

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CIVIL ACTION NO. 3:20-cv-366**

NIRAV INGREDIENTS, INC. and ASH )	)	
INGREDIENTS, INC., )	)	
	)	
Plaintiffs, )	)	
	)	
v. )	)	
	)	
WELLS FARGO BANK, N.A. & JOHN )	)	
DOE(s). )	)	
	)	
Defendants. )	)	
	)	
	)	
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**PLAINTIFFS’ RESPONSE TO  
DEFENDANT WELLS FARGO BANK,  
N.A.’S AMENDED MOTION TO  
DISMISS**

Plaintiffs’ Nirav Ingredients, Inc. and Ash Ingredients, Inc. (hereinafter, collectively, “Plaintiffs”), through counsel and pursuant to Local Rule 7.1(e)(1), hereby submit this Response in Opposition to Defendant Wells Fargo, N.A.’s Amended Motion to Dismiss.

**BACKGROUND**

**Facts**

Plaintiff Nirav Ingredients, Inc. (“Nirav”) has maintained an account with Defendant Wells Fargo Bank, N.A. (“Defendant Wells”) for over 25 years (ECF No. 1, ¶8). Over the last 25 years Nirav has transacted more than \$148,000,000 through its accounts with Defendant Wells. (*Id.* at ¶15-16). In May of 2019, Plaintiff Ash Ingredients, Inc. (“Ash”) was to make payment to Nirav to satisfy outstanding invoices owed to Nirav. (*Id.* at 20). Ash received wire instructions via an email from an unknown hacker (the “Hacker”) which appeared to be from Nirav, but contained an extra “v” in the email address (“Hacked Email”). (*Id.* at 28-29). The wire instructions listed an account number that was not Nirav’s account number but contained Nirav’s

actual business name and actual business address as the beneficiary information. (*Id.* at 30). Without Nirav's knowledge, Defendant Wells allowed an unknown party ("Defendant John Doe") to open a fake account with Defendant Wells. (*Id.* at 23-24). Ash caused 2 wire transfer orders to be issued which contained Defendant John Doe's account number and Nirav's name and address. Defendant Wells accepted the wire transfer orders. (*Id.* at 31). Defendant Wells then deposited the funds into Defendant John Doe's account despite knowing that the account did not belong to Nirav. By the time Nirav discovered the funds had been deposited in Defendant John Doe's account the funds had been removed from Defendant John Doe's account. (*Id.* at 34). Defendant Wells transferred Nirav's money without hesitation and despite the knowledge that Defendant John Doe's account was not owned by Nirav. (*Id.* at 35).

Despite the central role that Defendant Wells played in Nirav being defrauded, Defendant Wells has refused to assist Nirav in its efforts to recover the money stolen from it, including (inexplicably) refusing to disclose the identity Defendant John Doe. (*Id.* at ¶¶24, 40).

### **Procedural History**

Nirav and Ash filed the above-captioned matter in the Superior Court of North Carolina in Mecklenburg County on June 6, 2020 against Defendant Wells for claims for negligence, breach of the UCC, and violation of the North Carolina Unfair and Deceptive Trade Practices Act. (Pl.'s Compl., Meck. Sup. Ct. No. 20-CVS-7801). Defendant filed a Notice of Removal and Notice of Appearance on July 9, 2020. (ECF No. 1, 3). Defendant filed a Motion to Dismiss for Failure to State a Claim on July 10, 2020, but did not attach a brief or memorandum of law. (ECF No. 4). Defendant then filed an Answer, Amended Motion to Dismiss, a Memorandum in Support of Amended Motion to Dismiss on August 31, 2020. (ECF No.6-8).

### **LEGAL STANDARD**

A complaint may be dismissed if it fails “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Rule 8(a)(2) of the Federal Rules of Civil Procedure requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” Under Rule 8 of the Federal Rules of Civil Procedure, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Atlantic Corp. v. Twombly*, 550 U.S. 544, 580 (2007).

In reviewing the adequacy of a complaint, a court should “accept as true all well-pleaded allegations and should review the complaint in a light most favorable to the plaintiff.” *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4<sup>th</sup> Cir. 1993). According to the U.S. Court of Appeals for the Fourth Circuit, “a motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief.” *Mylan Labs.*, 7 F.3d at 1134.

