STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: March 25, 2014]

DOMESTIC BANK, Plaintiff,	:	
v.	:	**C.A. No. PB 09-3004**
JOHANNY URBAEZ, Alias John Doe, U & P CORP., JOHNNY CASH CHECK CASHING, INC., EZ CASH I, LLC, EZ CASH II, LLC, SPEEDY MONEY SYSTEMS, LLC, EZ LAUNDRY, LLC, Defendants,	:	
AND	:	
MEMO MONEY ORDER CO., INC., Intervenor.	:	

DECISION

SILVERSTEIN, J. In the within action, Johanny Urbaez (Urbaez) carried out a kiting scheme using mostly Memo Money Order Co., Inc.'s (MEMO) money orders at Domestic Bank (Domestic).[1] Both Domestic and MEMO have suffered losses as a result of Urbaez's conduct, and at issue is who bears responsibility between them.[2] Before this Court is Domestic's Super. R. Civ. P. 56 motion for summary judgment on Counts I-V of the Second Amended Claim of Intervenor MEMO against Domestic (MEMO's Second Amended Claim) and on Count I of Domestic's Amended Counterclaim. Domestic also moved for dismissal of Counts VI and VII

[1] Domestic is now known as Admirals Bank (Admirals). Admirals, a federally chartered bank with a place of business in Providence, is the corporate successor to Domestic. The parties identified Admirals as Domestic "for practical purposes" and the Court will do the same. (Hr'g Tr. 25.)

[2] Previously, this Court considered a motion to dismiss a previously filed counterclaim by Domestic against MEMO. See Domestic Bank v. Urbaez et al., C.A. No. PB 09-3004, 2011 WL 282334 (R.I. Super. Ct. Jan. 25, 2011) (Domestic Bank I).

of MEMO's Second Amended Claim pursuant to Super. R. Civ. P. 12(b)(6). MEMO cross-moved for summary judgment on all counts of Domestic's Amended Counterclaim and on Counts IV and V of MEMO's Second Amended Claim.

I

Facts and Travel

Domestic is a federally chartered bank with a principal place of business in Cranston, Rhode Island. MEMO is a Pennsylvania corporation licensed to do business in Rhode Island. Urbaez conducted his banking at Domestic, where he was a customer since 2000. Urbaez and the Money Order Defendants maintained multiple accounts at Domestic.[3]

In October 2006, Urbaez individually and as President of Johnny Cash Check Cashing, Inc. (Johnny Cash)[4] entered into a Personal Money Order Trust Agreement (Trust Agreement) with MEMO, whereby Urbaez and Johnny Cash would serve as special agents and trustees for the benefit of MEMO. The Trust Agreement imposed various conditions on how Johnny Cash was to handle funds associated with the sale of MEMO money orders (Money Order Funds), including that Johnny Cash was to hold Money Order Funds separate and apart from other funds of the Money Order Defendants. Initially, MEMO retrieved the funds from the sale of money orders deposited with Domestic by an Automatic Clearing House (ACH) electronic funds transfer that MEMO was able to initiate on its own accord. However, in March 2009, MEMO changed its policy so that all future transfers of Money Order Funds were accomplished by wire transfer, initiated by Johnny Cash.

[3] The Money Order Defendants refers to U & P Corp., Johnny Cash Check Cashing, Inc., EZ Cash I, LLC, EZ Cash II, LLC, Speedy Money Systems, LLC, and EZ Laundry, LLC.

[4] Urbaez was the principal of Johnny Cash. Johnny Cash and Urbaez hereinafter will often be referred to simply as Johnny Cash.

The fraudulent activity by Johnny Cash took place in May 2009, when Johnny Cash deposited by remote capture[5] device forged items into the Money Order Defendants' accounts at Domestic.[6] Included in these forged items were MEMO money orders that Johnny Cash deposited between May 11, 2009 and May 18, 2009. Before the fraudulent activity was detected, Domestic presented the MEMO money orders to MEMO's bank, BancFirst Stratford (BancFirst) for payment. BancFirst honored and paid approximately $1.2 million of MEMO money orders. However, BancFirst returned to Domestic three hundred thirty-seven (337) MEMO money orders totaling $235,737.49 pursuant to a stop payment instruction ordered by MEMO on May 20, 2009.

