



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 24, 2018

### LETTER OPINION

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RE: *AG4 Holding, LLC, et al. v. Regency Title & Escrow Services, Inc., et al.*  
CL-2017-13211

Dear Counsel:

This cause came before the Court on Defendant, Wells Fargo Bank, N.A.'s ("Wells Fargo") Demurrer to the Complaint of Plaintiffs AG4 Holding, LLC ("AG4") and

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Anurag Gupta, alleging a cause of action of claimed first impression under Virginia's statute governing wire transfer of funds, namely Code Section 8.4A-207 (Count V), and for Negligence (VI) and Conversion (VII). This case presents adjudication of the consequential rights and liabilities of the parties when a wire transfer of funds goes awry resulting from fraudulent misdirection of proceeds into the account of another. Under the facts of this cause, the Court finds Plaintiffs may allege causes of action for violation of Virginia Code Section 8.4A-207 (Count V) and for Negligence (VI) against Defendant Wells Fargo, but that these counts are inadequately pled and in need of amendment. The Court further finds the Plaintiffs' claim for Conversion may not be maintained, as it is statutorily preempted by application of Virginia Code Sections 8.4A-211 and 8.4A-405. Thus, for the reasons as more fully stated herein, this Court sustains Defendant Wells Fargo's objections to Counts V and VI, with leave to amend, and to Count VII without leave to amend. Plaintiffs further consents to the dismissal of their claim for attorney's fees with respect to Wells Fargo. Therefore such claim shall be dismissed without prejudice, without the Court passing on its propriety, and without restricting Plaintiffs from presenting evidence at trial of the quantum of fees incurred, should the same be demanded in proof of any viable punitive damages claim.

## **BACKGROUND**

Plaintiff AG4 Holdings, LLC, is a Virginia Limited Liability Company organized for the purpose of holding title to and managing real estate investments. Its sole member is Plaintiff Anurag Gupta. In February 2017, Gupta entered into a contract for the purchase of real estate in Ashburn, Virginia. Title to the property was to be held by AG4. Closing on the purchase was set for February 28, 2017.

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Defendant Regency Title & Escrow Services, Inc. ("Regency") is a title and real estate settlement company. Gupta communicated with Regency regarding the closing for the purchase of the subject property. One of the communications was an email directing Gupta to wire the closing funds to Regency's account at Wells Fargo to be held in escrow. On February 24, 2017, Gupta wired \$309,947.81 from AG4's account at Bank of America to Regency's account at Wells Fargo. On February 27, 2017, Bank of America contacted Gupta to notify him that the wire transfer was flagged in connection with fraudulent activity. Bank of America speculated that a third party had obtained unauthorized access to Regency's email and created fraudulent closing documents, including the wire instructions.

Bank of America allegedly notified Wells Fargo to recall the wire transfer at 12:25 p.m. on February 27, 2017. Later that day, Gupta went to a Wells Fargo branch and was told the wired funds were still in the account into which they had been wired. He was also informed the account had been frozen. The Wells Fargo account into which the funds were wired was in the name of Cathy Construction or Cathy A. Jarosik Construction. The account allegedly was opened in February, 2016. Thereafter, AG4 contends Wells Fargo failed to prevent the withdrawal of the bulk of said funds that it had committed to freeze, causing Plaintiffs to lose all but approximately \$55,000.00 of the deposit.

Based on these alleged facts, AG4 has asserted the following claims against Wells Fargo: Violation of Virginia Code Section 8.4A-207 (Count V), Negligence (Count VI), and Conversion (Count VII).

Plaintiffs seek compensatory damages from Wells Fargo in the amount of \$309,947.81. They also seek \$350,000 in punitive damages, plus attorney's fees, under the negligence and conversion claims. Wells Fargo has represented it has returned approximately \$55,000.00 of the \$309,947.81 to Bank of America, which is all that remained un-transferred in the account after misappropriation of funds by the alleged thief-accountholder who executed the scheme to defraud Plaintiffs.

