



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CONTINENTAL FINANCE
COMPANY, LLC,

Plaintiff-Below/Appellant,

v.

TD BANK NATIONAL
ASSOCIATION,

Defendant-Below/Appellee.

No. 613, 2018

Court Below:

New Castle County Superior Court
C.A. No. N17C-07-002-MMJ-CCLD

APPELLEE TD BANK, N.A.'S ANSWERING BRIEF

Dated: June 19, 2019

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GLOSSARY

2006 Master Agreement	Master Agreement for Banking Services dated March 1, 2006
2011 Master Agreement	Cash Management Master Agreement dated June 22, 2011
Account Agreement	Business Deposit Account Agreement
Amended Complaint	Continental's Amended Complaint dated April 30, 2018
Business Account Agreements	Collective reference to the Account Agreement, 2006 Master Agreement, and 2011 Master Agreement
Continental	Plaintiff-Below/Appellant Continental Finance Company, LLC
Czap	Roberta Czap, former Vice President of Continental
December Opinion	Trial Court's Second Opinion dated December 10, 2018
January Opinion	Trial Court's First Opinion dated January 24, 2018
Master Agreements	Collective reference to the 2006 Master Agreement and 2011 Master Agreement
Opening Brief or Op. Br.	Continental's Opening Brief dated May 6, 2019
Original Complaint	Continental's Complaint dated July 3, 2017
Parties	Collective reference to Continental and TD Bank
TD Bank	Defendant-Below/Appellee TD Bank, N.A.
Trial Court	Superior Court of the State of Delaware
UCC	The Uniform Commercial Code

NATURE OF PROCEEDINGS

Czap was a long time, trusted Vice President of Accounting at Continental. Czap embezzled over \$6 million from Continental. For this crime against her employer under Continental's watch, Czap was criminally indicted by the United States of America. She admitted to her crime, pled guilty, was sentenced, and agreed to forfeit over \$1.1 million, two properties, a car, a truck, a motor home, and a Jeep.¹

This appeal stems from Continental's efforts to deflect its own responsibility for its trusted employee's embezzlement by blaming TD Bank. Continental's rogue employee was able to embezzle money because Continental failed to monitor its accounts, failed to review its account statements, and failed to investigate and timely report any unauthorized activity in breach of its obligations under the agreements with TD Bank and the UCC.

The Trial Court dismissed Continental's claims against TD Bank—twice. Continental's Original Complaint, dated July 3, 2017, sued TD Bank for negligence. (B1). TD Bank moved to dismiss. (A-000037). The Parties briefed the motion (A-000038; A-000163; A-000229), and presented oral argument on December 19, 2017. In its January Opinion, the Trial Court granted TD Bank's motion to dismiss. (A-000254).

¹ See A-000393 (referencing Czap's public criminal case docket available at the U.S. District Court for the District of Delaware, No. 1:16-cr-00096-LPS at ECF No. 16).

Continental sought leave to reopen the action (A-000261; A-000347), and filed an Amended Complaint on April 30, 2018. (A-000354). TD Bank again moved to dismiss. (A-000524). The Parties briefed the motion (A-0000386; A-000527; A-000630), and presented oral argument on November 14, 2018. The Trial Court granted TD Bank's motion to dismiss the Amended Complaint in its December Opinion. (A-000693).

On December 18, 2018, Continental noticed its appeal to this Court challenging only the December Opinion. (A-000703). On May 6, 2019, Continental filed its Opening Brief. This is TD Bank's Answering Brief.

RESPONSE TO SUMMARY OF ARGUMENT

1. DENIED. The Trial Court properly considered the unambiguous terms of the Business Account Agreements governing the relationship of Continental and TD Bank and the allegations in the Amended Complaint.

2. DENIED. The Trial Court correctly rejected Continental's deflection efforts to impose on TD Bank liability in tort for duties either expressly and unambiguously addressed within the governing Business Account Agreements, displaced by the UCC, or otherwise unfounded in common law.

3. DENIED. The Trial Court properly concluded that the UCC displaced Continental's common-law claims concerning the alleged facts.

4. DENIED. The Trial Court properly rejected, as a matter of law, Continental's arguments concerning the monthly account statements TD Bank provided to Continental and TD Bank's commercially reasonable security procedures.

5. DENIED. The Trial Court did not impose a heightened pleading standard when dismissing Continental's claim of gross negligence.

6. DENIED. The Trial Court correctly applied the statute of repose where Continental failed to review its monthly account statements and timely report any alleged unauthorized transactions.

STATEMENT OF FACTS

I. Continental had a Contract Relationship with TD Bank Governing its Bank Account.

In 2006, Continental opened its business bank account at TD Bank.² (A-000359, ¶ 14 (incorrectly referencing 2007)). It served as Continental’s “primary cash operating account.” (*Id.* at ¶ 15). In addition to establishing a business bank account, Continental subscribed to electronic business services allowing Continental to perform banking functions in its own office. These services are subject to two agreements signed by Continental’s Chief Financial Officer, William R. Knotts: the 2006 Master Agreement (A-000435–444); and the 2011 Master Agreement (A-000447–473).

The Master Agreements supplement the Account Agreement (A-000475–523) that governs Continental’s business account. Together, the Business Account Agreements clearly and unambiguously state the terms of the Parties’ respective rights, remedies, and responsibilities.

A. Continental Agreed To Be Liable For Improper ACH Transfers.

Specifically, under the Business Account Agreements, Continental agreed that TD Bank “may unconditionally rely” on the information provided by

² Continental originally opened its account with Commerce Bank, which was succeeded by TD Bank. (A-000359, ¶ 14).

Continental and that Continental shall be solely liable for any improper ACH transfers. The Business Account Agreements³ state as follows:

- “Each Authorized Representative whom Customer permits to access and use the Services is duly authorized by all necessary action on the part of Customer to (i) access the Account(s) and use the Services; (ii) access any information related to any Account(s) to which the Authorized Representative has access and (iii) engage in any transaction relating to any Account(s) to which the Authorized Representative has access.” (A-000449, 2011 Master Agreement at § 3.1);
- “***Bank may unconditionally rely on the validity and accuracy of any communication or transaction made, or purported to be made, by an Authorized Representative.***” (*Id.* at § 3.2);⁴
- “In providing the Services, ***Bank shall be entitled to rely upon the accuracy of all information and authorizations received from Customer or an Authorized Representative*** and the authenticity of any signatures purporting to be of Customer or an Authorized Representative.” (A-000451, 2011 Master Agreement at § 9.1);
- “***Customer agrees that it shall be solely responsible for ensuring compliance with any security procedures established by Bank*** in connection with the Services, as such may be amended from time to time, and that ***Bank shall have no liability for any losses sustained by Customer as a result of a breach of security procedures*** if Bank has substantially complied with the security procedures.” (*Id.* at § 9.2);
- “Bank shall be entitled to rely on any written list of Authorized Representatives provided to Bank by Customer until revoked or modified by Customer in writing.” (*Id.* at § 9.3);

³ These provisions are not new to the 2011 Master Agreement as similar provisions exist in the 2006 Master Agreement. *See* A-000437–40 at §§ 5.2, 8.9, 8.10.

⁴ Emphasis added throughout unless otherwise indicated.

