IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

IN RE: ESTATE OF LARRY W. COOK Deceased	
JANINE SATTERFIELD, in Her capacity as Administrator for the Estate of Larry W. Cook, *Plaintiff*, v. WELLS FARGO & COMPANY, *et al.*, *Defendants*.	Civil No. 1:23-cv-00009 CMH/LRV

DEFENDANT NAVY FEDERAL CREDIT UNION'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT

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Defendant Navy Federal Credit Union ("Navy Federal"), by counsel, pursuant to Fed. R. Civ. P. 12(b)(6), submits this memorandum of law in support of its motion to dismiss the Amended Complaint ("Amended Complaint") filed by Plaintiff Janine Satterfield ("Plaintiff"), in her capacity as Administrator of the Estate of Larry W. Cook ("Cook"). Plaintiff's Amended Complaint adds allegations about Cook's distinguished career and military service, alleges he was serving as the acting trustee and beneficiary of a trust at the time of his passing, and adds additional details regarding his assets and bank accounts. Plaintiff additionally concedes she lacks standing to sue in her individual capacity and asserts the claims as administrator of Cook's estate. Plaintiff's Amended Complaint does not cure the defects which made the original complaint subject to dismissal. Having now had two bites at the proverbial apple and failed to state viable claims both times, the Amended Complaint should be dismissed with prejudice.

INTRODUCTION

This case involves international wire transactions wherein the decedent, Larry W. Cook ("Cook"), transferred approximately $3.6 million from his deposit account at Navy Federal to bank accounts in Thailand. Plaintiff, Cook's niece, and the administrator of his estate, filed this action asserting that Cook, who was 76 years-old at the time of the transactions, was an unwitting victim of a fraud scheme and wired the funds not realizing a third-party scammer was taking advantage of him. Plaintiff seeks to recover the funds Cook transferred to bank accounts in Thailand from Navy Federal, asserting that because Navy Federal suspected Cook was the victim of financial exploitation and reported the circumstances of the international wires to Fairfax County Adult Protective Services ("APS"), it was Navy Federal's duty to monitor Cook's accounts, protect him from fraud, and prevent him from transferring money to scammers.

Because the nature of the relationship between Cook and Navy Federal was strictly one of

customer and depository bank governed by contract, Navy Federal had no duty to monitor Cook's account, oversee how he used his money, or protect him from the alleged criminal acts of a third party. Navy Federal is a credit union in the business of providing banking services, not a guardian charged with overseeing how deposit customers use their money. Navy Federal processed the wires in direct compliance with Cook's instructions, and the Uniform Commercial Code ("U.C.C."), which governs the alleged wire transactions, expressly declines to impose liability on banks for conduct that occurs prior to acceptance of a customer's payment order. Even so, Navy Federal reported the circumstances of Cook's international wire transactions to APS for further investigation, believing he might be the victim of elder financial exploitation. The investigation was closed after Cook refused to cooperate with APS. *See* Am. Compl. Ex. 8 at 12 (Cook "yelled" at APS workers, telling them he was "spending the money the way he wanted to.") Various federal and state statutes insulate Navy Federal from liability for this reporting.

After Cook's death, Plaintiff initiated this lawsuit in her capacity as Administrator, purporting to assert various common law causes of action claiming Navy Federal is responsible for repaying to the estate the $3.6 million that Cook transferred to accounts in Thailand. Plaintiff purports to assert causes of action for (i) "Assumption of Voluntary Duty" (Count I); Breach of the Covenant of Good Faith and Fair Dealing (Count II); and Negligence/Voluntary Assumption of Duty (Count III). Navy Federal, however, processed the transactions Cook initiated, the money belonged to Cook and was his money to transfer, and Navy Federal is not liable under any of Plaintiff's theories. After Navy Federal filed a motion to dismiss the Plaintiff's original complaint, she filed the Amended Complaint with hopes of avoiding dismissal. However, the Amended Complaint contains no substantive differences from the original complaint, fails to resolve the deficiencies of the original complaint, and must be dismissed with prejudice.

BACKGROUND[1]

Cook was a Navy veteran who maintained deposit accounts with Navy Federal, a federally chartered credit union. Am. Compl. ¶ 13. Over a six-month period, Cook processed a total of seventy-four wire transfers from his Navy Federal account to individuals holding accounts with Standard Chartered and the Bank of Bangkok, totaling $3,680,700.00. *Id.* at ¶ 50. Plaintiff alleges that Cook fell prey to a scam that Navy Federal warned about in a customer alert dated December 3, 2020, pertaining to "Fake calls from Apple and Amazon support: What you need to know." *Id.* at ¶ 43. The alleged "customer alert" was a Federal Trade Commission notification advising that scammers were making phone calls to address issues with the recipient's Amazon or Apple account as a means of obtaining sensitive personal information. Am. Compl. ¶ 43; Am. Compl. Ex. 5. Whether Cook actually fell prey to the scam the FTC warned about is not clear, however, as "Loan Repayment" was listed as the purpose of nearly all of the wire transfers. Am. Compl. at ¶ 51.

The Amended Complaint alleges that on December 15, 2020, Navy Federal reported Cook to Fairfax APS for "incoming wires and outgoing wires [that] were conducted in a manner indicative of possible elder financial exploitation." Am. Compl. ¶ 58. Navy Federal's report to APS noted that Cook "ha[d] been warned numerous times that he is the victim of a scam, but he still want[ed] to proceed with the wires." Am. Compl. ¶ 59. APS thereafter commenced an investigation, and its internal report stated the following:

- Mr. Cook refused to meet with APS. As a result, there is no information about his

[1] Navy Federal does not concede the veracity of any of the facts alleged in Plaintiff's Amended Complaint, however, will accept all facts as true for purpose of the Memorandum in Support of its Motion to Dismiss.

ability to perform ADLs and IADLs and his support network." Am. Compl., Ex. 8 at 8.