During the month when the fraudulent activity took place, Domestic was investigating the various Money Order Defendants' accounts. On May 11, 2009, Domestic increased its internal monitoring of the accounts based on an unusually large cash deposit made by Johnny Cash. (Jenkins Dep. 16:20 – 16:22, Nov. 18, 2010.) On May 15, 2009, a Domestic bank teller was instructed to ask Johnny Cash why cash withdrawals were necessary, in response to which Johnny Cash gave "a legitimate response." On May 16, 2009, after learning that Johnny Cash had made another large withdrawal, Domestic froze all of the Money Order Defendants' accounts. This freeze was implemented on Monday, May 18, 2009. Domestic met with Johnny Cash on May 18, 2009, regarding the freeze, and Domestic requested documentation from Johnny Cash to substantiate his need for access to the funds. Johnny Cash did not provide the documentation to Domestic, and the freeze stayed in place until the accounts were closed.

[5] The remote capture system allowed the Money Order Defendants to initiate a deposit to accounts at Domestic by scanning the money orders and electronically sending the images to Domestic on a secure line. When Domestic received the electronic deposit, Domestic would validate the dollar amounts and initiate the deposit into the designated account.

[6] A further description of the fraudulent activity is contained in Domestic Bank I.

Domestic's Amended Counterclaim against MEMO arises from the returned and unpaid 337 MEMO money orders that were issued by the Money Order Defendants. Domestic asserts a claim that MEMO breached its obligation as the drawer of the money orders under G.L. 1956 § 6A-3-414 (Domestic Count I). Domestic also asserts a tortious interference with business relations claim (Domestic Count II) that is pled in the alternative, should MEMO be found not to be the issuer/drawer of the MEMO money orders. Finally, Domestic alleges negligence against MEMO (Domestic Count III).

In its Second Amended Claim, MEMO asserts seven claims against Domestic. Those claims are conversion (MEMO Count I), aiding and abetting (MEMO Count II),[7] unjust enrichment (MEMO Count III),[8] negligence pursuant to Article 3 of the Uniform Commercial Code (UCC) (MEMO Count IV), breach of implied warranties (MEMO Count V), violation of the Rhode Island Uniform Fiduciaries Act (RIUFA) (Count VI), and an additional claim of conversion (Count VII).[9]

[7] Summary judgment was entered in favor of Domestic on this count by the Court at the November 19, 2013 hearing. (Hr'g Tr. 39.)

[8] Summary judgment was entered in favor of Domestic on this count by the Court at the November 19, 2013 hearing. (Hr'g Tr. 39.)

[9] MEMO amended their claim after Domestic and MEMO had filed cross-motions for summary judgment. The motions for summary judgment were fully briefed by the time of the filing of MEMO's Second Amended Claim. MEMO's Second Amended Claim does not alter MEMO Counts I-V (except that Admirals Bank is substituted for Domestic). Therefore, MEMO Counts I-V are still before the Court on Super. R. Civ. P. 56 motions and MEMO Counts VI and VII are before the Court pursuant to Super. R. Civ. P. 12(b)(6).

II

Standard of Review

A

Summary Judgment

"Summary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter . . . that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact." Palmisciano v. Burrillville Racing Ass'n, 603 A.2d 317, 320 (R.I. 1992) (citing Steinberg v. State, 427 A.2d 338 (R.I. 1981)). The court, during a summary judgment proceeding, "does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Id. (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). Moreover, "the justice's only function is to determine whether there are any issues involving material facts." Steinberg, 427 A.2d at 340. The court's purpose during the summary judgment procedure is issue finding, not issue determination. O'Connor v. McKanna, 116 R.I. 627, 359 A.2d 350 (1976). Therefore, the only task for the judge in ruling on a summary judgment motion is to determine whether there is a genuine issue concerning any material fact. Id.

