**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| O'NEILL, BRAGG & STAFFIN, P.C., *et al.* | * | |
| Plaintiffs, | * | |
| v. | * | Case No. 2:18-cv-02109-HB |
| BANK OF AMERICA CORPORATION | * | |
| Defendant. | * | |
| | * | |

* * * * * * * * * * * * * *

**BANK OF AMERICA CORPORATION'S MOTION TO DISMISS COMPLAINT**

Defendant Bank of America Corporation ("Bank of America" or the "Bank"), through undersigned counsel and pursuant to Fed. R. Civ. P. 12, hereby moves to dismiss the Complaint filed by Plaintiffs O'Neill, Bragg & Staffin, P.C., Gary L. Bragg and Alvin M. Staffin ("Plaintiffs"), ECF 1, for failure to state a claim upon which relief can be granted. In support, Bank of America refers hereto and incorporates herein its Memorandum of Law.

WHEREFORE, for the foregoing reasons, Bank of America Corporation respectfully requests that the Court dismiss Plaintiffs' Complaint.

Date: June 28, 2018

Respectfully submitted,

*/s/ Jarrod D. Shaw*

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 28, 2018, Bank of America Corporation's Motion to Dismiss Complaint, Memorandum in Support, and Proposed Order were electronically filed and served to all counsel of record via CM/ECF.

*/s/ Jarrod D. Shaw*
Jarrod D. Shaw

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| Defendant. | * | |
| | * | |

* * * * * * * * * * * * *

**BANK OF AMERICA CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS COMPLAINT**

Date: June 28, 2018

Respectfully submitted,

*/s/ Jarrod D. Shaw*

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Defendant Bank of America Corporation[1] ("Bank of America" or the "Bank"), through undersigned counsel and pursuant to Fed. R. Civ. P. 12, hereby moves to dismiss the Complaint filed by Plaintiffs O'Neill, Bragg & Staffin, P.C. ("OBS"), Gary L. Bragg ("Bragg"), and Alvin M. Staffin ("Staffin") (collectively, "Plaintiffs"), ECF 1, for failure to state a claim upon which relief can be granted. In support, Bank of America states:

## INTRODUCTION

Although the Complaint is lengthy, the facts are straightforward. OBS was a victim of a phishing scheme. One of its named partners, Alvin M. Staffin, took the bait, failed to verify an email payment request from a fraudster, and wired $580,000 from OBS's IOLTA account at Bank of America to the fraudster's account at Bank of China. Exercising its due diligence, after Staffin initiated the wire transfer, the Bank called Staffin to obtain personal verification of the wire transfer request via telephone wire pin. Staffin again verified the wire. After verification, Staffin learned that the firm had been the victim of fraud and attempted the cancel the wire. Unfortunately, that effort was untimely as Bank of America had already sent the wire transfer pursuant to Staffin's order.

[1] The Complaint identifies "Bank of America Corporation" as the defendant. Bank of America Corporation, however, is a holding corporation while the correct party is "Bank of America, N.A." *See* Compl. Exh. 1, ECF 1-2 at 1 ("In this agreement, 'Bank of America', 'Bank', 'we', 'us' and 'our' means Bank of America, N.A. 'You' and 'Your' means each and every owner of the account and each and every other person with authority to withdraw funds from the account or otherwise operate the account."). Thus, Plaintiffs have failed to join an indispensable party pursuant to Fed. R. Civ. P. 19 and Bank of America Corporation must be dismissed because it has no relationship, contractual or otherwise, with Plaintiffs. Notwithstanding these case dispositive issues, Bank of America has also set forth arguments herein as to why Plaintiffs' claims likewise fail against Bank of America, N.A in the event Plaintiffs seek leave to amend or add Bank of America, N.A. as a defendant in this action. Any such effort would be futile and should therefore be denied for the reasons set forth herein.

Based on these facts, the Court should dismiss the Complaint it its entirety. *First*, Pennsylvania's Commercial Code ("PCC"), which adopted the Uniform Commercial Code ("UCC"), displaces all of the common law claims, *i.e.*, the breach of contract claims in Counts I-III and the negligence claims in Counts VIII-IX. *Second*, the PCC (Counts IV-VI) does not impose liability on a bank that fails to cancel an already initiated wire transfer request pursuant to a customer's valid instructions. *Third*, even if the common law claims are not displaced by the PCC, they nevertheless fail as a matter of law. The breach of contract claims fail because the plain language of the contract between OBS and the Bank provides that the Bank has no obligation to cancel wire transfer requests that have been initiated and the Bank is absolved of all liability if an executed wire transfer request cannot be cancelled. As to the negligence claims, the Bank does not owe a tort duty to Plaintiffs and the doctrines of the gist of the action and economic loss bar Plaintiffs' claims. *Finally*, the Regulation E claim (Count VII) fails because it is inapplicable to wire transfers, as well as the type of account at issue here.

## FACTUAL AND PROCEDURAL BACKGROUND[2]

Plaintiff OBS is a law firm based in Pennsylvania. Compl., ECF 1, ¶ 1. The other two Plaintiffs, Bragg and Staffin, are shareholders and named partners at OBS. *Id.*, ¶¶ 2–3, 15. OBS is Bank of America's customer and their relationship is defined by contract. *See id.*, ¶¶ 10, 17, 92. Staffin and Bragg acted as agents of OBS in establishing OBS's IOLTA account at Bank of America. *Id.*, ¶ 17. As relevant to the claims at issue, Staffin and Bragg themselves are not Bank customers.

