73190-4

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

No. 73190-4-1

CHARLES V. MCCLAIN, III

Appellant, Pro se

vs.

1st SECURITY BANK OF WASHINGTON,

Respondent.

INFORMAL BRIEF OF APPELLANT

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 AUG 17 AM 10: 24

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COMES NOW, Appellant respectfully requests oral arguments. Appellant adopts, incorporates by reference, and restates the facts contained within all pleadings, Declarations and transcript.

I. ASSIGNMENTS OF ERROR

1. The trial court erred in the granting of Summary Judgment to Respondent, as there were several issues of material fact in dispute.

2. The trial court erred in the denial of Appellant's Partial Summary Judgment, as Appellant did in fact; have standing to reclaim $475,000.00 and the balance of the total deposits to Appellant's account with Respondent.

3. The trial court erred in the granting of Respondent's Summary Judgment, as it made several mistakes of fact.

4. The trial court erred in the granting of Respondent's Summary Judgment and the denial of Appellant's Partial Summary Judgment, as it made several mistakes of law and fact.

5. Respondent has no standing to defend its actions by claiming fraud.

Issues pertaining to Assignment of Error

1. Respondent argued that Appellant was involved, knew who was involved or participated in an internet fraud of J.P. Morgan Chase Bank along with Wachovia Band (Now Wells Fargo) Cox Communications and Comcast. (CP 552, lns. 19-20) Appellant denied same thus creating an issue of material fact.

Respondent argued that even though the money was deposited and

credited to Appellant's joint account, with right of survivorship the money in the account was not the property of the accountholders and the result of fraud. Appellant denied same thus creating an issue of material fact.

Respondent stated Appellant and his son had another account with Respondent. Respondent stated in their Motion for Summary Judgment (CP 558, lns. 17-19) the following: *"... more than $52,000.00 was deposited into McClain's other 1st Security account, on which he and his son were joint owners."* (CP 365 at Item 17, Ex. P at CP 533) Respondent cannot have it both ways. Respondent has never asked for those funds to be returned, nor did Respondent seize those funds. Respondent also states in the RP pg. 2, lns. 24-25 and pg. 3, lns. 1-3 that Respondent deposited funds into Appellant's account. That is a misstatement and not a factual representation of what actually occurs with ACH Transfers. The wires sent by J.P. Morgan Chase and Wachovia Bank, for approximately 4.5 million dollars was received by Respondent. Upon completion of the wire transfer Respondent took title to all funds and then credited Appellant's account with the same amount. This in effect made Respondent Appellant's debtor and Appellant the Creditor. At this point in time the credits in Appellant's account were not legally accessible by Respondent. Respondent was liable to Appellant for the amount shown on Appellant's bank statement. (CP 316 at Item 4, Ex. 1, CP 321, Total Deposits) The funds were available for withdrawal at any time pursuant to Appellant's Account Agreement. (CP 365 at Item 16, Ex. O, at CP 521 under

Withdrawals) Respondent illegally froze the account of Appellant and denied Appellant access to his funds. (CP 317 at Item 10, 343, Ex. 7, lns. 2-4) This was a violation of Appellant's Deposit Agreement (CP 365 at Item 16, Ex. O, at CP 521) the Washington State Constitution and Washington State law as Respondent acted as an agent of the government and disturbed Appellant in his private financial affairs a right guaranteed under the Washington State Constitution Article 1 Section 7. Appellant attempted to amend his complaint to include additional claims such as breach of contract, but that motion was denied. Thus, Appellant will have to pursue those claims, which is his right, in Federal Court. However, it is addressed in the RP pg. 17, lns. 15-22.

Respondent argued the Declarations of Correen King (CP 598-601) and Michael Lippert (CP 589-597) established that fraud was committed. Appellant denied same thus creating an issue of material fact. The Declarations do not meet the legal requirement of Washington that all nine elements of fraud be proved and did not state Appellant was an active participant in the alleged fraud. It does however prove that Appellant's private banking information was provided by Respondent to both Correen King and Michael Lippert in violation of Washington Constitution, Law and Appellant's Deposit Agreement, which was also a claim in Appellant's Motion to Amend, which was denied.

Respondent argued that it was legal to commit wire and bank fraud in order to retrieve the $475,000.00 wired to Appellant's Sister-in- Law.

Appellant denied same thus creating an issue of material fact. Respondent avoided prosecution for wire and bank fraud. This is not possible without a conspiracy and governmental support. This action does violate Appellant's Constitutional Rights, as the Respondent is and was acting as an agent of the government. The Court should take Judicial Notice that Respondent admits to monitoring of private bank transactions and activity of its accountholders (CP 365, Item 19, Ex. R, CP 542, lns. 15-17) then contacts government agencies providing private financial information without any subpoena, warrant or Court Order.

Respondent argued Appellant offered no proof he was entitled to the funds in the account. Appellant denied same thus creating an issue of material fact. Respondent was aware that Appellant was to receive half of all monies received by Harrison Hanover, as the direct result of saving Harrison Hanover's life. (CP 97, lns. 14-19) The Court should take Judicial Notice that CP 94-118 was not the Declaration of Harrison Hanover that was stricken from the record and that the transcript verifies the Trial Court never considered Appellant's evidence. (*See,* RP pg. 4, ln 21-24)

Respondent argued they returned the money to its lawful owner. Respondent was not in a position to determine the legal owners, as it is the duty of a court of law. In fact, Respondent's admission they took action on a deposit account based on the ownership of the funds in the account meets the requirement of Washington law supporting conversion making Respondent

liable to Appellant for all losses incurred.

Respondent mislead the trial court, as the ACH Agreement, which is part of Appellant's Deposit Agreement and applies only to funds transferred by Appellant not funds received (CP 365 at Item 16, Ex. O, at CP 530 at Law Governing Certain Funds Transfers) Appellant denied same thus creating an issue of material fact.

Respondent argued they had to return the funds once they knew a fraud had taken place or Respondent would face civil liability. This is only true if the actual knowledge is presented prior to the settlement date and the crediting of Appellant's account. Respondent never had actual knowledge of a fraud and never met the elements of fraud set forth in Washington State law. Respondent can do whatever it desires with its money, after settlement where Respondent gains title, but it cannot take Appellant's funds from Appellant's demand deposit account unless Appellant is in debt to Respondent, which Appellant was not. Respondent again mislead the trial court by not citing the appropriate legal standard. The liability only applies if the account holder initiates an ACH transfer, as the receiver is not bound by the ACH rules.

Respondent argues Appellant cannot prove conversion. Appellant denied same thus creating an issue of material fact. The Respondent again misleads the trial court. All of the ACH rules cited do not apply to Appellant. Once money is credited to a deposit account, pursuant to Washington State law, if a disagreement arises the bank files an Interpleader and acts as a

disinterested third party until the court decides ownership.

2. Respondent argued the money in a bank account cannot be considered chattel. Appellant's argument in his Motion for Partial Summary Judgment was that Respondent interfered with the $475,000.00 wired to Appellant's Sister-in-Law. Respondent has abandoned a defense in Appellant's appeal of the Partial Summary Judgment Order, thus acknowledging their mistake. The $475,000.00 was actual funds removed from the joint account of Appellant and Harrison Hanover in which Respondent stated all right, title and interest were vested in Hanover. This makes the wired funds chattel the Respondent had no right to seize or control those funds. Respondent cannot have it both ways. Appellant denied same thus creating an issue of material fact.

Respondent argued it had the right to return the funds. Appellant denied same thus creating an issue of material fact. While this is true it is somewhat misleading, as the money returned was not the money from Appellant's account. The money Respondent took possession of at the time of settlement was the Respondent's money, title and all. Respondent then took or erased all the credits in Appellant's account, in which Appellant had title to, reducing both Appellant's accounts to a zero balance.

Respondent argued its actions were authorized by contract. Appellant denied same thus creating an issue of material fact. Even though Respondent stated in sworn discovery the following *"Defendant is unaware of any*

document, Contract, ACH or NACHA policy that required it to return the ACH deposits to the ODFI's." Respondent cannot have it both ways. It is well settled that a contract cannot circumvent the laws of Washington State.

Respondent mislead the trial court as the ACH Agreement which is part of Appellant's Deposit Agreement by claiming it applies to all funds transfers. Appellant denied same thus creating an issue of material fact. It actually applies only to funds transferred by Appellant not funds received.