"When an examination of the pleadings, affidavits, admissions, answers to interrogatories and other similar matters, viewed in the light most favorable to the party opposing the motion, reveals no such issue, the suit is ripe for summary judgment." Id. "[T]he opposing parties will not be allowed to rely upon mere allegations or denials in their pleadings. Rather, by affidavits or otherwise they have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998).

However, it is not an absolute requirement that the nonmoving party file an affidavit in opposition to the motion. Steinberg, 427 A.2d at 338. If the affidavit of the moving party does not establish the absence of a material factual issue, the trial justice should deny the motion despite the failure of the nonmoving party to file a counter-affidavit.

B

Motion to Dismiss

"The sole function of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint." McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)) (internal quotations omitted). In determining whether to grant a Rule 12(b)(6) motion to dismiss, this Court "'assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs.'" Giuliano v. Pastina, Jr., 793 A.2d 1035, 1036-37 (R.I. 2002) (quoting Martin v. Howard, 784 A.2d 291, 297-98 (R.I. 2001)). Furthermore, "[a] motion to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) should be granted only when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief under any set of facts that could be proven in support of the claim." Siena, M.D. et al. v. Microsoft Corporation, 796 A.2d 461, 463 (R.I. 2002) (citing Bruno v. Criterion Holdings, Inc., 736 A.2d 99, 99 (R.I. 1999)).

The United States Supreme Court has adopted the view that a complaint must allege facts that "raise a right to relief above the speculative level[.]" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Accordingly, a plaintiff's factual allegations contained in a complaint must be specific enough to cross "the line from conceivable to plausible[.]" Id. at 570. Thus, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then

determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

Our Supreme Court recently announced that "it is clear that the new Federal standard cannot be blended with the traditional Rhode Island standard." Chhun v. Mortgage Elec. Registration Sys., Inc., 84 A.3d 419, 422 n.5 (R.I. 2014). Nonetheless, the Court left "the Twombly and Iqbal conundrum for another day" as it was not determinative of the outcome in the case. Id. at 423. Without further guidance, this Court will continue to ascribe to the traditional Rhode Island standard articulated above.

III

Discussion

A

Identity of Parties

As a threshold matter, Domestic argues that MEMO lacks standing to bring many of the claims it asserts because of the framework established by the UCC as to who may sue whom in connection with the collection process of negotiable instruments. Here, Domestic claims that MEMO is the drawer of the money orders and therefore, is not able to bring a direct action against Domestic, which claims to be the depository bank. Rather, Domestic asserts that MEMO's causes of actions should be against BancFirst as the payor bank under the structure created by the UCC. Conversely, MEMO argues that it is not the drawer of the money orders, but rather is the drawee and thus argues it is able to sue Domestic directly.

Article 3 of the UCC applies to and governs negotiable instruments. See § 3-102. As this Court found in the underlying motion to dismiss, "it is without question that the Money

Orders at issue are negotiable instruments." Domestic Bank I. Therefore, it clearly follows that the UCC, and the body of law developed thereunder, will control this Court's analysis.

To simplify the identification of parties involved in the collection process of negotiable instruments, the UCC provides titles and definitions thereof to each party, including drawer,[10] drawee,[11] issuer,[12] collecting bank,[13] depository bank,[14] and payor bank.[15] Once parties are properly identified as being one of the above-mentioned parties, the rights and obligations that they owe to one another are determined by the UCC. Here, it is evident that Domestic is the depository bank[16] and that BancFirst is the payor bank. (MEMO's Answers to Interrog. No. 30.) However, what is disputed is the identity of MEMO. If MEMO were found to be the drawer of the money orders, then it would be unable to maintain a cause of action against Domestic as the depository bank. See Thompson v. First BankAmericano, 518 F.3d 128, 132 (2d Cir. 2008); Federal Ins. Co. v. Citizens Bank, No. CA 11–435 S, 2012 WL 1565238, at *6-7 (D.R.I. Apr. 11, 2012) (finding that drawers lack standing to bring claims against depository bank); Old Republic Nat. Title Ins. Co. v. Bank of E. Asia Ltd., 291 F. Supp. 2d 60, 67 (D. Conn. 2003) ("[A] drawer cannot maintain a direct cause of action under the Code against a depository bank for conversion or negligence.") (applying New York law); Stone & Webster Eng'g Corp. v. First Nat. Bank & Trust Co. of Greenfield, 184 N.E.2d 358, 363 (Mass. 1962) ("So one might ask: If the drawee is liable to the drawer and the collecting bank is liable to the drawee, why not let the drawer sue the collecting bank direct? We believe that the answer lies in the applicable defences set up in the