### I. STAFFIN AUTHORIZED A $580,000 WIRE FROM OBS'S IOLTA ACCOUNT BASED ON UNVERIFIED EMAILS WITH A HACKER.

[2] The facts set forth in the Complaint are taken as true for the purposes of this Motion only.

On or before December 6, 2017, a computer hacker gained access to Bragg's OBS email account and, while posing as Bragg and using Bragg's email account, requested that Staffin initiate a $580,000 wire transfer from the OBS Bank of America account to an account at the Bank of China. *Id*., ¶¶ 27–28, 31. The wire was supposedly being sent to Midtown Resources for an Eagle Funding loan; however, the account in which the hacker directed Staffin to send the wire transfer was in the name of Cochen International Ltd. at the Bank of China in Hong Kong. *Id*., ¶ 31. Staffin never confirmed the validity of this request with Bragg prior to initiating the wire transfer. *See id*., ¶¶ 36–37. At 5:52 P.M. on December 6, 2017, Staffin instructed the Bank to initiate the $580,000 wire transfer from OBS's IOLTA account to the Bank of China.[3] *Id*., ¶ 35. As part of the Bank's due diligence, the Bank called Staffin to verify the outgoing wire. Compl., Exh. 8, ECF 1-9. Staffin did. *Id*.

After verifying the wire, Staffin called Bragg to discuss the wire transfer. Compl., ECF 1, ¶ 36. Bragg informed Staffin that he did not send the emails instructing Staffin to wire the $580,000 to the Bank of China. *Id*., ¶ 37. Realizing that OBS had been defrauded, Staffin attempted to cancel the wire transfer request. *Id*., ¶ 38. By the time that Staffin called the Bank to cancel the wire, however, the wire had already been initiated. *See id*., ¶ 98 ("It is undisputed that Staffin and Bragg contacted Defendant on December 6, 2017 ***shortly after the wire transfer confirmation*** to report that the wire transfer resulted from fraud perpetrated against Plaintiffs.") (emphasis added); *see also* Compl. Exh. 7, ECF 1-8 ("Date: 6-DEC-2017 Time Wire Completed: 17:52 ET); Compl., Exh. 8, ECF 1-9 ("12/06/2017 (7:07p): Alvin Staffin contacted the Wire

[3] The Bank's records do not match this allegation. According to the Bank, Staffin first initiated the wire transfer on December 6, 2017 at 5:22 pm and, at 5:50 pm, the Bank called Staffin to validate the outgoing wire, which Staffin confirmed. *See* Compl., Exh. 8, ECF 1-9. For the purposes of this Motion, however, the Bank will assume that the allegations in paragraph 35 of the Complaint are true.

Operations team to report wire fraud (although it was an authorized transfer of funds) and spoke with Jason who ***confirmed that the outgoing wire couldn't be stopped or cancelled as the wire instructions had already been sent***. . . .") (emphasis added).

Notwithstanding the inability to stop the wire, Jason suggested that Staffin request a wire recall the following morning, once the non-cancellable wire transfer had been received by the Bank of China. *Id*., ¶ 40. Christian Rios, a representative from Bank of America's Check Fraud Claims team, stated that he could request the funds back, but did not guarantee that it would be successful. *Id*., ¶ 46.

The Bank of China received the wire transfer on December 7, 2017 at 5:00 am EST. *Id*., ¶ 49. Staffin contacted Bank of America to initiate a wire recall request, which Bank of America did at 8:47 am. *Id*., ¶¶ 52, 54. The following day, on December 8, 2017, the Bank of China responded to the wire recall request, stating:

> WE COULD ONLY ARRANGE THE REFUND PURSUANT TO A HONG KONG COURT ORDER BINDING ON US AND WHEN THERE IS SUFFICIENT CREDIT BALANCE IN THE CUSTOMER'S ACCOUNT AT THE MATERIAL TIME. WE SUGGEST YOU TO REPORT THE CASE TO AND SEEK ASSISTANCE FROM THE HONG KONG POLICE FORCE.

*Id*., ¶ 69. Bragg filed a cyber crime report with the Hong Kong police, *id*., ¶ 70, and sent a letter to the Bank of China's Fraud department requesting a freeze on the Cochen International Ltd. account in which the wire transfer was posted, *id*., ¶ 72. The Bank of China indicated that it could not process the wire recall because it had already processed the transfer. *See id*., ¶ 73.

OBS retained the law firm of Tanner DeWitt Solicitors ("TDS") in Hong Kong to garnish the funds in the Cochen account and was able to recover $83,509.21. *Id*., ¶¶ 75, 77. After paying the TDS's fees, OBS netted $58,730.11. *Id*., ¶ 77. TDS was also able to obtain a final judgment

on OBS's behalf against third party recipients of the wire transfer, which totaled $53,130, plus $7,130 in costs. *Id*., ¶ 78.

## II. SEVERAL DOCUMENTS COMPRISE THE CONTRACT BETWEEN OBS AND BANK OF AMERICA.

The Deposit Account Agreement itemizes the documents comprising the contract between OBS and the Bank:

> This Deposit Agreement and Disclosures, the applicable Schedule of Fees, the signature card and other account opening documents for your account are part of the binding contract between you and us (this "Agreement") for your deposit account and your deposit relationship with us. They contain the terms of our agreement with you. Please read all of these documents carefully.

