BAY RAG CORPORATION, Plaintiff,

vs.

BANK OF AMERICA a/k/a Bank of American , N.A. and City National Bank of Florida, a national banking association, Defendant.

Circuit Court, 11th Judicial Circuit in and for Miami-Dade County.

Case No. 16-1262 CA (22).

January 20, 2017. Michael A. Hanzman, Judge.

ORDER ON DEFENDANTS' MOTION TO DISMISS FOURTH AMENDED COMPLAINT

I. Introduction

Plaintiff, Bay Rag Corporation ("Bay Rag"), seeks to recover $62,000.00 initially wired into -- and later out of -- its operating account maintained with Defendant Bank of America ("BOA"). After the funds were "credited to Plaintiff's account," and "available for its use," BOA reversed the wire transfer by debiting the account. BOA took this action at the request of Defendant City National Bank ("City National"), which informed BOA that the initial wire resulted from a fraud which caused it, as the originating bank, to mistakenly transfer the funds from the account of its customer -- Windhaven Insurance Company; a company that had no relationship with, and owed no money to, Bay Rag.[1] But by the time the fraud was discovered and the account was debited, Bay Rag -- allegedly in "reliance" upon receipt of the funds -- delivered "more than one hundred thousand dollars ($100,000.00) of merchandise" to the client who it believed had wired the money. Complaint, ¶ 10.[2]

Though the only pertinent question presented is whether BOA had a legal right to debit the account, Plaintiff advances seven legal and equitable claims sounding in both contract and tort. BOA and City National seek dismissal.

II. The Contract Claim

i. The Parties' Positions

According to BOA the terms of its standard "Deposit Agreement and Disclosures" ("Agreement") gave it the unfettered right to charge back a customer account for any

"check, money order, cashier's check or similar item" deposited which the bank later discovers was "fraudulent, counterfeit, or invalid for some other reason," even if the funds were previously available for the customer's use. *See* Agreement, p. 17. BOA insists that the "wire transfer" at issue falls comfortably within this provision and, as a result, claims that Plaintiff's allegations are "expressly contradicted" by the terms of the parties contract, thereby "rendering the pleading objectionable." BOA Motion, p. 12; *Harry Pepper & Associates, Inc. v. Lasseter*, 247 So. 2d 736 (Fla. 3d DCA 1971).

Bay Rag disagrees and insists that the provisions of the Agreement relied upon by BOA do not apply to "wire transfers" because: (a) a wire transfer is not an "item" at all; (b) the Agreement expressly provides that "[f]und transfers through Fedwire will be governed by, and subject to, Regulation J,[3] Subpart B, and Uniform Commercial Code ("UCC") Article 4A incorporated by reference thereunder," *see* Agreement, p. 44; (c) the UCC dictates that this type of dispute be resolved by applying the law governing "mistake and restitution," *see* UCC § 4A-211 (§ 670.211, Fla. Stat. (2016)) (if a payment order is cancelled "the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution"); and (d) the UCC prohibits any attempt to vary the parties' rights and obligations by private "agreement." *See* § 4A-404(c).[4] Bay Rag Memo in Opposition, pp 7-9.

Given the parties' disagreement the first issue to be addressed is whether the provisions of the Agreement relied upon by BOA apply to fraudulent or invalid "wire transfers."

ii. The Deposit Agreement

a. General Deposit Terms

The term the Agreement relied upon by BOA -- contained in the section titled "Processing Deposits and Cashed Items" -- first advises the customer that:

If we accept checks or other *items* for deposit to your account or cash them, you [the customer] are responsible for the checks and other *items* if there is a subsequent problem with them."

Agreement, p. 17. (Emphasis added). The customer also is informed that:

All deposits are subject to our subsequent verification and adjustment, even if you have already withdrawn all or part of the deposit unless you can prove our determination was erroneous.

