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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CONTINENTAL FINANCE COMPANY, LLC, Below Plaintiff, Current Appellant - against - TD BANK, NATIONAL ASSOCIATION, Below Defendant, Current Appellee	C.A. No.: 613, 2018

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NATURE OF PROCEEDINGS

This action concerns TD Bank's grossly negligent failure to identify a years-long embezzlement scheme perpetrated using two TD Bank accounts held at the same Delaware branch. Roberta Czap, a now-former Continental employee, transferred millions of dollars from Continental's account at TD Bank to her personal TD Bank account via hundreds of fraudulent ACH transactions, disguised by fake vendor names. Despite its knowledge of Czap's personal financial means and the position of trust Czap occupied at Continental, TD Bank failed to investigate the numerous large and irregular deposits from Continental's TD Bank account into Czap's personal account at TD Bank, as well as her frequent cash withdrawals of those fraudulently obtained funds. Given the implausible nature of these transactions, even the most rudimentary investigation by TD Bank would have uncovered Czap's fraud. TD Bank did not do so. TD Bank compounded those failures by not providing Continental with any of the information necessary to identify this fraud, instead delivering account statements that contained effectively no useful information. Simply put, TD Bank abdicated its duties to Continental by both failing to uncover Czap's fraud and also failing to provide Continental with the information necessary to do so.

Continental filed its original complaint on July 3, 2017, suing TD Bank for negligence. TD Bank moved to dismiss. On January 24, 2018, the Court granted

that motion, and dismissed Continental's complaint without prejudice. The Court's opinion and order relied on extrinsic contracts that were not incorporated into the Complaint, but envisioned Continental amending its complaint to address those contracts, which contemplate TD Bank's common-law liability: "[c]laims grounded in gross negligence, willful misconduct, or bad faith supported by particularized factual allegations are not contractually excluded, but must be asserted pursuant to any relevant UCC provisions." A-000250 (Opinion at 7). Continental amended its complaint on April 30, 2018. TD Bank moved to dismiss. The Court granted that motion, and dismissed the Amended Complaint with prejudice. The Court held that (1) absent certain exceptions not present here, TD Bank did not owe any common-law duties to its customer Continental; (2) the UCC entirely displaced Continental's claims; (3) Continental had not established a "prima facie" case of gross negligence; and (4) the UCC's one-year statute of repose applies. The Superior Court also made various factual findings concerning Czap's scheme and TD Bank's performance of its obligations under those agreements, notwithstanding that the parties have conducted no discovery and presented no evidence.

This appeal followed.

SUMMARY OF ARGUMENT

1. In granting TD Bank's motion to dismiss, the Superior Court made improper factual determinations and wrongfully rejected allegations in Continental's Amended Complaint. Black-letter law requires the Court to accept Continental's well-pled allegations, and forbids the Court from making factual conclusions on a motion to dismiss, without discovery. The Court did both things in finding, for example, that Czap was an "authorized user" of Continental's ACH accounts and that TD Bank employed "commercially reasonable" security procedures. The Court also ignored well-pled allegations about TD Bank's ability to uncover Czap's fraud.

2. The Superior Court wrongly held that, under Delaware law, banks do not owe any tort duties to their customers. This would mark a substantial change in the relationship between banks and customers in the State. Unsurprisingly, this is not the law in Delaware, where courts have repeatedly held that banks can be liable in tort. Moreover, the parties' agreements—which underpin much of the Superior Court's decision—also specifically contemplate TD Bank's common-law liability.

3. The UCC does not displace Continental's common-law claims. There is no UCC provision excusing TD Bank from failing to identify the fraudulent deposits at issue here. Although the Superior Court relied on Article 4A of the UCC, those provisions solely pertain to ACH transfers. Continental's claims are not so limited.

The UCC also allows parties to vary the terms of the UCC by agreement. 6 Del. C. § 1-302. The parties did just that by contemplating TD Bank's common-law liability in multiple contracts.

4. Continental has established that TD Bank breached the UCC by not employing commercially reasonable security procedures and by not providing adequate bank statements. The Superior Court wrongly rejected the former argument through improper fact-finding, and failed to consider the latter argument.

5. The Amended Complaint pleads gross negligence. The Superior Court held that Continental had not established a "*prima facie*" case of gross negligence. But that holding both improperly creates a heightened pleading requirement while also ignoring the specific allegations in the Amended Complaint explaining with specificity how TD Bank failed to investigate implausible activity involving two TD Bank accounts maintained at the same branch, despite specific knowledge about both accountholders and their relationship to each other.

6. The UCC's statute of repose does not apply here. That statute, which requires customers to notify receiving banks of problematic payment orders within a set time, is inapplicable because TD Bank is not just a receiving bank. To the contrary, TD Bank sat on all sides of the at-issue transactions. Moreover, the statute only applies where the bank has "reasonably identified" the payment order. TD Bank's vague account statements fail to do so.

STATEMENT OF FACTS

I. CONTINENTAL MAINTAINS AN ACCOUNT AT TD BANK

In or around 2007, Continental opened a bank account with Commerce Bank. Following a merger between Commerce Bank and TD Bank, that account became a TD Bank account, ending in 8479 (the "Continental TD Account"). That account served as the company's main operating account, and Continental used it to pay vendors and other recipients via automated clearing house, or ACH, transactions. A-000359 (Am. Compl. ¶¶ 14-15).

