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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,
as Assignee and Subrogee of Skils' Kin,

Plaintiff,

v.

WASHINGTON TRUST BANK,

Defendant.

PLAINTIFF TRAVELERS CASUALTY AND SURETY COMPANY OF
AMERICA'S OPENING BRIEF ON CERTIFIED QUESTIONS

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 ORIGINAL

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INTRODUCTION

This case presents three certified questions from the United States District Court for the Eastern District of Washington. The certified questions concern fundamental principles of commercial paper and bank-customer relations under the Uniform Commercial Code (“UCC” or “Code”). The Court’s answers to these questions will determine whether the UCC and Washington law impose liability on a bank for slipshod banking practices that materially and directly facilitated an embezzlement when the bank had the last and best chance to stop the theft.

The first two certified questions relate to the “bank statement” defense under Subsection 4-406(f) of the UCC, RCW 62A.4-406(f). When a bank pays its customer’s check to someone not entitled to payment, the bank can sometimes defend against the customer’s claim to recover the funds if the customer did not review its bank statements and canceled items and timely report discrepancies to the bank. The first certified question asks whether this defense is available under the particular facts of this case under Washington law. The second certified question, which the Court need only address if it answers “yes” to the first question, asks whether a bank can trigger this defense by making images of canceled items available through an online banking service. The third certified question asks whether the defendant bank committed

commercially unreasonable conduct as a matter of law on the record before the Court.

The Court should answer the first certified question “no,” not reach the second certified question and answer “yes” to the third certified question.

CERTIFIED QUESTIONS

The federal district court certified the following questions:

1. When a check (i) is presented for payment, (ii) bears no signature in the name of the payee on the back, and (iii) the drawee/payor bank pays the check over the counter, in cash, to an individual who is not the payee but who is an authorized signer on the account and who signs the back of the check in her own name, is the signature on the back of the check an “unauthorized signature,” “alteration,” or “unauthorized indorsement” as a matter of law imposing on the customer the notice requirements of RCW 62A.4-406(f)?
2. If the Answer to Question #1 is “Yes”, does providing a bank customer with a listing of the front of the checks and electronic access to images of the front and back of the checks via on-line banking make the “statement of account” and “items” reasonably available as required by 4-406(a)?
3. Does a bank fail to exercise ordinary care as a matter of law if it pays a check to a person other than the payee when the check contains no indorsement in the name of the payee?

STANDARD OF REVIEW

This Court reviews certified questions of law de novo. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 420, 334 P.3d 529, 533 (2014) (citing *Carsen v. Global Client Solutions, LLC*, 171 Wn.2d 486,

493, 256 P.3d 321 (2011)). The Court considers the questions presented “in light of the record certified by the federal court.” *Id.*

STATEMENT OF THE CASE

Skils’Kin Receives Funds from the Social Security Administration on Behalf of Its Clients

Skils’Kin, a community-based, not-for-profit agency with offices located in Spokane, Washington and elsewhere, provides services to Spokane-area adults with developmental, physical and mental disabilities. (ECF No. 86-1, App. Ex. 1, p. A23, ¶ 4) Among other services for its clients, Skils’Kin provides certain money management services. (ECF No. 86-1, App. Ex. 1, p. A23, ¶ 5)

In its usual course of business, Skils’Kin is appointed by the Social Security Administration (“SSA”) as a “representative payee” with regard to certain clients. (ECF No. 86-1, App. Ex. 1, p. A23, ¶ 6) As a representative payee, Skils’Kin receives funds by Automated Clearing House transfer from the SSA for the use of the client. (Brian Behler Decl., ECF No. 86-1, App. Ex. 13, p. A447, ¶ 8) Skils’Kin does not receive checks payable to its clients from the SSA or from other third-party payors. (ECF No. 86-1, App. Ex. 13, p. A448, ¶ 9)

Washington Trust Bank Cashed Checks for Shannon Patterson Even Though the Checks Were Payable to Third-Party Payees

Shannon Patterson (“Patterson”) was an authorized signer on

Skils'Kin accounts (the "Accounts") at Washington Trust Bank ("WTB" or "the Bank"). (ECF No. 86-1, App. Ex. 1, p. A24, ¶ 8) Over a period of time, Skils'Kin issued 353 checks (the "Checks") drawn on one of the Accounts that Patterson signed on the front as an authorized signer of Skils'Kin. (ECF No. 86-1, App. Ex. 1, p. A24, ¶ 9; Checks, ECF No. 86-1, App. Ex. 2, p. A28-A381)

The Checks were payable to the order of third parties, and Patterson was not named as a payee on any of the Checks. (ECF No. 86-1, App. Ex. 1, p. A24, ¶ 10; ECF No. 86-1, App. Ex. 2, pp. A28-A381) The named payees did not indorse any of the Checks over to Patterson. (ECF No. 86-1, App. Ex. 1, p. A24, ¶ 11; ECF No. 86-1, App. Ex. 2, pp. A28-A381) None of the Checks were deposited to any account. Rather, Patterson transferred each of the Checks in person to a Washington Trust Bank teller in exchange for cash, *i.e.* United States currency, after signing her name on the back of each of the Checks. (ECF No. 86-1, App. Ex. 1, p. A24, ¶ 12; ECF No. 86-1, App. Ex. 2, p. A28-A381)

Patterson Signed the Backs of the Checks to Acknowledge and Document Her Receipt of the Cash

WTB had Patterson sign the backs of the Checks so the bank had "proof" of who "took the money" or "proof of who cashed the check." (Burgess Dep., ECF No. 86-1, App. Ex. 16, pp. A480-A481, 81:24-82:20)

Signatures on the backs of cashed checks as proof of who received the cash are receipts rather than indorsements. (Edwards Expert Report and Declaration, ECF No. 86-1, App. Ex. 3, pp. A399-A405)

Patterson did not sign the back of the Checks to indorse them, *i.e.* to negotiate the Checks to a third party; to restrict payment on the checks (such as “for deposit only”); or to incur indorser’s liability on the checks. (ECF No. 86-1, App. Ex. 3, pp. A399-A405) The circumstances of the check-cashing transactions unambiguously indicate that Patterson signed the backs of the Checks as a receipt for the cash. (ECF No. 86-1, App. Ex. 3, pp. A399-A405; ECF No. 86-1, App. Ex. 16, pp. A480-A481, 81:24-82:20)

WTB has a teller manual with which the Indiana branch tellers were familiar. (Atha Dep., ECF No. 86-1, App. Ex. 17, pp. A486, 11:2-4; Jarrell Dep., ECF No. 86-1, App. Ex. 18, pp. A501, 48:21-24) Section TEL-202 of WTB’s teller manual, entitled “Types of Endorsements,” lists six categories of endorsements. The Patterson signatures on the backs of the Checks do not fall within any of these categories of endorsements. (TEL-202, ECF No. 86-1, App. Ex. 6, p. A415-A417; ECF No. 86-1, App. Ex. 18, pp. A502-A503, 49:18-51:8; ECF No. 86-1, App. Ex. 17, pp. A491-A493, 33:14-23, 35:25-37:1) As the term is used in the banking industry, Patterson’s signatures on the backs of the Checks are not

“indorsements.” (ECF No. 86-1, App. Ex. 3, pp. A399-A405)

WTB Tellers Did Not Act Consistently With the Text of WTB’s Own Teller Manual

WTB’s teller training manual emphasizes the “importance” of “following the rules” and “following all policies and procedures.” (Teller Training Manual, ECF No. 86-1, App. Ex. 4, p. A410) According to this manual, following the rules and following all policies and procedures is important, among other reasons, because doing so “ensure[s] the safety of our customers’ funds.” (ECF No. 86-1, App. Ex. 4, p. A410) Following the rules and following all policies and procedures is also important because doing so “ensures consistency. All customers expect fair and equal treatment. By following the rules, you make sure each customer’s accounts are treated fairly.” (ECF No. 86-1, App. Ex. 4, p. A410)

Section TEL-201 of WTB’s teller manual, entitled “Conditions for Negotiability,” states “Positive identification of the payee must be VERIFIED for Bank customers and non-customers.” (TEL-201, ECF No. 86-1, App. Ex. 5, p. A414) Notwithstanding Section TEL-201, WTB tellers cashed the Checks for Patterson even though (i) Patterson was not a payee on any of the Checks, (ii) the named payees were non-customers, (iii) Patterson presented no positive identification of any of the payees, and (iv) the teller did not verify any such positive identification for any of

the payees. (ECF No. 86-1, App. Ex. 1, p. A24, ¶¶ 10, 12; ECF No. 86-1, App. Ex. 2, p. A28-A381)

Section TEL-203 of WTB's teller manual, entitled "Endorsement Policies," provides:

2. The payee(s)/presenters must endorse the check exactly as the name(s) appear(s) on the face of the check
4. If the presenter is NOT THE PAYEE, ensure the payee's endorsement is on the back of the check. Have the presenter also endorse the check.

(TEL-203, ECF No. 86-1, App. Ex. 7, pp. A419) Notwithstanding Section TEL-203 of the teller manual, WTB tellers cashed the Checks for Patterson even though the payees had not indorsed any of the Checks. (ECF No. 86-1, App. Ex. 1, p. A24, ¶¶ 11-12; ECF No. 86-1, App Ex. 2, pp. A28-A381)

Section TEL-206 of WTB's teller manual, titled "Manager Approval Policies," provides:

- A manager's approval for cashing checks is required for the following:
6. UNACCEPTABLE IDENTIFICATION presented for check cashing purposes.

(TEL-206, ECF No. 86-1, App. Ex. 8, p. A422)

Section TEL-207 of WTB's teller manual, titled "Manager Approval Procedures," provides: "Initials on the FACE of the check

indicates [sic] that the manager will assume full responsibility for the validity of the item.” (TEL-207, ECF No. 86-1, App. Ex. 9, p. A424)

Notwithstanding Sections TEL-206 and TEL-207 of the teller manual, the Checks do not reflect any markings on the face of the Checks indicating that a manager approved the transactions. (ECF No. 86-1, App. Ex. 2, pp. A28-A381)

Section TEL-209 of WTB’s teller manual, titled “Check Cashing Procedures,” provides:

1. EXAMINE the check(s) for all the required conditions of negotiability (refer to TEL-201).
NOTE: . . . An authorized signer on a business account does NOT have the authority to cash checks payable to the business OR to receive cash back from a deposit.
2. If the payee is a non-customer, REQUEST valid identification (refer to TEL-205) and have the item ENDORSED IN YOUR PRESENCE.”

