SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

GALASSO, LANGIONE, & BOTTER, LLP, (formerly known as GALASSO, LANGIONE, LLP.),

Decision and Order

Plaintiffs,

-against-

MOTION SEQUENCE:20, 21
INDEX NO.: 010038-07
ACTION NO.: 1

ANTHONY P. GALASSO and SIGNATURE BANK,

Defendants.

GALASSO, LANGIONE & BOTTER, LLP, PETER J. GALASSO, Individually, JAMES R. LANGIONE, Individually, GALASSO, LANGIONE & BOTTER, LLP As Escrow Agents on SIGNATURE BANK Account Number 1500451064 and Account Number 1500351639, and M&T BANK Account Number 9835989485, on behalf of STEPHEN BARON, ADELE FABRIZIO, THERESA HALLORAN and THE ESTATE OF GEORGE CAROLL,

MOTION SEQUENCE: 05
ACTION NO.: 2
INDEX NO.: 19198-07

Plaintiffs,

-against-

SIGNATURE BANK, M & T BANK, ANTHONY GALASSO, DANIEL SAMELA, CPA, CHRISTINE GALASSO, MATTHEW MANDELA, JEANNE MANDELA, ROBERT FRESELLA, DONNA FRESELLA, and

"JOHN & JANE DOES 1-10,"

Defendants.

SIGNATURE BANK,

Plaintiff,

INDEX NO.: 014211-07
ACTION NO.: 3

GALASSO, LANGIONE & BOTTER, GALASSO and LANGIONE, LLP, PETER J. GALASSO & JAMES LANGIONE, LLP, PETER GALASSO, and JAMES LANGIONE,

Defendants.

WENDY BARON and STEPHEN BARON,

Plaintiffs,

MOTION SEQUENCE:05, 06
INDEX NO.: 001510-09
ACTION NO. 4

-against-

ANTHONY GALASSO, GALASSO, LANGIONE, LLP, GALASSO, LANGIONE & BOTTER, LLP, GALASSO, LANGIONE, CATTERSON & LOFUMENTO, LLP, PETER GALASSO, individually, JAMES LANGIONE, individually, ALAN BOTTER, individually, SIGNATURE BANK, M&T BANK, and GC LAWCONDO, LLC,

Defendants.

The following papers and the attachments and exhibits thereto have been read on these motions:

Notice of Motion (10038-07 Seq. # 20)	1
Memorandum of Law in Support (10038-07 Seq. #20)	2
Statement of Material Facts (10038-07 Seq. #20)	3
Response to Material Facts (10038-07 Seq. #20)	4
Affirmation in Opposition (10038-07 Seq. #20) and in Further Support of Motion (10038-07 Seq. #20)	5

Reply Brief (10038-07 Seq. #20)	6
Notice of Motion (10038-07 Seq. #21)	7
Statement of Material Facts (10038-07 Seq. #21)	8
Response to Statement of Material Facts (10038-07 Seq. #21)	9
Affidavit in Opposition (10038-07 Seq. #21)	10
Memorandum of Law in Opposition (10038-07 Seq. #21)	11
Affirmation in Reply (10038-07 Seq. #21)	12
Notice of Motion (19198-07 Seq. # 05)	13
Notice of Motion (1510-09 Seq. # 05)	14
Statement of Material Facts (1510-09 Seq. # 05)	15
Affirmation in Opposition (1510-09 Seq. # 05) and in Further Support of Motion (1510-09 Seq. #06)	16
Reply Affirmation (1510-09 Seq. # 05)	17
Notice of Motion (1510-09 Seq. #06)	18
Statement of Material Facts (1510-09 Seq. # 06)	19
Affirmation in Opposition (1510-09 Seq. # 06)	20
Affirmation in Reply (1510-09 Seq. # 05)	21
Letter dated February 4, 2015	22
Submission received August 2, 2016 (copy of checks)	23

Introduction

The within actions, which have been joined for discovery and trial, arise from, *inter alia*, the theft, transfer and disposition of funds from the escrow and IOLA accounts of, or maintained by and for, the parties, and concern the disputes between the parties to allocate responsibility for the losses occasioned in connection therewith.[1]

[1] Initially, the court notes that after submission of the motions, it undertook, with the parties' consent, numerous and extended attempts at settlement, which ultimately failed.

Factual Background[2]

The Firm

In December 1988, Peter Galasso ("Peter") and James Langione ("Langione") established the law firm, Galasso, Langione & Goidell. In 2000, Goidell left the law firm, at which time it became Galasso Langione, LLP. In 2003, Alan Botter, Esq. joined the law firm, the name of which again changed to Galasso, Langione & Botter, LLP. In 2008, Alan Botter withdrew as a partner and the law firm changed again to Galasso, Langione, Catterson & LoFrumento, LLP. In 2013, following Peter Galasso's suspension from the practice of law due to circumstances which will be discussed herein, the law firm changed to Langione, Catterson & LoFrumento, LLP (the various firm partnerships shall be hereinafter be referred to as the "Firm") (Affirmation in Support at ¶¶ 4-6 [Motion Seq. No. 6]; Ex. "36" at pp 18- 20 [Motion Seq. No. 21]).

In 1993, the Firm hired Peter's brother, Anthony Galasso ("Anthony"), as a "gofer". Within a few years, Anthony became the Firm's office manager and bookkeeper, "responsible for all accounting and financial aspects" therefor (Affidavit in Support at ¶ 4 [Motion Seq. No. 20]).

The Banking Relationship Between the Firm and Signature Bank

In or around 1990, the Firm started banking at EAB Bank. In 2001, EAB Bank "became" Citibank (Ex "17" at pp 32, 96 [Motion Seq. No. 21]). As office manager and bookkeeper, Anthony undertook certain banking duties for the Firm. He would go to the bank to make

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[2] The facts herein have been gleaned from the parties' submissions, which are often confusing and incomplete. In order to obtain a more complete and accurate factual background, the court has reviewed decisions of Justice Robert Ross in the related *Wendy J. Baron v Stephen A. Baron* matrimonial action (Index No. 210384-02) and Justice Ira Warshawsky in the within actions, to the extent referenced herein.

deposits, sign checks on the Firm's operating accounts and attend to other banking matters.[3] As such, Anthony "got to know" Steve Reinhardt ("Reinhardt"), a bank Vice President, and his assistant, Annie Jeter ("Jeter"), and became the "face" of the Firm at the bank (Affidavit in Opposition at ¶ 6 [Motion Seq. No. 21]).

In February 2002, Reinhardt left Citibank and became a Senior Vice President and Group Director at Signature Bank ("Signature").[4] He thereafter met with Peter and Anthony and asked the Firm to transfer its accounts from Citibank to Signature (Affidavit in Opposition at ¶ 8 [Motion Seq. No. 21]). In 2002, the Firm transferred its banking business from Citibank to Signature. Anthony was in favor of moving the Firm's accounts because he thought Reinhardt was a "nice guy" and that it was "[m]ore of the loyalty that comes with just being friendly with somebody for 10 years" (Ex. "36" at p 67 [Motion Seq. No. 21]).

Peter (in his affidavit) does not remember whether he "did anything physically to make [the transfer] happen", or whether he "signed documents to make it happen", but, rather, "it just happened" (Ex. "36" at p 68 [Motion Seq. No. 21]). Nevertheless, Peter testified as follows:

> I specifically remember signing account applications only because I knew that you can't open up the account absent that, so I recall that we did that because there was a process, but again, I don't have a specific picture in my head as to signing documents. I just know that we prob - at the time we got the corresponding accounts opened . . . .

Peter further testified that he assumed Anthony brought the bank documents to Reinhardt

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[3] Peter testified that Anthony was given the authority to sign checks on the operating accounts (Affidavit in Opposition at ¶ 4 [Motion Seq. No. 21]; Signature's Statement of Material Facts at ¶¶ 4-8 [Motion Seq. No. 20]; Firm's Statement of Material Facts at ¶ 3 [Motion Seq. No. 21]).

[4] Jeter also left EAB Bank and began working at Citibank.

at Signature because "that would be the type of task that we would ask [Anthony] to do rather than us as attorneys do" (Ex. "36" at pp 71-72 [Motion Seq. No. 21]).

Peter asserts that "other than indicating to Reinhardt that Anthony was to be signator on our operating accounts in August 2002 and thereafter utilizing Anthony to deposit client checks into the Firm's authorized Signature accounts, it is undisputed that no other bank related power was ever conferred upon Anthony by [Langione] or me. Anthony's only delegated tasks as far as [Langione] and I were concerned was to deposit client checks at the Signature Bank branch located in Garden City and to pay our operating expenses from our operating respective accounts" given that our practices were distinct (Affidavit in Support at ¶ 29 [Motion Seq. No. 21]).

When the Firm transferred its bank accounts from Citibank to Signature, Anthony submitted a supposedly forged Limited Liability Partnership Banking Agreement dated August 27, 2002, indicating that "Anthony was authorized to deposit checks, make withdrawals on [the Firm's] operating accounts, transfer money between the operating accounts and "contract for any services offered by the Bank" (Affidavit in Opposition at ¶¶ 12- 13 [Motion Seq. No. 21]).

Reinhardt, when questioned about Anthony's authority, testified that Peter never explicitly stated that Anthony had authority to sign account applications on his behalf (Ex. "17" at p 159 [Motion Seq. No. 21]). However, following the transfer of accounts to Signature, "Peter had virtually no dealings with Signature representatives Steve Reinhardt or Annie Jeter during the entire time that his law firm banked at Signature" (Signature's Statement of Material Facts at ¶ 92 [Motion Seq. No. 20]). In this regard, Peter acknowledged that he delegated to Anthony (and the Firm's accountant) the duty of maintaining all physical bank accounts, and that

Anthony was "at the bank more . . . being friendly" with Bank personnel, and thus, Signature contends that it was Anthony who was the "face of the firm" (Ex. "36" at pp 32-33 [Motion Seq. No. 21]; Affidavit in Opposition at ¶ 6 [Motion Seq. No. 21]).

In 2002, the Firm initially opened and maintained three accounts at Signature. Two accounts were the Firms's operating accounts (account numbers 1500351604 and 1500592636), and the third account was the Firm's IOLA account (account number 1500351639). The next year, Alan Botter joined the firm and because "he ran a practice that was largely independent of [Langione and Peter's] practices, Alan opened his own IOLA and operating accounts" (Firm's Statement of Material Facts at ¶ 4 [Motion Seq. No. 21]).

The account applications submitted by Anthony to Signature (not including the Botter accounts), designated Anthony as an authorized signatory on the Firm's operating accounts but not on the IOLA account. Anthony was also designated as the "primary contact" for the Firm on the operating accounts but not the IOLA account (Exs. "18", "19", "22" [Motion Seq. No. 21]). Each of the account applications designated a post office box as the address in which Signature was to mail its monthly statements and, further, each application required the Firm to confirm that it had received a copy of, and agreed to certain terms and conditions of, the Signature Business Account Agreement and Disclosures with respect to the IOLA and operating accounts (Affirmation in Opposition to Motion at ¶ 14 [Motion Seq. No. 21]). This was indicated by a checkmark in the appropriate box on the accounts' applications. In addition to the three authorized accounts, Anthony opened and maintained "sham" accounts at Signature Bank

without the Firm's authorization or knowledge.[5] Peter and Langione contend that they never signed any of the bank documents that were submitted to Signature for the authorized accounts and that they were forged by Anthony along with the sham account applications[6] (Affirmation in Opposition at ¶ 20 [Motion Seq. No. 20]).

In this regard, Jeter testified that she and Anthony completed the account applications together; at her deposition, Jeter identified her handwriting on the 2002 account applications, with the exception of the social security numbers (Galasso Statement of Material Facts at ¶ 20 [Motion Seq. No. 21]). Jeter acknowledged that despite the fact the applications were completed by her, including designating a post office box as the mailing address for the Firm's bank mail, she never had a conversation with or met either Peter or Langione (Galasso Statement of Facts at ¶ 21 [Motion Seq. No. 21])

Although the account applications designated a post office box as the mailing address for all accounts statements, initially, the Firm's monthly bank statements were sent to the Firm at its office address. Anthony thereafter contacted Jeter and instructed her to send the Firm's bank mail to the post office box Anthony maintained on behalf of the Firm[7] (Galasso Statement of Facts at ¶ 25 [Motion Seq. No. 21]; Ex. "26" at p 75 [Motion Seq. No. 20]; Affirmation in

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[5] Additional sham accounts were opened in May 2005 under account numbers 1500592644, 1500351612 and 1500335160.

[6] Signature asserts that although Peter and Langione allege that they were unaware of the existence of the sham accounts, there were numerous checks drawn from them to pay business expenditures as well as checks written to Peter and Langione, individually. In addition, Jeffrey Catterson received checks totaling $9,000 and Michael LoFrumento received a check in the amount of $5,000 from these accounts (Ex. "43" at p 7 [Motion Seq. No. 21]).

[7] A post office box was initially opened by the Firm prior to 2002 for the purpose of having prospective secretaries send their resumes to the Firm. This same post office box is the location that Anthony indicated was the mailing address for all of the accounts opened at Signature.

Support at ¶ 29 [Motion Seq. No. 21]). At Anthony's request, Jeter instructed another Signature employee (Anthony Ficorilli) to change the mailing address on the accounts (Ex. "D" to Affirmation in Opposition [Motion Seq. No. 06]).

Baron Escrow Account at Signature Bank

In 2002, Wendy and Stephen Baron became parties to a matrimonial action. The Firm represented Stephen in the divorce action entitled *Wendy J. Baron v Stephen A. Baron*, Index No. 210384-02 (Affirmation in Support at ¶ 27 [Motion Seq. No. 6). During the pendency of their matrimonial action, Stephen Baron sold a commercial parcel of real property located at 415 South Broadway, Hicksville, New York. On June 8, 2004, a stipulation was executed by Stephen Baron, Wendy Baron, and their matrimonial attorneys, Peter Galasso and Jerry Winter, respectively. Pursuant to the stipulation, upon the closing of title to the property, the net proceeds were to be "deposited in escrow in an interest bearing escrow account by Peter Galasso, Esq., as attorney, subject to further order of this Court". The stipulation further provided that a representative of both Wendy and Stephen "may be present at the closing and shall receive copies of all documents signed or exchanged at the closing including but not limited to the closing statement and copies of all checks". The stipulation was so-ordered by Justice Robert Ross on June 9, 2004 (Ex. "A" [Motion Seq. No. 5]).

Pursuant to the escrow agreement dated June 10, 2004, Peter Galasso was appointed escrow agent for the proceeds. The escrow agreement stated, in pertinent part, as follows:

> 1. Pursuant to the "So Ordered" Stipulation dated June 8, 2004 . . . , Peter J. Galasso, Esq. agrees to act as Escrow Agent to receive the net proceeds of sale at the closing for premises known as 415 South Broadway, Hicksville, New York, and agrees to

deposit same in an interest bearing account subject to further order of the Supreme Court in the matrimonial action.

2. The undersigned Escrow Agent acknowledges receipt of three (3) checks totaling $4,840,862.34 which he accepts subject to collection, which he shall deposit into an interest bearing account under the Social Security Number of Stephen Baron.

* * *

7. The Escrow Agent hereby undertakes to perform only such duties as are specifically set forth herein. The Escrow Agent shall not be liable for any mistake of fact or error of judgment by him or for any acts or omissions by him of any kind, unless caused by his willful misconduct or gross negligence.

8. In order to induce the Escrow Agent to act herein, Stephen Baron agrees to indemnify the Escrow Agent and hold him harmless against any and all liabilities incurred by him hereunder except for liabilities incurred by the Escrow Agent resulting from his own willful misconduct or gross negligence (Ex. "B" [Motion Seq. No. 5]).

The escrow agreement was signed by "Peter J. Galasso, Esq." twice, once as "attorney for Stephen Baron" and a second time as "Escrow Agent". It was also executed by Stephen Baron, and Jerry Winter, Esq., on behalf of, and as attorney for, Wendy Baron. The escrow agreement appointed Jerry Winter P.C. as the substitute escrow agent. Peter states that "[t]he Barons both executed an Escrow Agreement that designated me, individually, as their escrow agent" (Affirmation in Support at ¶ 31 [Motion Seq. No. 6).[8]

On June 11, 2004, Jeffrey Catterson, Esq., a partner in the Firm, attended the closing for the Baron property, "took possession of the checks representing the net proceeds and returned those checks to [Peter]", at the Firm's office (Affirmation in Support at ¶¶ 22, 23 [Motion Seq. No. 6]). The sale of the Baron property yielded net proceeds in the amount of $4,840,862.34,

[8] The Firm acknowledges that the escrow agreement "made no mention of the other Firm Defendants" and the other Firm Defendants were not signatories to, nor even mentioned in, the Baron escrow agreement (Affidavit in Support at ¶ 23 [Motion Seq. No. 6]).

which was dispersed in three checks.[9] Peter did not "personally" deposit the proceeds in the escrow account but instructed his brother Anthony to deposit the money and open the account (Affirmation in Support of Motion at ¶¶ 5, 10 [Motion Seq. No. 5]). Specifically, Peter states that after receiving the checks from Jeffrey Catterson, "I instructed Anthony, my brother and the Firm's long time employee and office manager, to deliver the checks to Signature Bank, along with the escrow account application [Langione] and I alone executed" (Affirmation in Support at ¶ 22 [Motion Seq. No. 6]).

According to Peter, both he and Langione executed the Baron escrow application in order to open the Baron escrow account because Anthony purportedly advised Peter that "Signature required that [Langione] be a designated signator on the Baron Escrow Account" (Affirmation in Support of Motion at ¶ 35 [Motion Seq. No. 6]).[10] The "original" Baron escrow account application was not produced in this litigation because it was supposedly destroyed by Anthony.[11] In its stead, Anthony allegedly substituted a forged Baron escrow account application. The

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[9] Copies of the checks were not produced in this litigation. On August 2, 2016, this court issued an order directing the production of these checks. The court received only a copy of the fronts of the checks, which revealed that they were made payable to "Peter Galasso, Esq".

[10] In filling out the Baron escrow account application, Peter sought to open the account as "Galasso, Langione, on behalf of Stephen Baron" under account number 1500451064, as escrow agents (notwithstanding the fact that the escrow agreement and stipulation designated Peter Galasso, individually, as escrow agent and not the Firm) (Affirmation in Support at ¶ 35 [Motion Seq. No. 6]) . Judge Ross in the matrimonial action additionally drew a distinction between Peter as escrow agent and the Firm stating "approximately $4.8 million dollars of marital assets that went missing from an escrow account at Signature Bank maintained for the benefit of the parties by Galasso, Langione & Botter Esqs. . . . " **(**Ross, J. Order dated February 27, 2008**)**.

[11] Peter states, that "[i]n lieu of delivering the escrow account application I had given him, Anthony deviously substituted and submitted to Signature an escrow account application that Anthony forged and that, among other defects designated him as a signator" (Affirmation in Support at ¶¶ 35-36 [Motion Seq. No. 6]).

allegedly forged application submitted to Signature allowed internet transfers, listed Post Office Box 721 in Mineola, New York as the address to where bank statements were to be mailed, and designated Anthony as an authorized signatory and primary contact on the account. Reinhardt, Signature's Executive Vice President, testified that the Baron account application should have been rejected because it violated Signature's rules that govern the establishment of attorney escrow accounts. Amongst other things, such rules prohibit non-attorneys from being authorized signatories on a law firm's attorney escrow account (Affirmation in Support at ¶ 29 [Motion Seq. No. 21]).

The escrow account application submitted to Signature was titled "Galasso Langione LLP as Escrow Agents for Stephen Baron", and designated Peter and Langione as signers, and Anthony as "Authorized Signer", "Primary Contact", and "Operations Manager/Principal" (Ex. "40" to Affirmation in Support [Motion Seq. No. 21]).

In this regard, Reinhardt testified:

> Q: And that if Anthony Galasso was designated as signator on escrow account that would be incorrect, correct?
>
> A: Correct.
>
> Q: And Signature Bank should not have accepted any attorney escrow account that designated Anthony Galasso as a signatory, correct?
>
> A: Correct (Affirmation in Support at ¶ 41 [Motion Seq. No. 6]).

The Firm's Contentions Concerning the Escrow Agent

Peter and the Firm's contentions regarding the identity of the escrow agent of the Baron escrow funds are inconsistent and have shifted significantly throughout the proceedings. For

example, the Firm repeatedly states in various submissions that it is the escrow agent: the "Firm executed an Escrow Agreement with Baron and his then wife's attorney, Jerry Winter, Esq., that provided the Firm would hold the net proceeds . . . ."; and, "[i]n furtherance of the Escrow Agreement," the Firm alleges that it instructed Anthony to "obtain an escrow account application from Signature to fulfil its obligation as escrow agent pursuant to the Escrow Agreement" (Ex "1" at ¶¶ 7-8 [Motion Seq. No. 2]). Elsewhere, the Firm describes its status as "the Plaintiff Firm, acting as Escrow Agent for Stephen Baron . . . ." (Affidavit in Support at ¶ 4 [Motion Seq. No. 21]).