The parties executed certain agreements concerning the Continental TD Account. For example, on or about March 1, 2006, Continental entered into a Master Services Agreement for Banking Services with Commerce Bank, N.A. (the "2006 Agreement"). Section 9.1 of the 2006 Agreement provides that "the Bank shall use reasonable care to provide accurate, complete and current financial information relating to the Account(s) maintained by the Company." A-000078 (2006 Agreement). That agreement also provides for TD Bank's liability in tort: "[u]nless due to Bank's negligence or willful misconduct, Bank shall have no liability to Company if the Services are utilized by Company, Company's employee(s), independent contractor(s) or other third party for a purpose or in a manner not contemplated or allowed" by the 2006 Agreement. *Id.* § 9.2; *see also* A-000079 (*id.* § 10.1) (Continental "shall not be required to indemnify and hold

harmless the Bank from any Losses which are caused by the Bank's negligence or willful misconduct.").

The parties subsequently executed a Cash Management Master Agreement dated as of June 22, 2011 (the "2011 Agreement"). Like the 2006 Agreement, the 2011 Agreement states that "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-000090 (2011 Agreement § 15.1); *see also* A-000091 (*id.* § 16.2) (TD Bank "shall have no right to be indemnified hereunder for losses resulting from its own gross negligence or willful misconduct as finally determined by a court of competent jurisdiction.").

II. TD BANK KNEW ROBERTA CZAP, AND HER PERSONAL FINANCIAL CONDITION

Roberta Czap ("Czap") helped establish the Continental TD Account. A-000359-60 (Am. Compl. ¶ 17). Czap ultimately became a Vice President of Accounting at the company. *Id.* Czap had a variety of relevant responsibilities. Among other things, Czap managed Continental's relationship with TD Bank, and was responsible for various accounting activities, including settling accounts, paying bills via ACH transaction, and cash reconciliations. *Id.* Those responsibilities required Czap to frequently interact with TD Bank employees, both in person and via email and phone. *Id.* Czap was thus well known to TD Bank

employees at the local branch as the Continental employee in charge of day-to-day financial transactions. A-000361 (*Id.* ¶ 19). Those employees specifically knew that Czap's responsibilities included the execution of ACH transfers on Continental's behalf. A-000359-61 (*Id.* ¶ 17, 19).

Czap also conducted some of her personal banking at TD Bank. Czap maintained a personal bank account with TD Bank, ending in 7093 (the "Czap TD Account"), at the same branch where Continental had its operating account. A-000360 (*Id.* ¶ 18). Czap deposited her paycheck into the Czap TD Account via clearly denominated (and regular) deposits. *Id.* TD Bank therefore knew or should have known about Czap's banking habits and personal financial situation. *Id.*

III. CZAP EMBEZZLES MONEY FROM CONTINENTAL

While working for Continental, Czap embezzled more than six million dollars from the company by using TD Bank's systems. A-000361 (*Id.* ¶¶ 20-21). Specifically, Czap executed more than 500 fictitious ACH payments whereby she funneled large sums of money from the Continental TD Account to, among other personal accounts, the Czap TD Account. *Id.* In order to avoid raising suspicions within Continental, Czap disguised these transactions by creating modified names of actual Continental vendors and then "paying" those "vendors" with these funds. A-000361 (*Id.* ¶ 22). Thus, for example, Czap transferred millions of dollars via ACH payments to "BCBS1"—a fictitious version of an actual Continental vendor,

Blue Cross Blue Shield. A-000362 (*Id.* ¶ 23). Those payments flowed from the Continental TD Account to the Czap TD Account (and Czap's personal accounts at other banks). *Id.* Czap did not employ any "shell" company, as TD Bank has suggested. A-000407 (Def. Br. at 15).

These transactions had no pattern with respect to either their amounts or timing, and often occurred numerous times within any given month. *See* A-000362-63 (Am. Compl. ¶ 24) (chart setting forth more than two dozen fraudulent transactions from 2016 alone, of differing amounts and with irregular timing). After transferring these funds, Czap then made large—and also irregular—cash withdrawals from the Czap TD Account. A-000364 (*Id.* ¶ 25). Czap's fraudulent activity resulted in balances in her personal account that clearly exceeded her personal financial means, and meant that the Czap TD Account had much more account activity than a typical personal banking account. *Id.* ¶ 26.

IV. TD BANK NEGLIGENTLY FAILS TO INVESTIGATE CZAP'S EMBEZZLEMENT

TD Bank did nothing to investigate these highly suspect ACH transactions or the corresponding irregular deposits into and withdrawals from the Czap TD Account. Had TD Bank done so, it would have immediately uncovered Czap's embezzlement scheme, for multiple reasons. *Id.* ¶ 27. Initially, the fact that Czap transferred millions of dollars via hundreds of transactions from the Continental TD Account to the Czap TD Account, standing alone, should have raised a red flag

at TD Bank. A-000364-65 (*Id.* ¶ 28). Moreover, TD Bank knew of Czap's position at Continental and her personal financial means. A-000365 (*Id.* ¶ 29). The receipt into her personal bank account of more than five hundred suspicious transfers from the Continental TD Account at the same branch should have triggered an investigation within TD Bank, separate and apart from any concerns about the validity of the transactions supposedly initiated by Continental. *Id.* Such an investigation—required by TD Bank's duty of care to Continental—would have uncovered Czap's criminal actions. A-000365-66 (*Id.* ¶ 30). Indeed, reviewing any one of these transactions would have immediately revealed this fraud to TD Bank. *Id.* Instead, TD Bank did nothing, and allowed Czap's scheme to continue for years. *See* A-000368 (*Id.* ¶ 35).

