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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2016-SC-000136-D

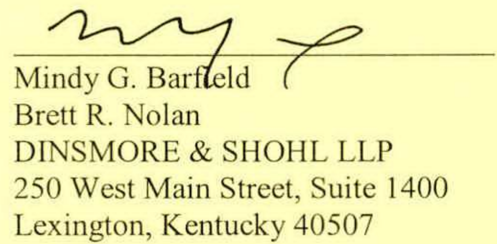
ANGELA FORD; ANGELA FORD, P.S.C.;
ATI VENTURES, LLC; AND — APPELLANTS
VILLA PARIDISIO, LLC;

ON REVIEW FROM THE KENTUCKY COURT OF APPEALS
v. — CASE NOS. 2014-CA-000762 & 2014-CA-00791
FAYETTE CIRCUIT COURT 2012-CI-03758

HAROLD BAERG, JR.;
KATHLEEN M. BAERG; AND — APPELLEES
FAISAL SHAH

REPLY BRIEF OF APPELLANTS

Respectfully submitted,



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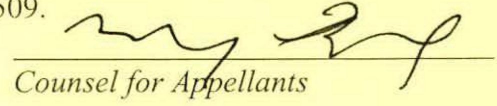
CERTIFICATE OF SERVICE

This is to certify that the Reply Brief of Appellants was served on this 21st day of April, 2017, via first class mail, postage prepaid on the following: Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Thomas L. Clark, Fayette Circuit Court, 120 N. Limestone Road., Lexington, Kentucky 40507; John N. Billings, Christopher L. Thacker, John F. Billings, and Stephen F. Wilson, Billings Law Firm, PLLC, 111 Church Street, Suite 200, Lexington, KY 40507; and Stephen M. O'Brien, III and D. Seth Coomer, O'Brien Batten & Kirtley, PLLC, 921 Beasley Street, Suite 150, Lexington, Kentucky 40509.



Counsel for Appellants

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ARGUMENT

In their Response briefs, both the Baergs and Shah rely on several misstatements of both Kentucky law and factual claims directly contradicted by the evidence in the record. Their arguments are unsupported in both law and fact, and must be rejected by this Court.

I. The doctrine of apparent authority did not divest Appellants of their title to the stolen funds.

The primary argument advanced by both the Baergs and Shah, and ultimately adopted by the Court of Appeals, is that Appellants lost title to their funds—which were stolen by Johnston—because Johnston had apparent authority from the perspective of the banks to make withdrawals. This argument is premised on a foundational misunderstanding of the law of apparent authority, which is why neither the Baergs nor Shah point this Court to a single case in which apparent authority was used to divest a party of their property rights even when the defendant did not rely on any manifestations of authority from a principal.

An essential element of apparent authority is reliance. Every recitation of the doctrine in Kentucky case law or elsewhere expressly notes that apparent authority only applies when the party asserting it *relied* on some manifestation of authority by a principal. As this Court explained, apparent authority only exists "when the principal has manifested to **the third party** that the agent is [authorized to act], **and the third party reasonably relies on that manifestation**." *Dean v. Commonwealth Bank and Trust Co.*, 434 S.W.3d 489, 499–500 (Ky. 2014) (emphasis added). This explanation further parallels the Restatement of Agency, which defines apparent authority as arising when "a third party **reasonably believes** the [agent] has authority to act on behalf of the principal

and that belief is traceable to the principal's manifestations." Restatement (Third) Agency § 2.03 (2006) (emphasis added). Reliance is a key element of the doctrine.

Neither the Baergs nor Shah argue that they ever relied on any manifestation of authority by Appellants regarding Johnston's right to withdraw or transfer Appellants' funds. Instead, they contend that because some other party (the banks at issue) relied on a manifestation of authority (of which they were not aware) when allowing Johnston to withdraw money from Appellants' accounts, they should not be liable for conversion. But there is simply no basis for making such a claim. Apparent authority exists only when the party asserting it relied on the principal's manifestation, and here, the Baergs and Shah make no such claim.