- "Mr. Cook was approached via telephone conversations on two occasions by this APS worker. On both phone calls, Mr. Cook refused to speak in depth about the financial exploitation concern and became angry that anyone had suggested that he was being victimized." *Id*.
- Mr. Cook had not responded to APS' requests for bank documents and, due to his unwillingness to cooperate, APS could not "obtain any information about Mr. Cook's support network" and, therefore, could "not speak with anyone within his social circle who may have been able to privately address the concern." *Id*. at 1011.
- "[Cook] yelled that he was doing what he wanted to do with his money and it was none of [APS'] business." *Id*. at 12.
- "[Cook] reported that he was repaying a loan. [APS] inquired about taking out a loan from a foreign country and not from the U.S." and "[Cook] stated that he wasn't doing anything that he didn't want to do." *Id*. at 13.

On January 28, 2021, APS sent a letter to Navy Federal stating that the "investigation has been completed, and at this time, Mr. Cook is in need of protective services." Am. Compl. Ex. 10. The letter went on to say that "[a]vailable and appropriate services will be offered" to Cook. *Id.* APS ultimately closed the investigation on February 1, 2021, noting the disposition of the investigation as follows: "Needs Protective Services – Refused." Am. Compl., Ex. 8 at 14. During and after the APS investigation, Cook continued to instruct Navy Federal to wire funds to the international accounts, and Navy Federal processed the transfers as Cook instructed. *See, e.g.*, Am. Compl. ¶ 66.

On April 21, 2021, Cook died intestate. Am. Compl. ¶ 1. On June 14, 2021, Plaintiff qualified as Administrator of Cook's estate. Am. Compl. ¶ 4. Plaintiff thereafter brought this action, on behalf of the estate, in the Circuit Court for Fairfax County on November 4, 2022. On January 3, 2023, Navy Federal removed the case to this Court pursuant to the Edge Act, 12 U.S.C. § 611 et seq, and principles of federal jurisdiction. *See* ECF No. 1, Notice of Removal. On January 10, 2023, Navy Federal filed a motion to dismiss the complaint. ECF No. 6. On January 24, 2023, Plaintiff filed an opposition to Navy Federal's motion to dismiss. ECF No. 15. On January 30, 2023, Navy Federal filed a reply in support of its motion to dismiss. ECF No. 16. On January 31, 2023, Plaintiff filed an amended complaint. ECF No. 17.

ARGUMENT

I. LEGAL STANDARD

A Rule 12(b)(6) motion to dismiss tests the sufficiency of the claimant's initial pleading and does not resolve contests surrounding the facts or the merits of a claim. *See, e.g., Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). Although the district court may draw all reasonable inferences in favor of the plaintiff, *see Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999), it "need not accept the legal conclusions drawn from the facts, and '[it] need not accept as true unwarranted inferences, unreasonable conclusions or arguments," *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (quotations and citation omitted); *accord Botkin v. Fisher*, No. 5:08CV00058, 2009 WL 790144, at *6 (W.D. Va. Mar. 25, 2009) ("[A] court is not required to accept unwarranted deductions of fact when ruling on a Rule 12(b)(6) motion.") (citations omitted).

"Ultimately, a complaint must contain 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Nemet Chevrolet, Ltd. v. Consumeraffairs.com*, 591

F.3d 250, 255-56 (4th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "Facial plausibility is established once the factual content of a complaint 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (citations omitted). In other words, a complaint's factual allegations must produce an inference of liability strong enough to nudge the plaintiff's claims "across the line from conceivable to plausible." *Id.* (quoting *Iqbal*, 129 S. Ct. at 1952). Satisfying this "context-specific" test does not require "detailed factual allegations." *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949-50). However, the complaint must "plead sufficient facts to allow a court, drawing on 'judicial experience and common sense,' to infer 'more than the mere possibility of misconduct.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950). "Without such 'heft,' the plaintiff's claims cannot establish a valid entitlement to relief, as facts that are 'merely consistent with a defendant's liability,' fail to nudge claims 'across the line from conceivable to plausible.'" *Id.* (internal citations omitted).

Additionally, in ruling on a motion to dismiss, the Court may consider exhibits attached to the complaint. *Moore v. Flagstar Bank*, 6 F. Supp. 2d 496, 500 (E.D. Va. 1997). It is also well-established that a court may ignore factual allegations in a complaint contradicted by the terms of documents incorporated into pleadings. *See Trigon Ins. Co. v. Columbia Naples Capital, LLC*, 235 F. Supp. 2d 495, 499 n.2 (E.D. Va. 2002) (stating that the court is not bound to accept as true factual allegations contradicted by exhibits to complaint).

Read in the light of the pleading standards enunciated above, and in consideration of the Plaintiff's allegations and the law of Virginia, as set forth below, all claims asserted in the Amended Complaint should be dismissed with prejudice.

