No.

IN THE

Supreme Court of the United States

STUDCO BUILDING SYSTEMS US, LLC,

Petitioner,

v.

1ST ADVANTAGE FEDERAL CREDIT UNION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An FBI report found that the funds stolen in internet scams were usually "sent directly to a financial institution . . . which directly contributed to the increase in global exposed losses." This case involves a question of national importance in which the courts of appeal have diverged: when does a financial institution bear responsibility for the loss when it allows scammers to use a custodial account to abscond with stolen funds. Uniform Commercial Code (UCC) Article 4A governs fund transfers. Section 4A-207 imposes liability against a financial institution when it "knows" that an incoming deposit is a misdirected transfer but fails to return it.

The questions presented are:

1. Whether "know" in UCC § 4A-207 imposes a due diligence standard as the Eleventh Circuit and several district courts have held, or whether it requires actual knowledge by an employee, as the Fourth Circuit held below. And if the district court applied the wrong standard, did the Fourth Circuit abuse its discretion by not remanding to allow the district court to apply the correct standard?

2. Whether UCC § 4A-207 allows the defrauded party to file a claim against the financial institution, as at least one district court has held, or whether it imposes a "privity" requirement, as the Fourth Circuit held below. And even if § 4A-207 requires privity, did the Fourth Circuit abuse its discretion by considering a privity argument that was never made in district court or in the appellant's opening brief, which if timely raised could have been cured by joining the party in privity?

PARTIES TO THE PROCEEDINGS

Petitioner Studco Building Systems US, LLC (Studco) was the plaintiff in the district court and appellee/cross-appellant in the court of appeals. Respondent 1st Advantage Federal Credit Union (1st Advantage) was the defendant in the district court and the appellant/cross-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Studco Building Systems US, LLC discloses that there is no parent or publicly held company owning 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Studco Bldg. Sys. U.S., LLC v. 1st Advantage Fed. Credit Union, No. 2:20-CV-417-RAJ-LAL, 509 F. Supp. 3d 509, 569 (E.D. Va. Dec. 18, 2020) (memorandum opinion and order granting in part and denying in part 1st Advantage's motion to dismiss plaintiff's complaint).

Studco Bldg. Sys. U.S., LLC v. 1st Advantage Fed. Credit Union, No. 2:20-CV-417-RAJ-LAL, 2023 WL 1926747 (E.D. Va. Jan. 12, 2023) (memorandum opinion and order entering judgment in Studco's favor following bench trial).

United States Court of Appeals (4th Cir.):

Studco Bldg. Sys. US, LLC v. 1st Advantage Fed. Credit Union, No. 23-1148, 23-1766, 133 F.4th 264 (4th Cir. Apr. 2, 2025) (reversing district court's January 12, 2023 memorandum opinion and order).

Studco Bldg. Sys. US, LLC v. 1st Advantage Fed. Credit Union, No. 23-1148, 23-1766 (4th Cir. Apr. 22, 2025) (order denying Studco's petition for rehearing and rehearing *en banc*).

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INTRODUCTION

Global connectivity has increased the prevalence of internet fraud schemes targeting American businesses and consumers. One of the most common schemes is perpetrated through a business email compromise (BEC). In these schemes, internet scammers use sophisticated deception tactics to mimic a business's trusted contact. These scammers dupe the business into believing that the trusted contact is changing its bank account information and requesting to direct future payments to a new account. This new account is key to their fraudulent scheme: the scammers create bank accounts solely to carry out their fraud, then quickly abscond with those misdirected funds.

A September 2024 FBI report found that BEC scams have exposed American businesses and consumers to over $55 billion dollars in losses. (Internet Crime Complaint Center, *Business Email Compromise: The $55 Billion Scam*, Alert No. I-091124-PSA, (Sept. 11, 2024), https://www.ic3.gov/PSA/2024/PSA240911 (last accessed July 15, 2025)). It is no secret that BEC scammers use accounts at financial institutions as the conduits for these schemes: "In 2023, the [FBI] saw a growth in BEC reporting where funds were sent directly to a financial institution housing custodial accounts . . . which directly contributed to the increase in global exposed losses." *Id.* at n. 1.

These schemes have resulted in a corresponding rise in claims by victims against the financial institutions that allowed the scammers to open fraudulent accounts and abscond with the stolen funds. These claims often arise under Article 4A of the Uniform Commercial Code. Article 4A governs the electronic funds transfers commonly used

by businesses: automated clearinghouse (ACH) and wire transfers. Article 4A has been codified in every United States jurisdiction; this case arises under Virginia's codification. *See* Va. Code § 8.4A-101 *et seq.*

UCC Article 4A was designed as a prudent allocation of risk among banks and businesses to allow for the efficient transfer of funds through financial institutions. The Eleventh Circuit has observed that "[i]nterpreting Article 4A in a manner that would allow a beneficiary bank to accept funds when it knows or should know that they were fraudulently obtained, would allow banks to use Article 4A as a shield for fraudulent activity." *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1276 (11th Cir. 2003). The Fourth Circuit's decision below does exactly that. The Fourth Circuit's construction of the relevant provision – § 4A-207 – eviscerates UCC Article 4A's prudent allocation of risk and transforms it into an immunity statute. But, "[i]t could hardly have been the intent of the drafters [of Article 4A] to enable a party to succeed in engaging in fraudulent activity . . . ." *Id.*

Section 4A-207 imposes liability on a financial institution when it "knows" that the name and account number on an incoming transfer describe different persons but fails to return it. "Know" means "actual knowledge" as defined in § 1-202(b), and § 1-202(f) defines "when an organization has knowledge of information received by the organization." § 4A-207 cmt. 2.

1. The first issue concerns whether "knowledge" under § 4A-207 applies a "due diligence" standard as the Eleventh Circuit and other district courts have held, or whether it requires actual knowledge by a bank employee,

as the Fourth Circuit held below. The UCC's official comments to § 4A-207 point to UCC § 1-202(f) for the definition of "knowledge."

> a. The Eleventh Circuit and other district courts have held that § 4A-207 imputes a financial institution with knowledge as of the date it would have obtained actual knowledge through the exercise of due diligence. *Peter E. Shapiro, P.A. v. Wells Fargo Bank N.A.*, 795 Fed. Appx. 741, 746-47 (11th Cir. 2019) ("the proper resolution of this [§ 4A-207 claim] depends on (1) whether an individual person had actual knowledge . . . , or (2) even if no individual person had actual knowledge of the name mismatch, whether . . . it failed to exercise due diligence and thus should be deemed to have knowledge of the mismatch"); *Julio J. Valdes, M.D., P.A. v. Customers Bank, Inc.*, 830 Fed. Appx. 598, 600–01 (11th Cir. 2020) (per curiam) (affirming dismissal of UCC § 4A-207 claim because the plaintiff did not allege "facts to establish that the [beneficiary bank] failed to exercise due diligence" (citing Florida's UCC § 1-202(f)). *See also Elkin Valley Baptist Church v. PNC Bank, N.A.*, 748 F. Supp. 3d 293, 332 (W.D. Pa. 2024), *motion to certify appeal denied*, No. CV 23-1798, 2024 WL 4817131 (W.D. Pa. Nov. 18, 2024) ("section 4A-207(b)(1) requires a threshold determination of whether a bank has knowledge of a mismatch (under [§ 1-202(f)'s] due diligence standard . . .)") (applying Pennsylvania law).
>
> b. The Fourth Circuit reached a conflicting interpretation of "knowledge." The Fourth Circuit held that "knowledge" narrowly means "'actual knowledge,' not constructive knowledge, as the district

court concluded." App. 15a. To meet this evidentiary burden, a plaintiff must meet the impossible task of producing direct evidence that a specific bank employee "had actual knowledge of the mismatch of name and account number." App. 20a.

c. Even if the Fourth Circuit's interpretation of "knowledge" in UCC § 4A-207 was correct, it should have "remand[ed] for further proceedings to permit the trial court to make the missing findings[.]" *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982). This Court has held that this requirement is "elementary" and necessary to respect the "basic responsibility of district courts" as factfinders. *DeMarco v. United States*, 415 U.S. 449, 450, n.1 (1974).

Hon. James Andrew Wynn's concurrence recognized that even under the panel majority's newly articulated "knowledge" standard, the district court's factual findings and trial record contained evidence from which "a factfinder could infer that [1st Advantage's investigation] led to a 1st Advantage employee obtaining actual knowledge of a misdescription." App. 26a. Despite Studco's request, the Fourth Circuit neither affirmed on this alternative basis nor remanded to the district court to apply the Fourth Circuit's articulated "knowledge" standard. *See Kelley v. S. Pac. Co.*, 419 U.S. 318, 332 (1974) (when the district court applies the wrong standards, appellate courts should remand to allow "the trier of fact to reexamine the record using the correct standards").

2. The second issue concerns *who* may bring a claim under § 4A-207. Courts are split on whether § 4A-207 imposes "privity": an inefficient chain of recovery where the originator of the misdirected funds must bring its claim against its own originating bank, who in turn seeks recovery against the beneficiary bank. *Compare Wheels Invs., LLC v. Wells Fargo Bank, N.A.*, 2021 WL 8895130, at *3 (M.D. Fla. Apr. 29, 2021) ("there is no expression of a privity requirement in Section 207"), *with Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d. 97 (2d Cir. 1998) (imposing privity requirement).

a. The Fourth Circuit's majority indirectly references privity, and the concurrence expressly adopted it as a requirement. But the Fourth Circuit should not have addressed it at all because 1st Advantage neither presented a "privity" argument to the district court nor made the argument in its appellate opening brief. "Ordinarily an appellate court does not give consideration to issues not raised [in the district court]." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). *See also N. Carolina Ins. Guar. Ass'n v. Becerra*, 55 F.4th 428, 433 n.5 (4th Cir. 2022) (points not advanced in appellant's opening brief are forfeited). None of the justifications for deviating from the ordinary rule are present. To the contrary, Studco could have cured privity deficiencies by impleading the "missing" party.

b. Section 4A-207 has "no expression of a privity requirement." *Wheels Invs.*, 2021 WL 8895130, at *3. A "privity" requirement might make sense outside of litigation to facilitate the orderly settlement of electronic fund transfers among the parties involved.

But requiring "privity" in litigation needlessly complicates litigation mandating the joinder of unnecessary parties. Proponents of a "privity" requirement argue that it prevents exposing a party involved in the challenged transfer to a "risk of multiple or inconsistent liabilities." *Grain Traders*, 160 F.3d. at 102. No such risk exists in litigation, because all necessary parties can be joined in a single proceeding and the finality of a judgment protects non-parties against inconsistent liabilities. The plain language of § 4A-207 and pragmatism allow the party suffering the loss to file a claim directly against the beneficiary bank.

3. The questions presented are important, recurring, and necessary to preserve the distinct roles of district and appellate courts.

a. The Fourth Circuit's interpretation of § 4A-207's requirements for "knowledge" and "privity" created a conflict with the Eleventh Circuit and several district courts. The Fourth Circuit's narrow reading of "knowledge"—especially when coupled with a strict "privity" requirement under § 4A-207—transforms a careful "allocation of risk" into a de facto immunity statute. *See Regions Bank*, 345 F.3d at 1275–76 (interpreting UCC Article 4A "in a manner that would allow a beneficiary bank to accept funds when it knows or should know that they were fraudulently obtained, would allow banks to use Article 4A as a shield for fraudulent activity"). Under the Fourth Circuit's construction of § 4A-207, an originator suffering a loss would not only need to meet the impossible burden of obtaining an admission that a bank employee knew

about a misdescription and failed to return it, but it would also need to compel its originating bank to litigate this claim on its behalf.

Courts are already experiencing an exponential increase in § 4A-207 claims as internet fraud continues to rise. Petitioner's research revealed at least fifty filings of § 4A-207 claims since 2022. Each case is high stakes for the person or business suffering the loss: misdirected transfers often total six and seven figure losses. Resolving the conflict between § 4A-207's requirement for "knowledge" and "privity" is essential to provide courts and litigants with clarity on the proper application of these provisions.

b. This Court's well-established principles aimed at preserving the institutional roles of district courts and appellate courts are also of national importance. This Court has separately and repeatedly admonished that appellate courts (i) must not consider arguments that were never presented to the trial court and (ii) must remand to the district court to make necessary findings where the appellate court failed to do so because of an erroneous view of the law. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Pullman-Standard*, 456 U.S. at 291. This Court has stated that these "elementary" principles are "devised to promote the ends of justice," *see id.*, and to "afford[]the District Judge latitude to perform his proper function as factfinder." *Kelley*, 419 U.S. at 333 (1974) (Stewart, J., concurring).

The Fourth Circuit violated both principles. The disregard was not harmless. As explained above,

> Judge Wynn's concurrence agreed that the record contains evidence of "actual knowledge." And, Studco would have cured privity by impleading the missing party. This Court should grant review to uphold these important principles.

The Court should grant this petition in order to resolve a split in the Circuits and restore the careful allocation of risk intended by the drafters of UCC Article 4A.

OPINIONS BELOW

The Fourth Circuit's opinion (App. 1a-31a) is reported at 133 F.4th 264. The district court's memorandum opinion and order following bench trial is not reported (App. 38a-82a). The district court's memorandum opinion and order as to 1st Advantage's motion to dismiss is reported at 509 F. Supp. 3d 560 (App. 83a-108a).

JURISDICTION

The judgment of the Fourth Circuit was entered on April 2, 2025. App. 109a. The Fourth Circuit's order denying the petition for rehearing *en banc* was entered on April 22, 2025. App. 1a, 32a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTORY PROVISIONS INVOLVED

Article III, section 2 of the Constitution provides that "[t]he judicial Power shall extent to all Cases, in Law and Equity, arising under ... the Laws of the United States."

Relevant portions of Article 4A of the Virginia Commercial Code, Va. Code § 8.4A-101 *et seq.*, are reprinted in the appendix. *See* App. 112a.

STATEMENT

A. Legal background

Uniform Commercial Code (UCC) Article 4A is codified in every U.S. jurisdiction, including Virginia, whose substantive law governs this case. Article 4A governs "funds transfers"—wire transfers, ACH transfers, and other electronic fund transfers through financial institutions. Va. Code § 8.4A-104(a). The rights and obligations of parties involved in a fund transfer are based on their role in that fund transfer:

- The "originator" is "the sender of the first payment order," Va. Code § 8.4A-104(c) (in this case Petitioner Studco);

- The "originator's bank" means the financial institution through which "originator" initiates the funds transfer, Va. Code § 8.4A-104(d) (the originator's bank is not a party to this proceeding);

- The "beneficiary's bank" means "the bank identified in a payment order," Va. Code § 8.4A-103(a)(3) (in this case Respondent 1st Advantage);

- The "beneficiary" means "the person to be paid by the beneficiary's bank," Va. Code § 8.4A-103(a)(2) (in case, the vendor Studco was intending to pay through its misdirected ACH transfers).

Section 4A-207 provides the framework for liability against financial institutions "when the beneficiary [of the payment order] is described by name and by an identifying number or an account number" but "the name and number refer to different persons." Va. Code § 8.4A-207 cmt. 2. In this instance, the name and number in each of Studco's misdirected ACH payment orders referred to different persons: the orders listed its vendor, "Olympic Steel, Inc." as the beneficiary," but the account number referred to the individual who opened the fraudulent account ("Lesa Taylor").

Under § 4A-207(a)(2), "if the beneficiary's bank . . . '***knows***' that the name and number identify different persons, no person has rights as beneficiary" and "acceptance of the order cannot occur." (emphasis added). "Knows" means actual knowledge but "Section [8.1A-202(f)] states rules for determining when an organization has knowledge of information received by the organization." Va. Code § 8.4A-207 cmt. 2.

Va. Code § 8.1A-202(f) states that "knowledge . . . received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, *in any event, from the time it would have been brought to the*

individual's attention if the organization had exercised due diligence." (emphasis added). Section 8.1A-202(f) also provides the standard for due diligence: "An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines."

B. Factual and procedural background

This case arises from a sophisticated BEC scheme perpetrated against Studco. The scammers, working with a 1st Advantage customer named "Lesa Taylor" (Taylor or Customer), created a fraudulent account at 1st Advantage. The scammers then diverted $558,868.71 that Studco intended to pay to its vendor, Olympic Steel, Inc., into that account. With Taylor's aid, the scammers absconded with the misdirected funds through a series of highly suspicious withdrawals.

Studco filed suit against 1st Advantage in the District Court for the Western District of New York. The Western District of New York transferred the case to the Eastern District of Virginia. Studco asserted a claim under Va. Code § 8.4A-207, alleging that 1st Advantage had knowingly accepted ACH payments where the beneficiary (Studco's vendor) did not match the account holder (Taylor). Studco also asserted common-law bailment and fraud claims.

1. Pre-trial proceedings

Before trial, 1st Advantage moved to dismiss under Rule 12(b)(6), App. 83a., filed an answer with affirmative defenses, App. 80a., moved for summary judgment under

Rule 56, App. 35a., and submitted pre-trial proposed findings of fact and conclusions of law, App. 40a.

None of these pleadings, in form or in substance, argued that Studco lacked standing or privity to assert a claim under Va. Code § 8.4A-207. None cite the section—§ 4A-402—that purportedly imposes the privity requirement.

2. Bench trial

a. At trial, Studco presented the testimony of its President, Ben Stevens, 1st Advantage's highest ranking compliance officer, Keith Ward ("Ward"), 1st Advantage's highest-ranking personnel for overseeing ACH payments, Veronica Dean, and the unrebutted expert testimony of the late Elliott McEntee ("McEntee" or "Studco's expert"). McEntee was the former president of the National Automated Clearinghouse Association (NACHA)—the organization that governs electronic transfers through the ACH network. McEntee was involved in writing the NACHA rules and creating the modern ACH network.

b. The parties stipulated that the following table (Table) summarizes the activity in the fraudulent account at 1st Advantage. App. 42a-43a.

Date	Amount	Event
Aug. 9, 2018	$100.00	Starting Balance
Aug. 30, 2018	$100.00	Ending Balance
Sept. 1, 2018	$100.00	Starting Balance
Sept. 30, 2018	$11.88	Ending Balance

Oct. 1, 2018	$11.88	Starting Balance
Oct. 4, 2018	**$156,834.55**	**ACH from "STUDCO BUILDING"**
Oct. 5, 2018	$58,000.00	Cashier's Check Withdrawal
Oct. 10, 2018	$46,000.00	Outgoing Domestic Wire
Oct. 12, 2018	$45,000.00	Outgoing Domestic Wire
Oct. 16, 2018	**$246,260.44**	**ACH from "STUDCO BUILDING"**
Oct. 17, 2018	$68,000.00	Cashier's Check Withdrawal
Oct. 19, 2018	$79,500.00	Cashier's Check Withdrawal
Oct. 23, 2018	$50,000.00	Withdrawal
Oct. 25, 2018	$10,464.14	International Wire Transfer Attempted
Oct. 25, 2018	$26,535.86	International Wire Transfer Attempted
Oct. 30, 2018	$10,464.14	International Wire Transfer REVERSED
Oct. 30, 2018	$26,535.86	International Wire Transfer REVERSED
Oct. 31, 2018	$25,000.00	Withdrawal
Oct. 31, 2018	$10,000.00	Withdrawal
Oct. 31, 2018	$1,282.90	Ending Balance
Nov. 1, 2018	$1,282.90	Ending Balance
Nov. 5, 2018	**$40,980.09**	**ACH from "STUDCO BUILDING"**

Nov. 6, 2018	$38,000.00	Cashier's Check Withdrawal
Nov. 13, 2018	**$114,793.63**	**ACH from "STUDCO BUILDING"**
Nov. 14, 2018	$60,000.00	Outgoing Domestic Wire
Nov. 16, 2018	$45,000.00	Outgoing Domestic Wire
Nov. 31, 2018	$11.12	Ending Balance
Dec. 1, 2018	$11.12	Ending Balance
Dec. 31, 2018	$0.00	Ending Balance

c. Each of the four incoming ACH's from Studco listed "Olympic Steel, Inc." as the intended beneficiary. App. 38a; Joint Appendix, *Studco Bldg. Sys. US, LLC v. 1st Advantage Fed. Credit Union*, No. 23-1148 (4th Cir. Oct. 10, 2023), ECF No. 20.

d. The evidence shows that 1st Advantage reviewed the scammers' account at least 33 times over an approximate 40-day period – each time related to the scammers conducting a suspicious transaction. *Id.* at JA164; JA178-180; JA196-JA208; JA212; JA230; JA267-JA271; JA482; JA528. Specifically:

> i. 1st Advantage's compliance department immediately noticed suspicious activity with the account when the Customer visited a 1st Advantage branch and provided false information to open the account. *Id.* at JA164-69; JA469.
>
> ii. The Customer visited a 1st Advantage branch on twelve distinct occasions to conduct admittedly highly

suspicious transactions with 1st Advantage tellers who are trained to investigate suspicious activity. *Id.* at JA231-232; JA322.

iii. 1st Advantage's fraud analysts would have reviewed nineteen separate suspicious deposits or withdrawal attempts based on "alerts" in 1st Advantage's anti-money laundering software ("FCRM"). *Id.* at JA178-180; JA196-JA210; JA255; JA581; JA584.

iv. Aside from FRCM, 1st Advantage had another system called "DataSafe" that generated a real time "warning" for each of Studco's incoming ACH transfers, which warned of the mismatch between the intended receiver (Olympic Steel) and the name on the account receiving the ACH (Taylor). *Id.* at JA271-272; JA252-262; JA274-275; JA389; JA395.

v. On October 25, 2018, Taylor attempted two international wire transfers at a 1st Advantage branch that triggered an Office of Foreign Assets Control Office alert which led to an "ongoing investigation" by 1st Advantage's director of compliance. *Id.* at JA113; JA218-219; JA224; JA226; JA442.

e. Following bench trial, the parties submitted proposed findings of fact and conclusions of law. Once again, 1st Advantage neither argued that Studco lacked standing or privity to assert a claim under § 4A-207, nor did it cite to § 4A-402. App. 38a-82a.

