EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT SOUTH CAROLINA
CHARLESTON DIVISION

AMANDA B. CONAWAY, *individually and on behalf of others similarly situated*, Plaintiff, v. BANK OF AMERICA, N.A.*,* Defendant.	Civil Action No. 2:22-cv-1387-BHH **ORDER**

This matter is before the Court on Defendant Bank of America, N.A.'s ("Defendant" or "Bank of America") motion to dismiss Plaintiff's class action complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 9.) In her complaint, Plaintiff Amanda Conaway ("Plaintiff" or "Conaway") asserts causes of action for: (1) violations of the Electronic Fund Transfer Act ("EFTA") and its implementing regulation, Regulation E, 12 C.F.R. § 1005, *et seq.* ("Reg E"); (2) breach of contract; (3) breach of implied contract; (4) negligence and negligence per se; and (5) negligent hiring, retention, and supervision. (ECF No. 1.) For the reasons set forth below, the Court grants Defendant's motion.

BACKGROUND

Accepting as true the allegations in Plaintiff's complaint, Plaintiff is a South Carolina resident who began receiving unemployment benefits from the South Carolina Department of Employment and Workforce ("DEW") in May of 2020. (ECF No. 1 ¶ 60.) DEW retained Bank of America to deliver benefits to South Carolina residents by issuing a prepaid debit card ("DEW Debit Card") to each recipient ("Cardholder") whom DEW has approved for benefits. (*Id.* ¶ 2.) DEW then distributed unemployment benefits by funding the DEW Debit Cards that Bank of America issued. (*Id.* ¶¶ 12-13, 15.)

An Account Agreement between Bank of America and each Cardholder governs the Cardholder's contractual relationship with Bank of America ("Agreement"). (*See id.* ¶ 33; ECF No. 9-2, Ex. 1.) Section 2 of the Agreement states: "If we suspect irregular, unauthorized, or unlawful activities may be involved in your Account, we may 'freeze' (or place a hold on) the balance pending an investigation of such suspected activities." This Section further explains: "If funds to which you are not entitled are deposited to your Account by mistake or otherwise, we may deduct those funds from your Account." Likewise, Section 3 of the Agreement states: "[W]e may restrict access to your Card if we notice suspicious activity." (ECF No. 9-2.)

According to Plaintiff's complaint, at an unspecified time, Bank of America "illegally froze her account due to suspected fraud; however, she states fraud never occurred on her account." (ECF No. 1 ¶ 60.) Plaintiff further alleges that she "called Bank of America to report the error on her account and clarify Bank of America froze her account without authorization." (*Id.* ¶ 61.) Plaintiff asserts that Bank of America told her that DEW needed to "resolve her issue as DEW oversaw her account." (*Id.*) According to Plaintiff, Bank of America "unfroze her account and granted her access again" three weeks later. (*Id.* ¶¶ 61-62.)

STANDARD OF REVIEW

"A Rule 12(b)(1) motion for lack of subject matter jurisdiction raises the fundamental question of whether a court has jurisdiction to adjudicate the matter before it." *Career Counseling, Inc. v. Amerifactors Fin. Grp., LLC*, 2017 WL 4269458, at *2 (D.S.C. Sept. 26, 2017). "Standing implicates the court's subject matter jurisdiction and is governed by Rule 12(b)(1)." *Id.* "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

To survive a motion to dismiss under Rule 12(b)(6), the complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Peirce v. Bryant*, 2015 WL 5474803, at *1 (D.S.C. Sept. 17, 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In other words, to "show that the plaintiff is 'entitled to relief,' the complaint must provide 'more than labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). When evaluating a motion to dismiss under Rule 12(b)(6), the Court "accepts all well-pled facts as true," but "'legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement' do not qualify as well pled facts." *Id.* (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 2555 (4th Cir. 2009)). Moreover, where a plaintiff pleads "facts that are merely consistent with a defendant's liability"—*i.e.*, "where the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct"—the complaint must be dismissed. *Id.* (quoting *Iqbal*, 556 U.S. at 679).