Agreement, p. 17. The Agreement then informs the customer that:

We cannot generally verify that checks, money orders, cashier's checks or *similar items* are authentic and valid at the time you ask us to cash them or accept them for deposit. *If we cash, or accept for deposit, a check, money order, cashier's check or similar item and we later learn that the item is fraudulent, counterfeit or invalid for some other reason, we may charge your account for the amount of the item. This may occur even if we previously made the funds available to you, or this causes your account to become overdrawn*.

Id. (Emphasis added). The Agreement defines an "Item" as:

. . .all orders and instructions for the payment, transfer or withdrawal of funds from an account. As examples, item includes: a check, substitute check, purported substitute check, electronic transaction (including an ACH transaction, ATM withdrawal or transfer, or point of sale transaction), draft, demand draft, remotely created check, remotely created consumer check, image replacement document, indemnified copy, preauthorized draft, preauthorized payment, automatic transfer, telephone-initiated transfer, Online Banking transfer or bill payment instruction, withdrawal slip, in-person transfer or withdrawal, cash ticket, deposit adjustment, or other order of instruction for the payment, transfer, or withdrawal of funds, or an image, digital image or a photocopy of any of the foregoing. Item also includes any written document created and authorized in your name that would be a check or draft but for the fact that it has not been signed. Item may also include a cash-in ticket and a deposit adjustment. Item may also include a check, draft, warrant, or other item deposited to your account, including a deposited item that was returned unpaid.

Id.

A careful reading of these terms reveals that they pertain only to the deposit of checks, money orders and *similar* items, as the headings of the sections they are contained within suggest. *See, e.g.*, Agreement, p. 17. ("Processing Deposits and Cashed Items"); ("Cashing Items and Accepting Items for Deposit"); ("Checks, Cashier's Checks and Similar Items"). *See also*, *City of Homestead v. Johnson*, 760 So. 2d 80 (Fla. 2000) [25 Fla. L. Weekly S206a] ("meaning of particular terms may be ascertained by reference to other closely associated words"). First off, the *exhaustive* definition of an "Item" never mentions a "wire transfer" or "Fedwire" transfer, including in the examples of "items" that may be deposited *into* an account. *See* Agreement, p. 3 ("item may also include a check, draft, warrant, or other item deposited to your account. . ."). Similarly, the particular clause relied upon by BOA addresses the cashing, or accepting for deposit, "a check, money order, cashier's check or *similar* item" later found to be "fraudulent, counterfeit or invalid for some

other reason." A Fedwire is again never mentioned and is not, in this Court's view, "similar" to one of the "items" specified (i.e., a "check," "money order" or "cashier's check").

Had BOA intended these contract clauses to cover "wire transfers" it easily could have -- and should have -- included the term "wire transfer" or "Fedwire" in the general definition of "Item," thereby removing any doubt as to whether a Fedwire transfer was within the reach of these provisions; particularly given the fact that "Item" is a defined term under the UCC and does "not include a payment order governed by Chapter 670. . . (i.e., a wire transfer). § 674.104(i), Fla. Stat. (2016). Bank of America, when drafting its Agreement, was obviously aware of this statutory definition. And if it wanted to expand that definition in its Agreement so as to include "wire transfers" governed by Chapter 670 it was obligated to do so clearly. It did not.

Finally, and on top of all that, the Agreement contains a separate section titled "Funds Transfer Service" which states that *its* provisions "apply to fund transfers you [the customer] send or receive through us." Agreement, p. 44. Conspicuously absent from this section of the Agreement is any term similar to those which grant BOA the unfettered right to charge back to a customer's account any amount previously credited by the deposit of fraudulent or invalid checks, money orders, or "similar items." Put simply, nothing in this section of the Agreement bestows upon BOA the absolute right to reverse a "wire transfer" with impunity.