[10] Sec. 6A-3-103(a)(3).
[11] Sec. 6A-3-103(a)(2).
[12] Sec. 6A-3-105(c).
[13] Sec. 6A-4-105(5).
[14] Sec. 6A-4-105(2).
[15] Sec. 6A-4-105(3).
[16] Depository bank is "the first bank to take an item." See § 6A-4-105(2).

Code."); W. Union Tel. Co. v. Peoples Nat. Bank in Lakewood, 404 A.2d 1178, 1182 (N.J. App. Div. 1979) ("Thus, this subsection contemplates that a drawer will sue its own drawee who, in turn, will sue a collecting or depositary bank.").

The UCC defines the drawer of a draft as the "person who signs or is identified in a draft as a person ordering payment." Sec. 6A-3-103(a)(3). The term "issuer" can refer to the "drawer of an instrument." Sec. 6A-3-105(c). Pursuant to § 6A-3-401(b), a "signature may be made: (1) manually or by means of a device or machine; and (2) by the use of any name, including a trade or assumed name, or by a word mark or symbol executed or adopted by a person with a present intention to authenticate a writing." The comments to the UCC explain further that a "signature may be handwritten, typed, printed or made in any other manner[.]" See also CCNB v. Piersol, 18 Pa. D. & C. 4th 428, 435 (Pa. Com. Pl. 1992) (finding that signature requirement was met by the imprinting of the bank's name, branch, and amount at the time of sale by a checkwriter). Here, MEMO provided Johnny Cash with money orders that were preprinted with MEMO's logo, address, website, and phone number. Additionally, MEMO provided Johnny Cash with an imprinter which would imprint on the money orders the amount, a serial number, and an agent/store number. This imprinting of information by Johnny Cash (MEMO's special agent) evidences a present intention to be bound, especially considering the fact that the information to be imprinted was unique to the specific money order that it was to be printed on. See Interfirst Bank Carrollton v. Northpark Nat'l Bank, 671 S.W.2d 100, 104 (Tex. App. 1984) (holding that an imprint of the bank name and money order was sufficient to establish a signature); Mirabile v. Udoh, 399 N.Y.S.2d 869, 871 (N.Y. Civ. Ct. 1977) (finding that money order with the bank name imprinted is a signature under the UCC.)

Additionally, it is of no consequence whether Johnny Cash was in compliance with the Trust Agreement when he issued the MEMO money orders. Such compliance is not material because § 6A-3-402(a) provides that a signature by a representative is binding on the represented party "[i]f a person acting, or purporting to act, as a representative signs an instrument." (emphasis added). Here, it is clear that Johnny Cash was "purporting to act" as the special agent of MEMO when the money orders were issued. See § 6A-3-402(a) cmt. 1 ("If under the law of agency the represented person would be bound by the act of the representative in signing either the name of the represented person or that of the representative, the signature is the authorized signature of the represented person."). MEMO's status as drawer becomes all the more obvious in light of MEMO's previous judicial admissions, through which they have identified themselves in various other jurisdictions and agencies as drawers and/or issuers of money orders.[17] See Domestic Statement of Undisputed Facts (SOF) ¶¶ 19, 20, 21, 22, 23, 25. Furthermore, counsel for MEMO admitted that "[w]hen everything goes right . . . MEMO through its agent is delivering a money order to the purchaser, making MEMO the issuer of the money order." (Hr'g Tr. 11.) MEMO enabled Johnny Cash as its special agent to act on its behalf and issue money orders for MEMO. Clearly, Johnny Cash was "purporting to act" as MEMO's agent to Domestic. Sec. 6A-3-402(a).