This Court already addressed the distinction applicable in this case when explaining apparent authority in *Dean.* In *Dean*, the Court held that a bank could not be liable under either the UCC or the common law after a company's employee engaged in a check-kiting scheme because the bank reasonably relied on the employee's apparent authority to make withdrawals and transfers. But in reaching this conclusion, the Court did not hold that the plaintiff was completely divested of title to its funds. In fact, the Court went out of its way to acknowledge that the application of apparent authority was entirely dependant on the *bank's* reliance as a defendant, and that for this reason, other parties would be treated differently: "That a principal did not approve an individual transaction [with a bank] does not change the fact that an agent can have apparent authority to . . . engage in the transaction, **at least when viewed from the perspective of the bank**." *Dean*, 434 S.W.3d at 500 (emphasis added). The Court did not say that the plaintiff lost all of its rights to the property, but instead specifically noted that apparent

authority insulates *the bank* from liability because *the bank* relied on the manifestations of authority by the principal. When viewed from the perspective of other parties who have no such reliance interest, apparent authority has no relevance or application.

The Baergs and Shah both disregard this essential element of the doctrine of apparent authority when arguing that the Court of Appeals correctly reversed the Circuit Court. The Baergs devote over two pages in their brief to arguing that they "were not required to rely on the manifestations of an unknown third party to receive good title," but within those pages they do not cite a single state or federal case from Kentucky or any other jurisdiction supporting this proposition. (Baergs' brief at 17–19). They summarily conclude that Johnston had apparent authority to withdraw funds from the Villa Paradisio accounts and fail to address the fact that at no point did the Baergs rely on any manifestation of authority by Ford or the other Appellants.[1]

Shah similarly acknowledges that he never relied on any manifestation of authority from Appellants, but nonetheless claims that the doctrine operated to "lawfully divest Appellants of title" when Johnston gave the check to Zafar Nasir who then gave it

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[1] Their authority is so weak on this issue that the Baergs cynically distort Appellants' brief to suggest that Appellants concede they lost title to the disputed funds—the entire issue in this appeal. The Baergs wrote, "As Appellants acknowledge, 'Ford could not bring a claim for conversion against the bank' because the banks received good title to the funds by operation of law." (Baergs Brief at 20, quoting Appellants' Brief at 24). Appellants, of course, made no such argument. In fact, the sentence the Baergs misquote states the opposite: "Furthermore, although Ford could not bring a claim for conversion against the bank, *she maintained her superior right to possess the funds as against third parties such as the Baergs* who did not rely on any manifestation of authority sufficient to establish apparent authority." (Appellants' Brief at 24) (emphasis added). The distortion of Appellants' brief only exemplifies the fact that the Baergs did not cite to a single case in which apparent authority was applied to parties who did not rely on any manifestation of authority by the principal.

to Shah. (Shah Brief at 11).[2] Shah, too, fails to provide a single authority of any kind indicating that apparent authority can completely divest a party of their property rights even where the defendant did not rely on a manifestation of authority from the principal. Instead, Shah summarily concludes that the Court of Appeals was correct in applying its analysis and asks the Court to ignore the plain language of *Dean* and other cases in which reliance is noted as an essential element of the doctrine. In sum, Appellants have demonstrated the inapplicability of the doctrine of apparent authority in this case, and neither the Baergs nor Shah have presented any rebuttal that would justify upholding the Kentucky Court of Appeals' decision based on apparent authority. It should therefore be reversed.

II. The Baergs and Shah are liable for conversion regardless of whether they knew or believed that Johnston stole the funds.

