to conduct transfers of funds into and out of their accounts maintained with BankAtlantic. Accordingly, under § 670.202(1), all funds transfers were “authorized orders” for which Plaintiffs cannot maintain an action.

Twentieth Affirmative Defense

All Counts of the Fourth Amended Complaint, to the extent that they seek the recovery of funds transfers or wire transfers as defined under Florida Statute § 670.102, have been waived by actual authority under Florida Statute § 670.202(1). Section 670.202(1) states that “a payment order received by the receiving bank is the authorized order of the person identified as the sender if that person authorized the order or is otherwise bound by it under the law of agency.” Plaintiffs expressly authorized their agents, Pro Sports and its employees, to conduct transfers of funds into and out of their accounts maintained with BankAtlantic. Accordingly, under § 670.202(1), all funds transfers were “authorized orders” for which Plaintiffs cannot maintain an action.

Twenty-First Affirmative Defense

All Counts of the Fourth Amended Complaint are barred by the common-law doctrine of estoppel. “The elements of equitable estoppel are ‘(1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.’” *Bueno v. Workman*, 20 So. 3d 993, 997 (Fla. 4th DCA 2009). In this matter, Plaintiffs represented to BankAtlantic that Pro Sports and its employees had authorization to conduct transactions into and out of their BankAtlantic accounts. BankAtlantic changed its position in detrimental reliance on Plaintiffs’ representations by allowing Pro Sports to conduct transactions on Plaintiffs’ accounts and transfer funds for Plaintiffs’ benefit. Accordingly,

Plaintiffs are estopped from claiming that transactions conducted by Pro Sports and its employees were unauthorized.

Twenty-Second Affirmative Defense

All Counts of the Fourth Amended Complaint have been waived under the common-law doctrine of estoppel. “The elements of equitable estoppel are ‘(1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.’” *Bueno*, 20 So. 3d at 997. In this matter, Plaintiffs represented to BankAtlantic that Pro Sports and its employees had authorization to conduct transactions into and out of their BankAtlantic accounts. BankAtlantic changed its position in detrimental reliance on Plaintiffs’ representations by allowing Pro Sports to conduct transactions on Plaintiffs’ accounts and transfer funds for Plaintiffs’ benefit. Accordingly, Plaintiffs are estopped from claiming that transactions conducted by Pro Sports and its employees were unauthorized.

Twenty-Third Affirmative Defense

Plaintiffs have already received a satisfaction of certain amounts sought in the Fourth Amended Complaint, and BankAtlantic is entitled to set-off certain amounts already recovered by Plaintiffs from other parties to reduce and eliminate any sums sought from BankAtlantic. Specifically, Plaintiffs have received confidential settlements from a number of parties the amount of which set-off Plaintiffs’ claims in this case. Such settlement agreements are confidential and will be filed under seal with the Court at the appropriate time. Plaintiffs, however, are only entitled to a single recovery for their alleged damages under Florida law and are precluded from BankAtlantic the amounts already received from third parties.

Twenty-Fourth Affirmative Defense

All Counts of the Fourth Amended Complaint are barred by the doctrine of election of remedies. “The election of remedies doctrine is an application of the doctrine of estoppel and operates on the theory that a party electing one course of action should not later be allowed to avail himself of an incompatible course.” *Plumbing Serv. Co. v. Progressive Plumbing, Inc.*, 46 So. 3d 144, 145 (Fla. 5th DCA 2010). “The purpose of the doctrine is to prevent a double recovery for the same wrong.” *Id.*

Plaintiffs have already sought recovery of the same transfers and investments identified in this matter from other parties, and in doing so, proceeded on the theory that the transfers made to invest Plaintiffs’ funds were authorized but ill-advised. Only now, after concluding their dispute with those third parties, have Plaintiffs reversed course and taken the opposite position that the transfers that funded their investments were unauthorized. Plaintiffs, however, having already elected to proceed under the theory that their investments were authorized in a prior dispute, are barred as a matter of law from asserting that the investments were unauthorized before this Court. Accordingly, Plaintiffs claims are barred under the doctrine of election of remedies.