Respondent never addresses the issue of the amount of the total deposits in Appellant's Motion for Partial Summary Judgment to Appellant's account shown on Appellant's December Bank Statement in the amount of $9,323,583. Respondent claims it was a reversal that caused the issue. However, According to NACHA Rules Notice must be given to the receiver prior to the settlement date of the reversing entry which was never done. Thus, due to Respondents abandonment of Appellant's appeal of the partial summary judgment order and under court rules a statement of fact not disputed in a required pleading is an admission of that fact as being undisputed. As such, after Respondent returned the disputed amounts to Cox Communications and Comcast it left from the above total $4,673,906.10 moneys unaccounted for. The amount left in credits/deposits in Appellant's account after the admitted withdrawals/debits by Respondent is $4,673,906. This amount has yet to be returned and does not include a debit of $35.00 for the wire transfer which Respondent has never returned either. The trial court

erred in failing to order the return of these funds.

Respondent stated in sworn interrogatories that ownership of the funds were never determined, (CP 231 at No: 59) yet Respondent on several occasions states it returned the funds to its legal owner in its pleadings to the court and letters to the FDIC and Department of Financial Institutions. Appellant denied same thus creating an issue of material fact.

3. Respondent was granted Summary Judgment by stating there were no material facts in dispute. Appellant has shown several disputed facts (CP 176-180) that are material to the claims made by Appellant and how the Respondent has intentionally misled the Trial Court, as to the law that was applicable to the issues before it. The Declarations and evidence presented to the Trial Court by Appellant was either dismissed or not considered by the Trial Court due to the misrepresentations of Respondent as there is simply no law or contract that allows Respondent's actions. In fact, it is contrary to established case law. Respondent itself stated in swore interrogatories the following: "*Defendant did not make a decision as to the ownership of funds.*" (CP 231 at No: 59) And "*In addition, defendant made no determination regarding plaintiff's property interest or lack thereof in the fraudulent deposits.*" (CP 259 at No: 62)

Respondent came before the court with unclean hands and was allowed to prevail against the Appellant by claiming fraud while failing to properly plead or prove the fraud pursuant to Washington State Court Rules

and law. Respondent mislead the Trial Court by their inaccurate pleading and characterizations of the law and what rights were available by the Account Agreement

4. Respondent actions in misleading the Trial Court resulted in several mistakes of law in the granting of Respondent's Summary Judgment and the denial of Appellant's Partial Summary Judgment. In the following argument Appellant will combine the misleading actions of Respondent as to both the Respondent's Summary Judgment and the Appellant's Partial Summary Judgment motions.

5. Respondent had no standing to claim fraud, as they were not a party to a fraud, if a fraud took place. Respondent is however responsible for their actions after the deposit of funds to Appellant's account and remain liable for those actions.

II. STATEMENT OF THE CASE

It is undisputed by Respondent and is shown on Appellant's bank statement that during the month of December of 2009, Appellant's deposit account received deposits totaling $9,323,583.08. (CP 316 at Item 4, Ex. 1, CP 321 at Total Deposits) Respondents alleged fraud and took $4,127,429.98 this left a balance of $4,673,906 which has not been returned to Appellant.

Respondent acquired monies from an account of a foreign national at a bank outside the U.S. in late January 2010, by claiming fraud on senders account, wire is fraud and wire was fraudulent, (CP 99

at Item 15) **after Respondent stated that all right, title and interest were vested in Hanover, as to the $475,000.00 withdrawn and wired from the joint account of Appellant to his Sister-in-Law in Manila Philippines**. There is nothing in law or contract that allows for this action by Respondent.

The issue before the Trial Court was to the liability of Respondent based on the actions Respondent took after the deposits to Appellant's Demand Deposit Account when the Washington State laws and Article 4A took effect. Those actions included denying Appellant's right to withdraw funds at 9:00am and later the freezing of Appellant's account on the morning of December 14, 2009, disclosing private financial information to both the FBI and Secret Service (CP 259 at No: 63) also a direct violation of Appellant's Account Agreement and Washington State law. Respondent's actions in preventing Appellant from withdrawal of funds amounting to approximately $650,000.00 was a direct violation of not only Appellant's Account Agreement but also Washington State law. Which resulted in consequential damages. Respondent was aware of in the form of investments in gold mines and a Casino in Central America. (CP 98, lns. 7-11)

Additional actions included lying to Appellant, other banks and state agencies, misleading (Lying) to both the FDIC (CP 316 at Item 6, CP 324, Ex. 3) **and the Washington Department of Financial Institutions** (CP 316 at Item 5, CP 322, Ex. 2) **along with the Trial Court, resulted in millions of dollars of losses by Appellant. Respondent committed perjury**

when they claimed under oath in interrogatories ownership of the funds was not determined then told the Trial Court, the FDIC and the Washington Department of Financial Institutions the legal owners were Cox Communications and Comcast.

Respondent contacted the FBI and Secret Service December 14 and 15, 2009, respectively and provided them with Appellant's private financial information with no warrant, subpoena or court order including the wire of $475,000.00 to the Philippines. Respondent then proceeded to seize the wire sent to another bank in the Philippines through the illegal acts of wire and bank fraud. Not to mention theft from Appellant's Sister-in-Law's bank account. There is no doubt that this could not have occurred without the assistance of a government agency and the granting of immunity from prosecution. Respondent would not return the funds until it was issued Letters of Indemnity from J.P. Morgan Chase, Wachovia Bank now Wells Fargo Bank, (CP 582 at Item 12, Ex. A, CP 585-586) Cox Communications and Comcast to absolve Respondent from any liability from Appellant. This is a *De Facto* admission of said liability to Appellant.

A grand Jury was convened in January of 2010, obtaining Appellant's bank and financial records with a subpoena, but failed to charge or indict Appellant or Harrison Hanover. The Secret Service cleared Appellant soon thereafter. Appellant attempted for over a year to resolve this issue with Respondent to no avail. Court action was a last resort.

III. ARGUMENT

Appellant makes his lack of standing argument first; as if this claim is valid the court need not waste its valuable time going any farther. Appellant argues that Respondent did not have standing to claim fraud. Because standing is a jurisdictional issue, however, it may be raised for the first time in appellate court. RAP 2.5(a); *Mitchell v. Doe*, 41 Wn. App. 846, 847-48, 706 P.2d 1100 (1985). Respondent was not a party to the fraud, if in fact, a fraud took place. The only entities' that have standing to claim a fraud occurred are the companies where the funds came from and or possible their banks and they are not Defendants in this instant action.

Respondent did not plead fraud pursuant to CR 9(b) which states: *"Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."*

There are nine elements of fraud pursuant to Washington State law. Those elements generally are: (1) a representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) his right to rely upon it, and (9) his consequent damage. *See Turner v. Enders*,

15 Wn. App. 875, 878, 552 P. 2d 694 (1976).

The Declarations of Correen King and Michael Lippert do not identify who supposedly committed the fraud. The Declaration of Correen King claims the deposit was a mistake. There is nothing in either Declaration stating Appellant was a party to the alleged fraud, therefore Respondent could not have met any of the nine elements of fraud.