Reading these provisions as a cohesive whole, the Court concludes that a Fedwire transfer is not an "item" for purposes of the Agreement's provisions relating to the processing of "Deposits and Cashed Items." At the very least the Agreement is ambiguous on the question of whether "wire transfers" fall within the ambit of these provisions because -- quite simply -- the terms "wire transfer" or "Fedwire" are never used, either within the definition of "Item" or anywhere else. It is therefore apparent -- at least to this Court -- that the term "item," as used in the Agreement, was intended to be *simpatico* with the definition of the exact same term contained in the UCC. *See* § 674.104(i), Fla. Stat. (2010).[5]

In sum, the Court concludes that the parties' duties, rights and obligations relative to this transaction are governed *exclusively* by the terms of the "Funds Transfer Service" section of the Agreement.

b. Fund Wire Transfers

The "Fund Transfer Service" portion of the Agreement -- which begins on page 43 -- first provides that its "provisions apply to fund transfers you send or receive through us"; describing a "funds transfer" as the process of carrying out payment orders that

lead to paying a beneficiary." *Id.* The customer is then informed that: (a) Uniform Commercial Code definitions will apply to the Agreement; (b) "your and our rights and obligations under this agreement are governed by and interpreted according to federal law and the law of the state where your account is located"; and (c) **"[f]unds transferred through Fedwire will be governed by and subject to Regulation J, Subpart B, and the Uniform Commercial Code Article 4A incorporated by reference thereunder."** *Id.* at p. 43 (emphasis added).

As it is undisputed that the funds at issue here were transferred by "Fedwire," the parties' rights and obligations are governed by "Regulation J, subpart B, and the Uniform Commercial Code Article 4A incorporated by reference." *Id*.

iii. Regulation J. and the UCC

Regulation J, and Article 4A of the UCC adopted therein, was "enacted to provide a comprehensive statutory scheme to apply to fund transfer disputes not involving the Electronic Funds Transfer Act." *Com. Land Title Ins. Corp. v. Regions Bank*, 2008 WL 744061 (11th Jud. Cir. 2008) [15 Fla. L. Weekly Supp. 457a]. Before its enactment courts had applied common law or the law of negotiable instruments by "analogy" -- an effort that "proved unsatisfactory." *Id.* Thus:

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 also made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles. In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately. This consideration is particularly important given the very large amounts of money that are involved in funds transfers.

See § 670.102, Fla. Stat. (2016), *See also, Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir. 1998) ("[o]ne of Article 4-A's primary goals is to promote certainty and finality so that 'the various parties to funds transfers [will] be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately' "). "Thus, where Article 4A has a provision on point, its provisions will govern the dispute, to the exclusion of common law or other statutory claims." *Com. Land Title Ins. Corp*., *supra.*

Turning to the relevant provisions of the UCC adopted by Regulation J, once a beneficiary bank [BOA] accepts a payment order it is obligated to "pay the amount of the order to the beneficiary" [Bay Rag] on the payment date or the next business day if acceptance occurs after the close of business. Article 4A-404(a). If the bank fails to comply with this deadline, and then refuses to pay after demand, it may be liable for consequential damages if it was on "notice" of circumstances that would cause such damages "as a result of nonpayment." *Id.* These *particular* rights of "a beneficiary. . . may not be varied by agreement or funds-transfer system rule." 4A-404 (c); *see also*, § 670.404(3), Fla. Stat. (2016).

After a payment order is accepted by the beneficiary bank [BOA] it may be cancelled or amended if it "was issued in execution of an authorized payment order" -- precisely what occurred here. In that circumstance the UCC dictates that "the beneficiary's bank [BOA] is entitled to recover from the beneficiary [Bay Rag] any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution." Article 4A-211(c)(2); *see also* § 670.211(3)(b), Fla. Stat. (2016). This provision, as plainly drafted, allowed BOA to charge back the funds initially wired and credited to Bay Rag *only* if it would be entitled to reverse the initial payment by application of the common law "governing mistake and restitution." *Id*.