3. The district court's memorandum opinion and order

a. The district court entered judgment in Studco's favor awarding full compensatory damages of $558,868.71, the amount of its total misdirected ACH transfers.

b. The district court held that under § 4A-207, "Studco has the right to recover the fraudulent ACH deposits that 1st Advantage received if Studco shows that 1st Advantage '[knew] that the name and [account] number' of the incoming ACHs from Studco 'identif[ied] different persons.'" App. 68a ¶ 4. Applying the knowledge standard in § 1A-202(f), the district court held:

> While it is true that 1st Advantage had no duty to proactively discover a misdescription of the Account information, the evidence at trial illustrated that 1st Advantage did not maintain reasonable routines for communicating significant information to the person conducting the transaction. If 1st Advantage had exercised due diligence, the misdescription would have been discovered during the first ACH transfer.

App. 74a-75a.

c. Applying this standard to the factual findings, the district court held:

> It is clear from the evidence presented that 1st Advantage did not maintain any routines, let alone reasonable routines, for communicating significant information to the person conducting

> the transaction. If 1st Advantage implemented reasonable routines for communicating information, the identification discrepancy recognized at the opening of the Account, the many alerts generated by the ACH transfers describing the misdescription of the Account, and the fact that Olympic Steel could not open an Account at 1st Advantage would have alerted 1st Advantage to the misdescription and possible fraud upon the posting of the first ACH transfer.

App. 77a.

d. Vitally, the district court sitting as factfinder found that 1st Advantage's director of compliance (Ward) lacked credibility. During examination, the court observed the utter improbability of Ward (and other trained fraud analysts) reviewing the customer's account activity, but failing to recognize the misdirected ACH deposits from Studco:

> THE COURT: But when you looked at these wires here, one for $10,000 and one for $26,000, did your eyes go up in the account anywhere to see whether she deposited any money, anything of that nature? Or your vision or your concern was just limited to these three or four items here in this document?
>
> [WARD]: The primary focus at that time was those few items.

> THE COURT: So you didn't look up the list on the historical account, and you didn't look down the list; is that correct?
>
> [WARD]: That is correct.

As factfinder, the district court found that Ward "testified inconsistently" about his investigation. App. 26a. Considering Ward's experience, training, and his admission that Taylor's account history exhibited all the signs of an account being used for fraud, there was ample evidence to support an inference that Ward and the compliance department had actual knowledge of misdirection (if not earlier based on 1st Advantage's repeated interactions with Taylor and her account). App. 26a.

e. The district court also found in Studco's favor under its alternative common law bailment claim. App. 71a-72a ¶ 11.

4. Fourth Circuit's Opinion and Denial of Rehearing

The Fourth Circuit reversed.

a. The panel majority and concurrence held that the district court applied the wrong standard of "knowledge," but disagreed as to whether the factual record developed at trial supported a finding of knowledge under their articulated standard.

The panel majority held that § 4A-207 requires "actual knowledge of the difference between the beneficiary's name of the account and the account number at the time the deposit was made." App. 13a. Without any discussion

of the record or the district court's factual findings, the panel majority curiously held that "the evidence showed that no individual at 1st Advantage had actual knowledge of the mismatch of name and account number." App. 20a.

Judge Wynn's concurrence, on the other hand, recognized that the "evidence indicates that 1st Advantage may have received actual knowledge of a misdescription . . . ." App. 26a. Judge Wynn focused on the district court's findings that Ward "testified inconsistently" about his "ongoing investigation" into Taylor's account. App. 26a; *supra* p. 14 (discussing the district court's credibility findings about Ward). Judge Wynn concluded that a "factfinder could infer that Ward's investigation led to a 1st Advantage employee obtaining actual knowledge of a misdescription between account name and number . . . ." App. 27a. But Judge Wynn ultimately concurred in the judgment of reversal based on the issue of privity. App. 27a.

b. The panel majority did not directly address the privity requirement, but quoted the Second Circuit's discussion of privity in *Grain Traders*, 160 F.3d at 102. App. 17a. The majority did not address Studco's waiver argument.

Judge Wynn's concurrence directly addressed privity. App. 27a. Judge Wynn, relying, *inter alia*, on *Grain Traders* and § 4A-402, held that § 4A-207 has a privity requirement that prohibits Studco from directly asserting its § 4A-207 claim against 1st Advantage. App. 27a-28a. Rather, "Studco must recover from [its originating bank], and, [the originating bank] must recover from 1st Advantage." App. 29a.

Judge Wynn addressed Studco's waiver argument in a footnote. App. 28a n.2. Judge Wynn held that he would "excuse any forfeiture" because "1st Advantage raised this issue below." App. 28a n.2. But 1st Advantage never made a privity argument in the district court.

c. The court of appeals denied rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit and other district courts have held that § 4A-207 imputes a financial institution as of the date it would have obtained actual knowledge through the exercise of due diligence. The Fourth Circuit's narrow reading of "knowledge" creates a circuit split.

The Fourth Circuit's interpretation is also wrong. The Fourth Circuit ignores the UCC's official comments and adjacent provisions that describe how courts should determine how and when a financial institution has knowledge of a misdescription. But even if the Fourth Circuit was correct, it should have remanded to allow the district court to apply the articulated standard.

When the Fourth Circuit's "knowledge" standard is combined with a "privity" requirement, § 4A-207 withers into a meaningless provision. Courts disagree as to whether § 4A-207 requires privity. Practically, the only effect imposing that unnecessary procedural requirement will be the needless duplicatation of litigation. But the Fourth Circuit's consideration of privity" was itself an abuse of discretion because 1st Advantage never made that argument in the district court.

These issues have national importance. American businesses move trillions of dollars though financial institutions annually. This Court's resolution of the conflict between the Fourth and Eleventh Circuits will provide clarity to banks and businesses of their respective obligations to prevent losses through misdirected funds funneled through fraudulent bank accounts.

I. The Circuits disagree about UCC § 4A-207's standard for measuring "knowledge."

A. Section 4A-207 imposes liability against a beneficiary bank when it would have learned of the misdescription if it had exercised due diligence.

Under § 4A-207, a financial institution is obligated to return a misdirected transfer if it "knows" that the name and number on an incoming transfer identify different persons. Here, for example, each incoming ACH from Studco identified "Olympic Steel, Inc." as beneficiary, but the account number belonged to "Lesa Taylor."

The official comments to § 4A-207 state that "knows" means "actual knowledge," but "Section [8.1A-202(f)] states rules for determining when an organization has knowledge of information received by the organization." Va. Code § 8.4A-207 cmt. 2. Virginia courts use the UCC official comments as "clarification" of UCC provisions. *Flintkote Co. v. W. W. Wilkinson, Inc.*, 260 S.E.2d 229, 232 (Va. 1979). Section 8.1A-202(f) provides the standard for organizational knowledge:

> [K]nowledge . . . received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines.

Thus, § 8.1A-202(f) imputes an organization with actual knowledge when the information related to the misdescription "is brought to the attention of the individual conducting that transaction," and if that does not occur "from the time it would have been brought to the individual's attention if the organization had exercised due diligence." Va. Code § 8.1A-202(f).

The Eleventh Circuit is the only other circuit to address § 4A-207's "knowledge" standard. The Eleventh Circuit agrees with Studco's position that § 8.1A-202(f)'s "due diligence" standard provides the standard of organizational "knowledge" for a § 4A-207 claim. *See Julio J. Valdes, M.D., P.A.*, 830 Fed. Appx. at 600–01 (affirming district court's dismissal of Florida UCC § 4A-207 claim because plaintiff failed to allege "facts to establish that Customers Bank failed to exercise due diligence" (citing Florida's UCC § 8.1A-202(f)) (emphasis added)); *Peter E. Shapiro, P.A.*, 795 Fed. Appx. at 746-47) ("the proper resolution of this [§ 4A-207 claim] depends on (1) whether an individual person had actual knowledge . . . , or (2)

even if no individual person had actual knowledge of the name mismatch, whether [the beneficiary bank]'s failure to communicate information from its automated audit trail regarding a potential name mismatch to an individual person means it failed to exercise due diligence and thus should be deemed to have knowledge of the mismatch") (applying Florida law) (emphasis added).

Many district courts that have analyzed the application of § 1-202(f)'s organizational knowledge to a UCC § 4A-207 misdescription-of-beneficiary claim have either expressly endorsed the due-diligence standard as the standard for a bank's knowledge, or have acknowledged that § 1-202(f) provides the standard for organizational "knowledge" for § 4A-207. *See Elkin Valley Baptist Church*, 748 F. Supp. 3d at 332 ("[S]ection 4A-207(b)(1) and requires a threshold determination of whether a bank has knowledge of a mismatch (under [§ 1-202(f)'s] due diligence standard)") (applying Pennsylvania law); *Squeeze Me Once, LLC v. SunTrust Bank*, 2020 WL 12968001, at *13-14 (M.D. La. Aug. 3, 2020) (acknowledging § 4A-207's reference to UCC 1-202(f) for definition of organization knowledge) (applying Louisiana law); *Wooddy L. Firm, LLC v. U.S. Bank Nat'l Ass'n*, 2020 WL 12631767, at *3 (D.S.C. Mar. 6, 2020) (same; denying motion to dismiss UCC § 4A-207 claim) (applying South Carolina law); *New S. Fed. Sav. Bank v. Flatbush Fed. Sav. & Loan Ass'n of Brooklyn*, 2003 WL 1888678, at *1 (S.D.N.Y. Apr. 15, 2003) (same) (applying New York Law). *See also PAF Invs., LLC v. Gen. Dynamics Land Sys., Inc.*, 2012 WL 13005315 (D.S.C. Nov. 20, 2012) (applying § 1-202(f) (formerly § 1-201(27)) due-diligence standard to find that mail delivered to accounts receivable department was organizational notice).

In contrast, the Fourth Circuit held that demonstrating "knowledge" under § 4A-207, requires direct evidence that an "individual at [the bank] had actual knowledge of the mismatch of name and account number when the ACH deposits" were "made into" the customer's account. App. 20a. The Fourth Circuit reasoned that § 1-202(f) is only a timing mechanism: "[§ 1-202(f)] . . . addresses when an organization is put on notice or receives knowledge." *Id.* The Fourth Circuit further argued that imposing a "due diligence" standard for organizational knowledge would conflict with § 4A-207's commentary that "a beneficiary bank has 'no duty to [affirmatively] determine whether there is a conflict between the account number and the name of the beneficiary . . . .'" *Id.* (citing Va. Code § 8.4A-207(b)(1); cmt. 2) (alternation added). Some district courts appear to agree with the Fourth Circuit's view. *See, e.g., GN Pro Group, LLC v. Well Done ASAP, LLC*, 764 F. Supp. 3d 757, 761-62 (N.D. Ill. 2025).

The Fourth Circuit's reading of §§ 4A-207 and 1-202(f) is too narrow. While a beneficiary bank has no affirmative duty to find name and account number conflicts in incoming transfers, it must act with due diligence once it is notified of the conflict. The Fourth Circuit's reading ignores the inconvenient portions of the official comments, and effectively transforms § 4A-207 into an immunity statute.

First, the Fourth Circuit's reading renders § 4A-207's reference to § 1-202(f)'s organizational standard meaningless. *See* § 4A-207 cmt. 2 ("[s]ection 1-202(f) states rules for determining when an organization has knowledge of information received by the organization"). This Court has said that "[t]o have 'actual knowledge' of

a piece of information, one must in fact be aware of it." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 184 (2020). Under this construction, the bank obtains knowledge *when* one of its employees becomes "aware of" the misdescription. If that is the case, there would be no reason for § 4A-207 to "address[] *when* an organization is put on notice *or receives knowledge*." App. 19a. (emphasis added). This test creates a near impossible evidentiary burden for a claimant. It is also bad policy: it encourages the financial institutions to act as ostriches to avoid obtaining actual knowledge of misdescriptions.

Second, testing knowledge only at the moment the misdirected funds are "made into" the customer's account contradicts § 4A-207's official comments. "Actual knowledge is assessed at the **time of payment**" under § 4A-405. *Sunset Cmty. Health Ctr., Inc. v. Cap. One Fin. Corp.*, 652 F. Supp. 3d 1020, 1027 (D. Minn. 2023) (citing § 4A-207 cmt. 2) (emphasis in original). Section 4A-405 has "three scenarios" for determining "time of payment," but it is generally "when the funds are otherwise made available to the beneficiary." *Id.* (citing § 4A-405(a)). It would make little sense to allow the financial institution to disregard information about the misdescription it learned of prior to making the misdirected funds available to its customer, simply because that knowledge was not contemporaneous to the incoming deposit. *See id.* (actual knowledge adequately pled under § 4A-407 where originator "identified the transfer as fraudulent during [a] phone call" that occurred prior to the bank making those funds available to the customer).

The Fourth Circuit's interpretation of §§ 4A-207 and 1-202(f) is unsound, and it conflicts with the Eleventh

Circuit and several district courts. This Court should find that § 1-202(f) imputes a bank with actual knowledge of a misdescription when the misdescription "is brought to the attention of the individual conducting that transaction," and if that does not occur "from the time it would have been brought to the individual's attention if the [bank] had exercised due diligence." Va. Code § 8.1A-202(f). This Court should reinstate the district court's judgment.

B. The Fourth Circuit abused its discretion by failing to remand to the district court to apply its "actual knowledge" standard.

Even if this Court agrees with the Fourth Circuit's interpretation of "knowledge" in § 4A-207, this Court should find that the Fourth Circuit abused its decision by failing to either: (a) remand to the district court to apply that standard, or (b) affirm the judgment on the trial record and the district court's findings of fact. As Judge Wynn's concurrence noted, the "evidence indicates that 1st Advantage may have received actual knowledge of a misdescription" under the Fourth Circuit's interpretation of "knowledge." App. 26a.

"When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings[.]" *Pullman-Standard*, 456 U.S. at 291 (citing *DeMarco*, 415 U.S. at 450, n.1 ("[T]he Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court."). *See also Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 268 (2015) (remanding

when court applied "legally erroneous" standard); *Kelley*, 419 U.S. at 332 (when the district court applies the wrong standards, appellate courts should remand to allow "the trier of fact to reexamine the record using the correct standards"). "[A] remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard*, 456 U.S. at 291 (citing *Kelley*, 419 U.S. at 331-32). "All of this is elementary." *Id.*

The Fourth Circuit held that it was legal "error for the district court to construe 'actual knowledge' to mean knowledge that could have been obtained with 'due diligence." App. 20a. But the Fourth Circuit's panel majority made no attempt to examine the trial record to determine whether the record supported affirming the judgment based on its articulated standard of knowledge. *See Scott v. United States*, 328 F.3d 132, 137 (4th Cir. 2003) (the court of appeals is "entitled to affirm on any ground appearing in the record, including theories not relied upon or rejected by the district court"). Rather, the panel majority summarily held that "evidence showed that no individual at 1st Advantage had actual knowledge of the mismatch," App. 20a. But the district court never had an opportunity to apply that standard.

"[A]ctual knowledge can be proved through inference from circumstantial evidence." *Intel Corp. Inv. Pol'y Comm.*, 589 U.S. at 189; *see also Raynor v. Pugh*, 817 F.3d 123, 128 (4th Cir. 2016) (same); *Parham v. Commonwealth*, 64 Va. App. 560, 566 (2015). "Circumstantial evidence is treated in the same manner as direct evidence." *Parham*, 64 Va. App. at 566 (citing *Chambliss v. Commonwealth*, 62 Va. App. 459, 465 (2013). Circumstantial evidence includes "any act or statement made and done or omitted

by the defendant, and all other facts and circumstances in evidence, which indicate his state of mind." *United States v. Ramirez-Carvajal*, 902 F.2d 30, at *2 (4th Cir. 1990). Factfinders may infer knowledge from "proof that a defendant deliberately closed his eyes to what otherwise would have been obvious." *Id.*

Judge Wynn's concurrence recognized that the record could support an inference of actual knowledge no later than October 25, 2018. App. 26a. But the record supports an inference of actual knowledge well before that, based on: the suspicious account opening, the Customer's twelve in-person fraudulent transactions, and nineteen reviews by fraud analysts following FCRM alerts. App. 62a ¶ 115(b). "[F]actfinding is the basic responsibility of district courts, rather than appellate courts." *DeMarco*, 415 U.S. at 450, n. 1. This Court should find that the Fourth Circuit abused its discretion by disregarding its "elementary" requirement to remand to the district court to apply its articulated "knowledge" standard.

II. Courts disagree as to whether UCC § 4A-207 imposes a privity requirement.

A. The Fourth Circuit abused its discretion by considering an argument that was never made in the district court.

The Fourth Circuit's consideration of "privity" was an abuse of discretion. 1st Advantage did not make the argument, and if it had, Studco could have cured a privity requirements by impleading the originating bank.

This Court's rule that "[o]rdinarily an appellate court does not give consideration to issues not raised [in the district court]" is well established. *Hormel*, 312 U.S. at 556; *Singleton*, 428 U.S. at 120 (following *Hormel*); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) (following *Singleton*). This rule is

> essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; ***it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence***.

Hormel, 312 U.S. at 556 (emphasis added). "[T]he complexity of a case does not eliminate the value of waiver and forfeiture rules, which ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression." *Exxon*, 554 U.S. at 487 n.6. Rather, "'the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided.'" *Id.* (quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993) (Boudin, J.) (citation omitted)).

"[W]hen to deviate from this rule [is] a matter 'left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.'" *Exxon*, 554 U.S. at 487 (quoting *Singleton*, 428 U.S. at 121). This Court has "stopped short of stating a general principle to contain appellate courts' discretion." *Id.* But it has offered narrow examples of when deviation from the general rule might

be appropriate: "where the proper resolution is beyond any doubt," or "where injustice might otherwise result." *Singleton*, 428 U.S. at, 121 (citing *Hormel*, 312 U.S., at 557); *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962).

Singleton and *Exxon* held that the court of appeals should not have considered an issue not passed upon by the district court. This Court should do the same here.

Singleton is instructive. In *Singleton*, 428 U.S. at 110, physicians filed a complaint seeking a declaration that a Missouri state statute was unconstitutional and an injunction against its enforcement. The district court granted the defendants' motion to dismiss finding that the physicians lacked standing to challenge the statute. *Id.* at 111. The Eighth Circuit reversed on the standing issue but then proceeded to the merits of the physicians' constitutional challenge (rather than remanding), reasoning that the "question of the statute's validity could not profit from further refinement" because it was "obviously unconstitutional." *Id.* at 111-112 (citations omitted).

This Court held that the Eighth Circuit should not have proceeded to the merits of the constitutional challenge, explaining:

> We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may

> have in defense of the statute. We think he was justified in not presenting those arguments to the Court of Appeals, and in assuming, rather, that he would at least be allowed to answer the complaint, should the Court of Appeals reinstate it.

Id. at 120.

In *Singleton*, this Court's analysis focused on the prejudice to the defendants. *See id.* By reaching the merits in *Singleton*, the Eighth Circuit deprived the defendants of their opportunity to develop a factual record to defend the statute's constitutionality. *Id.*

The Fourth Circuit's consideration of the "privity" issue similarly prejudiced Studco. As Judge Wynn's concurrence explained, "privity" would require a chain of recovery: "Studco must recover from [its originating bank], and [the originating bank] must recover from 1st Advantage." App. 29a.

This could have been easily remedied if timely raised by 1st Advantage. Studco would have amended its complaint to join the originating bank as a party. *See Exxon*, 554 U.S. at 486 (the issue must be succinctly raised before the district court; a generalized reference to a categorial defense like "preemption" is insufficient). This is not a situation "where the proper resolution is beyond any doubt," or "where injustice might otherwise result." *Singleton*, 428 U.S. at 121. To the contrary, the injustice occurred to Studco.

This Court should find that the Fourth Circuit erred by considering a "privity" argument that was never passed upon by the District Court.

B. Section 4A-207 does not require "privity."

In any event, "there is no expression of a privity requirement in Section [4A-]207." *Wheels Invs.*, 2021 WL 8895130, at *3. *C.f., Grain Traders*, 160 F.3d. at 102 (finding privity requirements). There is also no reference to § 4A-402 in § 4A-207. Va. Code § 8.4A-207. Nor does § 4A-402 make itself "subject to" (*i.e.*, subordinate to § 4A-207). Va. Code § 8.4A-402(a).

Proponents of a "privity" rule argue that it creates a tidy chain of recovery that prevents "uncertainty as to rights and liabilities" and "risk of multiple or inconsistent liabilities" to the parties involved in the transfers at issue. *Grain Traders*, 160 F.3d. at 102. In real-world transactions this might make sense: an originator seeking a return of a misdirected ACH payment makes a request with its originating bank to retract that payment from the receiving bank (which is exactly what Studco did prior to commencing this litigation).

But this rule falls apart when applied to litigation. Many conceivable cases exist where the originating bank did nothing wrong, but the receiving bank failed to return a misdirected transfer despite having knowledge of the misdescription between the name and number. This would compel the originator (the true party seeking recovery) to needlessly join the originating bank solely for the purposes of technical adherence to a "privity" requirement.

Nor is there any "risk of multiple or inconsistent liabilities" when claims are brought before a court. The originator suffering a loss will assert claims against any party against whom it believes is liable for the loss. *See, e.g.*, *Elkin Valley Baptist Church*, 748 F. Supp. 3d at 300 (originator asserting § 4A-207 claims against both originator bank and receiving bank). If the defendant believes other parties are responsible, it can implead those parties. Discovery in litigation prevents any chance of a windfall.

Section 4A-207 does not require privity, and any argument in its favor does not hold up when applied to litigation. In litigation, all the necessary parties can be joined, and the court can make a full disposition of all of the parties' rights and responsibilities. The privity requirement espoused by the Fourth Circuit would only duplicate litigation by requiring the joinder of unnecessary parties.

If § 4A-207 has a *pre-litigation* privity requirement, Studco satisfied that requirement by seeking a return of its misdirected transfers from its originating bank. This Court should find that § 4A-207 does not have a privity requirement in litigation.

III. These issues are critically important, and this case is an ideal vehicle for resolution.

The magnitude of electronic funds in our modern economy underscores the urgent need for clarity and consistency in the law governing such transactions. In 2024 alone, the National Automated Clearinghouse Association (NACHA) reported that its ACH Network transferred $58.24 trillion in business-to-business

transactions. (*Overall ACH Network Volume*, NACHA, https://www.nacha.org/content/ach-network-volume-and-value-statistics (last accessed July 16, 2025)). Person-to-person transfers accounted for another $641.16 billion. *Id.* These numbers continue to rise in 2025. *Id.* The importance of uniform, predictable rules in this domain (rules understood by all parties involved) is self-evident.

