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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ATTISHA ENTERPRISES, INC., a
12 corporation,

13 Plaintiff,

14 v.

15 CAPITAL ONE, N.A.; DOES 1 to 25,
16 inclusive,

17 Defendants.

Case No.: 3:20-cv-01366-BEN-RBB

**ORDER GRANTING MOTION TO
DISMISS**

[ECF No. 7]

18 This matter comes before the Court on Defendant Capital One, N.A.'s ("Capital
19 One") Motion to Dismiss the Complaint filed by Plaintiff Attisha Enterprises, Inc.
20 ("Attisha Enterprises"). As specific state laws apply to these allegations that displace the
21 pleaded common law claims, the motion to dismiss is **granted with leave to amend**.

22 **I. BACKGROUND¹**

23 On March 12, 2020, Attisha Enterprises filed suit against Capital One in San Diego
24 County Superior Court alleging common law claims of negligence, conversion, and
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27 ¹ The following overview of the facts is drawn from the Complaint, ECF No. 1-2, which
28 the Court assumes true in analyzing Capital One's motion to dismiss. *Erickson v. Pardus*,
551 U.S. 89, 94 (2007). The Court is not making factual findings.

1 money had and received. Compl., ECF No. 1-2. Capital One was served with the
2 Summons and Complaint on June 19, 2020, and timely removed the action to this Court
3 on July 17, 2020. ECF No. 1. Capital One thereafter filed this motion to dismiss. ECF
4 No. 7.

5 The claims here involve a wire transfer. On or about May 14, 2018, Attisha
6 Enterprises entered into a purchase agreement to buy the Sweetwater 24/7 Convenience
7 Store and Chevron Gas Station. Compl., ECF No. 1-2, ¶ 9. The parties to the purchase
8 agreement opened escrow with TICOR Title Company of California (“TICOR”). *Id.* As
9 part of the purchase agreement, Attisha Enterprises was to deposit \$100,000.00 to be held
10 in escrow by TICOR. *Id.* at ¶ 10.

11 On September 27, 2018, Attisha Enterprises received fraudulent wire instructions
12 from the unnamed Defendants,² who were fraudsters using the name TICOR Title
13 Company of California and a Capital One account number. *Id.* Attisha Enterprises
14 caused \$100,000.00 to be wired from its account to the fraudsters’ account at Capital One
15 because it did not know these instructions were fraudulent and not from TICOR. *Id.* at ¶
16 11. Capital One accepted the wire transfer. *Id.* at ¶ 12.

17 Some time later, Attisha Enterprises realized the wire instructions were fraudulent
18 and contacted Capital One. *Id.* at ¶ 13. It requested that Capital One not release the
19 funds. *Id.* Nonetheless, Capital One allowed the account owner, who was not TICOR, to
20 withdraw the majority of the funds. *Id.* The Complaint is unclear about when Attisha
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22 ² Naming “Doe” defendants implicates Rule 4 of the Federal Rules of Civil Procedure,
23 which requires service of the complaint. *See Keavney v. Cty. of San Diego*, No. 19-cv-
24 1947-AJB-BGS, 2020 WL 4192286, at *4-5 (S.D. Cal. Jul. 21, 2020) (noting that “it is
25 effectively impossible for the United States Marshal or deputy marshal to fulfill his or her
26 duty to serve an unnamed defendant”); *see also* Fed. R. Civ. P. 4(m) (providing that “[i]f
27 a defendant is not served within 90 days after the complaint is filed, the court—on motion
28 or on its own after notice to the plaintiff—must dismiss the action without prejudice
against that defendant or order that service be made within a specified time.”). More than
100 days have passed since the complaint was filed. Therefore, Attisha Enterprises is
hereby cautioned the Doe defendants will be dismissed without prejudice if those
defendants are not served within thirty days of this Order.