In the case is *Go-Best Assets Ltd. v. Citizens Bank*, 79 Mass. App. Ct. 473, 495, 947 N.E.2d 581 (2011). For the Court's convenience Appellant has identified the players in this instant action within *Go-Best's* statement (Bolded). The Court stated: **The fraud or breach of contract claim of the originator** (Cox Communications and Comcast, Originators) **may be grounds for recovery by the originator** (Cox Communications and Comcast) **from the beneficiary** (Appellant) **after the beneficiary** (Appellant) **is paid, but it does not affect the obligation of the beneficiary's bank** (Respondent) to **pay the beneficiary** (Appellant)."**Id. The bank's** (Respondents) **duty to pay the wired funds to Goldings's** (Appellant's) **account supersedes any common-law duty the bank may owe to those whose funds are at risk of misappropriation.**

Even, if Respondent was able to and had standing to claim fraud. Appellant would still receive the funds and have a claim against Respondent for damages. In the case *United States v. Redcorn*, 528 F.3d 727 (10th Cir.2008) Again, for the Court's convenience Appellant has identified the

players in this case as above within the *Redcorn* statement (Bolded). The case stated: **Reluctantly, we are forced to agree**. (The Court) **Once the defendants** (Appellant) **deposited the funds into their personal bank accounts**, (Appellant's Accounts held by Respondent) **they had accomplished their crime and the funds were available for their personal use. That they chose to transfer part of their stolen money to their broker in Florida for the purpose of investments is purely incidental to the fraud; they could just as easily have decided to blow it on a luxury trip to the Ozarks.**

The standard of review on Summary Judgment is well settled. Review is *de novo;* the Appellate Court engages in the same inquiry as the Trial Court. *Trimble v. Washington State Univ.,* 93 140 Wn.2d 88 (2000), citing *Benjamin v. Washington State Bar Ass'n,* 138 Wn.2d 506, 515, 980 P.2d 742 (1999). Summary Judgment is appropriate if there is no genuine issue of material fact ***and*** the moving party is entitled to judgment as a matter of law. *Trimble v. Washington State Univ., supra,* citing *Clements v. Travelers lndem. Co.,* 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); *City of Sequim v. Malkasian,* 157 Wash. 2d 251, 261, 138 P. 3d 943 (2006); CR 56 (c). All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. *Trimble v. Washington State Univ., supra,* citing *Clements,* 121 Wn.2d at 249; *Ranger Ins. Co. v. Pierce Cnty.,* 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "The motion should be

granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Clements, supra,* 121 Wn.2d at 249 (citing *Wilson v. Steinbach,* 98 Wn.2d 434, 656 P.2d 1030 (1982); *Dowler v. Clover Park Sch. Dist. No. 400,* 172 Wash. 2d 471, 484, 258 P. 3d 676 (2011); *Simpson Tacoma Kraft Co. v. Dep't of Ecology,* 119 Wn. 2d 640, 646, 835 P.2d 1030 (1992). An order erroneously granting Summary Judgment on a claim is inherently prejudicial and *requires reversal.* (Emphasis added) *Beers v. Ross,* 173 Wn. App. 566, 569, 154 P.3d 277,279 (2007)

Right of trial is a bedrock foundation of the American legal system. With respect to nearly all legal proceedings, and with very limited exception, the parties involved have a state and federal constitutional right to a trial by jury. That right should not be taken away lightly. Summary Judgment is an administrative efficiency measure, and should never be used to trump or deny basic constitutional rights. The purpose of the Summary Judgment procedure is to avoid an unnecessary trial when there truly is no genuine issue of material fact. It is meant to prevent a waste of "judicial resources" if the result is without question a foregone conclusion, not to deprive litigants of constitutional rights and the opportunity to defend themselves.

A trial is absolutely necessary if there is a genuine issue as to ***any*** material fact. *Jacobsen v. State,* 89 Wn.2d 104, 569 P.2d 1152 (1977); *La Plante v. State,* 85 Wn.2d 154, 158, 531P.2d299 (1975); *Morris v. McNicol,* 83 Wn.2d 491, 519 P.2d 7 (1974); *Preston v. Duncan,* 55 Wn.2d 678, 681,

349 P.2d 605 (1960). A "material fact" is one upon which the outcome of the litigation depends, meaning that such fact could affect the properly rendered outcome. *Jacobsen v. State, supra; Morris v. McNicol, supra; Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 500 P .2d 88 (1972). In ruling on a Motion for Summary Judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, *if reasonable people might reach different conclusions, the motion must be denied* (emphasis added). *Balise v. Underwood,* 62 Wn. 2d 195, 199, 381P.2d966 (1963); 45 Wash. L. Rev. 4, 5. Any doubts about whether there are material facts in dispute are to be resolved against the moving party. *Phillips v. King County,* 136 Wn.2d 946, 968, 968 P.2d 871 (1998).

Summary Judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is ***no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."*** CR 56(c) (Emphasis added). It is a two-prong standard, consisting of "factual" and "legal" elements, both of which must clearly be met. The court is required to view "the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving part." *Lakey v. Puget Sound Energy Inc.,* 176 Wn.2d 909, 922 (1996); *Greater Harbor 2000 v. Seattle,* 132 Wn.2d 267, 279 (1997); *Marquis v. City of Spokane,* 130 Wn.2d 97, 105, 922 P.2d 43 (1996). If there is a dispute as to any material fact, *summary judgment is improper. Id* (Emphasis added). Summary Judgment should be denied where there is "any reasonable hypothesis" entitling Appellants to the relief sought.

Mostromv. Pettibon, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). **Weighing evidence, balancing competing experts' credibility, and resolving conflicting issues of fact are not appropriate on summary judgment – trial is necessary to resolve these types of issues.** *Larson v. Nelson,* 118 Wn. App. 797, 810, 77 P. 3d 671 (2003). (Emphasis Added)

Summing up, on a *de novo* review of a Summary Judgment the Court of Appeals gives no deference to the Trial Court's decision. Based on the same record presented to the Trial Court, the Court of Appeals makes its own decision as to whether there are genuine issues of material fact that prevent Summary Judgment. It also makes its own decision as to whether the moving party was entitled to judgment as a matter of law. The court views all evidence in the light most favorable to the Appellant, in this instance. *Washington Imaging Services, LLC v. Washington State Dept. of Revenue,* 171 Wn.2d 548, 555, 252 P.3d 885 (2011); The Analysis and Decision of Summary Judgment Motions *A Monograph* on *Rule* 56 *of the Federal Rules of Civil Procedure* William W Schwarzer, Alan Hirsch, David J. Barrans. Federal Judicial Center 1991.

1. Respondent argued that Appellant was involved, knew who was involved or participated in an internet fraud of J.P. Morgan Chase Bank along with Wachovia Band (Now Wells Fargo) Cox Communication and Comcast but presented no proof or anything to resemble proof. Appellant denied same thus creating an issue of material fact. Appellant's Declarations or pleadings were never disputed by anyone with personal knowledge. Those Declarations showed Appellant received half of Harrison Hanover's income for saving his

life. Respondent was aware of that fact as well as the expectation of large deposit to the account as a result of conversations with the Branch Manager Carl March. (CP 97 at Item 11, pg. 98, lns. 1-6) His phone call to May-Ling Sowell the morning of December 14, 2009, was designed to interfere with Appellant's private financial dealings, an issue that is protected by law, contract and the Washington State Constitution, because he was not getting a Harley. Both Appellant and Harrison Hanover were told by Carl March that once the money was deposited for withdrawal it had passed the security procedures. (CP 98, lns. 4-6)(CP 205 -206, at Item 4, lns. 1-9 respectively) Carl March asked us to buy him a Harley Davidson Motorcycle but Harrison told him no. Had we bought him the motorcycle we would not be here today wasting the valuable Court's time. Appellant attempting to make a withdrawal is not a Security Procedure, as Respondent claims in the answer to interrogatories. Respondent states the following: *"When Plaintiff brought the account to Defendant's attention by initiating a large withdrawal of on December 14, 2009... "* (CP 365 at Item 19, Ex. R at CP 542, lns. 15-17) Appellant's financial matters are private, protected by not only privacy laws but the Respondent's Account Agreement, Washington State Constitution Article I Section 7, the Right to Financial Privacy Act, Electronic Communications Privacy Act and the Washington State Consumer Protection Act. Appellant received the funds from Harrison Hanover in good faith, for valuable consideration and with no knowledge of any wrongdoing. (CP 98 at

Item 13, lns. 19-23) This is contained in Appellant's Declarations (CP 207 Item 16, CP 239 Item 5, Ex 11) and also stated in the RP at pg. 22, ln 3-6.

The Declaration of May-Ling Sowell claims to have information the deposits to Appellant's account were fraudulent earlier than the Declarations of Correen King and Michael Lippert claim the alleged fraudulent activity was discovered. Appellant was denied withdrawals. Appellant's account was frozen prior to Respondent having any actual knowledge of any claimed fraud and after Respondent had gained title to the funds transferred. In Fact, May-Ling Sowell admits it was December 15, 2009, before she had written notice, which is required by law prior to any action by Respondent. (CP 582 at Item 15) However, this information was after the payment order was accepted and title transferred. Respondents' actions are inconsistent with Washington State law. RCW 30.22.210, Authority to withhold payments, it plainly states that unless Respondent had actual knowledge, that they can't withhold a payment from a depositor just on a whim. Actual knowledge is defined in the statutes as written notice to the manager of the branch at the bank where the accounts held. Respondent had no such written notice and even, if it did once the funds are credited to the account for withdrawal and ownership is transferred the funds can no longer be returned or accessed by the bank without Appellant's being in debt to the bank, which Appellant was not. Also, an ACH withdrawal must have Appellant's authorization. The funds must be held until the following: (a) All such depositors and/or beneficiaries have consented, in

writing, to the requested payment; or (b) The payment is authorized or directed by a court of proper jurisdiction. Respondent did not have actual knowledge as defined by statute nor did Respondent hold funds until a court directed the release of funds.