- “The Administrator(s) may designate other Administrators and/or Authorized Users. *Customer accepts as its sole responsibility the Administrator’s designation of other Administrators and Authorized Users.*” (A-000459, 2011 Master Agreement, Appendix I at § 5.2);
- “*Customer is responsible for any Payment, transfer and other Services and charges incurred by any Administrator and any Authorized User, even if such Administrator or Authorized User exceeds his/her authorization.*” (*Id.* at § 5.3);
- “*Customer acknowledges and agrees that Bank is authorized to act on any and all communications or instructions received using the Access Devices, regardless of whether the communications or instructions are authorized.*” (A-000460, 2011 Master Agreement, Appendix I at § 6.6); and
- “*If an Entry (or a request for cancellation or amendment of an Entry) received by Bank purports to have been transmitted or authorized by Customer, it will be deemed effective as Customer’s Entry (or request), and Customer shall be obligated to pay Bank the amount of such Entry (or request) even though the Entry (or request) was not authorized by Customer, provided Bank acted in compliance with the Security Procedures.*” (A-000463, 2011 Master Agreement, Appendix II at § 7.1).

B. Continental Expressly Agreed To The Commercial Reasonableness Of TD Bank’s Security Procedures.

Continental also agreed that it would take measures to prevent fraud and that the security measures provided by TD Bank to validate an authorized individual were commercially reasonable for that purpose but that they were not designed to detect fraud. The Business Account Agreements state expressly and unequivocally:

- “*Customer shall take all reasonable measures and exercise all reasonable precautions to prevent the unauthorized disclosure of use of all Access Devices associated with or necessary for Customer’s use of the Services.*” (A-000449, 2011 Master Agreement at § 3.3);

- “***Any security procedures maintained by Bank are not intended to detect errors*** in the content of any instruction received from Customer or Customer’s agent or vendor. ***Any errors in an instruction from Customer, Customer’s Authorized Representative, agent or vendor shall be Customer’s sole responsibility.*** Customer agrees that all security procedures described in this Agreement and applicable Appendix are ***commercially reasonable*** and that Bank may charge Customer’s Account for any instruction that Bank executed in good faith and in conformity with the security procedures, whether or not the transfer is in fact authorized.” (A-000451, 2011 Master Agreement at § 9.4);
- “THE CUSTOMER SHALL BE RESPONSIBLE TO SAFEGUARD THESE ACCESS DEVICES AND MAKE THEM AVAILABLE ONLY TO DESIGNATED INDIVIDUALS.... CUSTOMER HAS THE SOLE RESPONSIBILITY TO ESTABLISH AND MAINTAIN PROCEDURES TO ASSURE THE CONFIDENTIALITY OF ANY PROTECTED ACCESS TO THE SECURITY PROCEDURE.” (A-000452, 2011 Master Agreement at § 9.6);
- “***Customer further acknowledges and agrees that all wire transfers and ACH transactions initiated through the Services incorporate ‘dual control’ or separation of duties.*** With this additional security feature, one Authorized User will be permitted to create, edit, cancel, delete and restore ACH batches or wire transfer orders under his/her unique User ID, password and Token; a second *different* Authorized User with his/her own unique User ID, password and Token will be required to approve, release or delete ACH batches or wire transfer orders.” (A-000459, 2011 Master Agreement, Appendix I at § 6.4);
- “***Customer acknowledges and agrees the Security Procedures are a commercially reasonable method for the purpose of verifying the authenticity of Entries*** (or any request for cancellation or amendment thereof). Customer further acknowledges that ***the purpose of the Security Procedures is not to detect an error in the transmission or content of an Entry.*** No security procedures have been agreed upon between Bank and Customer for the detection of any such error.” (A-000463, 2011 Master Agreement, Appendix II at § 6.1);

- *“Customer is strictly responsible for establishing and maintaining procedures to safeguard against unauthorized transmissions. Customer warrants to Bank that no individual will be allowed to initiate transfers in the absence of proper supervision and safeguards”* (*Id.* at § 6.2);
- *“You agree to take reasonable steps to ensure that you have adequate internal procedures to secure your Accounts and items drawn on your Accounts or deposited to them. To help prevent embezzlement and protect your business assets in particular, we recommend that you:*
 - *Assign responsibilities for your Account(s) to multiple individuals* – e.g., those who reconcile statements for your Account(s) should be different from those who issue items drawn on your Account(s);
 - Reconcile statements for your Account(s) when received and notify us immediately of any problem;
 - *Periodically reassign accounting duties* such as reconciling your Account(s) or making a deposit;
 - *Review transaction activity on your Account(s) for unexpected fluctuations* – for example, compare the percentage of cash deposits to total deposit size, as most businesses will maintain a constant average, and a large fluctuation may indicate embezzlement; [and]
 - Obtain business insurance for these risks.” (A-000499, Account Agreement at 23); and
- **“Security Procedures:** Funds Transfers will be made according to our approved transmission methods and associated security procedure (“Security Procedure”). *The Security Procedure is intended to verify that an order is authorized, but it is not intended to detect errors.* The Security Procedure we will use may include but is not limited to: 1) your completion of a form(s) or other documentation of the request; *You agree that the Security Procedure is commercially reasonable and that a Funds Transfer or payment order, verified by the Security Procedure, is effective as your order, whether or not the order is in fact authorized by you.*” (*Id.* at 27).

C. Continental Agreed To Review Its Account Statements And Timely Report Errors To TD Bank.

If an error or unauthorized transaction does occur, then Continental agreed that it would review its account statements and report any errors to TD Bank, and that TD Bank is not liable for undetected/unreported errors. The Business Account Agreements⁵ state expressly and unequivocally:

- ***“Customer is responsible for monitoring all Services provided by Bank, including each individual transaction processed by Bank, and notifying Bank of any errors or other problems within ten (10) Calendar Days (or such longer period as may be required by applicable law) after Bank has made available to Customer any report, statement or other material containing or reflecting the error, including an Account analysis statement or on-line Account access. Except to the extent required by law, failure to notify Bank or any error or problem within such time will relieve Bank or any and all liability for interest upon correction of the error or problem (and for any loss from any subsequent transaction involving the same error or problem). In the event Customer fails to report such error or problem within thirty (30) Calendar Days after Bank made available such report, statement or on-line Account access, the transaction shall be deemed to have been properly authorized and executed, and Bank shall have no liability with respect to any error or problem.”*** (A-000452, 2011 Master Agreement at § 11); and
- **“You Must Tell Us About Errors:** You must use ordinary care to determine whether each Funds Transfer has been authorized properly by you, and to discover any errors relating to Funds Transfers executed by us. ***You must tell us about an unauthorized Funds Transfer or any errors relating to a Funds Transfer no later than ten (10) Business Days*** after the earlier of the date we tell you that your Funds Transfer has been executed or the date we tell you that your Account has been

⁵ Similar provisions exist in the 2006 Master Agreement. See A-000437 at § 4.

debited to pay for such Funds Transfer.” (A-000504, Account Agreement at 28).

D. Continental Agreed That Article 4A Of The UCC And NACHA Rules Apply, And That Only Account Numbers Need Match To Process A Transaction.