(TEL-209, ECF No. 86-1, App. Ex. 10, p. A426) Notwithstanding Section TEL-209 of the teller manual, WTB tellers cashed the Checks for Patterson even though they did not meet the conditions of negotiability set forth in TEL-201 and even though the payees were non-customers who did not endorse the Checks at all (let alone in the presence of the teller) and even though Patterson presented no valid identification that she was the payee. (ECF No. 86-1, App. Ex. 1, p. A24, ¶¶ 11-12; ECF No. 86-1, App. Ex. 2, p. A28-A381)

Section TEL-209 also provides that “An authorized signer on a business account does NOT have the authority to cash checks payable to the business OR to receive cash-back from a deposit.” (TEL-209, ECF No. 86-1, App. Ex. 10, p. A426) Notwithstanding this provision of Section TEL-209 of the teller manual, WTB tellers cashed Checks on the Skills’Kin business accounts for Patterson, an authorized signer on the accounts. (ECF No. 86-1, App. Ex. 1, p. A24, ¶¶ 8-9, 12; ECF No. 86-1, App. Ex. 2, p. A28-A381)

WTB’s written procedures did not permit the cashing of checks for Patterson when the checks were payable to third parties who were not physically present. (Karin Selland Decl., ECF No. 86-1, App. Ex. 15, p. A462, ¶ 6; ECF No. 86-1, App. Ex. 3, pp. A388-A397; 5; ECF No. 86-1, App. Ex. 20, p. A514, 8:19-9:6; ECF No. 86-1, App. Ex 18, p. A504, 53:22-54:1)

By cashing the Checks for Patterson, WTB did not comply with reasonable commercial standards of the banking industry applicable to WTB. (ECF No. 86-1, App. Ex. 3, pp. A388-A397) By cashing Checks payable to third parties for Patterson, WTB did not comply with reasonable commercial standards of fair dealing. (ECF No. 86-1, App. Ex. 3, pp. A396-A397)

Patterson Had No Authority to Cash the Checks

All material contact between WTB and Skils'Kin was through Patterson. (ECF No. 86-1, App. Ex. 13, pp. A446-A447, A448, A449-A450, A450, A451-A452, ¶¶ 4-5, 9, 12, 14, 16, 18; ECF No. 86-1, App. Ex. 16, pp. A475-A476, 51:25-52:23) Skils'Kin did not authorize Patterson to cash checks Skils'Kin had issued to its clients or to any other third parties. (ECF No. 86-1, App. Ex. 13, pp. pp. A446-A447, A449-A450, A450, A451-A452, ¶¶ 4-5, 12, 14, 18) No one at Skils'Kin ever told anyone at WTB, or otherwise held out to WTB, that Patterson was authorized or permitted to cash checks Skils'Kin had issued to its clients or to any other third parties. (ECF No. 86-1, App. Ex. 13, pp. A447, A449-A450, A450, A451-A452, ¶¶ 5, 12, 14, 18) Moreover, the SSA did not authorize Skils'Kin, Patterson or any other representative or agent of Skils'Kin to cash checks that Skils'Kin had issued to its clients or to any other third parties. (ECF No. 86-1, App. Ex. 13, p. A448-A449, ¶ 11)

Skils'Kin clients did not authorize Skils'Kin, Patterson or any other representative or agent of Skils'Kin to cash checks that Skils'Kin had issued to its clients or other third parties. (ECF No. 86-1, App. Ex. 13, p. A448-A449, ¶ 11) Neither Skils'Kin nor Patterson was an attorney in fact of Skils'Kin clients. (ECF No. 86-1, App. Ex. 13, p. A447, ¶¶ 6-7) Neither Skils'Kin nor Patterson served as a guardian of Skils'Kin clients.

(ECF No. 86-1, App. Ex. 13, p. A447, ¶¶ 6-7)

WTB's Statements of Account

Skils'Kin received statements of account from WTB that listed the check numbers, posting dates and amounts of the checks paid by the bank during the statement period. (Nicolle Laporte Decl., ECF No. 86-1, App. Ex. 14, p. A456, ¶ 3)

Skils'Kin's statements of account contained no information as to whether the checks were cashed, paid over the counter (for cash or other consideration), deposited, negotiated or otherwise transferred before being paid. (ECF No. 86-1, App. Ex. 14, p. A456, ¶ 4)

Skils'Kin's statements of account contained no information as to any signature on the backs of the checks. (ECF No. 86-1, App. Ex. 14, p. A456, ¶ 5) WTB did not send canceled checks to Skils'Kin by mail with the statements of account. (ECF No. 86-1, App. Ex. 14, p. A457, ¶ 6) WTB sent Skils'Kin copies by mail of the front sides of the checks listed on the corresponding statement of account. (ECF No. 86-1, App. Ex. 14, p. A457, ¶ 7) WTB did not send Skils'Kin copies by mail of the backs of the checks listed in the statements of account. (ECF No. 86-1, App. Ex. 14, p. A457, ¶ 8) Skils'Kin's statements of account had no instructions on how Skils'Kin could obtain the original canceled checks or copies of the backs of canceled checks. (ECF No. 86-1, App. Ex. 14, p. A457, ¶ 9)

Nicolle Laporte, Skils'Kin's Accounting Manager, had responsibility for reconciling Skils'Kin's bank statements with Skils'Kin's check ledgers on a monthly basis. She diligently performed that function every month and personally reconciled all of Skils'Kin's account statements at WTB. (Nicolle Laporte Decl., ECF No. 86-1, App. Ex. 14, pp. 455-456, ¶¶ 1-2)

Beginning in January 2011, after the Bank started wrongfully cashing third party checks for Patterson, Ms. Laporte also had access to Skils'Kin's accounts through the Bank's online banking service. (Nicolle Laporte Second Decl., ECF No. 103, p. 2, ¶ 3) However, the terms and conditions that the Bank included on the signature sheet for the Accounts did not refer to online banking and reflect no agreement by Skils'Kin that it would accept statements and items online for review. (ECF No. 90-1, p. 24)

Proceedings in the United States District Court

After paying Skils'Kin's insurance claim, Plaintiff Travelers Casualty and Surety Company of America ("Travelers") filed suit against the Bank, alleging that the Bank was liable for paying Checks that were not properly payable under Subsection 4-401(a) of the UCC, RCW 62A.4-401(a). (ECF No. 42) After completing discovery, the parties filed cross-motions for summary judgment. The district court denied the Bank's

motion completely, granted Travelers' motion in part and set the case for trial. (ECF No. 140, *Travelers Cas. & Sur. Co. of America v. Washington Trust Bank*, 86 F. Supp. 3d 1148 (E.D. Wash. 2015)) In pretrial proceedings, the Court determined that it would certify certain questions to this Court and entered an order staying all proceedings pending review by this Court. (ECF No. 181) On November 10, 2015, the district court entered its order setting forth the certified questions that are the subject of this proceeding. (ECF No. 193).

SUMMARY OF ARGUMENT

Contrary to elementary principles of banking, WTB *paid* Checks in cash – *i.e.*, exchanged them for U.S. currency – for Patterson even though Patterson was neither the payee nor the indorsee of the Checks.

For example, on December 5, 2012, Patterson approached a teller window with a check for \$3,690.00 payable to the order of “Joe Childs.” (ECF No. 86-1, p. A351) Joe Childs, the payee, had not indorsed the check (either in blank or to Skils’Kin or to Patterson) and he did not approach the teller window with Patterson. Nonetheless, the teller handed over \$3,690.00 in currency *to Patterson*, simply assuming that she would deliver the cash *to Joe Childs*. The teller had Patterson sign the back of the check – in her own name and not in the name of Mr. Childs – before handing her the cash. Patterson stole the money from this and the 352

other transactions at issue before committing suicide.

WTB is liable for paying these Checks because they were not “properly payable” under Subsection 4-401(a) of the UCC, RCW 62A.4-401(a). Recognizing that a check made payable to one person is not properly payable to another, WTB has principally defended this case under a preclusion subsection of Article 4 of the UCC, RCW 62A.4-406(f). WTB argues that, even if the Checks were not properly payable, Travelers is precluded from asserting its claims under Subsection 4-406(f) because Skils’Kin did not timely report unauthorized indorsements or unauthorized signatures on the checks. The first two certified questions pertain to this UCC subsection.

Subsection 4-406(f) does not apply under the facts of this case, the plain language of the statute and fundamental principles of commercial law. Subsection 4-406(f) can give a bank a defense when a check was not authorized by the customer or paid to someone to whom the check was not negotiated. Those are not the facts here. The UCC does not require a customer to report to the bank facts that the bank tellers already knew from transacting the checks. The Bank facilitated Patterson’s theft by cashing Checks that it never should have cashed. No preclusion in Subsection 4-406(f) applies, so the Court should answer the first certified question “no.”

The Court need not reach the second certified question. If it does,

however, the answer should also be “no.” To invoke Subsection 4-406(f), a bank must make statements and canceled items “available” to the customer. The bank does not get to choose unilaterally how it makes statements and items available. If the customer has not agreed that the bank may make statements and items available electronically through the bank’s online banking system, the mere existence of the system does not meet the statutory prerequisite to invoke Subsection 4-406(f).

Finally, substantial case law and evidence of record establishes unequivocally that a bank fails to exercise “ordinary care” under the UCC if it pays a check for a person other than the named payee when the check was never negotiated to that person. The Court should answer the third certified question “yes.”

ARGUMENT

I. Subsection 4-406(f) Does Not Apply to Travelers’ Claims, so the Court Should Answer “No” to the First Certified Question

Patterson signed the back of each Check. The first certified question asks whether her signature on the back was, as a matter of law, either an unauthorized alteration, an unauthorized indorsement or an unauthorized customer signature subject to Subsection 4-406(f) of the UCC. Section 4-406(f) does not apply in this case under the plain language of the statute and fundamental principles of negotiable

instruments law.