Moreover, MEMO was the entity that was ordering payment of the money orders. The Court previously contemplated the meaning of the space in the money orders that provided: "PURCHASER'S SIGNATURE FOR ISSUER." See Domestic Bank I, 2011 WL 282334, at *11. While MEMO has admitted that in a non-fraudulent transaction, it is the issuer, MEMO

[17] This Court does not find that MEMO is judicially estopped from arguing that it is not the drawer of the money orders, as Domestic argues it should be. However, the Court also cannot simply ignore the fact that MEMO has made these admissions in the past.

also argued that the purchaser of the money order is the one that ultimately orders payment of the money order. This suggests that the purchaser is then the drawer of the money order (defined as the person "ordering payment"). However, this conclusion would make the line—"PURCHASER'S SIGNATURE FOR ISSUER"—mentioned above superfluous, as the purchaser would be the same as the issuer. MEMO's argument that it is not ordering payment of the money orders loses further weight when considered with the fact that MEMO was the entity that requested BancFirst to stop payment on the money orders. See § 6A-4-403(a) ("A customer or any person authorized to draw on the account if there is more than one person may stop payment of any item drawn on the customer's account.") (emphasis added). Since MEMO was the one ordering payment and signed the money orders through its agent as aforesaid, it is to be considered the drawer of the money orders at issue. Accordingly, MEMO lacks standing to bring UCC claims against Domestic as the depository bank. See Federal Ins. Co., 2012 WL 1565238, at *6-7; Old Republic Nat. Title Ins. Co., 291 F. Supp. 2d at 67. Therefore, summary judgment may enter in favor of Domestic on MEMO Count I, MEMO Count IV, and MEMO Count V.[18]

B

Obligations as Drawer

Domestic seeks to recover payment from MEMO for breach of MEMO's obligations as drawer of the money orders under § 6A-3-414. Section 6A-3-414(b) provides:

[18] This Court notes that both parties advanced arguments in the event that MEMO was found not to be drawer of the money orders and did have standing to pursue the claims under the UCC. Such arguments range from displacement of claims by the UCC, to the duty owed by a bank to non-bank customers, to questions of fact regarding a potential negligence claim. However, because the Court has found that MEMO is the drawer of the money orders, it is unnecessary to address these ancillary issues, and the Court declines to make any findings relating to these issues.

> "If an unaccepted draft is dishonored, the drawer is obliged to pay the draft (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in §§ 6A-3-115 and 6A-3-407. The obligation is owed to a person entitled to enforce the draft or to an indorser who paid the draft under § 6A-3-415."

As MEMO was found to be the drawer of the money orders, § 6A-3-414 is applicable. However, MEMO argues that it is not liable because of the limitation imposed by the section, specifically the reference to § 6A-3-407, which deals with "Alterations." MEMO argues that § 6A-3-407(b)[19] and (c)[20] discharges MEMO from any further liability because the imprinting of information by Johnny Cash was done fraudulently. MEMO contends that Johnny Cash fraudulently altered the money orders and that Domestic is not a holder in due course (HDC) of the money orders. Domestic argues that even though it is a HDC, it is irrelevant because § 6A-3-407 is made inapplicable by §6A-3-405(b), which provides that:

> "For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise

[19] "Except as provided in subsection (c), an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms."

[20] "A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument (i) according to its original terms, or (ii) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed."

> ordinary care to the extent the failure to exercise ordinary care contributed to the loss."

Domestic, therefore, asserts that MEMO cannot avail itself of § 6A-3-407, and even if it could, Domestic should be considered a HDC.

Section 6A-3-405(a)(1) states that an employee includes independent contractors. Johnny Cash, besides being MEMO's special agent and trustee, was identified as an independent contractor in the Trust Agreement. Therefore, MEMO's liability is not limited by § 6A-3-407 because MEMO is clearly liable under § 6A-3-405. This result is logical, considering that Johnny Cash was MEMO's special agent and trustee, and it was MEMO who enabled Johnny Cash to print the money orders originally. In fact, the comments to § 6A-3-405 agree that:

> "[s]ection 3-405 adopts the principle that the risk of loss for fraudulent indorsements by employees who are entrusted with responsibility with respect to checks should fall on the employer rather than the bank that takes the check or pays it, if the bank was not negligent in the transaction. Section 3-405 is based on the belief that the employer is in a far better position to avoid the loss by care in choosing employees, in supervising them, and in adopting other measures to prevent forged indorsements on instruments payable to the employer or fraud in the issuance of instruments in the name of the employer." Sec. 6A-3-405 cmt. 1.