II. PLAINTIFF'S AMENDED COMPLAINT MUST BE DISMISSED IN ITS ENTIRETY

A. Plaintiff's Common Law Claims are Preempted and Displaced by the Uniform Commercial Code.

Plaintiff's state law claims relating to Cook's wire transactions are displaced by Article 4A of Virginia's U.C.C. As multiple courts have recognized, "[p]arties whose conflict arises out of a funds transfer should look first and foremost to Article 4-A for guidance in bringing and resolving their claims." *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1274 (11th Cir. 2003) (quoting *Sheerbonnet, Ltd. v. Am. Express Bank, Ltd.*, 951 F. Supp. 403, 409 (S.D.N.Y. 1995). Article 4A of the U.C.C., which has been codified under Virginia law as Va. Code § 8.4A *et. seq.*, applies to wire transfers. *See* Va. Code § 8.4A-102 (which states that the title "applies to funds transfers defined in § 8.4A-104"); Va. Code § 8.4A-104, cmt. 6 ("[M]ost payments covered by Article 4A are commonly referred to as wire transfers and usually involve some kind of electronic transmission....").

The drafters of Article 4A intended for the parties to be able to predict risk with certainty. *See* Va. Code § 8.4A-102, cmt. Article 4A is intended to set forth all duties and rights between banks regarding wire transfers, and to preclude precisely what Plaintiff attempts to do here – displace its provisions with resort to common law claims. As the Comments to Article 4A note, "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 § 8.4A-102, cmt. Indeed, the Comments to § 8.4A-102 expressly articulate the need for certainty in balancing rights, risks, and liabilities related to fund transfers as follows:

> In 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

> 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.

§ 8.4A-102 cmt. (emphasis added).

Here, Plaintiff contends that Navy Federal had a duty to protect Cook or otherwise act to prevent Cook's losses. Am. Compl. ¶¶ 69-77. From Plaintiff's perspective, Navy Federal should have refrained from accepting Cook's payment orders. *See Id.* However, Plaintiff's attempt to manufacture a duty where there is not one is expressly rejected by Va. Code § 8.4A-212, which states that a "bank owes no duty to any party to the funds transfer except as provided in this title or by express agreement."[2] Indeed, a bank can be liable under Section 212 for *not* accepting a payment order. *See id*. No provision of section 8.4A imposes liability on a receiving bank[3] that properly executes a duly authorized wire transfer by the sender, which is precisely what happened

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[2] The full text of Va. Code § 8.4A-212 reads as follows: 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.

[3] The "receiving bank" is defined as the "bank to which sender's instruction is addressed." Va. Code § 8.4A-103(a)(4).

here.[4] Furthermore, the U.C.C. expressly preempts liability on the part of a bank for conduct that occurs *before* the bank accepts a payment order. *See id.*

As noted above, Article 4A of the U.C.C. provides the exclusive means of governing claims arising out of wire transfers and it is improper for courts to impose liability under the common law inconsistent with the U.C.C.'s purposes and policies. *See Peter E. Shapiro, P.A. v. Wells Fargo Bank N.A.*, 795 F. App'x 741 (11th Cir. 2019) (affirming district court's dismissal of common law negligence claim arising out of wire transfer on Article 4A preemption grounds). Plaintiff has not asserted a U.C.C. claim for a reason: there can be no recovery under the U.C.C. because the wires were authorized by Cook and the funds he transferred went exactly where he instructed the wires to go. Thus, it would be improper for the court to impose liability on Navy Federal for initiating wire transactions for Cook when there can be no recovery under the U.C.C. *See Grain Traders, Inc. v. Citibank, N.A.,* 160 F.3d 97, 106 (2d Cir. 1998) (holding that the U.C.C. precluded common law claims of conversion and money had and received because the liability sought to be imposed by plaintiff's common law claims "would be inconsistent with the provisions of Article 4A"); *Nirav Ingredients, Inc. v. Wells Fargo Bank, N.A.*, No. 21-1893, 2022 WL 3334626, at *3 (4th Cir. Aug. 12, 2022) (unpublished opinion) (affirming dismissal of plaintiff's negligence claim against bank in wire fraud case, applying preemption principles, and confirming that banks are not "insurers for...peoples' mistakes in falling for phishing scams"). Accordingly, Plaintiff's claims should be dismissed.

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[4] Title 8.4A does create the possibility of liability of a receiving bank in the following various circumstances. None of them are alleged in this case:

- Unauthorized wire transfers (§ 8.4A-204);
- Erroneous payment orders (§ 8.4A-205);
- Rejection of payment order (§ 8.4A-210); and
- Cancellation and amendment of payment orders (§ 8.4A-211).

B. Article 4A expressly forecloses pre-acceptance liability for a receiving bank with respect to a wire transfer.

Article 4A forecloses the imposition of liability on a receiving bank under the circumstances alleged in Cook's Amended Complaint. A "receiving bank" is defined under § 8.4A-103(a)(4) as "the bank to which the sender's instruction is addressed." A "sender" is defined as "the person giving the instruction to the receiving bank." Va. Code Ann. § 8.4A-103(a)(5). Under Article 4A, "[l]iability based on acceptance arises only when *acceptance occurs* as stated in § 8.4A-209, and liability is limited to that provided in this title."[5] Va. Code Ann. § 8.4A-212 (emphasis added). However, a receiving bank "does not otherwise have any duty…*before acceptance, to take any action, or refrain from taking any action*, with respect to the order except as provided in this title or by express agreement." Va. Code Ann. § 8.4A-212 (emphasis added).