Additionally, Continental agreed that it was subject to the Article 4A of the UCC and applicable National Automated Clearing House Association (“NACHA”) rules, including the rule that an ACH is to be automatically processed to the designated account number even if the account name and number do not match. *See* NACHA Rule 3.1.2. The Business Account Agreements⁶ state expressly and unequivocally:

- “Customer and Bank shall comply with (i) all applicable laws, regulations, rules and orders; (ii) the Account Agreement; (iii) all applicable . . . (“NACHA”) rules, regulations, and policies; (iv) the Uniform Commercial Code; (v) Office of Foreign Asset Control (“OFAC”) sanctions; and (vi) all applicable laws, regulations and orders administered by FinCEN....” (A-000449–50, 2011 Master Agreement at § 3.6); and
- “*Customer acknowledges and agrees that if an Entry describes a Receiver inconsistently by name and account number, then (i) payment of such Entry transmitted to an RDFI may be made by the RDFI (or by Bank for an On-Us Entry) on a basis of the account number, even if it identifies a person different from the named Receiver and (ii) Customer’s obligation to pay the amount of Entry to Bank is not excused in such circumstances.*” (A-000467, 2011 Master Agreement, Appendix II at § 22).

⁶ Similar provisions exist in the 2006 Master Agreement. *See* A-000437–41 at §§ 5.6, 8.2. 8.16.

E. Continental Agreed To A Limitation Of Liability And To Indemnify TD Bank For Losses Caused By The Acts Of Continental Or Its Employees.

Continental further agreed to a limitation of its prospective damages. The Business Account Agreements⁷ state expressly and unequivocally:

- “Except to the extent required by law, the liability of Bank in connection with the Services will be *limited to actual damages sustained by Customer and only to the extent such damages are a direct result of Bank’s gross negligence, willful misconduct, or bad faith.*” (A-000453, 2011 Master Agreement at § 15.1);
- “Except as otherwise expressly prohibited or limited by law, *Customer shall indemnify and hold Bank harmless from any and all liabilities, losses, damages, costs, and expenses of any kind ... which may be incurred by Bank relating to or arising out of: (i) any claim of any person that (a) Bank is responsible for any act or omission of Customer ... (ii) any failure by Customer to observe and perform properly all of its obligations hereunder or any wrongful act of Customer or any of its Affiliates; (iii) any breach by Customer of any of its warranties, representations or agreements*” (A-000454, 2011 Master Agreement at § 16.1).

F. Continental Agreed That The Master Agreements State The Parties’ Entire Agreement.

The Business Account Agreements state the entire agreement between the Parties. Under the Master Agreements, in the event of conflict between the Master Agreements or Account Agreement, the terms of the Master Agreements control.

⁷ Similar provisions exist in the 2006 Master Agreement. See A-000441 at §§ 9.2, 9.5.

(See A-000443, 2006 Master Agreement at § 17; A-000450, 2011 Master Agreement at § 4.1). Moreover:

- “Bank and Customer acknowledge and agree that this Agreement ... constitute the complete and exclusive statement of the agreement between them with respect to the Services, and supersede any prior oral or written understandings, representations, and agreements between the parties relation to the Services.” (A-000455, 2011 Master Agreement at § 20; *see also* A-000443, 2006 Master Agreement at § 17).

II. Czap Embezzled From Continental.

Continental hired Czap as its first employee. (A-000359–60, ¶ 17). Czap ultimately worked her way to Vice President of Accounting. (*Id.*). In that role, Czap was responsible for “general accounting activities, including daily settlement of accounts, bill payment, cash reconciliations, and other general accounting functions.” (*Id.*).

Continental’s business bank account permitted the use of ACH services, which Continental used to pay “vendors and other third parties for various corporate expenses.” (A-000359, ¶ 16). As the Amended Complaint admits, *Czap had “log-in credentials to use TD Bank’s ACH services on behalf of Continental, and was generally in charge of initiating those ACH transfers.”* (A-000359–60, ¶ 17). Czap separately had a personal account at TD Bank, which she used to deposit her earnings from Continental. (A-000360, ¶ 18).

At some point, the Federal Bureau of Investigation uncovered Czap’s embezzlement scheme and revealed it to Continental. (A-000367, ¶ 32). Czap had

been authorizing ACH transactions on behalf of Continental from its business account to pay what Czap identified as a vendor. But this vendor turned out to be a modified version of an actual Continental vendor, created by Czap as a shell through which she could direct payments into a variety of her personal bank accounts, one of which she held at TD Bank. (A-000361–62, ¶¶ 22–23). Czap ultimately embezzled over six million dollars from Continental. (A-000362, ¶ 23). The Amended Complaint is silent as to the timeframe of Czap’s scheme.

Notably, after the account was opened, *TD Bank sent Continental monthly bank statements clearly showing all of the activity of Continental’s business account.* (A-000356, ¶ 6). Continental apparently never reviewed, audited, or questioned any of the account activity or statements.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE AMENDED COMPLAINT FOR FAILING TO STATE A CLAIM BY CONSIDERING CONTINENTAL’S OWN ALLEGATIONS AND THE TERMS OF THE BUSINESS ACCOUNT AGREEMENTS.⁸

A. Question Presented

Did the Trial Court properly dismiss the Amended Complaint where Continental’s allegations and the unambiguous terms of the Business Account Agreements foreclose Continental’s claims as a matter of law? (A-000256–57).

B. Scope of Review

This Court reviews *de novo* the Trial Court’s ruling on a motion to dismiss for failure to state a claim. *Clouser v. Doherty*, 2017 WL 3947404, at *4 (Del. Sept. 7, 2017) (TABLE); *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

C. Merits of Argument

The Trial Court properly considered the Parties’ Business Account Agreements in deciding to dismiss both the Original and the Amended Complaint. In the January Opinion, the Trial Court rejected Continental’s attempts to exclude the Parties’ undisputed written Business Account Agreements and correctly held:

It is indeed a “general rule that matters outside of the pleadings should not be considered in ruling on a Rule 12(b)(6) motion to dismiss.” That general rule does not apply, however, when “the document is integral to a plaintiff’s claim and incorporated into the complaint” or “when the

⁸ Argument I responds to Continental’s Arguments I and IV.

document is not being relied upon to prove the truth of its contents.” Plaintiffs may not avoid this exception simply by declining to attach an otherwise fatal, integral document. “[W]hen plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his motion attacking the pleading....”

Even at the motion to dismiss stage, artful pleading cannot alter the undisputed fact that clear, unambiguous, plain contract language defines the extent of TD Bank’s liability. Continental cannot simply ignore the parties’ contracts and assert tort claims to prevent the Court from considering agreements that are central to the legal relationship of the parties. Where a contract specifically allocates risks between the parties, the Court may consider the contract for purposes of a motion to dismiss.

(A-000256–57).

1. *Continental Failed to Appeal the Trial Court’s January Opinion Concerning the Consideration of the Parties’ Business Account Agreements.*

As a threshold matter, Continental cannot challenge the Trial Court’s consideration of the Business Account Agreements. (*See Op. Br.* at 10 (arguing against consideration of the Business Account Agreements); *id.* at 18 (citing A-000257)). Continental did not appeal the January Opinion. (A-000704 (designating only the December Opinion)). Rulings not challenged on appeal become final. *See Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1289 (Del. 1998) (holding that a ruling not appealed “has become final”); *In re Oxbow Carbon LLC*, 2019 WL 2076137, at *2 (Del. Ch. May 10, 2019) (ORDER) (leaving unchanged rulings not challenged on appeal). Thus, Continental cannot now challenge the legitimacy of

the Trial Court's consideration of the Business Account Agreements in the January Opinion, and all rulings therein are final.