However, in other submissions, Peter and the Firm state that Peter, and not the Firm, was the escrow agent: "That [*pendente lite*] motion was settled by virtue of the Barons' agreement to deposit the net proceeds into an escrow account pursuant to an Escrow Agreement that the parties executed and which denominated me [Peter], individually, and not the Firm, as the Barons' escrow agent" (Affidavit in Support at ¶ 29 [Motion Seq. No. 21]); "Wendy Baron's [*pendete lite*] motion was eventually resolved by the parties' Escrow Agreement, which designated Peter as the Barons' escrow agent" (Memorandum of Law in Support at p 4 [Motion Seq. No. 21]); "that [*pendente lite*] motion was settled by virtue of the Barons' agreement to deposit the net proceeds into an escrow account pursuant to an Escrow Agreement that the parties executed and which denominated Peter, individually, and not the Firm, as the Barons' escrow agent" (Memorandum of Law in Support [Motion Seq. No. 21]); "in addition to being Stephen's lead counsel in his divorce action, I acted as Stephen and Wendy's escrow agent pursuant to the Escrow Agreement" (Affidavit in Support at ¶ 3 [Motion Seq. No. 6]).

In Peter Galasso's affidavit, submitted on behalf of the Firm Defendants, Peter asserts

that the counterclaim interposed against Stephen Baron in the answer to the amended complaint, was "based upon [Baron's] contractual obligation to indemnify me [Peter] for any damages I [Peter] might incur or be ordered to pay that related to the funds deposited in escrow on the Barons' behalf" (Affidavit in Support at ¶ 12 [Motion Seq. No. 6]). The actual wording of the counterclaim, however, is as follows::

> Plaintiffs [the Barons] and Peter entered into the Escrow Agreement dated June 8, 2004, which provides, *inter alia*, that in the event the Firm or any of its partners are held liable for Plaintiff's loss, then Stephen Baron will be obligated to indemnify the Defendants for whatever they are ordered to pay to Plaintiffs. If either or both Plaintiff recover judgment against any of the answering defendants, any such answering defendant will be entitled to recover from the Plaintiff Stephen Baron the amount of such judgment (Ex. "D" at ¶¶ 55-56 [Motion Seq. No. 6]).

Peter's affidavit also states the following:

> In June 2004, during the pendency of the Barons' divorce action, I agreed to act as an escrow agent for the Barons when my client Stephen, without the aid of counsel, entered into a contract to sell a commercial building located in Hicksville, New York;
>
> The Barons both executed an Escrow Agreement that designated me, individually, as their escrow agent and which authorized me to take possession of and hold the net proceeds derived from the sale of Stephen's Hicksville property. . .;
>
> The Baron Escrow Agreement made no mention of the other Firm Defendants and specifically limited my liability to the Barons for any loss suffered by them relative to the funds deposited in escrow to losses resulting from my "gross negligence or willful misconduct" which would connote a sinister complicity in Anthony's theft;
>
> *The other Firm Defendants were not signatories to nor even mentioned in the Baron Escrow Agreement, did not play any role in the receipt or management of the Barons' funds, were not in any way involved in Stephen's representation* and did not share in the Baron fees;
>
> In performing my role as the Barons' escrow agent, I elected to deposit the Baron escrow funds into an interest bearing Money Market attorney escrow account at Signature Bank, entitled "Galasso, Langione, on behalf of Stephen Baron under account number 1500451064 (Affidavit in Support at ¶ 23 [Motion Seq. No. 6]

[emphasis added]).

And the Firm's Memorandum of Law reads that:

> As Justice Ira Warshawsky held in his decision dated January 4, 2011, the Baron Escrow Agreement is dispositive of all of the Barons' claims. That Escrow Agreement specifically designates Peter as the parties' stakeholder, sets forth his obligations thereunder, and establishes under what circumstances Peter can be held liable for losses sustained by the Barons. The remaining defendants are not mentioned in the Baron Escrow Agreement, played no role whatsoever in the Baron divorce or the management of the Baron Escrow account, and are otherwise shielded from liability by virtue of their Limited Liability Partnership status under Partnership Law § 26(2)(b) (Memorandum of Law at pp 6-7 [Motion Seq. No. 6]).[12]

The Firm Transfers its Banking Business from Signature to M&T Bank

In November 2005, the Firm "instructed Anthony to transfer all of the Firm's accounts at Signature", with the exception of the Baron escrow account, to M&T Bank (Ex. "8" at ¶ 24 [Motion Seq. 21]). However, "contrary to the Firm's expectations and understanding, Anthony failed to close any of the Firm's accounts" at Signature and "diverted and converted Firm revenue and client awards to those Signature accounts" (Firm Affirmation in Support at p 21and ¶ 35 [Motion Seq. No. 21]).

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[12] In an order dated January 4, 2011 (Warshawsky, J.), the court denied a motion by the Firm seeking to substitute Stephen Baron and Wendy Baron as party plaintiffs in *Galasso, Langione & Botter, LLP (formerly known as Galasso, Langione, LLP), as Escrow Agent for Stephen Baron on Signature Bank Account No. 1500451064 v Anthony P. Galasso and Signature Bank* (Index No. 10038-07). Also in that order, the court (Warshawsky, J.) referenced the Firm, rather than Peter, as escrow agent under the escrow agreement. The court will not *sua sponte* address any potential implications or issues that could be raised in regard to the foregoing, as such implications and issues have not been raised by the parties herein and the court is unaware of any appeal being taken from that order. To the extent that the Firm and Peter argue that Justice Warshawsky's order limits Peter's liability, the undersigned rejects that argument, Justice Warshawsky's statements, to the extent that they may be interpreted as suggested, being mere *dicta*.

Anthony's Fraudulent Transfers from the Baron Escrow Account

Between June 23, 2004 and January 17, 2007, through the use of approximately 90 internet transfers, Anthony transferred $4,501,571 from the Baron escrow account into the Firm's IOLA account and operating accounts.[13] The Baron funds were used to "replace" funds that Anthony had previously removed from the Firm accounts dating back to 2002 when Anthony began to transfer money and write checks to himself and pay expenses that he had accumulated on the Firm's American Express card. Notably, Anthony had full signing authority on all operating checking accounts. Transferred funds from the Baron escrow account were also disbursed to Peter Galasso, Firm employees, and other entities in the course of business, without the Barons' consent and purportedly without the knowledge of the Firm's principals. Anthony used internet banking, which he requested on the forged account application, to facilitate his theft. To enable the internet banking, Signature mailed two code numbers (a user ID and a password) in separate envelopes to the Firm's office address. Anthony, who was authorized to open the Firm's mail, took the codes and used them to perform the internet transfers. Under Signature's internet procedures, each customer is given one customer number, irrespective of the number of accounts the customer may have. This procedure, which permits the customer to have internet access to all of their accounts and to transfer money from one account to another, linked

[13] $200,000 was initially transferred from the Baron escrow account and deposited into one of the Firm's operating accounts. Thereafter, $100,000 from that same Firm operating account was used to purchase the office condominium. An additional $475,000 paid at the condominium closing had been transferred from the Baron escrow account into a firm operating account and then into a money market account from which the $475,000 check was written (Ex. "K" to Motion Seq No. 5).

the various Firm accounts to each other.[14] A representative from Signature's customer relations unit also visited the Firm's office to teach Anthony how to conduct internet banking (Affidavit in Opposition at ¶¶ 31, 34-35 [Motion Seq. No. 21]; Affirmation in Support at ¶ 35 [Motion Seq. No. 20]).

Baron escrow funds were disbursed to the following accounts (Ex "16(D)" [Motion Seq. No. 21]):

Account 1500351639 (IOLA)	$1,037,321.00
Account 1500351604 (James Langione Operating Account)	$1,475,000.00
Account 1500592636 (Peter Galasso Operating Account)	$705,000.00
Account 1500351612 (Sham Account)	$896,250.00
Account 1500351620 (Sham Account)	$188,000.00
Account 1500592644 (Sham Money Market Account)	$200,000.00

To escape detection, in each of the forged applications submitted to Signature, including the Baron escrow account application, Anthony directed that all bank statements be diverted to a post office box. The original bank statements were then retrieved by Anthony and placed by him in a file cabinet in his office. Anthony fabricated the Baron escrow account bank statements by creating "genuine-looking but false computer generated bank statements" which he distributed to the Firm and the Barons' accountant (Ex. "K" to Motion Seq. 5). Although Peter admits knowing that the statements were kept in the file cabinet, he testified that he never looked at them (Ex. "F" at ¶¶ 81- 83 [Motion Seq. No. 5]; Signature's Statement of Material Facts at ¶ 45 [Motion Seq. No. 20]; Ex "36" [Motion Seq. No. 21]). The Firm states that "except for

[14] Internet transfers are different from wire transfers, which allow transfers from one bank to a different bank. It is also noted that there were no wire transfers from the Baron escrow account, nor were checks written, or cash withdrawals made, from the Baron escrow account (Affirmation in Opposition at ¶ 31 [Motion Seq. No. 21]).

identifying a discrepancy of about $5,000 in September of 2006, Anthony's fabricated statements survived [the Firm accountant's] review and audit" (Affirmation in Support at ¶¶ 38-39 [Motion Seq. No. 6]).[15]

Anthony's Fraudulent Transfers from the IOLA Account

Regarding the IOLA account, the Firm alleges in their complaint that Anthony perpetuated his theft through "wire transfers from the Signature IOLA account to various other unauthorized Signature accounts, by forging the endorsements of payees on settlement checks, by forging the signatures of partners James R. Langione, Esq. and Peter J. Galasso, Esq. on checks drawn on the IOLA account, by unauthorized withdrawals from the Signature IOLA account, and/or by unauthorized deposits of Firm revenues into the unauthorized Signature accounts" (Ex. "8" at ¶ 29 [Motion Seq. No. 21]). The Firm also contends that Signature allowed transfers to be made from the IOLA account in response to two of Anthony's telephone calls despite the fact that he was a non-attorney and "the very act of allowing a telephone call to trigger an IOLA transfer was prohibited" (Firm's Statement of Material Facts at ¶ 29 [Motion Seq. No. 21]).

According to the Firm's expert, $1,037,321 was transferred from the Baron escrow account into the IOLA account and subsequently disbursed (Ex. "43" at p 6 [Motion Seq. No. 21]).

Significantly, Peter reviewed monthly financial reports prepared by Anthony in lieu of

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[15] At some point, Stephen Baron's accountant noticed a discrepancy in the Baron account, which he brought to the attention of Peter. Anthony explained to Peter that Signature had made a mistake in the amount of interest it calculated and said that Signature would correct it. Anthony then forged a new document, with the appropriate interest amount, and sent a copy to Baron's accountant (Signature's Statement of Material Facts at ¶¶ 87-90).

reviewing the actual bank-prepared and issued monthly statements of the IOLA account (kept in Anthony's office) (Ex. "K" [Motion Seq. No. 5]).

Anthony's Fraudulent Activity with Loans

When the Firm began banking at Signature in 2002, it secured a $150,000 line of credit from which Langione would occasionally draw funds to pay operating expenses while he awaited receipt of his contingency share of personal injury awards (Affirmation in Support at ¶ 65 [Motion Seq. No. 21]).

Signature maintains that Peter and Langione prepared and signed various documents to extend the existing business loan for the Firm and to expand the Firm's credit line. However, according to Peter, Langione, and Anthony, all of the signatures on the loan documents were forged by Anthony. Signature subsequently loaned $650,000 to the Firm (Signature's Statement of Material Facts at ¶ 96; Affirmation in Support to Motion at ¶ 53 [Motion Seq. No. 21]).[16]

The loans contain continuing guarantees purportedly signed by Peter and Langione guaranteeing the indebtedness of the Firm although Reinhardt, Senior Vice President at the Bank, admitted that he did not actually witness Peter or Langione sign the guarantees. Reinhardt also admits that when he received Peter and Langione's guarantees from Anthony, they were already signed and notarized before Reinhardt signed them as a witness. In addition, "the notary stamp for the notary, Shannon Williams, who allegedly signed these documents, which in fact she testified that she did not sign, was already expired" (Galasso Statement of Material Facts at ¶¶ 66

[16] Signature asserts that although some of the loan documents indicate that they should be signed in the presence of an officer of the bank, Reinhardt testified that as an accommodation to his clients, he did not insist on it (Signature's Statement of Material Facts at ¶ 97).

- 68; Exhibit “17" [Motion Seq. No. 21]).

Law Condominium

In 2005, when the Firm decided to purchase a new office condominium located at 377 Oak Street in Garden City, “Anthony had to replenish savings previously stolen from [Peter’s personal savings account] with funds Anthony stole from the Baron Escrow account”. Anthony testified, “I had to get money in [Peter’s] account so I just took it from one of the other accounts. I’m not sure what account I took it from, and I just transferred the money into that account so I could write a check from his account for the down payment so it would appear that it was coming from his account the whole time.” Peter states that, “Anthony replenished approximately $350,000 of the approximate $450,000 of savings he had previously stolen from me and which I unwittingly utilized to purchase my office condominium in September, 2005" (Affirmation in Support at ¶¶ 45-46 [Motion Seq. No. 6]).

Disciplinary Proceedings

In January 2007, Anthony confessed his fraudulent activities, was arrested, and subsequently pled guilty to 22 felony counts of grand larceny. Anthony was sentenced to 2 ½ to 7 ½ years in jail (Ex “E”at ¶ 28 [Motion Seq. No. 6], Affirmation in Support at ¶ 40 [Motion Seq. No. 6]). At the time of Anthony’s arrest, approximately $466,000 was left in the Baron escrow account, which was subsequently transferred by court order to Steven Eisman, Esq. (Stephen’s new attorney), and to Wendy Baron’s attorney, Jerry Winter, Esq. (Affirmation in Support at ¶ 49 [Motion Seq. 6]).

The Grievance Committee for the Ninth Judicial District thereafter commenced a disciplinary proceeding against Peter. The Petition contained 10 charges of professional misconduct, including breach of fiduciary duty, unjust enrichment, and failure to supervise a non-attorney employee which resulted in the misappropriation of client funds. Special Referee Arthur Cooperman sustained all 10 charges.

The Second Department confirmed the Special Referee's report and suspended Peter from the practice of law for a period of two years (*Matter of Galasso*, 94 AD3d 30 [2d Dept 2012]).

On appeal, the Court of Appeals affirmed and modified the decision of the Appellate Division by dismissing charge five of the petition and remitting the matter to the Second Department for further proceedings (*Matter of Galasso*, 19 NY3d 688 [2012]).[17]

In an order dated February 27, 2013, the Second Department adhered to the two-year suspension imposed in its prior order (*Matter of Galasso,* 105 AD3d 103 [2d Dept 2013]).

The Grievance Committee for the Ninth Judicial District also commenced a disciplinary proceeding against Langione in March, 2013. Following a hearing, the designated referee sustained 12 charges against Langione; thereafter, the Grievance Committee moved to confirm the report. In an order dated June 24, 2015, the Appellate Division, Second Department confirmed the report with the exception of charge 6, as it was duplicative of other charges, and part of charge 9. In all other respects, the report, in which the Referee found that Langione failed to take reasonable steps to safeguard funds and failed to exercise reasonable management and

[17] Charge five alleged that Peter failed to timely comply with lawful demands for information made by the Grievance Committee in connection with an investigation of his alleged professional misconduct, in violation of Code of Professional Responsibility DR 1-102 (a) (5) and (7) and Rules of Professional Conduct 8.4 (d) and (h).

supervisory authority, in violation of Code of Professional Responsibility DR 1-102(a)(7 (22 NYCRR 1200.3 [a][7]), was confirmed. As a result, Langione was suspended from the practice of law for a period of six months commencing July 24, 2015 (*Matter of Langione,* 131 AD3d 199 [2d Dept 2015]).

Baron Matrimonial Action

Pursuant to the "Decision After Trial", on June 18, 2007, a judgment of divorce in the *Baron* matrimonial action was granted by Justice Robert Ross.

In July 2007, Stephen Baron moved for an order: 1) vacating the Judgment of Divorce; 2) correcting the Judgment; and 3) staying enforcement of the Judgment. The court (Ross, J.) granted the stay and found that:

> Part of the equitable distribution to be distributed is missing as a result of the misappropriation of the $4,906,317.00 of marital funds placed in the escrow account of Peter Galasso, Esq., former counsel for defendant.[18] No court can refuse to equitably distribute marital assets. *LeVigne v LeVigne,* 200 AD2d 561; *Richmond v Richmond,* 144 AD2d 549.
>
> These missing assets, which were to be distributed, serve to frustrate the distribution as determined by the trial court (Jonas, J.). Accordingly, the matter shall be the object of a hearing to be held before [Ross, J.] on October 19, 2007 to determine which party has responsibility for those escrow funds which have been misappropriated (Decision dated October 15, 2007).

On September 3, 2008, a final Judgment of Divorce was signed by the court and subsequently entered on September 11, 2008 (Ross, J.).

In resolution of a motion by "counsel for the escrow agent" seeking: 1) the resignation of

[18] Anthony's fraudulent conduct and unauthorized transfers were discovered in January 2007.

"escrow agent, Peter J. Galasso, Esq." from his duties as escrow agent; 2) substitution of Jerry Winter, P.C.[19] as the escrow agent; and 3) a direction that the remaining funds held in the escrow account be transferred to "Jerry Winter, P.C., as attorney", an Order on Consent was issued on September 14, 2008 stating:

> [I]t is ordered that, without prejudice to the rights of the parties and each of them to pursue Peter J. Galasso, Esq., the law firm of Galasso, Langione & Botter, LLP, and/or any other parties or entities responsible in whole or in part for the disappearance of approximately $4,400,000 plus interest from the Signature Bank account captioned "Stephen Baron, Galasso Langione LLP Escrow Agents" under account #1500451064 ("Escrow Account"), said Peter J. Galasso, Esq. is directed to transfer any and all funds remaining in the aforesaid escrow account, to wit, the sum of $470,137.29 plus interest accumulated until disbursement, to "Jerry Winter, P.C., as attorney", pursuant to the written Escrow Agreement dated June 10, 2004 (Order on Consent dated September 14, 2008).

On April 8, 2011, a "So Ordered Stipulation" was entered resolving issues that remained outstanding and unresolved between the parties. In regard to the pending lawsuits against, *inter alia,* Peter Galasso, and claims filed with the Lawyer's Fund, the stipulation states:

> (a) The Parties have retained Anthony Capetola, Esq. for the purpose of taking such steps as are necessary to facilitate recovery of the missing escrow funds on behalf of both parties. Any recovery by lawsuit, settlement or otherwise by Mr. Capetola, or any subsequent counsel retained by the parties to recover the missing escrow funds, shall be equally divided between the parties. The parties agree to be equally responsible for any legal fees which are or may become due to Mr. Capetola.

Subsequently, on that same day, an Order on Consent was entered stating:

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[19] Interestingly, in June 2006, pursuant to an order in the *Baron* matrimonial action, the sum of $100,000 was authorized to be withdrawn from the Baron escrow account and paid to Wendy Baron's attorney, Jerry Winter, P.C. for legal fees. It was later discovered that instead of issuing a check from the Baron escrow account, as directed by the order, a $100,000 check was issued from the Firm's IOLA account (Ex "E" to Affirmation in Support at ¶¶ 43-44; Ex. "C" to Affirmation in Opposition [Motion Seq. No. 6]). Apparently, neither Peter, who signed the check, nor Winter who received it, noticed that the check was disbursed from the IOLA account and not the Baron escrow account, as directed.

The parties shall equally share the risk of loss. The escrow loss of $4,840,862.34 that was discovered by the parties for the first time in January of 2007, pursuant to DRL Sec 236 B is deemed to be a "matrimonial loss", to be shared by the parties in the same proportion as "marital assets" other than Defendant's business, were equitably distributed by the trial court and shared equally on a 50/50 basis and to the extent permitted by law and IRS regulations, the parties may exercise their rights, if any, to claim their respective shares of the net escrow loss as a theft or casualty loss.

Procedural History

ACTION 1 - INDEX NO.: 10038-07 - ESCROW ACTION

In June 2007, after discovering Anthony's fraudulent scheme, the Firm commenced an action against Signature Bank and Anthony Galasso ("Escrow Action") based upon Anthony's theft/conversion of funds from the Baron escrow account. Action 1 is entitled *Galasso, Langione & Botter, LLP (formerly known as Galasso, Langione, LLP), as Escrow Agent for Stephen Baron on Signature Bank Account No. 1500451064 v Anthony P. Galasso and Signature Bank* (Index No. 10038-07).[20] The verified complaint in the Escrow Action contains the following causes of action:

First:	As against Defendant Signature under UCC 4-A
Second:	As against Defendant Signature under UCC Article 4
Third:	As against Defendant Signature - Lack of Ordinary Care under UCC Article 4
Fourth:	As against Defendant Signature - Breach of Contract
Fifth:	As against Defendant Signature - Negligence
First:	As against Defendant Anthony Galasso - for Wrongful Conversion and Misappropriation of Escrow Funds

In his verified answer, Anthony Galasso advances a counterclaim stating:

If the plaintiffs are successful against defendant Anthony Galasso, then Anthony Galasso is entitled to offset and indemnification against third-party defendants Galasso Langione & Botter, LLP, Peter J. Galasso, James R. Langione and Alan S.