Plaintiff, in Count II, has alleged that BOA had "no lawful basis to debit" its account and, as a result, its decision to do so was a breach of the Agreement. Complaint, ¶¶, 50, 56. As the Court has concluded that the provisions of the Agreement granting BOA the unfettered right to charge back amounts credited for fraudulent "items" do not apply to wire transfers, and that this dispute -- per the contract -- is governed by Regulation J and the UCC -- this claim states a cause of action. Accordingly, BOA's Motion to Dismiss Count II for Breach of Contract is DENIED.

iv. The Non Contractual Claims

BOA and City National also insist that the non-contractual causes of action pled fail to state a claim. As for Count I ("Restitution") and Count III ("Money had and Received"), BOA claims that: (a) because it received no benefit here there is nothing for it to return and, as a result, restitution does not lie, *See*, *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) [15 Fla. L. Weekly Fed. S53a]; and (b) because the parties entered into an express contract covering the subject matter of this dispute, equitable claims (i.e., "Restitution" and "Money Had and Received") are foreclosed.

As for City National, it first challenges Defendant's "Negligence" claim (Count IV) by insisting that it owed Bay Rag -- a non-customer -- no "duty" at all. City National also argues that Bay Rag's claim for indemnification (Count V) fails because it has not --

and cannot -- allege that it is exposed to some technical or derivative liability to any third party as a result of City National's conduct. Finally, City National contends that the allegations of "Tortious Interference" (Count VI) and "Conversion" (Count VII) also fail to state a claim. And both Defendants ask that Plaintiff's claim for attorney's fees be stricken because no statute or contract authorizes such an award.

Upon careful consideration of the parties' briefs, and a review of pertinent precedent, the Court agrees that this case has been way over pled and that -- at the end of the day -- it involves no more than a breach of contract claim that is governed by the Agreement. *See, e.g.*, *Ocean Communications, Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1344a] ("[d]efendants correctly state that a plaintiff cannot pursue an equitable theory, such as unjust enrichment or *quantum meruit*, to prove entitlement to relief if an express contract exists"). The Court will not supplant the parties' bargained for allocation of risk by affording Plaintiff equitable remedies not tethered to their contract and controlling legislation. Thus, the "equitable" claims against BOA are dismissed with prejudice.

Count IV -- sounding in "Negligence" against City National -- is also dismissed with prejudice because this Defendant owed Bay Rag no common law duty of care. *See, e.g.*, *Florida Action Films, Inc. v. Green East #2, Ltd.*, 24 Fla. L. Weekly Supp. 513a (11th Jud. Cir. September 1, 2016) (Hanzman, J) ("[a]s first semester law students are taught, the presence of a 'duty' is the *sine qua non* to any claim for negligence"). Any duty on the part of City National to use "ordinary care" in "complying with statutory obligations governing wire transfers," Complaint ¶ 64, ran only to the benefit of its clients, not Bay Rag -- a total stranger. *See, e.g., Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 227 (4th Cir. 2002) ("[w]e are persuaded by the reasoning articulated in the numerous cases holding that a bank does not owe noncustomers a duty of care"). Nor has Plaintiff pled a viable claim for indemnification. *See, e.g., Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490, 492 (Fla. 1979).

Finally, the tortious interference and conversion claims also fail to state a cause of action. Upon discovery of this fraud City National had every right to seek relief on behalf of its client Windhaven, and assume any legal liability that might arise if it were later determined that the reversal of the transaction was improper. In fact, under controlling UCC provisions City National was obligated to seek relief only from the beneficiary bank -- BOA. *See Grain Traders, supra* ("§ 4-A-402 allows each sender of a payment order to seek refund only from the receiving bank it paid"). Put simply, City National's conduct in requesting the return of these funds was sanctioned by the UCC and was not -- as a matter of law -- "unjustified" or "intentional" interference with the business relationship between BOA and Bay Rag. And because the money returned by BOA was not separate and identifiable it cannot be the subject of a claim for conversion. *See, e.g.*, *Gasparini v. Pordomingo*, 972 So. 2d 1053 (Fla. 3d DCA