## ARGUMENTS OF THE PARTIES

### A. Defendant Wells Fargo's Arguments

#### 1. Wells Fargo Maintains Count V Fails to Allege Facts Sufficient to State a Cause of Action Under Code Section 8.4A-207:

Wells Fargo avers wire transfers are governed by Article 4A of the Uniform Commercial Code ("UCC"). Virginia Code Section 8.4A-207(b)(1) governs the facts alleged in the Complaint. It provides if the bank receives a payment order that identifies the beneficiary by name and account number, the bank may rely on the account number even if the number and name identify different persons. This is not true if the bank knows the number and name refer to different persons. "Know" means actual knowledge. Va. Code Ann. § 8.4A-207, Official Comment 2. Wells Fargo argues the beneficiary's bank has no duty to determine whether the name and number refer to the same person because the payment orders are mainly processed by automated payment. The bank is allowed to act on the basis of the account number without regard to the name. The Complaint does not allege Wells Fargo had actual knowledge that the name and number on the payment order referred to different persons, and Wells Fargo contends it did not have the duty to make this determination.

Wells Fargo continues that Plaintiffs ignore Code Section 8.4A-207(b)(1) in their Complaint. While Wells Fargo admits Section 8.4-207(a) was violated it contends that section does not apply to the facts alleged in the Complaint. It argues that Code section only applies if the identification information on the payment order refers to a nonexistent or unidentifiable person or account. Here, the wire transfer did not refer to a nonexistent or unidentifiable person or account.

Wells Fargo posits that Code Section 8.4A-207(b)(1) is applicable in this case where the beneficiary name and account number allegedly refer to different persons. Wells Fargo was entitled to rely on the account number. Wells Fargo proffers that “[i]n a last ditch effort to avoid application of Code § 8.4A-207(b)(1), Plaintiffs allege that Wells Fargo violated the Bank Secrecy Act and the Patriot Act by failing to properly verify that Cathy A. Jarosik Construction is registered as a business entity in Illinois.” (Def.’s Mot. 4). Wells Fargo, points out however, that as Plaintiffs concede, there is no private cause of action for violation of the Bank Secrecy Act or the Patriot Act.

## 2. Wells Fargo Alleges All Common Law Claims Are Preempted:

Wells Fargo asserts that before Article 4A was drafted, there was no comprehensive body of law defining the rights and obligations of parties to a funds transfer. The Article 4A rules consider the competing interests of the parties involved. Thus, Wells Fargo contends “[t]he rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of [Article 4A].” Consequently, Wells Fargo continues, “resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties

and liabilities inconsistent with those stated in [Article 4A]." Va. Code Ann. § 8.4A-102, Official Comment.

Wells Fargo urges the Court find the common law claims in Counts VI (negligence) and VII (conversion) are preempted by the UCC. Article 4A allows for a payment order to be cancelled or amended, but only if it is done in a manner which affords the beneficiary's bank the chance to act before the payment order has been accepted. The Complaint alleges Wells Fargo had already credited the account before receiving notice of the allegedly erroneous transfer. Wells Fargo states it was obligated to pay the order to the beneficiary once it accepted the order: "Code § 8.4A-212 plainly states that the bank 'owes no duty to any party to the funds transfer except as provided in this title or by express agreement.'" (Def.'s Mot. 6).

3. Wells Fargo Posits in the Alternative that Even If Not Preempted, the Common Law Claims Fail as a Matter of Law:

Wells Fargo says it did not owe a legal duty to Plaintiffs and the economic loss rule applies. The Complaint does not allege facts showing that Wells Fargo owed Plaintiffs a duty. A bank does not owe a duty to a non-customer. Further, Wells Fargo did not owe a duty to hold funds in the account into which Plaintiffs had instructed the bank to deposit the funds. Lastly, Wells Fargo alleges the economic loss rule bars the negligence claim because the Complaint does not allege that a contractual relationship existed.

Wells Fargo further reminds the Court that "[a]n action for conversion can be maintained only by the person having a property interest in and entitled to the immediate possession of the item alleged to have been wrongfully converted." (Def.'s Mot. 7) (Citing *Economopoulos v. Kolaitis*, 259 Va. 806, 814 (2000)). Therefore Wells

Fargo contends it accepted the funds, AG4 no longer owned the funds and was not entitled to the immediate possession of the funds.