[20] The court notes that the Firm is purportedly moving "as the Escrow agent"; the complaint states that "the Firm" executed the escrow agreement and that "the Firm" instructed Anthony to obtain an escrow account application (Ex. "1" [Motion Seq. No. 21]).

> Botter to the extent of their liability and culpability. Any judgment should be apportioned based upon the liability and culpability of the individual parties (Ex. "2" [Motion Seq. No. 21]).

In its amended verified answer, Signature Bank asserts the following two crossclaims against Anthony Galasso:

> If Signature Bank is held liable for any damages claimed by the plaintiffs, then it is entitled to recover from co-defendant Anthony P. Galasso, the full amount of any judgment or a part of any judgment obtained on the basis of contribution, based upon an apportionment of responsibility.
>
> If the plaintiffs should recover judgment against defendant Signature Bank, defendant Signature Bank will be entitled to full recovery against co-defendant Anthony P. Galasso, on the basis of common law indemnification, and defendant Signature Bank will be further entitled to recovery against Anthony P. Galasso of its costs, disbursements and attorneys' fees.

ACTION 2 - INDEX NO 19198-07 - IOLA ACTION

In October 2007, another action was commenced by the Firm against Signature and other Defendants (M&T Bank, David Samela, and family members of Anthony who appear to have benefitted from Anthony's theft) for losses to the Firm's IOLA account at Signature ("IOLA Action"). Action 2 is entitled *Galasso, Langione & Botter, LLP, Peter J. Galasso, Individually, James R. Langione, Individually, Galasso, Langione & Botter, LLP, as Escrow Agents on Signature Bank Account No.:1500451064 and Account No.:1500351639, and M&T Bank Account No.: 9835989485, on behalf of Stephen Baron, Adele Fabrizio, Theresa Halloran and The Estate of George Carroll v Signature Bank, M&T Bank, Anthony Galasso, Daniel Samela, CPA, Christine Galasso, Matthew Manzella, Jeanne Manzella, Robert Fresella, Donna Fresella and "John and Jane Does 1-10"* (Index No. 19198-07).

The amended complaint in the IOLA Action contains the following causes of action:

First:	As against Defendant Signature - UCC Article 4-A
Second:	As against Defendant Signature - Strict Liability under UCC Article 4
Third:	As against Defendant Signature - Lack of Ordinary Care under UCC Article 4
Fourth:	As against Defendant Signature - Breach of Contract
Fifth:	As against Defendant Signature - Negligence
First:	As against Defendant M&T - Violation of Agreement
Second:	As against Defendant M&T - Under UCC 4-401(1)
Third:	As against Defendant M&T - Under UCC 4-401(1)
Fourth:	As against Defendant M&T - Conversion
Fifth:	As against Defendant M&T - Breach of Agreement
Sixth:	As against Defendant M&T - Breach of Agreement
Seventh:	As against Defendant M&T - Conversion
Eighth:	As against Defendant M&T - Breach of Agreement
Ninth:	As against Defendant M&T - Breach of Agreement
Tenth:	As against Defendant M&T - Negligence
Eleventh:	As against Defendant M&T - Under UCC 4-401 (1)
Twelfth:	As against Defendant M&T - Under UCC 4-406(3)
Thirteenth:	As against Defendant M&T - Breach of Agreement
Fourteenth:	As against Defendant M&T - Negligence
Fifteenth:	As against Defendant M&T - Violation of Agreement
Sixteenth:	As against Defendant M&T - Violation of Covenant of Good Faith
First:	As against Defendant Daniel Samela - Negligence
First:	As against Defendant Anthony Galasso - Theft and Conversion
First:	As against Defendant Christine Galasso - Benefit from Stolen Money
First:	As against Defendants Matthew Manzella, Jeanne Manzella, Robert Fresella and Donna Fresella - Benefit from Stolen Money
Second:	As against Defendants Matthew Manzella, Jeanne Manzella, Robert Fresella and Donna Fresella - Complicit in Theft and Conversion (Ex. “8" [Motion Seq. No. 21]).[21]

Again, Signature Bank, in its amended verified answer, interposes two crossclaims against Anthony Galasso stating:

> If Signature Bank is held liable for any damages claimed by the plaintiffs, then it is entitled to recover from co-defendant Anthony P. Galasso, the full amount of any judgment or a part of any judgment obtained on the basis of contribution, based

[21] Robert and Donna Fresella’s motion for summary judgment dismissing the complaint in the IOLA Action is granted, there being no opposition thereto.

upon an apportionment of responsibility.

> If the plaintiffs should recover judgment against defendant Signature Bank, defendant Signature Bank will be entitled to full recovery against co-defendant Anthony P. Galasso, on the basis of common law indemnification, and defendant Signature Bank will be further entitled to recovery against Anthony P. Galasso of its costs, disbursements and attorneys' fees.

The amended verified answer of Defendant Signature Bank also asserts two crossclaims against M & T Bank, Daniel Samela, CPA, Christine Galasso, Matthew Manzella, Jeanne Manzella, Robert Fresella, and Donna Fresella stating:

> If Signature is held liable for any damages claimed by the plaintiffs, then it is entitled to recover from [co-defendants] the full amount of any judgment or part of any judgment obtained on the basis of contribution, based upon an apportionment of responsibility.
>
> If the plaintiffs should recover judgment against defendant Signature Bank, defendant Signature Bank will be entitled to full recovery against [co-defendants], on the basis of common law indemnification, and defendant Signature Bank will be further entitled to recovery against [co-defendants] of its costs, disbursements and attorneys' fees" (Ex. "10" [Motion Seq. No. 21])

The Firm complaints in the Escrow Action and the IOLA Action are similar insofar as they each assert the following causes of action against Signature: violation of Uniform Commercial Code ("UCC") article 4-A; violation of UCC 4-401; violation of UCC 4-406(3); breach of contract; and negligence. As the designations herein suggest, the difference between these actions is that the claims in the Escrow Action relate to misconduct, etc. concerning the Baron escrow account and the claims in the IOLA Action relate to misconduct, etc. concerning the Firm's IOLA account.

ACTION 3 - INDEX NO 014211-07 - LOAN ACTION

In August 2007, Signature Bank commenced an action against the Firm ("Loan Action") seeking to recover the proceeds of a loan and advances purportedly made to the Firm based upon forged applications Anthony submitted to Signature. Action 3 is entitled *Signature Bank v Galasso Langione & Botter, Galasso and Langione, LLP, Peter J. Galasso & James Langione, L.L.P., Peter J. Galasso and James Langione* (Index No. 014211-07). The verified complaint in the Loan Action contains the following causes of action:

First:	As against Defendants Galasso Law Firm, Peter, and Langione - Breach of Contract
Second:	As against Defendants Galasso Law Firm, Peter, and Langione - Breach of Credit Account Agreement
Third:	As against Galasso Law Firm - Breach of Security Agreement
Fourth:	As against Galasso Law Firm - Conversion
Fifth:	As against Defendants Galasso Law Firm, Peter, and Langione - Unjust Enrichment
Sixth:	As against Defendants Galasso Law Firm, Peter, and Langione - Money Had and Received

In the amended answer, the Defendants, Galasso Langione & Botter, and Galasso and Langione, LLP, Peter J. Galasso & James Langione, LLP., Peter J. Galasso and James Langione advance two counterclaims. In the first counterclaim, the Defendants assert, for "bad faith, and abuse of process", that Signature be held responsible for the Firm's costs and fees incurred in defending this action. In the second counterclaim, Defendants assert that they have suffered damages as a result of Anthony having "utilized funds stolen from the Firm and its clients to pay monthly credit line indebtedness he fraudulently obtained".

ACTION 4 - INDEX NO 001510-09 - BARON ACTION

A fourth action was commenced by the Barons ("Baron Action") in January 2009 against Anthony, Peter, the Firm, Signature Bank, M&T Bank and GC Lawcondo LLC, the entity which held the title to the office condominium purchased by the Firm (which purchase was financed with the Baron's escrow money). Action 4 is entitled *Wendy Baron and Stephen Baron v Anthony Galasso, Galasso, Langione, LLP, Galasso, Langione & Botter, LLP, Galasso, Langione, Catterson & LoFrumento, LLP, Peter Galasso, Individually, James Langione, Individually, Alan Botter, Individually, Signature Bank, M&T Bank, and GC Lawcondo, LLC* (Index No. 001510-09). The amended complaint contains the following causes action:

First:	As against the Firm, Peter, Langione, and Botter - Accounting
Second:	As against the Firm, Peter, Langione, and Botter - Unjust Enrichment
Third:	As against the Firm, Peter, Langione, Botter, and Anthony - Conspiracy
Fourth:	As against the Firm, Peter, Langione, Botter, and Anthony - Conversion
Fifth:	As against Peter - Gross Negligence
Sixth:	As against the Firm, Peter, Langione, and Botter - Legal Malpractice
Seventh:	As against Anthony - Theft
Eighth:	As against the Firm, Peter, Langione, and Botter - Constructive Trust
Ninth:	As against Signature and M&T Bank - Gross Negligence
Tenth:	As against the Firm, Peter, Langione, and Botter - Breach of Fiduciary Duty
Eleventh:	As against Signature and M&T Bank - Aiding and Abetting Breach of Fiduciary Duty
Twelfth:	As against the Firm, Peter, and Langione - Respondeat Superior
Thirteenth:	As against the Defendants - Violation of Judiciary Law § 487 (Ex "E" at pp 10-22 [Motion Seq. No. 5]).

Anthony's answer to the amended complaint asserts four crossclaims:

First: As against co-defendants: Anthony Galasso is entitled to offset to the extent of their liability and culpability, if any liability is found against him. Any judgment should be apportioned based upon the liability and culpability of the individual parties.

Second: As against Peter Galasso and Galasso, Langione & Botter as escrow agents: . . . failure to make payment to the plaintiffs, the said defendants have been unjustly enriched in the amount of $4,370,725.05 plus interest.

Third: As against co-defendants; as a result of the withholding and retention of monies to which plaintiffs may be entitled, the said co-defendants are guilty of conversion.

Fourth: As the co-defendants, Anthony Galasso is entitled to offset to the extent of their liability and culpability, if any liability is found against him. Any judgment should be apportioned based upon the liability and culpability of the individual parties (Ex "F" at pp 3-4 [Motion Seq. No. 5]).

Defendants Peter Galasso, Galasso, Langione, LLP, Galasso, Langione & Botter, LLP, Galasso, Langione, Catterson & LoFrumento, LLP and GC Lawcondo, LLC, assert a counterclaim in their amended answer against Stephen Baron for indemnification stating:

> Plaintiffs and Peter entered into the Escrow Agreement dated June 8, 2004, which provides, inter alia, that in the event the firm or any of its partners are held liable for Plaintiffs' loss, then Stephen Baron will be obligated to indemnify the Defendants for whatever they are ordered to pay to Plaintiffs.
>
> If either or both Plaintiffs recover judgment against any of the answering defendants, any such answering defendant will be entitled to recover from the Plaintiff Stephen Baron the amount of such judgment (Ex "G" at pp 8-9 [Motion Seq. No. 5]).

In his answer to the amended complaint, Alan Botter asserts one crossclaim against the co-defendants stating: "The Plaintiff's damages, if any, were caused by reason of the primary negligence, carelessness, wrongful conduct, and/or affirmative acts of omission or commission of

the co-defendants in this action" and by that reason the co-defendants "will be liable to [Botter] in the event judgment is recovered against [Botter]" (Ex "I" at p 5 [Motion Seq. No. 5]).

Following motion practice, and an appeal to the Second Department, Signature Bank and M&T Bank were dismissed from the Baron Action (discussed *infra*).

The Instant Motions

Signature Bank's Motion for Summary Judgment
(Motion Sequence No. 20)

Signature Bank moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing the Firm's claims asserted against it in the Escrow Action and the IOLA Action; and for an award of damages against the Firm and its principals, Peter and Langione, in the amount of $100,000 plus interest in the Loan Action.[22]

Relief in the Loan Action

In branch "ii" of its notice of motion, Signature seeks partial summary judgment on the sixth cause of action in the Loan Action - the action commenced by it against the Firm, Peter, and Langione. Signature's sixth cause of action is a claim for money had and received with respect to approximately $405,227 in loans from Signature which were not repaid. Specifically, according to the complaint, the Firm received funds from Signature to which Signature has an immediate superior right of possession and the Firm benefitted from the receipt of the funds.

[22] Signature's motion (Motion Seq. No. 20) seeks relief in three actions: Index Nos. 19198-07 (IOLA Action), 01038-07 (Escrow Action), and 14211-07 (Loan Action).

Signature maintains that under principles of equity and good conscience, the Firm should not be allowed to retain the funds (Ex. "11" at ¶¶ 69-73 [Motion Seq. No. 21]).

In support of its motion for partial summary judgment on the cause of action for money had and received, Signature argues that Peter and Langione have "conceded" that they "knew the Firm had actually obtained loans from Signature and that the principal balance was at least $100,000 - $150,000", and that these "undisputed facts establish that the Firm is liable to Signature in the amount of at least $100,000" (Signature Memorandum of Law in Opposition at pp 44-45; Exs. "36" and "37" [Motion Seq. No. 21]).

In opposition, the Firm argues that it did not "concede" to borrowing approximately $100,000 but, rather, that the amount of approximately $100,000 was available to be borrowed on a line of credit.[23] Langione similarly testified that he believed the amount of the line of credit was $150,000 (Ex. "37" at p 31 [Motion to Seq. No. 20]), an amount which was confirmed by Peter Galasso (Affirmation in Support at ¶ 65 [Motion Seq. No. 21]). According to Peter, "[b]ecause James ran a personal injury/medical malpractice practice, he occasionally needed access to a credit-line. When we moved our banking business to Signature in 2002, we secured a $150,000 credit-line from Signature. Occasionally, James would draw funds from the credit-line to pay operating expenses while he awaited receipt of his contingency share of a personal injury award" (Affirmation in Support of ¶ 65 [Motion Seq. 21]). The Firm contends that it "*never* admitted that [it] actually took credit-line advances; [it] simply conceded that [it] understood that Signature had granted [it] access to a credit-line of between $100,000 and $150,000" (Firm

[23] When discussing the line of credit, Peter Galasso testified at his deposition that he thought the "amount of money on loan from Signature Bank" to the Firm was between $100,000 and $150,000 (Ex. "36" at p 136 [Motion Seq. No. 20]).

Affirmation in Reply at ¶ 65 [Motion Seq. No. 21]).

Contrary to its contention, Signature has failed to set forth *prima facie* entitlement to summary judgment on the claim for money had and received, which requires a showing that defendant benefitted from receipt of the money and that equity and good conscience should not allow the defendant to keep the money (*Regional Economic Community Action Program, Inc. v Enlarged City School District of Middletown*, 18 NY3d 474 [2012]; *Matter of Witbeck*, 245 AD2d 848, 850 [3d Dept 1997]).[24] In this regard, Signature has not established, as a matter of law, that the Firm, Peter or Langione actually received or utilized funds derived from the line of credit. In addition, even assuming *arguendo* that Anthony fraudulently received funds from the credit line, Signature did not *prima facie* establish in its motion papers that the Firm, Peter or Langione actually received, or benefitted from, those funds received by Anthony.

UCC Article 4-A (First Cause of Action in the Escrow and IOLA Actions)

The Firm claims, in its first cause of action in the Escrow Action, that Signature violated sections 4-A-202(1) and 4-A-204(1) of the UCC by, *inter alia,* permitting Anthony Galasso to make substantial withdrawals and transfers from the Baron escrow account which were unauthorized, fraudulent and made without the Firm's permission. The Firm also alleges that Signature was aware that Anthony was not an attorney, was not an authorized signatory on the escrow account, and that only Peter and James Langione were authorized signatories on the

[24] According to the Firm, $239,000 was repaid to Signature from Firm accounts in satisfaction of the Firm's alleged credit line indebtedness (Anthony remitted $239,000 to Signature in payment of the credit line that "Anthony fraudulently expanded by submitting forged loan documents") (Affirmation in Opposition at ¶ 86 [Motion Seq. No. 20]).

escrow account (Ex "1" at ¶¶ 35-39 [Motion Seq. No. 21]).

Similarly, the Firm claims in its first cause of action in the IOLA Action that:

> 39. Upon information and belief, [the Firm] and Signature agreed that no wire transfers or internet activity was permitted on the IOLA account, and that only Peter J. Galasso and James R. Langione were authorized signatories on the IOLA account.
>
> 40. In violation of that agreement, Signature permitted Anthony to make substantial withdrawals and transfers from the IOLA account by wire activity and/or via the internet.
>
> 41. The wire withdrawals and transfers from the IOLA account were unauthorized, fraudulent and without the permission of [the Firm].
>
> 42. The unauthorized wire withdrawals and transfers from the IOLA account perpetrated by Anthony were "funds transfers" as defined in UCC § 4-A-104.
>
> * * *
>
> 45. Signature never offered to [the Firm] any security procedure to ensure that payment orders received by Signature were authorized and error-free, nor did Signature ever implement or effectuate any such security procedure with respect to the IOLA account.
>
> 46. The funds transfers perpetuated by Anthony and accepted and paid by Signature from the IOLA account were not accepted and paid by Signature in good faith, because Signature was actually aware that Anthony was not an attorney, could not act as a fiduciary with respect to the IOLA account, and was not an authorized signator to the IOLA account.
>
> 47. Signature failed to verify any of the funds transfers perpetrated by Anthony that it accepted and paid from the IOLA account.
>
> 48. Signature has never notified [the Firm] of the funds transfers perpetrated by Anthony from the IOLA account or that the IOLA account was debited by virtue of the funds transfers within the meaning of UCC § 4-A-204(1) (Ex. "8" at ¶¶ 39-48 [Motion Seq. No. 21]).

Initially, the court notes that UCC Article 4-A entitled "Funds Transfers" applies to "funds transfers defined in Section 4-A-104" and is defined as the "series of transactions,

beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order" (UCC 4-A-104[1]).

Section 4-A-202(1) of the UCC entitled "Authorized and Verified Payment Orders" provides that a "payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is *otherwise bound by it under the law of agency*" (emphasis added).

Section 4-A-204(1) of the UCC entitled "Refund of Payment and Duty of Customer to Report with Respect to Unauthorized Payment Order" reads, in pertinent part, as follows:

> If a receiving bank accepts a payment order issued in the name of its customer as sender which is (a) not authorized and not effective as the order of the customer under Section 4-A-202, . . . the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment . . . .

UCC 4–A–204 places a strict duty on a bank to refund to a customer any amount paid on the basis of an *unauthorized* electronic funds transfer (*Regatos v North Fork Bank*, 5 NY3d 395 [2005]).

In support of its motion for summary judgment, Signature argues that the Firm's UCC 4-A-202 and 4-A-204 UCC claims in the Escrow and IOLA Actions must be dismissed because, *inter alia*, the transfers at issue were authorized and ratified by the Firm pursuant to UCC 4-A-202(1).

It is axiomatic that apparent authority must be based on the actions or statements of the principal (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]). A third party may not invoke the doctrine of apparent authority of an agent unless words or conduct of the principal communicated to the third party caused the third party to believe in the agent's authority (*Legal*

Aid Society of N.E.N.Y. v E.O.C., 132 AD2d 113 [3d Dept 1987]; *Melstein v Schmid Labs*, 116 AD2d 632 [2d Dept 1986]) and relied thereon (*Hoysradt v Nilles Ford–Mercury, Inc.*, 168 AD2d 824 [3d Dept 1990]). However, apparent authority may arise without any contact between the principal and the third party (*Property Advisory Group, Inc. v Bevona*, 718 FSupp 209, 211 [SDNY 1989]), particularly where the principal has voluntarily placed the agent "in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular businesses is justified in assuming that such agent has authority to perform a particular act" (2 NYJur2d Agency § 89; *see also First Fidelity Bank, N.A. v Government of Antigua & Barbuda*, 877 F2d 189, 193 [2d Cir 1989] ["appointment of a person to a position with generally recognized duties may create apparent authority"]; *E.F. Hutton & Co. v First Florida Securities, Inc*., 654 FSupp 1132 [SDNY 1987]).