### **ANALYSIS**

#### **I. Plaintiffs’ Negligence Claim is Properly Pled and not Precluded by the Uniform Commercial Code**

In North Carolina, to establish a claim for negligence the plaintiff must show that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the plaintiff’s injury was proximately caused by the breach. *Martishius v. Caroico Studios, Inc.*, 355 N.C. 465, 562 S.E.2d 887 (2002).

Defendant Wells contends that Plaintiffs’ negligence claim should be dismissed due to North Carolina’s adoption of Article 4A of the Uniform Commercial Code which, Defendant Wells argues, displaces Nirav’s common law claim of negligence. (ECF No. 4 ps. 2-4).

Defendant Wells further asserts that “[t]he core of Nirav Ingredient’s negligence claim is that Wells Fargo mishandled an incoming wire transfer.” (*Id.* at p. 3).

However, Plaintiffs have alleged wrongdoing that includes acts committed before *and* after the wire transfer, the transfer itself being merely one of Defendant Wells’ negligent actions. Specifically, in support of their negligence claim, Plaintiffs have alleged that Defendant Wells:

- Allowed Defendant John Doe to open a Wells Fargo Bank account without Nirav’s knowledge or consent;
- Failed to properly verify Defendant John Doe’s identity before allowing Defendant it to open the fake account;
- Knew, or should have known, that preventing fake accounts from being opened is a necessary protection for the interests of its account holders, including Nirav;
- Failed to detect the clear signs of fraud related to the opening and closing of Defendant John Doe’s account and those who set up and used the account;
- Failed to provide any information about Defendant John Doe to assist Nirav in recovery of its stolen funds;
- Failed to act with due care upon Nirav’s notice to Defendant Wells that it had detected fraudulent activity;
- Failed to previously enact commercially reasonable, and adequate safety procedures which would have notified Nirav that its name and address was being used to conduct a transaction with another Defendant Wells’ account;
- Failed to adequately train its employees to recognize the opening of fraudulent accounts;

- Failed to freeze Defendant John Doe’s account after the wire transfer to preserve Nirav’s funds; and
- Failed to initiate a criminal investigation following Nirav’s report of having been defrauded.

(ECF No. 1 ¶ 23, 25, 27, 35, 38, 60(b), 60(c)(iii), 60(e)(iii)-(iv)).

Since a majority of the fraudulent conduct alleged by Plaintiffs against Defendant Wells occurred both before and after the wire transfers at issue in this matter, Article 4A does not displace Plaintiffs’ negligence claims.

In support of its argument, Defendant Wells cites a holding from the Second Circuit, failing to note that in *Eisenberg v. Wachovia Bank, N.A.*, the Fourth Circuit applied North Carolina law in dismissing the plaintiff’s negligence claims because Eisenberg was not a customer of Wachovia but, specifically stating that *Regulation J did not preempt the plaintiff’s common law claims*. 301 F.3d 220, 222, 225 (2002). *emphasis added*.

The *Eisenburg* Court held that Subpart B of Regulation J does not address the duties, obligations and liabilities applicable to bank functions having nothing to do with a Fedwire transfer and that allowing the plaintiff’s claims to go forward would not “create an obstacle to the fulfillment of Subpart B’s purpose of establishing a uniform body of federal law to govern Fedwire transfers.” *Id* at 224. The Court further posited that Regulation J did not preempt negligence claims to the extent the claims questioned the opening and management of fake accounts. *Id*. Here, Plaintiff’s negligence claims are premised on conduct not covered by Subpart B, and therefore Plaintiff’s negligence claims cannot be considered in conflict with Subpart B.

Likewise, in *Peredicho v. Wells Fargo, N.A.* the United States District Court of South Carolina applied *Eisenberg* in finding that “Plaintiff’s negligence claim was not preempted by Article 4 to the extent it relates to the opening and use of the fraudster’s account, which falls outside of the wire transfer itself.” No. 3:18-cv-02394-JFA. Here, Plaintiff’s claims are not barred by Regulation J because they concern conduct outside of and separate from the wire transfer process.