1 Enterprises realized the wire instructions were fraudulent, when and how it notified
2 Capital One of the issue, and when the fraudsters withdrew most of the funds. Attisha
3 Enterprises alleges that \$25,000.00 remains in the account, but that Capital One refuses to
4 return the funds to Attisha Enterprises. *Id.*

5 Attisha Enterprises alleges Capital One had “actual knowledge” the account
6 holders were not in fact TICOR based on Capital One’s internal procedures for opening a
7 business account. *Id.* at ¶ 8. It argues Capital One owed a duty of care to Attisha
8 Enterprises to not “allow persons or entities to open accounts in the name of another
9 person or entity known not to actually be that person or entity” and that Capital One
10 breached that duty by accepting and depositing the wire transfer in the numbered account.
11 *Id.* at ¶¶ 15-16. Attisha Enterprises further alleges that once it notified Capital One of the
12 fraudulent wire instructions, Capital One was obligated to return the funds but did not do
13 so. *Id.* at ¶ 22.

14 **II. LEGAL STANDARD**

15 A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal
16 theory or absence of sufficient alleged facts under a cognizable legal theory. *Johnson v.*
17 *Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Navarro v. Block*, 250
18 F.3d 729, 732 (9th Cir. 2001). When considering a Rule 12(b)(6) motion, the Court
19 “accept[s] as true facts alleged and draw[s] inferences from them in the light most
20 favorable to the plaintiff.” *Stacy v. Rederite Otto Danielsen*, 609 F.3d 1033, 1035 (9th
21 Cir. 2010). A plaintiff must not merely allege conceivably unlawful conduct but must
22 allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp.*
23 *v. Twombly*, 550 U.S. 544, 570 (2007). “A claim is facially plausible ‘when the plaintiff
24 pleads factual content that allows the court to draw the reasonable inference that the
25 defendant is liable for the misconduct alleged.’” *Zixiang Li v. Kerry*, 710 F.3d 995, 999
26 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “Threadbare
27 recitals of the elements of a cause of action, supported by mere conclusory statements, do
28 not suffice.” *Iqbal*, 556 U.S. at 678.

1 If a court dismisses a complaint, it may grant leave to amend unless “the pleading
2 could not possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe, Inc.*
3 *v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

4 **III. ANALYSIS**

5 Attisha Enterprises alleges common law claims for negligence, conversion, and
6 money had and received. *See generally* Compl., ECF No. 1-2. Capital One argues that
7 all claims are barred by Uniform Commercial Code Article 4A, codified at Division 11 of
8 the California Commercial Code, and that even if some claims are not barred the
9 Complaint contains insufficient factual allegations to plausibly state a claim for relief.
10 Mot., ECF No. 7, 1-2. The Court examines each claim in turn.

11 **A. Negligence**

12 Attisha Enterprises’ first claim alleges negligence. Compl., ECF No. 1-2, ¶¶ 14-
13 19. The elements of a negligence claim are (1) the existence of a duty to exercise due
14 care; (2) breach of that duty; (3) causation; and (4) damage. *See, e.g., Merrill v. Navegar,*
15 *Inc.*, 26 Cal. 4th 465, 500 (Cal. 2000). However, the negligence claim alleges three
16 separate negligent acts. “A party may set out 2 or more statements of a claim or defense
17 alternatively or hypothetically, either in a single count or defense or in separate ones.”
18 Fed. R. Civ. P. 8(d)(2). “If a party makes alternative statements, the pleading is sufficient
19 if any one of them is sufficient.” *Id.* Accordingly, the Court evaluates each alleged
20 negligent act and determines whether any one of those allegations is sufficient to
21 withstand the motion to dismiss. Because, as set out below, each allegedly negligent act
22 is insufficient in at least one respect, the Court dismisses the negligence claim without
23 prejudice.

24 **1. Negligent Account Opening**

25 Attisha Enterprises first alleges Capital One negligently allowed an entity that was
26 not TICOR to open an account in TICOR’s name. *See* Compl., ECF No. 1-2, ¶ 15
27 (“Capital One had a duty of care and obligation to Plaintiff and other members of the
28 public not to allow persons or entities to open accounts in the name of another person or

1 entity known not to actually be that person or entity”). Capital One argues this common
2 law claim is displaced by the California Commercial Code. Mot., ECF No. 7, 4-7.
3 Alternatively, Capital One argues California law does not impose on banks a duty of care
4 towards noncustomers, and thus, the allegation fails to state a cognizable legal theory for
5 recovery. *Id.* at 7-8.