Here, Stephen Reinhardt, Signature's Senior Account Executive and Senior Vice President at the time, testified that he met with Peter and Anthony in 2002 to discuss transferring the Firm's EAB accounts to Signature (Ex. "17" to Firm's Motion [Motion Seq. No. 21]). According to Signature's own complaint (in the Loan Action), "Signature regularly dealt with Anthony Galasso regarding all banking matters on behalf of the Law Firm" (Exhibit "11" at ¶ 29 [Motion Seq. No. 20]). In addition, the Firm admits that Anthony was to be a signatory on the Firm's operating accounts in August 2002, thereby allowing Anthony to deposit checks into the Firm's accounts and pay the Firm's operating expenses from those accounts (Firm's Rule 19-a Statement of Facts at ¶¶ 17, 18 [Motion Seq. No. 21]). It is also undisputed that Peter instructed Anthony to deliver to Signature the Baron escrow application that Langione and Peter had executed along with the Barons' escrow funds to deposit into the Baron escrow account (Firm's

Rule 19-a Statement of Facts at ¶ 38 [Motion Seq. No. 21]). In fact, it was "assume[d]" by Peter that Anthony was given the task of bringing the new account applications to Signature, because "that would be the type of task that we would ask him to do, rather than us attorneys do" (Firm's Rule 19-a Statement of Facts at ¶ 24 [Motion Seq. No. 20]). The court additionally notes that Peter testified that he did not recall executing Signature Bank applications[25] (except for the Baron escrow account application) on behalf of the Firm and that it was Anthony who opened the Signature accounts by completing the necessary applications and forms (Ex "36" at pp 68, 71-72 [Motion Seq. No. 21]). In this regard, the "Firm agrees that . . . the Firm's established relationship with Signature provided Anthony with the apparent authority to deliver account opening documents to it" (Firm Affirmation in Opposition at ¶ 41 [Motion Seq. No. 20]).[26] And even more specifically, "[t]he Firm concedes that Anthony had the apparent authority to deliver the Baron Escrow Account application to Signature" (Firm Affirmation in Opposition at ¶ 44 [Motion Seq. No. 20]).

In view of the foregoing, Signature has established that Anthony had actual and apparent authority to conduct all banking services on behalf of the Firm. In addition, Anthony had actual authority to open some accounts at Signature on behalf of the Firm; to the extent that Anthony

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[25] As stated above, Peter testified that he did not remember that he "did anything physically to make [the transfer from EAB to Signature] happen", or whether he "signed documents to make it happen", but, rather, "it just happened" (Ex. "36" at p 68 [Motion Seq. No. 21]).

[26] The Firm states that "Anthony's indicia of authority to deliver the authentic account applications to establish the Baron escrow is not being disputed". The "Firm agrees that like in those cases where the dishonest employee produces compelling indicia of their apparent authority to deliver executed account applications, the Firm's established relationship with Signature provided Anthony with the apparent authority to deliver account opening documents to it" (Firm Affirmation in Opposition at ¶ 41 [Motion Seq. No. 20]).

lacked actual authority to open other accounts at Signature (*e.g.* the sham accounts), he had apparent authority to open those accounts and also to make transfers on behalf of the Firm. Those transfers were, therefore, "authorized" under the UCC.

It is further noted that the Limited Liability Partnership Banking Agreement ("LLP Agreement") submitted to Signature on August 27, 2002 "authorized" Anthony (in addition to Peter and Langione) to do the following on behalf of the Firm:

a. To open deposit accounts at the Bank;
b. *To contract for any services offered by the Bank*;
c. To submit for deposit and/or collection for the account of this LLP all checks, drafts, notes or other instruments for the payment of money; and the Bank is authorized to accept such instruments, whether or not endorsed by this LLP, it being understood that each such instrument shall be deemed to be unqualifiedly endorsed by this LLP;
d. To make deposits of currency for the account of this LLP;
e. To sign checks, drafts or other orders with respect to any funds to the credit of this LLP, including checks, drafts or orders in favor of any person designated above, and to issue stop payment instructions with reference to any of the above;
f. *To make withdrawals of funds from accounts in the name of this LLP, and to transfer funds between such accounts, by any means authorized by the Bank* (Ex. "38" [Motion Seq. No. 21 [emphasis added]).

The fact that the LLP Agreement submitted to Signature was forged does not alter the conclusion that Anthony had apparent authority to engage in banking and thereby bind the Firm (*see Sybedon Corp. v Bank Leumi Trust Co. of N.Y.*, 224 AD2d 320 [1st Dept 1996]; *Geotel, Inc. v Wallace*, 162 AD2d 166 [1st Dept 1990] [court properly dismissed claim against brokerage house on ground that defendant acted with principal's apparent authority, having furnished a corporate resolution to that effect, albeit the resolution authorizing the defendant to act was never passed]; *see also Manhattan Medical Diagnostic & Rehabilitation, P.C. v Wachovia National*

Bank, N.A., 13 Misc3d 1228(A) [Sup Ct NY County 2006] *aff'd* 49 AD3d 461 [1st Dept 2008]).

In *Sybedon Corp. v Bank Leumi Trust Co. of N.Y.* (224 AD2d at 320, *supra*), the First Department found that a defendant bank's reliance upon an employee's apparent authority created by falsified corporate resolutions was reasonable and held that:

> Plaintiffs are precluded by UCC 3-405 (1)©, the "padded payroll" rule, from recovering against defendant bank on the 16 checks drawn by and made payable to plaintiff Sybedon Corporation and forged by plaintiffs' defalcating employee with Sybedon's indorsement "for deposit only" to plaintiff ZBL Associates' account with defendant, with respect to which the employee had actual authority to withdraw funds and did so. There is no merit to plaintiffs' argument that the rule does not apply to a check made payable to the drawer itself, there being nothing in the UCC to indicate any kind of restriction on who the payee may be, and it being enough that " 'an employee starts the wheels of normal business procedure in motion to produce a check for a non-authorized transaction'". Certainly, Sybedon was in a position to inquire into the purpose of checks presented to it by its employee for its signature and made payable to itself. In such a case, the loss resulting from the forged indorsement should be placed on the drawer-employer, who is in the best position to prevent wrongdoing by carefully selecting and supervising its employees, or through purchasing insurance. . . . We also agree with the IAS Court that plaintiffs cannot recover the money withdrawn from the account its employee opened in Sybedon's name, defendant [bank] having reasonably relied upon the employee's apparent authority created by falsified corporate resolutions showing him to be Sybedon's Secretary.

Accordingly, at bar, the court concludes that Anthony was the Firm's banking agent, having actual and apparent authority to conduct all banking business on behalf of the Firm; that he did not have actual authority to submit forged account applications or account applications adding him as signatory did not alter his apparent authority to do so (*see In re National Sur. Co. (Benenson)*, 162 Misc 344 [Sup Ct Special Term New York County 1937] [surety company liable on a bond on which signatures were forged by its agent, who had apparent authority to deliver such bonds and to make representations as to their authenticity]). As such, the risk of

loss from the unauthorized acts of a dishonest agent falls on the principal that selected the agent and not on the party who relies on his apparent authority (*see Prudential-Bache Securities, Inc. v Citibank, N.A.*, 73 NY2d 263 [1989]; *Sybedon Corp. v Bank Leumi Trust Co. of N.Y.*, 224 AD2d at 320, *supra; Geotel, Inc. v Wallace*, 162 AD2d at 168, *supra*).

Accordingly, the funds transfers from the Baron escrow account and IOLA account were authorized under UCC 4-A-202.[27] The first causes of action in the Escrow and IOLA Actions predicated upon the "unauthorized" transfers from the Baron and IOLA accounts, are dismissed.

UCC Article 4 (Second and Third Causes of Action in the Escrow and IOLA Actions)

The Escrow Action

In its second cause of action in the Escrow Action, a strict liability claim against Signature, the Firm alleges that Anthony Galasso perpetrated his theft from the Baron escrow account by forging signatures on documents resulting in unauthorized debits and funds transfers from the Baron escrow account and that these forgeries resulted in the payment of items by Signature that were not properly payable within the meaning of the UCC 4-401.

In its third cause of action in the Escrow Action, the Firm claims that: Signature never notified it of the improperly paid items from the Baron escrow account nor did it provide to the Firm monthly bank statements associated with the account as required by UCC 4-406.

[27] Given that the funds transfers at issue were authorized under UCC 4-A-202(1), the court does not address: UCC 4-A-202(2), which defines the customer's rights, and limits a bank's liability when the bank accepts a payment order that turns out to be unauthorized; or 4-A-204, which defines the circumstances under which a customer may be awarded a refund of funds found to have been transferred without authorization.

Importantly, Article 4 of the UCC does not apply to funds transfers (6B Anderson UCC § 4-102:5 [3d ed]; *John and Mary Markle Foundation v Manufacturers Hanover Trust Co*., 209 AD2d 587 [2d Dept 1994] [in case which involved wire transfer of funds, Article 4 of the UCC was "thus inapplicable because [Article 4] does not specifically address the problems of electronic funds transfer"]; *Sybedon Corp. v Bank Leumi Trust Co. of New York*, 1994 WL 16857163 [Sup Ct New York County 1994] [wire transfer transactions are not covered by Article 4 of the UCC, but have been governed by Article 4-A since January 1, 1991]; *Weeks Office Products, Inc. v Chemical Bank*, 180 AD2d 419 [1st Dept 1992] [Uniform Commercial Code was inapplicable to wire transfers prior to the enactment of article 4-A]; *Delbrueck & Co. v Manufacturers Hanover Trust Co.*, 609 F2d 1047 [2d Cir 1979] [UCC was "not applicable to this case because the UCC does not specifically address the problems of electronic funds transfer"]).

Inasmuch as all of Anthony's withdrawals from the Baron escrow account were made via the internet (Signature Rule 19-a Statement of Facts at ¶¶ 67-69 [Motion Seq. No. 20),[28] and because an internet transfer constitutes an electronic funds transfer pursuant to 15 USC § 1693a (7),[29] the Article 4 claims (the second and third causes of action in the Firm's complaint) in the Escrow Action must be dismissed.

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[28] According to the Firm's complaint, however, beginning on or about June 14, 2004 and continuing until January 17, 2007, Anthony "wrongfully withdrew funds from the Baron escrow account the sum of approximately $4,400,000 by *wire transfers* to certain Signature accounts, some of which he maintained without the knowledge of the Firm" (Ex. "1" at ¶ 23 [Motion Seq. No. 21]) (emphasis added). It appears that the Firm uses the words "internet transfers" and "wire transfers" interchangeably.

[29] Pursuant to 15 USC § 1693a (7), "the term 'electronic fund transfer' means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone."

The IOLA Action

The Firm asserts in the amended complaint in the IOLA Action that, "[u]pon information and belief", "Anthony perpetrated his theft by repeated unauthorized wire transfers from the Signature IOLA account to various unauthorized Signature accounts,[30] by forging the endorsements of payees on settlement checks, by forging the signature of partners . . . on checks drawn on the IOLA account, by unauthorized withdrawals from the Signature IOLA account, and/or by unauthorized deposits of Firm revenues into the unauthorized Signature accounts" (Ex. "8" at ¶ 29 [Motion Seq. No. 21]).

With respect to the UCC Article 4 claim, in its second cause of action in the IOLA Action, the Firm alleges that "Signature is strictly liable for the losses occasioned by Anthony's forgeries from the IOLA account . . . pursuant to UCC 4-401" because: Anthony perpetrated his theft from the IOLA account by forging signatures on checks resulting in unauthorized debits from the IOLA account and that the forgeries resulted in the payment of items by Signature that were not properly payable within the meaning of UCC 4-401(1); and that Signature never notified the Firm of the improperly paid items from the IOLA account nor did Signature make available to the Firm the bank statements and forged items within the meaning of UCC 4-406 (Ex. "8" at ¶¶ 52-54, 56 [Motion Seq. No. 21]).

In its third cause of action in the IOLA Action, the Firm alleges that: Signature did not use ordinary care in managing the Firm's banking business and bank accounts when it failed to communicate to the Firm's partners information pertinent to irregular or unusual banking

[30] According to the Firm, "Signature permitted Anthony to make substantial withdrawals and transfers from the IOLA account by wire activity and/or via the internet" (Ex. "8" at ¶ 40 [Motion Seq. No. 21]).

activities; Signature failed to use ordinary care in making payments from the IOLA account upon Anthony's forgeries; and Signature is liable for the losses occasioned by Anthony's forgeries from the IOLA account pursuant to UCC 4-406(3) (Ex. "8" at ¶¶ 58-60 [Motion Seq. No. 21]).

As noted, there is no recovery under Article 4 of the UCC for electronic funds transfers, wire and internet transfers, and telephonic transfers. Thus, any liability for the transfers at issue in the IOLA Action is limited to those transfers which did not occur via the telephone, internet or wire transfer (i.e., Anthony's submission of forged checks to Signature wherein the forgery was that of a signature on the front of the check or as an endorsement on the back of the check).

Pursuant to UCC 4-401(1), "[a]s against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft . . . ." The effect of this provision is to impose strict liability on a bank that charges against its customer's account any item that is not properly payable (*Robinson Motor Xpress, Inc. v HSBC Bank, USA*, 37 AD3d 117 [2d Dept 2006]; *CNA Holdings, Inc. v Citibank, N.A.* 10 AD3d 517 [1st Dept 2004]). The law is clear that under the UCC, a forged instrument is not "properly payable," and therefore may not be charged against the customer's account (*Monreal v Fleet Bank*, 95 NY2d 204 [2000]; *Getty Petroleum Corp. v American Exp. Travel Related Services Co., Inc.*, 90 NY2d 322 [1997]).

At bar, the evidence establishes that Anthony Galasso forged signatures on checks from the IOLA account and that as a result of the forgeries Signature issued payment of items that were not properly payable within the meaning of the UCC (*see* Affidavit in Support at ¶¶ 44, 62, Ex. "16" - "J" [Motion Sequence No. 21]).

Notwithstanding, Signature argues that the Firm's failure to comply with duties imposed

by the UCC - the duty of prompt examination of its bank statements and notification to Signature of the forgeries - constitutes a defense to the Firm's claims, without regard to Signature's lack of care. Specifically, according to Signature, the Firm's UCC Article 4 claims must be dismissed because Signature made the statements and checks available to the Firm each month since the accounts were opened in August 2002 up until January 2007 but the Firm did not report any of the forgeries from the IOLA account until January 18, 2007, which was beyond the one-year period that most of the statements were made available to the Firm, and "well outside of the [shortened] 14 day [notification] period required under the parties' agreement.".[31]

In this regard, UCC 4-406 provides, in relevant part:

> (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries . . . or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.
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> * * *
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> (4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection [1]) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

Under New York law, a bank can avoid its liability under UCC 4-401 when it makes

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[31] The Firm reported Anthony's fraudulent conduct and forgeries on January 18, 2007. However, the exact date that the last statement was made available to the Firm is not clear. Under the circumstances of this case, given the applicability of the repeater rule, and the resulting limitation on Signature's liability (discussed *infra*), the absence of information concerning the date that the last statement was made available is not consequential.

statements of the account and the forged items available to the customer, and the customer fails to report the forgeries to the bank within one year (or three years with an unauthorized indorsement) (UCC 4-406 [4]; *Putnam Rolling Ladder Co. v Manufacturers Hanover Trust Co*., 74 NY2d 340, 345 [1989]; *Robinson Motor Xpress, Inc. v HSBC Bank, USA*, 37 AD3d at 119, *supra*). The one-year period begins to run when a bank "sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or . . . in a reasonable manner makes the statement and items available to the customer" (UCC 4-406 [1]; *Woods v MONY Legacy Life Ins. Co*., 84 NY2d 280, 285-286 [1994]; *Robinson Motor Xpress, Inc. v HSBC Bank, USA*, 37 AD3d at 119, *supra*; *Matin v Chase Manhattan Bank*, 10 AD3d 447, 448 [2d Dept 2004]). However, the parties may shorten the one-year notice period by agreement (*see Gluck v JPMorgan Chase Bank*, 12 AD3d 305, 306 [1st Dept 2004]; *Catalano v Marine Midland Bank*, 303 AD2d 617, 618 [2d Dept 2003]; *Josephs v Bank of N.Y.*, 302 AD2d 318 [1st Dept 2003]). Importantly, if the customer fails to report the forgery to the bank within the applicable time limit, the customer is precluded from asserting any claims against the bank based upon the forged signature (*see Matin v Chase Manhattan Bank*, 10 AD3d at 448-449, *supra*). Such preclusion constitutes a complete defense to the action (*see New Gold Equities Corp. v Chemical Bank*, 251 AD2d 91 [1st Dept 1998]).

Here, the agreement between Signature and the Firm shortened the statutory period to 14 days. Specifically, Signature's "Business Account Agreements and Disclosures" states:

> Once a month, the Bank will send you at your address appearing on the Bank's records, a Statement of the Bank Deposit Account balance and activity since the last Statement which will be accompanied, when available and applicable, by any checks paid during that Statement Cycle Period. These checks may be originals, copies or optical images of the original. You will exercise reasonable care and promptness in

> examining such Statement and checks to discover any errors or irregularity including, but not limited to, any forged, unauthorized or improperly made signatures on, or any alteration of, a check. You will notify the Bank promptly in writing of any errors or irregularities, and in no event more than fourteen (14) calendar days after the time such Statement and checks were first made available to the [sic] you.
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> * * *
>
> You must notify the Bank in writing within fourteen (14) calendar days from the delivery or mailing of any Bank Deposit Account Statement, of any claimed errors in such Statement and with respect to any cancelled check accompanying the Statement. Such errors include, but are not limited to, claims that your signature was forged, a check was drawn without your authority, that a check was altered in any way, or that the amount of a check was raised. . . . If you fail to give such notice, the Bank Deposit Account Statement shall be considered to be correct for all purposes and the Bank shall not be liable for any payments made and charged to the Bank Deposit Account. . . . [U]nless you shall have given the Bank the written notice provided above . . . you agree that the Bank shall be deemed to have acted in good faith and used ordinary care and shall not be liable to you for any forgery of your signature or any alteration if the forgery of your signature or the alteration is not readily apparent and recognizable to an ordinary bank teller (Ex. "40" to Signature's Motion [Motion Seq. No. 20]).

Signature established its *prima facie* entitlement to judgment as a matter of law dismissing those claims in the amended complaint in the IOLA Action with respect to forged checks by submitting evidence that the monthly account statements were "made available" to the Firm within the meaning of UCC 4-406(4), thus triggering the 14-day notice requirement in the parties' agreement (which, as indicated, the Firm was bound by despite Anthony's forgery in connection therewith) requiring that the Firm discover and report any alleged forgeries within the applicable 14-day period (*see Woods v MONY Legacy Life Ins. Co.*, 84 NY2d at 285-286, *supra*; *Josephs v Bank of N.Y.*, 302 AD2d at 318, *supra*; *compare Matin v Chase Manhattan Bank*, 10 AD3d at 447, *supra* [bank failed to meet its burden of establishing that it made statements available to customer to defeat customer's action alleging that unknown person used forged

change of address card to cause bank to send monthly statements to different address; bank did not contest that statements were sent to address on forged change of address card rather than account holder's actual address]).

In this regard, the court notes that Signature mailed the bank statements to the Firm at the post office box designated in the account application; the post office box was, in fact, maintained on behalf of the Firm for Firm business and Anthony filed the IOLA account statements in a cabinet in his office and neither Peter nor anyone else from the Firm ever reviewed them (Ex. "26" at pp 99, 477-478, 481-482 [Motion Seq. No. 21]; Ex. "36" at pp 151-152, 155 [Motion Seq. No. 21]; Vita Affidavit in Opposition at ¶ 38 [Motion Seq. No. 21]). Significantly, Peter testified that it was his understanding that "all bank records would be kept in [Anthony's] office in the cabinet" and that he did not recall ever looking at the monthly statements (Ex. "36" at pp 151, 153 [Motion Seq. No. 21]).

In opposition, the Firm argues that the account statements were not made available until January 17, 2007 (when Anthony's theft was uncovered) because prior to that time the statements were sent to the post office box designated by Anthony and not the office address of the Firm (Firm Memorandum of Law in Support at p 20 [Motion Seq. No. 21]). The Firm's reliance on *Robinson Motor Xpress, Inc. v HSBC Bank, USA* (37 AD3d at 119, *supra*) to support its claim that the statements were "not made available" is unpersuasive.

In *Robinson*, an account agreement provided that the statements would be mailed to the address provided on the signature card unless that address was subsequently changed by a document executed by an authorized signatory. The original signature card for the account directed that the statements be mailed to the office of the plaintiff's accountants. After a few

months, but before the alleged forgeries began, the bank ceased mailing the statements to plaintiff's accountants' address, and mailed them to the plaintiff's office address notwithstanding the absence of any properly-executed document directing a change in that address. The bank did not proffer any explanation for the change. Given that factual underpinning, the Second Department held as follows:

> When a customer requests that a bank mail the statements either to himself or to another person, and the bank complies, the statements are considered 'made available to the customer' for the purposes of the UCC. Thus, where the statements are provided as directed by the customer, or in a manner of which the customer is aware but to which the customer does not object, the statements are "made available" within the meaning of the statute and the bank is entitled to the protections afforded by UCC 4-406 (4) even if the statements are thereafter intercepted by a dishonest employee or other ill-intentioned third party.
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> * * *
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> In the circumstances presented here, even though the statements were mailed to a business address of the plaintiff, they were not "made available" to the plaintiff within the meaning of the statute *because they were mailed to an address other than that which the plaintiff had designated for that purpose*. A mailing is normally sufficient if it reaches the customer at its business address, even if that was not the business address identified for the delivery of such documents. Nevertheless, where, as here, the customer has expressly directed that the statements be mailed to a specific address or officer, as it might for the purpose of preventing a fraud such as was perpetrated here and the bank fails to comply with that instruction, such delivery is equivalent to the statements having been improperly directed to an address unrelated to the plaintiff, and the statements cannot be said to have been "made available" to the plaintiff by the mailing (*Id*. at 119-120 [citations and internal quotations omitted] [emphasis added]).