2008) [33 Fla. L. Weekly D295a] ("[f]or money to be the object of conversion "there must be an obligation to keep intact or deliver the specific money in question, so that money can be identified"). *Futch v. Head,* 511 So.2d 314, 320 (Fla. 1st DCA 1987).[6]

V. Conclusion

Regulation J and Article 4A of the UCC reflect a "deliberate decision" to adopt "precise and detailed rules" that are "intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by" its provisions, thereby displacing "broadly stated, flexible principals" based on equity and tort law. Article 4A.102, Official Cmt. #1. So when a "particular provision" of Article 4A covers a dispute it will be the "exclusive means" by which the rights and liabilities of the originating bank (City National), beneficiary bank (BOA), and beneficiary (Bay Rag), will be judged. *Commonwealth Land Title, supra*.

Under the circumstances presented here the comprehensive federal and corresponding state statutory schemes governing Fedwire transfer disputes give a beneficiary such as Bay Rag one remedy and one remedy only; a suit against the beneficiary bank to secure return of the funds through application of the law of "mistake and restitution." If application of the law of "mistake and restitution" leads to the conclusion that BOA had no right to debit the account it will have breached the Agreement and Plaintiff will secure an appropriate damage award. Conversely, if application of that "law" to the facts to be developed affords no relief Plaintiff will go hence without day. But this case involves nothing more than the question of which party is required to bear this "loss" -- a question that will be answered *solely* by reference to the parties' express contract which, as the Court has already concluded, requires application of Regulation J and controlling UCC provisions. This case will not be adjudicated by application of "equity" or "tort" law principals; the precise type of "flexible" claims Article 4A was carefully crafted to preempt in favor of uniform rules governing the allocation of risk in cases involving Fedwire transfers.

Based on the foregoing, it is hereby,

ORDERED and ADJUDGED:

1. Counts I, III, IV, V, VI and VII of Plaintiff's Fourth Amended Complaint are dismissed with prejudice.

2. BOA's Motion to Dismiss Count II is DENIED. BOA shall file its Answer and Affirmative Defenses, if any, to this claim within twenty (20) days.

3. Plaintiff's claim for attorney's fees pursuant to Florida Statute § 57.105(7) based *solely* upon the Deposit Agreement remain pending. All claims for attorney's fees as "consequential damages" are stricken.

4. The order staying this action is hereby vacated.

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[1]Apparently Windhaven's account at City National was hacked by an unauthorized person who illegally moved the funds to Bay Rag's account at BOA. After discovering this fraud City National contacted BOA and requested that the wire be reversed -- a request BOA obliged *after* receiving an indemnity commitment from City National.

[2]On or about the time the funds were transferred Bay Rag was expecting a wire in excess of $100,000.00 from one of its customers, Yaw Enterprises. Bay Rag claims that it shipped additional merchandise to Yaw in reliance on the wire, believing Yaw had paid outstanding invoices. Apparently Bay Rag never attempted to verify the source of the wire and confirm that the funds had actually been sent by Yaw.

[3]Codified at 12 CFR § 210.25-210.32, Regulation J was issued pursuant to the Federal Reserve Act. Its purpose is to provide "rules to govern fund transfers through Fedwire." *Id.* at § 210.25.

[4]This is so -- according to Bay Rag -- because permitting contractual modifications would "disrupt the intricate uniform rules governing an allocation of risk of loss in a manner inconsistent with the provisions of Regulation J," and "allow for a hodge podge of wire transfer rules and result in the loss of the efficient flow of funds in commerce." Plaintiff's Supp. Memo, p. 3.