As the Amended Complaint demonstrates, Plaintiff takes issue with the fact that Navy Federal, as the receiving bank, accepted Cook's orders to transfer funds to the overseas accounts. Because the claims are predicated on Navy Federal's acceptance of Cook's payment orders, Article 4A expressly eliminates the possibility that Navy Federal could be liable to Cook for any alleged action or inaction that took place *before* Navy Federal accepted the transfers, as liability for acceptance can only occur *after* the acceptance. Therefore, even if the Plaintiff's claims could be fairly characterized as pertaining to pre-transfer conduct with respect to the wire transfers, Article 4A, which applies equally to pre- and post-acceptance conduct, expressly prohibits liability for a wire transfer before a payment order is accepted. Thus, Plaintiff's claims must be dismissed with

[5] Section 8.4A-209 provides that a receiving bank "accepts a payment order when it executes the order." Va. Code Ann. § 8.4A-209(a). This section of the Article also provides that "[a]cceptance of a payment order cannot occur before the order is received by the receiving bank." Va. Code Ann. § 8.4A-209(c).

prejudice.

C. Each of Plaintiff's Common Law Claims Fails as a Matter of Law.

As noted previously, Plaintiff's claims are centered around Navy Federal's acceptance of Cook's payment orders. Article 4A of the U.C.C. sets specific parameters with respect to a receiving bank's acceptance of a sender's payment order. Specifically, Article 4A expressly rejects the notion that a receiving bank owes a sender a duty to act or not act with respect to a given order prior to the order being accepted. Yet, Plaintiff inexplicably requests that this Court ignore the clear provisions of Article 4A and permit her claims founded on Navy Federal's alleged pre-acceptance conduct to proceed beyond dismissal. To do so, however, would run counter to the express language of Article 4A. Therefore, each of Plaintiff's claims against Navy Federal must be dismissed with prejudice.

Courts regularly reject claims in wire fraud cases similar to those Plaintiff alleges here. *See, e.g., Napoli v. Scottrade, Inc.*, No. COA17-783, 2018 WL 2648448 (N.C. Ct. App. June 5, 2018). In *Napoli*, the North Carolina Court of Appeals considered whether the plaintiff had sufficiently alleged a duty on the part of the defendant bank for her negligence claim to survive a motion to dismiss. Plaintiff alleged that her eighty-one-year-old mother, who had shown signs of dementia but had not been adjudicated incompetent, initiated multiple suspicious bank transactions, which included wire transfers. *Id.* at *1. Plaintiff further alleged that over a two-week period, her mother withdrew, cashed or transferred $81,300.00 from her account as a part of the alleged suspicious activity. *Id.* Additionally, plaintiff alleged that when she flagged the transactions for an employee of the bank, the employee admitted to being "worried about the suspicious nature of the transactions" but not knowing what to do about them. *Id.* Plaintiff's mother was subsequently diagnosed with dementia and adjudicated incompetent. Plaintiff asserted

that a fiduciary relationship exists between a bank and an elderly individual showing feeble-minded behavior who engages in multiple suspicious transactions, which gives rise to both a common-law duty and one imposed by public policy. *Id.* at *2. Additionally, Plaintiff argued that the defendant bank negligently breached its duty to plaintiff by failing to stop the transactions or alert the proper authorities. *Id.* at *1.

In rejecting plaintiff's argument regarding the bank's duty, the court first noted that "the relationship between a bank and its customer is governed by the Uniform Commercial Code." *Id.* at *2. The court then concluded that the duties plaintiff sought to impose on the bank were contrary to those created by the U.C.C. *Id.* Instead, as the court pointed out, the relationship between a bank and its customer is ordinarily one of debtor-creditor, and a fiduciary duty is not created by virtue of that relationship. *Id.* at *3. Although the court did note that a special duty could arise under the "proper circumstances," the court explained that those special circumstances are derived from the terms of the contract between the parties or the duties set forth in the U.C.C. *Id.*

With respect to the U.C.C. specifically, the court emphasized that "common law only supplements the U.C.C., if not displaced by [its] particular provisions." *Id.* Additionally, the court held that "[b]oth Articles 4 and 4A provide the bright line rule that there must be actual *adjudication* of incompetency for a bank to refuse a customer's instruction," and noted that "for wire transfer instructions 'a payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an *adjudication* of incapacity.'" *Id.* (original emphasis) (citing N.C. Gen. Stat. § 25-4A-211(g) (Article 4A of North Carolina's Uniform Commercial Code)). Thus, as the court explained, the "[d]efendant had an affirmative duty to obey [its customer's] instructions unless it had knowledge of an *adjudication* of incompetence, regardless of whether it was suspicious of the transactions and [its customer's]

competence." *Id.* at *4 (emphasis added). Accordingly, the court held that plaintiff was unable to establish the requisite elements of duty and breach and affirmed the trial court's dismissal of her negligence claim against the defendant bank, finding that the negligence claim failed as a matter of law. *Id.* at *4-5.

Plaintiff's claims here should meet the same result as *Napoli* as they conflict with Article 4A of the UCC and fail as a matter of law.

1. Plaintiff's Claim for "Assumption of Voluntary Duty" Must Be Dismissed.

Plaintiff's first claim, titled "Assumption of Voluntary Duty" should be dismissed for multiple reasons.

a. Virginia Law Does Not Recognize a Cause of Action for Assumption of Voluntary Duty.

Count I of the Amended Complaint fails to state a claim cognizable under Virginia law. Plaintiff alleges that Navy Federal undertook a voluntary duty to protect Cook by reporting the circumstances surrounding the transfers to APS and then not taking internal steps to stop sending wires for him. *See* Am. Compl. ¶¶ 82-83, 87. However, there is no cause of action under Virginia law known as "assumption of voluntary duty" and the claim should be dismissed.