Many businesses – particularly those in manufacturing and construction – move large sums of money through ACH systems. In this case, for example, each of Studco's misdirected transfers exceeded six figures. And in *Elkin Valley Baptist Church*, 748 F. Supp. 3d at 300, a church was defrauded and misdirected a $793,876.10 payment intended to pay a contractor to improve the church's house of worship for all of its congregants.

Ordinary individuals are victims too. The U.S. Treasury's Financial Crimes Enforcement Network reports that "individual homebuyers suffer disproportionately from incidents of business email compromise in the real estate sector." (*FinCEN Analysis of Business Email Compromise in the Real Estate Sector Reveals Threat Patterns and Trends*, FinCEN (Mar. 30, 2023), https://www.fincen.gov/news/news-releases/fincen-analysis-business-email-compromise-real-estate-sector-reveals-threat (last accessed July 15, 2025) (internal quotation omitted)). These would-be homeowners have seen life savings intended for a down payment instantly evaporate. These are devastating losses for the organizations and individuals involved.

Courts have observed an increase in § 4A-207 claims: at least 50 claims have been filed since 2022 and it is likely

many more were resolved by informal dispute resolution. These claims will surely increase as internet-enabled fraud continues to proliferate. Yet, for claimants in the Fourth Circuit, the court of appeals' severe cabining of § 4A-207 threatens to eliminate any realistic path to recovery – even when a financial institution willfully turns a blind-eye to obvious fraud occurring in its customer's accounts.

The existing split among the Fourth Circuit and Eleventh Circuit will lead to inequitable results. Courts following the Fourth Circuit's view may summarily dismiss claims for failure to allege facts showing "actual" knowledge, despite those facts being exclusively in the financial institution's possession. *See e.g., GN Pro Group*, 764 F. Supp. 3d at 761-62 (dismissing § 4A-207 for failure to allege facts demonstrating the bank's actual knowledge of the misdescription). In other instances, courts may refuse to consider significant information or knowledge of fraud that the financial institution received *prior to the misdirected transfer* because that knowledge was perfectly contemporaneous (*i.e.*, not exactly "at the time the deposit was made," App. 13a). "It could hardly have been the intent of the drafters to enable a party to succeed in engaging in fraudulent activity, so long as it complied with the provisions of Article 4A." *Regions Bank*, 345 F.3d at 1276.

Also, a bank that does business in both Georgia and South Carolina will be subject to different standards. This betrays the uniform scheme intended by the UCC. UCC provisions should be "interpreted consistently with [identical UCC provisions in] other jurisdictions." *Land O'Lakes Purina Feed LLC v. Jaeger*, 976 F. Supp. 2d 1073, 1076 (S.D. Iowa 2013).

The divergence will widen with increased prevalence of § 4A-207 claims. Such divergence already exists among district courts. For example, one court in the Eastern District of Pennsylvania (Third Circuit) has sided with the Eleventh Circuit, *Elkin Valley Baptist Church*, 748 F. Supp. 3d 293, while another District Court in the Northern District of Illinois (Seventh Circuit) sides with the Fourth Circuit, *GN Pro Group*, 764 F. Supp. 3d at 761-62.

Last, this case is before this Court with a full factual record to trial. Very few § 4A-207 cases have proceeded to this stage. And "knowledge" is quintessentially a factual question. Thus, if this Court announces a rule for "knowledge" under § 4A-207, it will have the opportunity to illustrate the application of that rule to the facts of this case, providing direction to the lower courts and future litigants.

CONCLUSION

The Court should grant the petition. Petitioner requests summary reversal.

Respectfully submitted.

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July 18, 2025

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED APRIL 2, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1148

STUDCO BUILDING SYSTEMS US, LLC,

Plaintiff-Appellee,

v.

1ST ADVANTAGE FEDERAL CREDIT UNION,

Defendant-Appellant.

THE CLEARING HOUSE ASSOCIATION, LLC; NACHA; THE VIRGINIA CREDIT UNION LEAGUE; THE NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS; THE CREDIT UNION NATIONAL ASSOCIATION,

Amici Supporting Appellant.

Appendix A

No. 23-1766

STUDCO BUILDING SYSTEMS US, LLC,

Plaintiff-Appellant,

v.

1ST ADVANTAGE FEDERAL CREDIT UNION,

Defendant-Appellee;

THE CLEARING HOUSE ASSOCIATION, LLC; NACHA; THE VIRGINIA CREDIT UNION LEAGUE; THE NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS; THE CREDIT UNION NATIONAL ASSOCIATION,

Amici Supporting Appellant.

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Raymond A. Jackson, Senior District Judge.
(2:20-cv-00417-RAJ-LRL)

Argued: December 12, 2024
Decided: March 26, 2025
Amended: April 2, 2025

Appendix A

Before WILKINSON, NIEMEYER, and WYNN, Circuit Judges.

No. 23-1148, reversed and remanded with instructions; No. 23-1766, affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Wilkinson concurred. Judge Wynn wrote an opinion concurring in part and concurring in the judgment.

NIEMEYER, Circuit Judge:

The ACH (Automated Clearing House) system, in which virtually every U.S. bank participates, functions electronically and automatically, processing over 33 billion transfers of funds among financial institutions each year, involving over $86 trillion. It is essential to the strength and efficiency of national commerce, for if those transfers were conducted manually, commerce would virtually grind to a halt.

Article 4A of the Uniform Commercial Code defines the exclusive rights and duties of financial institutions with respect to such funds transfers. In this appeal, we apply those principles to resolve the parties' rights and duties where payment orders for the transfers of funds misdescribed the account into which the funds were to be deposited.

Studco Building Systems US, LLC, a metal fabricator located in Webster, New York, regularly purchased steel from Olympic Steel, Inc., located in northern Ohio. The two companies had a close relationship, having done

business with each other for over nine years. When Studco received invoices from Olympic, it paid them using ACH payments, which were made by electronic transfers of money from Studco's account with JPMorgan Chase to Olympic's account with its own bank.

In early October 2018, Studco received an email purportedly from Olympic, advising Studco that Olympic was changing banks and that Studco should thereafter make its ACH payments to Olympic's new account at 1st Advantage Federal Credit Union in Newport News, Virginia. The email provided Studco with the new bank account number and routing number. Consistent with the email, Studco redirected its next four ACH payments, totaling over $550,000, to what it believed was Olympic's new account at 1st Advantage.

It turned out that the email was fraudulent, initiated by a person or persons who had maliciously hacked into Studco's email system and then effected a sophisticated scam by redirecting Studco's payments to an account that the scammers controlled. The scammers made off with the money and were never identified.

Studco, which bore the loss, commenced this action against 1st Advantage, seeking reimbursement from 1st Advantage based on its allegedly negligent failure to discover that the scammers had misdescribed the account into which the ACH funds were to be deposited. It claimed that if 1st Advantage had handled the transfers in a commercially reasonable manner, the loss would have been avoided. Studco's principal claim was grounded

on § 4A-207 of the Uniform Commercial Code (which Virginia has adopted and codified at Va. Code Ann. § 8.4A-207), claiming that 1st Advantage was liable because it completed the funds transfers to the misdescribed account—an account for which the name did not match the account number. It also asserted several other claims, alleging fraud, conversion, breach of bailment, and similar violations.

Following a bench trial, the district court entered judgment in favor of Studco, awarding it $558,868.71, plus attorneys fees and costs. The court grounded the relief on Studco's § 8.4A-207 misdescription claim and its breach of bailment claim. The court found that 1st Advantage failed to act "in a commercially reasonable manner or exercise ordinary care in allowing [the withdrawal of] six-figures over the course of a month." It explained that had 1st Advantage implemented reasonable routines, they "would have alerted 1st Advantage to the misdescription and possible fraud upon the posting of the first ACH transfer."

For the reasons that follow, we reverse. 1st Advantage deposited the ACH payments into the account *with the number specified in Studco's ACH payment order*, even though that account was not in fact held by Olympic. Under those circumstances, a bank such as 1st Advantage has no liability under § 8.4A-207 unless it had *actual knowledge* of the misdescription. Because there was no evidence of actual knowledge presented in this case, it was error for the court to have held 1st Advantage liable on a finding of negligence or commercial unreasonableness. It was also error for the court to have concluded that Studco's ACH

deposit of funds into the 1st Advantage account was a bailment, subjecting 1st Advantage to bailment liability.

On Studco's separate appeal from the district court's order denying its request for punitive damages, we affirm.

I

On October 1, 2018, Studco received an email purportedly from William Georger, "Account Manager," at Olympic, Studco's steel supplier. The email informed Studco that Olympic had changed banks and that Studco should pay Olympic's invoices by ACH payments to its new bank account. The email read:

> **From**: William Georger
> <william.georger@olysteel.net>
> **Sent**: Monday, October 1, 2018 1:35 PM
> **To**: Cathy Diaz <accounts@studcosystems.com>
> **Cc**: corporate.ar@olysteel.net
> **Subject**: New Bank
>
> Dear Customer,
>
> First of all-we want to thank you for being such an important piece of the Olympic Steel story throughout the years. We're continuing to grow this year.
>
> We recently made the corporate decision to change our major banking activities from Chase, Please note that effective Immediately all payment should be remitted to our new bank information, Kindly let me know if you are the right person to send the new instructions to.

> Should you have any questions, please feel free to reach out to me via email, looking forward to continued growth and creativity together.
>
> **Will Georger**
>
> Account Manager
>
> Mobile: 716.440.8180
>
> William.Georger@Olysteel.com
>
> Olympic Steel Inc.
>
> www.olysteel.com
>
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An account specialist at Studco responded, "Yes please send the new bank info to me." In response, Studco received a second email, again purportedly from William Georger at Olympic, stating, "Please find the attached our new bank instructions." The attachment read:

Appendix A

OLYMPIC **STEEL**
1 EASTERN STEEL ROAD
MILFORD, CT 06460 USA
PHONE: 203-878-9381

Date: 10/01/2018

ACH/EFT INSTRUCTIONS.

Bank Information;
Bank name: 1st Advantage Federal Credit Union
Routing number: 251480563

Account Information;
Account number: [redacted]4713.
Account name: Olympic Steel Inc

Email Remittance: Ach_Remittance@mail.com.
Please include the invoice number with your remittance.

Thanks for your cooperation.

/s/ Will Georger
Will Georger
Will Georger Account Manager.

Studco did not verify the emails or the bank change to confirm the instructions, even though the communications contained several indicators of the emails' inauthenticity. The purported Olympic emails originated from the domain name "Olysteel.net," which is different from Olympic's actual domain name, "Olysteel.com." And the email address from which the emails came was different from

the email address provided in the signature block of the same emails. The emails were also poorly written, using commas instead of periods at the ends of sentences and omitting a capital letter at the beginning of a sentence. In addition, the first email instructed that "all payment should be submitted to our new bank information," using "payment" in the singular and directing, nonsensically, that payments be "remitted" to "information." The emails were purportedly signed by William Georger with a western New York telephone number (716-440-8180), but the attached banking information, also purportedly signed by William Georger, listed a Connecticut address and telephone number (203-878-9381) for Olympic. Finally, apparently no one at Studco questioned why Olympic would use 1st Advantage Federal Credit Union—a local credit union in Newport News, Virginia—when Olympic was based in northern Ohio.

A few days later, in accordance with Olympic's purported instruction and the new bank information, Studco began paying Olympic's invoices by ordering that ACH funds transfers be made to the "Olympic Steel Inc" account with the account number xxx4713 at 1st Advantage Federal Credit Union. Four payments were so ordered, totaling $558,868.71. The transferred funds were automatically and electronically deposited into the account bearing the number that Studco gave, xxx4713, although that account was not held by "Olympic Steel Inc," but by Lesa Taylor, a longtime customer of 1st Advantage. As it turned out, Lesa Taylor, too, was duped into the scam when she answered an advertisement for employment and was hired as an assistant to real estate professionals. She

agreed to use her account at 1st Advantage as part of her employment responsibilities and evidently believed that the deposits into and withdrawals from her account were for legitimate real estate business.

At the time of the deposits, 1st Advantage had in place a "DataSafe" system to monitor ACH transfers, which automatically generated and stored reports of each ACH transfer. The DataSafe reports included warnings if the identified payee on an ACH order did not exactly match the name on the receiving account. Such warnings were automatically generated for any discrepancy, as small as a missing initial, suffix, or misspelling or as significant as an entirely different name on the account, such as Lesa Taylor instead of "Olympic Steel Inc." According to the unrebutted testimony of 1st Advantage and the district court's finding, the DataSafe system generated hundreds to thousands of warnings related to mismatched names on a daily basis, but the system did not notify anyone when a warning was generated, nor did 1st Advantage review the reports as a matter of course.

The four ACH funds transfers were automatically deposited into the account associated with the number specified on Studco's ACH funds transfer order, the xxx4713 account at 1st Advantage. The reports generated for those deposits automatically included a warning of the mismatch: "Tape name does not contain file last name TAYLOR." The evidence at trial showed that no one at 1st Advantage read any of these DataSafe deposit reports or the warnings on them before 1st Advantage first learned of the scam from the president of Studco on November 21, 2018.

The FBI conducted an investigation and concluded that the scam originated somewhere in the near east or north Africa, probably in the United Arab Emirates, Nigeria, or Dubai. The scammers, however, were never identified, and none of the money was recovered. Studco ultimately paid Olympic "again" for the four invoices, thus incurring the total loss.

Studco commenced this action to recover its loss from 1st Advantage, whom it claimed could have prevented the loss by adopting "basic security standards" and otherwise acting in a commercially reasonable manner. In its eight-count amended complaint, it alleged that 1st Advantage was liable for failing to refuse the ACH deposits directed to Lesa Taylor's account because the payment orders were to deposit them into the account of "Olympic Steel Inc," not Lesa Taylor. Studco alleged that this violated Virginia Code § 8.4A-207. It also alleged that 1st Advantage accepted the ACH deposits as a bailment and failed, as a bailee, to act with reasonable care. Finally, it alleged six additional counts, including claims for conversion, fraud, and a civil RICO violation under 18 U.S.C. § 1961 *et seq.* In addition to compensatory damages, Studco requested punitive damages.

After dismissing several claims, the district court conducted a bench trial on Studco's § 8.4A-207 misdescription claim, its bailment claim, and a fraud claim. Following trial, the court ruled in favor of Studco on the misdescription and bailment claims and ruled in favor of 1st Advantage on the fraud claim. As to the misdescription claim, the court stated:

> It is clear from the evidence presented that 1st Advantage did not maintain any routines, let alone reasonable routines, for communicating significant information to the person conducting the transaction. If 1st Advantage implemented reasonable routines for communicating information, the identification discrepancy recognized at the opening of the Account, the numerous alerts generated by the ACH transfers describing the misdescription of the Account, and the fact that Olympic Steel could not open an account at 1st Advantage would have alerted 1st Advantage to the misdescription and possible fraud upon the posting of the first ACH transfer. Accordingly, the Court finds that Studco met its burden at trial to prove by a preponderance of the evidence a misdescription of beneficiary in violation of Va. Code Ann. § 8.4A-207.

And as to the bailment claim, the court ruled that "1st Advantage did not act in a commercially reasonable manner or exercise ordinary care in allowing Taylor to withdraw six-figures over the course of a month." The court entered judgment for Studco in the amount of $558,868.71, plus attorneys fees and costs, but denied Studco's claim for punitive damages. From the district court's judgment, 1st Advantage appealed.

Thereafter, Studco filed a Rule 59(e) motion to amend the judgment to include punitive damages in its favor in

the amount of $350,000. The district court denied that motion, and Studco also appealed.

By order dated July 24, 2023, we consolidated the two appeals.

II

With respect to Studco's misdescription claim under Virginia Code § 8.4A-207(b), 1st Advantage contends that the district court erred by importing the equivalent of a negligence standard for determining liability. It argues that it is not liable under § 8.4A-207(b), because it lacked *actual knowledge* of the difference between the beneficiary's name of the account and the account number at the time the deposit was made. (Citing *First Sec. Bank of N.M., N.A. v. Pan Am. Bank*, 215 F.3d 1147, 1152-53 (10th Cir. 2000)). It asserts further that granting Studco's claim based on a standard of negligence or commercial reasonableness would be dangerous for the financial industry, which is critically dependent on automated funds transfers like the ones that occurred in this case.

The Uniform Commercial Code, which Virginia has adopted, regulates ACH funds transfers in Article 4A by providing "precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability" and therefore enabling the parties to these transfers "to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately." Va. Code Ann. § 8.4A-102 cmt.

Consistent with these principles, the Official Commentary provides that Article 4A is "intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties" to such transfers. *Id.*; *see also Donmar Enters., Inc. v. S. Nat'l Bank of N.C.*, 64 F.3d 944, 949-50 (4th Cir. 1995); 3 James J. White et al., *Uniform Commercial Code* § 22.9 (6th ed. 2014) (noting that Article 4A preempts common-law claims, such as negligence and conversion, "that would create inconsistent rights, duties, or liabilities"). As we observed in *Donmar Enterprises*, the principles underlying Article 4A are important because "[t]he success of funds transfer systems is predicated on speed, efficiency, high volume, low cost, certainty, and finality." 64 F.3d at 948. "At bottom, Article 4[A] provides a framework for facilitating complicated transactions between sophisticated parties with competing interests." *Approved Mortg. Corp. v. Truist Bank*, 106 F.4th 582, 592 (7th Cir. 2024).

A "funds transfer" regulated by Article 4A begins with a "payment order" issued by an "originator" (Studco) to "a receiving bank" (JPMorgan Chase) to transfer funds to a "beneficiary's bank" (1st Advantage) for deposit into the account of the bank's "beneficiary" (Olympic). *See* Va. Code Ann. §§ 8.4A-103 to -104. When the payment order provides an account name that does not match the account number, as in this case, there is a "misdescription of beneficiary" as to which § 8.4A-207 specifies the rights and duties of the parties. As the Official Commentary to that section summarizes, § 8.4A-207(b) "deals with the problem of payment orders in which the description of the beneficiary does not allow identification of the beneficiary

because the beneficiary is described by name and by an identifying number or an account number and the name and number refer to different persons." *Id.* § 8.4A-207 cmt. 2.

Section 8.4A-207(b)(1) provides, as applicable here, that, "[i]f a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons" and if "the beneficiary's bank *does not know* that the name and number refer to different persons," the beneficiary's bank "may rely on the number as the proper identification of the beneficiary of the order." Va. Code Ann. § 8.4A-207(b)(1) (emphasis added). That provision goes further and states that "[t]he beneficiary's bank need not determine whether the name and number refer to the same person." *Id.* Thus, the provision protects the beneficiary's bank from any liability when it deposits funds into the account for which a number was provided in the payment order, even if the name does not match, so long as it "*does not know* that the name and number refer to different persons." *Id.* (emphasis added). And in this context, "'[k]nowledge' means actual knowledge," not imputed knowledge or constructive knowledge. *Id.* § 8.1A-202(b); *see also Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004) (defining actual knowledge to refer to where one has "subjectively recognized" the fact); *Cook v. Jones*, 606 F. App'x 131, 132 (4th Cir. 2015) (per curiam) ("Constructive notice is insufficient to show actual knowledge" (citing *Farmer v. Brennan*, 511 U.S. 825, 840-42, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994))).

Allowing the beneficiary bank to deposit transferred funds automatically, based only on account number, promotes efficiency and certainty to the system. As the Official Commentary explains, "The processing of the order by the beneficiary's bank and the crediting of the beneficiary's account are done by use of the identifying or bank account number *without human reading of the payment order itself.* The process is comparable to that used in automated payment of checks." Va. Code Ann. § 8.4A-207 cmt. 2 (emphasis added). The Commentary goes on to address the very circumstances before us, noting that "[i]n some cases the false number will be the result of error by the originator" and in others "fraud is involved." *Id.* Yet, it explains, the beneficiary's bank has "no duty to determine whether there is a conflict" between the account number and the name of the beneficiary, and the bank "may rely on the number as the proper identification of the beneficiary." *Id.*

Thus, if the beneficiary's bank deposits the funds into the account associated with the number designated in the payment order and it has no knowledge of any misdescription at the time of the deposit, it has no further liability. In these circumstances, the Uniform Commercial Code places the "risk of loss" on the person who dealt with the thief—in this case Studco—"whose remedy is against" the recipient of the funds (Lesa Taylor), the thieves (the unidentified scammers), or potentially the receiving bank (JPMorgan Chase). Va. Code Ann. § 8.4A-207(c)(2) & cmt. 3. The Commentary explains that "it is not unfair to assign the loss to . . . the person who dealt with the impostor and . . . supplied the wrong account number," because the

originator (Studco) "could have avoided the loss if it had not used an account number that it was not sure was that of" the intended beneficiary. *Id.* As the Second Circuit has noted, "[T]here are sound policy reasons for limiting the right to seek a refund to the sender who directly paid the receiving bank." *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir. 1998). Most notably,

> [t]o allow a party to, in effect, skip over the bank with which it dealt directly, and go to the next bank in the chain would result in uncertainty as to rights and liabilities, would create risk of multiple or inconsistent liabilities, and would require intermediary banks to investigate the financial circumstances and various legal relations of the other parties to the transfer.

Id. Allowing otherwise "would impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs." *Id.*

With this regulation of funds transfers, the Uniform Commercial Code recognizes that "[t]he efficiency benefits of an automated system are undermined if a bank is not able to rely on its automated system but must independently verify there is no conflict between a beneficiary name and an account number." *First Sec. Bank of N.M.*, 215 F.3d at 1152. And this makes good sense. Countless discrepancies can arise inadvertently and harmlessly. For instance, the inclusion or omission of a suffix such as Jr. or a middle initial could trigger an alert, as could the listing of a surname prior to the first name. Requiring individualized

review for meaningless differences such as these would be most impractical, time-consuming, and expensive and would impede the efficient transfer of funds, imposing gridlock on the financial system. The policy of the Uniform Commercial Code is clearly to facilitate funds transfers by enabling the beneficiary's bank to rely solely on valid account numbers when making deposits and not requiring it to examine and address every discrepancy.