Compl. Exh. 1, ECF 1-2 at 2; *see id*., ¶ 10. These documents, which comprise the contract, have specific provisions governing the cancellation of wire transfers. For example, the Deposit Account Agreement states:

> **Amending or Cancelling Payment Orders** ***You may not amend or cancel a payment order after we receive it.*** If you ask us to do this, we may make a reasonable effort to act on your request. But ***we are not liable to you if, for any reason, a payment order is not amended or canceled***. You agree to reimburse us for any costs, losses or damages that we incur in connection with your request to amend or cancel a payment order.

ECF 1-2 at 65 (emphasis added). This provision is found under the heading "Funds Transfer Services" and adopts specific terms as defined by Article 4 of the UCC. *Id*. at 64. Thus, terms like "payment orders" as used in the Deposit Account Agreement have the same definition in the PCC. *See* 13 Pa. C.S. § 4A103(a)(1).

In paragraph 92 of their Complaint, Plaintiffs reproduced certain portions of the Telephone Wire Transfer Agreement but omitted the provisions that negate their claims. Specifically, the full provision of the Telephone Wire Transfer Agreement states:

> **4. Cancellation of Wire Transfer Requests**
> ***We have no obligation to cancel or amend any telephone or draw wire transfer request after we receive it*** or to cancel or amend any transfer to be made pursuant

> to a standing order which is in effect. If you or a bank sending us a draw request sends us a wire transfer request instructing us to cancel or amend a telephone or draw wire transfer request and we are able to verify the authenticity of the cancellation or amendment request using the Security Procedure, as applicable, we will make a reasonable effort to act on that request, but ***we will not be liable if it is not effected***. You agree to indemnify us against and hold us harmless from any and all liabilities, claims, costs, expenses and damages of any nature, including legal expenses, we incur in connection with your request to amend or cancel. Your obligations under this provision will survive termination of the Service.

*Id*. at 3 (emphasis added).

The terms governing OBS's IOLTA account during the operative time were outlined in the Deposit Agreement and Treasury Services Agreement – Escrow Management Service Addendum, not the Summit Bank Escrow Account Control Agreement. *See* Compl., Exh. 18, ECF 1-21 ("Please note that the account referenced above is currently set up with the Escrow Management Service based on the terms of the Deposit Agreement and Treasury Services Agreement - Escrow Management Service Addendum.").

The Deposit Account Agreement and Telephone Wire Transfer Agreement, along with signature cards and other account opening documents, comprise the contract between OBS and Bank of America. The Deposit Account Agreement explains that the relationship between OBS and the Bank "is that of debtor and creditor. This Agreement and the deposit relationship do not create a fiduciary, quasi-fiduciary or special relationship between us." Compl. Exh. 1, ECF 1-2 at 2.

## STANDARD OF REVIEW

Dismissal of the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) is proper if the Complaint fails to state a viable claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory

statements," are not enough to survive a motion to dismiss. *Id.* Rather, Federal Rule 8(a)(2) imposes a "plausibility standard" which requires the plaintiff to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1939. A plaintiff must plead more than the mere possibility of relief. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009).

The Third Circuit explained that a District Court must undertake the following three steps to determine the sufficiency of a claim:

> First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

*Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 212 (3d Cir. 2013) (citation omitted).

## ANALYSIS

### I. THE UCC DISPLACES ALL COMMON LAW CLAIMS AND ESTABLISHES THAT THE BANK HAS NO LIABILITY AS A MATTER OF LAW.

Pennsylvania enacted Article 4A of the Uniform Commercial Code in 1992 as part of what is now referred to as the Pennsylvania Commercial Code ("PCC"). *See* 13 Pa. C.S. §§ 4A101 *et seq.* Pennsylvania adopted Article 4A to provide norms and ensure predictability vis-à-vis funds transfers:

> 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.

13 Pa. C.S.A. § 4A102, UCC Cmt. Thus, if the PCC specifically governs a funds transfer scenario, it displaces all other causes of action. Here, the allegations in the Complaint are covered squarely by Article 4A.

**A. The Pennsylvania UCC Displaces All of the Common Law Claims.**

The PCC "displaces parallel common law claims (1) when it supplies a comprehensive remedy and (2) where 'reliance on the common law would thwart the purposes of the Code.'" *Environmental Equipment & Service Co. v. Wachovia Bank, N.A.*, 742 F. Supp. 2d 705, 713 (E.D. Pa. 2010) (holding that the PCC displaced claims of common law negligence, breach of contract, and implied duties of good faith and fair dealing) (quoting *New Jersey Bank, N.A. v. Bradford Sec. Operations, Inc.*, 690 F.2d 339, 346 (3d Cir. 1982)); *see Gress v. PNC Bank*, N.A., 100 F. Supp. 2d 289 (E.D. Pa. 2000) (granting bank's motion to dismiss common law claims for conversion and negligence because they were displaced by the PCC); *see also Aleo Int'l, Ltd. v. Citibank, N.A.*, 612 NYS.2d 540, 24 UCC Rep.2d 164 (Sup. Ct. 1994) (dismissing negligence claim because Article 4A occupies the wire transfer field and displaces any common law causes of action).