## **II. Plaintiffs’ Second Claim under the North Carolina Uniform Commercial Code Does not Fail for Lack of Standing**

Defendant Wells contends that Nirav lacks standing to maintain a claim against Defendant Wells under North Carolina’s version of the Uniform Commercial Code (“UCC”). (ECF No. 4 ps. 4-5). Defendant relies on a case outside of the Fourth Circuit, *Grain Traders v. Citibank, N.A.*, for the proposition that Plaintiffs do not have standing because an action can only be maintained by the originator of the wire transfer and only against their own Bank. (ECF No. 4, p. 4). However, *Grain Traders* involved claims by the plaintiff for violation of New York’s Uniform Commercial Code Section 4A-402. 160 F.3d 97, 99 (1998). Thus, not only is *Grain Trades* not binding authority on this Court, but it is factually distinguishable as well.

North Carolina’s UCC §4A-402, is entitled “Obligation of Sender to Pay Receiving Bank.” While that may be similar to New York’s version of that UCC provision, Plaintiffs have not alleged a violation of that section, but rather for a violation of Section 4A-207(b)(2)—a completely different provision. In short, Nirav contends that Defendant Wells knew there was discrepancy between the account number and the name and address in the wire instructions when it wired Nirav’s funds to Defendant Jon Doe. Compounding Defendant Wells’ wrongdoing is the fact that Nirav and Ash had previously conducted multiple transactions through Defendant Wells in the hundreds of thousands of dollars. (ECF No. 1 ¶21).

### III. The Complaint does not Establish that Defendant Wells Met its Statutory Obligations under Article 4A of the UCC

Defendant Wells further contends that Plaintiffs' UCC Claim should be dismissed because (on the face of the complaint) it complied with all of the requirements of Article 4A. (ECF No. 4 ps. 5-7)

Specifically, Defendant Wells' argues that it had no obligation to check the name of the account receiving the incoming electronic transfer. Defendant Wells further argues that its knowledge that Defendant John Doe was not the intended recipient of the funds is an inconsistent theory with the purpose of automated wire transfers. (ECF No. 4 ps. 5-7). Defendant Wells' argument itself is inconsistent and does not justify dismissal in the early stages of this litigation.

It is apparent Defendant Wells' theory relies on N.C. Gen. Stat. § 25-4A-207(b)(1), which provides that in situations where a payment order is received by a beneficiary bank and the payment order identifies the beneficiary by both name and account number and the name and number identify different persons, if the beneficiary bank that does not know there is a discrepancy between the name and number then the beneficiary bank may rely on the number alone. (ECF No. 4 ps. 5-7; N.C. Gen. Stat. §25-4A-207). However, as is the case here, under N.C Gen. Stat. § 25-4A-207(b)(2), “[i]f the beneficiary’s bank pays the person identified by name or **knows that the name and number identify different persons**, no person has rights as the beneficiary...” N.C. Gen. Stat. § 25-4A-207(b)(2) (emphasis added).

In *Song Chuan Tech.*, the court held that “if [the bank] knew the name and account number did not match then it must return the transmitted funds if the account holder was not entitled to receive payment form the originator of the funds transfer.” *Song Chuan Tech. (Fujian) Co. v. Bank of Am., N.A.*, No. CV 2:16-3269-RMG, 2017 WL 1862207, at \*3 (D.S.C. May 8,

2017). Here, because Defendant Wells knew or should have known Defendant John Doe's account number did not match Nirav's name and address, the transmitted funds must be returned.

Defendant Wells' argument that its knowledge of a discrepancy is irrelevant is wholly inapplicable in this case because Plaintiffs' have in fact alleged that Defendant Wells Fargo had *actual* knowledge of the discrepancy between the name on the payment order and the account number that the funds were transferred. (ECF No. 4 ps. 6-7; ECF No. 1 ¶¶68). Plaintiffs have alleged that Nirav was listed as the beneficiary, that the account number on the order referred to Defendant John Doe, and that Defendant Wells transferred the funds to Defendant John Doe's account even though Defendant Wells had transacted millions of dollars of Nirav's business in the past. (ECF No. 1 ¶¶30, 32, 67). These factual allegations, which must be taken as true by the Court under a Rule 12(b)(6) motion, are more than sufficient to state a claim under N.C. Gen. Stat. §25-4A-207(b). Further, the fact that Defendant Wells has refused to give even basic information related to the Hacker and/or Defendant John Doe is enough to unlock the keys to discovery and allow this case to move forward.