Nor could Continental have uncovered these activities itself. Instead, TD Bank provided Continental with statements that contain only the date, amount, and indicate that the payment is an "ACH Settlement" from "CONTINENTAL FINA ACH TRANS." A-000367-68 (*Id.* ¶ 33) (including sample entries from monthly statements for Continental TD Account). Among other things, those statements failed to identify the recipient of the funds, the payee's account information, or any other information that would have allowed Continental to uncover Czap's scheme.

ARGUMENT

I. THE SUPERIOR COURT MADE IMPROPER FACTUAL FINDINGS ON A MOTION TO DISMISS

A. Question Presented

Did the Superior Court err in granting TD Bank's Motion to Dismiss based, in part, upon factual findings made without any discovery? A-000694-700.

B. Scope of Review

This Court reviews *de novo* trial court rulings granting motions to dismiss. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

C. Merits of Argument

"A motion to dismiss must be decided solely upon the allegations in the complaint." *Johnson v. Student Funding Grp., LLC*, No. CV N14C-08-098 ALR, 2015 WL 351979, at *1 (Del. Super. Ct. Jan. 26, 2015) (citation omitted). Generally, "matters outside of the pleadings should not be considered in ruling on a Rule 12(b)(6) motion to dismiss." *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996).

The Superior Court violated these black-letter rules by making multiple factual findings that underpin critical elements of the Order. The Superior Court held that the 2011 Agreement "established certain security procedures," that Czap "followed th[e] security procedure [set forth in that Agreement] by using a User

ID, password, and Token" and that the 2011 Agreement provides that TD Bank cannot be held liable if TD Bank "substantially complied" with those procedures. A-000694 (Order at 2) (quotations omitted). Critically, the Superior Court also found those procedures to be "commercially reasonable." *Id.* The Order cites to no evidence for these findings. Nor could it, given that the parties have conducted no discovery. The Superior Court relied on those findings to dismiss Continental's claims by finding that "Czap was an Authorized User within the definition of the Master Agreement and, as such, committed her theft within the security procedures set forth in the Master Agreement." A-000700 (*Id.* at 8). None of these allegations appear in the Amended Complaint.

This is improper. The Superior Court cannot determine, on a motion to dismiss, specific facts about either Czap's theft or the propriety of TD Bank's security procedures. The Superior Court's findings depend on the conclusion that TD Bank created and complied with "commercially reasonable" security procedures. But the questions of whether security procedures existed, the commercial reasonability of those procedures, and whether the bank complied with them, are all inherently fact-intensive inquiries that cannot be resolved on a motion to dismiss. *Gantler v. Stephens*, 965 A.2d 695, 704 (Del. 2009) (dismissal inappropriate if "any set of facts" could justify relief). The Order should be reversed to allow the parties to conduct the necessary discovery.

II. THE SUPERIOR COURT PURPORTED TO CHANGE DELAWARE LAW BY HOLDING THAT BANKS OWE NO TORT DUTIES TO CUSTOMERS

A. Question Presented

Did the Superior Court err in holding that, under Delaware law, banks do not owe any tort duties to their customers? *See* A-000699, A-000550-53.

B. Scope of Review

This Court reviews *de novo* trial court rulings granting motions to dismiss. *Cent. Mortg. Co.*, 27 A.3d at 535.

C. Merits of Argument

The Superior Court's decision rests largely on the incredible conclusion that "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-000699 (Order at 7). In other words, the Superior Court held that, under Delaware law, banks do not owe any tort duties to their customers. This is wrong, for several reasons.

First, the Superior Court is mistaken on the law. It is not the case that banks do not owe tort duties to their customers, as the Superior Court held. Given the potential ramifications of such a rule, that is not surprising. To the contrary, this Court has held that a bank has a duty to review inherently suspicious activity like the transactions at issue here. *See, e.g.*, *Allied Auto Sales, Inc. v. President,*

Directors & Co. of Farmers Bank of Del., 59 Del. 192, 195 (1966) (rejecting summary judgment for bank on negligence claim, and holding that "[t]he answer conceivably may hinge upon evidence at trial concerning the customary banking practices and procedures that should have been followed in this type of situation, and whether those practices and procedures were observed in this instance"); *see also Renzi v. Aleszczyk*, 44 A.D.2d 648, 649 (N.Y. App. Div. 1974) (collecting cases) ("[T]he 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. Where some fact or circumstance ought to 'have excited the suspicion and inquiry of an ordinarily careful person,' the bank has a duty to inquire into the circumstances before it pays out the funds."); *Novak v. Greater New York Sav. Bank*, 282 N.E.2d 285, 288 (N.Y. 1972). TD Bank repeatedly violated this common-law duty. As fully explained in the Amended Complaint, TD Bank breached its duty of care by failing to discover Czap's fraudulent scheme, despite the obvious evidence available exclusively to TD Bank (to say nothing of TD Bank's awareness of Czap's personal financial situation and her position of trust at Continental). The Superior Court wrongly rejected those allegations in favor of creating a new blanket rule in this State. The Order should be reversed for this reason alone.