Here, Article 4A supplies a comprehensive scheme governing Plaintiffs' claims. Under Article 4A, a "payment order" is an instruction by a "sender" to a "receiving bank" to pay a sum certain. 13 Pa. C.S.A. § 4A103(a)(1). Section 4A211 provides the rights and responsibilities of the sender and the receiving bank when the former cancels a payment order. *See id.* § 4A211 cmt. 1 ("This section deals with cancellation and amendment of payment orders. It states the conditions under which cancellation or amendment is both effective and rightful."). Specifically, "a communication by the sender canceling or amending a payment order is effective . . . if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication ***before the bank accepts the payment order***." *Id.* § 4A211(b) (emphasis added). The "receiving bank . . . accepts a payment order when it executes

the order." *Id.* § 4A209(a). "A payment order is 'executed' by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank." *Id.* § 4A301(a).

Although there are no Pennsylvania cases addressing a bank customer's cancellation of a payment order under 13 Pa. C.S.A. § 4A211, *Fisher & Mandell LLP v. Citibank, N.A.*, 632 F.3d 793 (2d Cir. 2011), applying New York's equivalent of the statute is directly on point. Like Plaintiff OBS in the instant case, plaintiff Fisher and Mandell is a law firm that fell victim to a phishing scheme and made two wire transfers to a fraudster. *Id*. at 795–96. When the law firm discovered the scheme, it instructed its bank, Citibank, to cancel the payment orders but Citibank was unsuccessful. *Id*. at 796. The law firm sued Citibank for, *inter alia*, negligence. *Id*. The Southern District of New York granted summary judgment to Citibank on all counts and the Second Circuit affirmed, holding, *inter alia*, that the negligence claim was preempted by the UCC.[4] *Id*. at 796–97. Both courts determined that the "sender" was the law firm because it was "the person giving the instruction to the receiving bank" under Section 4–A–103(1)(e).[5] *Id*. at 802. The law firm's cancellation instruction went to Citibank, the "receiving bank" under Section 4–A–103(d)[6] as "the bank to which the sender's instruction [was] addressed." *Id*. By the time the law firm cancelled the payment orders, however, Citibank had already executed the payment orders, *i.e.*, sent the wire transfers. *Id*. The Southern District of New York and the Second Circuit held that the law firm's cancellation order "was not effective, as it did not give Citibank 'a reasonable opportunity to act on the communication before [it] accept[ed] [*i.e.*, executed] the payment order.'" *Id.* (citing New York's analog to § 4A211(b)). Thus, the court held that the law

[4] The law firm also alleged a breach of contract claim, which was premised on a different set of facts and involved a different issue, *i.e.*, when a check clears.

[5] Pennsylvania's exact analog is 13 Pa. C.S.A. § 4A103(a)(5).

[6] Pennsylvania's exact analog is 13 Pa. C.S.A. § 4A103(a)(4).

firm's negligence claim, which was premised on Citibank's alleged failure to act on its cancellation request in a timely manner, was displaced by New York's UCC.

Rejecting Plaintiffs' likely argument here, the Second Circuit explained that Citibank was both the "sending bank" and the "receiving bank" and that, in the first leg of the transaction, the law firm was the "sender" because "the sender is the person who 'want[s] to withdraw . . . the [payment] order because [he] has had a change of mind about the transaction or because the payment order was erroneously issued or for any other reason.'" *Id*. (citing New York's analog to § 4A211 cmt. 1).

Here, Plaintiffs' common law claims are displaced by the PCC just like the law firm's negligence claim in *Fisher & Mandell LLP*. OBS, through Staffin, is the sender that gave the payment order to Bank of America as the receiving bank. 13 Pa. C.S.A. § 4A103(a)(1). At 5:52 pm on December 6, 2017, plaintiff Staffin requested the wire transfer. Compl., ECF 1, ¶ 35. However, by the time that Staffin discovered the fraud and called the Bank to cancel the wire, the wire had already been initiated. *See id*., ¶ 98 ("It is undisputed that Staffin and Bragg contacted Defendant on December 6, 2017 ***shortly after the wire transfer confirmation*** to report that the wire transfer resulted from fraud perpetrated against Plaintiffs.") (emphasis added). Accordingly, under 13 Pa. C.S.A. § 4A211(b), OBS's communication to cancel the payment order is covered squarely by 13 Pa. C.S.A. § 4A211(b).[7] In other words, the rights and responsibilities of all parties in this litigation are dictated by Section 4A211(b). And, the (non)viability of Plaintiffs' claims against the Bank is addressed by the statute. *See infra*. Thus, Plaintiffs' claims for breach of

[7] The Telephone Wire Transfer Agreement also states that wire transfer requests are subject to Article 4A of the UCC. *See* Compl., ECF 1 ¶ 92 (citing Compl., Exh. 20, ECF 1-23 § 6(a)).

contract and negligence based on the Bank's alleged failure to cancel the outgoing wire to the Bank of China (Counts I, II, III, VIII, and IX) must be dismissed because they are displaced by the PCC.

**B. Under the PCC, the Bank Has No Liability As a Matter of Law.**

For the same reason that OBS's common law claims have been displaced, its claims under the UCC also fail – Bank of America had already sent the outgoing wire by the time Staffin tried to cancel the wire. As explained above and in *Fisher & Mandell LLP*, under Section 4A211(b), the cancellation of a payment order is effective only if the receiving bank has not yet accepted the payment order, *i.e.*, the customer's bank has not yet executed the wire transfer. Indeed, as the leading treatise on the UCC explains, a payment order cannot be cancelled once the originator's bank transmits the payment order: "***once a payment order has been accepted it cannot be canceled or amended. Once the originator's bank executes the payment order, the originator cannot cancel or amend.***" Barkley Clark, The Law of Bank Deposits, Collections and Credit Cards, § 17.04[9][a] (emphasis added).[8]

Here, as in *Fischer & Mandell, LLP*, the "critical question" is when Bank of America "executed the wire transfer request[]." 632 F.3d at 802. The Complaint is clear that Bank of America executed the wire transfer request ***before*** Plaintiffs attempted to cancel the wire. Consequently, Plaintiffs' communication to cancel the payment order was ineffective under 13 Pa.