The bank statements in *Robinson Motor Xpress, Inc. v HSBC Bank, USA* (37 AD3d at 119, *supra*) were mailed to an address other than the one that was specifically designated in the account agreement. In the case at bar, however, as noted, it is undisputed that the IOLA account application submitted in 2002 by Anthony, the Firm's banking agent, "directed that Signature

monthly account statements be mailed to the Post Office Box" (Firm Responses to Signature Rule 19-a Statement of Facts at ¶ 46 [Motion Seq. No. 20]; Ex. "19" [Motion Seq. No. 21]). Further, Anthony's submission of the forged IOLA account application along with the corresponding "Business Account Agreements and Disclosures" was within the apparent scope of Anthony's authority with which he has been cloaked (*see* discussion *supra*; *In re National Surety Co.* (*Benenson*), 162 Misc 344 [Sup Ct Special Term, New York County 1937]; 2A NYJur2d Agency § 270 [1998 ed.]). As such, the court rejects the Firm's argument.

Given the shortened repose period set forth in Signature's Business Account Agreement and Disclaimer, forged check transactions in the IOLA action that were not reported within 14 days from the date that the last bank statement was made available to the Firm are barred.

Moreover, UCC 4-406(2) and (3) provides that:

> (2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank
>
> (a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and
>
> (b) *an unauthorized signature or alteration by the same wrongdoer* on any other item paid in good faith by the bank after the first item and statement was available to the customer f*or a reasonable period not exceeding fourteen calendar days* and before the bank receives notification from the customer of any such unauthorized signature or alteration.
>
> (3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s) (emphasis added).

In addition, it is undisputed that each of the subject checks were forged by the same wrongdoer, Anthony, thus implicating the "repeater rule" set forth in UCC 4-406(2)(b).[32] In this regard, the UCC imposes certain reciprocal duties on the bank's customer and the:

> Failure to comply with those duties shifts the burden of loss from bank to customer. *UCC 4–406 imposes upon a customer the duty to inspect its statement* and canceled checks with reasonable care and promptness. *Failure to do so results in preclusion of any claim against the bank for repeated forgeries by the same wrongdoer after the first such forged check and statement reflecting it are made available to the customer.* This rule reflects the fact that the customer is generally in a better position than the bank to prevent repetition of forgery. A skillful forgery may not be detected by even a careful bank inspector, but the customer to whom the canceled check and statement are returned should know whether or not it actually intended to authorize payment of its funds to the named payee (see, UCC 4–406, comment 3). Thus, the shifting burden of loss is intended as well to encourage the parties to use reasonable care in situations where, from a systematic point of view, that is the efficient loss-avoidance mechanism (*Putnam Rolling Ladder Co. v Manufacturers Hanover Trust Co*., 74 NY2d 340, 345 [1989] [emphasis added]).

With respect to the forged check transactions that are not otherwise barred by UCC 4-406[4] and the shortened repose period, the Firm failed to perform its statutory duty of promptly reviewing all bank statements and checks to determine whether there were any irregularities (*see* UCC 4–406[1]). Thus, the "repeater rule" set forth in UCC 4–406(2)(b) would bar the Firm's remaining claims (those within the 14-day repose period) for Anthony's repeated forgeries. The court notes that Signature's purported failure to exercise ordinary care in paying the checks (*see*

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[32] UCC 4-406(2)(b) reads as follows: If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank * * * an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

UCC 4-406(3) reads: The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

UCC 4-406[3]; *Garage Mgt. Corp. v Chase Manhattan Bank*, 22 AD3d 432 [1st Dept 2005]; *In re Estate of Ray*, 24 Misc3d 285 [Sur Ct Kings County 2009]; Official Comment, McKinney's Cons. Laws of NY, Book 62 ½, UCC 4–406 at 567–568 [2001]; 9 NYJur2d Banks § 420) is inapplicable given the court's findings and holding herein dismissing the negligence claim asserted against Signature in the fifth cause of action (*see* discussion *infra*).

Accordingly, the branch of Signature's motion seeking dismissal of the second and third causes of action in the IOLA Action is granted.

Negligence (Fifth Cause of Action in the Escrow and IOLA Actions)

In the Escrow Action, the Firm alleges that Signature "negligently and carelessly managed and failed to protect the Firm's deposits and failed to exercise ordinary care in its oversight of those deposits in the following ways": in "accepting a forged escrow application pertinent to the Firm's deposit" of the Baron escrow funds; permitting Anthony, a non-attorney, to be a signatory to the Baron escrow account; permitting Anthony to "wire-transfer" funds from the Baron escrow account to various accounts Anthony wrongfully maintained at Signature; permitting Anthony to pay his personal expenses from the Firm's operating accounts; negotiating and accepting for deposit forged two-party checks from Anthony and thereafter permitting Anthony to utilize those funds for his own benefit; permitting Anthony to unilaterally divert the banking records, monthly statements and IRS 1099 statements to a post office box maintained by Anthony; failing to identify and uncover banking irregularities; and failing to communicate with either partner of the Firm about the banking irregularities. It is further alleged in the complaint in the Escrow Action that "Signature representatives violated Signature's anti-fraud protocol and

training in their negligent failure to recognize the irregular Firm account activity and to conduct an investigation into that irregular account activity" and that "Signature failed to exercise ordinary care in its oversight and management of the Firm's accounts" (Ex. "1" at ¶¶ 57-60 [Motion Seq. No. 21]).

In the IOLA Action, the Firm alleges that Signature was negligent as follows: from June 2004 through January 2007, Signature had actual knowledge or notice that repeated unauthorized withdrawals and transfers from the IOLA account were occurring or had occurred; Signature was under a duty to exercise reasonable care to investigate the facts and circumstances of the withdrawals and transfers from the IOLA account, and to notify the fiduciaries of the Firm thereof; Signature failed to exercise reasonable care to investigate the unauthorized withdrawals and transfers from the IOLA account, or to notify either Peter or Langione about the transfers; Signature's failure to investigate the unauthorized transfers and withdrawals from the IOLA account "permitted Anthony to perpetuate the theft of the deposits in the IOLA account"; and therefore, Signature is "liable for the losses occasioned from the IOLA account" (Ex. "8" at ¶¶ 65-69 [Motion Seq. No. 21]).

In support of its motion for summary judgment dismissing the Firm's negligence causes of action in the Escrow and IOLA Actions, Signature argues that Article 4-A of the UCC preempts the Firm's common law claims for negligence. Specifically, "[a]rticle 4-A applies to 'funds transfers' - which is indisputably the method by which all of the funds were transferred out of the Baron escrow account and some of the funds were removed from the IOLA account"; the Firm's losses stem, "not from Signature's act of opening the bank accounts, but instead from the actions" Anthony - the Firm's employee - took thereafter, i.e., using his access to the

accounts and the Firm's "complete lack of oversight of [Anthony's] activities to transfer funds out of the accounts and/or otherwise misappropriate them for his personal use"; and, thus, to the extent the Firm's common law claims for negligence in both the Escrow Action and IOLA Action concern funds transfers, they must be dismissed (Memorandum of Law at pp 17, 19 [Motion Seq. No. 20]).

Preemption

Section 1-103 of the UCC provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions" (*see also Hechter v New York Life Ins. Co.*, 46 NY2d 34, 39 [1978] [UCC does not displace common law causes of action unless a particular code provision expressly so provides]; *Bank of Hawaii Intern. Corp. v Marco Trading Corp.*, 261 AD2d 333 [1st Dept 1999]).

The Official Comment for UCC 4-A-102 entitled "Subject Matter" states, in pertinent part, as follows:

> Funds transfers involve competing interests--those of the banks that provide funds transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process and they were thoroughly considered. *The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. 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).

Drafted to cure deficiencies in the application of existing tenets of law, the provisions of Article 4-A were expressly intended to become the exclusive means of resolving such disputes

and expressly bars all other causes of action inconsistent with its terms (*Ma v Merrill Lynch, Pierce, Fenner & Smith, Inc*., 597 F3d 84, 87-91 [2d Cir 2010]; *In re Awal Bank, BSC*, 455 BR 73 [SDNY 2011] [Article 4A of the UCC displaces common law claims only to the extent that such common law claims are inconsistent with the UCC provisions]; *Sheerbonnet, Ltd. v American Express Bank, Ltd*., 951 FSupp 403, 407–8 [SDNY 1996] [exclusivity of Article 4–A is deliberately restricted to any situation covered by particular provisions of the Article]).[33] In this vein, the Second Circuit Court of Appeals has held that, as it "did with Article 4A . . . Article 4 precludes common law claims that would impose liability inconsistent with the rights and liabilities expressly created by Article 4" (*Fischer & Mandell, LLP v Citibank, N.A*., 632 F3d 793 [2d Cir 2011]).

Conversely, situations not covered by the UCC are not within the exclusive province of Articles 4 and 4-A (*see Fischer & Mandell, LLP v Citibank, N.A*., 632 F3d 793 [2d Cir 2011] [breach of contract claim not preempted where agreements therein did not create rights or obligations inconsistent with those created in Articles 4 and 4-A of the UCC]; *Patco Const. Co., Inc. v People's United Bank*, 684 F3d 197, 216 [1st Cir 2012] ["plaintiffs may turn to common

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[33] In *Ma v Merrill Lynch, Pierce, Fenner & Smith, Inc*. (597 F3d at 89-90, *supra*), the Second Circuit stated (citation and internal quotations omitted):

> The drafters made clear that Article 4A reflects a deliberate decision . . . to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment . . . . Prior to Article 4A's adoption, courts resolved disputes over funds transfers in part by referring to general principles of common law or equity. Article 4A rejected this piecemeal approach in favor of a more disciplined regime under which common law claims at odds with Article 4A are no longer permitted. Article 4A precludes customers from bringing common law claims inconsistent with the statute: 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.

law remedies to seek redress for an alleged harm arising from a funds transfer where Article 4A does not protect against the underlying injury or misconduct alleged"]; *Regions Bank v Provident Bank, Inc*., 345 F3d 1267, 1275 [11th Cir 2003] ["Article 4A is not the 'exclusive means by which a plaintiff can seek to redress an alleged harm arising from a funds transfer'"]; *Regions Bank v Wieder & Mastroianni, P.C*., 423 FSupp2d 265, 269 [SDNY 2006] [permitting claims for conversion and breach of fiduciary duty]; *Sheerbonnet, Ltd. v American Express Bank, Ltd*., 951 FSupp at 410, *supra* [where common law or equitable principles are not inconsistent with specific provisions of Article 4A, they are not displaced by Article 4A]; *Ma v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F3d at 89–90, *supra* [claims that "are not about the mechanics of how a funds transfer was conducted may fall outside" the Article 4-A regime]; *In re Awal Bank, BSC*, 455 BR at 92, *supra*).[34]

The Fourth Circuit's decision in *Eisenberg v Wachovia Bank, N.A*. (301 F3d 220 [4th Cir 2002]) is particularly instructive on the issue of preemption. In *Eisenberg*, the plaintiff, a victim of a fraudulent investment scheme perpetrated by Douglas Reid, commenced a negligence action against Wachovia Bank through which funds were transferred. Reid had falsely represented to plaintiff that he was a senior vice president of Bear Stearns Companies and convinced plaintiff to

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[34] "Not all common law claims are per se inconsistent with this regime". According to the Court in *Ma v Merrill Lynch, Pierce, Fenner & Smith, Inc*. (597 F3d at 89-90, *supra* [citations and internal quotations omitted] [emphasis added]):

> Article 4A controls how electronic funds transfers are conducted and specifies certain rights and duties related to the execution of such transactions. It calls for banks to adopt certain security procedures (§§ 4–A–201, 202), controls the timing for executing payments (§ 4–A–301), and assigns responsibility for reporting erroneous electronic debits (§§ 4–A–304, 505). Claims that, for example, are not about the mechanics of how a funds transfer was conducted may fall outside of this regime. *For Article 4A purposes, the critical inquiry is whether its provisions protect against the type of underlying injury or misconduct alleged in a claim.*

make an investment. At Reid's direction, plaintiff transferred $1,000,000 via electronic wire to a Wachovia branch bank in North Carolina for deposit in an account bearing the name "Douglas Walter Reid dba Bear Stearns," "For Further Credit to BEAR STEARNS." Wachovia accepted the transfer and deposited the funds to the credit of the specified account, which had been opened by and was under the control of Reid.

Importantly, the Wachovia employee who opened Reid's account did not verify that Reid was authorized to operate under the Bear Stearns name. In that regard, Reid possessed no such authority and was not in any way affiliated with Bear Stearns. After Reid withdrew almost all of plaintiff's funds and converted them to his own use, plaintiff filed a complaint against Wachovia asserting two claims of negligence. The first claim alleged that Wachovia negligently allowed Reid to establish and operate a fraudulent bank account and negligently failed to train its employees to detect fraud. The second claim alleged that Wachovia was vicariously liable for its employee's negligence in allowing Reid to open the bank account without proper verification.

Wachovia moved to dismiss the complaint, on the ground, *inter alia,* that the negligence claims were preempted by Subpart B of the Federal Reserve Board Regulation J ("Regulation J"). Subpart B of Regulation J incorporates Article 4-A of the UCC to provide rules to govern funds transfers through Fedwire. The District Court dismissed the complaint on the basis that the negligence claims were preempted. Reviewing the dismissal *de novo*, the Fourth Circuit Court of Appeals held, *inter alia*, that Regulation J did not preempt the plaintiff's negligence claims.

According to the Fourth Circuit:

> The rules adopted from Article 4A serve as the exclusive means for determining the rights, duties and liabilities of all parties involved in a Fedwire funds transfer. Affected parties include senders, intermediary banks, receiving banks and

beneficiaries. The Federal Reserve Board intended Subpart B to create a "uniform and comprehensive national regulation of Fedwire transfers."

By its own terms, Regulation J "supersedes or pre-empts inconsistent provisions of state law" . . . . Regulation J preempts any state law cause of action premised on conduct falling within the scope of Subpart B, whether the state law conflicts with or is duplicative of Subpart B. Determining if a state law claim is preempted by Regulation J turns on whether the challenged conduct in the state claim would be covered under Subpart B as well.

Plaintiff's negligence claims focus on several aspects of Wachovia's conduct in establishing Reid's account and crediting plaintiff's funds transfer to that account. One instance of alleged negligence involves Wachovia "accepting and crediting the Wire Transfer to Mr. Reid's account when the wire instructions designated 'Bear Stearns' as the intended recipient." Plaintiff addressed the Fedwire transfer to "Wachovia Bank," "Beneficiary Account 1861296138," "For Further Credit to BEAR STEARNS." Subpart B applies here. When a transfer order identifies the beneficiary by an account number, the receiving bank may rely on the account number in crediting the account even though the transfer order identifies a person different from the holder of the account. Wachovia properly processed plaintiff's funds transfer order under the standards of Subpart B.

Wachovia is not liable under Subpart B for the manner in which it received and credited plaintiff's Fedwire funds transfer. Any state law claim that is premised on this same conduct would be either duplicative of or contradictory to Regulation J and is thus preempted. Plaintiff's negligence claims are preempted insofar as they challenge Wachovia's Fedwire transfer processing.

Plaintiff contends, however, that his negligence claims primarily challenge not the wire transfer processing but rather Wachovia's conduct in allowing Reid to open and operate the bank account under the name "dba Bear Stearns." The Fedwire transfer, according to plaintiff, is only incidental to his negligence claims. Plaintiff thus urges that his negligence claims are not preempted by Regulation J. We agree.

Plaintiff's allegations of negligence are not limited to Wachovia's conduct in processing the Fedwire transfer order. Plaintiff also alleged that Wachovia is negligent by reason of allowing Reid to open the "dba Bear Stearns" bank account, failing to discover Reid's improper use of the account and failing to train its employees to recognize and prevent fraud. Subpart B has no application to Wachovia's conduct in these instances. Subpart B governs only Fedwire funds transfers, defined as "the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order." Subpart B does not address the duties, obligations and liabilities applicable

to bank functions having nothing to do with a Fedwire transfer.

> State law claims premised on conduct not covered by Subpart B cannot create a conflict with or duplicate the rules established in Subpart B. Permitting plaintiff's claims to go forward would not create an obstacle to the fulfillment of Subpart B's purpose of establishing a uniform body of federal law to govern Fedwire transfers. A finding that Wachovia is negligent in opening Reid's account would not conflict with a finding that, under Subpart B of Regulation J, Wachovia properly credited the Fedwire transfer to the account. The two findings would touch on distinct and independent conduct by Wachovia.
>
> We hold that plaintiff's negligence claims, insofar as they challenge the opening and management of Reid's account, are not preempted by Regulation J (*Eisenberg v Wachovia Bank, N.A*. (301 F3d at 222-224, *supra* [internal quotations and citation omitted]).

Similarly, in *Gilson v TD Bank, N.A.* (2011 WL 294447 [SD Fla 2011]), the District Court concluded that the plaintiffs' negligence claim was not inconsistent with, and thus not preempted by, Article 4-A, stating:

> [T]he basis for [plaintiffs'] negligence claim extends beyond TD Bank's conduct with regard to the wire transfers into and out of the accounts. Indeed, Plaintiffs' negligence claim centers on the Bank's allegedly negligent and reckless conduct with regard to opening the accounts. Plaintiffs' Second Amended Complaint alleges that TD Bank acted with gross negligence and recklessness in numerous ways during the account openings, and the record shows a genuine issue of material fact on this issue. Plaintiffs have come forward with evidence that TD Bank deviated from its standard account opening procedures by not receiving a filing receipt or partnership agreement for G & C. Moreover, Plaintiffs evidence shows that TD Bank failed to notice inconsistencies on the account opening documentation for the G & C accounts . . . Because the crux of Plaintiffs' negligence claim is TD Bank's lack of care during the account openings, not the wire transfers, the Court finds that the negligence claim does not create rights, duties and liabilities inconsistent with those stated in Article 4A, which governs only wire transfers. For the same reasons, the Court finds that Plaintiffs' negligence claim extends beyond the scope of Florida Statute § 670.204 (a portion of Article 4A), which defines liability regarding unauthorized wire transfers. Therefore, the Court holds that UCC Article 4A as adopted by Florida law does not preempt Plaintiffs' negligence claim (*Id*. at *9).

Given the above authority, the court finds that most of the allegedly negligent conduct ascribed to Signature by the Firm in the Escrow and IOLA Actions is preempted by the UCC.

To the extent that negligence claims could be asserted with respect to opening accounts (as alleged in the Escrow action) and managing accounts (as alleged in the IOLA Action), such claims are theoretically independent of, and not inconsistent with, the UCC. Under the circumstances at bar, however, the complained-of conduct does not give rise to a cause of action for negligence.

The crux of the Firm's claim of negligence in the Escrow Action (asserted by the Firm as "Escrow Agent for Stephen Baron") is predicated upon the Banks's error in permitting Anthony, a non-attorney, to be a signatory on the Baron escrow account. This claim of negligence must be dismissed, as made clear by reference to the Second Department's decision in the related Baron Action, in which it dismissed the Barons' negligence claim against Signature, which is essentially identical to the claim being asserted herein by the Firm.

In the *Baron* Action, the Second Department, reversing the order of the Supreme Court (Bucaria, J.), dated August 4, 2009, dismissed the Barons' negligence claim asserted against Signature (83 AD3d 626, 628 [2d Dept 2011]), holding as follows:

> Additionally, the Supreme Court should have granted that branch of Signature's motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against it for failure to state a cause of action.
>
> * * *
>
> In the ninth cause of action, the plaintiffs sought to recover damages from Signature for negligence. Generally, a depositary bank has no duty to monitor fiduciary accounts maintained at its branches in order to safeguard funds in those accounts from fiduciary misappropriation. Nonetheless,

> '[l]iability may be imposed if a depositary bank has actual knowledge or notice that a diversion will occur or is ongoing. Facts sufficient to cause a reasonably prudent person to suspect that trust funds are being misappropriated will trigger a duty of inquiry on the part of a depositary bank, and the bank's failure to conduct a reasonable inquiry when the obligation arises will result in the bank being charged with such knowledge as inquiry would have disclosed. Such facts include a chronic insufficiency of funds, or payment of the fiduciary's personal obligations to the depositary bank from the escrow account.'
>
> The plaintiffs did not allege that Signature had actual knowledge of the allegedly improper diversions from the escrow account, nor did they allege facts that would be sufficient to trigger a duty of inquiry on Signature's part. The plaintiffs' allegation that Signature was aware that Anthony Galasso was not an attorney and, thus, allegedly not legally authorized to be a signatory to any attorney's escrow account, was insufficient, since that fact would not "cause a reasonably prudent person to suspect that trust funds [were] being misappropriated" (id.). The only other nonconclusory allegations in the complaint on this issue were that funds were withdrawn from the escrow account by electronic transfers, and that such transfers were prohibited by the terms of the agreement establishing the escrow account. The latter fact, however, was indisputably shown through evidentiary material to be "not a fact at all". Thus, the plaintiffs failed to state a cause of action to recover damages from Signature for negligence (83 AD3d at 627-628, *supra* [internal citations omitted]).