A. The Nature of Travelers' Claims and the Bank's Defense Under Subsection 4-406(f)

Travelers claims that the Bank is liable because it debited Skills'Kin's account upon paying Skills'Kin Checks that were not "properly payable" under RCW 62A.4-401(a). The Bank asserts a defense under RCW 62A.4-406(f). Since Subsection 4-406(f) applies to some, but not all, situations where a bank violates Subsection 4-401(a), this defense must be analyzed in light of the nature of Travelers' affirmative claim.

1. Travelers' Claim Under Subsection 4-401(a) That the Checks Were Not Properly Payable

Like all checks under the UCC, each Check was an "order" by Skills'Kin (as drawer) to the Bank (as drawee) to pay a fixed amount of money to the order of a specific payee. RCW 62A.3-104(f), (e) & (a). Under the Code, the Bank is only allowed to pay checks that are "properly payable." *Id.* § 4-401(a). For relevant purposes, a check is only "properly payable" to a "holder" of the check, because a "holder" is "entitled to enforce" the check. *Id.* § 3-301(i). *See generally Brown v. Dep't of Commerce*, 184 Wn.2d 509, 525, 2015 Wash. LEXIS 1191, at **18-19 (Oct. 22, 2015) (a holder is a "person entitled to enforce" an instrument under the UCC).

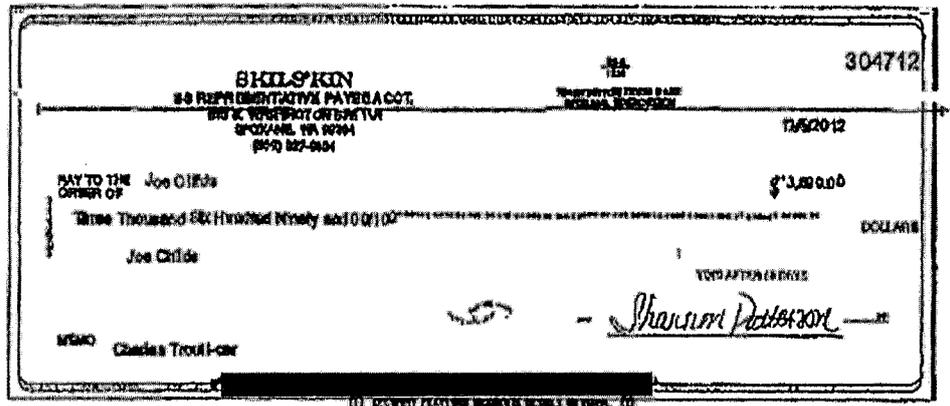
Under the Code's definition, Patterson was not the "holder" of any

of the Checks because the Checks were payable to someone else. RCW 62A.1-201(b)(21)(A) (“holder” means a *payee* in *possession* of the instrument). If the original payee had both indorsed the check and delivered it to a third party, that transaction would constitute a “negotiation” of the check to the third party, who would then become the new “holder” with rights to enforce. RCW 62A.3-201. In the present case, the original payees did not negotiate the Checks over to Patterson, yet the Bank paid her anyway. The Checks thus were not “properly payable” to Patterson when the Bank paid her.

For example, in *Tonelli v. Chase Manhattan Bank, N.A.*, 41 N.Y.2d 667, 363 N.E.2d 564 (1977), a case very similar to the present facts, a bank customer wrote a certified check payable to a payee. The customer’s employee personally brought the check to the drawee bank and presented it for payment even though it bore no indorsement of the payee. The drawee bank took the check from the employee, charged the customer’s account and gave the employee a cashier’s check. The New York Court of Appeals held that the drawee “breached the duty owed to its customer” because the original check, “lacking the necessary indorsement of the payee, was not ‘properly payable’ and thus the [customer’s] account could not be charged for the amount the check.” 41 N.Y.2d at 669, 363 N.E.2d at 566 (citations omitted). The present case is very similar to *Tonelli*:

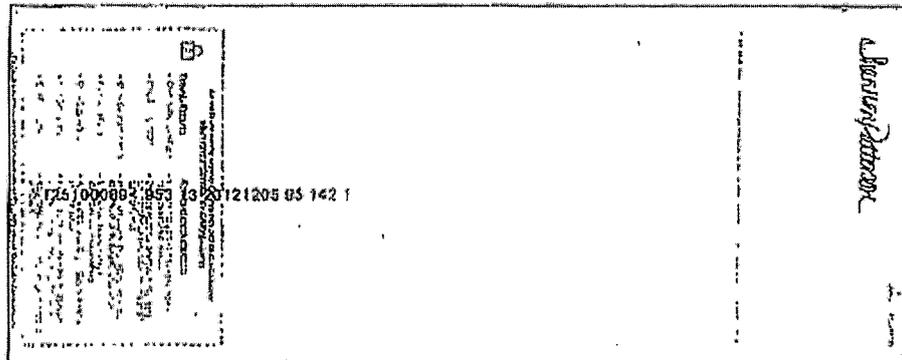
WTB, as the drawee bank, cashed checks for Patterson even though they were payable to others who had not indorsed them. The Checks were not properly payable to Patterson just as they were not properly payable to the employee in *Tonelli*.¹

To revisit the example described in the Summary of Argument (*supra* p. 13), on December 5, 2012, Patterson approached a teller window with this check for \$3,690.00 payable to the order of “Joe Childs”:



(ECF No. 86-1, p. A351) Although Patterson signed the back of the check, Joe Childs, the payee, did not:

¹ Similarly, a check is not properly payable to a putative indorsee if the payee's indorsement is forged. *Bank of the W. v. Wes-Con Dev. Co.*, 15 Wn. App. 238, 240-41, 548 P.2d 563, 566 (1976) (“A drawee bank may not debit a drawer's account after paying a check with a forged payee's endorsement. When the payee . . . deposited the check . . . no negotiation occurred because the necessary endorsement of the other payee . . . was lacking. Checks containing a forged endorsement are not ‘otherwise properly payable’ and may not be charged to the drawer's account”) (citations omitted); UCC § 4-401 Official Cmt. 1 (“An item containing a forged drawer's signature or forged indorsement is not properly payable”).



(*Id.*) Furthermore, Joe Childs did not approach the teller window with Patterson; and neither Skils'Kin nor Patterson had ever delivered any power of attorney, guardianship order or other documentation to the Bank establishing that Patterson had the right to present Mr. Childs' checks for payment. The teller handed over \$3,690.00 in currency to Patterson when the check was not properly payable to her. Accordingly, the Bank had no right to charge the check to Skils'Kin's account. *Bank of the W.*, 15 Wn. App. at 241, 548 P.2d at 566.²

² Although never pleaded as a defense, WTB argued in response to Travelers' summary judgment motion that Patterson was a holder under RCW 62A.3-404(b)(1). Travelers contended in the district court that the Bank had waived this defense and that the evidence did not support the defense in any event. The district court has not yet resolved those issues and the certified questions do not pertain to Section 3-404. Moreover, even if applicable, Section 3-404 is not a complete defense for the Bank. It merely triggers a comparative fault analysis whereby the Bank and Skils'Kin (Travelers) would share the loss to the extent that each party's failure to exercise ordinary care substantially contributed to the loss. RCW 62A.3-404(d).

2. The Bank's Defense Under Subsection 4-406(f)

In circumstances specified in the statute, Subsection 4-406(f) can give a drawee bank a defense to a customer's claim under Subsection 4-401(a) that the bank had paid a check that was not properly payable. Generally, the defense is triggered when the bank gives the customer a bank statement showing payment of the check along with the canceled check. Thereafter, the customer must review the statement and the canceled check and report the specified anomalies within certain time periods if it wishes to pursue a claim against the bank. *See generally* RCW 62A.4-406.

By its own terms, however, Subsection 4-406(f) does not bar a customer's entire *claim*, as a traditional statute of limitation bars a plaintiff's claim if the plaintiff files the claim after the statutory period.³ Rather than barring a *claim*, Subsection 4-406(f) only "preclude[s]" the customer (if the other statutory prerequisites are met) "from asserting against the bank" the "customer's unauthorized signature," an "alteration" or an "unauthorized indorsement" on the item in question. RCW 62A.4-406(f). If the customer's claim does not require the customer to assert one of these three traits, Subsection 4-406(f) does not apply. *Travelers Indem.*

³ In a separate section, Article 4 of the UCC has a typical statute of limitations that applies to entire claims. RCW 62A.4-111.

Co. v. Scalea, No. 85 Civ. 0400 (WK), 1987 U.S. Dist. LEXIS 11440, at *16-18 (S.D.N.Y. 1987) (refusing to apply § 4-406 where there were no unauthorized alterations, customer signatures or indorsements at issue, noting that bank cited no “decision which extends the application of U.C.C. § 4-406 beyond its plain language”).

This distinction between barring entire claims, like a traditional statute of limitation, and barring the customer from “asserting” certain traits of a check when pursuing a claim, is significant and reflects the careful balancing of risks inherent in the structure of the UCC. By the plain language of the statute, if the customer’s 4-401(a) claim does not depend on the presence of an unauthorized alteration, an unauthorized indorsement or the customer’s unauthorized signature, then the preclusion in Subsection 4-406(f) does not apply. RCW 62A.4-406(f).

The underlying policy is straightforward. If a given check is not facially suspect (*e.g.* if the customer’s drawer signature appears correct and the indorsement is in the same name as the payee), then the bank should be able to pay the check. If the check has an unauthorized signature or indorsement notwithstanding the fact that it appears facially proper, the customer is better placed than the bank to discover the loss by reviewing its bank statements and canceled items.

On the other hand, if the transaction is irregular on its face, such as

when the bank cashes the check for a third party knowing from the front and back of the check that the payee had not negotiated the check, it makes little sense to absolve the bank from the consequences of its failure to comply with the Code simply because the customer did not discover and report the bank's misconduct. *See Ford Motor Credit Co. v. United Services Automobile Ass'n*, 11 UCC Rep. Serv. 361, 364, 1972 WL 20865 (N.Y. City Civil Ct. 1972) ("As to Chase, [the drawee bank], there is no 'notice' [the customer] could have given at any time that would have been superior to that derived from even a cursory examination of the instrument by Chase's [employees]").