[8] The exception to this general rule is not applicable to this case. There may be a delay between the time the customer initiates the payment order and the time that the bank executes on it. Under this scenario, the customer may cancel or amend the payment order "if it is received in a time and manner that gives the bank a reasonable opportunity to act on it." *Id*. Here, Bank of America had already executed the payment order when Staffin attempted to cancel it. In addition, however, the UCC allows the parties to specify via contract a specific cutoff time for cancellation requests. *Id*. ("In order to avoid questions about whether a notice gives the bank a reasonable time, the agreement should contain a specific cutoff time for cancellation requests or amendments."). As discussed below, the Bank had such a provision in the applicable contract documents, which absolves the Bank of liability.

C.S.A. § 4A211(b).[9] Thus, the Court should dismiss Plaintiffs' PCC claims (Counts IV-VI) against the Bank.

## II. EVEN IF THE UCC DOES NOT DISPLACE THE COMMON LAW CLAIMS, THE COMMON LAW CLAIMS SHOULD NEVERTHELESS BE DISMISSED UNDER RULE 12(b)(6).

Plaintiffs' common claims fail even if they were not preempted by the PCC. Fatal to Plaintiffs' claims is that, consistent with the PCC, the operative documents comprising the contract between OBS and the Bank immunize the Bank from liability for an outgoing wire transfer that the Bank has already executed. As an initial matter, Bank of America agrees with Plaintiffs that the contract between OBS and the Bank includes the Deposit Account Agreement and the Telephone Wire Transfer Agreement.[10] There is no breach, however, because the plain language of these documents contradict the allegations set forth in the Complaint. *See Hart v. Univ. of Scranton*, 838 F. Supp. 2d 324, 328 (M.D. Pa. 2011) (dismissing breach of contract claim where plaintiff failed to allege a specific breach of those terms); *see also CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999) (citing *Snaith v. Snaith*, 422 A.2d 1379, 1382 (Pa. Super. 1980)) ("[w]hile not every term of a contract must be stated in complete detail, every element must be specifically pleaded"). In addition, the Escrow Control Account Agreement provided by a predecessor Bank is inapplicable. Further, Plaintiffs' negligence claims fail because the

[9] The contract between OBS and the Bank is consistent with 13 Pa. C.S.A. § 4A211(b) and Barkley Clark's treatise. As explained *infra*, the contracts explicitly informed OBS that it could not cancel payment orders after they have been received by the Bank and the Bank has no liability if it cannot cancel a payment order.

[10] The contract also includes operative signature cards, account opening documents, Personal Schedule of Fees, and any treasury services agreements.

relationship between OBS and the Bank is purely contractual and they are barred by the gist of the action and economic loss doctrines.

**A. Plaintiffs' Breach Of Contract Claims Under Counts II And III Fail Because The Contract States That Executed Payment Orders Cannot Be Cancelled And The Contract Disclaims Liability Arising From A Failed Cancellation.**

The express terms of the Deposit Account Agreement and Telephone Wire Transfer Agreement do not impose any contractual obligations requiring the Bank to cancel or amend a payment order. These documents state that the customer may not amend or cancel a payment order, then further disclaims any liability for the Bank's failure to do so. Specifically, the Deposit Account Agreement states:

> **Amending or Cancelling Payment Orders** ***You may not amend or cancel a payment order after we receive it***. If you ask us to do this, we may make a reasonable effort to act on your request. ***But we are not liable to you if, for any reason, a payment order is not amended or canceled***. You agree to reimburse us for any costs, losses or damages that we incur in connection with your request to amend or cancel a payment order.

Compl., ECF 1-2 at 65 (emphasis added). Plaintiffs ignore this provisions, and instead, claim that the Bank violated the Stop Payment provision in the Deposit Account Agreement, which applies to checks or "other item[s]" drawn on an account. Compl., ECF 1 ¶ 157. In contrast, the language quoted above specifically comes from "Sending Funds Transfer" section of the Deposit Account Agreement. Because the "Sending Funds Transfer" provision is more specific than the "Stop Payment" provision, it controls over the latter. *See Great Am. Ins. Co. v. Norwin Sch. Dist.*, 544 F.3d 229, 247 (3d Cir. 2008) ("[S]pecific provisions ordinarily control more general provisions."); *Levine v. Employers Insurance Company of Wausau*, No. 17-1342, 2018 WL 1748056, at *4 (4th Cir. Apr. 12, 2018) (when "one provision specifically addresses the dispute at hand while the other remains general, we have consistently held that the specific provision will govern over the general.").

The Telephone Wire Transfer Agreement is consistent with the Deposit Account Agreement:

> **4. Cancellation of Wire Transfer Requests**
> ***We have no obligation to cancel or amend any telephone or draw wire transfer request after we receive it*** or to cancel or amend any transfer to be made pursuant to a standing order which is in effect. If you or a bank sending us a draw request sends us a wire transfer request instructing us to cancel or amend a telephone or draw wire transfer request and we are able to verify the authenticity of the cancellation or amendment request using the Security Procedure, as applicable, we will make a reasonable effort to act on that request, but ***we will not be liable*** if it is not effected. ***You agree to indemnify us against and hold us harmless from any and all liabilities, claims, costs, expenses and damages of any nature, including legal expenses, we incur in connection with your request to amend or cancel***. Your obligations under this provision will survive termination of the Service.