In fact, Respondent states in the Motion for Summary Judgment (CP 560 at ln. 24, CP 561, lns. 1-4) the following; *Ms. Sowell immediately obtained the information necessary from the ACH system to determine that the deposit that morning from Comcast in the amount $3,024,836.36 was not legitimate. Based upon that discovery, the remaining funds in the account were frozen while Ms. Sowell ascertained the legitimacy of the other deposits.* This is not actual knowledge as defined per statute. In fact, this is not true Ms. Sowell's Declaration makes no such statement. Again Respondent misleads the Trial Court. Respondent failed to follow Washington State law as numerated herein RCW 62A.4A-401 Payment date. **"Payment date" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank**. The payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank. [1991 sp.s. c 21 § 4A-401.] The orders were payable on December 10, 14 and 15, 2009, to the beneficiary (Appellant). (CP 365 at Item 18, Ex. P at CP 536)

RCW 62A.4A-404 Obligation of beneficiary's bank to pay and give

notice to beneficiary.**(1) Subject to RCW 62A.4A-211(5),62A.4A-405 (4), and 62A.4A-405(5), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order.** **Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.** (Emphasis Added) Respondent refused to pay Appellant knowing that contracts for Gold mines were to be signed in Costa Rico and property was being bought with a Casino. (CP 98, at Item 13) This resulted in several million dollars of damages to Appellant.

(2) **If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds-transfer business day following the payment date.** If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order.

Notice may be given by first-class mail or by any other means reasonable in the circumstances. **If the bank fails to give the required notice, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank.** Reasonable attorneys' fees are also recoverable if demand for interest is made and refused before an action is brought on the claim. Appellant never received any notice from Respondent.

(3) The right of a beneficiary to receive payment and damages as stated in subsection (a) [subsection (1) of this section] may not be varied by agreement or a funds-transfer system rule. The right of a beneficiary to be notified as stated in subsection (2) of this section may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer.

Respondent's intention misleading of the Trial Court is particularly troublesome here, as the law says the right of a beneficiary (Appellant) may not be varied by agreement or a funds-transfer rule. This negates Respondent's entire argument, as to being contractual, or otherwise obligated to return the funds.

RCW 30.22.240 Records - Disclosure- Requests by law enforcement- Fees. (1) If a financial institution discloses information in good faith concerning its customer or customers in accordance with this section, it shall

not be liable to its customers or others for such disclosure or its consequences. **Good faith will be presumed if the financial institution follows the procedures set forth in this section.** (Emphasis Added)

(2) A request for financial records made by a law enforcement officer shall be submitted to the financial institution in writing stating that the officer is conducting a criminal investigation of actual or attempted withdrawals from an account at the institution and that the officer reasonably believes a statutory notice of dishonor has been given pursuant to RCW 62A.3-515, fifteen days have elapsed, and the item remains unpaid. The request shall include the name and number of the account and be accompanied by a copy of:(a) **The front and back of at least one unpaid check or draft drawn on the account that has been presented for payment no fewer than two times or has been drawn on a closed account**; (Emphasis Added) Respondent failed to comply with this law as well. Appellant had not written a single check on the account in question. This action resulted in damages to Appellant in the millions of dollars.

RCW 30.20.060 Deposits and accounts-Regulations-Passbooks or records Deposit contract. **A bank or trust company shall repay all deposits to the depositor or his or her lawful representative when required at such time or times and with such interest as the regulations of the corporation shall prescribe.**: Which, in this case is at any time as stated in the Account Agreement.

RCW 30.22.040 (5) "Depositor", when utilized in determining the

rights of individuals to funds in an account, means an individual who owns the funds. **When utilized in determining the rights of a financial institution to make or withhold payment, and/or to take any other action with regard to funds held under a contract of deposit, "depositor" means the individual or individuals who have the current right to payment of funds held under the contract of deposit without regard to the actual rights of ownership thereof by these individuals.**

Respondent failed to allow withdrawals when requested by Appellant (Depositor as defined above) in violation of this law and Appellant's Deposit Agreement. Appellant's Deposit Agreement states: "WITHDRAWALS- *Unless clearly indicated otherwise on the account records,* ***any of you, acting alone, who signs in the space designated for signatures on the signature card may withdraw or transfer all or any part of the account balance at any time."*** (CP 365 at Item 16, Ex. O, at CP 521 under Withdrawals) In Washington State "any" means "all." The word "any" means "every" and "all." *State v. Westling*, 145 Wn.2d 607, 612, 40 P. 3d 669 (2002) (*citing State v. Smith*, 117 Wn. 2d 263, 271, 814 P.2d 652 (1991)).The credits in Appellant's Demand Deposit Account bank account were an obligation of the bank's (Respondent's) liability to the account holders, Appellant and Hanover and had nothing to do with the money that was returned after Respondent assumed ownership of the wire transfer.

In *Ohio Casualty Insurance Company v. Smith, et al.*, 297 F.2d 265,

(7th Circuit.1962) the U.S. Court Of Appeals in the 7th Circuit noted that *Porter v. Roseman*, 74 N.E., 1105, 1905, stands against the weight of authority in the United States against a recognized public policy that money must be permitted to flow freely in our economy, at 266. The 7th Circuit further noted the general rule is that one who receives money in good faith for valuable consideration prevails over the victim. Such is still the general rule. *Toupin v. Laverdiere*, 729 A.2d 1286 (R.I. 1999)

RCW 62A.4-215 Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.(a) **An item is finally paid by a payor bank when the bank has first done <u>any</u> of the following: (1) Paid the item in cash**; **(2) Settled for the item without having a right to revoke the settlement under statute, clearing-house rule, or agreement; (e) Subject to (i) applicable law stating a time for availability of funds and (ii) any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in a customer's account becomes available for withdrawal as of right;** Respondent had no legal authority to take the funds from Appellant's account even if fraud had taken place. Respondent did not have the right to withhold the funds Appellant was attempting to withdraw due to the Account Agreement. Respondent had no right to seize the $475,000.00 from an account of a foreign national at a bank outside the Country. The money once deposited was the property of Appellant even if a

fraud had taken place. *See United States v. Redcorn*, 528 F. 3d 727 (10th Cir.2008). **Reluctantly, we are forced to agree. Once the defendants deposited the funds into their personal bank accounts, they had accomplished their crime and the funds were available for their personal use. That they chose to transfer part of their stolen money to their broker in Florida for the purpose of investments is purely incidental to the fraud; they could just as easily have decided to blow it on a luxury trip to the Ozarks.** Without a closer connection to the mechanism of their fraud, what they did with the stolen money after-ward cannot itself relate to an "essential part of [the] scheme." Mann, 884 F. 2d at 536. (Quoting Puckett, 692 F. 2d at 669). **Additionally, the court stated the funds were labeled from the moment they were deposited and held in a Bank of America accounts, and they could be spent, transferred or otherwise drawn on at their pleasure.** We see nothing to bear out the contention that moving the stolen funds would have been slower, without the intermediate stopovers. We think the scheme to defraud ended at the earlier step, before the interstate wires were used. **It was at that point the persons intended to receive the money had received it irrevocably, and the scheme had reached fruition.** *Kann v. United States*, 323 U.S. 88 at 94. (1944).

One who receives money in good conscious and has practiced no deceit or unfairness in receiving it is under no legal obligation to return it to one from whom it's been obtained by deceit on the part of another.