4. Wells Fargo alleges the Complaint Fails to State the Basis for the Recovery of Attorney's Fees:

Wells Fargo states Plaintiffs do not state the basis for their demand for attorney's fees as required by Rule 3:25(B) of the Rules of the Supreme Court of Virginia.

**B. Plaintiffs' Response**

(i) Plaintiffs' Count V States a Claim Under Virginia Code Section 8.4A-207(a):

Plaintiffs contend their claim under Virginia Code Section 8.4A-207(a) is a claim of first impression. The Bank Secrecy Act and USA Patriot Act require banks to adopt a customer identification program to verify the identity of its customers. Defendant Wells Fargo permitted a bank account to be opened in the name of Cathy A. Jarosik Construction without verifying it was registered as a business entity. Plaintiffs assert Cathy A. Jarosik Construction is a nonexistent and unidentifiable person or entity.

Defendant Wells Fargo argues it cannot be liable under Virginia Code 8.4-207(b)(1); however, Plaintiffs maintain its defense is not supported by the plain language of the statute. Section 201(a) applies when "in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account . . . ." Va. Code Ann. § 8.4A-207(a). Therefore, when the name or bank account number refers to a nonexistent person, acceptance cannot occur. Plaintiffs aver they have not asserted Wells Fargo had actual knowledge the account number and name on the payment order

identified different persons, or that Wells Fargo paid the order using the name as the identifier; thus, making 207(b) inapplicable.

Plaintiffs point out other courts have found that when a transfer bears the correct name but wrong account number, acceptance cannot occur. *Corfan Banco Asuncion Paraguay v. Ocean Bank*, 715 So.2d 967 (1998).

(ii) Plaintiffs Maintain the Common Law is Not Displaced by Section 8.4A-207:

Plaintiffs assert the Virginia Supreme Court has recognized certain common law claims may not be preempted by Title 8.4A. "Section 8.1A-103 states that unless expressly displaced by 'particular' Code provisions, principles of law and equity, including the common laws of negligence and conversion, 'supplement' the UCC." (Pl.'s Mot. 4). Article 4A-207 does not expressly bar any common law claims.

Plaintiffs continue that their negligence claim is not inconsistent with the rights, duties and liability set forth in Virginia Code Section 8.4A-102 et seq. Further, they posit their negligence claim arises from conduct by Wells Fargo that is subsequent to the wire transfer. Wells Fargo is alleged to be negligent for not implementing an account freeze after multiple sources notified it the transfer was fraudulent. Similarly, Wells Fargo purportedly committed conversion after the date it allegedly placed a "hard freeze" on the fraudulent account.

(iii) Plaintiffs Aver Count VI States a Claim for Negligence:

Plaintiffs concede banks do not owe a duty to non-customers, but highlight there is an exception to this general rule. "A bank may be liable to a noncustomer for its misappropriation when a fiduciary relationship exists between the customer and the noncustomer, the bank knows or ought to know of the fiduciary relationship, and the



bank has actual knowledge of its customer's misappropriation. *Change v. JPMorgan Chase Bank, N.A.*, 845 F.3d 1087 (2017). These elements have been set forth in the Complaint. Wells Fargo allegedly allowed the funds to be transferred out of the account after it was informed the funds had been diverted into the incorrect account.

(iv) Plaintiffs Argue Count VII States a Claim for Conversion:

Plaintiffs claim any act of dominion that is wrongfully exerted over property in denial of the owner's rights is conversion. Conversion can occur through intentional, reckless, or negligent conduct. Plaintiffs have alleged Wells Fargo converted the funds by failing to freeze the account after being notified of the fraud and failing to return the funds, and continuing to control the transferred funds.

(v) Plaintiffs' Claim for Attorney's Fees:

Plaintiffs consent to the dismissal of their claim for attorney's fees with respect to Wells Fargo, but request they not be restricted from presenting evidence at trial of the quantum of fees incurred in support of their claim for punitive damages.

**C. Defendant Wells Fargo's Reply**

(1) Wells Fargo Retorts Count V Fails to State a Cause of Action:

Wells Fargo insists Plaintiffs' argument requires the Court to rewrite the UCC and ignore the allegations in the Complaint. Virginia Code Section 8.4A-207 does not mention the Bank Secrecy Act or the Patriot Act. Further, these two acts do not provide relief for violations.