*Id*. at 3 (emphasis added). Plaintiffs reproduce portions of this provision, although they omit the language which undermines their claims. *See* Compl., ECF 1 ¶ 175. Specifically, Plaintiffs omit the first sentence, which states that the Bank has no obligation to cancel a wire transfer that it has received, and the latter portion of the second sentence, which disclaims liability.

In sum, the Deposit Account Agreement and the Telephone Wire Transfer Agreement echo the provisions of the PCC. Bank of America could not breach the contract because the contract, as these two documents explicitly state, does not require the Bank to cancel a wire transfer that it has already initiated. Further, the disclaimer of liability provisions bind Plaintiffs. *See First Virginia Bank-Colonial v. Masri*, 245 Va. 461 (1993) (holding that a person who signs a wire transfer agreement is bound by the exculpatory clause since he had the capacity to understand the provision and apparently merely signed without reading). Thus, the Court should dismiss the breach of contract claims in Counts I, II, and III.

### B. Plaintiffs' Breach of Contract Claim Under Count I Fails Because The Escrow Control Account Agreement Is Inapplicable to Wire Transfers.

The Escrow Control Account Agreement is inapplicable. It was provided to OBS by Summit Bank, a predecessor of Bank of America, in 2002. *See* Compl., ECF 1, ¶ 134; Compl.,

Exh. 3, ECF 1-4. Rather, the terms governing OBS's IOLTA account during the operative time period were set forth in the Deposit Agreement and Treasury Services Agreement – Escrow Management Service Addendum. *See* Compl., Exh. 18, ECF 1-21. A letter provided by Bank of America to OBS on February 18, 2018 states, "Please note that the account referenced above is currently set up with the Escrow Management Service based on the terms of the Deposit Agreement and Treasury Services Agreement - Escrow Management Service Addendum." *Id*.

Further, the Escrow Account Control Agreement does not apply to wire transfers. In fact, the terms "wire transfer" or "payment order" do not appear in it. The Escrow Control Account Agreement explains that a depositor "may direct the Bank to stop payment of any check, draft or direction to transfer funds orally or in writing." Compl., Exh. 3, ECF 1-4 ¶ 4. In this agreement, however, transferring funds means moving the funds "from the insured money market account to the demand deposit account," not to another bank via wire. *Id*., ¶ 3. Neither does the Escrow Control Account Agreement apply to the "sweeping" of the IOLTA subaccounts, as alleged in the Complaint. The Escrow Control Account Agreement simply allows the Bank to pay a check if there is an insufficient balance in one of OBS's subaccounts. *See id*., ¶ 3 ("If a check is presented to the Bank at a time when there is insufficient balance of available funds in the Subaccount, the Bank, in its direction, may pay the check or return the check and, in either event, charge the Depositor a service charge."). Here, Bank of America paid a wire where one subaccount had insufficient funds.

Accordingly, because the Escrow Control Account Agreement is silent with regard to wire transfers there is no basis to assert a claim for breach of contract. *See Angino v. Wells Fargo Bank, N.A.*, 666 Fed. Appx. 204 (3d Cir. 2016). In *Angino*, the plaintiffs filed a breach of contract claim against Wells Fargo after the bank denied their request to refinance their mortgage. *Id*. at 206.

The plaintiffs could not point to any term in the loan agreement imposing the duty to refinance on Wells Fargo, but argued that the loan agreement "incorporated the expectation that refinancing would be provided if necessary when the principal on the loan came due." *Id.* at 207. The lower court concluded that "neither the note nor the mortgage contained terms granting [plaintiffs] the right to refinance." *Id*. at 207. The Third Circuit declined to infer this right because the written agreement was unambiguous, and it could not "read in its silence an additional legal obligation to offer a refinancing option when the principal payments came due." *Id.* Similarly, here, the Court should hold that the Escrow Account Control Agreement's silence on wire transfers cannot form the basis of a breach of contract claim.

### C. Plaintiffs' Breach of Contract Claims Under Counts I And II Also Fail Because There Is No Contractual Provision Prohibiting the Bank From Using Funds in the Entire Account.[11]

All of the breach of contract claims fail for the additional reason that there is no provision prohibiting the Bank from paying the wire transfer even though the Eagle Funding subaccount had insufficient funds. In Counts I and II, Plaintiffs merely cite provisions in the Escrow Control Account Agreement and Deposit Account Agreement that allow the Bank to either pay or not pay an item notwithstanding OBS's insufficient funds in a subaccount. *See* Compl., ECF 1, ¶¶ 140, 159. Bank of America chose the former – it paid the wire transfer that Plaintiffs requested, authorized, and validated.

Instead of pleading a specific contractual provision that Bank of America allegedly violated, Plaintiffs state that there is ***nothing*** permitting Bank of America from paying the $580,000 wire transfer from OBS's entire IOLTA account. This is insufficient pleading as a matter

[11] Count III does not allege breach of contract based on the Bank's alleged "sweeping" of subaccounts.

of law. *See Hart*, 838 F. Supp. 2d at 328 (dismissing breach of contract claim where plaintiff failed to allege a specific breach of those terms); *see also CoreStates Bank, N.A.*, 723 A.2d at 1058 (requiring every element of a breach of contract claim to be specifically pleaded).