Transamerica Insurance Company v. Long, 318 F. Supp. 156, (W.D. Pa. 1970) Which, is exactly what happened here. **After stolen money has been negotiated, the victim owner cannot recover a like amount from a third party recipient unless it can be proven that the recipient had prior knowledge that the money was stolen.** It is absolutely necessary for commerce that the one who receives money is not put under inquiry as to the source. It is generally impractical to discovery the source of money, and for this reason, one who receives money in good faith for valuable consideration prevails over the victim. *James Talcott, Incorporated v. Roy D. Warren Commercial Incorporated,* 171 S.E. 2d. 907, (GA Ct. App. 1969)

Washington state law grants Plaintiff a property right in his deposit account. The Ninth Circuit, in United States v. Komisaruk, 874 F.2d 686, 693 (1989) stated; ("[T]he word' property' implies ownership, or the 'exclusive right to possess, enjoy, and dispose of a thing.'"(citing Webster's Third New Int'l Dictionary 1818 (1986))); (same). The U. S. Supreme Court has also supported this conclusion. In U.S. v. National Bank of Commerce, 472 U.S. 713 (1985); citing IRS v. Gaster, 42 F. 3d 787, 791 (3d Cir. 1994) **unrestricted right to withdrawal from joint demand deposit account is a property right** and (holding that IRS cannot levy against a joint bank account where the delinquent taxpayer lacks the right to make a unilateral withdrawal of the funds). (Emphasis Added) **Funds/Credits in a Bank Account Are Subject to a Claim of Conversion "A conversion is the act of willfully**

interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Reliance Insurance Co. v. U.S. Bank, WA., NA.*, 143 F.3d 502, 506 (9th Cir. 1998) citing *Public Utility District v. Washington Public Power Supply System,* 104 Wn.2d 353, 705 P.2d 1195, 1211 (1985). Reliance further states: **"Even where money can be the subject of conversion, the cause of action does not lie"unless** it was wrongfully received by the party charged with conversion **or unless such party was under obligation to return the specific money to the party claiming it.**" *Public Utility District*, 705 P.2d at 1211. (Emphasis Added) Here Respondent was under obligation to return the specific money/credits to the Appellant making those funds/credits subject to a claim of conversion. Respondent was obligated by statute to produce the credits/funds on demand from Appellant's demand deposit account. In fact, under the terms of Respondent's own account agreement in which it states that Appellant may withdraw or transfer all or any part of the account balance at any time. Respondent failed to allow Plaintiff to withdraw funds/credits. Thus, violating its contractual agreement along with Washington State law. Appellants' justification is not only statutes, Respondents' own Account Agreement, but also the U.S. Supreme Court. Respondent was, in fact, Appellant's debtor in December 2009, and can only discharge their liability by paying Appellant the amount of funds shown on deposit in Appellant's December Bank Statement. The United States

Supreme Court in *Leather Manufacturers' Nat. Bank v. Merchants' Nat. Bank*, 128 U.S. 26, 9 S. Ct. 3, 32 L. Ed. 342 (1888) also stated: "The specific money deposited [in a bank] does not remain the money of the depositor, but becomes the property of the bank, to be invested and used as it pleases; its obligation to the depositor is only to pay out an equal amount upon his demand or order; and proof of refusal or neglect to pay such demand or order is necessary to sustain an action by the depositor against the bank. **The bank cannot discharge its liability to account with the depositor to the extent of a deposit, except by payment to him, or to the holder of a written order from him, usually in the form of a check.**" (Emphasis Added) While this case is over 120 years old it is still good law and cited as recently as January 24, 2012. *Barnhill v. Johnson*, 503 U.S. 393, 398, 112 S. Ct. 1386, 1389, 118 L.Ed.2d 39 (1992) **("A person with an account at a bank enjoys a claim against the bank for funds in an amount equal to the account balance.")**. Respondent was in fact a debtor to Appellant. Appellant must have recourse when his property is illegally withheld, taken by another, or withheld in violation of a contract whether it is called conversion, theft, misappropriation or another term especially when Respondent violates the law.

Respondent must follow the Uniform Commercial Code Article 4A codified in Washington at RCW 62A Uniform Commercial Code Chapter 4A Funds Transfer. The issues before this Court are similar to those in *Regions Bank v. The Provident Bank, Inc.*, 345 F.3d 1267

(11th Cir. 2003) Appellant will add in parenthesis containing (Respondent, Appellant, J.P. Morgan Chase and Wachovia Bank now Wells Fargo Bank, Cox Communications and Comcast where applicable to assist the Court in understanding Appellants' claims) *Regions'* states: A beneficiary bank (Respondent) accepts a payment order when the "bank receives payment of the entire amount of the sender's order." U.C.C. § 4A-209(b)(2) (2003). Provident (Respondent) accepted payment orders from Fleet Bank (J.P. Morgan Chase and Wells Fargo) and deposited the funds into the DDA (Appellant's) account held by Morningstar (Appellant) at Provident (Respondent), on April 11 and 13, 2000. Title to funds in a wire transfer passes to the *beneficiary bank* (Respondent) upon acceptance of a payment order. *See United States v. BCCI Holdings (Luxembourg), S.A.*, 980 F. Supp. 21, 27 (D.D.C.1997) "**Because an accepted transfer cannot be revoked without the consent of the beneficiary**, (Appellant) **and the beneficiary bank** (Respondent) **incurs an obligation to the beneficiary** (Appellant) **upon acceptance of the funds, the ownership interest in those funds must pass from the originator** (Cox and Comcast) **upon completion of the funds transfer.") (quotation marks and citations omitted). *See also United States v. BCCI Holdings (Luxembourg), S.A., et al. (In re Petition of Pacific Bank)*, 956 F. Supp. 5, 11 (D.D.C.1997) (same); Official Comment of U.C.C. § 4A-102 (explaining that in the drafting of Article 4A, substantial consideration was given to policy goals of assigning responsibility,**

allocating risks, and predicting risk with certainty in electronic fund wire transactions).(Emphasis Added) Provident (Respondent) received the payment order without "knowing or having reasonable cause to believe that the property [had] been obtained through commission of a theft offense," Ohio Rev. Code Ann. § 2913.51, title to the funds lawfully passed to Provident (Respondent) on April 11 and 13, 2000, upon its acceptance of the payment orders on behalf of (Appellant) Morningstar's DDA.

Regions' goes on to say: **To state a valid claim requiring disgorgement of the funds wired to Provident** (Respondent), **Regions** (J.P. Morgan Chase and Wells Fargo Bank) **was required to demonstrate that Provident** (Respondent) **knew or had reasonable cause to believe that it was receiving fraudulently obtained funds *before* it received the wire transfers and acquired title to the funds. Provident** (Respondent) **obtained legal title to the funds when it accepted the wire transfers from Fleet Bank** (J. P. Morgan Chase and Wells Fargo Bank) **on April 11 and 13, 2000.** *Shawmut Worcester County Bank v. First Am. Bank & Trust,* 731 F. Supp. 57, 60 (D.Mass.1990) (**holding that the completion of a wire transfer extinguishes the originator's ownership interest in the funds**).

On July 30, 2012 after Respondent had obtained summary judgment a case in Massachusetts was published which almost paralleled the case at Bar and involved approximately the same amount of money. The case is *Go–Best Assets Ltd. v. Citizens Bank*, 79 Mass. App. Ct. 473, 495, 947 N.E.2d

581 (2011). Appellant will insert Respondent etc. As done previously to assist the Court. *Go-Best* states: A bank (Respondent) generally does not have a duty to investigate or inquire into the withdrawal of deposited funds by a person (Appellant) authorized to draw on the account to ensure that the funds are not being misappropriated. See *Boston Note Brokerage Co. v. Pilgrim Trust Co.*, 318 Mass. 224, 227–228, 61 N.E.2d 113 (1945); *Kendall v. Fidelity Trust Co.*, 230 Mass. 238, 242, 119 N.E. 861 (1918). See also *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 287 (2d Cir.2006) *Go- Best* goes on to say: Once Citizens Bank (Respondent) accepted Go–Best's (J.P. Morgan Chase and Wells Fargo Bank) payment orders, it was obligated under Article 4A of the Uniform Commercial Code, adopted by the Legislature in 1991, G.L. c. 106, § 4A, inserted by St.1991, c. 286, § 2, to pay the $5 million to the client (Appellant) account by the next business day. G.L. c. 106, § 4A–404 (a) ("bank is obliged to pay the amount of the order to the beneficiary (Appellant) of the order on the payment date after the close of the funds transfer business day"). **Even if Go–Best** (Cox Communications and Comcast) **had attempted to prevent payment to the client account by claiming that Goldings** (Appellant) **was not entitled to payment because of fraud or breach of contract (which Go–Best did not do here), the bank** (Respondent)**still is obligated to make the payment**. See official comment 3 to U.C.C. § 4A–404, 2B (Part II) U.L.A. 98 (Master ed.2002). "**The fraud or breach of contract claim of the originator** (Cox Communication and Comcast) **may**