In this case, the scammers duped Studco by posing as Olympic and then redirecting Studco's payments of Olympic's invoices to a new account that the scammers controlled. Thus, it was Studco who dealt with the thieves. And from those dealings, Studco ordered the transfer of funds to a particular numbered account (xxx4713), which it misstated was the account of "Olympic Steel Inc," when in fact the account with that number was held by Lesa Taylor. 1st Advantage received the funds through the ACH system and automatically deposited them into account xxx4713, without any human intervention, as it was entitled to do under § 8.4A-207. And while each transfer automatically generated a report with a warning of the misdescription, the reports were automatically stored in 1st Advantage's system and not read by any person at 1st Advantage. Indeed, it was not 1st Advantage's custom to review such reports, nor would it have been practical to review them, as they numbered in the hundreds to thousands each day. Rather, 1st Advantage relied on the account number that Studco provided, in accordance with the Uniform Commercial Code's design, and correctly deposited the funds into that account. Because 1st Advantage had no *actual knowledge* of the misdescription at the time the

deposits were made, it incurred no liability for making the deposits.

Although the district court correctly recognized that 1st Advantage could only be held liable for deposits into misdescribed accounts if it had *actual* knowledge of the misdescription, it nonetheless ruled in favor of Studco, finding that 1st Advantage had actual knowledge because it should have, with "due diligence," had such knowledge. It explained,

> An organization has actual knowledge for a particular transaction "from the time it would have been brought to the individual's attention if the organization had exercised due diligence." Va. Code Ann. § 8.1A-202(f). An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Va. Code Ann. § 8.1A-202(f).

Section 8.1A-202(f), however, on which the district court relied, addresses *when* an organization is put on notice or receives knowledge. *See* Va. Code Ann. § 8.1A-202 cmt. 3 (noting that subsection (f) merely clarifies that notice or knowledge is effective "only from the time" specified in the subsection). But § 8.1A-202(f) does not define knowledge. That is done in § 8.1A-202(b), which defines the term "knowledge" to mean "actual knowledge," not constructive knowledge, as the district court concluded.

It was therefore error for the district court to construe "actual knowledge" to mean knowledge that could have been obtained with "due diligence."

Studco nonetheless contends that 1st Advantage's failure to maintain reasonable routines that would have prevented the transactions in this case imputes to 1st Advantage the knowledge required by § 8.4A-207(b). But this argument fails to recognize that § 8.4A-207(b) specifies that a bank may rely on the account number, and the Official Commentary further explains that the beneficiary's bank has "*no duty* to determine whether there is a conflict" between the account number and the name of the beneficiary. *Id.* § 8.4A-207(b)(1) & cmt. 2 (emphasis added). The beneficiary's bank therefore has no duty to adopt reasonable routines to check for conflicting names. *See Peter E. Shapiro, P.A. v. Wells Fargo Bank, N.A.*, 795 F. App'x 741, 749 (11th Cir. 2019) (per curiam) ("We agree with the district court that Shapiro's 'proposed due diligence standard would undermine the express purpose of Article 4A by reinserting human review into a process which is intended to be quick and automated'").

Accordingly, because the evidence showed that no individual at 1st Advantage had actual knowledge of the mismatch of name and account number when the ACH deposits were correctly made into the account numbered xxx4713, as directed by the payment order, we reverse the district court's judgment on Studco's misdescription claim under Virginia Code § 8.4A-207.

III

1st Advantage also contends that the district court erred in concluding that Studco's deposit of funds into an account with 1st Advantage created a bailment, imposing a duty of care on 1st Advantage as a bailee. It argues (1) that under Virginia law, a bailment is created only by transfer of a chattel (a physical thing), which did not occur in this case; (2) that any bailment liability is nonetheless preempted by Article 4A of the Uniform Commercial Code; and (3) that, in any event, Studco itself failed to exercise reasonable care and therefore is barred from recovery under Virginia's contributory negligence doctrine. (First citing *AlBritton v. Commonwealth*, 299 Va. 392, 853 S.E.2d 512, 523 (Va. 2021); and then citing *Smith v. Va. Elec. & Power Co.*, 204 Va. 128, 129 S.E.2d 655, 659 (Va. 1963)). We agree that Studco's deposit of funds into account xxx4713 at 1st Advantage was not a bailment.

Under Virginia law, "a general deposit in a bank is 'not a bailment.'" *Gardner v. Commonwealth*, 262 Va. 18, 546 S.E.2d 686, 687 (Va. 2001) (quoting *Pendleton v. Commonwealth*, 110 Va. 229, 65 S.E. 536, 538 (Va. 1909)). A bailment is "the rightful possession of goods by one who is not the owner." *K-B Corp. v. Gallagher*, 218 Va. 381, 237 S.E.2d 183, 185 (Va. 1977) (quoting 9 Samuel Williston, *Contracts* 875 (3d ed. 1967)). "And in order for an alleged bailee to have possession, 'there must be the union of two elements, physical control over the thing possessed, and an intent to exercise that control.'" *Id.* (quoting Ray Andrews Brown, *The Law of Personal Property* § 10.2,

at 213-14 (3d ed. 1975)). "Ordinarily, for a bailment to arise there must be a delivery of the chattel by the bailor and its acceptance by the bailee." *Id.* (citing *Crandall v. Woodard*, 206 Va. 321, 143 S.E.2d 923, 927 (Va. 1965)). Additionally, bailees are expected to return the chattel of goods to the bailor at the conclusion of the bailment. *Auto. Servs. Fin., Inc. v. Affordable Towing, Inc.*, 71 Va. Cir. 15, 16 (2006); *AdvanceMe, Inc. v. Shaker Corp.*, 79 Va. Cir. 171, 173 (2009).

In view of these well-established principles, we conclude that no bailment relationship was created in this case to give rise to bailment liability.

Studco, however, points to *First State Bank of Monroe v. Connoley*, 131 Va. 479, 109 S.E. 301 (Va. 1921), to argue that "money held by [a] bank is a chattel, subject to a bailment." But the chattel in *Connoley* was not simply money, but a particular physical packet of cash, and the bailor was not a bank, but rather an individual. 109 S.E. at 302-03. In distinction, ACH funds transfers are accounting statements with respect to fungible currency that merely alter bank account balances, and Virginia law understands such deposits to be neither chattels nor goods. *See Gardner*, 546 S.E.2d at 687. Moreover, Studco's deposits were not time-limited, and Studco did not expect to receive the money back, as would be indicative of a bailment arrangement.

Accordingly, we reverse the district court's judgment in favor of Studco also on Studco's bailment claim. Because we conclude that no bailment was created, we need not

address 1st Advantage's arguments that Article 4A of the Uniform Commercial Code preempts Studco's bailment claims and that Studco was barred from recovery under the doctrine of contributory negligence.

IV

Studco makes a separate argument for why we should affirm the district court's judgment, or at least remand the case, claiming that such relief is justified as a remedy for 1st Advantage's spoliation of evidence. Studco filed a spoliation motion in the district court, but the court did not reach the merits, denying the motion as moot. Studco now claims that its motion is in play and that we should recognize that 1st Advantage, while on notice of anticipated litigation, intentionally destroyed records that were developed by its Financial Crime Risk Manager system. That system monitored deposits and withdrawals from customer accounts and issued alerts when bank rules were violated or money laundering was suspected. Because 1st Advantage reviewed these alerts daily, Studco argues that 1st Advantage must have known of the misdescribed deposits made into Taylor's account and that its destruction of the alerts should trigger an adverse inference that 1st Advantage had knowledge of the misdescribed ACH deposits, thereby creating liability under Virginia Code § 8.4A-207.

Studco's spoliation argument in this case, however, is belied by the evidence in the record. 1st Advantage testified without dispute—and the district court so found—that its Financial Crime Risk Manager system

generated no alerts with respect to Lesa Taylor's account. It also asserts that no data or documents related to Taylor's account were ever destroyed. The 1st Advantage executive testifying did acknowledge that in July 2019, after the events in question, 1st Advantage decided not to renew the services of the company that had operated its Financial Crime Risk Manager system and to hire a new one that provided a system with more coverage. But he also testified, without contradiction, that all documents related to Taylor's account were preserved and produced to Studco.

Since Studco has provided no evidence contradicting the fact that the Financial Crime Risk Manager system produced no alerts relating to Taylor's account and that all documents relating to that account were preserved and produced, we decline to affirm or remand based on Studco's spoliation motion.

V

On Studco's separate appeal challenging the district court's order denying its claim for punitive damages, we affirm in view of our decision to reverse the district court's judgment in favor of Studco. *See Syed v. ZH Techs., Inc.*, 280 Va. 58, 694 S.E.2d 625, 634 (Va. 2010) ("It is well-established that an award of compensatory damages is an indispensable predicate for an award of punitive damages, except in actions for libel and slander" (cleaned up)).

* * *

Appendix A

The judgment of the district court, dated January 12, 2023, in case number 23-1148, is reversed, and that case is remanded to the district court with instructions to enter judgment in favor of 1st Advantage. The order in case number 23-1766 is affirmed.

No. 23-1148, REVERSED AND REMANDED WITH INSTRUCTIONS

No. 23-1766, AFFIRMED

WYNN, Circuit Judge, concurring in part and concurring in the judgment:

I fully agree with the majority's interpretation of the Uniform Commercial Code, which allows a bank to process an ACH deposit based solely on account number so long as the bank does not have actual knowledge of a misdescription between the account name and account number. And I agree that the actual knowledge requirement means that an "individual" employee at the bank must have actual knowledge of the misdescription at the time of deposit. Majority Op. at 17.

But in this matter, the evidence indicates that 1st Advantage may have received actual knowledge of a misdescription prior to Studco's final two deposits. On October 25, 2018, Lesa Taylor's two attempted overseas wire transfers triggered a federal Office of Foreign Assets Control alert, so 1st Advantage cancelled those transfers and (apparently unsuccessfully) suspended future wire transactions. J.A. 213-14, 216. Keith Ward, the compliance manager for 1st Advantage, opened an "ongoing investigation" into the account, J.A. 380, which he described as "focused on wire activity," J.A. 219, although it also "looked at the account history," J.A. 379. The district court found that Ward "testified inconsistently" as to the scope of the investigation, that Ward "could not articulate the exact dates he reviewed [Taylor's] account history," and that Ward failed to create any documentation of the investigation even though Ward agreed that memorializing it would have been "best practice." *Studco*

Bldg. Sys. US, LLC v. 1st Advantage Fed. Credit Union, No. 2:20-cv-417, 2023 U.S. Dist. LEXIS 24818, 2023 WL 1926747, at *8 (E.D. Va. Jan. 12, 2023) (quoting J.A. 224). 1st Advantage allowed further deposits into the account on November 5 and November 13, for more than $150,000, and did not stop Taylor from withdrawing some of those funds and wiring the rest to the scammers. J.A. 482.

In my view, a factfinder could infer that Ward's investigation led to a 1st Advantage employee obtaining actual knowledge of a misdescription between account name and number prior to Studco's two November deposits. For example, had a 1st Advantage employee glanced at its DataSafe reports[1] during the investigation into Taylor's account history, the employee would have seen warnings of the misdescriptions on Studco's prior deposits. *See* J.A. 268-71 (DataSafe report, automatically generated on October 4, 2018, reading: "Warning . . . Tape name [on ACH deposit] does not contain last name Taylor.") So I cannot agree that "there was no evidence of actual knowledge presented in this case," Majority Op. at 5, and I would not grant 1st Advantage summary judgment on that basis.

Nonetheless, I agree with reversing the district court's judgment and granting summary judgment to 1st Advantage because the UCC's misdescription provision imposes a privity requirement. Thus, Studco must seek

1. DataSafe is one of 1st Advantage's "core processors" and automatically generates reports for incoming ACH deposits. J.A. 260; *see* J.A. 261.

recovery of its funds from its own bank; it cannot recover directly from 1st Advantage.[2]

The misdescription provision does not itself indicate what happens when a bank knowingly accepts a misdescribed deposit. But the UCC official comments[3] to the misdescription provision explain that we look to UCC Section 4A-402 for the remedy. U.C.C. § 4A-207 cmt. 2 (Am. L. Inst. & Unif. L. Comm'n 2023); *see Frankel-Ross v. Congregation OHR Hatalmud*, No. 15-cv-6566, 2016 U.S. Dist. LEXIS 128342, 2016 WL 4939074, at *3 (S.D.N.Y. Sept. 12, 2016) (Section 402 "provides the remedial scheme" for Section 207). Section 402 states: "If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay." Va. Code. § 8.4A-402(d). In other words, if a payment order was improper—as Studco alleges here—the bank receiving

2. 1st Advantage raised this issue below in substance but failed to raise it in its opening brief. J.A. 503-04. The amicus brief for the Clearing House Association makes the argument on appeal (and 1st Advantage reiterates the argument its reply brief). CHA Amicus Br. at 7; Reply Br. at 7. I therefore would excuse any forfeiture and address the issue.

3. Virginia courts use the UCC official comments as "clarification" of UCC provisions. *Flintkote Co. v. W. W. Wilkinson, Inc.*, 220 Va. 564, 260 S.E.2d 229, 232 (Va. 1979); *see also Ha v. Dominion Bank of N. Va.*, No. 97333, 1991 WL 834745, at *2 (Va. Cir. Ct. Jan. 24, 1991) ("The Official Comments to the U.C.C. are certainly not binding on the Court, but they do represent powerful dicta which should not be heedlessly ignored." (citing *In re Varney Wood Prods., Inc.*, 458 F.2d 435, 437 (4th Cir. 1972))).

payment is obliged to refund the payment to the sender (here, Studco).

The catch is that the UCC defines the receiving bank (i.e. the bank receiving payment)[4] as "the bank to which the sender's instruction is addressed"—which, from Studco's perspective, is *Studco's bank*, JPMorgan Chase, and *not* 1st Advantage. *Id.* § 8.4A-103(a)(4); J.A. 370. So Studco must recover from Chase, and Chase must recover from 1st Advantage. Studco cannot recover directly from 1st Advantage.

The UCC official comments to the misdescription provision explain the chain of recovery that must occur if a bank knowingly accepts a misdescribed deposit (as Studco argues occurred here). In that case, "Originator's Bank [here Chase] is not obliged to pay Beneficiary's Bank [here 1st Advantage]. Similarly, [Originator, here Studco] is excused from its obligation to pay Originator's Bank [here Chase]." U.C.C. § 4A-207 cmt. 2 (citation omitted) (citing *id.* § 4A-402(b)).

The Second Circuit explained this remedial scheme in *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97 (2d Cir. 1998), holding that Article 4A is intended "to effect

4. *See Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 101 (2d Cir. 1998) (holding that "receiving bank" and "bank receiving payment" are synonymous in this context). Note that Section 402(d) is discussing payment orders, which only have two parties: a sender and a receiving bank. Va. Code Ann. § 8.4A-103(a)(1). Funds transfers, on the other hand, consist of a "series" of "payment order[s]." *Id.* § 8.4A-104(a).

an orderly unraveling of a funds transfer in the event that the transfer was not completed, and accomplished this by incorporating a 'privity' requirement into the 'money back guarantee' provision so that it applies only between the parties to a particular payment order and not to the parties to the funds transfer as a whole." *Id.* at 101. So, a sender of a payment may "seek refund only from the receiving bank it paid" and may not "skip over the bank with which it dealt directly, and go to the next bank in the chain." *Id.* at 102.

The only other circuit court to have addressed the issue, and every district court to have considered it save one, have also found such a privity requirement. *See Approved Mortg. Corp. v. Truist Bank*, 106 F.4th 582, 590-91 (7th Cir. 2024) (holding that the UCC's misdescription provision is subject to a privity requirement under Section 402); *Scura, Wigfield, Heyer, Stevens & Cammarota, LLP v. Citibank, NA*, No. 2:21-cv-12835, 2022 U.S. Dist. LEXIS 239270, 2022 WL 16706948, at *4-6 (D.N.J. Oct. 3, 2022) (same); *Imperium Logistics, LLC v. Truist Fin. Corp.*, 686 F. Supp. 3d 600, 604-05 (E.D. Mich. 2023) (same); *AmpliTech Grp., Inc. v. Truist Bank*, 746 F. Supp. 3d 1384, 1391 (S.D. Fla. 2024) (same); *cf. Zhejiang Matrix SCM Co. v. PNC Bank*, No. 23-cv-979, 2024 U.S. Dist. LEXIS 44671, 2024 WL 1096534, at *4 (E.D. Pa. Mar. 13, 2024) (precluding the plaintiff from pursuing "*any* Article 4A claim" due to a lack of privity (emphasis added)). *But see Wheels Invs., LLC v. Wells Fargo Bank, N.A.*, No. 6:19-cv-658, 2021 U.S. Dist. LEXIS 259136, 2021 WL 8895130, at *3 (M.D. Fla. Apr. 29, 2021) ("There is no expression of a privity requirement in Section 207.").

I would follow this near-consensus interpretation of the UCC's misdescription provision and, therefore, hold that 1st Advantage is entitled to summary judgment because Studco cannot recover directly from it.

For these reasons, I concur in part and concur in the judgment.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED APRIL 2, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1148 (L)

STUDCO BUILDING SYSTEMS US, LLC,

Plaintiff–Appellee,

v.

1ST ADVANTAGE FEDERAL CREDIT UNION,

Defendant–Appellant.

THE CLEARING HOUSE ASSOCIATION, LLC; NACHA; THE VIRGINIA CREDIT UNION LEAGUE; THE NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS; THE CREDIT UNION NATIONAL ASSOCIATION,

Amici Supporting Appellant.

Filed April 2, 2025

Appendix B

ORDER

The court amends its opinion filed March 26, 2025, as follows:

Throughout the concurring opinion, brackets surrounding record citations have been deleted.

For the Court – By Direction

/s/_____
Nwamaka Anowi, Clerk

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION, FILED JULY 7, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Case No. 2:20-cv-00417

STUDCO BUILDING SYSTEMS U.S. L.L.C.,

Plaintiff,

v.

1st ADVANTAGE FEDERAL CREDIT UNION,

Defendant.

Filed July 7, 2023

MEMORANDUM OPINION AND ORDER

Before the Court is Studco Building Systems U.S., LLC ("Plaintiff' or "Studco") Motion To Amend Judgment To Include Punitive Damages ("Motion"), ECF No. 125, pursuant to Federal Rule of Civil Procedure 59(e). 1stAdvantage Federal Credit Union ("Defendant" or "1st Advantage") filed a response in opposition, ECF No. 130. Plaintiff replied. ECF No. 132. Having carefully reviewed the parties' filings, the Court finds this matter ripe for

judicial determination. For the reasons below, Plaintiff's Motion, ECF No. 125, is **DENIED**.

On November 5, 2019, Plaintiff filed the Complaint in this matter, initiating an action against Defendant for failure to comport with basic security standards that resulted in the unlawful diversion of funds. Complaint, ECF No. 1. Plaintiff filed an Amended Complaint on January 29,2020. Amend. Compl., ECF No. 11. The case was then transferred to the Eastern District of Virginia. Case Transfer, ECF No. 23. On January 12, 2023, following a bench trial, the Court entered judgment in favor of Plaintiff, finding Defendant liable for compensatory damages in the amount of$558,868.71. ECF No. 119. On February 9, 2023, Plaintiff filed a Motion to Amend Judgment to Include Punitive Damages, pursuant to Rule 56(e). ECF No. 125. On February 23,2023, Defendant responded in opposition. ECF No. 130. On March 1, 2023, Plaintiff replied. ECF No. 132.

Under Fed. R. Civ. P. 59(e), this Court has discretion to amend a final judgment in the following circumstances: "'(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.'" *Ingle ex rel. Est. of Ingle v. Yelton*, 439 F.3d 191, 197 (4th Cir. 2006) (quoting *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998)). The Fourth Circuit has emphasized that mere disagreement with the court's ruling does not warrant a Rule 59(e) motion. *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Rule 59(e) motions are not a tool with which

an unsuccessful party may rehash the same arguments and facts previously presented. *Alana v. Clarke*, 2018 WL 9651488 (B.D. Va. Oct. 31, 2018) (citations omitted). Here, Plaintiff has not argued that the Opinion must be amended to accommodate an intervening change in controlling law or to account for new evidence not available at trial. Plaintiff instead states that an amendment would "prevent manifest injustice." ECF No. 126 at 6. However, Plaintiff does not explain how amending the Opinion would prevent manifest injustice. Upon reply, instead Plaintiff argues that the Opinion must be amended to correct a clear-error-of-law. ECF No. 132 at 6. Plaintiff argues that the Court made a legal error when it concluded that the evidence at trial was insufficient to support a punitive damages award. *Id.* However, again Plaintiff fails to explain how this is a legal error instead of Plaintiffs disagreement with the Court's factual finding. The Court finds that Plaintiff has not satisfied any ground to amend or reconsider this Court's order. The Court finds Plaintiffs arguments insufficient to change this Court's order.

Even if Plaintiff had adequately articulated any facts to show that an amended Opinion would correct a legal error or prevent manifest injustice, Plaintiff fails to show any factual findings to support punitive damages. Federal courts "apply[] the state's substantive law of punitive damages under standards imposed by federal procedural law." *Atlas Food Sys. & Servs. v. Crane Nat'l Vendors*, 99 F.3d 587, 593 (4th Cir.1996). Thus, the Court relies on "Virginia's scheme for awarding punitive damages." *Johnson v. Hugo's Skateway*, 914 F.2d 1408, 1417 (4th Cir. 1992).

Appendix C

In *Horn v. Webb*, 882 S.E.2d 894 (Va. 2023) the Virginia Supreme Court explained that punitive damages "are allowable only where there is misconduct or actual malice, or such reckless or negligence as to evince a conscious disregard of the rights of others." The court further explained that when "there is no 'fraud, malice, oppression, or other special motives of aggravation, damages by way of punishment cannot be awarded, and compensatory damages only are permissible." *Id.* Here, after a bench trial, the Court found that Plaintiff "ha[d] not provided sufficient evidence for punitive damages." EFC No. 119 at 34. Now, after trial, Plaintiff does not provide any new facts that were not available at or presented at trial. Further, these facts do not show "special motives of aggravation" on the part of Defendant. Therefore, the Court finds Plaintiffs arguments insufficient to change this Court's order.

For the reasons above, Plaintiffs Motion, ECF No. 125, is **DENIED**. The Court **DIRECTS** the Clerk to send a copy of this Order to the parties.

IT IS SO ORDERED.

Norfolk, Virginia
July 7, 2023

/s/
Raymond A. Jackson
United States District Judge

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION, FILED JANUARY 12, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
NORFOLK DIVISION

Case No. 2:20-cv-417

STUDCO BUILDING SYSTEMS US, LLC,

Plaintiff,

v.

1ST ADVANTAGE FEDERAL CREDIT UNION,

Defendant.