Wells Fargo states Plaintiffs argue the wire transfer referred to a nonexistent entity but that is not true. The Complaint does not allege the wire transfer referred to Cathy A. Jarosik Construction. The wire referred to Regency Title and Escrow Services.

Regency is an existing entity. The bank account number was also an existing account number at Wells Fargo. This case differs, Wells Fargo continues, from *Corfan*, which Plaintiffs cite.

(2) Wells Fargo Reiterates all Common Law Claims are Preempted:

Wells Fargo charges Plaintiffs are attempting to resort to principles outside of Article 4A. The argument the claims arose after the wire transfer should be rejected. The claims are preempted because they conflict with Article 4A, which defines Wells Fargo's rights and duties.

Wells Fargo declares the Complaint does not allege it's customer was in a fiduciary relationship with AG4 and misappropriated funds. The Complaint alleges the fiduciary relationship was between Regency and AG4, and that John Doe misappropriated the funds.

## ANALYSIS

A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts which may be reasonably and fairly implied and inferred from those allegations. See *McDermott v. Reynolds*, 260 Va. 98, 100 (2000). A demurrer does not, however, admit the correctness of the pleader's conclusions of law. *Yuzefovsky v. St. John's Wood Apts.*, 261 Va. 97, 102 (2001). To survive a challenge by demurrer, a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment. While it is "unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer," the Complaint must state a cause of action. *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22 (1993) (citing *Hunger v. Burroughs*, 123 Va. 113 (1918)).

**I. Whether Plaintiffs State a Cause of Action Under Code Section 8.4A-207 (Count V)**

Article 4A was drafted because there was a lack of case law addressing the complications which can arise with wire transfers. The official comment to Section 8.4A-102 explains,

[i]n the drafting of Article 4A, a deliberate decision was made to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment. A deliberate decision was also made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles. In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately. This consideration is particularly important given the very large amounts of money that are involved in funds transfers.

Funds transfers involve competing interests -- those of the banks that provide funds transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process and they were thoroughly considered. *The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article.*

Va. Code Ann. § 8.4A-102, Official Comment (emphasis added).

This case involves a fraudulent wire transfer, thereby falling under the purview of Article 4A. Plaintiffs bring their first count under Section 8.4A-207(a). Wells Fargo argues that this case falls under Section 8.4A-207(b) instead. Virginia Code Section 8.4A-207 reads in part:

(a) Subject to subsection (b) of this section, if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.

(b) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:

(1) Except as otherwise provided in subsection (c) of this section, if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(2) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

Virginia Code Ann. § 8.4A-207.

It is evident from the official comment to this code section that each subsection is interrelated and the subsections must be analyzed as a whole. Section 8.4A-207(a) specifies that it is subject to subsection (b). The official comment also states that subsection (b) takes precedence over subsection (a). It further provides an example analogous to the case at hand. It reads in part:

For example, Doe is the holder of shares in Mutual Fund. Thief, impersonating Doe, requests redemption of the shares and directs Mutual Fund to wire the redemption proceeds to Doe's account #12345 in Beneficiary's Bank. Mutual Fund originates a funds transfer by issuing a payment order to Originator's Bank to make the payment to Doe's account #12345 in Beneficiary's Bank. Originator's Bank executes the order by issuing a conforming payment order to Beneficiary's Bank which makes payment to account #12345. That account is the account of Roe rather than Doe. Roe might be a person acting in concert with Thief or Roe might be an innocent third party. Assume that Roe is a gem merchant that agreed to sell gems to Thief who agreed to wire the purchase price to Roe's account in Beneficiary's Bank. Roe believed that the credit to Roe's account was a transfer of funds from Thief and released the gems to Thief

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in good faith in reliance on the payment. The case law is unclear on the responsibility of a beneficiary's bank in carrying out a payment order in which the identification of the beneficiary by name and number is conflicting. See *Securities Fund Services, Inc. v. American National Bank*, 542 F.Supp. 323 (N.D.Ill.1982) and *Bradford Trust Co. v. Texas American Bank*, 790 F.2d 407 (5th Cir.1986). Section 4A-207 resolves the issue.