However, the comment continues: "If the bank failed to exercise ordinary care, subsection (b) allows the employer to shift loss to the bank to the extent the bank's failure to exercise ordinary care contributed to the loss." The UCC defines ordinary care as the

> "observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or chapter 4 of this title." Sec. 6A-3-103(a)(7)

While the parties did not specifically address whether Domestic acted with "ordinary care," they did raise the issue of whether Domestic should be considered a HDC. The arguments of whether Domestic qualified as a HDC may be extrapolated to determine if Domestic acted with "ordinary care."

Domestic asserts that its actions were reasonable in light of the circumstances. Domestic claims that (1) its remote capture system was commercially reasonable in the industry, (Jenkins Dep. 11:3 – 13:10, Nov. 18, 2010; Baker Dep. 93:11 – 94:2, Dec. 20, 2011; SOF ¶ 82); (2) a purchaser signature was never required by Domestic, MEMO, or BancFirst, (Oliva Dep. 29:8 – 29:19, 97:12 – 100:14, 203:4 – 203:24, Nov. 19, 2010; Jenkins Dep. 13:11 – 13:18, Nov. 18, 2010); (3) Domestic was the vigilant party that initially discovered the fraud (MEMO's Answers to Interrog. No. 23); and (4) Domestic's funds availability policy for money service businesses was reasonable, given the need of these businesses to have immediate access to deposits. (LaPlume Dep. 37:24 – 38:24, 66:2 – 66:17, 90:7 – 90:13, Oct. 28, 2011; Jenkins Dep. 166:5 – 165:13, Nov. 18, 2010.) MEMO counters that Domestic did not act reasonably because (1) Johnny Cash was classified as a high-risk account; (2) Domestic allowed Johnny Cash to withdraw funds on float; and (3) Domestic should have been alarmed by the large quantity of money orders that Johnny Cash was seeking to deposit.

MEMO's argument as to why Domestic did not exercise "ordinary care" is unavailing. While MEMO has raised purported reasons why Domestic's actions were not commercially reasonable, Domestic counters with deposition testimony as to why their actions were reasonable.[21] See Bourg, 705 A.2d at 971 (holding that parties have an affirmative duty to set

[21] MEMO relies heavily on the testimony of a Domestic bank officer who testified that he was not allowed to threaten to close Johnny Cash's accounts because "[c]heck cashers brought in too much income." (Lamarra Dep. 16:20 – 16:22, Oct. 27, 2011.) This, like MEMO's other

forth facts establishing a genuine issue of fact through "affidavits or otherwise" (depositions, admission, interrogatories, etc.)) Domestic recognizes that Johnny Cash accounts were classified as high risk accounts. However, the accounts were classified as high risk because all money service business accounts were classified as such (LaPlume Dep. 23:12 – 24:1, Oct. 28, 2011), and, in fact, numerous other large volume cash accounts have such a classification, including law firms, car dealerships, and jewelers. (Baker Dep. 34:18 – 35:11, Dec. 20, 2011.) Additionally, while Johnny Cash's ability to withdraw funds based on float was one of the reasons for the loss suffered and a reason why MEMO argued that Domestic did not act in good faith, the policy was not an unreasonable commercial standard. Bank officers testified at depositions that allowing money service industries immediate access to funds was necessary in order for check cashing businesses to "work." (LaPlume Dep. 90:7 – 90:13, Oct. 28, 2011; Jenkins Dep. 166:5 – 166:13, Nov. 18, 2010.) Furthermore, if access to float was commercially unreasonable, then the need for funds availability structures and chargebacks would be significantly diminished if not completely irrelevant because a bank customer would never be able to withdraw deposited funds until they had been cleared completely. See § 6A-4-214. Finally, although MEMO questions Domestic's good faith in accepting such a large quantity of money orders, the fact is that Johnny Cash had been a loyal customer of Domestic since 2000. In fact, Domestic was the first to identify Johnny Cash's scheme and questioned him on May 15, 2009. Johnny Cash gave a "legitimate" reason for the large amount of deposits and withdrawals, citing to the mid-month and end of week pay cycles coinciding. (Jenkins Dep. 44:24 – 45:10, Nov. 18, 2010.) The Court