Moreover, it is well established under Virginia law that a bank has no duty to protect its customers from third-party criminal conduct. As a general rule under Virginia law, "a person does not have a duty to warn or protect another from the criminal acts of a third person." *Commonwealth v. Peterson*, 286 Va. 349, 356 (2013) (citations omitted). Such a duty only arises "when a special relationship exists between a defendant and a plaintiff that gives rise to a right to protection to the plaintiff or between the defendant and third persons that imposes a duty upon the defendant to control the conduct of the third person causing reasonably foreseeable danger to the

plaintiff." *See Kellermann v. McDonough,* 278 Va. 478, 492 (2009) (citations omitted). In the absence of a special relationship, a defendant has "no duty to protect [a plaintiff] from the criminal acts of third parties based on this theory of negligence." *Id.* at 495.

No special relationship exists here. The instances where a "special relationship" exists to control the criminal conduct of a third party are very limited. In these narrow situations, the relationship is defined as one where one individual has assumed the obligation to take charge over, and control the behavior of, the third party. *See Nasser v. Parker*, 249 Va. 172, 179-180 (1995) ("It is a settled rule of decision in this Court [] that, in order to establish a 'special relation' under Restatement § 315(a) and overcome a demurrer in this type of case, a plaintiff must allege facts which, if proven, would show that the defendant had 'taken charge' of a third person within the meaning of § 319."); *see also Delk v. Columbia/HCA Healthcare Corp*., 259 Va. 125, 135 (2000) (citations omitted) ("We have held that the aforementioned provisions of the Restatement give rise to a duty in tort only if a special relationship exists between a defendant who is charged with negligence and the actor, and that this special relationship is established when the defendant has taken charge or exercised control over the actor.").

Perhaps recognizing how tenuous her claims are, Plaintiff apparently includes Count I, which is not a stand-alone cause of action, in her Amended Complaint so she can have two opportunities to convince this Court that a duty exists where even Plaintiff recognizes it should not. In Paragraph 87 of the Amended Complaint, Plaintiff contends that Navy Federal somehow created a special relationship with Cook, by anonymously reporting its concerns to Cook (pre-acceptance conduct) to APS. Cook was not involved, let alone aware, that Navy Federal made the report to APS and, therefore, it is inconceivable that such action sufficiently establishes that Navy Federal assumed the obligation to take charge and control over either Cook's well-being or the

alleged scammers. Moreover, as discussed in more detail *infra*, where Navy Federal never communicated to anyone, including Cook, that it was engaging the investigatory services of APS, Plaintiff's contention that a special relation existed between Navy Federal and Cook is hopeful at best.

Moreover, as with the plaintiff if *Napoli*, Plaintiff adds additional facts to her Amended Complaint to suggest that Cook was incompetent when he made the transfers. *See, e.g.,* Am. Compl. ¶¶ 14, 28-41 (alleging that Cook's health, including his cognitive abilities, declined after he suffered a stroke in July 2019, allegedly resulting in behavior that was not characteristic of him). However, Plaintiff here has likewise failed to allege that Cook was adjudged incompetent, that Navy Federal was informed by Cook or anyone else of this impairment, or that Navy Federal even observed any of the alleged changes in his character or conduct. Thus, Plaintiff has, like the plaintiff in *Napoli*, failed to demonstrate that Navy Federal had a basis under the U.C.C. to refuse Cook's wire instructions.

No Virginia court has ever imposed a duty of care on financial institutions to protect elderly customers from being defrauded by third-party scammers. When confronted with similar issues, courts in other jurisdictions have refused to recognize such a cause of action or impose a duty of care on financial institutions. *See Napoli,* 2018 WL 2648448 at *4-5.

b. The Relationship Between Navy Federal and Cook is Contractual.

Under Virginia law, the signature card between the bank and depositor forms the contract between the parties, and subject to any additional terms in the deposit agreement and statutory scheme, regulates their rights and duties. *See Fleming v. Bank of Va.,* 231 Va. 299, 305 (1986). A depository bank does not act as insurer or assume any duties outside of the parties' contract. In fact, the general rule is that "the relationship between a general depositor and the bank in which

its deposit is made is simply that of debtor and creditor." *PS Bus. Parks, L.P. v. Deutsch & Gilden, Inc.*, 287 Va. 410, 417 (1982). The law is the same in other jurisdictions. *See Das v. Bank of Am.*, 186 Cal. App. 4th 727, 741-742 (2010) (holding that the relationship between a bank and its customer "is not fiduciary in character," but rather "founded in contract," and that a bank "is ordinarily not required to supervise a depositor's use of his own funds"); *Hawkins v. Bank of Am., N.A.*, No. 17-cv-01954-BAS-AGS, 2018 WL 1316160, at *2 (S.D. Cal. Mar 14, 2018) (stating that "BOA owed 'no duty to monitor fiduciary accounts for irregular transactions, to prevent improper disbursements from the accounts, or to conduct an investigation of possible misappropriation of funds'" and concluding "Plaintiff has not and cannot plausibly plead that BOA owed a duty to initially investigate Hawkins' transfers when they were made") (citations omitted).

Here, the relationship between Cook and Navy Federal was solely that of depositor and depositary bank derived from a contract of deposit. Plaintiff has not pointed to any language in that contract that created a special relationship, and none exists.

c. Federal and State Statutes Insulate Navy Federal from Liability.