*If Beneficiary's Bank did not know about the conflict between the name and number, subsection (b)(1) applies.* Beneficiary's Bank has no duty to determine whether there is a conflict and it may rely on the number as the proper identification of the beneficiary of the order. When it accepts the order, it is entitled to payment from Originator's Bank. Section 4A-402(b). On the other hand, if Beneficiary's Bank knew about the conflict between the name and number and nevertheless paid Roe, subsection (b)(2) applies. Under that provision, acceptance of the payment order of Originator's Bank did not occur because there is no beneficiary of that order. Since acceptance did not occur Originator's Bank is not obliged to pay Beneficiary's Bank. Section 4A-402(b). Similarly, Mutual Fund is excused from its obligation to pay Originator's Bank. Section 4A-402(c). Thus, Beneficiary's Bank takes the loss. Its only cause of action is against Thief. Roe is not obliged to return the payment to the beneficiary's bank because Roe received the payment in good faith and for value. Article 4A makes irrelevant the issue of whether Mutual Fund was or was not negligent in issuing its payment order.

*Normally, subsection (b)(1) will apply to the hypothetical case discussed in Comment 2.*

Va. Code Ann. § 8.4A-207, Official Comment 2 (emphasis added).

As such, Plaintiffs cannot ignore that subsection (b) of the statute most likely applies. Plaintiffs argue they are bringing a claim under subsection (a) because it is a case of first impression. They also argue they have not asserted Wells Fargo had actual knowledge the account number and name on the payment order identified different persons, or that Wells Fargo paid the order using the name as the identifier; thus, making 207(b) inapplicable. However, that argument applies only to 207(b)(2) and not to 201(b)(1). Plaintiffs should be allowed to bring forth their claim, but will need to amend the Complaint to address the applicability of subsection (b)(1). If they want to claim

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(b)(1) does not apply, they will need to add factual allegations to more clearly support their position.

Thus the Court must sustain the objection to the claim under Virginia Code Section 8.4A-207, *with* leave to amend.

## **II. Whether Plaintiffs State a Cause of Action for Negligence and Conversion (Counts VI and VII)**

The more complicated issue presented by the Demurrer is whether Article 4A preempts Plaintiffs' negligence and conversion claims. The Court must determine: 1) whether the claims are preempted by Article 4A; and if not, 2) whether each claim survives demurrer. The Official Comment of Virginia Code Section 8.4A-102, which is quoted on page eleven of this opinion, sets forth that principles of law or equity may not be relied upon in order to create rights, duties, and liabilities which contradict those stated in Article 4A. The Comment, however, does not state the drafters intended to completely prohibit a party's reliance on law and equity claims. They merely meant to narrow and restrict their application.

In this case, Plaintiffs allege Wells Fargo was negligent in allowing a third party to obtain funds from the account to which Plaintiffs' funds were inappropriately transferred. Plaintiffs emphasize that this all occurred after Wells Fargo received notice of the fraud and Wells Fargo had informed Plaintiff Gupta a freeze would be placed on the account. The freeze, however, was not placed on the account. Under Section 8.4A-207, Wells Fargo was seemingly within its right to rely on the account number and pay the funds to the account listed on the pay order. Plaintiffs argue, however, they are not focusing on that point in time and they are only focusing on the point in time, after everyone was

made aware of the fraud. Wells Fargo argues that Section 8.4A-212 governs that time period. The statute reads:

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this title, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in this title or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in § 8.4A-209, and liability is limited to that provided in this title. *A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this title or by express agreement*

Va. Code Ann. § 8.4A-212 (emphasis added). It is not clear or obvious that Plaintiffs' negligence claim would impose a duty or liability on Wells Fargo that contradicts what is stated in Article 4A. This is particularly true when one considers Wells Fargo told Plaintiff Gupta it would place a freeze on the account and then did not do so – a representation on which Plaintiff relied detrimentally.