In addition to ignoring the reliance element of apparent authority, both the Baergs and the Shah fail to adequately respond to the longstanding Kentucky law establishing that even innocent recipients of stolen property are subject to a conversion claim by the property's true owner. As explained in Appellants' principal brief, Kentucky courts have long held that a recipient of stolen property is liable for conversion regardless of their knowledge or good faith. *Urban v. Lansing's Adm'r*, 39 S.W.2d 219, 221 (Ky. 1931); *State Farm Auto. Mut. Ins. Co. v. Chrysler Credit Corp.*, 792 S.W.2d 626, 627 (Ky. App. 1990); Restatement (Second) of Torts § 229. This has always been the law in Kentucky and remains the law today.

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[2] Shah mistakenly analyzes the issue as whether he relied on a manifestation authority from *Johnston*, not Appellants. (*See* Shah Brief at 11 ("Undoubtedly, Appellee never relied on any manifestation from Mr. Johnson [sic] in this transaction.")).

Bizarrely, the Baergs argue that the opposite is true without citing any cases to support their claim. They contend that "Kentucky law does not permit a previous owner of property to void subsequent lawful transfers of the property simply because they were victims of fraud at some point in the past." (Baergs Brief at 18). But in fact, this is exactly what Kentucky law permits. In *Urban v. Lansing's Adm'r*, Kentucky's highest court plainly stated:

> The purchaser of stolen chattels acquires no title, however innocent he may be, and an innocent holder appropriating or disposing of stolen property is liable for conversion. . . . Therefore, **even though Urban was without knowledge of the theft of the automobile**, he was guilty of a conversion, and the plaintiff was entitled to recover **irrespective of Urban's good faith or bad faith, knowledge or ignorance.**

Id. at 221 (emphasis added). The Baergs are simply incorrect when they contend that Kentucky law permits innocent recipients of stolen property to avoid liability for conversion.

The Baergs attempt to distinguish this case from *Urban* by arguing, incredibly, that Johnston was not a "thief" (Baergs' Brief at 18), a sentiment repeated throughout their brief. In their "Clarification of Factual Background," the Baergs go so far as to argue that Johnston had the authority to make withdrawals from Appellants' account, but the only support the Baergs offer for this claim is an affidavit by Johnston that was stricken from the record by the trial court.[3] (Baergs' Brief at 3, n. 10). There is no evidence *in the record* indicating that Johnston was authorized by Appellants to make transfers or withdrawals from their accounts, and—as Appellants noted in their principal brief—the uncontroverted record evidence, including Ford's Affidavit, establishes that

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[3] *See* R. 2364. Johnston's untimely appeal was dismissed by the Kentucky Court of Appeals and he chose not to further appeal the dismissal.

Johnston had no such authority. (*See* R. 912, 1469). Ford's Affidavit in the record verifies that Johnston had no authority to withdraw any money from the bank accounts at issue without her prior approval, and it was never rebutted by any evidence in the record now before this Court. (R. 912, 1469). This evidence alone establishes that Johnston was a thief, and should suffice to demonstrate that he acted illegally and without authority.[4]

Shah makes a similar argument when he distinguishes this case from *Urban* on the grounds that "the property at issue here was not unlawfully taken from its owner." (Shah Brief at 13). Shah's recitation of the facts in the record repeats this blatant distortion several times. He contends that Appellants did not limit Johnston's authority to make withdrawals or transfers from their accounts (*id.* at 2) and Appellants are only now claiming that Johnston was not authorized to make the illegal transfers (*id.* at 1). In fact,