6 “The California Uniform Commercial Code does not automatically displace all
7 other legal principles.” *Zengen, Inc. v. Comerica Bank*, 41 Cal. 4th 239, 247 (Cal. 2007).
8 Instead, it provides that “[u]nless displaced by the particular provisions of this code, the
9 principles of law and equity, including the law merchant and the law relative to capacity
10 to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion,
11 mistake, bankruptcy, or other validating or invalidating cause shall supplement its
12 provisions.” *Id.* (quoting Cal. Com. Code § 1103). Thus, a plaintiff may bring a cause of
13 action for negligence, conversion, or money had and received “unless some particular
14 provisions of the California Uniform Commercial Code [has] displaced them.” *Id.*

15 Capital One argues this claim arises from a wire transfer that Capital One allegedly
16 should not have executed. Mot., ECF No. 7, 3-4. Common law claims involving wire
17 transfers, Capital One contends, are displaced by the duties, allocation of risk, and
18 remedies available in the California Commercial Code. *Id.*

19 However, at least with respect to the alleged fraudsters’ opening of an account with
20 Capital One, the California Commercial Code provisions regarding wire transfers do not
21 apply. Section 11104 applies to “funds transfer[s],” defined as “the series of transactions,
22 beginning with the originator’s payment order, made for the purpose of making payment
23 to the beneficiary of the order.” Cal. Com. Code § 11104(a). Nothing in that section
24 applies to opening an account Capital One allegedly knew was being created in a
25 fraudulent name. Accordingly, this allegedly negligent act is not displaced by the
26 California Commercial Code.

27 Turning to the factual sufficiency of the allegations, Capital One correctly notes
28 that in California, “absent extraordinary and specific facts, a bank does not owe a

1 fiduciary duty of care to a noncustomer.” *Software Design & Application, Ltd. v. Hoefer*
2 *& Arnett, Inc.*, 49 Cal. App. 4th 472, 479 (Cal. Ct. App. 1996). Even “[v]iolation of a
3 self-imposed rule does not create actionable negligence unless plaintiff (1) suffers the
4 type of harm sought to be prevented by the rule and (2) is a member of the class of people
5 for whose protection the rule was promulgated.” *Id.* at 482 (citing *Fireman’s Fund Ins.*
6 *Co. v. Security Pacific Nat. Bank*, 85 Cal. App. 3d 797, 829 (Cal. Ct. App. 1978)).
7 However, “this general proposition of non-liability is far from a per se rule.” *Bear*
8 *Stearns and Co. v. Buehler*, 23 Fed. App’x 773, 776 (9th Cir. 2001). If the circumstances
9 surrounding the opening of the accounts were suspicious as to trigger a duty to
10 investigate a potentially phony account, such a duty to investigate a suspicious account
11 opening may arise. *Cf. Software Design*, 49 Cal. App. 4th at 482 (finding “the
12 circumstances surrounding the opening of the accounts were not so suspicious as to
13 trigger a duty to investigate the phony partnership for the benefit of strangers,” which
14 implicitly acknowledges some circumstances could give rise to such a duty).

15 Here, Attisha Enterprises generally alleges that Capital One has internal procedures
16 that require certain documents be produced to prove identity when opening an account.
17 Compl., ECF No. 1-2, ¶ 6. It further alleges “Capital One allowed Defendants Does 1 to
18 25 to open an account in the name of ‘TICOR Title Company of California’ . . . [despite
19 having] actual knowledge that the person or entity opening this account was not in fact
20 the entity known as ‘TICOR Title Company of California.’” *Id.* at ¶ 8. However, the
21 Complaint contains no allegations about what circumstances were suspicious such that a
22 duty to investigate may have been triggered. It also contains no allegations about what
23 the alleged internal procedures were or what they require.

24 The failure to allege facts supporting suspicious circumstances places the claim
25 within the general set of cases findings banks do not owe a duty of care to noncustomers.
26 *See Software Design*, 49 Cal. App. 4th at 479. Without those allegations of suspicious
27 circumstances, no duty can arise. Accordingly, as pleaded, this allegedly negligent act is
28 insufficient to survive the motion to dismiss. However, Attisha Enterprises is granted

1 leave to amend. *See* Fed. R. Civ. P. 15(a)(2) (“The court should freely give leave [to
2 amend] when justice so requires”).