Filed January 12, 2023

MEMORANDUM OPINION AND ORDER

The Court issues this Memorandum Opinion and Order after a bench trial in the above-styled matter to resolve Studco Building Systems US, LLC's ("Plaintiff" or "Studco") claims against 1st Advantage Federal Credit Union ("Defendant" or "1st Advantage"). Plaintiff seeks compensatory damages related to Defendant's processing of a payment order allegedly induced through fraud by

beneficiary and asserts claims for violation of the Uniform Commercial Code (UCC), bailment, and fraudulent concealment.[1] Further, Plaintiff seeks punitive and treble damages in an amount not less than $100,000, interest, costs, attorneys' fees, and disbursements.

For the reasons below, the Court **FINDS** in favor of the Plaintiff for Count I and Count III. Accordingly, the Court **FINDS** Defendants liable for compensatory damages in the amount of $558,868.71. The Court enters judgement for Plaintiff.

I. PROCEDURAL HISTORY

On November 5, 2019, Plaintiff filed the Complaint in this matter, initiating an action against Defendant for failure to comport with basic security standards that resulted in the unlawful diversion of funds. Complaint ("Compl."), ECF No. 1. Plaintiff filed an Amended Complaint on January 29, 2020. Amend. Compl. ("Am. Compl."), ECF No. 11. The case was then transferred to the Eastern District of Virginia. Case Transfer, ECF No. 23. On December 18, 2020, after full briefing by the parties, the Court dismissed Counts II, IV, VII, and VIII with prejudice as to 1st Advantage and all counts regarding John Doe. Motion to Dismiss Order, ECF No. 41. Defendant answered the Amended Complaint on January 15, 2021. Answer, ECF No. 44.

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1. Plaintiff's Motion for Sanctions shall be addressed in a separate Order.

Appendix D

On May 2, 2020, after full briefing by the parties, the Court denied the parties' cross-motions for summary judgment. Summary Judgment Order ("Summ. J. Or."), ECF No. 103. On May 26, 2022, both parties filed a Joint Statement of Uncontested Facts. Joint Pretrial Stip. ("J. Pretrial Stip."), ECF No. 111. The Court held a bench trial, which commenced on September 13, 2022. The parties filed post-trial briefs, and this matter is now ripe for judicial determination. Defendant's Proposed Findings of Fact, ("Def.'s Prop. Facts") ECF No. 117; Plaintiff's Proposed Findings of Fact, ("Pl.'s Prop. Facts") ECF No. 118. The Court issues the following Findings of Fact and Conclusions of Law, as required by Rule 52(a) of the Federal Rules of Civil Procedure.

II. FINDINGS OF FACT

A. Stipulated Facts

The parties have stipulated to the following facts, which the Court accepts and finds:

1. Lesa Taylor opened an account at 1st Advantage in 2010 (the "2010 Account") which remained open through 2018. J. Pretrial Stip., ECF No. 111.

2. Lesa Taylor opened an account at 1st Advantage in 2015 (the "2015 Account") which remained open through 2018. *Id.*

3. On August 9, 2018, Lesa Taylor opened a personal account (Account No. xxx713) at 1st Advantage (the "Account"). *Id.*

4. On October 1, 2018, Studco received a "spoofed" email from an unknown third party purporting to be from Olympic Steel, and fraudulently instructing Studco to change its banking remittance information to the Account. *Id.*

5. In 2018, Keith Ward was 1st Advantage's Compliance Manager. *Id.*

6. In 2018, Keith Ward was the highest-ranking employee in 1st Advantage's compliance department. *Id.* at 2.

7. From October 4 to November 13, 2018, Studco made four ACH deposits identifying Olympic Steel as the beneficiary but listing Lesa Taylor's 1st Advantage account number. *Id.*

8. The ACH deposits originating from Studco's account with JP Morgan Chase totaled $558,868.71, broken down as follows:

    a. On October 4, 2018 for $ 156,834.55.

    b. On October 16, 2018 for $246,260.44;

    c. On November 5, 2018 for $40,980.09; and

    d. On November 13, 2018 for $114,793.63. (collectively referred to as the "ACH deposits"). *Id.*

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9. The following, Table 1, is an accurate representation of (a) starting and ending balances for the Account, and (b) withdrawals and deposits for the Account, between August 9, 2018 and December 31, 2018:

Date	Amount	Event
August 9, 2018	**$100.00**	**Starting Balance**
August 30, 2018	**$100.00**	**Ending Balance**
[redacted]		
September 1, 2018	**$100.00**	**Starting Balance**
September 30, 2018	$11.88	Ending Balance
[redacted]		
October 1, 2018	**$11.88**	**Starting Balance**
October 4, 2018	$156,834.55	ACH from "STUDCO BUILDING"
October 5, 2018	$58,000.00	Cashier's Check Withdrawal
October 10, 2018	$46,000.00	Outgoing Domestic Wire
October 12, 2018	$45,000.00	Outgoing Domestic Wire
October 16, 2018	$246,260.44	ACH from "STUDCO BUILDING"
October 17, 2018	$68,000.00	Cashier's Check Withdrawal
October 19, 2018	$79,500.00	Cashier's Check Withdrawal
October 23, 2018	$50,000.00	Withdrawal
October 25, 2018	$10,464.14	International Wire Transfer Attempted

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October 25, 2018	$26,535.86	International Wire Transfer Attempted
October 30, 2018	$10,464.14	International Wire Transfer REVERSED
October 30, 2018	$26,535.86	International Wire Transfer REVERSED
October 31, 2018	$25,000.00	Withdrawal
October 31, 2018	$10,000.00	Withdrawal
October 31, 2018	**$1,282.90**	**Ending Balance**
November 1, 2018	**$1,282.90**	**Ending Balance**
November 5, 2018	$40,980.09	ACH from "STUDCO BUILDING"
November 6, 2018	$38,000.00	Cashier's Check Withdrawal
November 13, 2018	$114,793.63	ACH from "STUDCO BUILDING"
November 14, 2018	$60,000.00	Outgoing Domestic Wire
November 16, 2018	$45,000.00	Outgoing Domestic Wire
November 31, 2018	**$11.12**	**Ending Balance**
December 1, 2018	$11.12	Ending Balance
December 31, 2018	$0.00	Ending Balance

10. All cashier's check withdrawals represented in Table 1 occurred at a physical 1st Advantage bank branch. *Id.* at 3.

11. All attempted or actual wire transfers represented in Table 1 occurred at a physical 1st Advantage bank branch. *Id.*

12. Between October 4, 2018 and November 16, 2018, 1st Advantage used anti-money laundering software called Financial Crimes Risk Manager ("FCRM") that monitored its members' transactions. *Id.*

13. FCRM was a "rules-based system" developed by FiServ, a public company that develops financial transaction security products used by thousands of financial institutions. Fiserv pre-programed rules into FCRM that triggered an "alert" when transactions occurred in a member's account that violated one of these rules. *Id.*

14. 1st Advantage's compliance analysts reviewed alerts generated by FCRM on a daily basis. *Id.*

15. Lesa Taylor attempted to make two international wires at a 1st Advantage branch on October 25, 2018. Related to the attempted international wire transfers:

    a. The attempted wire transfers created an alert by the Office of Foreign Asset Control ("OFAC"), which is different from a FCRM alert;

    b. The alert was based on the destination of the proposed outgoing wire transfer;

c. 1st Advantage discussed the transfers with Ms. Taylor and, due to Ms. Taylor possessing insufficient information about the identity of the recipients, 1st Advantage declined to make the proposed international wire transfers;

d. Other than declining to make the two proposed international wire transfers, 1st Advantage did not restrict or otherwise stop activity into or out of the Account between October 25, 2018, and November 21, 2018. *Id.* at 3-4.

16. It is the policy of 1st Advantage to conduct its ACH activities in compliance with all applicable Rules of the National Automated Clearing House Association ("NACHA"). *Id.* at 4.

17. 1st Advantage received an investigative subpoena regarding the ACH transactions at issue in this case, from the Federal Bureau of Investigation ("FBI") in or about the beginning of February 2019. *Id.*

B. Additional Factual Findings

The Court makes the following additional factual findings:

Company Background

1. Studco is a manufacturer of commercial metal building products for the wall and ceiling industry. Trial Transcript ("Tr") at 5:11-14.

2. Studco purchases raw materials from suppliers to manufacture metal building products. Tr. 5:18-21.

3. One of those suppliers is Olympic Steel, Inc. ("Olympic Steel"). Tr. 5:22-23.

4. Studco purchases raw steel coil from Olympic Steel. Tr. 5:11-6:1.

5. Studco had been buying from Olympic Steel for nine years. Tr. 6:2-4.

6. Defendant, 1st Advantage Federal Credit Union ("1st Advantage"), is a federally chartered, not-for-profit, member-owned credit union. Tr. 265:2-18.

7. 1st Advantage is a "community-based" credit union; its federal charter and federal law limit 1st Advantage membership to residents of Hampton Roads area up to Richmond and a portion of North Carolina. Tr. 265:18-266:2.

The 2018 Email and Account Change

8. Studco has a standard process to pay for orders with vendors like Olympic Steel. Tr. 6:16-10:11.

9. Studco's payment of vendor invoices typically goes through three levels of approval. Tr. 9:7-10.

10. The purchasing process begins when Studco has a conversation by phone with suppliers that is

then confirmed by email. Tr. 6:16-20. After the conversation and email a purchase order is sent to the vendor. *Id.*

11. After Studco receives the invoice, the accounts payable clerk matches the invoice with the purchase order. Tr. 8:12-18.

12. After that occurs, the purchasing manager that initially placed the order revises the invoice. Tr. 8:18-21.

13. The payment is then entered in Studco's computer system by accounts payable and sent to Studco's Global Managing Director, Ben Stevens, for final approval. Tr. 8:22-9:1.

14. Studco has a documented policy in place for changing a vendor's payment information. Tr. 10:16-11:6; Pl.'s Exhs. 17, 18.

15. Under the policy, the finance person responsible for accounts payable has the authority to change the vendor's banking details in Studco's payment system. Tr. 12:20-13:2; Pl.'s Exhs. 17, 18.

16. In 2018, Studco utilized a vendor - LMT Technology Solutions, Inc. ("LMT") - to maintain and monitor its information technology (IT) infrastructure. Tr. 14:6-12.

17. LMT performed system updates, managed firewalls, conducted network testing, and

conducted employee training on phishing and spoofing attacks. Tr: 14: 6-22. LMT also made recommendations on changes to Studco's internal policies to improve its security. Tr. 14:23-15:2

18. Until September 2018, Studco was never the victim of a security incident. Tr. 15:10-18.

19. Studco became the victim of unknown third-parties gaining access to its email system in September 2018. Tr. 16:13-18.

20. Studco learned of the email intrusion on November 20, 2018. Tr. 16:13-18.

21. Upon learning of the intrusion, Studco immediately contacted relevant parties, including its IT provider (LMT), its bank, its lawyers, and its insurance brokers. Tr. 16:25-17:9.

22. LMT began investigating Studco's email system to determine how the third-parties accessed Studco's system, determine the extent of the third-parties' activities in Studco's email system, and remove the third-parties' access Studco's emails. Tr. 17:7-17.

23. In the course of LMT's investigation, it learned that unknown third-parties gained access to Studco's email system on September 24, 2018. Tr. 34:21-25. Between September 2018 and November 2018, these third-parties monitored Studco's communications, including communications

between Studco and its vendor Olympic Steel. Tr. 18:3-19.

24. The legitimate email from Olympic Steel instructing Studco to change the company's banking information. Pl.'s Exh. 16.

25. No one at Studco received the legitimate email from Olympic Steel. Tr. 54:9-55:12.

26. The third parties sent Studco a "spoofed" email on October 4, 2018. Tr. 35:12-36:19. Pl.'s Exh. 16.

27. The spoofed email, purportedly from Olympic Steel notified Studco to direct future vendor payments to an account at 1st Advantage. Tr. 19:3-18. Pl.'s Exh. 12 at 2.

28. Before receiving the spoofed email, Olympic Steel had previously informed Studco it would be sending Studco a change in banking instructions. Tr. 19:19-20:7.

29. Following the instructions in the spoofed email, Studco updated its vendor payment information for Olympic Steel to the 1st Advantage account. Thereafter, Studco's payments for invoices submitted by Olympic Steel were directed to that account. Tr. 19:8-11.

Appendix D

1st Advantage's Risk Management Systems

30. The Bank Secrecy Act ("BSA") requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering, which includes reporting suspicious activity that might signify money laundering, tax evasion, or other criminal activities. Tr. 217:12-18; Tr. 224:12-225:7.

31. The automated clearinghouse (ACH) system is a nationwide network through which depository institutions send each other batches of electronic credit and debit transfers. The National Automated Clearinghouse Association ("NACHA") Operating Rules direct how the ACH Network is operated. Tr. 198:9-12.

32. It is the policy of 1st Advantage to conduct its ACH activities in compliance with the NACHA Operating Rules, Federal Reserve regulations, and Article 4A of the Uniform Commercial Code. Tr. 155:22-25; Tr. 158:17-159:13 Pl's Exh. 3 at 1.

33. To comply with BSA requirements, 1st Advantage relied on anti-money laundering software called "FCRM." Tr. 79:5-10.

34. FCRM is a "rules-based" software that monitored transactions in 1st Advantage's customers' accounts for suspicious activity based on pre-programmed rules in the software. Tr. 79:5-80:2.

35. When a transaction triggers a rule, the software creates an "alert." Tr. 79:20-25.

36. As of 2018, FRCM was one of the mostly commonly used AML software programs by credit unions in the country. Tr. 85:23-86:4.

37. FCRM was pre-programmed with rules that would trigger an alert if a transaction "broke" a rule. Tr. 84:14-17.

38. The conditions in the rules were designed around common factors indicating suspicious or criminal activity in the account. Tr. 85:22-24.

39. 1st Advantage did not change the pre-programmed rules in FCRM. Tr. 85:13-19. Rather, 1st Advantage was using the "out-of-the-box" rules in FRCM. Tr. 85:20-22.

40. Depending on the type of FCRM alert triggered, 1st Advantage's analysts would investigate the alerts to determine appropriate next steps. Tr. 80:4-13.

41. In investigating the alert, the analysts could review past account activity, general account activity, and the accountholder's relationship with the institution. Tr. 80:11-22.

42. Historical account activity is a significant factor in determining what next steps should be taken. Tr. 81:1-4.

43. The possible next actions for an alert included: (a) further monitoring, (b) opening a case to look deeper in the activity that generated the alert, (c) placing a restriction on the account, (d) closing the account, or (e) doing nothing. Tr. 81:5-82:1.

44. 1st Advantage had no documented guidelines to determine the appropriate next action based on an alert. Tr. 82:2-19. Rather, when investigating an account, 1st Advantage made decisions on a case-by-case basis. Tr. 82:9-19

45. Once posted to an account, each ACH transaction generates a report within 1st Advantage's core computer system. These reports, known as "DataSafe reports," are automatically generated and stored within 1st Advantage's electronic filing system, Optical, without any human involvement. Tr. 184:4-15.

46. These DataSafe reports contain "warnings" if the identified payee on the payment order does not exactly match the name of the receiving account holder. Tr. 179:13-25

47. 1st Advantage's system generates "hundreds to thousands" of warnings related to mismatched names on a daily basis. Tr. 177:15-25.

48. The majority of warnings generated on a daily basis are not useful to 1st Advantage, nor does the system notify anyone at 1st Advantage when a warning is generated. Tr. 179:2-4; Tr. 180:1-2.

49. For at least 26 years, it has never been the regular course of conduct for anyone at 1st Advantage to review DataSafe warnings. Tr. 180:10-13.

50. Veronica Deans ("Deans") is the highest-ranking person in 1st Advantage's ACH department. Tr. 157:8-10.

51. Deans was the primary person responsible to ensure 1st Advantage was processing ACH payments within the NACHA Rules and other applicable guidelines. Tr. 156:4-8.

52. Deans was responsible for any questions related to fraudulent ACH payments. Tr. 157:8-11.

53. In 2018, 1st Advantage had a written policy related to processing ACH payments. However, that policy did not address how to handle misdirected payments or fraudulent ACHs. Tr. 158:1-160:2; Pl's Exh. 3.

54. 1st Advantage also did not have a system in place to monitor for fraudulent incoming ACH payments. Tr. 162:13-16.

55. 1st Advantage's ACH system will create an "exception" if something is "wrong with the transaction" and therefore requires manual intervention before 1st Advantage can post an incoming ACH to an account. Tr. 160:6-12.

56. 1st Advantage's ACH system also generated "Warning" reports. Tr. 160:16-18.

57. 1st Advantage's system would generate a Warning if the intended beneficiary of an incoming ACH did not match the name of the customer receiving the ACH. Tr. 162:17-22.

58. Each of the four incoming ACHs from Studco generated a Warning but did not generate Exceptions. Tr. 172:1-8; 173:16-23; 175:3-9; 176:10-17; Pl.'s Ex 2.

59. 1st Advantage's ACH policy did not address how 1st Advantage should handle "exceptions" or Warnings. Tr. 160:13-21.

60. The Warnings were generated in real time to 1st Advantage received an ACH containing a misdescription. Tr. 162:23-163:4.

61. The Warnings are saved in 1st Advantage's Optical system. Tr. 163:5-6.

62. 1st Advantage does not review the Warnings. Tr. 163:7-8;

63. The ACH department has the ability to review the documents Optical. Tr. 163:6-12.

64. Deans testified that she did not know why 1st Advantage has a system that generates Warnings only for them to be ignored. Tr. 163:16-21.

65. Deans testified that the ACH system generates "hundreds to thousands" of Warnings per day. Tr. 177:15-25.

66. Deans acknowledged that the ACH system creates multiple types of Warnings and no one at 1st Advantage reviews the Warnings. Tr. 179:5-12; 188:2-189:3.

67. Each of the four incoming ACHs from Studco had a "CCD" classification which indicates a corporate payment that is typically for business-to-business transactions. Tr. 169:15-170:1; Pl.'s Exh. 2.

68. Since each of the four ACH transfers from Studco to the Account at 1st Advantage did not generate an exception the system automatically deposited the incoming funds without human involvement. Tr. 183:3-13.

The Account at 1st Advantage

69. On or around August 9, 2018, Lesa Taylor ("Taylor") visited a 1st Advantage branch to open an account (the "Account"). Tr. 64:22-24.

70. Taylor had an eight-year relationship with 1st Advantage with no history of fraud. Tr. 267:17-25.

71. Taylor was sole owner of the Account as well as a joint owner on an account opened April 12, 2010 (the "2010 Account") and on an account

belonging to her grandson (the "2015 Account"). Pl.'s Exh. 4.

72. At the time Taylor opened the account, she informed 1st Advantage that the account would be used for real estate transactions. Tr. 66:15-67:5.

73. Taylor's application to open the account stated her occupation as "merchant coordinator." Tr. 67:6-24; Pl.'s Exh. 19 at 1.

74. The account opening triggered an "ID verification warning" which was resolved by retail staff. Tr. 69:19-23; Pl.'s Exh. 7.

75. The system identified a few discrepancies in the information provided to the information on file. Tr. 69:14-18.

76. The alert stated that the system was not able to verify the address that was provided by Taylor. Tr. 73:7-22.

77. The alert was sent to Kelley Whiting, a compliance specialist in the Compliance department. Tr. 70:15-18; Pl.'s Exh. 7.

78. Keith Ward ("Ward"), who was 1st Advantage's Compliance Manager was cc'd on emails regarding how the retail team verified the address for Taylor's account. Tr. 71:2-72:11; Pl.'s Exh. 7.

79. The retail staff qualified the information based on Taylor's existing relationship with 1st Advantage. Tr. 69:19-23.

80. Despite the discrepancies and alert, 1st Advantage allowed Taylor to open the Account. Tr. 74:9-12.

81. The Account was a personal checking account, and not a business or commercial account. Tr. 68:16-18.

82. Taylor's 2010 Account had been active for approximately eight years as of the date Taylor opened her new Account in 2018. Tr. 77:23-78:1.

83. In those eight years, the 2010 Account never had a balance or withdrawal over $10,000 and never had a deposit of six figures. Tr. 78:2-10.

84. Taylor's 2015 Account had been active for approximately three years as of the date Taylor opened her new Account in 2018. Tr. 78:11-14.

85. In those three years, the 2015 Account never had a balance or withdrawal over $10,000 and never had a deposit of six figures. Tr. 78:11-20.

86. Ward testified that the historical account activity in Taylor's 2010 Account and 2015 Account was "significantly different" than the five-and six-figure deposit and withdrawal activity in Taylor's new Account in October and November 2018. Tr. 78:25-79:4.

87. Each of the ACH Deposits to the Account:

    a. Listed "Olympic Steel Inc." as the intended beneficiary Tr. 76:25-3;

    b. Listed the Account number as the recipient Tr. 76:25-3;

    c. Had a "CCD" code indicating it was a commercial or business-to-business transfer; and

    d. Generated a "WARNING" in 1st Advantage's systems notifying 1st Advantage of the discrepancy between the account holder name and name of the intended beneficiary. Tr. 168:7-176:17.

88. Neither Studco nor Olympic Steel were customers of 1st Advantage. Tr. 266:9-18.

89. Taylor made each of the withdrawals from the Account through an in-person transaction at a 1st Advantage branch. Tr. 131:5-11.

90. A "very small percentage" of 1st Advantage's customers have transactions similar in size to the transactions occurring in the Account. Tr. 153:14-18.

91. 1st Advantage's tellers received training on detecting suspicious activity by customers. Tr. 131:12-14.

92. 1st Advantage's tellers are trained to "notify the proper individuals" if they "notice something" in the "normal processing" of a transaction. However, tellers are not trained to "do a deep dive into an account." Tr. 131:19-25.

93. 1st Advantage tellers are also trained to look at account history or bring in a manager when there is suspicious activity. Tr. 132:17-133:6.

Alerts on the Account

94. On October 25, 2018, Taylor visited a 1st Advantage branch and attempted two international wire transfers totaling $37,000.00. Tr. 113:15-24

95. The attempted wire transfers triggered an Office of Foreign Assets Control ("OFAC") alert in 1st Advantage's fraud detection systems. Tr. 113:25-114:4.

96. The OFAC alert caused Taylor's account to be escalated to the compliance department. Tr. 114:10-115:11.

97. The OFAC alert caused 1st Advantage to question the purpose of Taylor's attempted international wires. Tr. 115:12-25.