Further, Continental does not, and cannot, challenge the Court's consideration of the Business Account Agreements in the December Opinion. Following dismissal of its Original Complaint, Continental chose to pursue its Amended Complaint by expressly referencing the Business Account Agreements. (A-000369–70, ¶¶ 36, 42).

2. *The Trial Court Properly Considered the Business Account Agreements in Dismissing the Original and Amended Complaint.*

Although Continental's argument is not proper before this Court, the Trial Court correctly considered the Business Account Agreements in deciding the motions to dismiss. A court need not accept conclusory allegations or "every strained interpretation of the allegations proposed by the plaintiff." *Clouser*, 2017 WL3947404, at *4. Indeed, a court may dismiss a complaint if the allegations or a related written instrument "effectively negate the claim as a matter of law." *Malpiede*, 780 A.2d at 1083; *see* Super. Ct. Civ. R. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *Ketler v. PFPA, LLC*, 2015 WL 3540187, at *1 (Del. Super. June 3, 2015) (explaining "[e]xhibits to pleadings are considered part of the pleadings and therefore this motion does not convert to one for summary judgment"); *Ash-Ramunno Assocs., Inc. v. Branner*, 1993 WL 193216, at *2 (Del. Ch. May 21, 1993).

Contracts are the type of operative document that a court may consider without converting the motion to dismiss to a motion for summary judgment. *In re New Valley Corp.*, 2001 WL 50212, at *6 (Del. Ch. Jan. 11, 2001) (refusing to consider meeting minutes, an appraisal, and a fairness opinion because such documents “are not in the same nature as a disclosure statement [or] **a contract**,” because “[t]he latter are **operative documents** that are **central to the cause of action**[,]” while “[t]he former are more evidentiary in nature”). This is particularly the case when, as here, the Business Account Agreements are “not being relied upon to prove the truth of its contents.” *Vanderbilt Income & Growth Assoc., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) (citing *In re Santa Fe Pac. Corp. S’holder Litig.*, 669 A.2d 59, 70 (Del. 1995)).

Allowing courts to consider documents integral to the underlying issues on a motion to dismiss discourages litigants from engaging in artful pleading and “strategically omit[ting] crucial information . . . in cases that, if pled straightforwardly, can be resolved on a motion to dismiss.” *Midland Food Servs., LLC v. Castle Hill Holdings V, LLC*, 792 A.2d 920, n.5 (Del. Ch. 1999) (considering, on a motion to dismiss, the terms of a contract). By enforcing this rule

a party cannot convert what is clearly a contractual dispute for which there are remedies available under the negotiated terms of the contract to a tort action simply by pleading claims of negligence. If such actions were allowed, it would permit a party to easily crack the foundation of a contractual relationship that has been

negotiated in good faith and agreed to by the parties and in essence void the contract.

Delmarva Power & Light Co. v. ABB Power T & D Co., 2002 WL 840564, at *6 (Del. Super. Apr. 30, 2002).

Here, the Business Account Agreements are relevant to the Parties' relationship and provide the scope of the Parties' rights, remedies, and responsibilities.⁹ Continental cannot simply avoid these contractual realities through artful pleading. As such, the Trial Court properly considered both the allegations in the Original and Amended Complaint, as well as the unambiguous terms of the Business Account Agreements.

3. *The Trial Court Did Not Make Factual Findings But Properly Relied on The Unambiguous Terms of the Business Account Agreements and Continental's Amended Complaint.*

On proper consideration of the Business Account Agreements, and accepting Continental's well-plead allegations as true, the Trial Court correctly construed the Parties' rights and obligations as a matter of law.

a. *Failure to State a Tort Claim Independent from the Parties' Contract Duties.*

First, the Trial Court's December Opinion correctly dismissed Continental's tort claims upon a finding that Continental accepted, per the terms of the Business Account Agreements, the duties of "preventing, monitoring, investigating, and

⁹ See *supra* Statement of Facts I.A–F.

reporting any fraudulent conduct”—*i.e.*, the very conduct at the heart of Continental’s allegations against TD Bank. (A-000695).

“***Whether a duty exists ‘is entirely a question of law’***” and, as such, ***does not require fact discovery***. *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002); *Diehl-Guerrero v. Hardy Boys Constr., LLC*, 2017 WL 1162947, at *3 (Del. Super. Mar. 27, 2017) (denying application to certify interlocutory appeal where the court dismissed plaintiff’s negligence claim against bank for failure to plead the bank owed such a duty, which is a question of law). Continental cannot dispute that a legal duty arises by way “of a fiduciary relationship, contractual duty, or a ‘special relationship’ as defined by common law.” (A-000699, December Opinion at 7 (relying on these principles to conclude “***no duty arises from the relationship among Continental, TD Bank, and Czap***”)).

Moreover, where a contract governs a relationship—as is the case here—a plaintiff seeking to state a tort claim must show that the tortious conduct breached a duty owed separate from that created by the contract—*i.e.*, a duty owed even if no contract existed. *See Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 889 (Del. Ch. 2009) (“***[I]n order to assert a tort claim along with a contract claim, the plaintiff must generally allege that the defendant violated an independent legal duty, apart from the duty imposed by contract.***”); *Saltei v. GSI Consultants, Inc.*, 788 A.2d 268, 280 (N.J. 2002) (“Under New Jersey law, ***a tort remedy does not arise from a***

contractual relationship unless the breaching party owes an independent duty imposed by law.”)¹⁰

Here, Continental’s common-law claims rely on allegations of duties expressly encompassed in the governing Business Account Agreements, rather than an independent duty at law. For example, the allegations concerning failure to investigate¹¹ and account monitoring or oversight¹² are duties specifically accounted for in the Business Account Agreements.

For example, *Continental*, not TD Bank, *owed a duty to maintain procedures to safeguard against unauthorized transactions, and to ensure that all ACH transactions incorporated dual control*. Continental owed a duty to:

- “ensur[e] compliance with any security procedures established[.]” (A-000451, 2011 Master Agreement at § 9.2);
- ensure that “all wire transfers and ACH transactions initiated through the Services incorporate ‘dual control’ or separation of duties.” (A-000459, 2011 Master Agreement, Appendix I at § 6.4);
- “take all reasonable measures and exercise all reasonable precautions to prevent the unauthorized disclosure or use of all Access Devices[.]” (A-000449, 2011 Master Agreement at § 3.3); and

¹⁰ The parties agreed that the New Jersey UCC governs their transactions from 2011 and forward. (A-000648, n.15). But, Continental now cites Delaware’s UCC, which is substantially the same on the issues.

¹¹ See generally A-000354 at ¶¶ 1, 4–7, 27, 34, 73, 78–79, 86.

¹² *Id.* at ¶¶ 6, 30, 73, 76–80, 84–88, 91–92.

- “establish[] and maintain[] procedures to safeguard against unauthorized transmissions,” and “warrant[ed] to Bank that no individual will be allowed to initiate transfers in the absence of proper supervision and safeguards[.]” (A-000463, 2011 Master Agreement, Appendix II at § 6.2).¹³

Continental, not TD Bank, also ***owed a duty to monitor account activity, and to report any irregularities to TD Bank***. For example, Continental owed a duty to:

- “monitor[] all Services provided by Bank, including each individual transaction processed by Bank, and notify[] Bank of any errors or other problems within ten (10) Calendar Days (or such longer period as may be required by applicable law) after Bank has made available to Customer any report, statement or other material containing or reflecting the error, including an Account analysis statement or on-line Account access.” (A-000452, 2011 Master Agreement at § 11); and
- “determine whether each Funds Transfer has been authorized properly by you, and to discover any errors relating to Funds Transfers executed by us,” and to “tell [TD Bank] about an unauthorized Funds Transfer or any errors relating to a Funds Transfer no later than ten (10) Business Days after the earlier of the date we tell you that your Funds Transfer has been executed or the date we tell you that your Account has been debited to pay for such Funds Transfer.” (A-000504, Account Agreement at 28).