The Firm argues that Signature's reliance on the Second Department's decision is "borderline frivolous" because: the Firm's "relationship with Signature was completely different than the Barons' relationship with Signature"; and the legal propositions at work in the related Barons' lawsuit against Signature (the Baron Action) were completely different than those at work" in the Escrow Action (Affirmation in Reply at ¶ 42 [Motion Seq. No. 21]).

Notably, the conduct alleged to comprise negligence in the Escrow Action is the same conduct alleged to comprise negligence in the Baron Action wherein the Second Department held that Signature was not negligent (*see* 83 AD3d at 628, *supra).* In this regard, Peter admits in his affidavit submitted in support of the Firm's motion in the Escrow Action that "[The Firm's] claims against Signature [in the Escrow Action] relate to the Baron Escrow Account and are

primarily based upon the fact it was not commercially reasonable for Signature to open an attorney escrow account that designated Anthony, a non-attorney, as an authorized signator, because, among other things, to do so violated Signature's written policy prohibiting the establishment of such accounts" (Affidavit in Support at ¶ 5 [Motion Seq. No. 21]). However, as held by the Second Department, the "allegation that Signature was aware that Anthony Galasso was not an attorney and, thus, allegedly not legally authorized to be a signatory to any attorney's escrow account, was insufficient, since that fact would not "cause a reasonably prudent person to suspect that trust funds [were] being misappropriated" (*see* 83 AD3d at 628, *supra*).

Moreover, with respect to Signature's liability predicated on Anthony's fraudulent internet transfers, the First Department's holding in *Home Savings of America, FSB v Amoros* (233 AD2d 35, 40 [1st Dept 1997]) is relevant:

> It is important to underscore at this juncture that *the mere transfer of trust funds between accounts at the depositary bank* and/or disbursement of funds by authorized signatories of accounts at the depositary bank, *are not, without more, sufficient grounds for bank liability*. There must in addition be some other circumstance implicating the bank as a participant in the diversion (i.e., acceptance of the funds in payment of a personal obligation as discussed supra), or indicative of the bank's neglectful countenance of an evidently intended or ongoing misappropriation ([internal citations omitted] [emphasis added]).

Similarly, with respect to the negligence allegations in the IOLA Action, Signature's alleged failure to use ordinary care in managing the Firm's banking accounts does not constitute an actionable claim for negligence. As noted, a depositary bank has no duty to monitor fiduciary accounts maintained at its branches to safeguard the funds in those accounts from fiduciary misappropriation (*Id*. at 38). Nor are there factual circumstances present at bar under which Signature should have suspected that trust funds were being misappropriated sufficient to trigger

Signature's duty of inquiry (*Id*. at 39).[35]

Accordingly, the branch of Signature's motion seeking dismissal of the fifth cause of action sounding in negligence in both the Escrow Action and the IOLA Action is granted.

Breach of Contract (Fourth Cause of Action in the Escrow and IOLA Actions)

In its fourth cause of action in the complaint in the Escrow Action (which deals with the Baron escrow account), the Firm alleges:

> Signature breached its agreement with the Firm by violating the aforesaid terms and conditions of the account application that: a) only Peter and James, partners in the Firm, were authorized signators on the escrow account; b) that no "wire activity" would be permitted on the escrow account; c) that no "internet activity" would be permitted on the escrow account; d) that no cash withdrawals would be permitted on the account; e) that the escrow account would not be "linked" to any other accounts; f) that bank statements reflecting the activity in the escrow account and items chargeable and payable to the escrow account would be mailed by Signature monthly to the Firm at its offices located at 600 Old Country Road, Suite 304, Garden City, New York and 377 Oak Street, Suite 101, Garden City, New York 11530; and g) that interest would accrue on the deposits in the escrow account at the rate of 1.25% annually.
>
> As a result of the foregoing, Signature is liable for the losses occasioned thereby from the [Baron] Escrow Account in excess of $4,400,000 plus interest (Ex. "1" at ¶¶ 54-55 [Motion Seq. No. 21]).

With respect to the breach of contract claims set forth in the IOLA Action (which deals with transfers made from the IOLA account), the Firm alleges:

> By virtue of the foregoing, Signature breached its agreement with [the Firm] by violating the aforesaid terms and conditions of the IOLA account agreement that: (I) only Peter J. Galasso and James R. Langione, partners in [the Firm] were authorized signators on the IOLA account; (ii) that no "wire activity" would be permitted on the

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[35] A bank's duty of inquiry may be triggered by a "chronic insufficiency of funds", overdrafts, and bounced checks, none of which are present in the case herein (*Lerner v Fleet Bank, N.A*., 459 F3d 273 [2d Cir 2006]).

> IOLA account; (iii) that no "internet activity" would be permitted on the IOLA account; (iv) that no cash withdrawals would be permitted on the IOLA account; (v) that the IOLA account would not be "linked" to any other accounts; and (vi) that bank statements reflecting activity in the IOLA account and items chargeable and payable to the IOLA account would be mailed by Signature monthly to [the Firm] at its offices located at 600 Old Country Road, Suite 304, Garden City, New York 11530, and then subsequently to its offices located at 377 Oak Street, Suite 101, Garden City, New York 11530.
>
> As a result thereof, Signature is liable for the losses occasioned thereby from the IOLA account with interest (Ex. "8" at ¶¶ 62-63 [Motion Seq. No. 21]).

Initially, the court notes that the breach of contract causes of action, to the extent the claims fall within the purview of the UCC, are dismissed (*see* discussion *supra*). However, to the extent that the breach of contract causes of action are not inconsistent with the provisions of the UCC and do not relate to the mechanics of how a transfer was conducted, they are not displaced.

With respect to the merits of the breach of contract claims, and as discussed earlier, while the Baron escrow application and the IOLA application were forged by Anthony,[36] Anthony nevertheless had actual and apparent authority to conduct all banking services on behalf of the Firm, including the opening of accounts, and, thus, the parties are bound by the terms set forth in both account applications (*see* discussion *supra*).[37] As such, the court notes that each of the acts alleged to constitute contract breaches were permitted by the account applications submitted to

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[36] The Firm and Signature agree that Anthony forged Peter and Langione's signatures and that Peter and Langione "never signed any of the bank documents that were submitted to Signature, including the 2002 account opening applications" (Signature's Statement of Material Facts and the Firm's Response to Signature's Statement of Material Facts at ¶¶ 41-42).

[37] As noted in the text above (*supra*), Anthony had actual authority to open some accounts at Signature on behalf of the Firm. To the extent that Anthony lacked actual authority to open certain other accounts at Signature, he had apparent authority to open those accounts.

Signature.[38]

Accordingly, the fourth causes of action asserting breach of contract in both the Escrow Action and IOLA Actions are dismissed.

The Firm's Motion for Summary Judgment
(Motion Sequence No. 21)

The Firm moves for an order: pursuant to CPLR 3212 for summary judgment on the causes of action asserted against Signature and Anthony Galasso and awarding it a money judgment in the amount of $9,594,563.26 for the losses sustained by the Barons (Escrow Action); awarding the Firm "a Money Judgment in the amount of $2,496,911.62" against Signature and Anthony Galasso for the losses sustained by it and its clients (IOLA Action); and "dismissing Signature Bank's direct and counterclaims against [the Firm]" (Loan Action).[39] The Firm also

[38] In this regard, the Baron account application submitted by Anthony listed Anthony as an authorized signatory on the Baron account; allowed "internet access to the account"; and set forth the post office box as the Firm's mailing address. While neither "wire" transfers nor cash withdrawals were permitted under the Baron account, no wire transfers or cash withdrawals occurred from the Baron account; all 90 transfers from the Baron account were via the internet, which, notably, was specifically permitted by the Baron account application. In addition, while the complaint alleges that Signature breached the Baron account application because it "linked" the Baron escrow account to other accounts, the court notes that nowhere in the Baron account application does it indicate that the Baron account would not be linked to other accounts.

The IOLA account application lists Peter and Langione as the only signatories to the IOLA account; allowed "wire activity" ranging from $100,000 to $150,000; allowed for "internet and phone access to the account"; and set forth the post office box as the mailing address. While the IOLA account application did not permit cash withdrawals, there is no evidence presented that any cash withdrawals were made from the IOLA account. In addition, the IOLA account application did not prohibit the linking of accounts, as is alleged in the IOLA amended complaint.

[39] The court has reviewed each of Signature's answers annexed to the motion papers and is unable to find any answer that contains a counterclaim asserted by Signature against the Firm.

asks for sanctions against Signature for commencing the Loan Action against it.[40]

Summary Judgment in the Escrow Action

Inasmuch as the court grants the branch of Signature's motion dismissing the complaint in the Escrow Action, the branch of the Firm's motion seeking summary judgment on the complaint in the Escrow Action is denied.[41]

Summary Judgment in the IOLA Action

Given the provisions herein granting Signature's motion dismissing the amended complaint in the IOLA Action, the branch of the Firm's motion for judgment on its causes of action therein is denied.

Summary Judgment in the Loan Action

The Firm's motion for summary judgment, which seeks dismissal of Signature's complaint in the Loan Action (asserting causes of action for breach of contract, breach of the credit account agreement, breach of security agreement, conversion, unjust enrichment, and money had and received), is denied.

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[40] According to the Firm, "[i]n view of the fact that Anthony confessed that it was he who fraudulently obtained the subject loans and credit-line funds from Signature and the fact that its claims were obviously unsustainable, Signature's commencement and prosecution of its claims against the [Firm] should be sanctioned" (Affirmation in Support at ¶ 69 [Motion Seq. No. 21]).

[41] The parties have not, in these motions, challenged the Firm's ability to maintain an action or seek relief on behalf of the Baron escrow account. As noted earlier, the court (Warshawsky, J.) previously denied a motion by the Firm for substitution in this regard on the basis, *inter alia*, that an escrow account was maintained by Galasso Langione, LLP.

These claims seek to redress losses Signature suffered after it extended loans and expanded the Firm's line of credit based upon Anthony's forged applications.[42]

Notwithstanding the fact that Anthony negotiated and forged credit-line documents that increased the Firm's credit-line from $150,000 to $650,000 (Affirmation in Support at ¶ 66 [Motion Seq. No. 21], Anthony had apparent authority to act as the "banking agent" for the Firm and, thus, the Firm is bound by the documents, albeit forged, submitted to Signature on behalf of the Firm. Accordingly, the court, denies the branch of the Firm's motion seeking dismissal of the claims for breach of contract, breach of the credit account agreement, and breach of the security agreement.

The Firm's motion is also denied to the extent it seeks dismissal of the conversion, unjust enrichment, and money had and received claims inasmuch as the Firm failed to make a *prima facie* showing entitling it to judgment as a matter of law on these claims.

Moreover, the branch of the Firm's motion seeking an award of sanctions against Signature for pursuing a "patently frivolous claim" against it is denied.[43]

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[42] According to the complaint in Signature's Loan Action, on October 22, 2003, Signature loaned the Firm, and the Firm executed a note for, $350,000 and there is approximately $148,379.54 due and owing on the note (first cause of action for breach of contract). In the second cause of action for breach of the credit account agreement, it is alleged that the Firm's line of credit in the amount of $150,000 was increased to $250,000 in February 2005 and there is approximately $256,848.098 due and owing on the line of credit (Ex. "11" to Firm Motion at ¶¶ 35-57 [Motion Seq. No. 21]).

[43] The Firm argues that Signature's refusal to discontinue the Loan Action after having learned that Anthony forged all of the loan documents and credit-line extensions is sanctionable conduct (Memorandum of Law in Support at p 24 [Motion Seq. No. 21].

The Barons' Motion for Summary Judgment
(Motion Sequence No. 5)

In the *Baron* Action, the Barons move for an order pursuant to CPLR 3212 granting them summary judgment on their claims asserted against the Firm, Peter Galasso, Anthony Galasso, and GW Lawcondo, LLC ("Lawcondo"), an LLC which held title to the condominium purchased by the Firm in 2005 and which purchase was financed with Stephen Baron's escrow money.[44]

The Barons' amended complaint contains 13 causes of action, with two causes of action having been dismissed in a prior order.[45]

In the first cause of action in the amended complaint, the Barons demand that Peter, Langione, Botter and the Firm "account" for the proceeds that constituted the Baron escrow funds. This claim is based upon: Anthony's theft of the Baron escrow funds; the wrongful transfer of Baron escrow funds into Firm bank accounts; the Barons' demands that the escrow funds be returned and that the Defendants "account for the proceeds"; "the gross negligence, lack of due care, and/or malpractice and professional misconduct on the part of the individual defendants . . . and the Law Firm", without which "this loss would not have occurred or would and could have been substantially mitigated"; and "there [being] no adequate remedy at law" (Ex

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[44] The Barons' motion does not seek an award of summary judgment against individual Defendants James Langione and Alan Botter.

[45] The ninth and eleventh causes of action in the *Baron* amended complaint sought recovery against Signature and M&T for gross negligence and aiding and abetting the Defendants' breach of fiduciary duties. The claims have been dismissed against Signature Bank and M&T Bank and, as such, Signature Bank and M&T are no longer parties to the *Baron* action (*see* 83 AD3d 626 [2d Dept 2011]; Order dated August 4, 2009 [Bucaria, J.]).

"E" at ¶¶ 48-52 [Motion Seq. No. 6]).[46]

The following elements must be shown in order to obtain an accounting: the existence of a confidential or fiduciary relationship; a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest; and no adequate remedy at law (*Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616 [2d Dept 2007]*; LoGerfo v Trustees of Columbia University in City of New York*, 35 AD3d 395, 397 [2d Dept 2006]).

The branch of the Barons' motion seeking judgment on their first cause of action for an accounting is denied. While it is true that there is a right to an accounting when there is a relation of agency or confidence (*Koppel v Wien, Lane & Malkin*, 125 AD2d 230 [1st Dept 1986]; *Rubenstein v Small*, 273 AppDiv 102, 104 [1st Dept 1947]), under the circumstances at bar, where the claims of the parties are before the court, their has been extensive discovery with respect to Baron escrow funds, the amount demanded by the Barons in the amended complaint is definite ($4,370,725.05 plus interest), and the court has granted summary judgment against the Firm, Peter and Langione (*see* discussion *infra*), for which an inquest on damages will be held, the request for an accounting should be denied (*see Dong Wook Park, PNP Group, Inc. and So Me Group, Inc. v Michael Parke Dori Group, Inc.*, 12 Misc3d 1182(A) [Sup Ct Nassau County 2006 [Austin, J.]; 1 NYJur2d Accounts and Accounting § 33).

The second cause of action asserts a claim of unjust enrichment against Peter, Langione, Botter and the Firm. The claim for unjust enrichment is based upon the Defendants' "derogation of their responsibilities as escrow agents" in that the Defendants, as "escrow agents" have not

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[46] Notwithstanding the Barons' assertion that there is "no adequate remedy at law" for the first cause of action, the wherefore clause in the *Baron* amended complaint also seeks money damages in the amount of $4,370,725.05 as well as an accounting.

only retained or disbursed the Baron escrow funds but have also "refused to pay" the Barons their escrow funds and that, in "equity and good conscience", these funds "ought not to be retained" by the Firm or any of the individual Defendants (Ex "E" at ¶¶ 54-55 [Motion Seq. No. 6]).

Unjust enrichment is an "obligation imposed by equity to prevent injustice" that "the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one [party] money . . . under such circumstances that in equity and good conscience [the party] ought not to retain it'" (*Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 117 [1st Dept 1990] quoting *Miller v Schloss*, 218 NY 400, 407 [1916]; *IDT Corp. v Morgan Stanley Dean Witter & Co*., 12 NY3d 132 [2009]). Unjust enrichment does not require the performance of any wrongful act by the one enriched and even "[i]nnocent parties may frequently be unjustly enriched" (*Simonds v Simonds*, 45 NY2d 233, 242 [1978]).

In view of the evidence submitted on the motions and as stated by the Court of Appeals in the related grievance matter, this court concludes that "the Baron funds were used for benefit of [Peter] and the [F]irm" (*Matter of Galasso*, 19 NY3d 688, 694 [2012]) and, that Peter and the Firm have been unjustly enriched with the Baron escrow funds such that it is against equity and good conscience for them to retain such funds.[47] As the Court of Appeals noted in *Matter of*

[47] The fact that Peter Galasso executed the Baron escrow agreement on his own behalf does not alter a finding that Peter has been unjustly enriched at the expense of the Barons. The court notes that where parties execute a valid and enforceable written contract "governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is *ordinarily* precluded" (*IDT Corp. v Morgan Stanley Dean Witter & Co*., 12 NY3d at 132, *supra* quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] [emphasis added]). This principle of law is nevertheless inapplicable to the particular circumstances at bar where Peter's conversion of, and benefit from, the receipt of stolen Baron escrow funds (discussed *infra*), is independent of the contract and could be found even in the absence of a breach of contract.

Galasso (*id*. at 692):

> [B]etween June 23, 2004 and January 17, 2007, Anthony Galasso transferred approximately $4,501,571 from the Baron escrow account into six other firm accounts maintained at Signature Bank through the use of roughly 90 Internet transfers. It seems that the Baron funds were used to replace money that Anthony Galasso had already removed from the firm accounts. Transferred funds from the Baron escrow account were then disbursed to respondent, firm employees and other entities in the course of business, all without the knowledge of the firm's principals or the consent of the Barons. In particular, approximately $360,000 in funds transferred from the Baron escrow account were used to finance the purchase of the firm's office condominium.

Also relevant to this discussion are sections 41 and 58 of the Restatement (Third) of Restitution and Unjust Enrichment (emphasis added):

> (41) A person who obtains a benefit by misappropriating financial assets, *or in consequence of their misappropriation by another*, is liable in restitution to the victim of the wrong.[48]
>
> * * *
>
> *Comment b*
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> * * *
>
> [T]he enrichment of innocent recipients of misappropriated financial assets—a class essentially limited to third-party donees from the wrongdoer—will normally be measured by the amount received, including interest and proceeds, but without liability for consequential gains.

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[48] *Cf.* Restatement (Third) of Restitution and Unjust Enrichment § 67:

> (1) A payee without notice takes payment free of a restitution claim to which it would otherwise be subject, but only to the extent that
> (a) the payee accepts the funds in satisfaction or reduction of the payee's valid claim as creditor of the payor or of another person;
> (b) the payee's receipt of the funds reduces the amount of the payee's claim pursuant to an obligation or instrument that the payee has previously acquired for value and without notice of any infirmity; or
> (c) the payee's receipt of the funds reduces the amount of the payee's inchoate claim in restitution against the payor or another person.

* * *

> 58 (1) A claimant entitled to restitution from property may obtain restitution from any traceable product of that property, without regard to subsequent changes of form.

It is evident from their submissions that the Firm Defendants fail to apprehend the outrageous nature of the argument they are making in connection with the claims for unjust enrichment, and, as will be discussed, with the claims for conversion and a constructive trust (concerning the Firm's condominium, which was purchased, in large part, with the Barons' stolen money). In this regard, they assert *that they should be permitted to retain benefits from the theft of their client's and fiduciary's funds*. To countenance this outrageous argument, however, would require the court, in essence, to hold that the Barons' stolen money was successfully laundered–and by the Firm's own employee and banking agent.[49]

Also rejected is any attempt by Peter to avail himself of the protection of the exculpatory provision in paragraph 7 of the Baron escrow agreement with respect to the unjust enrichment claim. Paragraph 7 reads: "The Escrow Agent [Peter] shall not be liable for any mistake of fact or error of Judgment by him or for any acts or omissions by him of any kind, unless caused by his

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[49] To illustrate, the court notes the following examples, which assume that C and D are without knowledge of A's wrongdoing:

1. A steals money from B and gives it to C. B can recover the money from C.
2. A steals money from B and gives it to C. C buys a car from D. B cannot recover the money from D. However, B can recover the car from C.
3. A steals money from B and gives it to C. C spends some of the money on riotous living and saves the rest. B can recover the unspent money from C, recover the traceable product of that property from C and obtain a judgment against C for the balance. (*see generally* Restatement (Third) of Restitution and Unjust Enrichment § 40, Illustration 20 [stolen cattle]).

To accept the Firm's arguments would mean that in none of these cases could B recover from C, the so-called innocent transferee. That restitution of a specific fund may not be available –because it was spent by C, does not mean that C is free from liability to B. Yet that is precisely what the Firm Defendants are arguing here.

willful misconduct or gross negligence". Assuming the validity and enforcement of that provision,[50] it has no application to Peter's unjust enrichment from stolen client funds.

Accordingly, summary judgment on the second cause of action is granted insofar as asserted against Peter and the Firm. Inasmuch as the Barons did not move for summary judgment against individual Defendants Langione and Botter, the court searches the record and grants judgment on the second cause of action insofar as asserted against Langione (CPLR 3212[b]). In this regard, the court notes that from the Baron escrow funds, $1,475,000 was transferred into Langione's operating account (Ex "16(D)" [Motion Seq. No. 21]).[51]

The third cause of action asserts a conspiracy by and between Peter, Langione, Botter, Anthony and the Firm. According to the amended complaint, the Defendants "conspired together and maliciously and by acts of omission or commission willfully entered into and/or enabled a plan and scheme to occur under which the Proceeds could be and were embezzled and the [Barons] by reason of the fraud of the defendants were deprived of their money and property" (Ex "E" at ¶ 57 [Motion Seq. No. 6]).