3 **2. Negligent Acceptance of Wire Transfer**

4 Attisha Enterprises also alleges Capital One negligently accepted and deposited its
5 funds transfer in an account not held in TICOR’s name. Compl., ECF No. 1-2, ¶ 16
6 (“Capital One negligently accepted, deposited Plaintiff’s wire [t]ransfer to Capital One
7 account number 1361414587 in the sum of \$100,000.00, which account was not in
8 TICOR’s name”). Capital One again argues this claim is displaced by the California
9 Commercial Code. Mot., ECF No. 7, 4-7.

10 As discussed above, “[t]he California Uniform Commercial Code does not
11 automatically displace all other legal principles.” *Zengen, Inc.*, 41 Cal. 4th at 251.
12 However, where a particular provision of the code displaces a common law cause of
13 action, “it applies to the exclusion of other legal principles giving rise to other causes of
14 action.” *Id.*

15 “[D]ivision 11 of the California [Uniform Commercial] Code applies to ‘funds
16 transferred [as] defined in Section 11104.’” *Id.* Section 11104 defines “funds transfer”
17 as “the series of transactions, beginning with the originator’s payment order, made for the
18 purpose of making payment to the beneficiary of the order.” Cal. Com. Code § 11104(a).
19 The Parties do not dispute that the wire transfer here is a funds transfer within the
20 meaning of the statute. Mot., ECF No. 7, 7; Opp’n, ECF No. 8, 5; *see also Sliders*
21 *Trading Co. L.L.C. v. Wells Fargo Bank NA*, Case No. 17-CV-04930-LB, 2017 WL
22 6539843, at *6 (N.D. Cal. Dec. 21, 2017) (finding that a similar wire transfer was also a
23 funds transfer within the meaning of Cal. Com. Code § 11104).

24 On occasion, and as alleged here, a wire transfer is sent to the wrong beneficiary.
25 These situations are governed by California Commercial Code Section 11207, which
26 provides that in general, a bank cannot accept a wire transfer order if “the name, bank
27 account number, or other identification of the beneficiary refers to a nonexistent or
28 unidentifiable person or account.” Cal. Com. Code § 11207(a). The consequences for

1 failure to abide by this provision are set forth in Section 11201 et seq., defining the
2 “respective rights, duties, and liabilities of the parties upon the issuance and acceptance
3 of a payment order [constituting a funds transfer].” *Zengen, Inc.*, 41 Cal. 4th at 254
4 (citations omitted). Capital One argues the Complaint, as pleaded, imposes a duty of
5 ordinary care that is not the same as the duty imposed on Capital One by Section 11207.
6 Mot., ECF No. 7, 9-10.

7 The Court agrees, and an example illustrates the issue. Attisha Enterprises’
8 negligence claim alleges Capital One owed “a *duty of ordinary care* to refuse to allow
9 wire transfers naming as the true beneficiary TICOR to be transferred into an account
10 held by a person or entity that was not TICOR.” Compl., ECF No. 1-2, 5, ¶ 15 (emphasis
11 added). This misstates Capital One’s obligations under Section 11207. Instead, Section
12 11207 states that Capital One would be liable if it “knew” the account name and number
13 refer to different persons. Cal. Com. Code § 11207(b)(1). There is no requirement
14 Capital One exercise “ordinary care” in making this determination. *Id.* Attisha
15 Enterprises implicitly recognizes this in its Opposition, arguing the Commercial Code
16 allows for a statutory claim of negligence under the facts alleged. ECF No. 8, 6.
17 However, the statutory claim available is not a common law negligence claim, and it “is
18 axiomatic that the complaint may not be amended by the briefs.” *Doe v. Wolf*, 432 F.
19 Supp. 3d 1200, 1215 (S.D. Cal. 2020).

20 Given that the wire transfer alleged here was a funds transfer within the meaning
21 of the California Commercial Code, which sets forth duties, allocation of risk, and
22 remedies that displace common law causes of action in the circumstances applicable here,
23 Attisha Enterprises’ common law claim alleging Capital One negligently allowed the
24 wire transfer is dismissed. Again, Attisha Enterprises is granted leave to amend.