¹³ The UCC reiterates this allocation of responsibility. *See, e.g.*, 6 *Del. C.* § 4A-203, cmt. 3 (“The burden on the customer is to supervise its employees to assure compliance with the security procedure and to safeguard confidential security information and access to transmitting facilities so that the security procedure cannot be breached.”); N.J. Stat. § 12A:4A-203, cmt. 3 (same).

Continental also agreed that *TD Bank* may unconditionally rely on the accuracy of the information *Continental* provides.¹⁴ Finally, *Continental* agreed to be solely responsible for unauthorized ACH transactions.¹⁵

Thus, if any party breached its contractually agreed-upon legal duties, it was *Continental*. Because *Continental* failed to allege any duties beyond those allocated with the Business Account Agreements, the Trial Court properly dismissed *Continental*'s tort claims.

b. Czap Is An Authorized User of Continental's Account, Which Had Commercially Reasonable Security Procedures.

Second, the Trial Court properly relied on the unambiguous terms of the Business Account Agreements to support findings that *Continental* agreed: (1) that it was subject to the Article 4A of the UCC;¹⁶ (2) to Article 4A's mandate that ACHs verified by a security procedure are effective as *Continental*'s order, whether or not authorized;¹⁷ and (3) "that all security procedures described in th[e] Agreement[s] .

¹⁴ See generally A-000435, 2006 Master Agreement at §§ 5.2, 8.9, 8.10; A-000447, 2011 Master Agreement at §§ 3.2, 9.1, Appendix I, §§ 5.2, 5.3, 6.6.

¹⁵ See A-000440, 2006 Master Agreement at § 8.10; A-000459, 2011 Master Agreement, Appendix I at § 5.3.

¹⁶ See A-000437, 2006 Master Agreement at § 5.6; A-000449–50, 2011 Master Agreement at § 3.6.

¹⁷ See, e.g., A-000503, Account Agreement at 27; A-000463, 2011 Master Agreement, Appendix II at § 7.1.

. . are *commercially reasonable* and that Bank may charge Customer’s Account for any instruction that Bank executed in good faith and in conformity with the security procedures, whether or not the transfer is in fact authorized.”¹⁸

Under the UCC, a “[s]ecurity procedure” is “*a procedure established by agreement* of a customer and a receiving bank for *the purpose of . . . verifying that a payment order . . . is that of the customer*[.]” 6 *Del. C.* § 4A-201; N.J. Stat. § 12A:4A-201. Indeed, it is the intent of the UCC to “place the risk of loss on the customer” where a payment order, even if unauthorized by the customer, is verified by a commercially reasonable security procedure. 6 *Del. C.* § 4A-203, cmt. 5; N.J. Stat. § 12A:4A-203, cmt. 5. Security procedures are “designed to capture ‘error[s] in the transmission or the content of the payment order.’” N.J. Stat. § 12A:4A-201. Continental did not allege errors in any of its payment orders, for example, claiming it initiated an ACH transfer for \$500 to “Account A” but TD Bank transferred \$5,000 to “Account Z.” *See* N.J. Stat. § 12A:4A-201, cmt. (“Security procedures can also be used to detect error in the content of messages or to detect payment orders that are transmitted by mistake as in the case of multiple transmission of the same payment order.”).

¹⁸ A-000451, 2011 Master Agreement at § 9.4.

Here, Czap—a Continental employee admittedly authorized to initiate ACH transfers from Continental’s account¹⁹—used her log-in credentials to initiate the ACH transfers, even if those transfers exceeded her internal authority. Continental agreed that all ACH transactions required two different users to use a security procedure of a User ID, password and Token.²⁰ Continental agreed that verification of a user with these three identifications was a “commercially reasonable” security procedure.²¹ Accordingly, the ACHs submitted by Czap with these “log-in credentials” were effective, whether or not authorized, and Continental bears responsibility for any losses caused by its own employee.

Despite the unambiguous terms of the Business Account Agreements, Continental suggests there cannot be reasonable security procedures in place because Continental never refused TD Bank’s procedures. (*See* A-000374, ¶¶ 68–69; A-000383, ¶ 99; A-000570–71 (arguing that security procedures are reasonable only if first rejected by the customer); Op. Br. at 29 (same)). Continental’s argument distorts the point of § 4A-202(3) of the UCC, which is devoid of any language

¹⁹ *See* A-000359–60, ¶ 17 (admitting Czap had “log-in credentials to use TD Bank’s ACH services on behalf of Continental, and that Czap was generally in charge of initiating those ACH transfers.”).

²⁰ A-000459, 2011 Master Agreement, Appendix I at § 6.4.

²¹ A-000451, 2011 Master Agreement at § 9.4.

mandating a customer's rejection before deeming any security procedure reasonable. Subsection (3) merely recognizes that if a customer has rejected a security procedure offered by the bank and then chooses a different security procedure and agrees to be bound by a payment order accepted in compliance with that procedure, then the procedure is deemed to be commercially reasonable. N.J. Stat. § 12A:4A-202(3); *see also* § 12A:4A-203, cmt. 4.²²

Continental ignores that the foregoing does not alter other provisions of the UCC, which state that parties can agree to a security procedure from the outset, and that if a payment order is received in compliance with that commercially reasonable procedure, then the order is effective as the order of the customer. *See* N.J. Stat. §§ 12A:4A-202(2), 12A:4A-201 (defining "security procedure" as "a procedure established by agreement of a customer and a receiving bank"). Because Continental does not dispute that it agreed to the security procedures in Section 9.4 of the 2011 Master Agreement, Continental cannot avoid its Business Account Agreements by claiming some right to first refusal as a condition precedent to the contractual terms.

Accordingly, the Trial Court's dismissal is properly based, as a matter of law, upon the allegations in the Amended Complaint, the unambiguous terms of the Business Account Agreements, and the UCC. (*See* A-000752, Nov. 14, 2018 Hr'g

²² A-000779–81, Nov. 14, 2018 Hr'g Tr. at 73:11–75:3.

Tr. at 46:7–22 (correctly advising that this issue was one of law and did not require discovery)). As such, this Court should affirm the Trial Court’s findings.

II. THE TRIAL COURT PROPERLY REJECTED CONTINENTAL'S EFFORTS TO IMPOSE UPON TD BANK EXTRACTIONAL TORT DUTIES NOT FOUND IN COMMON LAW.²³

A. Question Presented

Did the Trial Court properly reject Continental's efforts to avoid the consequences of the Business Account Agreements and application of the UCC to impose upon TD Bank extracontractual tort duties that do not exist in common law? (A-000697-99).

B. Scope of Review

This Court reviews *de novo* the Trial Court's ruling on a motion to dismiss for failure to state a claim. *Clouser*, 2017 WL3947404, at *4; *Malpiede*, 780 A.2d at 1082.