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[50] The validity and enforcement of the exculpatory and indemnification provisions of the Baron escrow agreement have not been raised by the parties. Nevertheless, the court notes that these provisions are highly disfavored, "generally frowned upon and are strictly construed" (Peter V. Coffey, Attorney Escrow Accounts 4th ed [2015], *Handling of Escrow Funds* § 2.38 at 89). This is especially true where, as here, the drafter of the agreement is an attorney seeking to limit his liability to a client.

[51] The court declines to search the record and find Alan Botter liable given the absence of any direct allegations that Botter: engaged in any misconduct; received any funds; or was unjustly enriched. In this regard, the court notes that Botter had a separate operating account and IOLA account for his law practice (*see* discussion *supra*). While it is arguable that Botter may have indirectly benefitted from the fraudulent transfers of Baron escrow funds into the Firm's operating accounts, thus rendering Botter liable for unjust enrichment and for conversion (based on his failure to return funds on demand), it is impossible to make a determination as a matter of law as to Botter's receipt, if any, of Baron escrow funds.

The Barons have failed to show *prima facie* entitlement to summary judgment on their conspiracy claim and, therefore, the branch of the Barons' motion seeking judgment on their third cause of action is denied.

The fourth cause of action, based upon conversion, asserts that Anthony, Peter, Langione, Botter and the Firm "converted to their own use all or part of the specific sum of $4,370,725.05 to which the [Barons] had a superior right, title and interest, which the said defendants failed, refused and neglected to return to the [Barons] when return was duly demanded" (Ex. "B" at ¶ 62 [Motion Seq. No. 6]).

To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights (*Scott v Fields*, 85 AD3d 756, 757 [2d Dept 2011]). A conversion takes place when someone, "intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]). "Money, if specifically identifiable, may be the subject of a conversion action" (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 884 [1st Dept 1982]; *Batsidis v Batsidis*, 9 AD3d 342 [2d Dept 2004]).

The Barons have set forth a *prima facie* showing on their claim for conversion inasmuch as the Barons had ownership and a superior right of possession to their escrow funds and the Firm and individual Defendants Peter, Langione, and Anthony have interfered with the Barons' right to possession of their funds.

In their effort to avoid liability, the Firm Defendants maintain that they were unaware of Anthony's fraudulent activities and did not intentionally exercise control over the Baron escrow funds.

While intent is an element of a conversion claim, "a converter need not intend to act wrongfully to be liable in conversion. The converter has sufficient intent if he or she intends to deal with the property at issue in a manner that is inconsistent with the rights of another" (NY Practice - Torts § 2:12; Prosser and Keeton on Torts § 15 at 92 [5th ed. 1984] [defendant need not knowingly or intentionally act wrongfully for a conversion to occur]; Mark S. Ochs, Esq., Handling of Escrow Funds by Attorneys § 1.35 ["The absence of venal intent is not a defense to a charge of conversion"]).[52]

Relevant on the requisite intent to sustain a claim for conversion is *Passaic Falls Throwing Co. v Villeneuve-Pohl Corporation* (169 AD 727 [1st Dept 1915] [emphasis added]), wherein the First Department held:

> 'The law on this subject is well settled. '*The proof,' . . . 'need not show a tortious taking, or that the defendants acted in bad faith*. If it should appear that they obtained the goods fairly from a person whom they had reason to think was the true owner, or if they acted under a mistake as to the plaintiffs' title, or under an honest, but mistaken, belief that the property was their own, they would still be liable to plaintiffs, if their acts in regard to it amount to a conversion. If they have taken it into their own hands, or disposed of it to others, or exercised any dominion over it whatever, they are guilty of a conversion, and their liability to plaintiffs is established.' This exposition of the law is fully sustained by the authorities [citing cases]. *A wrongful intent is not an essential element of the conversion*. It is enough in this action that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it.'

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[52] "Venal intent" is defined as a "culpable state of mind" (*Peters v Committee of Grievances for the US Dist Ct for the S. Dist. of NY*, 748 F3d 456 [2d Cir 2014]).

Morever, assuming *arguendo* that the Firm's original possession of the Baron escrow funds, subsequent transfer into Firm accounts and use by Firm Defendants, did not constitute a conversion (which the court does not conclude), a conversion nevertheless took place **after** the rightful owner, the Barons, demanded the funds and the Defendants refused to return them (*Simpson & Simpson, PLLC v Lippes Mathias Wexler Friedman LLP* (130 AD3d 1543 [4th Dept 2015]; *DiLorenzo v General Motors Acceptance Corp*., 29 AD3d 853 [2d Dept 2006]).

The court rejects the Firm Defendants' erroneous argument regarding intent as well as their attempt to avoid liability for using stolen client and fiduciary funds.

Accordingly, the Barons are entitled to judgment as a matter of law on their fourth cause of action for conversion, insofar as asserted against the Firm, Peter, and Anthony, it being undisputed that the Barons had ownership and a superior right of possession to the escrow funds placed in the Baron escrow account and the funds from the Baron escrow account were used by the Firm Defendants, purportedly under the mistaken belief that they were using theirs and the Firm's own money (*see id*.). In any event, a conversion occurred when the Firm Defendants refused to return the funds to the Barons upon demand. And, as a matter of law, the Firm Defendants are not "holders in due course".[53]

In addition, the court searches the record and awards the Barons judgment on their conversion claim to the extent it is asserted against individual Defendant James Langione (CPLR

[53] For reasons cited above in connection with the unjust enrichment claim asserted against Peter, the exculpatory provision set forth in the Escrow agreement is also inapplicable to the conversion claim asserted against him.

3212[b]). [54]

The fifth cause of action, which is specifically asserted against Peter, alleges that "by virtue of the escrow agreement, Peter Galasso was entrusted with the [Baron] Proceeds which were lost through [Peter's] gross negligence and inferred malfeasance in hiring and retaining Anthony Galasso as his agent and employee and clothing Anthony with authority to exercise control over and administer" the Baron escrow funds as well as other Firm accounts "without adequate supervision or control" (Ex "E" at ¶ 65 [Motion Seq. No. 6]).

"To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others" (*Ryan v IM Kapco, Inc*., 88 AD3d 682 [2d Dept 2011]; *Kleartone Transparent Prods. Co. v Dun & Bradstreet*, 88 AD2d 353 [2d Dept 1982] [gross negligence "has been defined as a reckless disregard of the consequences, with an indifference to the rights of others"]). However, the question of whether a party acted with gross negligence is generally a question of fact (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901 [2d Dept 2014]; *Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117 [1st Dept 1999]), and thus, the branch of the Barons' motion seeking summary judgment on the fifth cause of action is denied.

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[54] It is noted that the circumstances herein warrant a finding of liability on claims for unjust enrichment **and** conversion (*e.g*., *Hamlet at Willow Creek Development Co., LLC v Northeast Land Development Corporation*, 64 AD3d 85 [2d Dept 2009] [plaintiff awarded summary judgment against defendant with respect to liability on causes of action for both unjust enrichment and conversion]; *Simpson & Simpson, PLLC v Lippes Mathias Wexler Friedman LLP,* 130 AD3d at 1546, *supra* [internal citations omitted] [causes of action for unjust enrichment and conversion, which had been dismissed by trial court upon defendant's motion for summary judgment, were reinstated. "Although the equitable cause of action for unjust enrichment is closely related to the cause of action for conversion based on wrongful detention of property after demand for its return by the rightful owner, it is nevertheless a separate cause of action from the cause of action for conversion"]; *Eighteen Holding Corp. v Drizin*, 268 AD2d 371 [1st Dept 2000] [First Department affirmed judgment which granted plaintiff's motion for summary judgment on causes of action for money had and received, unjust enrichment and conversion]).

The sixth cause of action is Stephen Baron's legal malpractice claim against the Firm, Peter, Langione, and Botter. In order to prove legal malpractice, a plaintiff must establish that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages (*Portilla v Law Offices of Arcia & Flanagan*, 125 AD3d 956 [2d Dept 2015]).

The Barons have failed to establish that the Firm's alleged breach of duty was the proximate cause of the loss of Barons' escrow funds, and, thus, the court denies the branch of the Barons' motion seeking summary judgment on their claim for legal malpractice.

With respect to the eighth cause of action for a constructive trust, the Barons assert that: "as a result of the attorney client relationship between Stephen Baron and Peter, James, Alan, and the Law Firm, and as a further result of the escrow agency relationship between both Plaintiffs and the same defendants, a confidential and/or fiduciary relationship relating to the escrow Agreement existed between the Plaintiffs and said defendants"; "in reliance upon this fiduciary relationship, the Plaintiffs transferred or consented to the delivery of the Proceeds to said defendants, a portion of which, Plaintiffs believe, has been retained, used, and/or invested by the defendants for their personal use or to acquire assets . . ."; "at the time the Proceeds were delivered to said defendants, the defendants expressly or impliedly promised and agreed to keep the Proceeds safe and insured and to return the Proceeds to the Plaintiffs in the future, a promise and representation which was broken"; the "defendants were able to and did retain, divert and/or reinvest the Proceeds or a portion thereof, for their own benefit, and in particular, to purchase, through their wholly owned and controlled entity, GC Lawcondo LLC"; and, thus, given these

acts, a "constructive trust should be imposed over the Proceeds and any properties, assets and monies representing any portion thereof which have been retained, diverted or reinvested by the defendants, including a constructive trust on the office condominium" (Ex "E" at ¶¶ 80-84 [Motion Seq. No. 6]).[55]

A constructive trust is an equitable remedy, the purpose of which is to prevent unjust enrichment. In general, to impose a constructive trust, four factors must be established: 1) a confidential or fiduciary relationship between the parties, 2) a promise, 3) a transfer in reliance thereon, and 4) unjust enrichment flowing from a breach of that promise. However, as these elements serve only as a guideline, a constructive trust may still be imposed even if all of the elements are not established (*Mei Yun Chen v Mei Wan Kao*, 97 AD3d 730 [2d Dept 2012]; *Marini v Lombardo*, 79 AD3d 932 [2d Dept 2010]). The purpose of the constructive trust is prevention of unjust enrichment (*Simonds v Simonds*, 45 NY2d 233 [1978]).

Here, the Barons have demonstrated their entitlement to a constructive trust against Defendant Lawcondo by showing that the condominium was purchased with funds from the Baron escrow account and that those funds were improperly removed from the Baron escrow account (*see Ed Hardy Pty Ltd v Berman*, 2014 WL 654616 [Sup Ct New York County 2014]). In this regard, Peter acknowledges that some of the funds used to purchase the office condominium were the Barons' escrow funds taken by Anthony and transferred into Peter's account. Specifically, Peter made the following statements in his affidavit:

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[55] Although the Barons advance an argument for summary judgment on a claim for money had and received in their motion papers, a cause of action for money had and received is not asserted in the complaint.

> What I did not know until well after Anthony's arrest is that when I decided to purchase our office condominium . . . , Anthony had to replenish savings previously stolen from me with funds Anthony stole from the Baron escrow account. . . .
>
> All in all, Anthony replenished approximately $350,000 of the appropriate $450,000 of savings he had previously stolen from me and which I unwittingly utilized to purchase my office condominium in September, 2005. . . .
>
> To avoid detection, Anthony simply dipped into the Baron Escrow Account to replenish the savings he stole from me so that the purchase of our office condominium would close without incident (Peter Affidavit in Support at ¶¶ 45, 46, 47 [Motion Seq. No. 6]).

The facts set forth in illustration 5 from the Restatement (Third) of Restitution and Unjust Enrichment § 41 are particularly instructive here:

> *Cashier embezzles $250,000 from Bank and uses the money to purchase a house, taking title jointly with Wife. Wife is unaware of the source of the funds, but Wife is not protected as a bona fide purchaser because she gives no value for her interest. Bank may obtain restitution by asserting rights in the house, claiming either* ownership (via constructive trust) or an equitable lien, with an unsecured claim against Cashier for any deficiency.
>
> Accordingly, a constructive trust will be imposed.

The Barons allege in the tenth cause of action that Peter, Langione, Botter, and the Firm failed to comply with the disciplinary rules governing attorneys and breached their fiduciary duties pursuant to former rules NYCRR section 1200.(5) and DR 9-102 by failing to supervise the Firm's escrow accounts in which funds it held for the benefit of others and failing to adequately supervise, oversee, inspect and monitor the work and activities of Anthony Galasso (Ex "E" at ¶¶ 99-100 [Motion Seq. No. 6]).[56]

[56] DR 9-102(a) provided that a "lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own." DR 9-102 has been replaced with Rule 1.15(a) of the Rules of Professional Conduct (22 NYCRR

The disciplinary proceedings referred to in the amended complaint resulted in decisions by the Second Department and the Court of Appeals wherein Peter Galasso was found, *inter alia*, to have: "breached his fiduciary duty by failing to safeguard the Baron funds" in violation of section DR 9-102(a) and has been "unjustly enriched by the use of misappropriated Baron funds for his personal benefit".[57] The Second Department also found that Peter "failed to maintain appropriate vigilance over his firm's bank accounts, resulting in actual and substantial harm to clients" (*Matter of Galasso*, 94 AD3d at 37, *supra*).

With respect to the proceedings against James Langione, the Second Department confirmed, *inter alia*, the Special Referee's Report finding that Langione "failed to take reasonable steps to ensure that the funds maintained in the Baron Escrow Account were safeguarded", in violation of former Code of Professional Responsibility DR 9-102(a) and/or DR 1-102(a)(7) (*Matter of Langione*, 131 AD3d 199 [2d Dept 2015]).[58] Citing to the Court of

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1200.12). Notwithstanding the fact that the tenth cause of action is asserted against Peter, James, Alan and the Firm, the court is unaware of any disciplinary proceedings having been instituted against Alan Botter.

[57] The Special Referee also found that Peter "knew or should have known that Baron funds transferred from the Baron escrow account into" another of the Firm's accounts at Signature in September 2004 were subsequently used to finance the down payment in connection with the Firm's purchase of its office condominium in Garden City. Moreover, the Firm "knew or should have known that Baron funds transferred from the Baron escrow account into" yet another of the Firm's accounts at Signature in September 2005, were subsequently used by the Firm to pay the $241,438.77 balance due the seller in connection with the purchase of the office condominium unit (including the payment of $22,622.60 in related closing costs) (*Matter of Galasso*, 94 AD3d 30, 33 [2d Dept 2012]).

[58] With respect to this charge, Langione argued that his only involvement in the Baron matter was limited to his being a signatory on the escrow account and that he was not a signatory to the Baron escrow agreement. In sustaining the charge, the Second Department noted that an attorney's obligation to safeguard funds is not controlled "solely by the contractual language of the escrow agreement, but also by a fiduciary relationship" and that the "implementation of any of the basic measures" that were subsequently adopted by the Firm would have likely mitigated, if not avoided, the losses sustained.

Appeals in *Matter of Galasso* (19 NY3d 688, 694 [2012]), the Second Department also stated that the "'implementation of any of the basic measures' that were subsequently adopted by the firm - 'personal review of the bank statements, personal contact with the bank and improved oversight of the Firm's books and records' - likely would have mitigated, if not avoided, the losses" (*Matter of Langione*, 131 AD3d at 208, *supra*).

In their motion, the Barons argue that the Defendants had "a full opportunity to litigate the issue at hand in the disciplinary proceedings and the outcome of those proceedings should control" and, thus, pursuant to the doctrine of collateral estoppel, the prior disciplinary findings that Peter and Langione breached their fiduciary duty is determinative as to the claim at bar that they breached their fiduciary duty, as asserted in the Baron amended complaint.

Collateral estoppel bars parties to a litigation from "re-litigating issues necessarily decided in a prior litigation" (*Stumpf AG v Dynegy Inc.*, 32 AD3d 232, 233 [2d Dept 2006]) and is "intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it" (*Kaufman v Eli Lilly & Co*., 65 NY2d 449, 456 [1985]).

The doctrine of collateral estoppel is "applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies, when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law" and "such determinations, when final, become conclusive and binding on the courts" (*Ryan v New York Tel. Co*., 62 NY2d 494, 499 [1984]). According to the Court of Appeals in *Jeffreys v Griffin* (1 NY3d 344 [2003] [internal citations omitted]:

> Collateral estoppel, or issue preclusion, gives conclusive effect to an administrative agency's quasi-judicial determination when two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in the administrative tribunal. The proponent of collateral estoppel must show identity of the issue, while the opponent must demonstrate the absence of a full and fair opportunity to litigate.

"What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding" (*Ryan v New York Tel. Co*., 62 NY2d at 499, *supra*).

While the court is cognizant of the principle that "violation of a disciplinary rule does not, without more, generate a cause of action" (*Schwarts v Olshan Grundman Frome & Rosenzweig,* 302 AD2d 193 [1st Dept 2003]; *Sharbar v Law Offices of Michael B. Wolk, P.C.*, 2011 WL 197825 [Sup Ct, New York County 2011]), in cases, such as the instant one, conduct constituting a violation of a disciplinary rule may constitute evidence of a breach of fiduciary duty (*see Schwarts v Olshan Grundman Frome & Rosenzweig,* 302 AD2d at 199, *supra*; *William Kaufman Organization, Ltd. v Graham & James LLP*, 269 AD2d 171 [1st Dept 2000]; *Swift v Ki Young Choe*, 242 AD2d 188, 194 [1998] ["it is not an alleged violation of the disciplinary rules that forms the basis of the malpractice claim, although some of the conduct constituting a violation of a disciplinary rule may also constitute evidence of malpractice"]; *Steinowitz v Gambescia*, 24 Misc3d 123(A) [Sup Ct App Term 2009]).

Here, the Barons have demonstrated that an identical issue was decided in the prior disciplinary proceeding and is decisive in the present action (*Juan C. v Cortines*, 89 NY2d 659, 667 [1997] [party seeking the benefit of collateral estoppel bears burden of demonstrating identity of issues]; *Ryan v New York Tel. Co*., 62 NY2d at 500, *supra*)**.**[59] Thus, as a matter of

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[59] The issues in the instant matter are identical to those raised in the disciplinary proceeding instituted by the Grievance Committee against Peter, to wit:

law, both Peter and Langione breached their fiduciary duty owing to the Barons.

Notwithstanding this finding, the court nevertheless denies the branch of the Barons' motion seeking judgment against Peter on the breach of fiduciary duty claim. In this regard, the possible applicability of the exculpatory provision in paragraph 7 of the Baron escrow agreement (*see* discussion *supra*) presents questions of fact as to whether Peter's breach of fiduciary duty in regard to supervision of the accounts rises to the level of gross negligence.[60] The same protection would not apply to Langione, however, who did not sign the escrow agreement but nevertheless

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> Charge two alleges that the respondent breached his fiduciary duty by failing to safeguard the Baron funds in violation of Code of Professional Responsibility DR9-102(a) and DR1-102(a)(7) (22NYCRR 1200.46[a], 1200.3[a][7]).
>
> Between June 11, 2004, and mid-January 2007, there were a series of internet transfers of Baron funds, totaling more than $4.3 million, from the Baron escrow account into various accounts maintained by the respondent and the Galasso Langione firm at Signature Bank incident to the respondent's practice of law and/or the Galasso Langione firm's practice of law.
>
> Following the aforementioned transfers, the Baron funds were disbursed to the respondent, other members and employees of the Galasso Langione firm, various third parties, and various business entities. Stephen and Wendy Baron, the parties ultimately entitled to receive the Baron funds, did not consent to, or benefit from, these disbursements of their funds (*Matter of Galasso*, 94 AD3d at 37, *supra*).

[60] Arguably, Peter Galasso, who executed the escrow agreement individually, cannot seek protection against his client under the exculpatory or indemnification provisions thereof considering his breach of the agreement. Significantly, Peter did not "receive the net proceeds of sale at the closing" and "deposit same in an interest bearing account". It is undisputed that Jeffrey Catterson attended the closing on behalf of Stephen Baron and, further, that the Baron escrow account at Signature was opened by Anthony, not Peter, as contemplated by the escrow agreement (see *Grace v Nappa*, 46 NY2d 560 [1979]; *Unloading Corp. v State of NY*, 132 AD2d 543 [2d Dept 1987] [when one party commits a material breach of a contract, the other party to the contract is relieved, or excused, from further performance under the contract]; *Awards.com v Kinko's, Inc.*, 42 AD3d 178 [1st Dept 2007] [non-breaching party is discharged from performing any further obligations under the contract and may elect to terminate the contract and sue for damages or continue the contract]). Assuming that Peter could delegate his responsibilities under the agreement to his brother, the account opened by Anthony was **not** the escrow account that was contemplated by the parties in the escrow agreement nor ordered by Justice Ross in the so-ordered stipulation dated June 9, 2004. No challenge to the enforceability of the provisions has been raised by the Barons, however.

had responsibility for the Baron funds. Accordingly, the court searches the record and grants judgment in favor of the Barons on the tenth cause of action insofar as asserted against Langione (CPLR 3212[b]).