Navy Federal cannot be liable for "voluntary assumption of duty" because banks are insulated from liability and granted immunity under various federal statutes for reporting transactions which might violate the law, including the possible financial exploitation of the elderly. *See, e.g., Senior Safe Act*, 12 U.S.C. § 3423 (2018); *Bank Secrecy Act,* 31 U.S.C. § 5318(g)(3)(A) (2012). Virginia law similarly permits financial institutions to report suspected elder fraud to protective services without liability. *See* Va. Code § 63.2-1606. Caselaw is clear that in reporting violations of law under these statutes, banks are insulated from civil and criminal liability. *See generally In re Agape Litigation*, 681 F. Supp. 2d 352, 360 (E.D.N.Y. 2010) ("[B]ecause the Bank Secrecy Act does not create a private right of action, the Court can perceive

no sound reason to recognize a duty of care that is predicated upon the statute's monitoring requirement."); *Venture Gen. Agency, LLC v. Wells Fargo Bank, N.A.*, No. 19-cv-02778-TSH, 2019 WL 3503109, at *7 (N.D. Cal. Aug. 1, 2019) (finding no duty of care arising out of the Bank Secrecy Act's monitoring requirements and citing to several cases where courts refused to find a common law duty on the part of banks created by the Act's provisions); *Eldereiny v. TD Ameritrade, Inc.*, No. 8:21-CV-451, 2022 WL 801118, at *3 (D. Neb. Mar. 16, 2022) ("[P]laintiffs direct the Court to nothing in [Senior Safe Act], nor can the Court find anything in the [Senior Safe Act], suggesting an intent to create a private right of action...."). Consumers do not have private rights of action against financial institutions under these statutes; nor can any statutory or common law cause of action be stated against a bank for voluntarily reporting a possible violation of law. For all these reasons, Plaintiff's claim for "Assumption of Voluntary Duty" fails as a matter of law.

2. Plaintiff's Second Claim, Alleging Breach of the Covenant of Good Faith and Fair dealing, Fails as a Matter of Law.

Plaintiff claims that Navy Federal "breached the covenant of good faith and fair dealing when [Navy Federal] failed to adequately investigate the suspicious transactions and transfers coming from Mr. Cook's accounts." Am. Compl. ¶ 99. But Plaintiff has not pointed to any contractual language which imposes this duty on Navy Federal.

A claim for breach of covenant of good faith and fair dealing cannot re-write contractual terms. Under Virginia law, "when parties to a contract create valid and binding rights, an implied covenant of good faith and fair dealing is inapplicable to those rights.... Generally, such a covenant cannot be the vehicle for rewriting an unambiguous contract in order to create duties that do not otherwise exist." *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 385 (1997) (citations omitted). Furthermore, "'[a] breach of the implied duty of good faith and fair dealing *must be*

raised in a claim for breach of contract, as opposed to a claim in tort.'" *Washington v. Veritiss, LLC*, No. 1:14cv1250 (JCC/TCB), 2015 WL 965931, at *5 (E.D. Va. Mar. 4, 2015) (emphasis added) (citations omitted). To survive dismissal, a plaintiff's allegations must demonstrate dishonesty, bad faith, or misrepresentation regarding contractual rights. *Id*.

Here, Plaintiff does not identify any contractual provision breached. As this Court knows, "[t]o survive a motion to dismiss, a breach of contract claim must allege both the existence of a contract *and a breach of a specific provision of that contract.*" *Broyhill v. Bank of Am., N.A.*, No. 1:10CV905, 2010 WL 3937400, at *5 (E.D. Va. Oct. 6, 2010) (emphasis added). Plaintiff points to no provision in the deposit contract between Cook and Navy Federal supporting her contention that Navy Federal breached the covenant of good faith and fair dealing "when [it] failed to adequately investigate the suspicious transaction and transfers coming from Mr. Cook's accounts." Am. Compl. ¶ 99. Additionally, Plaintiff only conclusively alleges that "[e]ach of Defendants' actions was done intentionally, and in bad faith...," without otherwise alleging a single fact to show that this was the case. Am. Compl. ¶ 101. Accordingly, Plaintiff seeks to do precisely what Virginia law has explicitly proscribed: write into the contract a duty that Navy Federal did not have. Therefore, this Court must also dismiss Count II for failure to state a claim.

3. Plaintiff's Third Claim Alleging Negligence/Voluntary Assumption of Duty Cannot Survive Dismissal as a Matter of Law.

Plaintiff's third cause of action fails for the same reason Plaintiff's first claim for "Assumption of a Voluntary Duty" fails. Plaintiff asks this Court to strain reason and logic to assist her in fashioning a basis for recovery in tort from Navy Federal; however, Virginia law will not allow such a result. There are no Virginia cases recognizing or imposing on a financial institution a duty of care in tort to protect elderly customers from fraud. As discussed at length above, Navy Federal owed contractual and U.C.C. statutory duties to Cook but did not have a duty

to monitor Cook's accounts or prevent him from being duped by alleged internet scammers.