In *Andrichyn v. TD Bank, N.A.*, 93 F. Supp. 3d 375, 385 (E.D. Pa. 2015), for example, the Court dismissed a breach of contract claim based on defendant T.D. Bank's processing of allegedly unlawful debits and assessment of overdraft fees generated by the processing of those unlawful debits. The Court explained that, while the plaintiffs cited a provision stating that TD "may block or otherwise prevent or prohibit" a "suspected restricted transaction," the agreement defined the term "restricted transaction" by referencing the Unlawful Internet Gambling Enforcement Act of 2006, which had nothing to do with unauthorized debits at issue. *Id*. at 383. With regard to the argument that the overdraft fees were improperly assessed, plaintiffs again did not point to any specific provision of the agreement to support its position. *Id*. at 386. In fact, the deposit agreement explicitly gave the bank the power to assess overdraft fees. *Id*.

Similar to *Andrichyn*, Plaintiffs' failure to plead a specific provision prohibiting the Bank from using funds from the entire IOLTA account to pay their valid wire transfer request requires dismissal of the Counts I and II. In fact, the Bank is allowed to either pay or not pay an item even if there is insufficient funds in a subaccount, thus undercutting Plaintiffs' claims. *See* Compl. Exh. 2, ECF 1-4 ¶ 3 ("If a check is presented to the Bank at a time when there is an insufficient balance of available funds in the Subaccount, the Bank, in its discretion, may pay the check or return the check and, in either event, charge the Depositor a service charge."); *see also* Compl. Exh. 1, ECF 1-2 at 17 ("If you have enrolled in one of the optional Overdraft Protection plans and have enough available funds in the linked account under the Overdraft Protection plan, we transfer funds to cover the item. Otherwise, without notice to you, we either authorize or pay the insufficient funds

item and overdraw your account (an overdraft item) or we decline or return the insufficient funds item without payment (a returned item).").

**D. Plaintiffs' Negligence Claims (Counts VIII and IX) Fail Because the Relationship Between a Bank and its Customer is Purely Contractual.**

In Pennsylvania, "[i]t is well established that the legal relationship between a financial institution and its depositors is based on contract, and that the contract terms are contained in the signature cards and deposit agreements." *First Federal Savings & Loan Ass'n. v. Office of the State Treasurer*, 669 A.2d 914, 915 (1995). That relationship "is not a fiduciary one." *Waye v. Commonwealth Bank*, 846 F. Supp. 321, 326 (M.D. Pa. 1994); *see also Temp–Way Corp., v. Continental Bank,* 139 B.R. 299, 318 (E.D. Pa. 1992) ("Pennsylvania law follows the well recognized principle that a lender is not a fiduciary of the borrower."). A fiduciary relationship arises only "if the lender gains substantial control over the borrower's business affairs." *Id.; see also Drapeau v. Joy Technologies, Inc.,* 670 A.2d 165, 172 (Pa. Super. 1996) (holding that a business association "may be the basis of a confidential relationship only if one party surrenders substantial control over some portion of his affairs to the other."). In *Bucci v. Wachovia Bank, N.A.*, for example, the Court dismissed a negligence claim because the amended complaint "does not allege that Wachovia had control over Bucci's business affairs nor does it allege the kind of fiduciary relationship necessary to give rise to a duty on the part of Wachovia." No. 08-1478, 2009 WL 1740503, at *3 (E.D. Pa. June 17, 2009).

Here, there is no allegation that the Bank entered into a fiduciary relationship with Plaintiffs. According to the Deposit Account Agreement:

> Our deposit relationship with you is that of debtor and creditor. This Agreement and the deposit relationship do not create a fiduciary, quasi-fiduciary or special relationship between us. We owe you only a duty of ordinary care. Our internal policies and procedures are solely for our own purposes and do not impose on us a higher standard of care than otherwise would apply by law without such policies or procedures.

Compl., Exh. 1, ECF 1-2 at 2. The allegations that Plaintiffs make in claiming that the Bank acted negligently are the Bank's (1) alleged failure to cancel the wire transfer after it had already been sent and (2) use of the funds in the entire IOLTA account. Both of these allegations are specifically covered by the terms of the contract. *See supra*. There is no allegation that the Bank took on additional responsibilities or held itself out to Plaintiffs sufficient to create a fiduciary relationship. Thus, the Court should dismiss Plaintiffs' negligence claims in Counts VIII and IX.

**E. Plaintiffs' Negligence Claims (Counts VIII and IX) Are Barred By the Gist of the Action Doctrine and the Economic Loss Doctrine.**