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[4] While this should be sufficient on its own to defeat Appellees' argument that Johnston had authority to withdraw the money, this Court may also take judicial notice of the approved Plea Agreement and Judgment in *United States v. Johnston,* Civ. A. No. 5:13-CR-142-JMH-REW (E.D. Ky.), attached hereto to the Appendix. They confirm that, as part of a plea agreement approved by the U.S. District Court for the Eastern District of Kentucky, Johnston *admitted* he had no authority to withdraw any money from Appellants' bank accounts without prior approval from his client, Ms. Ford; that instead, he stole money from Appellants using a "a complex scheme of money transfers made in an attempt to hide the fraudulent misappropriation of client funds," including the very wire transfers and transfers by check at issue in this case; and that he was sentenced to twenty (20) years in federal prison for those and other crimes. A court may take judicial notice of an adjudicative fact at any point in a proceeding, including on appeal. *See Doe v. Golden and Walters, PLLC*, 173 S.W.3d 260, 264 (Ky. App. 2005); *see also* Lawson, Kentucky Evidence Handbook 4th Ed. (2003) at. 19 ("By approving of notice 'at any stage of the proceeding,' KRE 201(f) codifies a line of Kentucky cases recognizing the authority of an appeals court to take judicial notice of a noticeable fact"). In *Doe*, the court took judicial notice of, among other things, a Sixth Circuit Court of Appeals Opinion entered after the trial court summary judgment then on appeal. It concluded that such an Order met the requirements of KRE 201(b). Like the federal court opinion in *Doe*, the documents attached to the Appendix from *U.S. v. Johnston* were issued after entry of summary judgment in favor of Appellants and they meet the KRE 201(b) standard of being "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Shah goes so far as to argue that in this case "there is no 'stolen' property or a 'thief,' rendering *Urban* inapplicable." (*Id.* at 14). Yet Shah provides no actual citations to the record to support these farfetched propositions, and simply ignores the fact that there is uncontroverted evidence in the trial court record indicating that Johnston was not authorized to withdraw or transfer the funds. (R. 912, 1469). At this juncture, there is simply no legitimate basis for Shah to contend that Johnston was authorized to steal from Appellants. The record establishes otherwise, and Shah's unsubstantiated assertions are without merit.

This Court is bound by the uncontroverted evidence in the record, which establishes that Johnston acted unlawfully when he withdrew and transferred funds out of Appellants' accounts. The fact that the Baergs and Shah claim to be unaware of his theft does not render it any less of a theft, and the holding of *Urban* therefore applies with equal force in this case. Under *Urban*, the Baergs and Shah are liable for conversion regardless of their alleged innocence or good faith, and no distortion of the underlying record changes this outcome. *Urban*, 39 S.W.2d at 221.

III. Intangible funds are subject to conversion.

The Baergs contend that "[t]he tort of conversion has limited application where intangible funds, rather than tangible chattels, is involved." (Baergs' Brief at 16). While it might be true that not all intangible funds are subject to conversion, the law is clear that when the funds are traceable and identifiable as separate property the law of conversion applies just as it does when the property is tangible chattels. *See Hearn v. Commonwealth*, 80 S.W.3d 432, 435 (Ky. 2002) ("Money is property which is capable of being converted."). As a court in the Eastern District of Kentucky recently explained, "a claim for conversion has been allowed where the funds in question were specific or

sequestered, identifiable monies or funds entrusted to the defendant's care for a specific purpose." *Ashland, Inc. v. Windward Petroleum, Inc.*, No. 04-554-JBC, 2006 U.S. Dist. LEXIS 49709, at *20 (E.D. Ky. July 11, 2006). The issue is not whether intangible money can be converted in general, but whether it is traceable and identifiable, which it clearly is in this case. The Appellees have never disputed that the funds they received came from Appellants' bank accounts.

Tellingly, the Baergs do not cite to a single case about conversion when arguing that the tort of conversion is limited for intangible funds. Rather, the Baergs cite only *People's Nat'l Bank v. Jones*, 61 S.W.2d 17 (Ky. 1933), a case that does not address the tort of conversion at all, much less the applicability of the tort to money that is traceable and identifiable. There is simply no law exempting the funds in this case from the tort of conversion, and the Baergs' argument otherwise is without merit.

IV. The UCC does not bar the claims against either Shah or the Baergs.

Both Shah and the Baergs rely on the UCC to claim Appellants lost title to their funds when Johnston made his unauthorized transfers. Neither argument is correct and both must be rejected by this Court.