25 3. Negligent Release of Funds

26 Attisha Enterprises’ final negligence theory alleges Capital One negligently
27 released the transferred funds to the account holder, even though that account holder is
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1 not TICOR. Compl., ECF No. 6, ¶ 16. Capital One again argues this claim is displaced
2 by the California Commercial Code. Mot., ECF No. 7, 4-7.

3 The same analysis applicable to Capital One’s allegedly negligent acceptance of
4 the wire transfer applies to its allegedly negligent release of those funds. Because this
5 negligent act directly involves a funds transfer, the claim must arise under division 11 of
6 the California Commercial Code, not common law negligence. *See BITH, LLC v.*
7 *Downey Sav. and Loan Ass’n, F.A.*, 2010 WL 3404711, at *7 (Cal. Ct. App. Aug. 31,
8 2010).³ Accordingly, Attisha Enterprises may “prepare and file a new [claim] predicated
9 on division 11, specifically section 11207.” *Id.*

10 **B. Conversion**

11 Attisha Enterprises’ second claim alleges conversion. Compl., ECF No. 1-2, ¶¶
12 20-25. Attisha Enterprises alleges Capital One and the unknown Defendants acquired
13 possession of approximately \$100,000.00 belonging to Attisha Enterprises and refuse to
14 return it. *Id.* at ¶ 22. Capital One and the unknown Defendants allegedly acquired the
15 money through the funds transfer detailed above. *Id.*

16 Capital One argues Attisha Enterprises’ conversion claim must likewise be
17 dismissed because *as applied to Capital One*, it is displaced by the California
18 Commercial Code. Mot., ECF No. 7, 13-14. Once again, the Court agrees.

19 Here, the gravamen of Attisha Enterprises’ conversion claim against Capital One is
20 that it should not have accepted and deposited the wire transfer in the numbered account.
21 Compl., ECF No. 1-2, ¶¶ 15-16. Attisha Enterprises further alleged that once it notified
22 Capital One of the fraudulent wire instructions, Capital One was obligated to return the
23 funds and did not do so. *Id.* at ¶ 22. As with the acceptance of the wire transfer and
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26 ³ The Court notes that *BITH, LLC*, is an unpublished decision of the California Court of
27 Appeal, but it can cite such cases as persuasive authority. *See Nunez by Nunez v. City of*
28 *San Diego*, 114 F.3d 935, 942 n.4 (9th Cir. 1997). The Court does so here because the
facts in *BITH, LLC* describe the deficiency of a negligence claim involving a funds
transfer and the appropriate claim to plead under the California Commercial Code.

1 release of funds discussed above, Capital One’s obligations rise and fall with the
2 California Commercial Code. A common law conversion may have occurred, but not by
3 Capital One.

4 Accordingly, the conversion claim is dismissed as to Capital One.

5 **C. Money Had and Received**

6 Attisha Enterprises’ third claim alleges money had and received, another common
7 law claim. Capital One argues the money had and received claim suffers from the same
8 factual deficiency as the conversion claim and is a common count of the previous claims.
9 For the reasons set forth above analyzing conversion, the Court agrees Attisha
10 Enterprises’ money had and received claim against Capital One is displaced by the
11 California Commercial Code.

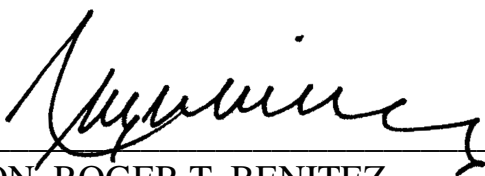
12 Accordingly, the money had and received claim is dismissed as to Capital One.

13 **IV. CONCLUSION**

14 Defendant’s Motion to Dismiss is **granted without prejudice**. Plaintiff may file
15 an amended complaint within 14 days of this order. Plaintiff may not add other parties
16 without seeking leave from this Court.

17 **IT IS SO ORDERED.**

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19 Date: December 7, 2020

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HON. ROGER T. BENITEZ
United States District Judge