Second, none of the authority the Superior Court offers in support of this sweeping conclusion is on-point, particularly given that the Order emanates from a

pre-answer motion to dismiss. The Superior Court cites to two decisions that come only after significant factual findings: *United Jersey Bank v. Kensey*, a summary-judgment case from New Jersey involving a "voluminous" record, 306 N.J. Super 540, 545 (N.J. Super. Ct. 1997), and *Mengele v. Christiana Federal Sav. & Loan Ass'n of Wilmington*, a case concerning a directed verdict issued after a jury trial. 287 A.2d 395, 398 (Del. 1972). Neither decision stand for a blanket rule that a bank can never be liable in tort to its customers. To the contrary, these cases confirm that, when a customer alleges that a bank has violated its common-law tort duties to a customer, the proper course is to allow the parties to create a full factual record via discovery, and then evaluate the bank's conduct under those facts. So too here. This Court should vacate the Order so that discovery may proceed.

Third, and finally, the agreements between the parties specifically contemplate TD Bank's common-law liability and, thus, that TD Bank has a duty to its customer, Continental. For example, the 2006 Agreement provides that "[u]nless due to Bank's negligence or willful misconduct, Bank shall have no liability to Company if the Services are utilized by Company, Company's employee(s), independent contractor(s) or other third party for a purpose or in a manner not contemplated or allowed" by the 2006 Agreement. A-000078 (2006 Agreement § 9.2). The 2011 Agreement similarly contemplates TD Bank's liability for "gross negligence, willful misconduct, or bad faith." A-000090 (2011

Agreement § 15.1). The 2011 Agreement also provides that TD Bank "shall have no right to be indemnified hereunder for losses resulting from its own gross negligence or willful misconduct as finally determined by a court of competent jurisdiction." A-000091 (*Id.* § 16.2). Taken together, these provisions confirm that TD Bank contractually owes a duty of care to Continental. In other words, because TD Bank contractually agreed to be liable for negligence, it follows that those same agreements confirm that TD Bank owes certain duties to Continental. Courts have previously held that parties can agree to impose duties via contract. *See, e.g.*, *Marbro, Inc. v. Borough of Tinton Falls*, 688 A.2d 159, 162 (N.J. Super. Ct. Law Div. 1996) (citation omitted) ("[P]arties bargaining at arms-length may generally contract as they wish"); *Burns v. Delaware Charter Guarantee & Tr. Co.*, 805 F. Supp. 2d 12, 26 (S.D.N.Y. 2011) (permitting negligence claim where contract "explicitly carves out claims of negligence and intentional conduct from its coverage"). This is the case here, and further confirms the impropriety of the blanket rule that the Superior Court's Order seeks to create in this State. This Court should reverse the Order in full, and allow the parties with discovery in the Superior Court.

III. THE COURT DISREGARDED CRITICAL FACTUAL ALLEGATIONS IN THE AMENDED COMPLAINT

A. Question Presented

Did the Superior Court err in not addressing the Amended Complaint's allegations that TD Bank should have discovered Czap's fraud? *See* A-000694-99.

B. Scope of Review

This Court reviews *de novo* trial court rulings granting motions to dismiss. *Cent. Mortg. Co.*, 27 A.3d at 535.

C. Merits of Argument

On a Rule 12(b)(6) motion to dismiss, courts accept as true all well-pled factual allegations and draws all reasonable inferences in favor of the plaintiff. *Master Mech., Inc. v. Shoal Const., Inc.*, No. Civ. A08L-12-055 JTV, 2009 WL 1515591, at *1 (Del. Super. Ct. May 29, 2009). The Superior Court failed to comply with these requirements by ignoring specific factual allegations in the Amended Complaint to grant TD Bank's motion to dismiss.

In dismissing the Amended Complaint, the Superior Court failed to address critical elements of Continental's claim: specifically, the ease with which TD Bank, as the party sitting on all sides of the transaction and personally familiar with Czap and Continental as a result of both parties maintaining accounts at the same TD Bank branch, could have uncovered Czap's fraud. Czap stole millions from Continental via fraudulent transfers from the company's bank account to her

personal account—both accounts maintained at TD Bank. TD Bank also personally knew Czap, her duties as Continental's bookkeeper, and her personal financial habits. Given those facts, review of any individual fraudulent transfer executed by Czap (information solely in the hands of TD Bank by virtue of TD Bank's deficient account statements) would have revealed a payment to a fictitious vendor, such as "BCBS1," flowing from Continental's operating account at TD Bank into Czap's personal account, also at TD Bank, in amounts far exceeding Czap's regular compensation. *See, e.g.*, A-000361-62 (Am. Compl. ¶¶ 22-24).

The Order does not address any of these facts. Instead, the Order obliquely references "TD Bank's knowledge of the relationship among Continental, Czap, and TD Bank," and that Czap moved the funds from the Continental TD Account to the Czap TD Account. A-000694, A-000699 (Order at 2, 7). Those scant references strip out from the Amended Complaint key elements about TD Bank's unique ability to uncover Czap's fraud following a cursory investigation. *See* A-000366-69 (Am Compl. ¶¶ 31-35). Indeed, those specific allegations are what makes this case unique, and render TD Bank's conduct grossly negligent. The Superior Court's failure to consider all of the Amended Complaint's allegations—as required by basic procedural rules—is reversible error. *Gantler*, 965 A.2d at 703 (on motion to dismiss, courts "view the complaint in light most favorable to non-moving party, and accepts as true its well-pled allegations").