Defendant Wells relies on *Sliders Trading Co., L.L.C.*, for the proposition that courts applying UCC §4A-207 have consistently found that a defendant is justified in accepting a wire based on an account number (regardless of any inconsistency with the beneficiary name). (EFC No. 4 p. 6). Although *Sliders* is not binding on this Court, it is also distinguishable in that *Sliders* specifically stated that the plaintiff had not alleged that the bank (which happened to be Wells Fargo) knew that the transfers resulted from fraud or that the accounts did not belong to the plaintiff's genuine customer. *Sliders Trading Co., L.L.C. v. Wells Fargo Bank, N.A.*, No. 17-CV-04930-LB, 2017 WL 6539843, at \*12 (N.D. Cal. Dec. 21, 2017). Here, Plaintiffs have



specifically alleged that Well Fargo knew the Fake Account did not belong to Nirav, an allegation which is to be taken as true at this point in the litigation.

Defendant further relies on *Peter E. Shapiro, P.A.* as authority exempting Defendant Wells from liability under UCC §4A-207(b)(2). (ECF No. 4 p. 6). However, the Court in *Peter E. Shapiro, P.A., v. Wells Fargo Bank, N.A.*, stated that “[a]lthough a bank has no duty to affirmatively search for conflicts between beneficiary names and account numbers of incoming wires, it may not escape liability if, before it pays the wire, it gains knowledge of the conflict by **any means** but nonetheless pays an individual who is not entitled to receive the funds.” 352 F. Supp. 3d at 1232 (emphasis added). As discussed above, Plaintiffs have alleged Defendant had actual and constructive knowledge of the conflict and nevertheless paid Defendant John Doe who was not entitled to receive the funds. Plaintiffs have sufficiently stated a claim for violation of the UCC and therefore Defendant Wells’ Motion should be denied.

#### **IV. Plaintiffs’ Third Claim for Relief Against Defendant Wells Fargo for Violation of North Carolina’s Unfair and Deceptive Trade Practices Act**

The North Carolina Unfair and Deceptive Trade Practices Act (“UTP”) provides a private case of action to plaintiffs damaged by unfair or deceptive acts or practices that affect commerce. N.C. Gen. Stat. § 75-1.1(a). Defendant Wells urges this Court to dismiss Plaintiffs’ UTP claim because Nirav Ingredients has failed to allege sufficiently shocking misconduct on its part. (ECF No. 4 ps. 7-8). This is manifestly inaccurate.

Plaintiffs have alleged that Defendant Wells knowingly transferred funds to Defendant John Doe’s fraudulent account after instructing Plaintiffs to follow certain procedures to facilitate safe and secure wiring policies, which included making sure that the account number, account name, and account address were all included in any wiring instruction that Nirav provided. However, Defendant Wells turned around and refused to honor the protections of those

procedures by transferring the funds to Defendant John Doe's account despite the discrepancy in the information that Defendant Wells implored Nirav to follow. Further, Defendant Wells has blatantly refused to assist Nirav in recovery of the lost funds. In this, Defendant Wells has left the barn door open, allowed the cow to wander out without excuse and then failed to even try to close the door afterwards. Its conduct would be shocking to any account holder who reasonably expected Defendant Wells to make the most minimum of efforts to safeguard its funds. Plaintiffs have more than met their burden to plead a claim under the UTP against Defendant Wells and its Amended Motion to Dismiss should be denied.

### **CONCLUSION**

Plaintiffs have sufficiently stated claims for negligence, violation of Article 4A of the UCC, and for violation of the UTP statute. Accordingly, Plaintiffs respectfully request that Defendant's Motion to Dismiss be denied.

Respectfully submitted this 14<sup>th</sup> day of September, 2020.

**s/ Joseph H. Powell**

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**LOCAL RULE 3(b)(iv) CERTIFICATION**

Plaintiffs, through the Undersigned Counsel, certify that this Response to Defendant's Motion to Dismiss complies with Local Rule 3(b)(iv) of the Initial Scheduling Order entered pursuant to the Standing Order Governing Civil Case Management before the Honorable Frank D. Whitney, Misc. No. 3:07-MC-47 (Doc. No. 2).

Respectfully submitted this 14<sup>th</sup> day of September, 2020.

**s/ Joseph H. Powell**

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**CERTIFICATE OF SERVICE**

The Undersigned Counsel certifies the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANT WELLS FARGO BANK, N.A.'S AMENDED MOTION TO DISMISS** has been filed with the United States Court for the Western District of North Carolina, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented to accept service by electronic means.

Respectfully submitted this 14<sup>th</sup> day of September, 2020.

**s/ Joseph H. Powell**

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