In an attempt to fashion a duty not recognized under Virginia law, Plaintiff cites in paragraphs 86 and 88 of her Amended Complaint to two Virginia cases which she contends impose a duty of care on Navy Federal. *See* Am. Compl. ¶¶ 86, 88 (citing *Burns v. Gagnon*, 283 Va. 657 (2012) and *Terry v. Irish Fleet, Inc.*, 296 Va. 129 (2018)). Both cases are inapposite. *Burns* involved a negligence claim asserted by a student against his assistant principal, which created an issue of first impression: whether a special relation exists between a principal and a student. *Burns,* 296 Va. at 663, 670. The court decided based on precedent that where a parent entrusts the supervision of her child to an adult who agrees to supervise the child, the adult must exercise reasonable care in discharging that duty. *Id*. at 671. The court reached this conclusion while also noting that the Virginia Supreme Court has been cautious about expanding the special relationship exception to include new relationships. *Id*. at 669. Here, Navy Federal is a federally chartered credit union in the business of conducting banking transactions for customers, not an adult entrusted with caring for a child. *Burns* provides no authority for this Court to find that a special relationship existed between Navy Federal and Cook beyond the one created by the contractual agreement between them, which is insufficient to create a duty on Navy Federal's part to protect Cook for the criminal acts of the third-party scammers.

Plaintiff also relies on *Terry v. Irish Fleet, Inc.*, 296 Va. 129 (2018), in which the court refused to find that the defendants undertook a voluntary duty. In *Terry*, the plaintiff sued a taxicab dispatching company for failing to protect her husband, a taxicab driver, from being fatally assaulted by a passenger. *Id*. at 132-33. The taxicab company had noted suspicious conduct about the passenger on a prior evening, but nevertheless sent plaintiff's husband to pick up the passenger, who shot him. *Id*. at 133-34. Plaintiff argued, among other things, that the dispatching company

assumed a duty to protect cab drivers by screening calls of potential cab fares and determining the safety risk of the caller. *Id*. at 134. The Supreme Court of Virginia, however, refused to find a duty, noting that plaintiff had failed to allege that the defendants agreed or promised to warn drivers of such conduct, and further failed to allege that defendants expressly communicated an intent to warn taxicab drivers. *Id*. at 139.

Here, Plaintiff alleges that "[Navy Federal] did not have a contractual obligation to report Mr. Cook to APS, but...by doing so, a special relationship was formed, and therefore a duty to act was required." Am. Compl. ¶ 87. It is entirely unclear why Plaintiff believes Navy Federal contacting APS somehow constitutes a voluntary assumption of a duty to protect Cook. Plaintiff does not allege that Navy Federal ever communicated to Cook, his family members, or even APS that Navy Federal would affirmatively take action to negate the criminal conduct of the international accountholders. In fact, the documents Plaintiff filed with her Amended Complaint evince the fact that Navy Federal contacted APS in confidence. *See* Am. Compl., Ex. 8 at 13 ("[Cook] wanted to know who made the referral [to APS] and worker explained that [sic] confidentiality policy. [Cook] became angry."). Nor does Plaintiff claim that Navy Federal ever represented to Cook, or anyone else, that Navy Federal would recall the wire transfers, monitor Cook's accounts, investigate the purpose for the wires, or protect Cook from a potential scam. *See, e.g., Terry*, 296 Va. at 136-38 (noting that in the absence of a special relationship, a defendant may owe a duty to protect a plaintiff from the criminal act of a third party where the defendant "voluntarily under[takes] such duty by *expressly communicating his intention to do so*" and further noting that the Supreme Court of Virginia has "rejected the contention that defendant 'voluntarily assumed' a legal duty to protect or warn against acts of criminal assault by a third person 'merely because a defendant took precautions not required of it' to protect the safety of the plaintiff")

(emphasis added).

Plaintiff's suggestion that Navy Federal breached a duty to Cook by not acting in response to the January 28, 2021 letter from APS is equally unavailing. Plaintiff relies on a single line from the APS report as the foundation for her proposition: "The investigation has been completed, and at this time, Mr. Cook is in need of protective services. Available and appropriate services will be offered." Am. Compl., Ex. 10; Am. Compl. ¶ 65. However, APS noted on several occasions that its investigation was limited by Cook's lack of cooperation. *See, e.g.,* Am. Compl. Ex. 8, at 8 (noting APS' lack of information about Cook's ability to perform daily activities because of his refusal to provide information). Without having been able to obtain all of the pertinent information from Cook, APS simply noted its *belief* that Cook was in need of protective services, while also noting Cook's continued refusal to engage with APS. *See* Am. Compl., Ex. 8 at 10. Accordingly, Plaintiff has not sufficiently alleged any basis for upending well-established Virginia law prohibiting the existence of a duty between a bank and its depositor under the circumstances alleged in the Amended Complaint.

Plaintiff's claim as alleged in Count III of the Amended Complaint fails as a matter of law and should be dismissed.

D. The Economic Loss and Source of Duty Rules Bar Plaintiff's Tort Claims.

Plaintiff's claims amount to nothing more than frustrated economic expectations cloaked in alleged violations of tort law. Such claims are barred by Virginia's economic loss rule, which can be summarized as the proposition that a plaintiff may not rely on a tort theory to recover economic losses against a defendant. *See Filak v. George*, 267 Va. 612, 618 (2004) ("when a plaintiff alleges and proves nothing more than disappointed economic expectations assumed only by agreement, the law of contracts, not the law of torts, provides the remedy for such economic

losses") (citations omitted); *see also Station # 2, LLC v. Lynch*, 280 Va. 166, 171-72 (2010) (a plaintiff cannot assert a tort claim based only on the breach of a contractual duty). To recover economic losses under a "negligence" theory, the duty breached must not be a contractual duty.

The economic loss rule maintains a conceptual distinction between the underlying purposes of tort and contract law. The Supreme Court of Virginia provided the following guidance in the seminal construction-law case, *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*:

> The controlling policy consideration underlying tort law is the safety of persons and property – the protection of persons and property from losses *resulting from injury*. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons or property on one hand and economic losses on the other.