be grounds for recovery by the originator (Cox Communication and Comcast) **from the beneficiary** (Appellant)**after the beneficiary** (Appellant) **is paid, but it does not affect the obligation of the beneficiary's bank**(Respondent)**to pay the beneficiary** (Appellant)**Id. The bank's** (Respondents) **duty to pay the wired funds to Goldings's** (Appellant's) **account supersedes any common-law duty the bank may owe to those whose funds are at risk of misappropriation. "Where a [Uniform Commercial Code] provision specifically defines parties' rights and remedies, it displaces analogous common-law theories of liability." Gossels v. Fleet Nat'l Bank, 453 Mass. 366, 370, 902 N.E.2d 370 (2009), and cases cited. See official comment to U.C.C. § 4A–102, 2B (Part II) U.L.A. 18 (Master ed.2002) ("resort to principles of law or equity outside of Article 4A [of the Uniform Commercial Code] is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article").**Therefore, if Citizens Bank owed a duty of care, it could not have prevented the funds from being deposited in Goldings's client account and instead would have had to take reasonable steps to prevent Goldings from misappropriating the Go–Best funds in his client account, either by freezing the account or otherwise ensuring that the Go–Best funds were safeguarded. **The intrusive nature of such steps and the interference with the account holder's access to funds deposited in his account is justified only where the bank has actual knowledge of an intended or apparent**

misappropriation. This is exactly what Respondent did after acceptance of the payment order and without the consent of the Appellant. Respondent's continual misleading statements to the Trial Court which conflicted with sworn statements made in interrogatories to Appellant are unconscionable and a fraud upon the Trial Court. Appellant would like to review some of those statements.

Respondent claims in their pleadings to the Court all their actions were allowed by or contractually authorized. However, in the sworn discovery provided to Plaintiff, Defendants stated the following: *"Defendant is unaware of any document, contract ACH or NACHA policy that required it to return the ACH deposits to the ODFI's."* (CP 207, Item 13, CP 233 Ex. 8, at No. 33) Additionally, as is well settled law that a contract that violates statute is illegal and unenforceable. Even if, as Respondent claims its actions were all authorized by contract the argument fails as a matter of law.

Respondent has sworn that they never made a determination as to ownership of the funds/credits in Plaintiff's account. *"Defendant did not make a decision as to the ownership of funds."* (CP 231 at No: 59) and *"In addition, defendant made no determination regarding plaintiff's property interest or lack thereof in the fraudulent deposits."*(CP 259 at No: 62) Respondent has now committed perjury, as both claims cannot be true. Their pleadings conflict with sworn statements provided in discovery. Respondent mislead the Trial Court several times on purpose. Appellant would like to

review some of those times.

Respondent cannot avoid case law or liability by claiming a case Appellant cited was overturned as was done in their pleading regarding *Kalk v Security Pacific Bank*, 126 Wn. 2d. 346 (1995) describing RCW 30.22.140. This is the Court's description of a statute it stands to reason another court would read and interpret the statute the same. **As long as a financial institution relies on the form of an account, as opposed to the actual ownership of the funds within the account, it is protected from liability. In other words, if a person's name is on an account, that person can withdraw all the funds in the account, regardless of ownership of the funds.** (Emphasis Added) Common law joint tenancy where "each of the tenants has an undivided interest in the whole, and not the whole of an undivided interest." *Merrick v. Peterson,* 25 Wn. App. 248, 258, 606 P.2d 700 (1980). Here, Respondent clearly relied on the ownership of the funds not the type of account and is therefore liable for their actions in withholding Appellant's funds and the discharge of their debt to Appellant as creditor.

Defendant stated in sworn discovery provided to Plaintiff that *"Defendant's verified signature (along with that of the other account holder) on the Terms and Conditions of the account was a verification of Plaintiff's ownership in the specified joint account."* Therefore, Appellant was an **owner of the account** and as such was **authorized by contract to withdraw up to the balance of the account at any time** and upon withdrawal of the

funds, all right, title and interest thereto would be vested in Appellant. Respondent acknowledges that Appellant is co-owner of the account below.

Respondent has stated *"As co-owner of the Account, Hanover was authorized to make withdrawals. Upon removal of the funds, all right title and interest thereto were vested in Hanover not McClain."* This statement applies equally to Appellant. Hanover in his sworn Declaration CP 94-118, which was not stricken by the Trial Court, stated that; *"... I gave McClain half my money because he had saved my life two times."* (CP 97 lns. 16-18) Using Defendant's own logic half of the $475.000.00 Respondent recovered through wire and bank fraud belonged to Appellant.

Respondents have admitted their liability *de facto* to Appellant and the Court within their discovery by refusing to return the funds until they received Letters of Indemnification from the parties involved. However, Respondent denies any liability to Appellant in their pleadings, again knowingly misleading the Court. Respondent admits to breach of contract by refusing Appellant access to funds in Appellant's account. This was accomplished by lying to Appellant on December 14, 2009. This was in direct violation of statute and Appellant's Account Agreement.

Respondent's Counsel intentionally misled the Court regarding ACH Rules contained within the NACHA Rules by the misrepresentation of those rules. Respondent cite a more recent version of the rules instead of the rules in effect in December 2009, which are not the same and not applicable to this

action. Respondent's Counsel failed to supply copies of the cited rules in an intentional, deliberate, deceitful and dishonest attempt to misstate those rules. First, the Originating Financial Institutions (J.P. Morgan Chase and Wachovia) did not reverse entries because the ACH Rules requires notice to the Receiver (Account Holders) which there was none. The Originating Financial Institutions simply made a request pursuant to Article 4A-205 codified in Washington at RCW 62A.4A-205 which does not allow the Receiving Bank (Respondent) to recover from the Beneficiary (Appellant) after acceptance of the payment order. The Respondent was not obligated to comply and refused to do so until completely indemnified from liability.

The deposits to Appellant's account were authorized. However, in sworn discovery Respondent lied again and again. Respondent also misrepresented the fact in their Reply in Support of Motion for Summary Judgment by stating the following; *"In the section of the disclosures directed to ACH and Wire Transfers,* ***McClain was informed that 1st Security had established procedures as security against unauthorized funds transfers.*** *Two specific examples of such procedures were provided, and the existence of other measures is made clear: "You agree we may vary the security procedure depending up on the amount and type of funds* ***you request transferred*** *or the* ***method you use to make the request."*** (Emphasis Added) The Court should take Judicial Notice that Respondent's statement does not apply to this situation, as Appellant was the "Receiver" and not the

"Originator" requesting the transfer. Even if the transfer was not authorized under the terms of the Originator's contract pursuant to Article 4A-202(b) a payment order accepted in good faith and in compliance with both a commercially reasonable security procedure and the customer's instructions is **"effective as the order of the customer, whether or not authorized."** The payment orders which resulted in the credits to Appellants account were not issued by an "interloper" and as such must be honored authorized or not pursuant to Article 4A. 202(b) Respondent's actions violated, but are not limited to, the following state statutes RCW 9A.83.020, RCW 62A.4A-205, RCW 62A.4A-401, RCW 62A.4A-404, RCW 30.04.050, RCW 30.22.210, and RCW 30.22.240.

NACHA rules require only the "Originator" to enter into a contract with the ODFI to be bound by the NACHA rules, NACHA Operating Rule § 2.1.1, and there is no such requirement for the Receiver. *Security First Network Bank v. C. A.P. S* No. O1-C-342 (N.D. lit. March 29, 2002) Therefore, Respondent's statements about the ACH Rules applying to Appellant in this situation, as a "Receiver", was again an intentional, knowingly, deceitful and dishonest misrepresentation of the facts of the case in order for Respondent to obtain an unjust and unfair judgment. Respondent's misconduct prevented a full and fair presentation of Appellant's case.