98. Due to the OFAC alert and the suspicious nature of the two wire transfers, 1st Advantage cancelled the two wire transfers. Tr. 114:5-115:25; Pl.'s Exh. 8.

99. Following the cancellation of Taylor's October 25, 2018 attempted wire transfers, 1st Advantage suspended "[a]ll wire[] transactions . . . pending further review." Tr. 117:2-8; Pl.'s Exh. 8 at 2.

100. Taylor's attempted wire transactions caused Ward and the Compliance Department to start an "ongoing investigation." Tr. 120:9-20

101. As a part of that "ongoing investigation," the Compliance Department looked at Taylor's account "a handful of times" between October 25, 2018 and November 21, 2018. Tr. 121:3-5; 123:3-25; 277:17:278:7.

102. Ward testified that "historical transactions" are one of the biggest factors in determining whether there is suspicious activity in an account. Tr. 124:11-19.

103. At all relevant times, Ward and the Compliance Department had access to "Optical," which was 1st Advantage's storage system for all of Taylor's account statements and member documents. Tr. 125:12-25.

104. Ward testified inconsistently regarding whether the Compliance department looked at all transactions in the Account. Tr. 119:9-120:5.

105. Ward testified that he did personally review Taylor's attempted wire activity on October

25, 2018, but he did not look at any of the other transactions in the Account. Tr. 152:3-18.

106. Ward testified at trial that the "primary focus at the time" was the attempted wires only. Tr. 152:9-14.

107. During the handful of times that Ward looked into Taylor's account between October 25, 2018 and November 21, 2018, he looked at the account history in Taylor's account. However, Ward could not articulate the exact dates he reviewed that account history. Tr. 124:1-10; 278:4-16.

108. Ward did not create any documentation of his ongoing investigation of Taylor's account. Tr. 124:20-125:6; 129:7-11.

109. Ward agreed that when 1st Advantage was performing an investigation it was "best practice to get as much documentation as possible." Tr. 125:7-11.

110. At Ward's direction, 1st Advantage reversed the two fraudulent wires on October 30, 2018. Tr. 126:4-127:3.

111. Despite its ongoing investigation and a restriction on the account to suspend further wire activity on the Account, 1st Advantage allowed outgoing wire transfers on November 14 and November 16. Tr. 129:12-130:1.

112. Despite 1st Advantage testifying that FCRM was designed to and should have triggered alerts for numerous transactions in the Account, Ward testified that FCRM "to his knowledge" did not trigger an alert. Tr. 109:21-110:14; 145:13-15.

113. Ward could not explain why FCRM did not trigger any alerts for Taylor's activity. Tr. 139:17-20.

114. Based on 1st Advantage's description of the rules, the transactions in Table 1 would have triggered multiple alerts in FCRM.

115. 1st Advantage agreed that:

    a. Taylor's Account was a "new account" and that the six-figure balances in the new account should have triggered the new account alert. Tr. 97:5-8.

    b. The first ACH deposit from Studco on October 4, 2018, the second ACH deposit from Studco on October 16, 2018, the third ACH deposit from Studco on November 5, 2018, and the fourth ACH deposit from Studco on November 13, 2018 should have all triggered FCRM alerts, including "high product service" and "new accounts" alerts. Tr. 108:11-25; Tr. 103:1-9. Tr. 104:14-105:11. Tr. 105:23-106:12; 108:5-10.

    c. Taylor's withdrawals on October 5, 2018, October 10, 2018 and October 12, 2018, Taylor's

withdrawals on October 17, 2018, October 19, 2018 and October 23, 2018, and Taylor's withdrawals on November 6, 2018, which all substantially removed the entirety of the preceding ACH deposits within days of the previous deposit, should have triggered FCRM alerts, including the "pass through account" rule. Tr. 103:11-104:13. Tr. 105:12-106:12. Tr. 107:13-108:10 Tr. 107:13-108:10.

d. Taylor's subsequent withdrawals, which substantially removed the entire November 13, 2018 ACH within three days of deposit, should have triggered FCRM alerts. Tr. 109:1-20.

Expert Testimony

116. Studco's Expert Witness, Elliott McEntee ("McEntee"), was qualified as a witness in the fields of risk management and ACH transactions at financial institutions without objection from 1st Advantage. Tr. 201:18-202:19.

117. Of relevance, McEntee has over 30 years of experience in risk management and ACH transactions at financial institutions. He was involved in creating the modem ACH system, and was involved in writing the NACHA rules as the former president of NACHA. Tr. 195:9-196:17; 198:7-19

118. McEntee explained that based on the discrepancies at the Account opening, 1st Advantage should not have allowed the Account to be opened or should have flagged the account as a potentially risky account. Tr. 207:11-18.

119. McEntee explained that it was not commercially reasonable to allowed the ACH deposits in Taylor's Account. Tr. 208:20-209:16.

120. The ACH Warnings "spelled out very clearly why [each of the incoming ACHs] were suspicious" and 1st Advantage "should have taken action, and . . . put a hold on the account." Tr. 209:6-12. 133.

121. McEntee testified that 1st Advantage's custom of not viewing Warnings because there are too many of them was not commercially reasonable because 1st Advantage could have sorted for medium and high value transactions. Tr. 211:3-19.

122. McEntee explained that the ACH rules allow financial institutions receiving ACH deposits to post a payment with a CCD classification in a personal account but, it is not without risk. Tr. 213:18-214:5. 135.

123. McEntee explained that NACHA Rule 3.8.4 "requires a financial institution to return the transaction that they're not able to post because there's something wrong with the receiver's account." Tr. 216:25-217:3.

124. Thus, 1st Advantage should have returned the ACHs from Studco because Olympic Steel did not have an account at 1st Advantage. Tr. 217:4-9; 218:1-3. Pl.'s Exh. 27

125. McEntee explained that it was not commercially reasonable for 1st Advantage to have allowed Taylor to withdraw the funds fraudulently posted to her account. Tr. 221:10-18.

126. In 2018, there was tremendous publicity around individuals opening an account for the purpose of assisting in laundering money and moving it overseas. Tr. 221:21-222:5.

127. The types of withdrawals used by Taylor - cashiers checks and wire transfers - were the type that should "create bells and whistles, alarms and red flags" because they are the "two main methods" used in money laundering. Tr. 222:6-23

128. McEntee opined that 1st Advantage would have been justified in restricting the account after the very first ACH deposit on October 4, 2018. Tr. 229:24-230:24.

129. McEntee explained that it was not commercially reasonable for 1st Advantage to not take an active role in determining the thresholds for the alerts in the rules. Tr. 235:1-9.

130. McEntee testified that it was not commercially reasonable for 1st Advantage to allow commercial deposits into a personal account. Tr. 262:3-13.

131. McEntee opined that it was not commercially reasonable for 1st Advantage to fail to review the historical account activity in addition to its automated processes. In particular, Ward should have looked past the attempted international wires on October 25, 2018. Tr. 262:14-263:8.

132. McEntee explained that it was unreasonable for 1st Advantage allow the deposits into the personal account, which was a new account that had a very small starting balance, and multiple large-value transactions. Tr. 262: 3-13.

133. McEntee testified that the Account should have been flagged as a new account, because the guidelines of 1st Advantage stated that a new account should be monitored in the first 180 days because if there is a problem with the account it generally happens in the first few months. Tr. 207:15-208:3.

1st Advantage's Discussions with Studco and November 2018 Investigation

134. The President of Studco, Ben Stevens, called the general telephone number of 1st Advantage, eventually speaking to Ward, on November 21, 2018. Tr. 21:9-15.

135. When Ward spoke to Stevens, he provided information that allowed 1st Advantage to identify "the accountholder within 1st Advantage." Pl.'s Exh. 4 at 1.

136. 1st Advantage froze all of Taylor's accounts. Tr. 268:21-25.

137. Ward spoke with Taylor about the ACH transfers on November 23, 2018; she told him that she had applied to work as a secretary with a person doing real estate transactions and was conducting those transactions based on a job for applied for. Tr. 271:17-272:3.

138. 1st Advantage shared information about the Account and the activity with JPMorgan Chase as well as SunTrust. Tr. at 270:24-271:6.

139. SunTrust and JPMorgan Chase initiated an investigation. Pl.'s Exh. 4.

III. CONCLUSIONS OF LAW

The Court has made the following conclusions of law:

1. Diversity jurisdiction in this action is conferred upon the Court by 28 U.S.C. § 1332. Studco is a corporation organized under the laws of the state of New York and with a primary place of business in New York. 1st Advantage is a member-owned federal cooperative bank organized under the

laws of the Commonwealth of Virginia with a primary place of business in Virginia. The amount in controversy exceeds $75,000 because Studco is seeking $558,868.71 in compensatory damages.

2. This case was properly transferred to this Court by the United States District Court for the Western District of New York.

3. Venue is proper under 28 U.S.C. § 1391 in any judicial district in which the defendant is properly subject to personal jurisdiction. 28 U.S.C. § 1391(b) and (c). Venue is proper pursuant to § 1391 because a substantial part of the acts giving rise to the claims occurred in this District and Defendant is domiciled in this District.

Count I: Misdescription of Beneficiary Under UCC § 4A-207

4. Under the Virginia Commercial Code ("VCC"), Studco has the right to recover the fraudulent ACH deposits that 1st Advantage received if Studco shows that 1st Advantage "[knew] that the name and [account] number" of the incoming ACHs from Studco "identif[ied] different persons.".

5. The VCC provides that if a bank receives a payment order that identifies the beneficiary by name and account number, a bank may rely on the account number even if the number and name identify different persons. Va. Code Ann.

§ 8.4A-207. This is not true if a bank knows the number and name refer to different persons. *Id.* For purposes of this statute, "Know" means actual knowledge. Va. Comm. Ann. § 8.1A-202.[2]; *see also, AG4 Holding, LLC v. Regency Title & Escrow Servs., Inc.*, 98 Va. Cir. 89 (2018).

6. Actual knowledge of information received by the organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. Va. Comm. Ann. § 8.1A-202(f). An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. *Id.*

7. The drafters of the statute recognized that a "very large percentage of payment orders issued to the beneficiary's bank by another bank are processed by automated means using machines capable of reading orders on standard formats that identify the beneficiary by an identifying number or the number of a bank account. The processing of the order by the beneficiary's bank and the crediting

2. Code § 8.1-201 was repealed effective July 1, 2003 and was replaced by Code § 8.1A-202. Subsection (b) of the new version states: "'Knowledge' means actual knowledge. 'Knows' has a corresponding meaning."

of the beneficiary's account are done by use of the identifying or bank account number without human reading of the payment order itself. The process is comparable to that used in automated payment of checks." Va. Code Ann. § 8.4A-207, Official Comment 2.

8. To put it another way, a bank may accept a wire transfer relying solely on the number as the proper identification of the beneficiary of the order and it has no duty to determine whether there is a conflict *unless* the bank actually knows that the number and the name identify different accounts. *See* U.C.C. § 4A-207(b); *Donmar Enters., Inc. v. Southern Nat'l Bank*, 828 F. Supp. 1230, 1239-40 (W.D.N.C. 1993), *aff'd*, 64 F.3d 944 (4th Cir. 1995).

9. Thus, if a bank does not know about a conflict between the name and number, then it has no duty to determine whether there is a conflict and it may rely on the number as the proper identification of the beneficiary of the order. However, if a beneficiary's bank knows about the conflict between the name and number and nevertheless paid processed the payment, then the bank could be in violation of Va. Code Ann. § 8.4A-207 (b)(2).

Count III: Bailment

10. Under Virginia law, a bailment is "the rightful possession of goods by one who is not the owner." *K-B Corp. v. Gallagher*, 218 Va. 381, 384 (1977).

Ordinarily, for a bailment to arise there must be a delivery of the chattel by the bailor and its acceptance by the bailee. *Crandall v. Woodard*, 206 Va. 321, 327 (1965). However, while no formality, contract, or actual meeting of the minds is required to establish the relationship, "the element of lawful possession[. . .], and duty to account for the thing as the property of another that creates the bailment. . . . " *Id.* In order for an alleged bailee to have possession, "there must be the union of two elements, physical control over the thing possessed, and an intent to exercise that control." *See* R. Brown, The Law of Personal Property s 10.1, 213-14., (3rd ed. 1975); *see also*, *York v. Jones*, 717 F.Supp. 421, 425 (E.D.Va. 1989). Physical control coupled with an intent to exercise control over the goods constitute possession. *Compare Morris v. Hamilton*, 225 Va. 372 (1983) (guest at party who picks up watch from counter in attempt to return it to owner was a gratuitous bailee) with *K-B Corp.*, 237 S.E.2d 183, 185 (Va. 1977) (no bailment found where employer required employee to furnish his own tools but employee kept them in the office in a locked box to which only employee had the key).

11. Although bailment requires a common law duty of care, a statute may define the duty of care. *See Williamson v. Old Brogue, Inc.*, 232 Va. 350, 355, 350 S.E.2d 621, 624 (1986) (holding "a statute may define the standard of care to be exercised where there is an underlying common-law duty. . . . ")

(citing *Butler v. Frieden*, 208 Va. 352, 353, 158 S.E.2d 121, 123 (1967)). In this case, the NACHA Rules and § 8.4A-207 of the UCC establish that 1st Advantage must act in a commercially reasonable manner or that it exercised ordinary care when it has control over ACH transfers.

Count V: Fraudulent Concealment

12. Virginia law has not codified "fraudulent concealment" as a claim available to a plaintiff under an enumerated statute. Rather, fraudulent concealment is recognized by Virginia state law as an "affirmative act or representation designed to prevent, and which does prevent, the discovery of the cause of action." *Culpeper National Bank v. Tidewater Improvement Co., Inc.*, 119 Va. 73, at 83-84 (1916). Accordingly, Virginia courts have consistently held that "[f]raudulent concealment must consist of affirmative acts of misrepresentation, mere silence being insufficient." *Culpeper Nat'l Bank, 119 Va. at 83-84, 89 S.E. at 121* (quoting 2 H.G. Wood & Dewitt C. Moore, Limitation of Actions at Law and in Equity 1422 (4th ed. 1916)); *see also, Newman v. Walker*, 270 Va. 291, 296-97, 618 S.E.2d 336, 338-39 (2005), *see also, Mackey v. McDannald*, 298 Va. 645, 842 S.E.2d 379, 387 (2020) (holding that "[m]ere silence by the person liable is not concealment, but there must be some affirmative act or representation designed to prevent, and which does prevent, the discovery of the cause of action.") (citations omitted).

13. Plaintiff must show that a defendant concealed with the intent to "trick or artifice preventing, or calculated to hinder a discovery of the cause of action by the use of ordinary diligence, and mere silence is insufficient. There must be something actually said or done which is directly intended to prevent discovery." *Culpeper Nat'l Bank 119 Va. at 83-84.* Similarly, the Fourth Circuit has interpreted fraudulent concealment as an "equitable doctrine that provides for tolling of a limitations period, [. . . to] prevent[] a defendant from concealing a fraud, or committing a fraud in a manner that it concealed itself until the defendant could plead the statute of limitations to protect it." *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535 (4th Cir. 2019).

14. In the Fourth Circuit, fraudulent concealment applies "in situations where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action. *Id.* Accordingly, the Fourth Circuit has long held that to toll a limitations period based on fraudulent concealment, "a plaintiff must demonstrate: (1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, at 122 (4th Cir. 1995) (citing *Weinberger v. Retail Credit Co.*, 498 F.2d

552, 555 (4th Cir. 1974)). *Id.* at 548 (4th Cir. 2019); *See, e.g., SD3 II LLC v. Black & Decker (U.S.) Inc.*, 888 F.3d 98, 107-08 (4th Cir. 2018); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 370 (4th Cir. 2014); *Go Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 178 (4th Cir. 2007).

IV. DISCUSSION

For the reasons stated below, the Court finds in favor of the Plaintiff for Counts I and III. The Court will analyze each Count in turn.

A. Misdescription of Beneficiary Under UCC § 4A-207

Virginia Commercial Code required 1st Advantage to reject the ACH deposits if it knew that there was a misdescription between the intended beneficiary (Olympic Steel) and the purported owner of the account receiving the ACH (Taylor). Va. Code Ann. § 8.4A-207. An organization has actual knowledge for a particular transaction "from the time it would have been brought to the individual's attention if the organization had exercised due diligence." Va. Comm. Ann. § 8.1A-202(f). An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Va. Comm. Ann. § 8.1A-202(f). While it is true that 1st Advantage had no duty to proactively discover a misdescription of the Account information, the evidence

at trial illustrated that 1st Advantage did not maintain reasonable routines for communicating significant information to the person conducting the transaction. If 1st Advantage had exercised due diligence, the misdescription would have been discovered during the first ACH transfer.

Undisputed testimony at trial showed, Taylor opened the Account at 1st Advantage, triggering an "ID verification warning". Findings of Fact ("FOF") ¶ 74. The alert stated that the system was not able to verify the address that was provided by Taylor, bringing awareness to a possible discrepancy between the information provided and the information on file. *Id.* ¶ 76. Even though the alert was sent to the Compliance Department, the retail staff qualified the information based on Taylor's other accounts with 1st Advantage. *Id.* ¶ 79. Despite the discrepancies and alert, 1st Advantage allowed Taylor to open the Account. *Id.* ¶ 80. Taylor opened a personal checking account, not a business or commercial account. *Id.* ¶ 81. Further, when opening the Account, Taylor informed 1st Advantage that the Account would be used for real estate transactions. *Id.* ¶ 72. However, Taylor's application stated that her occupation was a "merchant coordinator." *Id.* ¶ 73. Upon the opening of the Account, 1st Advantage had been notified of identification discrepancies.

Additionally, 1st Advantage failed to establish a reasonable routine to monitor alerts that warned of suspicious activity regarding the Account. Actual knowledge of the misdescription can be imputed on 1st Advantage because the transfers generated real-time

warnings that the name of the intended beneficiary (Olympic Steel) did not match the name of the owner of the account receiving the ACH (Taylor). Notably, Olympic Steel has never had an account at 1st Advantage and could not open an account at 1st Advantage. *Id.* ¶ 88. Further, all ACH transactions were coded as "CCD" yet were still allowed into the Account, which was opened as a personal account. *Id.* ¶¶ 3, 67. 1st Advantage had access to all of this information in real-time yet no mechanisms to review these systems. *Id.* ¶¶ 60, 62. Even though 1st Advantage claimed to receive hundreds of thousands of similar alerts daily, there was no system in place to escalate pertinent alerts of high value transactions to those handling such transactions. *Id.* ¶¶ 47, 48, 121. Instead, 1st Advantage ignored all warnings generated by their systems designed and used for the purpose of detecting fraudulent or suspicious activity.

Additionally, unrebutted expert witness testimony explained that it was unreasonable for 1st Advantage allow the deposits into the personal account, which was a new account that had a very small starting balance, and multiple large-value transactions. *Id.* ¶ 132. Ward explained that the six-figure consumer deposits were very rare. *Id.* ¶ 90. Moreover, the expert witness explained that not viewing Warnings because of the sheer volume of alerts was not commercially reasonable because 1st Advantage could sort out high-value transactions and the Warnings related to those transactions. *Id.* ¶ 121. 1st Advantage cannot ignore their own systems to prevent fraud in order to claim that they did not have actual knowledge of said fraud.

It is clear from the evidence presented that 1st Advantage did not maintain any routines, let alone reasonable routines, for communicating significant information to the person conducting the transaction. If 1st Advantage implemented reasonable routines for communicating information, the identification discrepancy recognized at the opening of the Account, the numerous alerts generated by the ACH transfers describing the misdescription of the Account, and the fact that Olympic Steel could not open an Account at 1st Advantage would have alerted 1st Advantage to the misdescription and possible fraud upon the posting of the first ACH transfer. Accordingly, the Court finds that Studco met its burden at trial to prove by a preponderance of the evidence a misdescription of beneficiary in violation of Va. Code Ann. § 8.4A-207.

B. Bailment

The NACHA Rules and § 8.4A-207 establish that 1st Advantage must act in a commercially reasonable manner or exercise ordinary care when it has control over ACH transfers. 1st Advantage did not act in a commercially reasonable manner or exercise ordinary care in allowing Taylor to withdraw six-figures over the course of a month. 1st Advantage did not act in a commercially reasonable manner in the following respects.

First, 1st Advantage should have flagged the account as a potentially risky account upon its opening. *Id.* ¶ 118. Undisputed testimony at trial illustrated that new accounts have the most risk within the first six months of opening because that is when many accounts are used for fraud.

Id. ¶ 133. The Account received high-value transactions coded as CCD even though it was a personal account with a low starting balance. *Id.* ¶¶ 3, 67; Stipulated Facts, ("SF"), ¶¶ 8-9. From the time of the Account's opening, the Account should have been flagged as a potentially risky account. FOF. ¶ 118.

Second, it was not commercially reasonable for 1st Advantage to allow the ACH deposits in Taylor's account based on the Warnings. Studco's expert opined that 1st Advantage should have designed a filter to focus on the largest transactions that generated Warnings. *Id.* ¶ 121. Studco's expert opined that NACHA Rule 3.8.4 required 1st Advantage to reject the ACHs. *Id.* ¶¶ 123-124.

Third, it was not commercially reasonable for 1st Advantage to allow Taylor to withdraw the funds posted to her account because her actions involved textbook money laundering practices. The expert witness explained the context of money laundering landscape in 2018 as there was tremendous publicity around individuals opening an account for the purpose of assisting in laundering money and moving it overseas. *Id.* ¶ 126. The types of withdrawals Taylor used - cashiers checks and wire transfers - were the type that should "create bells and whistles, alarms and red flags" because they are the "two main methods" used in money laundering. *Id.* ¶ 127. Undisputed testimony illustrated that Taylor's conduct followed the textbook pattern of "high turnover" and "pass through" accounts. *Id.* ¶ 115. The expert further explained that 1st Advantage would have been justified in restricting the account after the first ACH deposit on October 4, 2018. *Id.* ¶ 128.