C. Merits of Argument

The Trial Court properly rejected Continental's attempts to argue that the alleged facts here created a unique situation that would require the Court to ignore the parties' undisputed written Business Account Agreements and the UCC. The Trial Court correctly held:

In Continental's opposition to TD Bank's Motion to Dismiss, Continental argues that the relationship among Continental, Czap and TD Bank presents a "unique situation" not covered by the UCC. However, in addition to there being no UCC provision to govern the "unique situation," *Continental has not identified case law that would*

²³ Argument II responds to Continental's Arguments II and III.

support this proposition. Continental argues that TD Bank breached its duty of care, *but fails to identify any specific duties assumed by contract beyond those established by the UCC*

Article 4A of the UCC governs ACH transfers. *The duties Continental alleges are expressly covered by the UCC.* The UCC displaces the common law claims.

Continental argues that this suit arises from TD Bank’s failure to act reasonably considering TD Bank’s knowledge of the relationship among Continental, Czap, and TD Bank. Specifically, Continental asserts that the relationship presented a “unique situation” and thus imposed on TD Bank a duty to investigate and report suspicious transactions. However, *in the absence of a fiduciary relationship, contractual duty, or “special relationship” as defined by common law, no duty arises from the relationship among Continental, TD Bank, and Czap.*

(A-000697–99, December Opinion at 5–7).

1. TD Bank Does Not Owe Any Common-Law Legal Duties.

There are three reasons why TD Bank does not owe Continental a common-law duty outside the duties found in the Business Account Agreements and the UCC.

First, the Trial Court correctly held that a bank’s duties to its customers arise by way contract or a special-relationship as defined by common law. In *Mengele v. Christiana Federal Savings & Loan Association of Wilmington*, this Court cited the contractual nature of the relationship between and bank and its customer and held that a “bank is required to refute charges of negligence against it only when its actions have been contrary to the directions contained in the contract between it and its depositor.” 287 A.2d 395, 397–98 (Del. 1972). Likewise, in *United Jersey Bank*

v. Kensey, the court refused to impose tort duties on a bank where such duties did not otherwise arise from a fiduciary relationship, a contract, or other “special circumstances” such as there being a relationship where the customer had “special trust or confidence in [the bank’s] advice.” 704 A.2d 38, 44–45 (N.J. Super. Ct. App. Div. 1997). These cases confirm that duties between banks and customers must stem from an underlying contract or some special relationship.

In an effort to avoid the realities of *Mengele* and *Kensey*, Continental incorrectly suggests the cases instruct courts to permit discovery before ruling on “allega[tions] that a bank has violated its common-law tort duties to a customer.” However, “[w]hether a duty exists *is entirely a question of law*” and, as such, *does not require fact discovery*. *Fritz*, 790 A.2d at 471; *Diehl-Guerrero*, 2017 WL 1162947, at *3.

Second, the Trial Court appropriately disregarded the non-binding decisional law cited by Continental for the alleged imposition of a common-law duty upon a bank related to funds transfers. On appeal, Continental refers this Court to the same three unpersuasive cases it previously presented to the Trial Court. (Op. Br. at 12–13). All three cases predate the 1989 enactment of Article 4A of the UCC,²⁴ which governs funds transfers—and two of the cases apply New York law. Moreover, as

²⁴ See UNIF. LAW COMM’N, UCC SUMMARY, <https://www.uniformlaws.org/acts/ucc> (providing introduction of Article 4A) (last visited June 18, 2019).

TD Bank explained to the Trial Court, each case is distinguishable for the reasons that follow:

- In *Allied Auto Sales, Inc. v. Farmers Bank of Delaware*, the plaintiff alleged that the defendant bank “**wrongfully failed to stop payment on the check pursuant to the plaintiff’s stop payment order[.]**” 216 A.2d 666, 667 (Del. 1966). This Court addressed “whether the defendant’s employees, in the bookkeeping department at its main office, acted with due and reasonable care and diligence, **in response to the plaintiff’s stop payment order[.]**” *Id.* Unlike the plaintiff in *Allied*, Continental never issued to TD Bank any stop payment orders. The Amended Complaint contains no allegation that TD Bank failed to respond to direction from an authorized user of Continental’s account.
- *Renzi v. Aleszczyk* concerns an unauthorized individual transferring funds out of another customer’s account with what was later determined to be a fake powers of attorney. 352 N.Y.S.2d 736, 738 (App. Div. 1974). The court concluded “the bank had a duty to exercise care and diligence **to determine if the party requesting the withdrawal had a right to receive the requested funds.**” *Id.* Here, Czap is an admittedly authorized user of Continental’s account and had the right to initiate the now challenged ACH transfers.
- *Novak v. Greater New York Savings Bank* involved an unauthorized individual withdrawing money with what was later found to be a stolen passbook.²⁵ 282 N.E.2d 285, 286 (N.Y. 1972). *Novak* held a bank accountable for the challenged withdrawal because it could not prove, due to its inability to locate the bank’s former employee, satisfaction of its security protocol—comparison of the requesting individual’s passbook and withdrawal slip signatures. *Id.* at 286–88. Putting aside that *Novak* concerns procedures outdated by nearly half a century, the

²⁵ Before electronic banking and accounting, customers used a small, bound paper “passbook” as “tangible evidence of their ownership of [a savings] account” at a bank. *Can you still open a passbook savings account?*, BANKRATE.COM, (Jan. 12, 2018) (internal quotation marks and citations omitted) *available at* <https://www.bankrate.com/banking/savings/smart-banking-is-passbook-savings-the-most-hipster-bank-account/>.

decision is irrelevant here because Czap, an admittedly authorized user of Continental's account, had the right to initiate the now challenged ACH transfers.

Third, there is no merit to Continental's argument that liability terms within the Master Agreements somehow impose an independent legal duty in common law. Simply because the Master Agreements contemplate the potential for TD Bank's liability for negligence (2006 Master Agreement) and gross negligence (2011 Master Agreement),²⁶ does not mean that liability may attach for conduct beyond that which is stated by contract. Nor do the liability provisions mean that Continental successfully pled such claims in the Amended Complaint. Continental's claims fail because the underlying allegations rely on conduct specifically accounted for within the Business Account Agreements,²⁷ and the UCC.²⁸

2. "Unique Situation" Allegations Do Not Create A Legal Duty.

Further, Continental's allegations regarding the purported "unique situation" between TD Bank and Continental, even when accepted as true, do not impose an

²⁶ Notwithstanding the limitations from application of the statute of repose, Section 9.2 of the 2006 Master Agreement contemplated the potential for TD Bank's liability for negligence, but Section 15.1 of the 2011 Master Agreement narrowed the liability provision only to claims of "gross negligence, willful misconduct, or bad faith."

²⁷ See *supra* Argument I.

²⁸ See *infra* Argument III.

extracontractual legal duty. At oral argument, Continental admitted it did not have any law to support that the “unique situation” resulted in the imposition of a duty:

THE COURT: I know. But you talk about this being a unique situation. But *I don't see any case support for a similar situation, or am I missing that?*

[CONTINENTAL]: *No*. There is not a perfect case for an embezzlement of millions of the dollars from the bookkeeper. I admit, I don't have that.

THE COURT: *So what are the other things in this account that create either a special relationship, or some unique circumstance?*

[CONTINENTAL]: *Negligence and gross negligence*, Your Honor.

(A-000737–38, Nov. 14, 2018 Hr’g Tr. at 31:6–13, 32:10–15).