It is further doubtful the General Assembly meant statutorily to cloak financial institutions with immunity from civil liability consequent to their knowing inaction to prevent a crime in progress after undertaking a promise not to serve as the crime's witting agent. The Supreme Court of Virginia has

“consistently held that ‘generally a person does not have a duty to protect another from the conduct of third persons.’” *Kellermann*, 278 Va. at 492, 684 S.E.2d at 793 (quoting *Didato v. Strehler*, 262 Va. 617, 628-29, 554 S.E.2d 42, 49 (2001)).... There is an exception to the general rule, however, where “a special relation exists (1) between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or (2) between the defendant and the plaintiff which gives a right to protection to the plaintiff.” *Id.* at 312, 421 S.E.2d at 420.

*Burns v. Gagnon*, 283 Va. 657, 668-669 (2012).

Whether a “special relationship” exists between Wells Fargo and either its account holder or alternatively, with Plaintiffs, is a question of apparent first impression in the context of whether to allow a negligence claim to be pled against Defendant Wells Fargo on such ground.

“Examples of special relationships...recognized between a defendant and a plaintiff include common carrier-passenger, business proprietor-invitee, innkeeper-guest, and employer-employee with regard to the employer's potential duty of protecting or warning an employee.” *Kellermann*, 278 Va. at 492, 684 S.E.2d at 793. While “this list of relationships that give rise to a special relationship is not exhaustive,” [the Supreme Court of Virginia has cautioned against] expanding it to include new relationships. *See id.*

*Burns*, 283 Va. at 669. It is possible a financial institution like Wells Fargo might qualify as having a special relationship with its account holder requiring it supervise deposits in a manner that does not facilitate the commission of crimes by bank inaction. However, the Supreme Court of Virginia's admonition that caution is in order in expanding the categories within the “special relationship” description gives this Court pause in reaching such conclusion when another basis allowing Plaintiff to plead negligence exists at law. Under the common-law principle of assumption of a duty,

“one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.” *Kellermann*, 278 Va. at 489, 684 S.E.2d at 791 (quoting *Nolde Bros. v. Wray*, 221 Va. 25, 28, 266 S.E.2d 882, 884 (1980)) (quotation marks omitted)...[W]hether a defendant owes a plaintiff a duty in tort is generally a question of law. But when the issue is not whether the law recognizes a duty, but rather whether the defendant by his conduct assumed a duty, the existence of that duty is a question for the fact-finder. *Id.* at 490, 684 S.E.2d at 791-92; *Didato*, 262 Va. at 629, 554 S.E.2d at 48.

In accordance with the principle of assumption of a duty, an actor who fails to exercise reasonable care in performing his undertaking may be subject to liability for...harm caused not only to the one to whom he has agreed to render services, but also to a third person. Liability to the latter is addressed in Restatement (Second) of Torts § 324A, which provides:



One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

*Burns*, 283 Va. at 672.

Wells Fargo's promise to Gupta to freeze the account of its account holder, could be considered an agreement which shifts Wells Fargo's liability as permitted by Section 8.4A-212. Section 8.4A-211 further supports the position that Wells Fargo had the duty to amend or cancel the payment after it had been accepted, if it agreed to do so. Virginia Code Section 8.4A-211(c) states "[a]fter a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank." It is not unambiguously clear that Article 4A preempts Plaintiffs' negligence claim, and therefore the Court does not sustain Wells Fargo's objection to the negligence claim on this ground. Plaintiffs, nonetheless, will still need to amend their Complaint better to allege facts which support their proposition the claim is not preempted.

Next, the Court must determine whether the factual allegations in the Complaint support each element required for negligence. A cause of action for negligence consists of four elements: (1) a duty the defendant owes to the plaintiff; (2) a breach of that duty; (3) proximate causation; and (4) an injury. *Richardson v. Lovvorn*, 199 Va. 688, 692, 101

S.E.2d 511, 514 (1958). “Whether a legal duty in tort exists is a pure question of law.” *Kellerman v. McDonough*, 278 Va. 478, 487 (2009). Plaintiffs allege they were in a fiduciary relationship with Regency, who is a Wells Fargo customer. Yet, they do not clearly allege Regency was the one to misappropriate the funds, and that Wells Fargo knew about Regency’s misappropriation. The Complaint only states, “[a]s of at least 12:25 p.m. on Monday, February 27, 2017, Wells Fargo was provided with actual knowledge that its customer, identifiable or otherwise, had misappropriated, or attempted to misappropriate Plaintiff’s Funds.” (Compl. ¶ 165). As such, it is not clear the duty element is sufficiently plead.