Twenty-Fifth Affirmative Defense

All Counts of the Fourth Amended Complaint have been waived under the doctrine of election of remedies. “The election of remedies doctrine is an application of the doctrine of estoppel and operates on the theory that a party electing one course of action should not later be allowed to avail himself of an incompatible course.” *Plumbing Serv. Co.*, 46 So. 3d at 145. “The purpose of the doctrine is to prevent a double recovery for the same wrong.” *Id.*

Plaintiffs have already sought recovery of the same transfers and investments identified in this matter from other parties, and in doing so, proceeded on the theory that the transfers made to invest Plaintiffs' funds were authorized but ill-advised. Only now, after concluding their dispute with those third parties, have Plaintiffs reversed course and taken the opposite position that the transfers that funded their investments were unauthorized. Plaintiffs, however, having already elected to proceed under the theory that their investments were authorized in a prior dispute, have waived the right to assert that the investments were unauthorized before this Court. Accordingly, Plaintiffs claims are barred under the doctrine of election of remedies.

Twenty-Sixth Affirmative Defense

BankAtlantic maintains that each and every transaction identified by Plaintiffs was either specifically authorized by Plaintiffs and/or initiated by a person authorized to make transfers on Plaintiffs' behalf, which BankAtlantic was under no duty to monitor. However, to the extent that any account or transaction might be found to be improper, Plaintiffs are precluded from recovery from BankAtlantic to the extent any alleged loss caused to Plaintiffs was the result of the intervening and superseding tortious actions of parties other than BankAtlantic. "One who establishes a remote condition which furnishes only the occasion for another's [intervening] negligence is not deemed to be a proximate cause of the resulting accident unless the intervening cause was foreseeable." *Deese v. McKinnonville Hunting Club, Inc.*, 874 So. 2d 1282, 1288 (Fla. 1st DCA 2004). A defendant "is not liable for damages suffered by an injured party 'when some separate force or action is the active and efficient intervening cause' of the injury." *Lindsey v. Bell S. Telecomm., Inc.*, 943 So. 2d 963, 965 (Fla. 4th DCA 2006).

In this matter, BankAtlantic was not the proximate cause of Plaintiffs' alleged loss. If any transaction was unauthorized or improper, which BankAtlantic denies, such loss was caused

solely by the actions of intervening and superseding tortfeasors. To the extent that any tort is found to have been committed, the potential intervening tortfeasors include, but are not limited to Pro Sports and those engaged in the operation of that enterprise, various investment and financial enterprises engaged in handling the purportedly unauthorized transactions, and professional advisors employed by Plaintiffs in making any investment in the Country Crossing project, including those identified in confidential documents filed with the Court under seal. Because BankAtlantic was not the proximate cause of Plaintiffs' alleged loss, Plaintiffs are precluded from recovery against BankAtlantic.

B. Defenses Applicable to Group A Plaintiffs Only

Twenty-Seventh Affirmative Defense

Plaintiffs' claims for relief under the common law in Count I are displaced by the Florida legislature's enactment of Articles 4 and 4A of the U.C.C. in Florida Statutes Chapters 674 and 670, respectively. Numerous cases have upheld the U.C.C.'s displacement of common law negligence claims based upon unauthorized wire transfers and negotiable instruments. *See, e.g., AmSouth Bank v. Tice*, 923 So. 2d 1060, 1068 (Ala. 2005) (common law claims displaced as inconsistent and duplicative of U.C.C. remedies); *Corfan Banco Asuncion Paraguay v. Ocean Bank*, 715 So. 2d 967, 971 (Fla. 3d DCA 1998) (negligence preempted as imposing duties inconstant with U.C.C.); *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1275 (11th Cir. 2003) (noting that the U.C.C. remedies "are not to be side-stepped when convenient by reference to other sources of law."); *Crawford v. JP Morgan Chase Bank NA*, No. 08-cv-12634, 2009 WL 1913415 (E.D. Mich. June 30, 2009). Thus, negligence actions which seek to impose rights, duties, or liabilities inconsistent with the U.C.C. are displaced. *See Weiner v. Am. Petrofina Mktg., Inc.*, 482 So. 2d 1362, 1364 (Fla. 1986) ("Although general principles of law and equity

are applicable to supplement the provisions of the code, they will not prevail when in conflict with code provisions.”); *Regions Bank v. Kaplan*, 8:12-CV-1837-T-17MAP, 2013 WL 1193831 (M.D. Fla. Mar. 22, 2013) (discussing U.C.C. displacement).

Plaintiffs have asserted a common law claim for negligence that is inconsistent with the rights, liabilities, duties, remedies, and defenses set forth in Articles 4 and 4A for allegedly unauthorized wire transfers. Specifically, Plaintiffs seek to recover allegedly unauthorized items despite their failure to notify BankAtlantic of such transfers within 180 days of receiving account statements reflecting the debits from their accounts. Similarly, Plaintiffs seek to recover allegedly unauthorized wire transfers despite their failure to notify BankAtlantic of such wire transfers within one year of receiving notice identifying the transaction. Such a recovery, however, would be inconsistent with the Florida Statutes §§ 674.406 and 670.505, which specifically prohibit recovery in these specified circumstances.