Respondent has no standing to claim fraud or to recover the alleged

fraudulent funds from Appellant's account paid as a result of alleged error, mistake or fraud on the part of another. Pursuant *to Thys, et al v. Rivard, et al,* 25 Wn. 2d. 345 (1946). *Peoples State Bank* v. *Hickey,* 55 Wn. App. 367, 372, 777 P.2d 1056 (1989). "It is immaterial whether the misrepresentation was innocent or willful. The effect is the same whether the misrepresentation was innocent, the result of carelessness, or deliberate." 55 Wn. App. at 371, citing *Bros, Inc.* v. *W.E. Grace Mfg. Co.,* 351 F.2d 208, 211 (5th Cir. 1965). It is also immaterial whether the misrepresentation or nondisclosure would have made a difference in the outcome of the trial, as "a litigant who has engaged in misconduct is not entitled to 'the benefit of calculation, which can be little better than speculation, as to the extent of wrong inflicted upon his opponent." *Taylor* v. *Cessna, supra,* 39 Wn. App. at 836 (citation and quotation omitted).

Respondent's Counsel contributed to the Appellant being unable to give the Court a full and fair presentation of his case. Respondent claims in their pleadings to the Court that all their actions were allowed by or contractually authorized but never cited or provided copies of the specific portions of the contract that allowed the actions of Respondent. However, in the sworn discovery provided to Appellant, Respondent stated the following: *"Defendant is unaware of any document, contract ACH or NACHA policy that required it to return the ACH deposits to the ODFI's."*

The Financial Institution Individual Account Deposit Act, RCW

30.22 et seq., governs issues relating to ownership of funds in bank accounts, including those in joint accounts with rights of survivorship." The very Title Respondent violated. This Act also requires Respondent to follow the Account Agreement which was not followed by Respondent. This issue was most recently addressed in *Sterling Savings Bank v. Phillip Murphy, et al,* No.: 29760-8-III (Jan. 2012) in which Sterling filed an Interpleader. "We note that a bank may, without liability, refuse to disburse any funds contained in the account to any . . . P.O.D. account beneficiary . . . until such time as . . . [t]he payment is authorized or directed by a court of proper jurisdiction. RCW 30.22.210(1)(b) (emphasis added). **Sterling's duty was to maintain the deposit account for Mr. Murphy according to the terms of the contract of deposit."** Here, Respondent failed in that duty to Appellant consequently Respondent is liable to Appellant for their actions and pursuant to the highest law of the law the U.S. Supreme Court in *Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386, 1389 (1992) Plaintiff has a claim up to the balance of his account verified by Respondent of over $9 Million Dollars through the submission in discovery of Appellant's bank statement. Obviously, Appellant never volunteered to be bound by the NACHA Rules that do not apply to him as a Receiver. Respondent's Counsel have yet again lied to the Court.

Respondent cited *Allied Sheet Metal Fabricators, Inc.* v. *Peoples Nat'l Bank of Washington,* 10 Wn. App. 530, 537, 518 P.2d 734, *aff'd,* 83 Wn.2d *1013, cert. denied,* 419 U.S. 967, 95 S. Ct. 231, 42 L. Ed.2d 183

(1974) The case was cited as authority for conversion and money not being chattel but, the words conversion and chattel appear nowhere in the case nor does the phrase money in a bank account is not chattel. Respondent is obviously misrepresenting case law to the Court. The word conversion appears nowhere in Appellant's contract (Account Agreement) therefore; you look to the plain meaning Webster's dictionary defines "conversion" as the "appropriation of and dealing with the property of another as if it were one's own without right." Webster's Third New International Dictionary 499 (2002). Black's Law Dictionary defines "conversion" as "[t]he wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property." Black's Law Dictionary 381 (9th Ed. 2009). This is exactly the case here.

Appellant was owner of the account, had property rights to the account and was authorized to withdraw from the account. Respondent interfered with the right of Appellant to withdraw funds. Respondent's actions were illegal and in violation of Appellant's contract, state and federal law. Appellant was deprived of the use and possession of the funds by Respondent which resulted in consequential damages. Whether you characterize the actions of Defendant as conversion, theft or breach of contract the results were the same. Appellant was damaged by the illegal

actions of Respondent Washington State Statutes do not apply to stolen money as evidenced by Respondent citing federal law. Appellant has no direct knowledge the money at issue here is or is not stolen or proceeds from an alleged fraud. Respondent states; *"He attempts to place himself in the position of Provident Bank, whose lack of knowledge of the fraud was meaningful to the outcome. Regions is irrelevant."*(CP 357 at Fn. 2, lns. 24-25) Respondent again is misrepresenting the case law and Appellant's reasons for citing the case. Respondent would be Provident not Appellant and Respondent obtained title to the transferred funds upon acceptance of the payment order. Here, that is exactly what happened Respondent accepted the payment orders without knowing or having any reason to believe the funds were obtained through the commission of a theft or fraud, if in fact one occurred, Respondent obtained legal title to the funds and passed that legal title to Appellant's demand deposit account in the form of credits/funds equal to the amount received by Respondent. Respondent then illegally denied Appellant access to his demand deposit account violating Appellant's Account Agreement, both state and federal law.

Respondent was obligated by statute to pay the amount of the order to the Appellant's account pursuant to RCW 62A.4A-404. When Respondent accepted the payment orders the transactions were closed. Thus, Respondent obtained legal title to the funds. Appellant obtained legal title to the funds deposited in Appellant's account. This is why there is no law, rule, or contract

that required Respondent to return the funds.

Regions bases its state law claims on the fundamental principle of property law that "no one can obtain title to stolen property [,] ... however innocent [a buyer] may have been in the purchase; public policy forbids the acquisition of title through the thief." *Pate v. Elliott*, 61 Ohio App.2d 144, 400 N.E.2d 910, 912 (1978) (*per curiam*) (quoting *Ogden v. Ogden,* 4 Ohio St. 182, 195 (1854)). This rule applies to the theft of goods or chattels **but does not apply to the transfer of money**. In Ohio, **"[t]he general rule, as evidenced by the great weight of authority**, is that **only bad faith on the part of a third person receiving stolen money, or his failure to pay valuable consideration therefore, will defeat his title thereto as against the true owner."** *Hinkle v. Cornwell Quality Tool Co.*, 40 Ohio App.3d 162, 532 N.E.2d 772, 777 (1987). *See also In re Newpower* (*Kitchen v. Boyd*), 233 F.3d 922, 930 (6th Cir.2000) (**explaining that if an embezzler purchases an item from a good faith seller with stolen funds, the seller "obtains good title to the money the thief provides"**); *Ogden,* 4 Ohio St. at 195 (stating that **one cannot take title from a thief, "money and bank notes possibly excepted").** (Emphasis added). *Id.* at 1276

Here, Respondent has not only failed to submit evidence that suggests bad faith or knowledge the funds were stolen on the part of the Appellant. Respondent has not submitted evidence that shows Appellant's failure to pay valuable consideration for the money received, nor has Respondent disputed

Appellant's statements in open court (RP pg. 22, 23, lns. 24, 25 and 1-6 respectively) or in Appellant's Declarations. (CP 207 Item 16, CP 239 Item 5, Ex 11) Appellant has no personal knowledge of any funds received into his account originating from any source other than Hanover. Appellant paid valuable consideration to Hanover from June, 2003 through June, 2010 in return for half of Hanover's future income from whatever source derived. **Since one acting in good faith may obtain title to money from a thief, *Hinkle*, 532 N.E.2d at 777, Provident obtained legal title to the funds when it accepted the wire transfers from Fleet Bank on April 11 and 13, 2000. Following Provident's acceptance of the funds transferred by Fleet Bank, Regions no longer had title to those funds.** *See Shawmut Worcester County Bank v. First Am. Bank & Trust,* 731 F. Supp. 57, 60 (D. Mass.1990) (**holding that the completion of a wire transfer extinguishes the originator's ownership interest in the funds**). (Emphasis added).

Appellant has proven and Respondent has admitted, that Respondent acted without any legal or contractual authority when it withheld Appellant's funds/credits after Appellant's demand on December 14, 2009 at 9:00am. (CP 206, Item 8, Ex. 3, CP 214) Appellant has proven that Respondent acted without any legal or contractual authority when it committed wire fraud by claiming fraud on sender's account or that the wire was fraudulent in a wire sent to an intermediary bank (Citibank-New York) to gain control of assets under the control of another bank (Banco de Oro) in the Philippines. This is

bank fraud. Respondent is liable to Appellant for the balance shown on his deposit account statement. (CP 206, Item 8, Ex. 3, CP 218 at Total Deposits) The same bank statement that was provided in discovery by Respondent and as the Court is well aware it was supplied as being true and correct. The statement shows $9,323,583.08 in total deposits. Respondent is liable pursuant to the highest law of the land the U.S. Supreme Court for that amount less withdrawals by account holders. *See Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386, 1389 (1992) **("[a] person with an account at a bank enjoys a claim against the bank for funds in an amount equal to the account balance.")**. The facts and the law can be no clearer than this. The legal doctrine of *Stare decisis* required the Trial Court to follow the rulings of the U.S. Supreme Court.

