

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**PNC BANK, NATIONAL ASSOCIATION,**

**Plaintiff,**

**v.**

**Case No: 6:13-cv-208-Orl-36DAB**

**SANFORD MILLER, MARY KELLY  
MILLER,**

**Defendants.**

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**ORDER**

This cause comes before the Court on the Report and Recommendation of Magistrate Judge David A. Baker, filed on May 16, 2013 (Doc. 19). In the Report and Recommendation, the Magistrate Judge recommends that Plaintiff PNC Bank, National Association's ("Plaintiff") Amended Motion to Strike Defendants Sanford Miller and Mary Kelly Miller's ("Defendants") First Affirmative Defense or, in the Alternative, Motion for Partial Judgment on the Pleadings ("Amended Motion to Strike") (Doc. 14) be denied as to Count Two.<sup>1</sup> See Doc. 19. None of the parties have objected to the Report and Recommendation and the time to do so has expired.

The Court agrees with the Magistrate Judge that Defendants should be permitted to assert an alleged violation of the Equal Credit Opportunity Act ("ECOA") as an affirmative defense to enforcement of a guaranty. See *id.* Permitting the affirmative defense is consistent with Florida law recognizing that illegality of contract may be raised as an affirmative defense, as well as the public policy behind the enactment of the ECOA. See, e.g., *Power Fin. Credit Union v. Nat'l*

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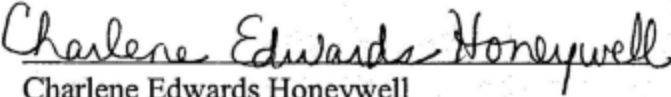
<sup>1</sup> As Defendants have conceded that their first affirmative defense does not apply to Counts One or Three, Magistrate Judge Baker recommends that the Amended Motion to Strike be denied, as moot, as to those Counts. See Doc. 19, p. 5 n.2.

*Credit Union Admin. Bd.*, 494 F. App'x 982, 986 (11th Cir. 2012) (“[A] contract which violates a provision of ... a statute is void and illegal and, will not be enforced in [Florida] courts.”); *Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08-CV-654-TCK-PJC, 2010 WL 3212751, at \*4 (N.D. Okla. Aug. 12, 2010) (permitting defensive use of an ECOA violation under the doctrine of recoupment and noting that cases decided by the First and Third Circuits, which “represent the weight of authority and what appears to be the trend,” have also permitted defensive use); *Bank of the West v. Kline*, 782 N.W.2d 453, 463 (Iowa 2010) (permitting the affirmative defense because it is consistent with Iowa law that contracts made in contravention of a statute are void, as well as the the public policy behind the enactment of the ECOA); *Chen v. Whitney Nat'l Bank*, 65 So. 3d 1170, 1174 (Fla. 1st Dist. Ct. App. 2011) (permitting the affirmative defense because it is consistent with Florida law recognizing that illegality of contract may be raised as an affirmative defense, as well as the public policy behind the enactment of the ECOA). Therefore, after careful consideration of the Report and Recommendation of the Magistrate Judge, in conjunction with an independent examination of the court file, the Court is of the opinion that the Magistrate Judge's Report and Recommendation should be adopted, confirmed, and approved in all respects.

Accordingly, it is hereby **ORDERED**:

1. The Report and Recommendation of the Magistrate Judge (Doc. 19) is adopted, confirmed, and approved in all respects and is made a part of this Order for all purposes, including appellate review.
2. Plaintiff's Amended Motion to Strike (Doc. 14) is **DENIED as moot** as to Counts One and Three, and **DENIED** as to Count Two.

**DONE** and **ORDERED** in Orlando, Florida on June 6, 2013.

  
Charlene Edwards Honeywell  
United States District Judge

Copies furnished to:

Counsel of Record  
Unrepresented Parties  
United States Magistrate Judge David A. Baker