DISCUSSION

The Court evaluates Plaintiff's claims based on the conduct *she* allegedly experienced—namely, a three-week period in which she asserts that "Bank of America illegally froze her account due to suspected fraud" even though "fraud never occurred on her account." (ECF No. 1 ¶¶ 60-62.) Importantly, although Plaintiff asserts that Bank of

America failed to prevent fraud from occurring on *other* Cardholders' accounts and further failed to properly respond to such fraud, Plaintiff alleges that she herself did not experience fraud. (*Id.* ¶ 60). Because Plaintiff does not allege experiencing any fraudulent or unauthorized transactions, the Court finds that Plaintiff lacks standing to bring any claims based on injuries related to alleged deficiencies in Bank of America's fraud prevention or remediation measures. In other words, although Plaintiff seeks to bring this action on behalf of a putative class, "even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 338 n.6 (2016) (internal quotations omitted); *see also Rogers v. U.S. Dep't of Health & Human Servs.*, 466 F. Supp. 3d 625, 638 (D.S.C. 2020) (explaining that to establish standing a plaintiff must allege a "concrete" injury "particularized to that plaintiff").

Here, Plaintiffs' negligence, negligent hiring, and implied contract claims are premised entirely on allegations that Bank of America failed to prevent or remediate fraud (ECF No. 1 ¶¶ 86-92 (negligence); ¶¶ 94-100 (negligent hiring); ¶¶ 112-118 (implied contract)); however, because Plaintiff does not allege that she sustained any injury as a result of fraud, as explained above, the Court finds these claims subject to dismissal pursuant to Rule 12(b)(1) due to Plaintiff's lack of standing. Likewise, the Court finds that Plaintiff lacks standing to assert any EFTA or contract theory that is premised on allegations surrounding fraud; thus, those theories likewise fail under Rule 12(b)(1).

Furthermore, the Court agrees with Defendant that Plaintiff's claims are also subject to dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

First, Plaintiff's EFTA/Reg E claim fails because she does not allege any fraudulent or unauthorized transaction governed by EFTA. *See Hardin v. Bank of Am., N.A.*, 2022 WL 3568568, at *3 (E.D. Mich. Aug. 18, 2022) (dismissing plaintiff's EFTA claim where "she never experienced fraud"). Stated plainly, an account freeze is not an "error" as that term is defined in EFTA and Reg E, and EFTA/Reg E do not prohibit or place any limitations on a financial institution's ability to freeze an account. *See id.* ("EFTA does not regulate account freezes; it regulates electronic fund transfers . . . [a]nd the regulation does not define account freezes as an 'error' covered under the EFTA.") (citation omitted); *see also* 12 C.F.R. § 1005.11(a)(1) (defining "error"). Additionally, Plaintiff does not allege an error under 15 U.S.C. § 1693f(f)(6), which defines error to include requests for "additional information or clarification concerning an electronic fund transfer" or documentation required by EFTA.

Next, Plaintiff's claims for breach of the Account Agreement and the accompanying implied covenant of good faith and fair dealing also fail as a matter of law. As an initial matter, Plaintiff's theory that Bank of America failed to investigate and reimburse fraud fails because she alleges that she never experienced any fraud, and the contract does not require Bank of America to take any action when fraud has not occurred or been reported. Furthermore, with respect to Plaintiff's theory that her account freeze breached the Agreement, Section 2 expressly allows Bank of America to freeze an account if it "suspects[s] irregular, unauthorized, or unlawful activities may be involved," which is precisely what Plaintiff alleges that Bank of America did—*i.e.*, "froze her account *due to suspected fraud*." (ECF No. 1 ¶ 60 (emphasis added).) *See Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 595, 599 (4th Cir. 2004) (finding no breach of either contract or implied covenant where contract "authorized [party] to act as it did"). Likewise, Plaintiff's theory that there was a breach because Bank of America froze her account "without a reasonable basis" and "beyond the length of time necessary for a reasonable investigation" fails to state a claim because the Agreement does not contain any such requirements. *See Hardin*, 2022 WL 3568568, at *5 (explaining that an analogous contract "included no 'reasonable basis' requirement to freeze the account," and "no such limit for how long [Bank of America] can freeze accounts"). Here, Bank of America simply needed a "suspicion" of fraud to freeze an account, and that is precisely what Plaintiff asserts Bank of America had. (ECF No. 1 ¶ 60.) Finally, Plaintiff has not stated a breach of contract claim based on the theory that, by freezing her account, Bank of America failed to make funds available as instructed by DEW, because the Agreement expressly permits Bank of America to freeze accounts.