Every bank can and should require those who present checks for payment to "give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority do so." RCW 62A.3-501(b)(2)(ii). Indeed, WTB's own teller manual stated: "Positive identification of the payee must be VERIFIED for Bank customers and non-customers." (TEL-201, ECF No. 86-1, App. Ex. 5, p. A414) When a bank cashes a check for someone other than the payee and knows from the back of the check that the payee never indorsed the check, it does not need the customer to tell the bank that the check is not properly payable. Any competent banker knows the problem already. *Ford Motor Credit Co., supra*. The drafters did not design the Code to protect a bank from its

knowing failure to handle a check properly merely because the customer did not catch the bank's mistake. Blaming a customer for not reporting a fact the bank already knew is not a defense. *Ford Motor Credit Co.*, 11 UCC Rep. Serv. at 364; *Madison Park Bank v. Field*, 64 Ill. App. 3d 838, 841, 381 N.E.2d 1030, 1032 (1978) (“an unauthorized, altered or forged signature would be more readily discoverable by a depositor” but “discovering a missing signature places no undue onus on a bank”).

Cases around the country explain these principles thoroughly when rejecting a bank's 4-406 defense as a matter of law. For example, in *Ford Motor Credit Co.*, a customer sued its drawee bank for paying a check that bore no indorsement of the payee. The bank argued that the plaintiff should have discovered and reported the missing indorsement under Section 4-406. The court rejected the defense as a matter of law and granted summary judgment to the plaintiff, explaining:

That a required endorsement is missing, however, is apparent for all to see, if they would but look. [Chase, the drawee bank, was] palpably negligent in honoring the check in the face of the missing endorsement. As to Chase, there is no “notice” [the customer] could have given at any time that would have been superior to that derived from even a cursory examination of the instrument by Chase's employees [sic]. It is not this court's understanding of the purpose and intent of § 4-406 that it should stand as an impediment to the redress of so patent a breach of the bank's contractual obligation to its depositor. Accordingly, [the customer's] cross-motion for summary judgment must be granted.

11 UCC Rep. Serv. at 364.

Other cases are in accord. *See Seaman Corp. v. Binghampton Sav. Bank*, 220 A.D.2d 62, 64, 643 N.Y.S.2d 767, 770 (1996) (“Moreover, UCC 4-406 does not apply, on its face, to missing endorsements”) (citation omitted); *Smith Barney, Harris Upham & Co. v. Citibank*, 162 A.D.2d 108, 109, 556 N.Y.S.2d 61, 63 (1990) (“While it is true that a depositor is under a duty to examine statements and canceled checks to discover irregularities in the account and notify the bank, where a payee’s endorsement is entirely missing rather than forged, a bank that pays such an instrument cannot avoid liability on the basis of the drawer’s subsequent failure to discover the irregularity”) (citation omitted); *Travelers Ins. Co. v. Connecticut Bank & Trust Co.*, 481 A.2d 111, 113 (Sup. Ct. Conn. 1984) (“A *missing* endorsement does not fall within the definition of ‘unauthorized’ endorsement under [UCC § 1-201(b)(41)],” so the preclusion in § 4-406 regarding unauthorized indorsements does not apply to checks with missing indorsements) (emphasis in original); *Philadelphia Commercial Dev. Corp. v. Continental Bank*, 29 Phil. Co. Rptr. 302, 322, 1995 WL 1315964 (Ct. Common Pl. of Pa. 1995) (UCC § 4-406 does not apply “where payment of a check without a necessary endorsement is alleged”); *cf. Madison Park Bank*, 64 Ill. App. 3d at 841, 381 N.E.2d at 1032 (to say that “unauthorized” means “missing” requires

“a tortured construction and interpretation of section 4-406[f]”; “an unauthorized, altered or forged signature would be more readily discoverable by a depositor” but “discovering a missing signature places no undue onus on a bank”).

Subsection 4-406(f) requires customers to discover and report checks that appear bona fide when, in fact, they were either unauthorized or not negotiated to the person presenting them for payment. The subsection does not require customers to discover and report to the bank that the bank had paid a check that was facially not payable to the person the bank paid.

B. Subsection 4-406(f) Does Not Bar Travelers’ Claims

Given this statutory framework, Subsection 4-406(f) does not apply to Travelers’ claims for two reasons. First, Travelers’ claims under Subsection 4-401(a) do not depend on unauthorized alterations, unauthorized indorsements or unauthorized customer signatures on the Checks. Accordingly, the preclusion in Subsection 4-406(f) is immaterial. Second, Patterson’s signature on the backs of the Checks were not, as a matter of law, unauthorized alterations, unauthorized indorsements or unauthorized customer signatures. Accordingly, Subsection 4-406(f) imposed no obligation on Skills’Kin to discover and report anything under the facts before the Court.

1. Travelers Does Not Assert Unauthorized Alterations, Indorsements or Customer Signatures

Travelers sues WTB in a single-count complaint alleging that the Checks “were not ‘properly payable’ within the meaning of RCW 62A.4-401(a) because they were not endorsed by the payee.” (2d Am. Compl., ECF No. 42, p. 3) Travelers does not – and need not – allege that the Checks bore unauthorized alterations, indorsements or customer signatures. Rather, the Checks were not properly payable to Patterson for a different reason, namely that she was not the payee or indorsee. *Tonelli*, 41 N.Y.2d at 669, 363 N.E.2d at 566. The Bank knew this fact at the instant its tellers negligently facilitated each fraudulent transaction by Patterson, and certainly did not need to rely on Skils’Kin to discover and report those same facts after reviewing statements and canceled checks weeks later.

Because Travelers’ claim does not depend on any one of the three irregularities referenced in Subsection 4-406(f), the subsection provides no defense to the Bank under the facts before the Court. “[W]here a payee’s endorsement is entirely missing rather than forged, a bank that pays such an instrument cannot avoid liability on the basis of the drawer’s subsequent failure to discovery the irregularity.” *Smith Barney, Harris Upham & Co.*, 162 A.D.2d at 109, 556 N.Y.S.2d at 63.

2. The Checks Bear No Unauthorized Alterations, Indorsements or Customer Signatures

Subsection 4-406(f) also does not apply to these Checks because the Checks do not have unauthorized alterations, indorsements or customer signatures.

a. Travelers' Claims Do Not Involve Unauthorized Alterations

The Court may summarily dispose of any issue over “alterations.” There is no evidence that any of the Checks were ever altered. Travelers has never alleged any alterations on any checks. The Bank has never contended that Subsection 4-406(f) applied because Skills’Kin failed to discover or report alterations. As a matter of law and fact, Patterson’s signatures on the backs of the Checks were not “alterations” that trigger Subsection 4-406(f). The Court should answer “no” to this aspect of the first certified question.

b. Patterson’s Signatures on the Backs of the Checks Were Not “Unauthorized Indorsements”

The Bank’s 4-406(f) defense also fails because Patterson’s signatures on the backs of the Checks were not “indorsements,” and thus could not possibly be “unauthorized indorsements” under Subsection 4-406(f).

While in every-day speech people sometimes loosely use the term

“indorsement” to refer to any signature on the back of a check, the legal meaning of the term in the UCC depends on the *purpose* of the signature, not its *location*. As the UCC Official Comments state, “‘Indorsement’ is defined in terms of the *purpose* of the signature.” UCC § 3-204 Official Cmt. 1 (emphasis added). The statutory definition sets forth three such “purposes” for indorsements: “(i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser’s liability on the instrument” RCW 62A.3-204(a). None of these purposes even arguably applies to Patterson’s signature on the backs of the Checks.

i. Patterson Did Not Negotiate the Checks

First, Patterson’s signatures on the backs of the Checks were obviously not for the purpose of “negotiating” them. *Id.* “Negotiation” is the transfer of a check by the “holder” to a third party, who thereby becomes the new “holder.” RCW 62A.3-201. A check payable to an identified person may only be negotiated if the holder indorses the check. *Id.* § 3-201(b). The “holder” of a check payable to an identified person is the payee if she or he possesses the check. RCW 62A.1-201(b)(21)(A). Patterson possessed the Checks, but the Checks were not payable to her. Accordingly, she was not the holder and could not possibly have indorsed the Checks to negotiate them. Said another way, only a payee or indorsee

indorses a check to negotiate it. Patterson was neither, so her signature on the back was obviously not for the purpose of negotiation.

More fundamentally, however, it does not make any sense to speak of the “negotiation” of a check to the drawee/payor bank. The central attribute of being a “holder” of a check is that the holder may enforce the check against the drawee. *See* RCW 62A.3-301(i) (a holder is a “person entitled to enforce” an instrument); *see Brown v. Dep’t of Commerce*, 184 Wn.2d at 525, 2015 Wash. LEXIS 1191 at **18-19 (same). A drawee bank has no reason to become the holder of a check drawn on itself – and thus no reason to take the check by negotiation – because the drawee has no reason to enforce a check against itself.

Rather, when a check is transferred to the drawee bank in exchange for cash or other consideration, the Code defines the transaction as a *presentment* rather than a *negotiation*. RCW 62A.3-501. As the District of Columbia Court of Appeals recently explained:

The trial court and the parties appear to have used the term “negotiate” to refer to the presentation of a cashier's check to the bank for payment. Strictly speaking, “negotiation” is the transfer of an instrument to another holder, which is distinct from presentation to the bank for payment. *See* D.C. Code § 28:3-201 (a) (2012 Repl.) (defining “negotiation”); D.C. Code § 28:3-501 (2012 Repl.) (defining “presentment”); D.C. Code §§ 28:3-602, -603 (2012 Repl. & 2015 Supp.) (discussing “payment”); *see generally*, e.g., Lawrence's *Anderson on the Uniform Commercial Code* § 3-201:8, Westlaw (3d ed. database updated Dec. 2014)

(“Presentment of an instrument for payment is not a negotiation of the instrument.”).

Bartel v. Bank of Am. Corp., 2015 D.C. App. LEXIS 591, No. 14-CV-1069 (D.C. Ct. App. Dec. 24, 2015).