As previously addressed, the Parties addressed these duties in their Business Account Agreements. Thus, the Trial Court appropriately (1) looked to the Business Account Agreements and the applicable provisions within the UCC to determine the Parties’ respective duties; and (2) accepted Continental’s “unique situation” allegations as true but concluded they did not create a separate common-law duty as a matter of law.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE UCC DISPLACED CONTINENTAL'S COMMON-LAW CLAIMS AND THAT TD BANK'S ACCOUNT STATEMENTS SATISFIED THE UCC.²⁹

A. Question Presented

Did the Trial Court correctly conclude as a matter of law that the UCC displaces Continental's common-law claims of negligence and gross negligence and that TD Bank provided monthly account statements that satisfied the UCC? (A-000697-99).

B. Scope of Review

This Court reviews *de novo* the trial court's ruling on a motion to dismiss for failure to state a claim. *Clouser*, 2017 WL3947404, at *4; *Malpiede*, 780 A.2d at 1082.

C. Merits of Argument

The Trial Court correctly held:

Continental argues that TD Bank breached its duty of care, *but fails to identify any specific duties assumed by contract beyond those established by the UCC*. . . .

Article 4A of the UCC governs ACH transfers. *The duties Continental alleges are expressly covered by the UCC*. The UCC displaces the common law claims. As decided in the January 24, 2018 Opinion, Continental's claim must be dismissed because Continental has not supported the proposition that the agreements between Continental and TD Bank add to, vary, or otherwise supplement the duties provided

²⁹ Argument III responds to Continental's Arguments V and VI.

expressly in the UCC. Further, *the account statements that TD Bank provided are sufficient under Section 406 of Article 4 because the statements contain a description, item, and date of payment.*

(A-000697–99, December Opinion at 5–7).

1. *The UCC Displaces Continental’s Common-Law Claims of Negligence and Gross Negligence.*

There are four reasons why the Trial Court correctly held that the UCC displaces Continental’s common-law claims.

First, it is black letter law that the UCC “is the primary source of commercial law rules in areas that it governs,” and it “preempts principles of common law and equity that are inconsistent with either [the UCC’s] provisions or policies.” 6 *Del. C.* §§ 1-103(b), cmt. 2 & 1-104; N.J. Stat. § 12A:1-103, cmt. 2 (stating the same); *see also Mahaffy & Assocs., Inc. v. Long*, 2003 WL 22351271, at *5–6 (Del. Super. Sept. 29, 2003); *ADS Assocs. Grp., Inc. v. Oritani Sav. Bank*, 99 A.3d 345, 347 (N.J. 2014) (“The Legislature enacted Article 4A to comprehensively address the issues raised by funds transfers and to determine the rights, duties, and liabilities of the parties affected by such transactions. Allowing [plaintiff’s] common law negligence claim to proceed would undermine the statute’s objectives.”).

Moreover, as Continental admits, the UCC displaces common-law claims when the parties’ duties in a particular situation are covered by the UCC. (Op. Br. at 22). *See Blaskovitz v. Dover Fed. Credit Union*, 2017 WL 2615748, at *3 (Del. Super. June 15, 2017) (“As to the negligence claim made by the Plaintiffs, the duties

alleged are entirely displaced by the [UCC.]”); *Mahaffy*, 2003 WL 22351271, at *6 (“Common Law claims as they apply to the duties of a depository bank are displaced only to [t]he extent that the UCC contains particular provisions regarding those duties. . . . Where the legislature has preempted the field by enacting a provision in the UCC which establishes the rights of the parties, competing theories of liability are not permitted.”).

Here, not only did Continental *expressly agree* that Article 4A of the UCC would govern fund transfers from its account,³⁰ Continental’s Amended Complaint is based on its rogue employee’s embezzlement scheme involving a series of ACH transfers. As the Trial Court correctly explained, Sections 4A-201–203 address the duties of banks and customers when authorizing the sort of electronic transfers of funds at the heart of this case. (*See Op. Br.* at 22 (conceding Article 4A of the UCC governs the duties and procedures for ACH funds transfers)). As such, other theories of liability outside the UCC statutory scheme are not permitted. 6 *Del. C.* §§ 4A-201–203; N.J. Stat. § 12A:1-103, cmt. 2; *ADS Assocs. Grp.*, 99 A.3d at 347.

Second, Continental is wrong in arguing that Article 4A is inapplicable because TD Bank allegedly failed to flag Czap’s ACH transfers based on the “unique situation” where TD Bank sat on both sides of the transfers. Continental, not TD

³⁰ A-000437, 2006 Master Agreement at § 5.6; A-000449–50; 2011 Master Agreement at § 3.6; A-000501, Account Agreement at 25.

Bank, was obliged by contract to prevent, monitor, investigate, and report any issues with Continental's ACH transfers. Like the Parties' Business Account Agreements, Article 4A squarely places the duty to monitor and notify of errors on the customer, not the bank. *See, e.g.*, N.J. Stat. § 12A:4A-211 (explaining timing and process requirements for customer to request cancellation or amendment of a payment order). Accordingly, because it addresses the specific duties raised by Continental's common-law claims, Continental cannot escape Article 4A.

Third, Continental mischaracterizes the Trial Court's statement regarding Continental's failure to support its proposition that the Business Account Agreements varied the UCC. (Op. Br. at 25 (discussing page 6 of the December Opinion)). When read in context with the rest of the December Opinion, the Trial Court found that Continental failed to demonstrate any duties within the Business Account Agreements that exceed the UCC. Indeed, all of Continental's allegations concern conduct expressly accounted for in the contracts and related to ACH transfers, which is governed by Article 4A.

Fourth, the Trial Court correctly rejected Continental's reliance on *Gilson v. TD Bank, N.A.*, 2011 WL 294447 (S.D. Fla. Jan. 27, 2011), to support its argument against displacement. *Gilson* denied Article 4A preemption on grounds that the "[p]laintiff's negligence claim center[ed] on the [defendant b]ank's allegedly negligent and reckless conduct with regard to opening the accounts" by an

unauthorized user. *Id.* at *9. Here conversely, the conduct at issue does not concern the improper opening of the Continental account at TD Bank and thus does not concern allegations that fall beyond the purview of the UCC. Further, the actor in *Gilson* was unauthorized. But here, the Amended Complaint admitted Czap was an authorized user of Continental’s account. (A-000359, ¶¶ 15, 17). Continental never disputed Czap’s authorized role within its briefing or during oral argument to the Trial Court. (*See, e.g.*, A-000717, Nov. 14, 2018 Hr’g Tr. at 11:13–17; A-000719 at 13:17–18; A-000720 at 14:2–5; A-000726 at 20:9–12; A-000775–76 at 69:17–70:1).

2. *TD Bank’s Accounts Statements Are Sufficient Under the UCC.*

Finally, TD Bank’s account statements were sufficient under the UCC as a matter of law and, therefore, the Trial Court properly dismissed Continental’s gross negligence claim concerning the sufficiency of the statements.

Continental agreed that it was subject to the UCC—specifically in Section 3.6 of the 2011 Master Agreement. Under the UCC, an account statement is sufficient when it contains the item, amount, and date of payment. N.J. Stat. § 12A:4-406, cmt. 1. Continental does not and cannot deny that the statements TD Bank gave Continental identified the date, and that the transaction was an “ACH Settlement” with an amount for each ACH transaction. (A-000357, ¶ 6; A-000367, ¶ 33 (providing an image of a partial account statement)).