As to Plaintiff's implied contract claim, the Court finds that it fails on three independent bases. First, Plaintiff's implied contract theory is premised on Bank of America's alleged failure to adequately prevent and resolve fraud, (ECF No. 1 ¶ 113), but, as explained above, Plaintiff specifically alleges that she did not experience any fraud. Second, "there can be no implied contract on a point fully covered by an express contract and in direct conflict therewith." *Palmetto Health Credit Union v. Open Sols. Inc.*, 2010 WL 2710551, at *4 (D.S.C. July 7, 2010). In other words, an implied contract theory cannot be used to impose additional obligations not contained in the express contract, such as the issuance of debit cards with specific technology. Third, it appears that Plaintiff effectively abandoned her implied contract claim by failing to respond to Bank of America's motion to dismiss on that claim. *See Vaughan v. United States*, 2021 WL

4993537, at *5 n.1 (D.S.C. Oct. 27, 201).

Next, with respect to Plaintiff's negligence claims (for negligence, negligence per se, and negligent hiring, retention, and supervision), the Court likewise finds that they fail for three reasons (in addition to standing, as noted above). First, Plaintiff has failed to state a claim based on a failure to prevent or remediate fraud because she alleges she never experienced fraud, and there is neither a breach of any duty nor causation based on her allegations. *See Bishop v. S.C. Dep't of Mental Health*, 502 S.E.2d 78, 83 (S.C. 1998) (stating that "[n]egligence is not actionable unless it is a proximate cause of the injury"). Additionally, Plaintiff appears to have waived the causation argument by not responding to it. *See Vaughan*, 2021 WL 4993537, at *5 n.1.

Second, even if Plaintiff had experienced fraud, there is no tort duty to support a negligence-based claim. "In South Carolina, a bank does not owe customers a 'special duty of care' based purely on his or her status as a customer." *Toney v. LaSalle Bank Nat. Ass'n*, 896 F. Supp. 2d 455, 480 (D.S.C. 2012), *aff'd*, 512 F. App'x 363 (4th Cir. 2013). In other words, negligence-based claims cannot be premised "upon the breach of a contractual duty." *Duncan v. Cent. Loan Admin & Reporting*, 2020 WL 5913519, at *2 (D.S.C. Oct. 6, 2020).

Third, Plaintiff has not alleged facts to support a claim for negligent hiring, supervision, and retention because she does not allege that Bank of America "knew or should have known that its employment of a specific person created an undue risk of harm to the public." *James v. Kelly Trucking Co.*, 661 S.E.2d 329, 330 (S.C. 2008). That is, Plaintiff's general allegation that Bank of America's "agent . . . negligently hired *hundreds* if not *thousands* of employees" who were not provided "proper training or supervision" does not state a claim for negligent hiring. *See id.* (*See also* ECF No. 1 ¶ 95 (emphasis added).) Finally, "[t]here is no statute or common law precedent in South Carolina that requires employers to conduct background checks on employees." *Kirk v. Mumford, Inc.*, 2006 WL 7285832, at *3 n.2 (S.C. Ct. App. Apr. 4, 2006).

Ultimately, after consideration, the Court finds that no amendment could cure the deficiencies in Plaintiff's complaint, as her claims all fail as a matter of law. Further, the Court finds that Plaintiff cannot cure the standing and pleading deficiencies with respect to any claim or theory premised on a failure to prevent or remediate fraud, as Plaintiff affirmatively alleges that she did not experience any fraud. As a result, the Court finds that Plaintiff's complaint is subject to dismissal with prejudice. *See Curtis v. Nix*, 2019 WL 1995344, at *1 (D.S.C. May 6, 2019) (dismissing with prejudice claims that "fail as a matter of law," such that "no amendment could cure the complaint's defects").

CONCLUSION

For the reasons set forth above, the Court grants Defendant's motion to dismiss (ECF No. 9) and dismisses this action with prejudice pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

/s/Bruce H. Hendricks
United States District Court Judge

March 23, 2023
Charleston, South Carolina