[5]The Court parenthetically notes that BOA was at liberty to include "wire transfers" as "items" it would be free to adjust without running afoul of the UCC. Article 4A-501(c) expressly provides that "except as otherwise provided in this Article, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party." *Id.* Thus, Regulation J -- through the adoption of this provision -- expressly permits parties to negotiate their contracts -- and allocate risk -- as they see fit "except as otherwise provided." *Id.* And the Court rejects Bay Rag's contention that Article 4A-404(c) would prohibit a bank from contracting around the "mistake and restitution" standard of § 4A-211(c)(2). Article 4A-404(c) prohibits varying by "agreement" the rights provided a beneficiary by sub-section (a) of *that* statute -- *nothing more*. In contrast, Article 4A-211 contains *no* provision precluding the parties from contracting around the requirement that a beneficiary's bank prove an entitlement to recapture funds by application of the "law governing mistake and

restitution." So pursuant to § 4A-501(a) BOA was free to draft its Agreement in a manner that would clearly allow it to reverse fraudulent wire transfers with impunity. *See, e.g.*, *Hernandez v. Crespo*, 41 Fla. L. Weekly S625a (Fla. S. Ct., Dec. 22, 2016) ("[p]arties may contract around a statute" so long as contractual provision does not contravene "legislative intent in a way that is clearly injurious to the public good. . ."). For whatever reason BOA chose not to do so, and this Court will not re-write its contract under the guise of judicial construction. *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D457a].

[6]Though not argued by BOA and City National the Court also concludes that *all* common law claims pled are completely preempted, *see Bensman v. Citicorp Trust, N.A.*, 354 F. Supp. 2d 1330 (S.D. Fla. 2005), because Article 4A was intended to be the exclusive means by which a court would analyze the rights, duties and defenses applicable to a funds transfer dispute, displacing common law causes of action. *See Com. Land Title Ins. Corp. v. Regions Bank*, 2008 WL 744061 (Fla.11th Cir. Ct., 2008) [15 Fla. L. Weekly Supp. 457a], and cases cited therein. Here, a particular provision in Article 4A (i.e., 4A-211(2)) specifically addresses the precise issue framed and the parties rights will therefore be adjudicated exclusively by application of this provision -- as required by the terms of their express contract. *See, e.g.*, *Corfan Banco Asuncion Paraguay v. Ocean Bank*, 715 So. 2d 967 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1407a] (court affirmed dismissal of common law negligence claim premised on the same duty imposed by UCC after being persuaded that the intent of Article 4A was to provide an exclusive remedy to parties bringing claims arising out of wire transfers transactions); *Aleo Intern., Ltd. v. Citibank, N.A.*, 160 Misc. 2d 950, 612 N.Y.S.2d 540 (Sup. Ct. 1994) ("Article 4-A does not include any provision for a cause of action in negligence" and claim involving an alleged failure to cancel a wire transfer would be adjudicated based on applicable UCC provision); *Bensman, supra* ("Mr. Bensman's state law claim. . .is either duplicative of or contradictory to Regulation J and is thus preempted"). The Court acknowledges that some courts (a vast minority) have held that "Article 4-A is not a 'hermetic legal seal' over funds transfers," and that "resorting to principles of law or equity outside of Article 4-A is acceptable, so long as it does not create rights, duties and liabilities "inconsistent with those stated in this Article." *Ctr.-Point Merch. Bank Ltd. v. Am. Exp. Bank Ltd.*, 913 F. Supp. 202 (S.D.N.Y. 1996). This Court, however, is obligated to follow the Third District's decision in *Ocean Bank* and, in any event, questions the wisdom of cases preserving common law claims so long as they are completely duplicative of the claim authorized by the UCC. It seems to this Court that allowing common law claims so long as they do not "create rights, duties and liabilities" inconsistent with a controlling provision of Article 4 is simply another way of saying that common law claims are preempted; as under this rationale the *only* common law

claims permitted are those in complete harmony with the controlling statute and thus wholly duplicative.