Additionally, the imposition of a common-law negligence duty of care with respect to these transactions would impose requirements and obligations inconsistent with the statutory scheme related to items and wire transfers in Chapters 674 and 670, which impose a strict liability scheme upon a bank for honoring an unauthorized item or wire transfer payment order. Therefore, Plaintiffs’ common-law claims are displaced by the U.C.C. under Florida law.

Twenty-Eighth Affirmative Defense

Counts I and III of Plaintiffs’ Fourth Amended Complaint, to the extent that they are premised upon the opening of Plaintiffs’ BankAtlantic accounts in October 2006, is barred by the applicable four-year statute of limitations. Under Florida law, both a cause of action for Negligence and a cause of action founded on statutory liability carry a four-year statute of limitations. See Fla. Stat. § 95.11(3)(a)(f); *Lopez-Loarca v. Cosme*, 76 So. 3d 5, 9 (Fla. 4th DCA

2011); *Hullinger v. Ryder Truck Rental, Inc.*, 548 So. 2d 231, 232 (Fla. 1989). Furthermore, the delayed discovery doctrine is inapplicable to a cause of action for Negligence or statutory liabilities. *Raie v. Cheminova, Inc.*, 336 F.3d 1278, 1281 (11th Cir. 2003); *Krawchenko v. Raymond James Fin. Servs., Inc.*, 2:11-CV-409-FTM-29, 2013 WL 489088 (M.D. Fla. Feb. 8, 2013).

Each Group A Plaintiffs' alleged damages arise from an account that was opened on October 16 or 17, 2006. As such, the applicable four-year statute of limitations on all negligence causes of action related to the opening of these accounts expired, at the latest, on October 16 or 17, 2010. However, Plaintiffs did not file the instant lawsuit against BB&T until October 31, 2013, which is over seven years after the accrual of any cause of action for negligent account opening and over three years past the expiration of the statute of limitations. Accordingly, Plaintiffs have waived any right to recovery under Count I of the Fourth Amended Complaint to the extent that Plaintiffs' Negligence claim seeks recovery for the allegedly negligent account opening of their October 2006 accounts. Such claims have already been dismissed by the Court. [ECF No. 85, at p. 7, 9].

Twenty-Ninth Affirmative Defense

Counts I and III of Plaintiffs' Fourth Amended Complaint, to the extent that they are premised upon the alleged opening of Plaintiffs' BankAtlantic accounts, is waived under the applicable four-year statute of limitations. Under Florida law, both a cause of action for Negligence and a cause of action founded on statutory liability carry a four-year statute of limitations. See Fla. Stat. § 95.11(3)(a)(f); *Lopez-Loarcae*, 76 So. 3d at 9; *Hullinger*, 548 So. 2d at 232. Furthermore, the delayed discovery doctrine is inapplicable to a cause of action for Negligence or statutory liabilities. *Raie*, 336 F.3d at 1281; *Krawchenko*, 2013 WL 489088.

Each Group A Plaintiffs' alleged damages arise from an account that was opened on October 16 or 17, 2006. As such, the applicable four-year statute of limitations on all negligence causes of action related to the opening of these accounts expired, at the latest, on October 16 or 17, 2010. However, Plaintiffs did not file the instant lawsuit against BB&T until October 31, 2013, which is over seven years after the accrual of any cause of action for negligent account opening and over three years past the expiration of the statute of limitations. Accordingly, Plaintiffs have waived any right to recovery under Count I of the Fourth Amended Complaint to the extent that Plaintiffs' Negligence claim seeks recovery for the allegedly negligent account opening of their October 2006 accounts. Such claims have already been dismissed by the Court. [ECF No. 85, at p. 7, 9].

Thirtieth Affirmative Defense

Counts I and III of Plaintiffs' Fourth Amended Complaint, to the extent that they seeks recovery of individual transactions that occurred more than four years before the statute of limitations expired, is barred by the applicable four-year statute of limitations. Under Florida law, both a cause of action for Negligence and a cause of action founded on statutory liability carry a four-year statute of limitations. *See* Fla. Stat. § 95.11(3)(a)(f); *Lopez-Loarca*, 76 So. 3d at 9; *Hullinger*, 548 So. 2d at 232. Furthermore, the delayed discovery doctrine is inapplicable to a cause of action for Negligence or statutory liabilities. *Raie*, 336 F.3d at 1281; *Krawchenko*, 2013 WL 489088. Plaintiffs have identified transactions from their October 2006 accounts that they claim were conducted without their authorization. To the extent that Plaintiffs seek the

recovery of transactions occurring more than four years outside the applicable statute of limitations, Plaintiffs are barred as a matter of law from asserting these claims.