Even if all of Respondent's allegations were true and Appellant or Hanover committed fraud to obtain the funds in his account, which Appellant and Hanover did not, Respondent still had no contractual, legal or any other right to take the funds, as stated by the *United States v. Redcorn*, 528 F.3d 727, 740-741 (10th Cir. 2008) The Court stated: **The funds were "available" from the moment they were deposited in Appellants' BOA accounts, and could be spent, transferred, or otherwise drawn on at their pleasure. It was at that point that "[t]he persons intended to receive the money had received it irrevocably" and the scheme "had reached fruition."** *Kann*, 323 U.S. at 94. (Emphasis Added)

According to the law it makes no difference if Appellant was a party to the scheme or not, the money once deposited in his demand deposit account and given to him by Harrison Hanover was irrevocably his and could be withdrawn and spent in any way shape or form Appellant desired. The acts of the Respondent in denying Appellant access to his account, withholding funds and later taking of the funds from an account of a third party overseas cannot be justified and are contrary to the law. The Trial Court has ignored the U.S. Supreme Court decisions related to this action and U. S. Supreme Courts direction regarding Pro se litigants. Appellant is entitled to the following: Due Process provides that the "rights of *sui juris* litigants are to be construed liberally and held to less stringent standard than formal pleadings drafted by lawyers; if a court can reasonably read pleadings to state valid claims on which a litigant could prevail, it should do so despite the failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirements." *Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972); *Hoag v. MacDougall*, 454 U.S. 364, 70 L. Ed. 2d 551, 102 S. Ct. 700 (1982). The Court should have recognized this is an action on contract allowed the amending of the complaint and afforded Appellant his day in Court. The Trial Court erred in granting Summary Judgment, concluding without explanation that that there were no material facts disputed in the Appellant's lawsuit against the Respondent. Agreement as to material facts is a key component

of entitlement to Summary Judgment. However, Appellant asserted at least ten disputed facts in his Statement of Disputed Facts. (CP 88)

The Trial Court's entire "ruling" in this regard, and its entire explanation as to dispute facts, consisted of its signing the Summary Judgment Order presented by Respondent that simply recited "Plaintiff has failed to establish any material fact in dispute..." As Appellant has amply demonstrated, that is simply not true. The Order goes on to state "It is further ordered, adjudged and decreed that Defendant's motion for partial summary judgment on his claim of conversion is denied." Appellant is not the Defendant as stated within the Order twice.

Appellant submitted a publication from Loyola Marymount and Loyola Law School to the Trial Court dealing with contracts and Article 4A of the UCC which is codified at RCW 62A. However, it was inadvertently missed in the Designation of Clerk's Papers. This was provided to the Court to assist in the explanation of Article 4A and the UCC. The specific issues dealt with in this instant action are addressed within this writing. The Court if it so desires can find this document at the following internet address. (http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2562&context=llr) (Contracting out of the UCC: Variation by Agreement under Articles 3,4and 4A) Appellant request the Court to take Judicial Notice of page 466 at 5 and 6 and page 485 Items (vi.) and (vii.).

IV. CONCLUSION

Appellant has shown that the Trial Court ignored key evidence of Appellant. Appellant has shown the Trial Court ignored U.S. Supreme Court rulings. Appellant has shown disputes of material fact. Respondent misled, misstated and out and out misrepresented its entire case to the Trial Court. Respondent admitted in sworn discovery it never determined ownership but stated in pleadings and open court that it returned the funds to the legal owners. Respondent stated in sworn discovery there was no law, policy or rule that required Respondent to return the transferred funds. However, Respondent claims over and over that Appellant's Account Agreement allowed its actions. Appellant has demonstrated that the Account Agreement and all the law favors Appellant's position. Respondent has nothing to stand on and in fact, has no standing to claim fraud because Respondent was not a party if in fact, a fraud took place. The only evidence Respondent has are three Declarations which actually harm Respondent's case.

The Declaration of May-Ling Sowell shows that she acted prior to the receipt of actual knowledge, as required by statute, in the actions she took in preventing Appellant access to his account at 9:00am on December 14, 2009. Sowell's Declaration shows that all the actions taken was after Respondent had accepted the payment order, had obtained title to the transferred funds and credited Appellant's account. Sowell's Declaration also shows she lied to Appellant and violated his Account Agreement.

The Declaration of Correen King is also flawed. King's Declaration shows that it was the afternoon December 15, 2009, before she was aware of any irregularities. This is after Respondent had accepted the payment order, had obtained title to the transferred funds and credited Appellant's account. King's Declaration says that Respondent reversed the transfers, which require the notification and authorization of the Appellant. Appellant gave no such authorization and received no such notice. King's Declaration also verifies that private financial information was provided to King by Respondent which violates not only Appellant's Account Agreement but the Washington State Constitution Article I Section 7, the Right to Financial Privacy Act, Electronic Communications Privacy Act and the Washington State Consumer Protection Act.

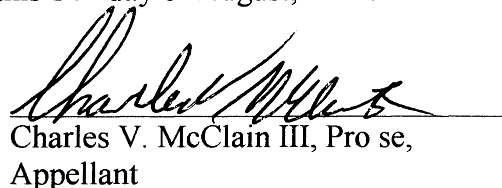
Additionally, King's Declaration does nothing to prove fraud. King states she received e-mails and diverted the funds which makes the transfers authorized based on those e-mails. King does not name any individual nor does she accuse Appellant of sending these e-mails. King's Declaration can't even identify who committed this alleged fraud. Just a thought, would you divert over a million dollars as a result of an e-mail from someone you do not know? It seems unbelievable to Appellant that in this day and age you wouldn't pick up a phone.

The Declaration of Michael Lippert faces the same issues. Lippert's Declaration verifies that the effective payment date was December 14, 2009,

meaning the date the funds are credited to the Respondent and Appellant's account. Lippert's Declaration also claims the transfers were a result of a series of e-mails making his transfer authorized as well. It wasn't until the afternoon of December 14, 2009; Cox determined the e-mails were fraudulent. Again millions of dollars and no phone call. This too is after Respondent had accepted the payment order, had obtained title to the transferred funds and credited Appellant's account. The Lippert Declaration also says that Respondent reversed the transfers, which require the notice and authorization of the Appellant. Appellant gave no such authorization and received no such notice. Again the Lippert Declaration does not identify anyone nor does it accuse the Appellant of sending the e-mails or participation in the alleged fraud. King's Declaration also verifies that private financial information was provided to King by Respondent.

The Respondent and their Counsel through their misconduct, unethical, dishonest, deceitful and illegal actions have misrepresented, the facts, the issues, the law and have contradicted their own sworn statements that were provided in discovery to Appellant. This Court on its own motion should sanction Respondent and their Counsel for their actions and misconduct.

RESPECTFULLY SUBMITTED this 14th day of August, 2015.



Charles V. McClain III, Pro se,
Appellant

CERTIFICATE OF SERVICE

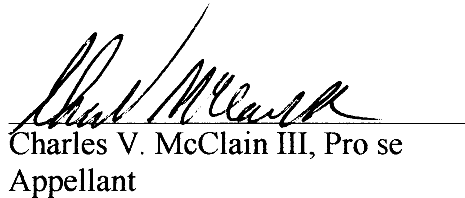
I hereby certify on 14th day of August, 2015, Appellant caused to be mailed a copy of the Informal Brief of Appellant using Priority U.S. Mail to the Respondent as follows:

McKay Huffington & Tyler, PLLC.
14205 SE 36th St., Suite 325
Bellevue, WA 98006
Attn: William McKay
Jean Huffington

And the Court as Follows:

Office of the Clerk
The Court Of Appeals
Division I
600 University St.
Seattle, WA 98101-4170

STATE OF WASHINGTON
2015 AUG 17 AM 10:24



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Appellant