Unlike a negotiation, presentment does not require the presenter’s indorsement. *See* RCW 62A.3-501 (setting forth the rules of presenting a check for payment, none of which include indorsement by the presenter). *See also Brown v. Fifth Third Bank*, 10 Ohio App. 3d 97, 98, 460 N.E.2d 739, 740 (1983) (“Presentation (or presentment) of an unnegotiated check calls merely for payment of the check. In the case of presentment for payment, a payor bank does not take by negotiation and therefore no endorsement is necessary”) (citations omitted); *Wright v. Bank of California*, 276 Cal. App. 2d 485, 488, 81 Cal. Rptr. 11, 13 (1969) (“taking the original unindorsed check in exchange for issuance of its own cashier’s check was not a ‘negotiation’ of the depositor’s check but only a ‘payment.’ Indorsement of a depositor’s check is necessary for the negotiation thereof. But presentation of a check to the drawee . . . for payment is not a negotiation of the check”) (citations omitted).⁴

⁴ While a *presenter* need not indorse a check to receive *payment*, a *payee* must still indorse a check to *negotiate* it to a third party holder (who then can present it to the drawee for payment). This case illustrates a situation like *Tonelli*, where the presenter (Patterson) was not a holder because the payee had never indorsed the check over to her. 41 N.Y.2d at 669, 363 N.E.2d at 566.

In the present case, Patterson brought the Checks to the Bank and presented them to tellers for payment. The tellers accepted her presentment, took the Checks, and gave Patterson cash in exchange. Each transaction was a presentment rather than a negotiation. Patterson's signature on the backs of the Checks could not possibly be for the purpose of negotiating them.

ii. Patterson Did Not Sign the Backs to Restrict Payment

Second, Patterson obviously did not sign the backs of the Checks to restrict payment. A "restrictive indorsement" is where the indorser limits the form of payment. *See* RCW 62A.3-206. For example, a depositor may write "for deposit only" to a particular account above her indorsement signature, thus restricting the depositary bank from utilizing the funds from the payment of the check for any purpose other than to credit the specified account. *Id.* § 3-206(c); UCC § 3-206 Official Cmt. 3.

Patterson placed no limiting language, such as "for deposit only," on the back of the Checks. Her signature was obviously not for the purpose of restricting payment.

iii. Patterson Did Not Sign the Backs to Incur Indorser's Liability

Third, Patterson clearly did not sign the backs of the Checks to incur "indorser's liability." RCW 62A.3-204(a). "Indorser's liability" is

an archaic transaction that is rarely done anymore, and when it is it pertains to promissory notes rather than checks. *See, e.g., New Haven Merchants Bank v. Pegnataro*, No. CV88 02 66 40, 1990 Conn. Super. LEXIS 823, at *2-4 (Sup. Ct. Conn. Jul. 25, 1990) (summarizing the law of indorser's liability). It is similar to guaranty or suretyship, where a third party to the instrument (whom the Code refers to as an "accommodation party") guarantees payment on an instrument for the benefit of a holder who will want to enforce it in the future. *See* RCW 62A.3-419.

It makes no sense to describe Patterson's signature as one to incur indorser's liability for the simple reason that there was no possibility of future holders of the Checks. The Checks were not being negotiated to third parties or even deposited to another bank, but instead were being presented directly to the drawee *for payment*. It is absurd to suggest that Patterson signed the back of the Checks to guarantee that the Bank would pay them when the Bank did in fact pay them – *to her* – in precisely the same transaction.

iv. Rather Than to Indorse the Checks, Patterson Signed the Backs to Document Receipt of the Cash

The Bank has impliedly conceded that Patterson's signatures on

the backs of the Checks did not fall within one of the three purposes of indorsements set forth in Subsection 3-204(a). The Bank has always couched its argument on a separate clause within Subsection 3-204(a) following the list of three purposes of an indorsement. This clause sets forth a rebuttable presumption that a signature is an indorsement “unless the accompanying words, terms of the instrument, place of the signature, *or other circumstances* unambiguously indicate that the signature was made for a purpose other than indorsement” RCW 62A.3-204(a) (emphasis added).

On the record before the Court, the circumstances of these check-cashing transactions establish unambiguously that Patterson’s signatures were *necessarily* for a purpose other than an indorsement. That purpose was to document her receipt of the cash. A drawee/payor bank like WTB has an absolute right under the Code to demand that the person whom it pays on a check must “sign a receipt on the instrument for any payment made.” RCW 62A.3-501(b)(2)(iii). Signing the back of a check as a receipt for cash does not constitute an “indorsement.”

The Bank’s Branch Manager testified that the Bank had Patterson sign the backs of the Checks for “proof of who cashed the check.” (Burgess Dep., ECF No. 86-1, App. Ex. 16, pp. A480-A481, 81:24-82:20) That is a receipt, pure and simple. Indeed, Travelers’ banking expert

opined that the “circumstances” – which the district judge specifically articulated in the text of the first certified question – permitted no conclusion other than that Patterson’s signature was for the purpose of documenting the receipt of the cash. (Edwards Expert Report and Declaration, ECF No. 86-1, App. Ex. 3, pp. A399-A405) Tellingly, the Bank retained a rebuttal banking expert, but the Bank’s expert offered no contrary opinion on this issue. The facts are unrebutted.

Ultimately, the rebuttable presumption in Subsection 3-204(a) always leads back to the three purposes for indorsements described in the subsection. Patterson *obviously* did not sign the backs to negotiate the Checks because she was presenting them for payment rather than negotiating them; Patterson *obviously* was not signing to restrict payment because she included no restrictive language about payment; and she *obviously* was not incurring indorser’s liability for future holders because the Bank was paying the Checks in the same transaction. At the same time, the Bank’s own Branch Manager testified that the Bank required her to sign the backs to document her receipt of the money, and unrebutted expert testimony proves that the signatures constituted receipts for cash. These circumstances unambiguously prove that the signatures were not “indorsements,” and thus that they were not “unauthorized indorsements” that Skills’Kin had to discover and report under Subsection 4-406(f).

**c. Travelers' Claims Do Not Involve
Unauthorized Customer Signatures**

As explained above (p. 26), the Court need not even consider whether Patterson's signature on the backs of the Checks constituted an unauthorized customer signature because Travelers' claims under Subsection 4-401(a) simply do not depend, in any way, on her signatures. Whether or not Patterson had signed the backs, the Checks were not properly payable to her. Thus, the 4-406(f) preclusion against asserting unauthorized customer signatures does not matter. Travelers does not – and need not – make any assertion that 4-406(f) even arguably precludes it from asserting. *See supra* p. 26.

Even so, Patterson's signature on the backs of the Checks was not an “unauthorized *customer* signature.” RCW 62A.4-406(f) (emphasis added). The “customer” was Skils'Kin, defined in Article 4 in relevant part as “a person having an account with a bank.” *Id.* § 4-104(a)(5). Skils'Kin, not the payees, had the account with WTB, and as the drawer of checks payable to third parties, there is no purported signature of Skils'Kin on the backs of the Checks.

An “unauthorized” signature is one “without actual, implied, or apparent authority.” RCW 62A.1-201(b)(41). To determine whether a signature is “unauthorized,” therefore, one must determine two things

about the signature: (1) whose signature it purports to be; and (2) whether the signature was made on behalf of that putative signer with actual, implied or apparent authority. The first prong is determinative here. A signature on the back of a check *always* purports to be the signature of a payee or an indorsee and *never* the signature of the customer.⁵ Thus, if Patterson's signature on the backs were unauthorized, they were unauthorized signatures of the *payees* rather than unauthorized *customer* signatures under Subsection 4-406(f).

Any argument to the contrary does violence to the purpose and structure of Subsection 4-406(f). As explained above, Subsection 4-406(f) requires the customer to discover and report checks that were not properly payable when it would be comparatively easier for the customer to discover the discrepancy rather than the Bank. *See supra* pp. 20-25. Customers should review statements and canceled items to watch for their own unauthorized signatures, but the bank is in the "first and best position" to guard against obvious discrepancies between the payee's name and the name signed on the back. *See Deljack v. U.S. Bank Nat'l Ass'n*, 2012 U.S. Dist. LEXIS 140929, at *11 (D. Idaho 2012) (customer had no duty to report bank's failure to honor restrictive endorsement

⁵ With the caveat that, when the customer writes a check to itself, the customer is both the customer and the payee.

because bank was “in the first and best position to discover the problem”). The law does not saddle the loss on the customer when the bank failed to guard against obvious mismatches between the payee’s name and the signature on the back of the check, even if the signature happens to be in the name of an employee of the customer.

II. The Bank Did Not Make Copies of Items Reasonably Available to Skils’Kin Through the Bank’s Online Banking System

A bank may only invoke Subsection 4-406(f) if both “the statement and items are made available to the customer.” RCW 62A.4-406(f). The second certified question asks whether a bank complies with this obligation if it provides “a listing of the front of the checks and electronic access to images of the front and back of the checks via on-line banking.” (ECF No. 193, p. 9) The Court need not reach this question because the Court should answer “no” to the first certified question.

If the Court reaches this second certified question, however, the Court should answer that electronic access only suffices to make statements and items “available” if the customer agreed to receive copies of statements and items in this fashion. Skils’Kin did not agree, in its deposit agreement or otherwise, to this procedure.

Section 4-406 first appeared in the original Uniform Commercial Code promulgated in 1958, which Washington enacted in 1965. 1958

UCC § 4-406; 2 1965 Wash. L., ch. 157, § 4-406, at 2470-72. Since its original enactment, Section 4-406 has always required a bank to either “send” statements and items to the customer or make them reasonably “available” to the customer. The statute was drafted in the pre-Internet era when banks typically sent paper copies of statements enclosing original canceled checks to the customer by mail to the customer’s address on file at the bank.

The bank and its customer can agree on the address to which the bank may send the statement and items or agree to the method by which the bank can otherwise make the statement and items available. If the bank does not use the agreed address or method, however, the bank has no defense under Section 4-406. *See Robinson Motor Xpress, Inc. v. HSBC Bank, USA*, 37 A.D.3d 117, 120-21, 826 N.Y.S.2d 350, 353-54 (2006) (bank did not make statements “available” to trigger § 4-406 when it sent them to a business address of the customer, but not to the one that the customer had designated for that purpose); *First Citizens Bank of Clayton County v. All-Lift of Georgia*, 251 Ga. App. 484, 486, 555 S.E.2d 1, 3 (2001) (bank did not make statements “available” by holding them for the customer when there was no evidence that the customer had agreed to that procedure).