IV. THE TRIAL COURT WRONGLY REQUIRED CONTINENTAL TO ADDRESS CERTAIN CONTRACTS, AND MADE IMPROPER FACTUAL FINDINGS BASED ON THOSE CONTRACTS

A. Question Presented

Did the Superior Court err in dismissing the original Complaint based on extrinsic contracts, requiring Continental to incorporate those contracts into its amended pleadings, and then make factual findings based on only certain provisions of those agreements? *See* A-000257, A-000699.

B. Scope of Review

This Court reviews *de novo* trial court rulings granting motions to dismiss. *Cent. Mortg. Co.*, 27 A.3d at 535.

C. Merits of Argument

As this Court has held, documents extrinsic to pleadings may be considered on a motion to dismiss only where they are: (1) integral to the claim and incorporated into the complaint; or (2) not being relied upon for the truth of their contents. *See Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996). "[I]f a party presents documents in support of its Rule 12(b)(6) motion and the court considers the documents, it generally must treat the motion as one for summary judgment . . . [and] the non-movant normally should have an opportunity for some discovery." *In re Santa Fe Pacific Corp. Shareholder Litig.*, 669 A.2d 59, 69 (Del. 1995) (citing Del. Ch. Ct.

R. 56(e)) (internal citations omitted).

Continental's original complaint did not incorporate any of the alleged agreements between TD Bank and Continental, nor were those agreements integral to Continental's claims: Continental asserted common-law negligence claims that fell squarely outside of the parties' agreements. *See generally* A-000017-36 (Compl.). The Court nevertheless dismissed the Complaint based on the "clear and unambiguous language" of those extraneous agreements. A-000257 (Order Dismissing Compl. at 4) (holding, without citation, that "[w]here a contract specifically allocates risks between the parties, the Court may consider the contract for purposes of a motion to dismiss"). Standing alone, this was erroneous. *In re New Valley Corp.*, No. Civ. A. 17649, 2001 WL 50212, at *6 (Del. Ch. Jan. 11, 2001) (refusing to consider documents outside of complaint because "[d]isputed matters of interpretation and characterization of documents do not fall within this exception to the general rule and . . . should not be injected into a motion to dismiss").

The Superior Court compounded that problem by requiring Continental to amend its complaint to address the fact that the extrinsic agreements cited by TD Bank contemplated TD Bank's common-law liability for "gross negligence, willful misconduct, or bad faith," and then dismissed the Amended Complaint via factual conclusions based on only certain provisions in those contracts. Specifically, in

holding—incorrectly—that TD Bank owed no "contractual duty" to Continental, *see* A-000699 (Order at 7), the Superior Court ignored language in the agreements providing that "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-000090 (2011 Agmt. § 15.1); *see also* A-000088 (2006 Agmt. § 9.2) (same, but contemplating liability for negligence). The Superior Court instead concluded, without evidence, that language outlining security procedures TD Bank was to employ controlled because those procedures were (a) actually employed by TD Bank, (b) "commercially reasonable," and (c) "substantially complied" with by TD Bank. A-000694 (Order at 2). This holding conflicts with black-letter law concerning contract interpretation and motions to dismiss. Courts cannot interpret certain provisions of a contract to the exclusion of the entire document. *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). The Superior Court did so by ignoring contractual language contemplating TD Bank's liability in tort. That Court also violated the rule against fact-finding on a motion to dismiss by ruling on, without evidence (there has been no discovery), the existence and propriety of TD Bank's security procedures over Continental's accounts. A-000694 (Order at 2). Without facts gleaned from discovery, that conclusion is improper here.

V. THE SUPERIOR COURT WRONGLY HELD THAT THE UCC DISPLACES CONTINENTAL'S CLAIMS

A. Question Presented

Did the Court err in concluding that the UCC displaced Continental's common-law claims despite (1) there being no UCC provision specifically addressing the Amended Complaint's allegations and (2) the language in the parties' agreements contracting around the UCC? A-000698, A-000554-61.

B. Scope of Review

This Court reviews *de novo* trial court rulings granting motions to dismiss. *Cent. Mortg. Co.*, 27 A.3d at 535.

C. Merits of Argument

The Superior Court dismissed Continental's common-law claims for negligence and gross negligence (Counts 1-5) for both general and specific reasons. As a general matter, the Superior Court held that (1) as a rule, the UCC displaces common-law laws and (2) Continental has not explained how the parties' agreements contract around the UCC. The first argument misstates the law, while the second mischaracterizes the Amended Complaint. The Court also specifically rejected Continental's claim that TD Bank was grossly negligent in providing insufficient account statements because it found that TD Bank complied with applicable UCC provisions. But the Amended Complaint alleges that TD Bank's statements do not comply with the UCC.