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purported reasons—Johnny Cash accounts were classified as high risk, Domestic allowed Johnny Cash to withdraw funds on float, and Domestic should have been alarmed by the large quantity of deposits—why Domestic did not act in good faith, does not establish a question of fact regarding whether Domestic acted with commercial unreasonableness, especially when those purported reasons are countered with evidence from deposition testimony. See Bourg, 705 A.2d at 971.

finds that Domestic acted pursuant to a commercially reasonable standard, and therefore, the loss does not shift from MEMO under § 6A-3-405. MEMO breached its obligations as drawer, and thus summary judgment may enter in favor of Domestic on Domestic Count I.[22]

C

Domestic Negligence Claim

MEMO seeks summary judgment on Domestic's negligence claim because "even if MEMO were to have been negligent in supervising or monitoring its agent . . . Domestic discharged any duty theoretically owed by MEMO to Domestic by virtue of Domestic's own subsequent negligence." Specifically, MEMO argues that Domestic had the "last clear chance" to avoid the fraudulent conduct. Domestic opposes MEMO's motion. Domestic contends that BancFirst was the entity with the "last clear chance" to avoid the fraudulent money orders. At this time, the Court finds that issues of fact exist regarding comparative negligence issues and the party with the "last clear chance." See Ouch v. Khea, 963 A.2d 630, 633 (R.I. 2009) (finding that complaints sounding in negligence are typically not resolved by summary judgment and instead should be resolved by fact finding); see also Daniels v. City and Cnty. of S.F., 255 P.2d 785, 788 (Cal. 1953) ("Whether or not the doctrine of last clear chance applies in a particular case depends entirely upon the existence or nonexistence of the elements necessary to bring it into play. Such question is controlled by factual circumstances and must ordinarily be resolved by the fact-finder."); De Grade v. La Coste, 131 A. 193, 193-94 (R.I. 1925) ("The question of last clear chance . . . presented an issue of fact."). Therefore, this Court denies MEMO's summary judgment motion on Domestic Count III.

[22] Domestic Count II was pled in the alternative to Domestic Count I. Therefore, summary judgment may enter in favor of MEMO on Domestic Count II.

D

Uniform Fiduciaries Act

MEMO seeks to hold Domestic liable under the RIUFA. Domestic argues that (1) the RIUFA does not create a cause of action, but rather is limited to being asserted as an affirmative defense; and (2) MEMO's Second Amended Claim does not allege that Domestic had knowledge of the underlying fiduciary relationship between MEMO and Johnny Cash.

Courts differ on whether the Uniform Fiduciaries Act creates a cause of action. Compare Legacy Inv. & Mgmt., LLC v. Susquehanna Bank, CIV. WDQ-12-2877, 2013 WL 5423919 (D. Md. Sept. 26, 2013) (finding that a cause of action was pled) with Appley v. West, 832 F.2d 1021, 1030-31 (7th Cir. 1987) ("UFA did not create the cause of action. Rather, the UFA is a defense[.]"). The First Circuit has addressed the RIUFA only in the context of it being raised as an affirmative defense. See Schock v. U.S., 254 F.3d 1 (1st Cir. 2001). However, the First Circuit did not address whether the RIUFA was limited to being raised as an affirmative defense only, or whether it could also be the basis for a cause of action. See id. at 3. This Court believes that the RIUFA, when it speaks in terms of liability, is creating an express cause of action that can be the basis for suit.[23]

Furthermore, this Court finds that MEMO has sufficiently pled allegations,[24] that when accepted as true, would either make Domestic aware of the fiduciary relationship or would give rise to an inference of bad faith on the part of Domestic. See Jackson v. Regions Bank, 3:09-00908, 2010 WL 3069844 (M.D. Tenn. Aug. 4, 2010) ("[The UFA] imposes liability upon

[23] See §§ 18-4-17 ("the creditor or other transferee is liable"); 18-4-18 ("the creditor or other payee is liable"); 18-4-20 ("the bank is liable").