Skills’Kin *never* agreed to accept statements and canceled items

through online banking with WTB. When the Bank first set up Skils'Kin's Accounts, it did not alert Skils'Kin that it would deliver statements and items online or sought Skils'Kin's agreement to such terms. Indeed, Skils'Kin did not even have access to online banking at WTB until almost one year after the Patterson fraud commenced. (Nicolle Laporte Second Decl., ECF No. 103, p. 2, ¶ 3)

On the back of the Skils'Kin signature sheets for its Accounts, the Bank included boilerplate, adhesion "terms and conditions" that the Bank contends are part of Skils'Kin's account agreement. (ECF No. 90-1, p. 24). These terms and conditions state that one of their purposes is to "establish rules to cover transactions or events which the law does not regulate." (*Id.*) Notably, the terms and conditions have a paragraph about "Statements," addressing the same topics as Section 4-406, but this paragraph does not require Skils'Kin to review canceled *items* at all and certainly *does not* require Skils'Kin to establish online banking access to review statements or items online. (*Id.*) Consistently, the contact information for Skils'Kin on the front of the signature sheet refers to Skils'Kin's street address. It makes no mention of any right by the Bank to deliver official account documents to Skils'Kin over the Internet. (*Id.*, p. 27)

Plainly, when these Accounts were set up, the parties contemplated

that the Bank would send statements to Skils'Kin by U.S. mail in the traditional fashion. The parties never contemplated that Skils'Kin would also have to review items posted online.

Accordingly, the Bank did not make statements and items "available" to Skils'Kin through online banking within the meaning of Subsection 4-406(f) because Skils'Kin never agreed to accept statements and items in that fashion. At least one court has so held. In *Elden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2011 WL 1236141 (S.D.N.Y. 2011), the Court held that the safe-harbor preclusion of Section 4-406 is not triggered by "voluntary" Internet systems offered to the customer as an "accommodation" that the customer was never obliged to utilize in the first place. *Id.* at *6.

A contrary holding would be especially unfair to consumers, as well as non-profits like Skils'Kin and small businesses, which often have limited Internet resources, bookkeeping capabilities and staffing. As lucrative as online banking may be for the banking industry, it poses challenges for large segments of society. People without computers, with poor or unreliable Internet service providers, as well as those with limited or no education, mental handicaps or a poor understanding of online banking systems may be capable of reviewing traditional, paper bank statements but may find it difficult or impossible to review statements

online.

Furthermore, if the Court accepts WTB's argument that online access to statements and items makes them "available" under Subsection 4-406(f) even when the customer *does not agree*, there will be nothing to prevent banks throughout the State of Washington from converting entirely to an online system for complying with Subsection 4-406(f) and eliminating paper statements completely. All customers – whether or not they have the capability and inclination to use online banking – would then be required to review statements online or be forever barred from asking the bank to recredit an account after the bank's improper payment. Such a drastic change in common banking practices going back for generations should be accomplished, if at all, by the legislature rather than by judicial construction of the word "available" in a statute written when the notion that a customer could examine images of bank statements and canceled checks on a computer screen was the stuff of science fiction.

If a customer agrees to review statements and items online she should be held to the terms of that agreement. However, the law should not deprive a customer of a perfectly good claim against her bank merely because she did not review her statements and canceled checks online when she never agreed to do that in the first place.

Because Skils'Kin did not agree to receive statements and canceled

items online, if the Court reaches the second certified question, it should answer the question “no.”

III. The Bank’s Cashing of These Checks Was Commercially Unreasonable as a Matter of Law

The third certified question asks whether a bank fails to exercise ordinary care as a matter of law if it pays a check to a person other than the payee when the check contains no indorsement in the name of the payee. The answer to this question is an unqualified “yes.”⁶

A bank fails to exercise “ordinary care” if it fails to exercise “reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged.” RCW 62A.3-103(a)(9). WTB failed to exercise reasonable commercial standards of banking as a matter of law by cashing the Checks for Patterson.

Whether a bank fails to exercise ordinary care sometimes presents a question of fact, but not when the transaction is “suspect on its face.” *Bank of the W.*, 15 Wn. App. at 241, 548 P.2d at 566. As one court has explained, “While normally the issue of negligence is for the trier of fact,

⁶ This question is relevant if the district court allows the Bank to assert a defense under RCW 62A.3-404. *See supra* note 1, p. 18. If the district court allows the Bank to pursue this defense, the Bank still bears the loss to the extent that its failure to exercise ordinary care substantially contributed to the loss. *Id.* § 3-404(d).

courts have found certain egregious practices by banks to violate reasonable commercial standards as a matter of law.” *Cont’l Cas. Co. v. Fifth/Third Bank*, 418 F. Supp. 2d 964, 978 (N.D. Ohio 2006). One of those “egregious practices” is the “clearly unreasonable conduct” of paying a check with a missing indorsement. *Id.* (quoting *Govoni & Sons Constr. Co. v. Mechs. Bank*, 51 Mass. App Ct. 35, 50-51 & n.34, 742 N.E.2d 1094, 1106 & n.34 (Mass. App. Ct. 2001)). *See also Citizens Bank, Dallas v. Thornton & Co., Inc.*, 177 Ga. App. 490, 490, 323 S.E.2d 688, 689 (1984) (check had no signature in name of payee on the back, so signature was “clearly ineffective” as an indorsement and bank acted in a commercially unreasonable manner by taking the check); *Trustees of Eighth Dist. Elec. Pension & Benefit Funds v. JP Morgan Chase Bank*, 2014 U.S. Dist. LEXIS 121577, at 16-17 (D. Idaho 2014) (“Further, courts have consistently found the failure of a bank to inquire about a missing or incorrect indorsement to violate reasonable commercial standards as a matter of law”) (citation omitted).

The principle is well-settled:

There is widespread authority that “payment of checks with missing indorsements” involves “clearly unreasonable conduct on the part of the bank.” White & Summers, *Uniform Commercial Code* § 15-5, at 761 & n.12 (3d ed. 1988) (collecting cases). *See Tonelli v. Chase Manhattan Bank, N.A.*, 41 N.Y.2d 667, 670, 394 N.Y.S.2d 858, 363 N.E.2d 564 (1977) (bank disregarded reasonable

commercial practice in issuing cashier's check in exchange for unindorsed certified check not payable to the presenter); Annot., Bank's "Reasonable Commercial Standards" Defense Under UCC § 3-419(3), 49 A.L.R.4th 888, 893, 911-914 (1986 & Supp. 2000) (collecting cases holding it commercially unreasonable as matter of law to pay checks over missing indorsements).

Govoni & Sons Constr. Co., 51 Mass. App. Ct. at 51 n.34, 742 N.E.2d at 1106 n.34.

In the present case, WTB paid the Checks to Patterson even though she was not the payee and the payee's indorsement was missing. This is patently unreasonable conduct by a bank. Indeed, the Bank's own teller manual made it very clear to tellers that:

2. The payee(s)/presenters must endorse the check exactly as the name(s) appear(s) on the face of the check
4. If the presenter is NOT THE PAYEE, ensure the payee's endorsement is on the back of the check. Have the presenter also endorse the check.

(TEL-203, ECF No. 86-1, App. Ex. 7, pp. A419) WTB's tellers utterly ignored their own teller manual, which is all the more reason to hold that the Bank failed to exercise ordinary care as a matter of law. *See Swiss Baco Skyline Logging, Inc. v. Haliewicz*, 18 Wn. App. 21, 30, 30-31, 567 P.2d 1141, 1147-48 (1977) (bank did not act in a commercially reasonable manner as a matter of law, noting that bank's conduct violated its own manual).

Every banker knows that he should not cash a check for someone to whom the check was not payable. The correct answer to the third certified question is “yes.”

CONCLUSION

Subsection 4-406(f) does not preclude claims. Rather, in specified circumstances, it precludes a customer from asserting against the bank three categories of discrepancies on checks. By assuring that its tellers comply with commercially reasonable standards of banking, including the fundamental rule that a bank should never cash a check for an individual unless it is payable to that individual, the bank can almost always limit its exposure to customer claims by asserting Subsection 4-406(f) as a defense.

Subsection 4-406(f), however, provides no defense for Washington Trust Bank under the facts of this case. Acting in a commercially unreasonable manner as a matter of law by cashing checks for someone to whom the Checks were not payable, the Bank lost any possible defense under Subsection 4-406(f). The Court should answer the first certified question “no,” not reach the second certified question, and answer the third certified question “yes.”

Respectfully submitted this 5th day of February, 2016.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of February, 2016, I caused the foregoing document to be filed via email with the Washington State Supreme Court at Supreme@courts.wa.gov, and I served a true and correct copy of the foregoing via email and hand delivered as follows:

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APPENDIX

Statutes Involved.....	A1
Certification Order (ECF No. 193, 11/10/15).....	A4

STATUTES INVOLVED

The first and second certified questions involve the following sections of the Uniform Commercial Code, RCW 62A:

62A.4-406. Customer's duty to discover and report unauthorized signature or alteration.

- (a) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid, copies of the items paid, or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment. If the bank does not return the items paid or copies of the items paid, it shall provide in the statement of account the telephone number that the customer may call to request an item or copy of an item pursuant to subsection (b) of this section.
- (b) If the items are not returned to the customer, the person retaining the items shall either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of seven years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item. A bank shall provide, upon request and without charge to the customer, at least two items or copies of items with respect to each statement of account sent to the customer. A bank may charge fees for additional items or copies of items in accordance with RCW 30.22.230. Requests for ten items or less shall be processed and completed within ten business days.
- (c) If a bank sends or makes available a statement of account or items pursuant to subsection (a), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.
- (d) If the bank proves that the customer, failed with respect to an item, to comply with the duties imposed on the customer by subsection (c) the customer is precluded from asserting against the bank:
 - (1) The customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and
 - (2) The customer's unauthorized signature or alteration by the same wrong-doer on any

other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding thirty days, in which to examine the item or statement of account and notify the bank

- (e) If subsection (d) applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (c) and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) does not apply.
- (f) Without regard to care or lack of care of either the customer or the bank, a natural person whose account is primarily for personal, family, or household purposes who does not within one year, and any other customer who does not within sixty days, from the time the statement and items are made available to the customer (subsection (a)) discover and report the customer's unauthorized signature or any alteration on the face or back of the item or does not within one year from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under RCW 62A.4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.