A. The Baergs cannot use Article 4A as a shield for fraudulent activity.

The Baergs contend that, under Article 4A of the UCC, Appellants lost title to their funds as soon as Johnston initiated his unauthorized transfer. But to make this argument, the Baergs rely on *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1277 (11th Cir. 2003), a case in which the Eleventh Circuit expressly held that Article 4A cannot be used as "a shield for fraudulent activity" and that courts should not construe it so as to reach "absurd results." *Id.* at 1276. The court explained that "[i]t could hardly have been the intent of the drafters to enable a party to succeed in engaging in fraudulent

activity, so long as it complied with the provisions of Article 4A." *Id.* Here, there is no disputing that Johnston used a wire transfer as a vehicle to perpetuate his fraud against Appellants, and permitting this scheme to successfully deprive Appellants of their property would allow Article 4A to be used as a shield for fraud and thereby distort the purpose of Article 4A beyond recognition.

The Baergs additionally make much of the fact that Appellants have a judgment against Johnston,[5] dismissing the serious concern that the Court of Appeals' Opinion provides a roadmap for future embezzlers who initiate wire transfers on behalf of their principal. They contend that there is no risk of future perpetrators relying on the Court of Appeals' ruling because those bad actors—like Johnston—will be subject to a judgment for conversion. But this argument misses the point: Johnston no longer has the money at issue. Just as a thief of tangible chattels will quickly dispose of his stolen goods, an embezzler could take Johnston's playbook and wire transfer the money to third parties. This will leave crime victims with only a meaningless paper judgment against the thief and no recourse against those persons who actually possess and/or made use of their property. This rule would be contrary to decades of law regarding the ability of a property owner to recover stolen property from any party, regardless of their good faith, and would unnecessarily undermine the common law to encourage future theft. This Court should rule against allowing Article 4A from serving as a shield for fraud.

B. Shah cannot rely on the UCC to avoid liability for conversion.

Incredibly, Shah raises an entirely novel argument based on the UCC that was never preserved in the trial court or addressed in the Court of Appeals. (Shah Brief at 6–

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[5] Notably, the Baergs *also* have a judgment against Johnston from their cross-claim in the underlying suit.

10). He contends that several provisions of the UCC regarding negotiable instruments, when read together, indicate that Appellants lost title to the funds at issue and therefore cannot proceed with their claim for conversion. This argument is wrong on the merits, but more importantly, has been waived and cannot be the basis for reversing the trial court's decision granting Appellants summary judgment.

This Court has expressly held that "when an appellate court determines to reverse a trial court, it cannot do so on an unpreserved legal ground unless it finds palpable error, because the trial court has not had a fair opportunity to rule on the legal question." *Fischer v. Fischer*, 348 S.W.3d 582, 590 (Ky. 2011). Shah did not previously raise any of the arguments regarding the UCC he now presents to this Court. He did not raise them to the trial court, and he did not raise them at the Court of Appeals. He is precluded as a matter of law from raising them now when the effect would be to reverse the trial court's decision on summary judgment.[6]

Even if Shah had preserved his argument under the UCC, his argument is nonetheless incorrect on the merits and must be rejected. Shah's argument focuses on provisions of the UCC regarding the transfer of a cashier's check and the circumstances in which a cashier's check is stolen. But here, Johnston did not steal a cashier's check from Appellants that Appellants are seeking to recover. He stole the *funds* that he used to purchase a cashier's check, and he used the cashier's check to transfer those *funds* to Shah. Thus, the issue is not—as Shah describes—"whether Appellants lost possession of the check during the chain of transactions" (Shah Brief at 9) because Appellants never

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[6] Shah appears to recognize that he is precluded from presenting these arguments, as he acknowledges this rule immediately prior to raising them anyway. (Shah Brief at 6).

had possession of the check. Appellants had possession of and the right to possess the funds that were stolen and transferred to Shah through the vehicle of a cashier's check. It is the *funds* that are at issue in this case that Appellants properly traced to Shah's account and that Shah admits to taking possession of when he deposited the cashier's check in his bank.