Continental cannot reasonably dispute that the “ACH Settlement” item description does not satisfy the UCC. Indeed, an account statement need only provide a customer with enough information for that customer to identify the items paid on the statement so the customer may verify the payments with its own records. *See* § 12A:4-406(a), cmt 1; *see also* Business Account Agreements (discussing dual controls and ways to prevent embezzlement). TD Bank was not required to identify the payee for each ACH transaction on the statements. Continental fails to cite any support for its insistence otherwise.

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT CONTINENTAL FAILED TO PLEAD A CLAIM OF GROSS NEGLIGENCE.³¹

A. Question Presented

Did the Trial Court apply the correct pleading standard and correctly conclude that Continental failed to plead a claim of gross negligence as a matter of law? (A-000701).

B. Scope of Review

This Court reviews *de novo* the Trial Court's ruling on a motion to dismiss for failure to state a claim. *Clouser*, 2017 WL3947404, at *4; *Malpiede*, 780 A.2d at 1082.

C. Merits of Argument

In the December Opinion, the Trial Court properly rejected Continental's gross negligence claim that was based on the same facts of Continental's simple negligence claim previously dismissed in the January Opinion. The Trial Court correctly held:

Continental concedes that *the factual underpinning of the Amended Complaint is not different from the original Complaint. The Court previously has held that the claims for simple negligence are barred by the clear and unambiguous language of the agreements between the parties.* A finding of gross negligence would require facts amounting to more than simple negligence. Therefore, without any additional facts, the Court cannot find that Continental has established

³¹ Argument IV responds to Continental's Argument VII.

a *prima facie* case that TD Bank violated its duties as a result of gross negligence.

(A-000701).

As a threshold matter, Continental cannot challenge the Trial Court's dismissal of simple negligence because Continental failed to appeal the January Opinion. *See* Argument I.C.1, above.

Further, Continental's selective reading of the December Opinion focusing on a *prima facie* claim of gross negligence is misplaced. The Trial Court did not impose a "non-existent heightened pleading standard." (Op. Br. at 32). *Prima facie* means "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted." BLACK'S LAW DICTIONARY at 1228. To avoid dismissal, a pleading must make a *prima facie* showing of the elements of its claim. *See Brown v. Perrette*, 1999 WL 342340, at *6 (Del. Ch. May 14, 1999) (advising that a claim "is susceptible to dismissal" absent a *prima facie* showing of every element of a claim); *Newspan, Inc. v. Hearthstone Funding Corp.*, 1994 WL 198721, at *3 (Del. Ch. May 10, 1994). "[I]n Delaware, a plaintiff still must establish that a defendant owed her a duty of care in order to state a *prima facie* claim of negligence." *Doe 30's Mother v. Bradley*, 58 A.3d 429, 436 (Del. Super. 2012); *see also Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007) ("The defendant is entitled to judgment as a matter of law if the plaintiff fails to establish a *prima facie* case of negligence."); *Sadler-Ievoli v. Sutton Bus & Truck Co.*, 2013 WL 3010719, at *3 (Del. Super. June 4, 2013) (granting a motion

to dismiss where plaintiff failed to meet its *prima facie* pleading burden); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 984 (Del. Ch. 2000) (same). Here, for the reasons stated in Arguments I and II above, the Business Account Agreements and the UCC negate Continental’s gross negligence claim as a matter of law, preventing Continental from making a *prima facie* showing of the elements of duty and breach.

Also, Continental’s reliance on *Hecksher v. Fairwinds Baptist Church*, 115 A.3d 1187 (Del. 2015) is misplaced. In *Hechsher*, this Court concluded the defendant-school owed legal duties to control its employees and protect students’ safety, and that the defendant-school’s failure to institute policies necessary to comply with these duties constituted gross negligence. *Id.* at 1206–07. Here, Continental’s allegation that “TD Bank failed to conduct *any* investigation into suspicious transfers” (Op. Br. at 31), does not support a claim of gross negligence because TD Bank had no such duty under the Business Account Agreements or the UCC to investigate account activity in the first instance. TD Bank cannot breach a duty it does not have³² and absent a duty and breach, Continental cannot impose liability on this theory of gross negligence. *Bradley*, 58 A.3d at 436 (“Regardless of

³² Rather, the opposite is true. Continental expressly accepted the responsibility to review its account statements and timely report unauthorized transactions. *See* Arguments I and II, above.

how morally, ethically or socially deplorable a defendant's conduct may be viewed by other constituencies, in the eyes of the law, the defendant may not be held to answer in negligence unless and until the court determines, as a matter of law, that the defendant owed a duty of care to the plaintiff.”).

V. THE TRIAL COURT PROPERLY RULED THAT DELAWARE'S STATUTE OF REPOSE BARS CONTINENTAL'S UNTIMELY CLAIMS.³³

A. Question Presented

Did the Trial Court properly conclude that the UCC's one-year statute of repose applies because it is undisputed that TD Bank is the "receiving bank" and that TD Bank provided adequate account statements as a matter of law? (A-000698, 702).

B. Scope of Review

This Court reviews *de novo* the Trial Court's ruling on a motion to dismiss for failure to state a claim. *Clouser*, 2017 WL3947404, at *4; *Malpiede*, 780 A.2d at 1082.

C. Merits of Argument

In citing 6 *Del. C.* § 4A-505, the Trial Court correctly held that "the UCC one-year statute of repose applies." The Trial Court's holding is correct for three reasons:

First, although Continental fails to allege the date(s) of the transactions for which it seeks to hold TD Bank liable, Continental's claims concerning transactions initiated more than one year before Continental notified TD Bank of Czap's fraud are barred under the UCC's one-year statute of repose. Under the UCC:

³³ Argument V responds to Continental's Argument VIII.

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, *the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one year after the notification was received by the customer.*

N.J. Stat. § 12A:4A-505; *id.* at cmt. (“[T]he obligation to refund may not be asserted by the customer if the customer has not objected to the debiting of the account within one year after the customer received notification of the debit.”).

Here, Continental admits that it received monthly bank statements from TD Bank, and thus had notice of the debits it now disputes. (A-000356–57, ¶ 6). Thus, Continental is barred from asserting claims for any transaction that occurred more than one year before it notified TD Bank of the fraud.

Second, despite admitting that the statute of repose applied to UCC-related claims, Continental remarkably and incorrectly seeks to avoid the statute's application by suggesting it does not apply in a case where the bank is on both sides of the transfer. This argument is belied by Article 4A's repeated contemplation of a scenario where one bank is both the “receiving” and “beneficiary” bank in an ACH transfer. N.J. Stat. § 12A:4A-203, cmt. 1. Thus, it is not surprising that Continental fails to cite any legal authority in support of its position.

Third, Continental further attempts to avoid the statute of repose arguing that Continental never received information from TD Bank that “reasonably identif[ied] the order[,]” which is required to trigger the statute. (Op. Br. at 33–34; A-000573). This argument fails because, as discussed above, the Trial Court correctly ruled that TD Bank’s account statements were sufficient as a matter of law.

CONCLUSION

The Trial Court correctly found that the Business Account Agreements and the UCC provide all of the relevant duties for the alleged facts and those duties required Continental, not TD Bank, to review Continental's account statements for unauthorized transactions. For the above reasons, TD Bank respectfully requests this Court AFFIRM the Trial Court's rulings.

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