Fourth, 1st Advantage did not act in a commercially reasonable manner when they failed to take an active role in determining the thresholds for the alerts in the rules and failing to have policies to detect certain types of fraud. 1st Advantage did not change the pre-programmed rules in FCRM. *Id.* ¶ 39. Rather, 1st Advantage was using the "out-of-the-box" rules in FRCM. *Id.* ¶ 40. 1st Advantage's ACH policy did not address how 1st Advantage should handle "exceptions" or Warnings. *Id.* ¶ 58. After an alert was generated, 1st Advantage had no documented guidelines to determine the appropriate next action based on an alert. *Id.* ¶ 44. Rather, when investigating an account, 1st Advantage made decisions on a case-by-case basis. *Id.* ¶ 36. In 2018, 1st Advantage had a written policy related to processing ACH payments. *Id.* ¶ 52 However, that policy did not address how to handle misdirected payments or fraudulent ACHs. *Id.* While 1st Advantage's tellers are trained to "notify the proper individuals" if they "notice something" in the "normal processing" of a transaction, they are not trained to "do a deep dive into an account." *Id.* ¶ 90. 1st Advantage tellers are trained to look at account history or bring in a manager when there is suspicious activity. *Id.* ¶ 93. 1st Advantage should have detected the suspicious activity during in-person teller interactions and through its FCRM software and placed a restriction on Taylor's account. The above illustrates complete inaction from 1st Advantage.

Fifth, 1st Advantage did not act in a commercially reasonable manner when it failed to review the historical account activity in addition to its automated processes after Taylor's attempted October 25, 2018 international

wires. In particular, Ward provided inconsistent testimony of whether he looked at the Account history during the investigation into the attempted international wire transfers. *Id.* ¶ 104-105. Instead, he focused on the discrete international wire transfers. *Id.* ¶ 106. By 1st Advantages own standards, it was not commercially reasonable to only focus on the attempted wire transfers and not look at account history, one of the most important factors. *Id.* ¶ 34. 1st Advantage placed a restriction on wire transfers but allowed Taylor to withdraw almost the exact same amount of money through cashier check withdrawals and domestic wire transfers within days of the attempted international wire transfers. *Id.* ¶ 99; SF, ¶ 9. 1st Advantage's failure to reasonably investigate after October 25, 2018 allowed Taylor to continue to withdraw money from the Account.

Finally, 1st Advantage's affirmative defense of contributory negligence holds no merit because even though Studco fell for a spoofed email 1st Advantage had the responsibility to act in a commercially reasonable manner in handling the in-person withdrawal of money from the Account. Contributory negligence bars recovery if Studco was negligent and that the negligence was a proximate cause, a direct, efficient contributing cause of the harm. *AlBritton v. Commonwealth*, 299 Va. 392, 411, 853 S.E.2d 512 (2021). 1st Advantage relies on *Cincinnati Insurance Co. v. Norfolk Truck Center, Inc.*, a case interpreting the term "directly" in an insurance policy, for the proposition that fraud induced by a false e-mail message inducing the defendant company to pay to wrong account was "directly" caused by computer fraud on company. 430 F.Supp.3d 116 (E.D. Va. 2019). However,

that case does not absolve 1st Advantage's duty to act in a commercially reasonable manner. Importantly, 1st Advantage's pattern and practice of ignoring their own systems to detect fraud, failure to look at account history when investigating the Account, and failure to implement commercially reasonable routines to prevent fraud was the direct cause of the withdrawal of funds from the Account. Therefore, the Court finds that contributory negligence does not bar recovery in this case and that 1st Advantage's failure to act in a commercially reasonable manner or exercise ordinary care directly led to the withdrawal of fraudulent funds from the Account. Further, the Court finds that 1st Advantage did not act in a commercially reasonable manner or exercise ordinary care when it maintained control over the ACH transfers at issue.

C. Fraudulent Concealment

The facts provided at trial have not sufficiently proven that 1st Advantage provided false information that hindered Studco's ability to recover its funds. The President of Studco, Ben Stevens, called the general telephone number of 1st Advantage, eventually speaking to Keith Ward, on November 21, 2018. SOF ¶ 134. When Ward spoke to Stevens, he provided information that allowed 1st Advantage to identify "the accountholder within 1st Advantage." *Id.* ¶ 135. 1st Advantage froze all of the member's accounts. *Id.* ¶ 136. Ward spoke with Taylor about the ACH transfers on November 23, 2018; she told him that she had applied to work as a secretary with a person doing real estate transactions and was conducting those transactions based on a job. *Id.* ¶ 137.

1st Advantage shared information about the Account and the activity with JPMorgan Chase as well as SunTrust. *Id.* ¶ 138. Thus, the Court finds that 1st Advantage did not make misrepresentations or affirmative acts designed to prevent the discovery of information to help Studco establish causes of actions against Lesa Taylor.

V. CONCLUSION

For the foregoing reasons, the Court **FINDS** in favor of Plaintiffs on Count I and Count III. The Court FINDS in favor of Defendant on Count V. Accordingly, **JUDGMENT IS ENTERED FOR PLAINTIFF for compensatory damages in the amount of $558,868.71.** The Plaintiff has not provided sufficient evidence for punitive damages. Further, Defendant is directed to pay attorney's fees and costs. Plaintiff shall file a statement of attorney's fees and costs within fifteen days (15 days) of the date of this Memorandum Opinion and Order.

The Clerk is **DIRECTED** to send a copy of this Order to the parties and counsel of record.

IT IS SO ORDERED.

Norfolk, Virginia
January 12, 2023

/s/
Raymond A. Jackson
United States District Judge

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION, FILED DECEMBER 18, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
NORFOLK DIVISION

CIVIL ACTION NO: 2:20-cv-417

STUDCO BUILDING SYSTEM U.S., LLC,

Plaintiff,

v.

1ST ADVANTAGE FEDERAL CREDIT UNION,
JOHN DOE,

Defendants.

Filed December 18, 2020

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). ECF No. 35. The Court finds that a hearing is not necessary. Having reviewed the parties' filings, this matter is ripe for judicial determination. For the following reasons, Defendant's Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART.**

Appendix E

I. FACTUAL AND PROCEDURAL HISTORY

The following facts taken from Studco Building System U.S.' ("Studco" or "Plaintiff") Complaint are considered true and cast in the light most favorable to Studco. ECF No. 11; *see also, Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

Around August 2018, 1st Advantage opened a personal checking account for an individual ("John Doe") in Virginia. *Id.* at ¶ 61. 1st Advantage is required to comply with the "Know Your Customer" ("KYC") regulations of federal Anti-Money Laundering ("AML") laws. *Id.* at ¶ 45. The Anti-Money Laundering laws require 1st Advantage to conduct customer due diligence which includes, among other things, verifying a member's identity, address and source of funds. *Id.* at ¶ 46. However, 1st Advantage did not verify John Doe's identity, physical/mailing, address, prior banking history, whether John Doe was eligible to be a member, nor did 1st Advantage verify the source of funds intended for the account. *Id.* at ¶¶ 62-64. Shortly after, in or around October 2018, John Doe transmitted fraudulent emails to Studco in New York State. *Id.* at ¶¶ 70-73. The emails appeared to be legitimate emails from a Studco supplier, Olympic Steel based in Ohio, and directed Studco to transmit funds intended for Olympic Steel into a bank account held at 1st Advantage. *Id.* at ¶ 70, 72, 81. 1st Advantage was aware that Olympic Steel did not hold an account at 1st Advantage. *Id.* at ¶¶ 81. Then, starting in October 2018, Studco sent one ACH credit to 1st Advantage pursuant to John Doe's fraudulent email instructions. *Id.* at ¶¶ 75-95. Specifically, 1st Advantage

received an ACH transfer of $156,834.55 that identified Studco as the originator and Olympic Steel, by corporate address, as the beneficiary or receiver which did not match any account holder with 1st Advantage. *Id.* at ¶ 83. The ACH credit identified the Personal Account number, but it was commercially coded as "CCD" which stands for "Corporate Credit or Debit." *Id.* at ¶¶ 79-83, 180. Pursuant to the Rules of the National Automated Clearing House Association (NACHA), CCD payments are restricted to transactions that involve only businesses. *Id.* at ¶ 77. Moreover, any CCD payments directed to personal accounts are required to be rejected by the Bank, which 1st Advantage did not do. *Id.* ¶¶ 75-79. Shortly thereafter, 1st Advantage accepted three additional high-value commercial ACH credit payments for the Personal Account, totaling $558,868.17. *Id.* at ¶ 87-92, 75.

After the funds were transferred to the Personal Account, John Doe withdrew over $558,868.17 incrementally and in-person at a 1st Advantage branch with the assistance of 1st Advantage. *Id.* at ¶¶ 108-146, 129-135. In a period of over a month, 1st Advantage employee(s) issued thirteen (13) cashier checks or wire transfers totaling $558,868.17 from the Personal Account. *Id.* at ¶¶ 113-115. Nine (9) of the thirteen (13) withdrawals from the Personal Account were made out to an individual or entity that is alleged to be known to 1st Advantage or its employee(s). *Id.* at ¶¶ 115-119, 139. Specifically, $268,500 of the total money was withdrawn in person by John Doe in the form of six cashier checks at a 1st Advantage branch location made out to "Vee's Enterprises," an entity that is incorporated in Georgia and opened by a person

named "Victoria Jones" (and/or "Vernasta Newton"). *Id.* at ¶¶ 117-119, 135-138. Eventually the Federal Bureau of Investigation ("FBI") in Rochester, New York commenced an investigation. During the investigation, Studco alleges that 1st Advantage has intentionally concealed, and continues to conceal, material information from Studco related to John Doe and the Personal Account and continues to perpetuate a fraud on Studco. *Id.* at ¶¶ 147-161.

On November 5, 2019, Studco initiated a suit seeking $558,868.71 in compensatory damages and not less than $100,000 in punitive damages against 1st Advantage and John Doe. ECF No. 1. On January 29, 2020, Plaintiff filed an amended complaint. ECF No. 11. Plaintiff claims six causes of action. Count I alleges Misdescription of Beneficiary, pursuant to UCC § 4A-207, against 1st Advantage and John Doe. *Id* at ¶¶ 174-184. Count II alleges Conversion of Instrument against 1st Advantage and John Doe. *Id.* at ¶¶ 185-198. Count III alleges Bailment against 1st Advantage. *Id.* at ¶¶ 199-220. Count IV alleges fraud against John Doe and Aiding and Abetting Fraud against 1st Advantage. *Id.* at ¶¶ 221-241. Count V alleges Fraudulent Concealment against 1st Advantage. *Id.* at ¶¶ 242-256. Count VI alleges a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim against 1st Advantage and John Doe, pursuant to 18 U.S.C. §§ 1961. *Id.* at ¶¶ 257-269. Count VII alleges Money Had and Received against 1st Advantage. *Id.* at ¶¶ 270-275. Count VIII alleges a Prima Facie Tort Against 1st Advantage. *Id.* at ¶¶ 276-283.

Appendix E

On September 11, 2020, 1st Advantage filed the instant Motion to Dismiss the Complaint for failure to state claims pertaining to 1st Advantage. ECF Nos. 35, 36. On September 25, 2020, Studco opposed the motion. ECF No. 39. On October 1, 2020, 1st Advantage replied. ECF No. 40.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of actions that fail to state a claim upon which relief can be granted. The United States Supreme Court has stated that in order "[t]o 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*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Specifically, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Moreover, at the motion to dismiss stage, the court is bound to accept all of the factual allegations in the complaint as true. *Id.* However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Assessing the claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.)). In considering a Rule 12(b)(6) motion to dismiss, the Court cannot consider "matters outside the pleadings" without converting the motion to a summary judgment. Fed. R.

Civ. P. 12(d). Nonetheless, the Court may still "consider documents attached to the complaint . . . as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." *Sec'y of State for Defence v. Trimble Navigation Ltd*, 484 F.3d 700, 705 (4th Cir. 2007); *see also* Fed. R. Civ. P. 10(c).

III. DISCUSSION

A. Subject Matter Jurisdiction and Choice of Law

As an initial matter, the Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332. Studco is a corporation organized under the laws of the state of New York and with a primary place of business in New York. ECF No. 1 at ¶ 9. 1st Advantage is a member-owned federal cooperative bank organized under the laws of the Commonwealth of Virginia with a primary place of business in Virginia. *Id.* at ¶ 5, 10. The amount in controversy exceeds $75,000 because Studco is seeking $558,868.71 in compensatory damages. *Id.* Exhibit 4 at 24. In a diversity action, district courts apply federal procedural law and state substantive law. *See Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 427, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996). Federal courts sitting in diversity jurisdiction apply the choice of law rules in the state in which it sits. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) (noting that forum state's choice of law rules is substantive). Therefore, the Court will apply the law of the Commonwealth of Virginia to the state claims.

Plaintiff also asserts a federal claim, Count VI, pursuant to 18 U.S. C. §§ 1961. The law is well-established that "[r]egardless of the allegations of a state law claim, 'where the vindication of a right under state law necessarily turn[s] on some construction of federal law,' the claim arises under federal law and thus supports federal question jurisdiction under 28 U.S.C. § 1331." *North Carolina v. Alcoa Power Generating, Inc.*, 2017 U.S. App. LEXIS 8226, at *10 (4th Cir. 2017) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)). Thus, the Court also has sufficient basis for federal question jurisdiction over Count VI and has supplemental jurisdiction over the remaining Counts because these claims result from the same transaction or occurrence. 28 U.S.C. § 1367(a).

B. Dismissal of Claims Against John Doe

The United States Court of Appeals for the Fourth Circuit has recognized that while there is a necessity for allowing John Doe suits in federal courts, "[the Court is] not unaware of the right of the district court to manage its docket and the danger of permitting suits with unnamed parties to remain on the docket unprosecuted." *Schiff v. Kennedy*, 691 F.2d 196, 198 (4th Cir. 1982). Moreover, the Fourth Circuit has held that if it does not appear that the true identity of an unnamed party can be discovered through discovery or through intervention by the court, then "the court could dismiss the action without prejudice." *Id.* That is, unless it appears that John is an actual person whose identify and address is identifiable, the Court may

dismiss claims against John Doe. Furthermore, to allege diversity jurisdiction properly in a John Doe case, the plaintiff must offer "some affirmative evidence pointing toward [John Doe's] citizenship." *Sligh v. Doe*, 596 F.2d 1169, 1171 (4th Cir. 1979). While this evidence need not be "conclusive" it must be "sufficient to support a finding [regarding citizenship] in the absence of any contradictory proof." *Id.; see also, Payne v. Doe*, No. 1:16CV697, 2017 U.S. Dist. LEXIS 49875, 2017 WL 1227932, at *1 (E.D. Va. Mar. 31, 2017).

Here, the Court finds that Plaintiff has had the time since the suit was filed on November 5, 2019 to identify the whereabouts, citizenship, or identity of John Doe, notwithstanding the allegations that 1st Advantage has made Plaintiffs efforts more difficult. However, in the Complaint Plaintiff, at best, alleges that the $268,500 of the total money withdrawn in person by John Doe in the form of six cashier checks at a 1st Advantage branch location was made out to "Vee's Enterprises," an entity that is incorporated in Georgia and opened by a person named "Victoria Jones" (and/or "Vernasta Newton"). ECF No. 1 at ¶¶ 117-119, 135-138. Therefore, the Court finds that Plaintiff has not provided sufficient affirmative evidence to identify John Doe's citizenship for the purpose of federal jurisdiction or to overcome the Court's concern of permitting suits against unnamed parties to remain on the docket. Accordingly, the claims against John Doe are **dismissed without prejudice**.

C. Count I: Misdescription of Beneficiary, UCC § 4A-207

Plaintiff alleges Misdescription of Beneficiary, pursuant to the Uniform Commercial Code § 4A-207, against 1st Advantage. ECF No. 11 at ¶¶ 174-184. Virginia has codified Misdescription of Beneficiary at VA Code Ann. § 8.4A-207. It provides that if the bank receives a payment order that identifies the beneficiary by name and account number, the bank may rely on the account number even if the number and name identify different persons. This is not true if the bank knows the number and name refer to different persons. Va. Code Ann. § 8.4A-207. For purposes of this statute, "Know" means actual knowledge. *Id.; see also, AG4 Holding, LLC v. Regency Title & Escrow Servs., Inc.*, 98 Va. Cir. 89 (2018). The drafters of the statute recognized that a "very large percentage of payment orders issued to the beneficiary's bank by another bank are processed by automated means using machines capable of reading orders on standard formats that identify the beneficiary by an identifying number or the number of a bank account. The processing of the order by the beneficiary's bank and the crediting of the beneficiary's account are done by use of the identifying or bank account number without human reading of the payment order itself. The process is comparable to that used in automated payment of checks." Va. Code Ann. § 8.4A-207, Official Comment 2.

To put it another way, a bank may accept a wire transfer relying solely on the number as the proper identification of the beneficiary of the order and it has no duty to determine

whether there is a conflict *unless* the bank actually knows that the number and the name identify different accounts. *See* U.C.C. § 4A-207(b); *Donmar Enters., Inc. v. Southern Nat'l Bank*, 828 F. Supp. 1230, 1239-40 (W.D.N.C. 1993), *aff'd*, 64 F.3d 944 (4th Cir. 1995). Thus, if the Bank does not know about a conflict between the name and number, then it has no duty to determine whether there is a conflict and it may rely on the number as the proper identification of the beneficiary of the order. However, if the beneficiary's bank knew about the conflict between the name and number and nevertheless paid processed the payment, then the bank could be in violation of Va. Code Ann. § 8.4A-207 (b)(2).

In the instant matter, the key question is whether Plaintiff pleaded sufficient facts to show that 1st Advantage knew that there was a conflict between the name and the number of the Personal Account and those listed on Studco's four ACH transfers. 1st Advantage argues that it "had no obligation to determine if the beneficiary identified on the payment requests corresponded to the account number and was entitled to rely solely on the account number." ECF No. 36 at 10. That is 1st Advantage argues that it had no knowledge of any conflict and instead relied solely on matching the account numbers to process the transfer of funds into the Personal Account.

Here, the Court finds that Studco pled sufficient facts which, if proven, could show that 1st Advantage was aware that the ACH transfers were misdescribed, i.e. there was a conflict. If true, Studco could show that its wire transfers, which were commercially coded as "CCD"

for Olympic Steel, did not match the name and number for any existing account at 1st Advantage for Olympic Steel. Notably, Olympic Steel has never had an account at 1st Advantage but the ACH transfers transferred into a Personal Account in the name of John Doe. ECF No. 11 at ¶¶ 75-107. While it is true that 1st Advantage has no duty to proactively discover a conflict, the Complaint alleges that 1st Advantage had actual knowledge of the misdescription because the transfers were codified as "CCD" and, thus, that it was automatically required to reject the misdescribed ACH transfers, pursuant to NACHA, but it did not. *Id.* Therefore, the issue of whether 1st Advantage had actual knowledge is a factual determination for the jury. Accordingly, the Court finds that Studco has pled sufficient facts that, if proven true, could constitute a misdescription of beneficiary in violation of Va. Code Ann. § 8.4A-207.

D. Count II: UCC § 3-420 Conversion of Instrument

Plaintiff alleges Conversion of Instrument against 1st Advantage. ECF No. 11 at ¶¶ 185-198. Virginia has codified Conversion of Instrument at VA Code Ann. § 8.3A-420. The statute provides:

> (a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce

> the instrument or receive payment. *An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument* or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee. *(emphasis added).*

VA Code Ann. § 8.3A-420. The term "instrument" means a negotiable instrument and includes a check. Code § 8.3A-104(b) and (f). The term "issuer" means a maker or drawer of an instrument. Code § 8.3A-105(c). The term "drawer" means a person who signs or is identified in a draft as a person ordering payment. Code § 8.3A-103(3). In this case, Studco is the "issuer" of the instrument, the ACH transfers. ECF No. 11 at ¶¶ 76. Moreover, John Doe is the "drawer," or the person who fraudulently ordered payment.

Pursuant to Virginia law, both the issuer and drawer are barred by VA Code Ann. § 8.3A-420 from bringing forth a claim of Conversion of Instrument when the instrument is subject to a claim of fraud. *See Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 658, 604 S.E.2d 403 (2004) (holding that "[w]e know for certain what the result must be when an instrument with a forged signature is the subject of a claim for conversion brought by the issuer thereof. The result is the dismissal of the claim."). Particularly, the Supreme Court of Virginia held that when a fraudulent instrument is the subject of a claim for conversion then the VA Code Ann. § 8.3A-420(a)(i) bars either the issuer or drawer from bringing a claim for

conversion. *Id; see also, Fax Connection, Inc. v. Chevy Chase Bank, F.S.B.*, 73 Va. Cir. *263, judgment entered sub nom. THE FAX CONNECTION, INC., &, Thomas Draghi, Plaintiffs, v. CHEVY CHASE BANK, FSB, et. al., Defendants.* (Va. Cir. Ct. 2007)

Here, Studco alleges that John Doe committed fraud by ordering that Studco deposit ACH transfers at 1st Advantage. Accordingly, the ACH transfers, or instruments Studco issued were invalid and subject to a claim fraud and, thus, cannot be the basis for a claim of conversion against 1st Advantage. Therefore, Count II is **dismissed with prejudice** as it pertains to 1st Advantage.

E. Count III: Bailment

Plaintiff alleges Bailment against 1st Advantage. ECF No. 11 at ¶¶ 199-220. Under Virginia law, a bailment is "the rightful possession of goods by one who is not the owner." *K-B Corp. v. Gallagher*, 218 Va. 381, 384, 237 S.E.2d 183 (1977). Ordinarily, for a bailment to arise there must be a delivery of the chattel by the bailor and its acceptance by the bailee. *Crandall v. Woodard*, 206 Va. 321, 327, 143 S.E.2d 923 (1965). However, while no formality, contract, or actual meeting of the minds is required to establish the relationship, "the element of lawful possession[. . .], and duty to account for the thing as the property of another that creates the bailment. . . ." *Id.* In order for an alleged bailee to have possession, "there must be the union of two elements, physical control over the thing possessed, and an intent to exercise that control." *See* R. Brown, The Law of Personal Property s 10.1, 213 14., (3rd ed. 1975); *see*

also, *York v. Jones*, 717 F.Supp. 421, 425 (E.D.Va. 1989). Physical control coupled with an intent to exercise control over the goods constitute possession. *Compare Morris v. Hamilton*, 225 Va. 372, 302 S.E.2d 51 (1983) (guest at party who picks up watch from counter in attempt to return it to owner was a gratuitous bailee) with *K-B Corp. v. Gallaghe*, 237 S.E.2d 183, 185, 218 Va. 381 (Va. 1977) (no bailment found where employer required employee to furnish his own tools but employee kept them in the office in a locked box to which only employee had the key). Although bailment requires a common law duty of care, a statute may define the duty of care. *See Williamson v. Old Brogue, Inc.*, 232 Va. 350, 355, 350 S.E.2d 621, 624, 3 Va. Law Rep. 1325 (1986) (holding "a statute may define the standard of care to be exercised where there is an underlying common-law duty. . . .") (citing *Butler v. Frieden*, 208 Va. 352, 353, 158 S.E.2d 121, 123 (1967)). In this case, the NACHA Rules and § 8.4A-207 UCC establish that 1st Advantage must act in a commercially reasonable manner or that it exercised ordinary care when it has control over ACH transfers. 1st Advantage agrees that NACHA sets such a standard of care. ECF No. 36 at 11-12.