Thirty-First Affirmative Defense

Counts I and III of Plaintiffs' Fourth Amended Complaint, to the extent that it seeks recovery of individual transactions that occurred more than four years before the statute of limitations expired, has been waived under the applicable four-year statute of limitations. Under Florida law, both a cause of action for Negligence and a cause of action founded on statutory liability carry a four-year statute of limitations. *See* Fla. Stat. § 95.11(3)(a)(f); *Lopez-Loarca*, 76 So. 3d at 9; *Hullinger*, 548 So. 2d at 232. Furthermore, the delayed discovery doctrine is inapplicable to a cause of action for Negligence or statutory liabilities. *Raie*, 336 F.3d at 1281; *Krawchenko*, 2013 WL 489088. Plaintiffs have identified transactions from their October 2006 accounts that they claim were conducted without their authorization. To the extent that Plaintiffs seek the recovery of transactions occurring more than four years outside the applicable statute of limitations, Plaintiffs have waived their right to assert these claims.

Thirty-Second Affirmative Defense

To the extent that any negligence may be found on the part of BankAtlantic, Count I of the Fourth Amended Complaint is subject to the doctrine of comparative fault under Florida common law. Plaintiffs were negligent in their actions, including but not limited to, granting Pro Sports and its employees unfettered access to their financial information, relying upon Pro Sports and its employees to manage their accounts, failing to timely check their account statements as the statements were made available to them, and disclosing sensitive financial information to Pro Sports. The value Plaintiffs' claims, if any, must be reduced by the portion of fault attributable to Plaintiffs' own actions and inactions.

Thirty-Third Affirmative Defense

BankAtlantic maintains that each and every transaction identified by Plaintiffs was either specifically authorized by Plaintiffs and/or initiated by a person authorized to make transfers on Plaintiffs' behalf, which BankAtlantic was under no duty to monitor. However, to the extent that any account or transaction might be found to be improper or negligent, Plaintiff's recovery—if any—must be reduced by the amount of fault attributable to non-parties as set forth in *Fabre v. Martin*, 623 So. 2d 1182 (Fla. 1993). Any alleged loss due to the opening of a BankAtlantic account or allegedly unauthorized transactions may be attributable, in whole or in part, to the actions of potential third parties including, but not limited to, Pro Sports and those engaged in the operation of that enterprise, various investment and financial enterprises engaged in handling the purportedly unauthorized transactions, and professional advisors employed by Plaintiffs in making any investment in the Country Crossing project, including those identified in confidential documents that may be filed with the Court under seal. To the extent each of these entities is found responsible for the some or all of the alleged loss sustained by Plaintiffs, fault should be allocated to these individuals or entities in accordance with the portion of fault attributable to each. Moreover, because BankAtlantic is without fault in this matter, the total loss allegedly sustained by Plaintiffs should be attributed exclusively to these entities.

Thirty-Fourth Affirmative Defense

Each Plaintiff admits to holding a valid and authorized deposit account at BankAtlantic prior to the opening of any account in October 2006. Plaintiffs further admit that the October 2006 accounts opened at BankAtlantic were funded through the transfer of all funds from their previous accounts into the October 2006 accounts. Under the terms of the Personal Account Depositor's Agreement & Disclosure Statement (the "Depositor's Agreement") in effect at the

time of the transfer, and under Florida Statutes §§ 674.406 and 670.505, Plaintiffs were both contractually and statutorily obligated to discover and report any allegedly unauthorized transfer of their funds, including any transfer used to fund the October 2006 accounts. Plaintiffs, however, failed to report any such transfer as required by the Depositor's Agreement or Florida Statutes §§ 674.406 and 670.505. Plaintiffs are therefore precluded as a matter of law from asserting that such transfers were unauthorized.

Thirty-Fifth Affirmative Defense

BankAtlantic specifically denies that Plaintiffs were harmed by the opening of any account in October 2006. To the extent that any such harm is found to have occurred, however, Plaintiffs' damages were fixed in total at the time that the initial transfers were made from Plaintiffs' prior accounts to fund the October 2006 accounts. Any subsequent transfer of Plaintiffs' funds after they had been allegedly removed from Plaintiffs' prior deposit account constitutes a mere "recycling" of the funds, and Plaintiffs were not damaged by the subsequent transfers. *Zublin Chile Ingenieria Y Construcciones LTDA v. Total Bank*, 2014 WL 3747138 (Fla. 11th Cir. Ct. 2014). Accordingly, Plaintiffs are not entitled to recover such transfers.