First, the Superior Court generally held that "[t]he UCC displaces common law claims." A-000698 (Order at 6). But that is not the law in Delaware. To the contrary, "Common Law claims as they apply to the duties of a depository bank are displaced only to the extent that the UCC contains *particular provisions* regarding those duties." *Mahaffy & Assocs., Inc. v. Long*, No. Civ. A. 01C-06-235SCD, 2003 WL 22351271, at *6 (Del. Super. Ct. Sept. 29, 2003) (emphasis added); *see also Blaskovitz by & through Blaskovitz v. Dover Fed. Credit Union*, No. CV K16C-10-017 WLW, 2017 WL 2615748, at *3 (Del. Super. Ct. June 15, 2017) ("The provisions of the UCC do not necessarily displace the common law."); Del. Code Ann. tit. 6, § 4A-102, Cmt. ("Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities *inconsistent with those* stated in this Article.") (emphasis added).

There is no particular provision governing Continental's claims here. The Superior Court pointed to Article 4A of the UCC in dismissing Continental's claims. A-000698 (Order at 6). Those provisions pertain to ACH transfers. Del. Code Ann. tit. 6, § 4A-102. But TD Bank's liability here is not only grounded in its failure to identify certain ACH transfers as problematic when they occurred; rather, Continental claims that TD Bank did not exercise any care by failing to flag hundreds of transfers between the Continental TD Account and the Czap TD Account (held, again, at the same branch) in light of TD Bank's particularized

knowledge about those two accounts. *See, e.g.,* A-000378-80 (Am. Compl. ¶¶ 82-87). Because Continental's claims are not limited to TD Bank's actions concerning ACH transfers, Article 4A does not preempt Continental's claims. *See, e.g., New Jersey Bank, N. A. v. Bradford Sec. Operations, Inc.*, 690 F.2d 339, 345–46 (3d Cir. 1982) (finding the UCC did not preempt an action for damages caused by negligent handling of securities, noting that "[a]s a general rule . . . the UCC does not displace the common law of tort as it affects parties in their commercial dealings except insofar as reliance on the common law would thwart the purposes of the Code."); *Travelers Cas. & Sur. Co. of Am. v. Bancorp Bank*, 691 F. Supp. 2d 531, 534, 536 (D. Del. 2009) (citation omitted) (plaintiffs' negligence action was not displaced by the UCC "because the UCC does not provide plaintiff with a cause of action under the particular facts of the case at bar," and explaining that "common law claims may supplement the UCC '[u]nless displaced by the particular provisions of the Uniform Commercial Code'"); *Cassello v. Allegiant Bank*, 288 F.3d 339, 340-41 (8th Cir. 2002) (permitting customer's negligence claim to proceed against bank because the Court "discovered no particular provision of the UCC that would displace a common-law claim of negligence") (quotation marks omitted); *Gilson v. TD Bank*, No. 10-20535-CIV, 2011 WL 294447, at *9 (S.D. Fla. Jan. 27, 2011) (rejecting argument that Article 4A preempted negligence claim because "the basis for [plaintiffs'] negligence claim

extends beyond TD Bank's conduct with regard to the wire transfers into and out of the accounts").

The Superior Court specifically addressed *Gilson v. TD Bank* in dismissing Continental's claims. In that case, plaintiffs alleged that TD Bank negligently failed to identify a fraud perpetuated by plaintiffs' investment advisor whereby the investment advisor transferred money from plaintiffs' accounts at TD Bank to other TD Bank accounts without plaintiffs' knowledge. *Gilson*, 2011 WL 294447, at *1. TD Bank argued that Article 4A of the UCC foreclosed those claims. The Court rejected that argument, finding that plaintiffs' claims extended beyond Article 4A's ambit. *Id.* at *9. The Superior Court found *Gilson* inapplicable because (1) the theft in *Gilson* was committed by an unauthorized user of the account, in contrast to the Court's finding that Czap was an "[a]uthorized [u]ser" of the Continental TD Account, and (2) plaintiffs in *Gilson* alleged that TD Bank was negligent in opening the bank accounts, an allegation not present here. A-000700 (Order at 8). Neither distinction has merit. The Court's distinction that Czap was an "authorized user" of the accounts is improper fact-finding on a motion to dismiss. *See* supra at 10-11. That allegation appears nowhere in the Amended Complaint, rendering that determination improper fact-finding on this motion to dismiss. *See supra* at 10-11. The Court's reliance on TD Bank's negligence in creating the *Gilson* accounts is equally misplaced. The important

distinction there is not TD Bank's specific negligence in opening bank accounts, but that such negligence fell outside of the UCC. That is the case here: As fully explained above, TD Bank's negligence falls outside of Article 4A. *Gilson* is on point.

Second, the Superior Court held that "Continental has not supported the proposition that the agreements between Continental and TD Bank add to, vary, or otherwise supplement" the UCC. A-000698 (Order at 6). This is incorrect. As Continental's underlying briefing explained, "the effect of provisions of the Uniform Commercial Code may be varied by agreement." Del. Code Ann. tit. 6, § 1-302. That is the effect of the 2006 and 2011 Agreements. Neither agreement makes the UCC the parties' exclusive remedy. Instead, TD Bank and Continental agreed to "comply with," among other things, "(i) all applicable laws, regulations, rules and orders; . . . [and] (iv) Article 4A of Uniform Commercial Code." A-000074 (2006 Agreement § 5.6); A-000086 (2011 Agreement § 3.6) (same, without reference to Article 4A). If the parties envisioned that the UCC would constitute their sole set of obligations, the agreements could have said so. They do not. Basic principles of contract interpretation require that the Court give effect to all terms of these agreements, including the parties' reliance on non-UCC forms of liability. *See GMG Capital Investments*, 36 A.3d at 779 (quotations omitted) ("In upholding the intentions of the parties, a court must construe the agreement as a

whole, giving effect to all provisions therein.").