Furthermore, as Shah himself notes, "transfer of a cashier's check is ***fundamentally the same as the transfer of cash***." (Shah Brief at 7) (emphasis added). The provisions of the UCC Shah cites to does not prevent Appellants from tracing their funds to Shah just as they could trace the cash equivalent.

Shah also argues that the UCC divests Appellants of their right to their stolen funds because the cashier's check was transferred by their agent, Johnston. However, Johnston was not acting as an authorized agent for Appellants when he transferred the cashier's check to his co-conspirator Zafar Nasir. As explained above, the uncontroverted evidence establishes that Johnston was not authorized to make any withdrawals or transfers from the ATI Ventures account, and thus Appellants did not "voluntarily relinquish possession of the instrument" when Johnston took the *ultra vires* act of stealing funds and transferring them to his associates. Shah's UCC defense must be rejected.

V. The Baergs' constructive possession and control is sufficient to establish liability for conversion.

The Baergs additionally argue that they cannot be liable for conversion because, pursuant to the technical requirements of a 1031 exchange, the Baergs did not actually take possession of the stolen funds when Johnston wired them on their behalf.

Legal authorities recognize that an individual may be liable for conversion if that individual had actual *or* constructive possession of the property in order to demonstrate the "dominion over property" element of the claim. *See, e.g.*, 18 Am Jur 2d Conversion § 23 ("Conversion is concerned with possession, not title, and its essence is not in the acquisition of the property by the wrongdoer, but rather in the wrongful deprivation of the owner. Such conversion may be either direct or constructive . . . ."); *Pan American Petroleum Corp. v. Long*, 340 F.2d 211, 220 (5th Cir. 1964) (Conversion requires "some distinct act of dominion or control over the personal property of another. The convertor may either have actual or constructive possession of the property."). The Baergs acknowledge that Johnston was acting as *their* agent when he used Appellants' funds to complete *their* 1031 exchange (Baergs Brief at 30), and there is thus no disputing that the Baergs exercised dominion and control over the money, whether directly or constructively through their agent.

While Kentucky courts have not discussed this specific nuanced issue, Kentucky jurisprudence shows that the conduct demonstrating the "exercise of dominion and control" may take different forms. For example, in one conversion case, the Court of Appeals began its analysis by noting that it "has been held in state court that conversion is the proper action when the chattel converted is money." *Brown v. Brown & Co.*, No. 86-CA-2686-MR, 1988 Ky. App. LEXIS 32, *7–8 (Ky. App. Feb. 26, 1988) (citing *Sherman v. Adams*, 194 S.W.2d 625 (Ky. 1946)). In *Brown*, the defendant was improperly withholding commissions from the plaintiff, his business partner, and the Court of Appeals found that these actions were sufficient to demonstrate dominion over the funds and establish a claim of conversion. Id. at *9–10. Key in *Brown* was the fact

that the plaintiff had identified specific sums of money to which he had a right to possession and over which the defendant was exercising dominion and control inconsistent with that right. *Id.* Appellants in this case provided undisputed evidence of the same to the trial court: their right to the specific sums identified, that Johnston lacked authority to transfer the identified monies, and the Baergs' control of those sums that was inconsistent with Appellants' right. This more than establishes the possession and control elements of a conversion claim.

VI. A demand is not necessary to establish the elements of conversion in Kentucky.

The Baergs' argument that the lack of a demand and refusal for the return of the property bars Appellees' conversion claims is directly contrary to Kentucky law. "[W]here an actual conversion is alleged, as here, an averment of demand and refusal is not required," because even though such a demand and refusal can be evidence of a conversion, "any wrongful exercise or dominion over chattels to the exclusion of the rights of the owner, or a withholding of them from his possession under a claim inconsistent with his rights, constitutes a conversion." *Joseph Goldberger Iron Co. v. Cincinnati Iron & Steel Co.*, 154 S.W. 374, 375 (Ky. 1913). This remains the accepted law on conversion in Kentucky. *Madison Capital Co., LLC v. S & S Salvage, LLC*, 765 F. Supp. 2d 923, 932 (W.D. Ky. 2011) aff'd 507 F. App'x 528 (6th Cir. 2012). "A demand and refusal are not necessary elements of a claim for conversion where an actual conversion is alleged from the outset by the plaintiff." *Id.* (citing *Joseph Goldberger Iron Co.*, 154 S.W. at 375). "[W]here conversion has occurred by way of a wrongful taking at the outset . . . demand and refusal need not be proved, which is logical since the taking is hostile at the forefront and demand for its return likely futile." *Id.* (internal quotation