Plaintiffs allege enough to satisfy the remaining elements. (Compl. ¶¶ 168-70). They allege the breach was the direct and proximate cause of their damages, and seek both compensatory and punitive damages.

Wells Fargo argues the economic loss rule bars this claim, and the Court should dismiss it for that reason. The economic loss rule makes a distinction between tort and contract law.

The law of torts is well equipped to offer redress for losses suffered by reason of a "breach of some duty imposed by law to protect the broad interests of social policy." Tort law is not designed, however, to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement.

*Burner v. Ford Motor Co.*, 52 Va. Cir. 301, 303 (Va. Cir. Ct. 2000). The rule “seems to arise mainly in product liability cases” and “there are a great many exceptions to the rule.” *Economic Loss Rule*, The Wolters Kluwer Bouvier Law Dictionary Desk Edition (2012). There is no allegation the parties entered into a contract, and therefore, the duty

Plaintiffs attempted to allege is not one which arose solely from a contractual agreement. This is not a case in which the economic loss rule would apply because Plaintiffs, did not, for example, purchase a good or service that resulted in disappointed economic expectations. This is a case in which it is alleged fraud and a misstep by Wells Fargo resulted in the disappearance of Plaintiffs' funds.

Wells Fargo also argues Plaintiffs' conversion claim is preempted by Article 4A. It cites to Section 8.4A-404(a) for support. The statute provides, "[s]ubject to subsection (e) of § 8.4A-211, and subsections (d) and (e) of § 8.4A-405, if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order." As Wells Fargo correctly argues, Plaintiffs no longer had the right to possession of the funds at the very instant Wells Fargo accepted the payment order, even if fraud was involved. Plaintiffs' right to possession of the property is an element which must be satisfied for a conversion claim. The statute expressly states Wells Fargo had an obligation to pay the funds to the beneficiary listed on the order at the moment of acceptance. Therefore, Plaintiffs' conversion claim is preempted by the Article, because allowing Plaintiffs to proceed on this claim would contradict a duty expressly stated in the Article.

The Court is thus compelled to sustain the objection to the negligence claim *with* leave to amend, and to the conversion claim *without* leave to amend.

## CONCLUSION

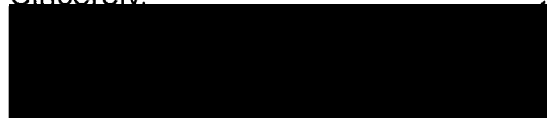
The Court has considered Defendant, Wells Fargo Bank, N.A.'s Demurrer to the Complaint of Plaintiffs AG4 Holding, LLC and Anurag Gupta, alleging a cause of action of claimed first impression under Virginia's statute governing wire transfer of funds,

namely Code Section 8.4A-207 (Count V), and for Negligence (VI) and Conversion (VII). This case presents adjudication of the consequential rights and liabilities of the parties when a wire transfer of funds goes awry resulting from fraudulent misdirection of proceeds into the account of another. Under the facts of this cause, the Court finds Plaintiffs may allege causes of action for violation of Virginia Code Section 8.4A-207 (Count V), and for Negligence (VI) against Defendant Wells Fargo, but that these counts are inadequately pled and in need of amendment. The Court further finds Plaintiffs' claim for Conversion may not be maintained as it is statutorily preempted by application of Virginia Code Sections 8.4A-211 and 8.4A-405. Thus, for the reasons as more fully stated herein, this Court sustains Wells Fargo's Demurrer to Counts V and VI, with leave to amend, and to Count VII without leave to amend. Plaintiffs further consent to the dismissal of their claim for attorney's fees with respect to Wells Fargo. Therefore such claim shall be dismissed without prejudice, without the Court passing on its propriety, and without restricting Plaintiffs from presenting evidence at trial of the quantum of fees incurred should the same be demanded in proof of any viable punitive damages claim.

Defendant Wells Fargo, shall prepare, circulate and submit to the Court an order incorporating the ruling in this Letter Opinion.

AND THIS CAUSE CONTINUES.

Sincerely,



David Bernhard  
Judge, Fairfax Circuit Court

**OPINION LETTER**