C. Defenses Applicable to Group B Plaintiffs Only

Thirty-Sixth Affirmative Defense

Counts II and IV of the Fourth Amended Complaint, to the extent that Plaintiffs seek recovery of any allegedly improper or unauthorized negotiable instrument or item, are barred by Plaintiffs' failure to comply with the conditions precedent to suit set forth in the Depositor's Agreement. The terms of the Depositor's Agreement impose a duty upon a bank customer to review all account statements and to notify the bank of any unauthorized signature within thirty (30) days of the customer's account statements have been made available.

Each of Plaintiffs' account statements were made available to them through various means, including availability through Pro Sports, availability through BankAtlantic, receipt of account statements through requests by counsel, and/or personal receipt of their monthly statements. Plaintiffs were under a contractual duty to review their statements and report any allegedly unauthorized transactions within 30 days. Plaintiffs, however, failed to comply with their statutory duty to timely report allegedly unauthorized transactions. As such, Plaintiffs' claims are barred as a matter of law under the Depositor's Agreement.

Thirty-Seventh Affirmative Defense

Counts II and IV of the Fourth Amended Complaint, to the extent that Plaintiffs seek recovery of allegedly improper or unauthorized negotiable instruments or items, have been waived by Plaintiffs' failure to comply with the conditions precedent to suit set forth in the Depositor's Agreement. The terms of the Depositor's Agreement impose a duty upon a bank customer to review all account statements and to notify the bank of any unauthorized signature within thirty (30) days of the customer's account statements have been made available.

Each of Plaintiffs' account statements were made available to them through various means, including availability through Pro Sports, availability through BankAtlantic, receipt of account statements through requests by counsel, and/or personal receipt of their monthly statements. Plaintiffs were under a contractual duty to review their statements and report any allegedly unauthorized transactions within 30 days. Plaintiffs, however, failed to comply with their statutory duty to timely report allegedly unauthorized transactions. As such, Plaintiffs' claims have been waived as a matter of law under the Depositor's Agreement.

Thirty-Eighth Affirmative Defense

Counts II and IV of the Fourth Amended Complaint, to the extent that they seek the recovery of funds transfers or wire transfers as defined under Florida Statute § 670.102, are barred by Plaintiffs' failure to comply with the conditions precedent to suit set forth in the Depositor's Agreement. The terms of the Depositor's Agreement impose a duty upon a bank customer to review all account statements and to notify the bank of any unauthorized wire transfer within one year of the customer's account statements have been made available.

Plaintiffs received actual notice of any allegedly unauthorized transfers through various means, including but not limited to, delivery of account statements to Pro Sports, delivery of account statements directly to Plaintiffs, delivery of account statements to counsel for Plaintiffs, and independent investigation of their financial affairs unrelated to their account statements. The Depositor's Agreement obligated Plaintiffs to report any allegedly unauthorized wire transfer within 1 year of receiving notice of such transfer. Plaintiffs, however, failed to comply with their contractual duty to timely report allegedly unauthorized wire transfers. As such, Plaintiffs' claims are barred as a matter of law under the Depositor's Agreement.

Thirty-Ninth Affirmative Defense

Counts II and IV of the Fourth Amended Complaint, to the extent that they seek the recovery of funds transfers or wire transfers as defined under Florida Statute § 670.102, have been waived by Plaintiffs' failure to comply with the conditions precedent to suit set forth in the Depositor's Agreement. The terms of the Depositor's Agreement impose a duty upon a bank customer to review all account statements and to notify the bank of any unauthorized wire transfer within one year of the customer's account statements have been made available.

Plaintiffs received actual notice of any allegedly unauthorized transfers through various means, including but not limited to, delivery of account statements to Pro Sports, delivery of

account statements directly to Plaintiffs, delivery of account statements to counsel for Plaintiffs, and independent investigation of their financial affairs unrelated to their account statements. The Depositor's Agreement obligated Plaintiffs to report any allegedly unauthorized wire transfer within one year of receiving notice of such transfer. Plaintiffs, however, failed to comply with their contractual duty to timely report allegedly unauthorized wire transfers. As such, Plaintiffs' claims are barred as a matter of law under the Depositor's Agreement.