236 Va. 419, 425 (1988) (emphasis added). Common law tort duties of care therefore relate to protection against personal injury and property damage, while negotiated contractual obligations (which can also be negligently performed) govern parties' economic expectations.

Here, Plaintiff alleges losses suffered by virtue of an alleged breach of a duty assumed only by agreement. Plaintiff alleges an economic loss of $3,633,050.00 stemming from Navy Federal's alleged improper acceptance of wire instructions from Cook. Navy Federal only assumed an obligation to pay (or not pay) funds from its members' accounts by way of a contractual agreement. Plaintiff's claims are therefore premised on the relationship that Navy Federal had with Cook, which was strictly contractual in nature. Moreover, as outlined *supra*, Plaintiff has failed to allege any basis for this Court finding that Navy Federal had a duty to Cook outside of those created by the parties' contract. Accordingly, Plaintiff's tort claims are precluded by the economic loss rule and should be dismissed.

Additionally, because Plaintiff's negligence claims essentially allege Navy Federal's

negligent performance of a contractual duty (whether to accept wiring instructions from an accountholder), they are also barred by Virginia's source of duty rule. In applying this rule, courts have recognized that the distinction between tort and contract law would be meaningless if courts deferred to a plaintiff's own mischaracterization of contractual obligations as common law tort duties. To this end, the Supreme Court of Virginia explained that "[i]n determining whether a cause of action sounds in contract or tort, the source of the duty violated must be ascertained." *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 558 (1998).

While it may be possible to show both a breach of contract and a breach of a common law duty under the same facts, "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Id.* "A tort action cannot be based solely on a negligent breach of contract." *Id.* at 559. In other words, if a plaintiff's claim for negligence centers on conduct arising out of a contractual duty alone, the claim is founded on contract, not tort, and must be dismissed. *See, e.g., Rossmann v. Lazarus*, No. 1:08cv316, 2008 WL 4550579 (E.D. Va. Oct. 7, 2008) (agreeing with the same argument set forth by defendant and granting defendant's motion to dismiss plaintiff's negligence claim on that basis). This source-of-duty inquiry is necessary to prevent turning every breach of contract into an actionable tort claim. *See Richmond Metro. Auth.,* 256 Va. at 560.

Here, the crux of Plaintiff's alleged claims is Navy Federal's alleged failure to stop Cook from transferring funds to bank accounts in Thailand via international wire. But it is Navy Federal's business to conduct banking transactions for customers with whom it has a contractual banking relationship. Without the contract in existence between Navy Federal and Cook, Plaintiff would not have a basis to challenge Navy Federal's transfer (or alleged negligent failure to refrain from transferring) funds from Cook's account. Accordingly, the source of duty rule mandates

dismissal of Plaintiff's tort claims since they are essentially allegations of negligent breach of contract.

E. Plaintiff's Claims are Barred, in Part, by the Applicable Statute of Limitations.

Plaintiff filed this lawsuit on November 4, 2022. To the extent the Amended Complaint purports to state claims of negligence and assumption of a duty arising in tort, the claims are governed by the two-year statute of limitations for negligence. *See* Va. Code § 8.01-243. Alternatively, the claims are governed by the two-year limitations period in Va. Code § 8.01-248, which applies to "[e]very personal action...for which no limitation is otherwise prescribed." Thus, even if had a basis for recovering the transfers, which Navy Federal maintains she does not, Plaintiff is barred from recovering any wires occurring prior to November 4, 2020.

Plaintiff's attempt to amend her pleading to preserve the wire transfers that occurred prior to November 4, 2020 fails. After having been challenged on the first iteration of a complaint, Plaintiff adds additional allegations to the Amended Complaint to suggest that Cook was under some sort of incapacity at the time he instructed Navy Federal to complete the wire transfers. *See* Am. Compl. ¶¶ 14, 28-41. Plaintiff's additional allegations cannot, however, shield the pre-November 4, 2020 wire transfers from being barred by the applicable statute of limitations.

First, although Plaintiff goes to great lengths to imply that Cook was incompetent or incapacity during the applicable statute of limitations period, she fails to allege one critical fact: that Cook was adjudged incapacitated by a court of competent jurisdiction. Without such an allegation, she cannot establish an incapacity sufficient to toll the statute of limitations. *See* Va. Code Ann. § 8.01-229 ("For the purposes of subdivisions 1 and 2, a person shall be deemed incapacitated if he is so adjudged by a court of competent jurisdiction.").

To the extent Plaintiff seeks to claim that Navy Federal's conduct as alleged in the

Amended Complaint constituted a continuous tort that resulted in tolling of the statute of limitations until Cook's death, such contention also fails. As noted *supra*, Plaintiff cannot, as a matter of law, establish that Navy Federal owed Cook any duty. Therefore, she is unable to demonstrate the existence of any continuing tort that would permit tolling of the statute of limitations. Accordingly, as noted in Navy Federal's Motion to Dismiss, Plaintiff's claims with respect to any wire transfers that occurred more than two years before the date on which the Complaint was filed are barred and must be dismissed with prejudice.

CONCLUSION

For the reasons stated above, Navy Federal Credit Union respectfully requests that this Court grant is Motion to Dismiss, dismiss Plaintiffs' Amended Complaint in its entirety, with prejudice, and allow further relief as this Court deems just and proper.

Dated: February 14, 2023

Respectfully submitted,

NAVY FEDERAL CREDIT UNION

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February 2023, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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