Third, and finally, the Superior Court wrongly relied on the UCC to dismiss Continental's Third Cause of Action, which alleges that TD Bank was grossly negligent in providing Continental with vague account statements that made it impossible for Continental to discover Czap's fraud. A-000378-79 (Am. Compl. ¶¶ 81-83). The Court held that TD Bank's statements satisfied the UCC because they "contain a description, item, and date of payment." A-000698 (Order at 6). That holding ignores the Amended Complaint's allegations.

Section 4-406 of the UCC provides that a "statement of account provides sufficient information if the item is described by item number, amount, and date of payment." Del. Code Ann. tit. 6, § 4-406(a). The Amended Complaint contains a sample account statement demonstrating how TD Bank falls short. That statement includes a date and an amount, but no description by "item" or "item number" — the statement merely points to an "ACH SETTLEMENT." A-000367 (Am. Compl. ¶ 33). Without a reference to the specific item or item number for those transactions, TD Bank's statements do not fall into the safe harbor provided by the UCC. What is more, and as the Amended Complaint alleges, those statements do not contain any of the information necessary to uncover Czap's fraud. For example, without any payee information, Continental could not determine that Czap was paying fictitious vendors and sending that money to the Czap TD

Account. A-000378 (*Id.* ¶ 82). In other words, TD Bank's failure to provide Continental with adequate account statements enabled Czap's fraud to continue unabated. As the Amended Complaint explains, that failure resulted from TD Bank's complete failure to meet its duty of care to Continental, its customer. *See* A-000368, A-000378-79 (Am. Compl. ¶¶ 33 ("Had TD Bank provided substantive bank statements, Continental would have uncovered Czap's scheme far earlier than it did, thereby limiting Continental's damages."); 81-83 (same)). Combined with the fact that TD Bank's account statements do not comply with the UCC, TD Bank's abdication of its duty to Continental here justifies reversal of the Order.

VI. THE TRIAL COURT WRONGLY DISMISSED THE AMENDED COMPLAINT'S CLAIMS THAT TD BANK BREACHED THE UCC

A. Question Presented

Did the Superior Court err in dismissing Continental's claim that TD Bank breached the UCC by not employing commercially reasonable security procedures where the Order contains no discussion of this claim? A-000696, A-000567-71.

B. Scope of Review

This Court reviews *de novo* trial court rulings granting motions to dismiss. *Cent. Mortg. Co.*, 27 A.3d at 535.

C. Merits of Argument

Count Six of the Amended Complaint alleges that TD Bank breached the Section 4A-202 of the UCC by failing to employ appropriate security procedures in protecting the Continental TD Account from fraudulent transfers. That provision requires that TD Bank ensure "the security procedure is a commercially reasonable method of providing security against unauthorized payment orders." Del. Code Ann. tit. 6, § 4A-202(b). TD Bank failed to do so by neither taking into account the specific circumstances of Continental's relationship with TD Bank nor considering the size, type, and frequency of payment orders issued by Continental in crafting those procedures. A-000383 (Am. Compl. ¶¶ 96-98).

The Superior Court acknowledged this claim in the Order, *see* A-000696 (Order at 4), but failed to discuss it before entirely dismissing the Amended

Complaint. A-000702 (*Id.* at 10). This indicates that the Court overlooked this claim in its Order. While that alone justifies reversal, the question of whether TD Bank's security procedures were "commercially reasonable," and whether those procedures were followed, and in good faith, are fact-intensive questions not properly the subject of a motion to dismiss. Continental has alleged that TD Bank did not adequately safeguard Continental's account at TD Bank. Whether TD Bank did so is a question that can only be resolved after discovery. *See* Del. Code Ann. tit. 6, § 4A-203, Official Cmt. 4 ("Whether the receiving bank complied with the [security] procedure is a question of fact."). Similarly irrelevant is the Superior Court's citation to language in the 2011 Agreement whereby Continental purportedly agreed that TD Bank's procedures were "commercially reasonable." A-000694 (Order at 2). The plain language of the UCC provides that a security procedure is deemed "commercially reasonable" as a matter of law only where "(i) the security procedure was chosen by the customer after the bank offered, ***and the customer refused***, a security procedure that was commercially reasonable for that customer, ***and*** (ii) the customer expressly agreed in writing to be bound by any payment order." Del. Code Ann. tit. 6, § 4A-202(c) (emphasis added). Continental never refused to employ any security procedure offered by TD Bank. *See* A-000374-75, A-000383 (Am. Compl. ¶¶ 67-70, 99). TD Bank's security procedure cannot be deemed "commercially reasonable" on a motion to dismiss.

VII. THE SUPERIOR COURT IMPROPERLY HELD THAT CONTINENTAL DID NOT PLEAD GROSS NEGLIGENCE

A. Question Presented

Did the Superior Court err in dismissing Continental's gross negligence claims, by both finding that the Amended Complaint did not establish a "*prima facie*" case for gross negligence and also rejecting the well-pled allegations in the Amended Complaint? A-000699-702, A-000545-53, A-000561-63.

B. Scope of Review

This Court reviews *de novo* trial court rulings granting motions to dismiss. *Cent. Mortg. Co.*, 27 A.3d at 535.