Fortieth Affirmative Defense

Counts II and IV the Fourth Amended Complaint are barred by the Depositor's Agreement provisions related to "Agent and Fiduciary Accounts." Under the terms of the Depositor's Agreement, Plaintiffs authorized BankAtlantic to "follow the directions of the Agent regarding the Account." Moreover, "Agent" is defined as "[a]ny individual acting as an agent, guardian, personal representative, trustee, custodian, representative payee, or in some other fiduciary capacity." The Depositor's Agreement also specifically states that "[w]e are not liable for the misapplication of funds from your Account by the Agent." All Plaintiffs' claims in the Fourth Amended Complaint are based on Plaintiffs' allegation that their agents, Pro Sports and its employees, conducted unauthorized transfers. However, under the terms of the Depositor's Agreement, Plaintiffs released BankAtlantic from any liability related to such transactions. Therefore, Plaintiffs' claims are barred as a matter of law.

Fortieth-First Affirmative Defense

Counts II and IV the Fourth Amended Complaint have been waived in the Depositor's Agreement provisions related to "Agent and Fiduciary Accounts." Under the terms of the Depositor's Agreement, Plaintiffs authorized BankAtlantic to "follow the directions of the Agent regarding the Account." Moreover, "Agent" is defined as "[a]ny individual acting as an agent,

guardian, personal representative, trustee, custodian, representative payee, or in some other fiduciary capacity.” The Depositor’s Agreement also specifically states that “[w]e are not liable for the misapplication of funds from your Account by the Agent.” All Plaintiffs’ claims in the Fourth Amended Complaint are based on Plaintiffs’ allegation that its agents, Pro Sports and its employees, conducted unauthorized transfers. However, under the terms of the Depositor’s Agreement, Plaintiffs released BankAtlantic from any liability related to such transactions. Therefore, Plaintiffs have waived all claims as a matter of law.

Fortieth-Second Affirmative Defense

Counts II and IV the Fourth Amended Complaint are barred by the Depositor’s Agreement provisions related to “Power of Attorney Accounts.” Under the terms of the Depositor’s Agreement, Plaintiffs warranted that any actions taken by BankAtlantic “in reliance upon your attorney-in-fact will be binding on you” The Depositor’s Agreement also specifically states that “[w]e are not liable for the misapplication of funds from your Account by the attorney-in-fact.” All Plaintiffs’ claims in the Fourth Amended Complaint are based on Plaintiffs’ allegation that their attorneys-in-fact, Pro Sports and its employees, conducted unauthorized transfers. However, under the terms of the Depositor’s Agreement, Plaintiffs released BankAtlantic from any liability related to such transactions. Therefore, Plaintiffs’ claims are barred as a matter of law.

Forty-Third Affirmative Defense

Counts II and IV the Fourth Amended Complaint have been waived under the Depositor’s Agreement provisions related to “Power of Attorney Accounts.” Under the terms of the Depositor’s Agreement, Plaintiffs warranted that any actions taken by BankAtlantic “in reliance upon your attorney-in-fact will be binding on you” The Depositor’s Agreement

also specifically states that “[w]e are not liable for the misapplication of funds from your Account by the attorney-in-fact.” All Plaintiffs’ claims in the Fourth Amended Complaint are based on Plaintiffs’ allegation that their attorneys-in-fact, Pro Sports and its employees, conducted unauthorized transfers. However, under the terms of the Depositor’s Agreement, Plaintiffs released BankAtlantic from any liability related to such transactions. Therefore, Plaintiffs have waived all claims as a matter of law.

Forty-Fourth Affirmative Defense

Counts II and IV the Fourth Amended Complaint are barred by the Depositor’s Agreement provisions related to “Security and Safety Measures.” Under the terms of the Depositor’s Agreement, several items are listed as precautions that BankAtlantic customers must take to ensure the safety of their own information, including but not limited to, safeguarding account information and access to account information. The Depositor’s Agreement also specifically states that if:

you fail to follow these and other precautions that are reasonable for your particular circumstances, you will be precluded from asserting any claims against us for paying any unauthorized, altered, counterfeit or other fraudulent item that such product, service, or precaution was designed to detect or deter, and we will not be required to re-credit your Account or otherwise have any liability for paying such items.

In this matter, Plaintiffs failed to follow the listed precautions within the Depositor’s Agreement by granting Pro Sports and its employees complete and unfettered access to their accounts with BankAtlantic and all related personal, sensitive, or otherwise confidential information necessary to conduct transactions into and out of their accounts held at BankAtlantic. Therefore, Plaintiffs are precluded from asserting any liability with regard to the transactions on their accounts.