1st Advantage maintains that it acted with the requisite standard of care because it "rel[ied] solely on the account number listed in the payment requests and had no duty to ascertain whether there was a conflict between the name of the identified payee and the account number." ECF No. 36 at 12. Thus, 1st Advantage argues that it cannot be held liable to Studco for bailment. *Id.*

However, the question of whether 1st Advantage acted in a commercially reasonable manner in exercising control over Studco's ACH transfers is one that the jury must answer. As noted above in Section III.C, the Court finds that Studco has pleaded sufficient facts that, if proven true, could show that 1st Advantage *did not* act with the requisite standard of care in processing, i.e. possessing, the ACH transfers because it was aware of a conflict between the names and account numbers. *See* Section III.C; *see also*, ECF No. 11 at 75-107. Specifically, the Complaint alleges that the NACHA Rules provide that "it is not commercially reasonable to deposit commercially-coded 'CCD' transfers expressly identified as 'business transactions' into a personal checking account. Furthermore, NACHA Rules require that depositing 'CCD' coded transfers into consumer accounts is not commercially reasonable. ECF No. 39 at 25; *see also*, ECF No. 11 at ¶ 172, 194, 204. Moreover, Studco has adequately alleged that 1st Advantage did not act in a commercially reasonable manner in allowing John Doe to fraudulently withdraw money over a month in-person. ECF No. 11 at ¶¶ 113-115, 130-35. Therefore, the motion to dismiss Count III is not meritorious.

F. Count IV: Aiding and Abetting Fraud

Plaintiff alleges Aiding and Abetting Fraud against 1st Advantage. ECF No. 11 at ¶¶ 221-241. There are two questions relevant to the instant motion to dismiss as it pertains to 1st Advantage: (1) whether aiding and abetting fraud is recognized in Virginia (and if so, what are the

elements); and (2) whether Studco pleaded sufficient facts to plausibly establish aiding and abetting fraud.

Neither Virginia law, Virginia State Courts, nor the United States Court of Appeals for the Fourth Circuit have recognized aiding and abetting fraud as a separate tort. *See All. Tech. Grp., LLC v. Achieve 1*, LLC, No. 3:12CV701-HEH, 2013 U.S. Dist. LEXIS 4708, 2013 WL 143500, at *4 (E.D. Va. Jan. 11, 2013) ([T]he Supreme Court of Virginia has refrained from either recognizing or rejecting a separate 'aiding and abetting' tort.) (citing *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 604 S.E.2d 403 (Va. 2004)); *see also, Terry v. SunTrust Banks, Inc.*, 493 Fed.Appx. 345, 356 n.9 (4th Cir. 2012) ("Because we conclude LES was not a fiduciary under Virginia law, we need not resolve SunTrust's alternative argument that Virginia does not recognize a cause of action of aiding and abetting a tort."). At most, both state and federal district courts are split. *Compare, e.g., Tysons Toyota, Inc. v. Commonwealth Life Ins.*, 20 Va. Cir. 399 (1990) ("A defendant who aids and abets in the commission of a tort may be jointly liable for that tort, but he is not liable for a separate tort of aiding and abetting."); *with AvalonBay Cmtys., Inc. v. Willden*, No. 1:08-CV-777, 2009 U.S. Dist. LEXIS 69118, 2009 WL 2431571, at *11 (E.D. Va. Aug. 7, 2009), *aff'd*, 392 Fed.Appx. 209 (4th Cir. 2010) ("Virginia law allows a third party to be liable for another party's breach of fiduciary duty when that third party knowingly participated in the breach."); *Sherry Wilson & Co. v. Generals Court, L.C.*, No. 21696, 2002 Va. Cir. LEXIS 479, 2002 WL 32136374, at *1 (Va. Cir. Ct. Sept. 27, 2002) ("Thus, unlike some jurisdictions, it may be said that the

common law of the Commonwealth has looked with favor upon recovery in tort against those who aid and abet others in the commission of the civil wrong for which damages may be maintained.").

Since the state law is unclear, the Court "must determine the rule that the state Supreme Court would probably follow, not fashion a rule which an independent federal court might consider best." *Meadow Ltd. P'ship v. Heritage Say. & Loan Ass'n*, 639 F. Supp. 643, 653 (E.D. Va. 1986). On this basis, some courts have conducted analysis on a cause of action for aiding and abetting despite misgivings about its appropriateness. *See id.* ("the Court assumes *arguendo* that Virginia would recognize these causes of action"); *see also All. Tech Grp.*, 2013 U.S. Dist. LEXIS 4708, 2013 WL 143500, at *5 (finding that "[i]t is not entirely clear that *Patteson* created a separate tort of 'aiding and abetting,'" but nevertheless addressing its elements as "a viable alternative theory to secure joint liability") (citing *Patteson v. Horsley*, 70 Va. 263 (1877)). However, other federal courts have declined to analyze a separate aiding and abetting claim. *See Microstrategy Servs. Corp. v. OpenRisk, LLC*, No. 1:14CV1244 JCC/IDD, 2015 U.S. Dist. LEXIS 32719, 2015 WL 1221263, at *3 (E.D. Va. Mar. 17, 2015), *on reconsideration*, No. 1:14CV1244 JCC/IDD, 2015 U.S. Dist. LEXIS 59347, 2015 WL 2126924 (E.D. Va. May 6, 2015) ("This Court declined to create such a cause of action [for aiding and abetting] and dismissed a claim identical to the one here for aiding and abetting a breach of fiduciary duty."); *Calderon v. Aurora Loan Serv., Inc.*, 1:10CV129, 2010 U.S. Dist. LEXIS 55602, 2010 WL 2306343, at *6 (E.D. Va. June 3, 2010).

The Court finds that at most Virginia law currently allow a third party to be liable for aiding and abetting another party's breach of fiduciary duty when that third party knowingly participated in the breach. *See AvalonBay*, 2009 U.S. Dist. LEXIS 69118, 2009 WL 2431571, at *11. Accordingly, to establish a claim for aiding and abetting another party's breach of fiduciary duty, "the third party must affirmatively aid the breach with the requisite *mens rea*, or culpable state of mind." *Id.* That is, the plaintiff must show that the "defendant: (1) knows about another's duty and breach; (2) participates in it or directs its commission; and, (3) benefits from it." *All. Tech. Grp.*, 2013 U.S. Dist. LEXIS 4708, 2013 WL 143500, at *5 (citing *Patteson v. Horsley*, 70 Va. 263, 270-71 (1877)); *see also, AvalonBay Communities, Inc.* 2009 U.S. Dist. LEXIS 69118, at *11 (E.D. Va. Aug. 7, 2009) ("Virginia law allows a third party to be liable for another party's breach of fiduciary duty when that third party knowingly participated in the breach.").

Here, Studco claims that 1st Advantage failed to notice John Doe's fraudulent scheme, facilitated the ACH transfers into John Doe's account, and refused to help Studco identify John Doe's whereabouts after discovering the alleged fraud. ECF No. 11 at ¶ 68, 79, 151. However, these facts, even if true, fail to satisfy the elements of aiding and abetting a breach of fiduciary duty. Studco's Complaint does not state that 1st Advantage "had actual knowledge of an existing duty and breach [between John Doe and Studco] that [1st Advantage] knowingly participated in." *Herold v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2018 U.S. Dist. LEXIS 70573 at *9 (E.D. Va.

Apr. 25, 2018). Therefore, Count IV (Aiding and Abetting Fraud) against 1st Advantage is dismissed with prejudice.

G. Count V: Fraudulent Concealment

Plaintiff alleges fraudulent concealment against 1st Advantage. ECF No. 11 at ¶¶ 242-256. Virginia law has not codified "fraudulent concealment" as a claim available to a plaintiff under an enumerated statute. Rather, fraudulent concealment is recognized by Virginia state law as an "affirmative act or representation designed to prevent, and which does prevent, the discovery of the cause of action." *Culpeper National Bank v. Tidewater Improvement Co., Inc.*, 119 Va. 73, at 83-84, 89 S.E. 118 (1916). Accordingly, Virginia courts have consistently held that "[f]raudulent concealment must consist of affirmative acts of misrepresentation, mere silence being insufficient." *Culpeper Nat'l Bank, 119 Va. at 83-84, 89 S. E. at 121* (quoting 2 H.G. Wood & Dewitt C. Moore, Limitation of Actions at Law and in Equity 1422 (4th ed. 1916)); *see also, Newman v. Walker*, 270 Va. 291, 296-97, 618 S.E.2d 336, 338-39 (2005), *see also, Mackey v. McDannald*, 298 Va. 645, 842 S.E.2d 379, 387 (2020) (holding that "[m]ere silence by the person liable is not concealment, but there must be some affirmative act or representation designed to prevent, and which does prevent, the discovery of the cause of action.") (citations omitted). Plaintiff must show that a defendant concealed with the intent to "trick or artifice preventing, or calculated to hinder a discovery of the cause of action by the use of ordinary diligence, and mere silence is insufficient. There must be something actually said or done which is directly intended to prevent discovery."

Culpeper Nat'l Bank 119 Va. at 83-84. Similarly, the Fourth Circuit has interpreted fraudulent concealment as an "equitable doctrine that provides for tolling of a limitations period, [. . . to] prevent[] a defendant from concealing a fraud, or committing a fraud in a manner that it concealed itself until the defendant could plead the statute of limitations to protect it." *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535 (4th Cir. 2019). In the Fourth Circuit, fraudulent concealment applies "in situations where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action. *Id.* Accordingly, the Fourth Circuit long has held that to toll a limitations period based on fraudulent concealment, "a plaintiff must demonstrate: (1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, at 122 (4th Cir. 1995) (citing *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 555 (4th Cir. 1974)). *Id.* at 548 (4th Cir. 2019); *See, e.g., SD3 II LLC v. Black & Decker (US.) Inc.*, 888 F.3d 98, 107-08 (4th Cir. 2018); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 370 (4th Cir. 2014); *Go Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 178 (4th Cir. 2007).

In the instant matter, Studco alleges that 1st Advantage "concealed material facts of the fraud against Studco to hinder, frustrate and outright defeat Studco's attempts to recover its fraudulently transferred funds, thereby causing damage to Studco. . . ." ECF No. 39 at 18; *see also*, ECF No. 11 at ¶¶ 148-51, 153, 157, 159-60,

161. However, 1st Advantage asks this Court to dismiss this claim because 1st Advantage has merely remained silent on Studco's numerous requests to identify John Doe. *Id.* at ¶¶ 252-56, *see also*, ECF No. 36 at 12. That is, 1st Advantage argues that since it has not made "any affirmative misrepresentations or acts designed to conceal John Doe's identify from Studco," this claim should be dismissed. *Id.*

The Court finds that Studco has pleaded sufficient facts that, if proven true, could show that 1st Advantage has made several misrepresentations or affirmative acts designed to prevent the discovery of vital information to help Studco establish causes of actions against John Doe. *See Culpeper National Bank* 119 Va. 73, at 83-84. While Studco still bears the burden of showing that 1st Advantage acted with the intent to misrepresent, Studco has pleaded facts which support this reasonable inference. For example, Studco alleges that it made several requests in which 1st Advantage initially provided *some*, but not all, information concerning John Doe's identity, activity, and whereabouts but then refused to keep responding to Studco's additional inquiries. *See* ECF No. 11 at ¶ 9-14, 19, 21. If proven true, Studco could show that 1st Advantage's actions constitute an affirmative act or misrepresentation designed to prevent Studco from obtaining information to bring claims against John Doe.

H. Count VI: Civil RICO

Plaintiff alleges Civil RICO against 1st Advantage and John Doe, pursuant to 18 U.S. C. §§ 1961 *et seq.*

ECF No. 11 at ¶¶ 257-269. Generally, the elements of a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim are (1) a person, (2) an enterprise, (3) a pattern of (4) racketeering activity (5) which causes injury to the plaintiff. 18 U.S.C.A. § 1962 (a, c). "The injury and causation components [of element (5)] are viewed as standing requirements." *D'Addario v. Geller*, 264 F.Supp.2d 367, at 396 (E.D.Va. 2003); *see also*, *Williams v. Equity Holding Corp.*, 498 F. Supp. 2d 831, 840 (E.D. Va. 2007). The Supreme Court has explained that a civil RICO claim has four essential elements: "(1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity." *Whitney, Bradley & Brown, Inc. v. Kammermann*, 436 F. App'x 257, 258 (4th Cir. 2011). "Racketeering activity" includes mail and wire fraud. *See* 18 U.S.C.A. § 1961(1)(B). These elements are "demanding" because "Congress contemplated that only a party engaging in widespread fraud would be subject to RICO's serious consequences." *Goodrow v. Friedman & Macfadyen, P.A.*, 2012 U.S. Dist. LEXIS 182188, 2012 WL 6725617, at *9 (E.D. Va. Dec. 27, 2012); *see also Menasco, Inc. v. Wasserman*, 886 F.2d 681, 683 (4th Cir. 1989). For a pattern of racketeering activity to exist, "two or more predicate acts of racketeering must have been committed within a ten-year period." *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 181 (4th Cir. 2002). For this reason, RICO's remedies are not appropriate for "the ordinary run of commercial transactions." *Menasco, Inc.* at 683; *see also*, *ePlus Tech.*, 313 F.3d at 181 (noting that the pattern requirement is "designed to prevent RICO's harsh sanctions . . . from being applied to garden-variety fraud schemes"). Instead, "[w]e have reserved RICO

liability for 'ongoing unlawful activities whose scope and persistence pose a special threat to social well-being.'" *Al-Abood*, 217 F.3d at 238 (quoting *Menasco*, 886 F.2d at 684). Consequently, "simply proving two or more predicate acts is insufficient for a RICO plaintiff to succeed." *Id.* at 238. Instead, "a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc.*, 492 U.S. at 239, 109 S.Ct. 2893 *(emphasis added)*. Moreover, a plaintiff must "plead with particularity that any other persons were similarly harmed by Defendants' alleged fraud, and thus failed to show 'a distinct threat of long-term racketeering activity.'" *Foster v. Wintergreen Real Estate Co.*, 363 F. App'x 269, 274 (4th Cir. 2010) (quoting *H.J. Inc.*, 492 U.S. at 242, 109 S.Ct. 2893); *see also Menasco*, 886 F.2d at 684. Thus, "[i]n essence, the pattern requirement has been reduced to a 'continuity plus relationship' test." *ePlus Tech.*, 313 F.3d at 181; *see also*, *Foster v. Wintergreen Real Estate Co.*, 363 F. App'x 269, 273 (4th Cir. 2010). Additionally, if a RICO claim is based on alleged fraudulent activity, a plaintiff must also meet "the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires particularity for claims of fraud." *Solutions v. Krohn & Moss*, 2018 U.S. Dist. LEXIS 241829, 2018 WL 6790654, at *6 (E.D. Va. July 26, 2018).

In the instant matter, the Court finds that Studco has not met the heightened pleading requirement to allow the Court to reasonably infer that there is more than the mere plausibility that 1st Advantage is liable for a civil RICO claim. Although Plaintiff does allege that

1st Advantage and John Doe were "work[ing] together to syphon those funds, totally over $500,000 from the Personal Account by a series of patently fraudulent withdrawals," Plaintiff fails to satisfy the continuity plus relationship test. *See* ECF No. 11 at ¶ 260; *see also*, *ePlus Tech.*, 313 F.3d at 181. That is, Plaintiff does not plead with particularity that any other persons were harmed by John Doe's alleged fraudulent scheme, that the scheme was/is ongoing, or that 1st Advantage presents a "distinct threat of long-term racketeering activity." *Foster.*, 363 F. App'x at 274. Moreover, Plaintiff does not allege that 1st Advantage directed, managed, or conspired with John Doe to specifically orchestrate a long-term racketeering scheme to defraud Plaintiff and others. Rather Plaintiff consistently refers to the fraud as one organized by and perpetuated by John Doe. *See e.g.*, ECF No. 11 at ¶ 112, 116, 120-23, 125-27, 146-47.

Therefore, Count VI against 1st Advantage is **dismissed with prejudice**.

I. Count VII: Money Had and Received

Plaintiff alleges Money Had and Received against 1st Advantage. *Id.* at ¶¶ 270-275. In Virginia, "an action of Money Had and Received exists whenever one has money of another which he has no right to retain and which defendant is obligated by natural justice and equity to refund." *Hartford Fire Ins. Co. v. First Union Natl. Bank*, 45 Va. Cir. 279 (1998) (citing *Shores v. Shaffer*, 206 Va. 775, 146 S.E.2d 190 (1966)); *see also*, *Robertson v. Robertson*, 137 Va. 378, 119 S.E. 140 (1923). Moreover, federal and

state courts in Virginia have held that a cause of action for Money Had and Received is indistinguishable from Conversion, codified at Va.Code § 8.3A-420. *See State of Qatar v. First Am. Bank of Virginia*, 880 F. Supp. 463, 467 (E.D. Va. 1995) (holding "the two torts are quite similar. Because whatever difference exists does not affect the disposition of this action, the Court will refer to the action as one simply for conversion.").

As noted above in Section III.D, the Court dismissed Plaintiff's claim of Conversion of Instrument against 1st Advantage (Count II) because Studco is barred by VA Code Ann. § 8.3A-420 from bringing forth a claim of Conversion of Instrument. Therefore, Count VII against 1st Advantage is also **dismissed with prejudice**.

J. Count VIII: Prima Facie Tort

Plaintiff alleges prima facie tort against 1st Advantage. ECF No. 11 at ¶¶ 276-283. The Court finds that the Commonwealth of Virginia does not recognize prima facie tort as a valid cause of action. *See Unlimited Screw Prod., Inc. v. Malm*, 781 F. Supp. 1121, 1130 (E.D. Va. 1991) *(citing Meadow Ltd. Partnership v. Heritage Say. & Loan Ass'n*, 639 F.Supp. 643, 653 (E.D.Va. 1986) (holding that "the Virginia Supreme Court has not recognized these various claims [including prima facie tort].").

Therefore, Count VIII against 1st Advantage is **dismissed with prejudice**.

IV. CONCLUSION

Plaintiff pleaded sufficient facts to state a claim to allow this Court to draw reasonable inferences that relief is plausible on its face for Counts I, III, and V against 1st Advantage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Accordingly, Counts II, IV, VI, VII, and VIII are dismissed with prejudice as to 1st Advantage. Moreover, all claims asserted against John Doe are dismissed without prejudice.

Based on the foregoing reasons, Defendant 1st Advantage's Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART.**

The Court **DIRECTS** the Clerk to provide a copy of this Order to the parties.

IT IS SO ORDERED.

Norfolk, Virginia
December 18, 2020

/s/ Raymond A. Jackson
Raymond A. Jackson
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED APRIL 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1148 (L)
(2:20-cv-00417-RAJ-LRL)

STUDCO BUILDING SYSTEMS US, LLC,

Plaintiff-Appellee,

v.

1ST ADVANTAGE FEDERAL CREDIT UNION,

Defendant-Appellant.

THE CLEARING HOUSE ASSOCIATION, LLC; NACHA; THE VIRGINIA CREDIT UNION LEAGUE; THE NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS; THE CREDIT UNION NATIONAL ASSOCIATION,

Amici Supporting Appellant.

Appendix F

No. 23-1766
(2:20-cv-00417-RAJ-LRL)

STUDCO BUILDING SYSTEMS US, LLC,

Plaintiff-Appellant,

v.

1ST ADVANTAGE FEDERAL CREDIT UNION,

Defendant-Appellee.

THE CLEARING HOUSE ASSOCIATION, LLC; NACHA; THE VIRGINIA CREDIT UNION LEAGUE; THE NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS; THE CREDIT UNION NATIONAL ASSOCIATION,

Amici Supporting Appellee.

Filed April 22, 2025

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40 on the petition for rehearing en banc.

Appendix F

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer, and Judge Wynn.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX G — RELEVANT STATUTORY PROVISIONS INVOLVED

Unif.Commercial Code § 1-202. Notice; Knowledge.

(a) Subject to subsection (f), a person has "notice" of a fact if the person:

(1) has actual knowledge of it;

(2) has received a notice or notification of it; or

(3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists.

(b) "Knowledge" means actual knowledge. "Knows" has a corresponding meaning.

(c) "Discover", "learn", or words of similar import refer to knowledge rather than to reason to know.

(d) A person "notifies" or "gives" a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.

(e) Subject to subsection (f), a person "receives" a notice or notification when:

(1) it comes to that person's attention; or

(2) it is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

Appendix G

Unif.Commercial Code § 4A-207.
Misdescription of Beneficiary.

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

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

> (1) Except as otherwise provided in subsection (c), if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.
>
> (2) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(c) If (i) a payment order described in subsection (b) is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1), the following rules apply:

> (1) If the originator is a bank, the originator is obliged to pay its order.
>
> (2) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a (S.) writing record stating the information to which the notice relates.

(d) In a case governed by subsection (b)(1), if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:

Appendix G

(1) If the originator is obliged to pay its payment order as stated in subsection (c), the originator has the right to recover.

(2) If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover.

Appendix G

Unif.Commercial Code § 4A-402.
Obligation of Sender to Pay Receiving Bank.

(a) This section is subject to Sections 4A-205 and 4A-207.

(b) With respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order.

(c) This subsection is subject to subsection (e) and to Section 4A-303. With respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of that sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order.

(d) If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided in Sections 4A-204 and 4A-304, interest is payable on the refundable amount from the date of payment.

(e) If a funds transfer is not completed as stated in subsection (c) and an intermediary bank is obliged to

refund payment as stated in subsection (d) but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in Section 4A-302(a)(1), to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in subsection (d).

(f) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) or to receive refund under subsection (d) may not be varied by agreement.