62A.3-204. Indorsement.

- (a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.
- (b) "Indorser" means a person who makes an indorsement.
- (c) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.

- (d) If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TRAVELERS CASUALTY AND
SURETY COMPANY,

Plaintiff,

vs.

WASHINGTON TRUST BANK,

Defendant.

No. CV-13-0409-JLQ

ORDER CERTIFYING LOCAL
LAW QUESTIONS TO THE
WASHINGTON SUPREME COURT

Pursuant to the Federal Court Local Law Certificate Procedure Act, RCW 2.60.010 et seq., and Washington RAP 16.16, this court certifies questions of local law to the Washington Supreme Court. Certification is necessary to ascertain the law of Washington state in order to orderly dispose of this case. The local law has not been clearly determined. RCW 2.60.020. The court finds each of the three questions set forth in Section IV appropriate for certification.

I. Factual Background and Introduction

The factual statement is derived, in part, from the court’s Memorandum Opinion and Order Re: Summary Judgment Motions (ECF No. 140) and from the factual statements submitted by the parties in their proposed Certification Orders (ECF No. 191 & 192).

Plaintiff, Travelers Casualty and Surety Company (“Travelers” or “Plaintiff” herein), issued a policy of insurance to Skils’Kin, a community-based, not-for-profit, agency with offices located in Spokane, Washington. Skils’Kin provides services to adults with developmental, physical, and mental disabilities, including money

1 management services. Skils'Kin is appointed by the Social Security Administration
2 ("SSA") as the "representative payee" for many of its clients. Skils'Kin is also
3 authorized to act as representative payee of the entitlements by its clients who signed an
4 agreement specifically acknowledging and appointing Skils'Kin as agent and
5 representative payee of the entitlements from SSA.

6 Skils'Kin managed the monthly income and living expenses of approximately
7 1,000 clients. Skils'Kin maintained a business checking account at Defendant
8 Washington Trust Bank (hereafter "Bank"), in which it deposited funds issued by the
9 SSA for the benefit of the clients. The average monthly balance in this account ranged
10 from \$166,876.47 to \$510,224.60 during the period of January 2010 to February 2013.
11 The SSA transferred client benefit funds directly into the account by automated clearing
12 house transfer. In the ordinary course of business, Skils'Kin then disbursed the funds for
13 the clients' benefit by drawing checks on the account made payable to the clients and
14 others providing services to the clients.

15 Shannon Patterson was a Skils'Kin employee, Payee Services Coordinator, and a
16 signatory on the bank account. In 2009 Patterson was promoted to Payee Manager, and
17 in March 2010 to Director of Payee Services. Skils'Kin adopted, and delivered to Bank,
18 a Corporate Resolution, which stated in part that Patterson and two other Skils'Kin
19 executives could: 1) open any deposit or checking accounts in the name of the
20 corporation; 2) endorse checks and orders for payment of money and withdraw funds on
21 deposit with Bank; and, 3) in connection with those powers, Patterson and the other
22 named individuals "so long as they act in a representative capacity as agents of this
23 corporation, are authorized to make any and all other contracts, agreements, stipulations
24 and orders which they may deem advisable for the effective exercise of the indicated
25 powers..." (ECF No. 90-3). Patterson was also authorized to sign checks by facsimile
26 signature.

1 Patterson engaged in a several year embezzlement scheme totaling some \$575,000
2 from roughly late-2008 to early-2013. Patterson accomplished the embezzlement by
3 taking checks drawn on the account to a teller window at the Bank branch, either inside
4 the branch building or at a drive-through window at the branch. The checks were made
5 payable to individuals, some of whom were Skils'Kin clients and some of whom were
6 not Skils'Kin clients. Patterson was not the named payee on any of the checks. The
7 checks bore Patterson's drawer signature on the front. Patterson did not approach the
8 teller window accompanied by the payees or by any other individuals and did not present
9 any documentation to the tellers indicating that she had authority to transact the checks
10 on behalf of the payees.

11 In each transaction, the Bank teller cashed the checks for Patterson, delivering
12 currency to Patterson in exchange for the checks which were payable to the clients or
13 others, not to Patterson. On the back of each of the checks, Patterson signed her own
14 name. Bank contends it required Patterson to sign the back of the checks as a condition
15 of cashing the checks. The parties dispute the purpose of Patterson's signature on the
16 back of the checks. There was no signature of the named payee on the back of any of the
17 checks. Bank cashed 353 such checks for Patterson.

18 Skils'Kin electronically received monthly bank statements during this time that
19 included the front, but not the back of each check which contained Patterson's signature.
20 The back of the checks could have been obtained by Skils'Kin upon request to the Bank.
21 The Bank contends that RCW 62A.4-406(f) precludes Skils'Kin and Travelers claims
22 since Patterson's signature on the back of the checks constituted an "unauthorized
23 signature," an "alteration," or an "unauthorized indorsement" that was not discovered and
24 reported by Skils'Kin within 60 days as required by that statute. Skils'Kin and Travelers
25 deny this preclusion argument and specifically deny that Patterson's signature on the back
26 of the checks constituted any of the three specified precursors to the application of 406(f).
27 The specific portions of 406(f) relied upon by the Bank as preclusion of this action states:

28 ORDER - 3

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Without regard to the care or lack of care of either the customer or the bank, a natural person who does not within one year, and any other customer who does not within sixty days from the time the statement and items are made available to the customer (subsection (a)) discover and report the customer's unauthorized signature or any alteration on the face or back of the item or does not within one year from that time discover and report any unauthorized indorsement is precluded from asserting against such bank such unauthorized signature or indorsement or such alteration.

Bank contends Patterson's signature on the back of the checks is included in the "unauthorized signature," "alteration," or "unauthorized indorsement" provisions of 406(f). Travelers denies Patterson's signature is included in 406(f) and denies that it is so claiming in this action. Travelers contends Bank is liable because Bank paid Patterson when the checks were not "properly payable" to her under RCW 62A.4-401(a). Travelers further contends that even if it is determined that 406(f) applies, the Bank statements furnished to Skils'Kin did not reveal the signatures of Patterson on the back of the checks.

Patterson's fraud went undetected from sometime in late-2008 until February, 2013. In February 2013, Patterson admitted to the fraud in a suicide note(s) and committed suicide. After the fraud was discovered, Skils'Kin made a claim under its fidelity insurance policy to Travelers. Travelers paid the claim and brought this action as the subrogee and assignee of Skils'Kin. Travelers claims damages in the total of the face amount of the checks that were paid to Patterson.

Bank denies liability and alleges various affirmative defenses. Bank contends that while cashing the checks was a departure from its standard banking policies, it was an accommodation for Skils'Kin and done pursuant to an oral agreement between Debbi Carlson, branch manger for Bank, and Patterson. Bank also contends Patterson was authorized by Corporate Resolution to make such agreements. Bank employees testified concerning reasons why Patterson was allowed to cash checks made payable to Skils'Kin clients - - that some Skils'Kin clients were homebound, were disruptive when they were in the bank, and/or did not have proper identification. Debbi Carlson testified she did not

1 recall any such agreement with Patterson, but teller Nicki Atha testified that Carlson gave
2 her approval to allow Patterson to sign the back of checks and receive the cash. Other
3 bank tellers also cashed checks for Patterson. Some tellers testified that this did not
4 comply with the Bank's standard procedures. The parties disagree as to whether Atha's
5 testimony is admissible. The role of such an oral agreement, if any, being factual in
6 nature, is not part of the local law certification herein.

7 Skils'Kin issued roughly 4,000 checks per month. Skils'Kin received monthly
8 bank statements listing checks that were paid from the account in the preceding month
9 by check number, date, and amount of the check, and including images of the face of each
10 check. The back of the checks with Patterson's signature were not included with the
11 statements. Nicolle Laporte, Skils'Kin's Accounting Manager, claims to have "diligently"
12 reconciled the monthly bank statements "every month" by looking through the copies of
13 the fronts of the checks as shown on the bank statements.

14 The account statements included copies of the fronts of the cancelled checks, but
15 not copies of the backs of the checks. When Laporte reviewed the statements, she looked
16 through the copies of the fronts of the checks. She testified that, to the best of her
17 knowledge, she saw nothing irregular with regard to any of the checks at issue. Laporte
18 also had on-line access to the account through the Bank's on-line banking service
19 commencing in January 2011. She testified that she could review individual cancelled
20 checks on-line, including the back of the checks, but the process was cumbersome
21 because she had to click through multiple screens and view the checks individually. The
22 Bank's system allowed on-line access to checks that had cleared within the past 90-days.

23 **II. The Claims**

24 The Second Amended Complaint ("SAC") claims that the Bank, in disregard of
25 reasonable commercial standards and its duty to exercise ordinary care, cashed checks
26 for Patterson, even though Patterson was not the named payee and the named payee had
27 not endorsed the checks. Bank argues that both under RCW 62A.4-406, and pursuant

1 to its banking agreement with Skils'Kin, Skils'Kin was required to examine the monthly
2 banking statements and to report unauthorized signatures or alterations within 60 days.
3 Bank contends Skils'Kin allowed the fraudulent activity of Patterson to continue for over
4 four years and failed to report the signatures of Patterson on the back of the checks.

5 **III. Discussion**

6 The parties have litigated this matter for nearly two years, and presented summary
7 judgment motions to this court. A central focus on summary judgment, and now, is the
8 Bank's claimed preclusion defense under RCW 62A.4-406, (hereafter "4-406") and
9 Travelers' contention that 4-406 does not apply because Travelers' claim does not rely
10 on the assertion of check alterations or unauthorized signatures on the checks. A local
11 law issue is whether section 4-406 applies to Travelers' claims. **Certified Questions 1**
12 **and 2**, set forth *infra*, pertain to the 4-406 defense. The Bank agrees that if 4-406 does
13 not preclude the Plaintiff's claims, there are then questions of reasonableness that should
14 be determined by the trier of fact. Travelers disagrees and argues that 4-406 does not
15 apply and the court should determine as a matter of law that Bank's practices violated
16 commercial standards. **Certified Question 3**, *infra*, concerns whether such a
17 determination can be made as a matter of Washington law on the record presented.