Forty-Fifth Affirmative Defense

Counts II and IV the Fourth Amended Complaint have been waived under the Depositor's Agreement provisions related to "Security and Safety Measures." Under the terms of the Depositor's Agreement, several items are listed as precautions that BankAtlantic customers must take to ensure the safety of their own information, including but not limited to, safeguarding account information and access to account information. The Depositor's Agreement also specifically states that if:

you fail to follow these and other precautions that are reasonable for your particular circumstances, you will be precluded from asserting any claims against us for paying any unauthorized, altered, counterfeit or other fraudulent item that such product, service, or precaution was designed to detect or deter, and we will not be required to re-credit your Account or otherwise have any liability for paying such items.

In this matter, Plaintiffs failed to follow the listed precautions within the Depositor's Agreement by granting Pro Sports and its employees complete and unfettered access to their accounts with BankAtlantic and all related personal, sensitive, or otherwise confidential information necessary to conduct transactions into and out of their accounts held at BankAtlantic. Therefore, Plaintiffs are precluded from asserting any liability with regard to the transactions on their accounts.

Forty-Sixth Affirmative Defense

Counts II and IV the Fourth Amended Complaint are barred by the Depositor's Agreement provisions related to "Items Resulting from Voluntary Disclosure." Under the terms of the Depositor's Agreement, Plaintiffs agreed that:

If you voluntarily disclose your Account number to another person orally, electronically, in writing or by other means, you are deemed to authorize each item, including electronic debits that result from your disclosure. By voluntarily disclosing your information, you are authorizing BankAtlantic to pay the item(s) and charge your account.

Plaintiffs voluntarily disclosed their account information for all accounts, including their account number, to their agents, Pro Sports and its employees. Therefore, under the terms of the

Depositor's Agreement, Plaintiffs expressly authorized BankAtlantic to charge their accounts for all items resulting from such disclosure. Because all items that Plaintiffs challenge in the Fourth Amended Complaint result from the disclosure of account information, Plaintiffs are precluded from recovery.

Forty-Seventh Affirmative Defense

Counts II and IV the Fourth Amended Complaint have been waived under the Depositor's Agreement provisions related to "Items Resulting from Voluntary Disclosure."

Under the terms of the Depositor's Agreement, Plaintiffs agreed that:

If you voluntarily disclose your Account number to another person orally, electronically, in writing or by other means, you are deemed to authorize each item, including electronic debits that result from your disclosure. By voluntarily disclosing your information, you are authorizing BankAtlantic to pay the item(s) and charge your account.

Plaintiffs voluntarily disclosed their account information for all accounts, including their account number, to their agents, Pro Sports and its employees. Therefore, under the terms of the Depositor's Agreement, Plaintiffs expressly authorized BankAtlantic to charge their accounts for all items resulting from such disclosure. Because all items that Plaintiffs challenge in the Fourth Amended Complaint result from the disclosure of account information, Plaintiffs are precluded from recovery.

D. Defenses Applicable to Plaintiff Jevon Kearse

Forty-Eighth Affirmative Defense

Count I of the Fourth Amended Complaint, as it is alleged by Plaintiff, Jevon Kearse ("Kearse") is barred by common-law contract principles. Under common-law contractual principles, a plaintiff seeking to allege a cause of action for negligence must show that the defendant has breached a duty separate and independent of any breach of contract between the

parties. See *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399, 408 (Fla. 2013) (Pariente, J., concurring); see also *Altenel, Inc. v. Millennium Partners, L.L.C.*, 11-22806-CV, 2013 WL 2363233 (S.D. Fla. Mar. 12, 2013); *Freeman v. Sharpe Res. Corp.*, 5:12-CV-1584-ORL-22T, 2013 WL 2151723 (M.D. Fla. May 16, 2013).

Kearse executed a Personal Signature Card in October 2006 in which he agreed that the terms of the BankAtlantic Personal Account Depositor's Agreement & Disclosure Statement ("Depositor's Agreement") would govern his account ending in 7797 (the "7797 Account"), from which all Kearse's claimed damages arise. The Depositor's Agreement specifically governs the conduct that Kearse alleges to be improper in Count I of the Fourth Amended Complaint, including but not limited to, liability for allegedly unauthorized transfers. Because Kearse fails to identify any breach of duty separate and independent of the Depositor's Agreement, Kearse's Negligence cause of action is barred as a matter of law under common-law contract principles.