The twelfth cause of action in the Baron amended complaint, based upon the doctrine of *respondeat superior*, alleges the following: Anthony's theft of the Baron proceeds "was a direct result of entrusting Anthony with total responsibility for banking matters, and by clothing him with the authority to act on their behalf"; "since Anthony was employed and authorized" to accept the Baron escrow money and deliver the escrow application to open the escrow account at Signature, the Firm Defendants are "liable, since they selected a dishonest person to represent them, who acted within the scope of his apparent authority on behalf of the defendants"; and, the Firm Defendants "should bear the risk of any unauthorized acts by Anthony that resulted in a loss to [the Barons]" since they "placed Anthony in a position to perpetrate the theft and are responsible for the acts of their employee and the damages flowing from his misconduct" (Ex "E" at ¶¶ 116-118 [Motion Seq. No. 6]).

Initially, the "Firm concedes that Anthony had the apparent authority to deliver the Baron Escrow Account application to Signature" (Firm Affirmation in Opposition at ¶ 44 [Motion Seq. No. 20]). Given Anthony's apparent authority as banking agent for the Firm, the law is well settled that a principal who puts an agent in a "position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud" (*Hatton v Quad Realty Corp.*, 100 AD2d 609 [2d Dept 1984]; *Fils-Aime v Ryder TRS, Inc.*, 40 AD3d 917 [2d Dept 2007] [under the doctrine of respondeat superior, a principal is liable for the negligent acts committed by its agent within the scope of the agency];

News American Marketing, Inc. v Lepage Bakeries, Inc., 16 AD3d 146 quoting *American Socy. of Mech. Engrs., Inc. v Hydrolevel Corp.*, 456 US 556, 566 [1982] [a "principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority"]; *Parlato v Equitable Life Assur. Society of US*, 299 AD2d 108 [1st Dept 2002]; *Standard Funding Corp. v Lewitt*, 225 AD2d 608 [2d Dept 1996], *rev'd on other grounds* 89 NY2d 546 [1997] [principal must answer to an innocent party for the misconduct of its agent acting within the scope of its actual or apparent authority]; *Hatton v Quad Realty Corp.*, 100 AD2d 609 [2d Dept 1984]; *Adler v Helman*, 169 AD2d 925 [3d Dept 1991] [a principal is liable for the fraudulent acts of his agent committed within the scope of his authority]; *Dembitzer v Gilliam*, 44 Misc2d 487 [Sup Ct Kings County 1964]; 2A NYJur2d Agency §§ 288, 298, 301).[61] The reasoning behind holding the principal liable in these circumstances (that as between two innocent parties the one who has allowed the fraud to be perpetrated should bear the loss) is equitable, based essentially on a theory of estoppel, and has been accepted by New York courts on several occasions (*see Walsh v Hartford Fire Ins. Co.*, 73 NY 5 [1878]; *Antar v Trans World Airlines*, 66 Misc 2d 93 [Sup Ct, Appellate Term 1970], *aff'd* 37 AD2d 921 [2d Dept 1971]; *Clarke v Montgo Realty Inc.*, 2 Misc3d 135(A) [Sup Ct App Term 2004]; 2A NYJur2d Agency § 106 ["when one of two innocent persons must suffer for the act of a third person, the person who has enabled the third person to do the injury must sustain the loss"]). In this regard, the court notes that an agent does not cease to act within the scope of his authority merely because the agent is engaged in a fraud upon the principal or a third person (2A NYJur2d Agency §§ 286,

[61] The fact that Anthony submitted a forged application in the name of "Galasso Langione LLP, as Escrow Agent for Stephen Baron" does not alter this finding that the Firm is liable for Anthony's actions (2A NYJur2d Agency § 270 [1998 ed.]).

288; *see also Kirschner v KPMG LLP*, 15 NY3d 446 [2010]). As such, the Firm, having held Anthony out as the banking agent for the Firm, is liable under a theory of *respondeat superior* for Anthony's fraudulent conduct.

Moreover, by virtue of the Baron escrow agreement, Peter Galasso, Esq. was appointed escrow agent for the Baron funds. Notwithstanding Peter's fiduciary duty "to receive the net proceeds of sale at the closing" and agreement to "deposit same in an interest bearing account", Peter nevertheless gave an account application to Anthony with the intended purpose that Anthony open the Baron escrow account at Signature. As such, Peter, as escrow agent for the Barons, delegated to Anthony, as subagent, the task of opening the Baron escrow account. It matters not that Anthony's submission of the forged application was contrary to Peter's instructions; Peter is nevertheless liable (*Riviellov Waldron*, 47 NY2d at 302, *supra* ["doctrine of *respondeat superior* renders a master vicariously liable for a tort committed by his servant while acting within the scope of his employment"]; 2A NYJur2d Agency § 270 [1998 ed.]).

Given the above well-settled principles, the Barons have demonstrated their *prima facie* entitlement to summary judgment on the twelfth cause of action insofar asserted against Peter and the Firm. Inasmuch as Peter's liability under a theory of *respondeat superior* is based on *Anthony's* conversion and fraudulent transfers, Peter cannot avail himself of the protection afforded him by the exculpatory provision relieving him of liability for *his own* negligent conduct (or conduct other than "gross negligence" or "willful misconduct"). Simply put, Peter is vicariously liable for Anthony's misconduct. The exculpatory provision in the Baron escrow agreement is, therefore, ineffective so as to limit Peter's liability under the doctrine of *respondeat superior.*

The courts grants judgment on the Barons' twelfth cause of action in the amended complaint, insofar as asserted against Peter and the Firm, given the Defendants' failure to rebut the Barons' *prima facie* showing.

According to the thirteenth cause of action, a claim based upon Judiciary Law § 487, the Firm engaged in a course of conduct to deceive and defraud the Barons of their monies inasmuch as it retained the Baron escrow funds and misappropriated the funds for its own benefits and hid the true facts regarding the misappropriation over a period of years (Ex "F" to Motion Seq. No. 5 at ¶¶ 122-124).

Pursuant to Judiciary Law § 487, an attorney who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, . . . wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for", is guilty of a misdemeanor.

A violation of Judiciary Law § 487 requires, among other things, an act of deceit by an attorney, with the *intent* to deceive the court or any party (*Curry v Dollard*, 52 AD3d 642, 644 [2d Dept 2008]). The Barons' allegations regarding an act of deceit or intent to deceive are conclusory and factually insufficient and, therefore, the branch of their motion seeking judgment on their thirteenth cause of action is denied.

Barons' Claims against Anthony Galasso

The Barons also seek summary judgment on the causes of action asserted against Anthony in the *Baron* amended complaint (conversion, conspiracy and theft). The court grants the Barons summary judgment on their fourth cause of action, a claim of conversion. However,

the branch of the Barons' motion for judgment on the claims for conspiracy and theft asserted in the third and seventh causes of action, respectively, are denied inasmuch as the Barons have failed to set forth their *prima facie* entitlement to such relief on these claims.

Firm Defendants' Motion for Summary Judgment
(Motion Sequence Number 6)

The Firm, Lawcondo, and individual Defendants Peter Galasso, James Langione, and Alan Botter (collectively the "Firm Defendants") move for an order: pursuant to CPLR 3212, awarding them summary judgment dismissing the Barons' complaint in the Baron Action; canceling the lis pendens filed by the Barons against the Lawcondo; and alternatively, if the movants are not granted summary judgment, directing that Stephen Baron indemnify Peter Galasso for any losses suffered thereby.

The Firm Defendants seek dismissal of the Barons' first cause of action for an accounting. According to the amended complaint, "but for the gross negligence, lack of due care, and/or malpractice and professional misconduct on the part of the individual defendants . . . and the Law Firm . . . , this loss would not have occurred or would and could have been substantially mitigated" (Ex "E" at ¶ 50 [Motion Seq. No. 6]).

The first cause of action in the *Baron* amended complaint for an accounting is dismissed (*see* discussion *supra*; *Dong Wook Park, PNP Group, Inc. and So Me Group, Inc. v Michael Parke Dori Group, Inc.*, 12 Misc3d 1182(A) [Sup Ct Nassau County 2006 [Austin, J.]; 1 NYJur2d Accounts and Accounting § 33).

The second cause of action asserts a claim of unjust enrichment against the Firm and individual Defendants Peter, Langione and Botter. The claim for unjust enrichment is predicated upon alleged misuse of the Baron escrow funds which the "escrow agents have either retained or disbursed" and "which said defendants refuse to pay to Plaintiffs, and which in equity and good conscience ought not to be retained" by the Firm (*see* discussion *supra*).

The branch of the motion seeking dismissal of the unjust enrichment claim, insofar as asserted against Peter, Langione, and the Firm, is denied given this court's order granting judgment on the Barons' unjust enrichment claim insofar as asserted against them (*see* discussion *supra*). The motion is also denied with respect to Botter inasmuch as the submissions of the Firm Defendants failed to *prima facie* establish that Botter did not receive, or benefit from, directly or indirectly, any funds stolen from the Baron escrow account.

The Firm seeks dismissal of the third cause of action (conspiracy) on the ground that the Barons cannot establish the elements of the underlying fraud claim. Peter Galasso's affidavit submitted in support of the motion for summary judgment sets forth with specific detail the manner in which Anthony perpetrated the fraud as well as the fact that Peter, Langione and Botter were unaware of what was transpiring. Given the Firm Defendants' unopposed assertions that they did not have knowledge of the fraud, and there being no evidence to the contrary, the conspiracy to commit fraud claim must be dismissed (*see Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067 [2d Dept 2012]).

The branch of the Firm Defendants' motion seeking dismissal of the fourth cause of action - the Barons' claim for conversion, is denied with respect to the Firm, Peter, Langione and Anthony inasmuch as the court has granted judgment in favor of the Barons on their conversion

claim against these Defendants (*see* discussion *supra*). It is also denied insofar as asserted against Botter inasmuch as the Firm Defendants' submissions failed to *prima facie* establish that Botter did not receive and refuse to return upon demand any of the fraudulently transferred Baron escrow funds.

The branch of the Firm Defendants' motion seeking summary judgment dismissing the fifth cause of action, predicated upon Peter's gross negligence and malfeasance in hiring and retaining Anthony and clothing him with authority to exercise control over the Baron escrow funds, "without adequate supervision or control", is denied (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901[2d Dept 2014]; *Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117 [1st Dept 1999]) (Ex "E" at ¶ 65 [Motion Seq. No. 6]).

Regarding the sixth cause of action sounding in legal malpractice, for a defendant to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements (*Verdi v Jacoby & Meyers, LLP*, 92 AD3d 771, 772 [2d Dept 2012]). Here, the Firm's submissions fail to make such a showing and, thus, the Firm's motion with regard to the sixth cause of action is denied.

The branch of the Firm Defendants' motion seeking dismissal of the eighth cause of action asserted in the Barons' amended complaint, namely, that a constructive trust should be imposed, *inter alia*, on the office condominium held in the name of the Defendant Lawcondo LLC is denied inasmuch as the court has granted summary judgment on that claim in favor of the Barons (*see* discussion *supra*). Further, given the court's imposition of a constructive trust, the branch of the Firm's motion seeking an order of the court cancelling the *lis pendens* filed by the

Barons against Lawcondo is denied (*see Keen v Keen*, 140 AD2d 311 [2d Dept 1988] ["complaint, which seeks to impose a constructive trust on real property allegedly purchased with funds fraudulently removed from the defendant [company] and requests a reconveyance of real property to that [company] . . . justifies the filing of a lis pendens by the plaintiff"]).

The Firm Defendants also seek dismissal of the tenth cause of action, a claim that the Defendants failed to comply with the disciplinary rules governing attorneys and breached their fiduciary duties by failing to supervise Anthony and the Firm's escrow accounts. Inasmuch as this order has granted summary judgment in favor of the Barons on their tenth cause of action insofar as asserted against Langione (*see* discussion *supra*), this branch of the Firm's motion, with respect to Langione, is denied. The court also denies the Firm Defendants' motion to the extent that it seeks dismissal of the cause of action insofar as asserted against Peter. However, the motion is granted to the extent that the tenth cause of action is dismissed insofar as asserted against the Firm and Botter.

The court denies the branch of the Firm Defendants' motion seeking summary judgment on the twelfth cause of action (respondeat superior) and grants judgment in favor of the Barons on this claim, but only insofar as the cause of action is asserted against the Firm and Peter (*see* discussion *supra*). The branch of the motion seeking dismissal of the *respondeat superior* cause of action is denied insofar as it is asserted against Langione and Botter, the Defendants having failed to demonstrate their *prima facie* entitlement to such relief.

The thirteenth cause of action, a claim based upon Judiciary Law § 487, requires, among other things, an act of deceit by an attorney, with the intent to deceive the court or any party (*Curry v Dollard*, 52 AD3d 642, 644 [2d Dept 2008]). The evidentiary material submitted by the

Firm Defendants demonstrates the absence of any intent to deceive the Barons (*Shaffer v Gilberg*, 125 AD3d 632 [2d Dept 2015]; *Cullin v Spiess*, 122 AD3d 792 [2d Dept 2014]). The thirteenth cause of action is, accordingly, dismissed.

Indemnification

In their answer to the Barons' amended complaint, the Firm Defendants interposed the following counterclaim:

> Plaintiffs and Peter entered into the Escrow Agreement . . . which provides, *inter alia*, that in the event the Firm or any of its partners are held liable for Plaintiffs' loss, then Stephen Baron will be obligated to indemnify the Defendants for whatever they are ordered to pay to Plaintiffs.
>
> If either or both Plaintiffs recover judgment against any of the answering defendants, any such answering defendant will be entitled to recover from the Plaintiff Stephen Baron the amount of such judgment" (Ex. "G" to Motion Seq. No. 6 at ¶¶ 57-58).

The Firm's Defendants' counterclaim is predicated upon paragraph eight of the Baron escrow agreement executed by Peter, as escrow agent:

> 8. In order to induce the Escrow Agent to act herein, Stephen Baron agrees to indemnify the Escrow Agent and hold him harmless against any and all liabilities incurred by him hereunder except for liabilities incurred by the Escrow Agent resulting from his own willful misconduct or gross negligence (Ex. "B" at ¶¶ 7, 8 [Motion Seq. No. 5] [emphasis added]).

As noted, Peter entered into the Baron escrow agreement in his individual capacity and not on behalf of the Firm, and thus, the counterclaim is facially frivolous to the extent that it seeks indemnification for anyone other than Peter (*Hampton Hall Pty Ltd., v Global Funding Services*, 82 AD3d 523 [1st Dept 2011]).

Branch "iii" of the Firm Defendants' motion requests an order directing that Stephen Baron indemnify Peter Galasso for any losses suffered in the event the Firm is not granted summary judgment. According to the Firm, there are "pivotal paragraphs contained in the Baron Escrow Agreement that bear on the issue of Peter's potential civil liability and on his right to indemnification for any loss he might suffer in performing his role as the Barons' stakeholder" (Firm Memorandum of Law in Support [Motion Seq. No. 6]). Peter, in his affidavit, continues "[a]lthough it appears to be legally inconceivable, if I am somehow liable for any part of the Barons' losses, I would then be entitled to an award of a like amount against Stephen in accordance with the Baron Escrow Agreement, that requires that Stephen indemnify me and hold me harmless for any loss that I might suffer as a result of my designation as the Barons' Escrow Agent" (Galasso Affidavit in Support at ¶ 26 [Motion Seq. No. 6]).

Peter is correct that any claim by him for indemnification from Stephen Baron based upon an order directing him to repay money stolen from the Barons' escrow account is "legally inconceivable". In addition, this assertion by Peter is ludicrous and appalling.

The indemnification language set forth in paragraph 8 must be strictly construed, and, thus, is inapplicable to the facts at bar inasmuch as the court finds Peter Galasso liable, as a matter of law, on the Barons' claims for unjust enrichment, conversion and under the doctrine of *respondeat superior* (*see* discussion *supra*). A finding of liability on these grounds does not constitute liability "incurred hereunder" (liability incurred under the escrow agreement) for which Stephen Baron could be made to indemnify Peter.

Accordingly, any attempt by Peter to limit his liability pursuant to the indemnification clause contained in the Baron escrow agreement for monies which he, Langione, and the Firm

benefitted from and/or converted is rejected by the court and, accordingly, branch "iii" of the Firm's motion is denied. Additionally, the court searches the record and grants the Barons summary judgment dismissing the counterclaim for indemnification asserted in the Firms' answer.

Conclusion

Based on the foregoing, it is hereby

Ordered that the branch of the motion by Signature Bank in the Escrow Action (Index No. 10038-07 [Motion Seq. No. 20]) for an order pursuant to CPLR 3212 dismissing the complaint, insofar as asserted against it, is granted; and it is further

Ordered that the motion by Signature Bank in the IOLA Action (Index No. 19198-07 [Motion Seq. No. 20]) for an order pursuant to CPLR 3212 dismissing the amended complaint, insofar as asserted against it, is granted; and it is further

Ordered that the motion made by Signature Bank in the Loan Action (Index No. 014211-07 [Motion Seq. No. 20]) for an order pursuant to CPLR 3212 awarding it judgment in the Loan Action on the sixth cause of action is denied; and it is further

Ordered that the branch of the motion by Galasso, Langione & Botter, LLP (formerly known as Galasso, Langione, LLP), as Escrow Agent for Stephen Baron on Signature Bank account number 1500451064, in the Escrow Action (Index No. 10038-07 [Motion Seq. No. 21]) for an order pursuant to CPLR 3212 awarding it judgment on the causes of action asserted in the complaint in the Escrow Action is denied; and it is further

Ordered that the branch of the motion by Galasso, Langione & Botter, LLP, Peter J. Galasso, Individually, James R. Langione, Individually, Galasso, Langione & Botter, LLP as Escrow Agents on Signature Bank Account Number 1500451064 and Account Number 1500351639, and M&T Bank Account Number 9835989485, on behalf of Stephen Baron, Adele Fabrizzio, Theresa Halloran and the Estate of George Caroll, for summary judgment with respect to losses sustained in the IOLA Action (Index No. 19198-07 [Motion Seq. No. 21]) is denied; and it is further

Ordered that the branch of the motion by Galasso, Langione & Botter, Galasso and Langione, LLP, Peter J. Galasso & James Langione, LLP, Peter Galasso and James Langione, seeking an order dismissing Signature Bank's complaint in the Loan Action (Index No. 014211-07 [Motion Seq. No. 21]) is denied; and it is further

Ordered that Motion Sequence Number 21 is, in all other respects, denied; and it is further

Ordered that the motion made by Robert Fresella and Donna Fresella in the IOLA Action (Index No. 19198/07 [Motion Seq. No. 5]) for an order pursuant to CPLR 3212 dismissing the complaint is granted and the complaint in the IOLA Action, insofar as asserted against Robert Fresella and Donna Fresella, is dismissed; and it is further

Ordered that the motion made by Stephen Baron and Wendy Baron for an order pursuant to CPLR 3212 awarding it judgment in the Baron Action (Index No. 001510-09 [Motion Seq. No. 5]) is granted with respect to: the second cause of action, but only insofar as asserted against the Firm, Peter Galasso, and James Langione; the fourth cause of action, but only insofar as asserted against the Firm, Peter Galasso, Anthony Galasso, and James Langione; the eighth cause

of action, but only insofar as asserted against GC Lawcondo LLC; the tenth cause of action, but only insofar as asserted against James Langione; and the twelfth cause of action, but only insofar as asserted against the Firm and Peter Galasso; and the motion is, in all other respects, denied; and it is further

Ordered that the branch of the motion made by Galasso, Langione, LLP, Galasso, Langione & Botter, LLP, Galasso, Langione, Catterson & LoFrumento, LLP, Peter Galasso, James Langione, Alan Botter, and GC Lawcondo, LLC in the Baron Action (Index No. 001510-09 [Motion Seq. No. 6]) for an order pursuant to CPLR 3212 granting them summary judgment dismissing the amended complaint is granted, but only to the following extent: the first cause of action is dismissed; the third cause of action is dismissed; the tenth cause of action is dismissed insofar as asserted against the Firm and Alan Botter; and the thirteenth cause of action is dismissed; and the motion is, in all other respects, denied; and it further

Ordered that the motion by Galasso, Langione, LLP; Galasso, Langione & Botter, LLP; Galasso, Langione, Catterson & LoFrumento, LLP; Peter Galasso; James Langione; Alan Botter, and GC Lawcondo, LLC (Motion Seq. No. 6) is, in all other respects, denied; and it is further

Ordered that upon searching the record, the court dismisses the counterclaim asserted by Peter Galasso, Galasso, Langione, LLP, Galasso, Langione & Botter, LLP, and Galasso, Langione, Catterson & LoFrumento, LLP in the Baron Action (Index No 1510-09); and it is further

Ordered that, with respect to all liability issues which have been resolved, and the only triable issues of fact remaining in connection therewith concern the amount of damages sustained, a trial shall be held on a date to be determined by the court to determine the amount of

damages sustained (CPLR 3212[c]); and it is further

Ordered that the attorneys for the parties shall appear in court for a conference to address further proceedings consistent with this decision and order on November 3, 2016.

This constitutes the decision and order of the court.

DATE: September 19, 2016

Hon. Vito M. DeStefano, J.S.C.