[24] Such allegations include: "[Domestic] knew, should have known or had reason to know that the Trust Account contained (or should have contained) Trust Funds which were the property of MEMO." (MEMO's Second Amended Claim ¶ 24.)

the depository bank if the factual allegations reflect the bank's 'actual knowledge' of a fiduciary's breach of his duties or if the bank has knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith."). Therefore, the motion to dismiss MEMO Count VI is denied.

E

MEMO Count VII for Conversion

MEMO asserts an additional count for conversion, which MEMO claims was brought under the UCC. Domestic argues that the claim should be dismissed because MEMO lacks standing as the drawer to sue Domestic.[25] Additionally, Domestic argues that the complaint does not properly plead conversion because it fails to identify that the claim was brought under the UCC. MEMO counters that because this is a motion to dismiss, the Court must accept the allegations in MEMO's Second Amended Claim as true, and therefore, MEMO cannot be considered the drawer. Furthermore, MEMO asserts that Domestic had notice that the count was brought under the UCC because the motion for leave to amend stated, "Proposed Count 7 – R.I. Gen. Laws § 6A-3-420."

In determining whether MEMO has made a claim upon which relief may be granted, the Court must "look only to the allegations of the complaint and to any facts and laws of which the trial court could properly take judicial notice." Berberian v. New England Tel. & Tel. Co., 114 R.I. 197, 199, 330 A.2d 813, 815 (1975). However, this Court is cognizant of the fact that its holding above, that MEMO is the drawer of the money orders, prevents MEMO from having standing to sue Domestic. See Federal Ins. Co., 2012 WL 1565238, at *6-7. Accordingly, this

[25] In support of this argument, Domestic asked the Court to convert the motion to a Super. R. Civ. P. 56 proceeding so that the Court may consider evidence in making a determination. The Court declined to do so. (Hr'g Tr. 95.)

Court believes that it is appropriate to take judicial notice of this fact, and finds sua sponte that MEMO is precluded from asserting this claim. See McClain v. Apodaca, 793 F.2d 1031, 1032-33 (9th Cir. 1986) (finding it appropriate for the court to raise sua sponte a preclusion motion which served the purposes of ensuring finality of decisions, conserving judicial resources, and protecting litigants from multiple lawsuits); Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980) ("Dismissal by the court sua sponte on res judicata grounds, however, is permissible in the interest of judicial economy where both actions were brought before the same court."). MEMO Count VII is accordingly dismissed.

IV

Conclusion

Based on the foregoing analysis, the Court finds that MEMO is to be considered the drawer of the money orders. Therefore, summary judgment may enter in favor of Domestic on MEMO Counts I, IV, and V, and Domestic's motion to dismiss is granted with respect to MEMO Count VII. The Court also finds that the RIUFA does provide an independent cause of action. Accordingly, Domestic's motion to dismiss MEMO Count VI is denied. MEMO Counts II and III were summarily decided at the hearing, and judgment may enter for Domestic on these counts. Additionally, MEMO has breached its obligations as drawer, and summary judgment may enter in favor of Domestic on Domestic Count I, and therefore, summary judgment may enter for MEMO on Domestic Count II as it was pled in the alternative to Domestic Count I. Finally, the Court finds that issues of fact exist with respect to Domestic Count III and denies MEMO's motion for summary judgment.

Counsel for Domestic may present an order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Domestic Bank v. Johanny Urbaez, et al.
CASE NO:	PB 09-3004
COURT:	Providence County Superior Court
DATE DECISION FILED:	March 25, 2014
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
For Plaintiff:	Paul M. Sanford, Esq.; Benjamin C. Caldwell, Esq.
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