18 RCW 62A.4-401(a) provides in part: "A bank may charge against the account of
19 a customer an item that is properly payable ... An item is properly payable if it is
20 authorized by the customer and is in accordance with any agreement between the
21 customer and bank." The checks at issue were made payable to Skils'Kin clients as
22 payees, and signed on the front by Patterson, an authorized signatory on the Skils'Kin
23 account. The parties agree Patterson was not a named payee on any of the checks and the
24 named payees did not indorse any of the checks over to Patterson.

25 The Bank contends it had an oral agreement with Patterson to allow her to cash
26 checks for clients because the clients were disabled, homebound, disruptive, or otherwise
27 unable to come into the Bank. Bank argues Patterson was authorized to make this

1 agreement on behalf of Skils'Kin because of a Corporate Resolution dated October 1,
2 2009. Travelers argues Skils'Kin did not give Patterson such authority and Patterson
3 was not acting on behalf of Skils'Kin when she was fraudulently embezzling funds.
4 There is a factual dispute as to whether there was an enforceable agreement between
5 Patterson and Bank. Travelers contends there is no admissible evidence of any such
6 agreement as Patterson is deceased and Debbi Carlson does not recall any agreement.

7 Neither party contends there was a written agreement allowing the check cashing
8 procedure which took place. There is a disputed question of fact as to the existence of
9 an oral agreement. If there was no agreement, the checks were, from the face of the
10 checks, not payable to the order of Patterson, and it could be argued that Skils'Kin had
11 no duty to report. See for example *Deljack v. U.S. Bank*, 2012 WL 4482049 (D.Idaho
12 2012)(customer had no duty to report bank's failure to honor restrictive endorsement as
13 bank was "in the first and best position to discover the problem"); *Elden v. Merrill Lynch*,
14 2011 WL 1236141, *8 (S.D.N.Y. 2011)("Numerous cases establish that a bank does not
15 act in a commercially reasonable manner when it pays checks lacking any indorsement
16 whatsoever."); *Ford Motor Credit Co. v. United Services*, 1972 WL 20865 (N.Y.City
17 Civ.Ct. 1972)("there is no notice [customer] could have given at any time that would
18 have been superior to that derived from even a cursory examination of the instrument by
19 [Bank's] employees"); *Seaman Corp. v. Binghamton Savings Bank*, 220 A.D.2d 62
20 (N.Y.App. 1996)(4-406 does not impose on customer duty to inspect for missing
21 indorsements). Under certain factual circumstances, it may be decided as a matter of law
22 that cashing a check with a missing indorsement, or indorsed by someone other than the
23 payee, is commercially unreasonable as a matter of law. See for example, *Elden*, cited
24 supra; *Govoni & Sons v. Mechanics Bank*, 51 Mass.App.Ct. 35 (2001). The resolution
25 of this issue under Washington law is unclear.

26 If the Washington Supreme Court finds it was not commercially unreasonable, as
27 a matter of law, for the Bank to pay the money to Patterson from the checks and that

1 Skills'Kin had a duty under 4-406 to report Patterson's signature on the back of the checks
2 as being improper, the final question becomes: did the Bank make the checks available
3 in a sufficient manner to allow discovery of the error? RCW Section 62A.4-406(a)
4 provides in part: "The statement of account provides sufficient information if the item is
5 described by item number, amount, and date of payment. If the bank does not return the
6 items paid or copies of items paid, it shall provide in the statement of account the
7 telephone number that the customer may call to request an item or copy." It is undisputed
8 that Bank provided Skills'Kin with monthly statements identifying each check by item
9 number, date, and amount of check. The statements also included copies of the front, but
10 not the back, of each check. Beginning in January 2011, Skills'Kin had 24-hour/day
11 online access to its checking account. This electronic online access allowed Skills'Kin to
12 view the front and back of each check that cleared its account.

13 Washington state courts have not yet determined whether providing on-line access
14 to the checks satisfies the requirement of 4-406(a). A treatise on the U.C.C. finds
15 electronic access to "fully satisfy" the 4-406(a) requirement. See White, Summers, &
16 Hillman, Uniform Commercial Code, § 1938 (6th ed. 2014)("We see no reason why a
17 listing of these checks and the debits to the account together with digital images of checks
18 would not fully satisfy the "statement of account" requirement in 4-406(a)."). In this
19 matter, only the front of the checks were shown on the paper account statements, but
20 images of both the front and back of the checks were available online.

21 In regard to **Certified Question 3**, several courts, including one prior Washington
22 appellate opinion, have found the issue of whether a bank has exercised ordinary care to
23 present a question of fact. See for example *Govoni & Sons v. Mechanics Bank*, 51
24 Mass.App.Ct. 35 (2001); *Fidata Trust Co. v. Community First Saving and Loan*, 946 F.2d
25 898 (9th Cir. 1991)(whether bank acted in commercially reasonable manner was mixed
26 question of law and fact); *Parsons Travel, Inc. v. Hoag*, 18 Wash.App. 588
27 (1977)(whether bank was negligent in cashing forged checks was a question of fact).

28 ORDER - 8

1 However, such questions may sometimes be determined as a matter of law. *Govoni &*
2 *Sons*, 51 Mass.App.Ct. 35 (2001). The *Govoni & Sons* court referenced several cases and
3 other authorities finding the following conduct to be clearly unreasonable: payment of
4 checks with missing indorsements; failure to respect restrictive indorsements; failure to
5 inquire into authority of one purporting to be an agent; payment of check with irregular
6 or incorrect indorsement; honoring check with visibly altered payee name; and allowing
7 deposit of check indorsed by corporate payee into a personal account. *Id.* at 1103.

8 The parties hereto disagree concerning whether the issue of bad faith is present in
9 this case. Bank filed a Motion in Limine on the issue and in its brief concerning certified
10 questions (ECF No. 192) argues the issue should be resolved prior to certification. This
11 court finds it is not necessary to resolve the question prior to certification.

12 **IV. Certified Questions**

13 **Question 1:**

14 When a check (i) is presented for payment, (ii) bears no signature in the name of the
15 payee on the back, and (iii) the drawee/payor bank pays the check over the counter, in
16 cash, to an individual who is not the payee but who is an authorized signer on the account
17 and who signs the back of the check in her own name, is the signature on the back of the
18 check an “unauthorized signature,” “alteration,” or “unauthorized indorsement” as a matter
19 of law imposing on the customer the notice requirements of RCW 62A.4-406(f) ?

20 **Question 2:**

21 If the Answer to Question #1 is “Yes”, does providing a bank customer with a
22 listing of the front of the checks and electronic access to images of the front and back of
23 the checks via on-line banking make the “statement of account” and “items” reasonably
24 available as required by 4-406(a)?

Question 3:

Does a bank fail to exercise ordinary care as a matter of law if it pays a check to a person other than the payee when the check contains no indorsement in the name of the payee?

This court's phrasing of the issues is not meant to restrict the Washington Supreme Court's consideration of the case, and that Court, may in its discretion, reformulate the questions. *Saucedo v. John Hancock Life & Health Ins.*, 2015 WL 4635634 (9th Cir. 2015).

IT IS HEREBY ORDERED:

1. Further proceedings in this court are stayed pending receipt of answers to the certified questions or other order from the Washington Supreme Court.

2. Upon the acceptance by the Washington Supreme Court of the certified questions, the parties shall file a joint status report four months after the date of acceptance and every four months thereafter to advise this court on the status of the proceeding.

3. The Clerk of this court is directed to transmit to the Washington Supreme Court, under official seal of this court, a copy of this Order and the following documents which shall constitute the "record" under RCW 2.60.010 et. seq: 1) the Complaint (ECF No. 1); 2) the First Amended Complaint (ECF No. 5); 3) Order re: Motion to Dismiss (ECF No. 27); 4) Second Amended Complaint (ECF No. 42); 5) Answer to Second Amended Complaint (ECF No. 47); 6) Order re: Motion to Dismiss Third-Party Complaint (ECF No. 66); 7) Stipulation of Facts (ECF No. 69); 8) Travelers' Motion for Summary Judgment and Supporting Documents (ECF Nos. 82-86); 9) Bank's Motion for Summary Judgment and Supporting Documents (ECF Nos. 88-91); 10) Travelers' Response to Summary Judgment and Supporting Documents (ECF Nos. 101-107); 11) Bank's Response to Summary Judgment and Supporting Documents (ECF Nos. 109-110); 12) Summary Judgment Reply Briefs (ECF Nos. 118, 119, 122, 123, 124, 125); 13) Memorandum Opinion and Order re: Summary Judgment Motions (ECF No. 140); 14) Trial Briefs (ECF

1 Nos. 162 & 177); and 15) the parties submissions re: proposed certified questions (ECF
2 No. 191 & 192).

3 4. Plaintiff Travelers shall serve and file the first brief with the Washington
4 Supreme Court within 30 days after the filing of the record in the Supreme Court pursuant
5 to RCW 2.60.030(4) and Wash.RAP 16.16. Twenty days after receipt, Defendant Bank
6 shall serve and file its brief in response. Within ten days thereafter, Plaintiff shall serve
7 and file its reply.

8 **IT IS SO ORDERED.** The Clerk shall enter this Order, forward a certified copy
9 thereof and a certified copy of the designated record to the Washington Supreme Court,
10 and forward a copy of this Order to counsel.

11 Dated this 10th day of November, 2015.

12 s/ Justin L. Quackenbush
13 JUSTIN L. QUACKENBUSH
14 SENIOR UNITED STATES DISTRICT JUDGE

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Travelers vs. Washington Trust Bank
Supreme Court No. 92483-0
USDC – Eastern District of WA No. CV-13-0409-JLQ

For filing, please find attached Plaintiff Traveler's Opening Brief on Certified Questions.

Regards,

Stephanie A. Abrahamson
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