C. Merits of Argument

The Superior Court rejected Continental's gross negligence claims (Counts 2-5), holding both that Continental had not established a "prima facie" case and that the Amended Complaint's allegations did not support a gross negligence claim. The former holding erroneously creates a new pleading standard in Delaware for gross negligence claims, while the latter ignores the well-pled allegations in the Amended Complaint.

To begin, the Superior Court's decision is logically flawed. According to the Order, because Continental's original Complaint only sounded in negligence, the Amended Complaint—which relies on a similar factual background—fails because it does not plead "additional facts" establishing gross negligence. *See* A-

000701 (Order at 9). But that holding ignores the possibility that the same facts supporting a negligence claim could also support a gross negligence claim. That is the case here. As the Amended Complaint explains, TD Bank failed to conduct *any* investigation into suspicious transfers from the Continental TD Account into the Czap TD Account, despite its knowledge of Czap's position of trust at Continental. *See, e.g.*, A-000364-66 (Am. Compl. ¶¶ 27-30). The Amended Complaint further demonstrates that any review of any transaction would have revealed that Czap was disguising as vendor payments fraudulent transfers from the Continental TD Account to the Czap TD Account. A-000364-65 (*Id.* ¶ 28). TD Bank further failed to investigate the irregular deposits into and withdrawals from the Czap TD Account, despite TD Bank's knowledge of Czap's personal financial situation. A-000368 (*Id.* at ¶ 34). Any review would have revealed that these deposits were from the Continental TD Account, and far exceeded Czap's regular compensation. *Id.* Continental also demonstrated that TD Bank has a duty of care to Continental, and that the parties' contracts contemplate TD Bank's liability in gross negligence. *See* A-000365-66, A-000369-72 (*Id.* ¶¶ 30; 36-55). Combined, these actions constitute precisely the sort of grossly negligent conduct contemplated by the parties' agreements. *Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1206-7 (2015) (finding plaintiff's allegations that defendant failure to investigate "red flags" and to employ "*any* reasonable steps" to identify

at-issue conduct pled gross negligence (emphasis original)). That those allegations also justify negligent conduct does not automatically mean, as the Superior Court held, that they cannot also adequately plead gross negligence.

The Superior Court compounded this error by requiring that Continental establish a "*prima facie*" case of gross negligence. A-000701 (Order at 9). This imposes a non-existent heightened pleading standard on a gross negligence claim. In order to plead gross negligence in Delaware, a plaintiff must plead, with specificity, "an extreme departure from the ordinary standard of care that signifies more than ordinary inadvertence or inattention." *Hecksher*, 115 A.3d at 1199 (internal quotations omitted). As fully set forth above, the Amended Complaint alleges, with specificity, that TD Bank's failure to investigate suspicious transfers from the Continental TD Account into the Czap TD Account, despite TD Bank's particularized knowledge about those two accounts, was grossly negligent. *See, e.g.*, A-000364-66 (Am. Compl. ¶¶ 27-30). The Amended Complaint identifies specific problematic transfers by date and fictitious payee, and further explains how TD Bank's failure to undertake any investigation into those implausible transactions establishes a complete abdication of TD Bank's duty to Continental. A-000364-66, A-000368-69 (Am. Compl. ¶¶ 27-31, 34-35). Requiring Continental to also establish a "*prima facie*" case—whatever that means, and even assuming that the Amended Complaint does not do so—is inappropriate under Delaware law.

VIII. THE TRIAL COURT WRONGLY CONCLUDED THAT THE UCC'S STATUTE OF REPOSE APPLIES

A. Question Presented

Does the UCC's one-year statute of repose apply where, as here, the bank is not merely the "receiving bank" and the notifications the customer receives from the bank do not reasonably identify the transactions? A-000702, A-000571-73.

B. Scope of Review

This Court reviews *de novo* trial court rulings granting motions to dismiss. *Cent. Mortg. Co.*, 27 A.3d at 535.

C. Merits of Argument

The Superior Court found that the UCC's statute of repose, which prohibits customers from suing "receiving banks" based on problematic payment orders unless the customer notifies the bank within one year of the order, applies to this case. *See* A-000702 (Order at 10). The Order contains no analysis for this decision. The statute of repose does not apply. To begin, the statute of repose explicitly only applies to "receiving banks." Del. Code Ann. tit. 6, § 4A-505. TD Bank is not simply a receiving bank here. As fully explained above, rather than passively receiving deposits, TD Bank sat on all on sides of these transactions. *See supra* at 8-9.

Second, the statute of repose applies only where "the customer received notification ***reasonably identifying*** the order." Del. Code Ann. tit. 6, § 4A-505

(emphasis added). The statements here do not: they merely provide a date, amount, and indicate—without any explanation—that the payment is an "ACH Settlement" from "CONTINENTAL FINA ACH TRANS." A-000367-68 (Am. Compl. ¶ 33). As the Amended Complaint explains, those account statements "did not identify the recipient of the funds, the payee's account information, or any other information that would have allowed Continental to uncover Czap's scheme." *Id.* Those statements thus do not "reasonably identify" a payment order sufficient to trigger Continental's obligation to notify TD Bank of these transactions. The UCC's one-year statute of repose does not apply.

CONCLUSION

For all of the reasons set forth above, this Court should reverse the Order in its entirety, and remand this case back to the Superior Court for further proceedings.

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