Forty-Ninth Affirmative Defense

Counts I and III asserted by Kearse are subject to each of the defenses asserted above in BankAtlantic's Thirty-Sixth through Forty-Seventh Affirmative Defenses. In his deposition, Kearse authenticated his signature on the account opening signature card for his 7797 Account. Kearse is therefore subject to all contractual defenses contained in the Depositor's Agreement. Accordingly, BankAtlantic incorporates and asserts each of its Thirty-Sixth through Forty-Seventh Affirmative Defenses against Kearse individually.

E. Defenses Applicable to Plaintiff Fred Taylor

Fiftieth Affirmative Defense

Count I of the Fourth Amended Complaint, as it is alleged by Plaintiff, Fred Taylor (“Taylor”) is barred by common-law contract principles. Under common-law contractual principles, a plaintiff seeking to allege a cause of action for negligence must show that the defendant has breached a duty separate and independent of any breach of contract between the parties. *See Tiara Condo. Ass’n, Inc.*, 110 So. 3d at 408 (Pariente, J., concurring); *see also Altenel, Inc.*, 2013 WL 2363233; *Freeman*, 2013 WL 2151723.

Taylor executed a Personal Signature Card in May 2011 in which he agreed that the terms of the BankAtlantic Personal Account Depositor’s Agreement & Disclosure Statement (“Depositor’s Agreement”) would govern his account ending in 7813 (the “7813 Account”), from which all Taylor’s claimed damages arise. The Depositor’s Agreement specifically governs the conduct that Taylor alleges to be improper in Count I of the Fourth Amended Complaint, including but not limited to, liability for allegedly unauthorized transfers. Because Taylor fails to identify any breach of duty separate and independent of the Depositor’s Agreement, Taylor’s Negligence cause of action is barred as a matter of law under common-law contract principles.

Fifty-First Affirmative Defense

Counts I and III asserted by Taylor are subject to each of the defenses asserted above in BankAtlantic’s Thirty-Sixth through Forty-Seventh Affirmative Defenses. In his deposition, Taylor authenticated his signature on certain signature cards for his 7813 Account. Taylor is therefore subject to certain contractual defenses contained in the Depositor’s Agreement.

Accordingly, BankAtlantic incorporates and asserts each of its Thirty-Sixth through Forty-Seventh Affirmative Defenses against Kears individually.

F. Defenses Applicable to Plaintiff Lito Sheppard

Fifty-Second Affirmative Defense

Count I of the Fourth Amended Complaint, as it is alleged by Plaintiff, Lito Sheppard (“Sheppard”) is barred by common-law contract principles. Under common-law contractual principles, a plaintiff seeking to allege a cause of action for negligence must show that the defendant has breached a duty separate and independent of any breach of contract between the parties. *See Tiara Condo. Ass’n, Inc.*, 110 So. 3d at 408 (Pariente, J., concurring); *see also Altenel, Inc.*, 2013 WL 2363233, *Freeman*, 2013 WL 2151723.

Sheppard executed a Personal Signature Card in which he agreed that the terms of the BankAtlantic Personal Account Depositor’s Agreement & Disclosure Statement (“Depositor’s Agreement”) would govern his account ending in 7821 (the “7821 Account”), from which all Sheppard’s claimed damages arise. The Depositor’s Agreement specifically governs the conduct that Sheppard alleges to be improper in Count I of the Fourth Amended Complaint, including but not limited to, liability for allegedly unauthorized transfers. Because Sheppard fails to identify any breach of duty separate and independent of the Depositor’s Agreement, Sheppard’s Negligence cause of action is barred as a matter of law under common-law contract principles.

Fifty-Third Affirmative Defense

Counts I and III asserted by Sheppard are subject to each of the defenses asserted above in BankAtlantic’s Thirty-Sixth through Forty-Seventh Affirmative Defenses. In his deposition, Sheppard authenticated his signature on certain signature cards for his 7821 Account. Sheppard is therefore subject to certain contractual defenses contained in the Depositor’s Agreement.

Accordingly, BankAtlantic incorporates and asserts each of its Thirty-Sixth through Forty-Seventh Affirmative Defenses against Sheppard individually.

Reservation of Rights

As of the date of filing of this Answer and Affirmative Defenses, discovery remains ongoing, and only Plaintiffs, Kearse, Taylor, and Sheppard have been made available for deposition. Accordingly, BankAtlantic reserves its right to supplement these affirmative defenses with any additional defenses it may discover during discovery related to the remaining Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of December, 2014, a true and correct copy of the foregoing was sent by ECF filing to the following:

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