Plaintiffs' negligence claims fail for the additional reason that they are barred by two related doctrines: the gist of the action doctrine and the economic loss doctrine. The gist of the action doctrine "forecloses a party's pursuit of a tort action for the mere breach of contractual duties without any separate or independent event giving rise to the tort." *Sköld v. Galderma Labs., L.P.*, 99 F. Supp. 3d 585, 600 (E.D. Pa. 2015) (citations and internal quotations omitted); *Certainteed Ceilings Corp. v. Aiken*, Civ. A. No. 14-3925, 2015 WL 410029, at *6 (E.D. Pa. Jan. 29, 2015) (dismissing breach of fiduciary duty claim because under the gist-of-the-action doctrine, which "ensure[s] that a party does not bring a tort claim for what is, in actuality, a claim for a breach of contract"); *see also USX Corp. v. Prime Leasing Inc.*, 988 F.2d 433, 440 (3d Cir. 1993) (rejecting an "impressible attempt to convert a contract claim into a tort claim"); *Strausser v. PRAMCO, III*, 944 A.2d 761, 768 (2008) (affirming dismissal of tort claims under "gist of the action" doctrine where torts claims were "directly related to the underlying contractual rights . . . of the parties as defined by the loan agreements and mortgages between them . . . ."). In *Jones v. ABN Amro Mortgage Group, Inc.*, 606 F.3d 119, 123–24 (3d Cir. 2010), for example, the Third Circuit affirmed the dismissal of a negligence claim because the basis of the negligence claim – a

mortgage servicer's failure to properly credit mortgage payments – "cannot be divorced from these contractual duties to credit payments under the mortgage."

Here, the cancellation of wire transfers and the procedures for overdrafts are specifically covered by the contract. Indeed, the contract explicitly states what the Bank's duties are. Plaintiffs' attempt to convert a breach of contract claim to a negligence claim is thus barred by the gist of the action doctrine.

Similarly, the economic-loss doctrine "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir. 1995); *Executive Wings, Inc. v. Dolby*, 131 F. Supp. 3d 404, 417 (W.D. Pa. 2015) (Hornak, J.). Pennsylvania law "provides that no cause of action exists for negligence that results solely in economic damages unaccompanied by physical or property damage." *Azur v. Chase Bank, USA, N.A.*, 601 F.3d 212, 222 (3d Cir. 2010) (quoting *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 175 (3d Cir. 2008)). As explained above, the contract covers the cancellation of a wire transfer and the procedures for overdrafts. In addition, Plaintiffs' only alleged damages are economic, *i.e.*, the $580,000 that Plaintiffs paid back to the IOLTA fund following the wire transfer, as well as the attorneys' fees and costs incurred in the Hong Kong litigation. *See* Compl., ECF 1 ¶ 237. The economic loss doctrine therefore applies.

## III. THE COURT SHOULD DISMISS COUNT VII BECAUSE REGULATION E DOES NOT APPLY TO WIRE TRANSFERS OR OBS'S IOLTA ACCOUNT.

Regulation E, 12 C.F.R. § 205 *et seq.*, specifically excludes wire transfers, like the one at issue here. Regulation E applies to electronic fund transfers, including: "(i) Point-of-sale transfers; (ii) Automated teller machine transfers; (iii) Direct deposits or withdrawals of funds; (iv) Transfers initiated by telephone; and (v) Transfers resulting from debit card transactions, whether or not

initiated through an electronic terminal." 12 C.F.R. § 205.3(b). By its own terms, it excludes certain types of electronic fund transfers:

> (c) Exclusions from coverage. The term electronic fund transfer does not include:
>
> * * * *
>
> (3) Wire or other similar transfers. Any transfer of funds through Fedwire or through a similar wire transfer system that is used primarily for transfers between financial institutions or between businesses.

12 C.F.R. §205.3(c)(3).

In *Garland v. Charleston Naval Shipyard Federal Credit Union*, 382 S.E.2d 250, 254 (S.C. Ct. App. 1989), for example, the Court of Appeals of South Carolina held that Plaintiff's claim under the Electronic Funds Transfer Act failed as a matter of law because the Act's implementing regulation, Regulation E, specifically exempted the automatic transfer of funds – there, a wire transfer from a customer's bank account to the Credit Union's bank account.

Similarly, here, the Complaint alleges that the Bank violated Regulation E by failing to disclose that is has a "service that transfers funds from another account of the consumer held at the institution to cover overdrafts. . . ." (ECF 1, ¶ 224) (citing 12 C.F.R. § 205.17(d)(5)). But, the electronic fund transfer at issue is a wire transfer, which is specifically excluded from Regulation E by 12 C.F.R. § 205.3(c)(3). *See* Compl., ECF 1, § 49 ("The wire transfer for the full amount of $580,000 was received by the Bank of China at 5:00 am on December 7, 2017.").

Further, Regulation E is inapplicable to OBS's IOLTA account because it is used primarily for business purposes, not for "personal, family, or household purposes." 12 C.F.R. §205.2(b)(1) (defining "account" to mean "a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes"). Thus, Count VII fails as a matter of law and should be dismissed.

## CONCLUSION

WHEREFORE, for the foregoing reasons, Bank of America Corporation respectfully requests that the Court dismiss Plaintiffs' Complaint.

Date: June 28, 2018

Respectfully submitted,

*/s/ Jarrod D. Shaw*

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| O'NEILL, BRAGG & STAFFIN, P.C., *et al.* | * | |
| Plaintiffs, | * | |
| v. | * | Case No. 2:18-cv-02109-HB |
| BANK OF AMERICA CORPORATION | * | |
| Defendant. | * | |
| | * | |

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**ORDER**

Upon consideration of Defendant Bank of America Corporation's Motion to Dismiss Plaintiffs' Complaint, any oppositions and replies thereto, and there being good cause shown, it is this ____ day of _____, 2018 hereby**:**

**ORDERED** that Defendant's Motion to Dismiss Plaintiffs' Complaint is **GRANTED WITH PREJUDICE**; and it is further

**ORDERED** that the Clerk **SHALL** close this case.

**HON. HARVEY BARTLE, III**
**UNITED STATES DISTRICT JUDGE**