marks and citation omitted). In this case, the Appellants alleged an actual conversion, which occurred by a wrongful taking at the outset. (R. 103–108). As a result, Kentucky law does not require a demand to pursue this type of claim for conversion.

VII. The Baergs and Shah were the legal cause of Appellants' loss.

The Baergs and Shah both argue that they were not the legal cause of Appellants' loss because Johnston is the party who stole the funds. This argument has no basis in the law, and in fact, Shah relies on a case from the Kentucky Court of Appeals that directly contradicts their claims. In *Jasper v. Blair*, the Kentucky Court of Appeals analyzed a case of conversion strikingly similar to the instant suit. 492 S.W.3d 579 (Ky. App. 2016). The defendant in *Jasper* was the owner of a jewelry store that purchased stolen jewelry from a burglar. The defendant broke the jewelry down and sold the gold as scrap and retained the diamonds. The Court of Appeals affirmed the $15,000 verdict against the jewelry store owner and rejected his argument that it could not be liable for conversion because it was the burglar who solely caused the plaintiff's loss. The Court of Appeals expressly rejected this argument and held that Jasper's purchase of the ring from the burglar was a "substantial factor" in the plaintiff's loss and he could therefore be liable for conversion. *Id.* at 583. Similarly, in this case, the Baergs and Shah caused Appellants to lose their funds by receiving and exercising control over Appellants' funds after Johnston stole them. They may not have been the thief, but they were a "substantial factor" in causing the Appellants' losses.

VIII. Equity requires restoring the funds to Appellants, the rightful owners.

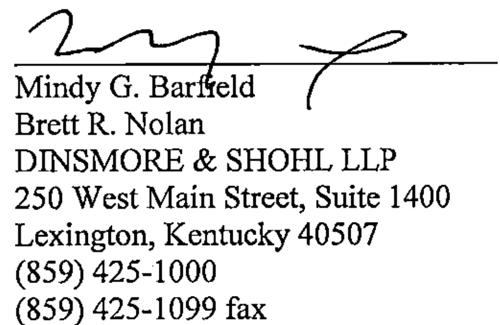
Finally, the Baergs contend that principles of equity demand that Appellants be forced to bear the loss of their property because the theft was caused by their agent, Johnston. Yet, the Baergs admit that Johnston acted as *their* agent when he transferred the

funds out of Appellants' account for carrying out *their* 1031 exchange. (Baergs Brief at 30). Appellants were not involved—and could not have known about—the Baergs 1031 exchanges, and it was the Baergs who had the opportunity to raise questions about why Johnston—their agent—was using funds from an account they did not recognize to carry out their transaction.[7] This is not a case of "shifting the burden from one innocent victim to the another," as the Baergs contend. It is a case of permitting the true owners to recover property illegally taken from them, as permitted by Kentucky's common law for decades.

CONCLUSION

For all of the above-stated reasons, and the reasons raised in Appellants' principal brief, Appellants respectfully request that this Court reverse the Court of Appeals and affirm the Fayette Circuit Court's entry of judgment in favor of Appellants.

Respectfully submitted,



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[7] As noted in Appellants' principal brief, the Baergs were notified at least once that the funds being used for their 1031 exchange were not coming from their authorized intermediary source, but were instead being withdrawn from one of Appellants' accounts. (*See* Appellants Brief at 5–6).

APPENDIX

1. Seth Johnston Guilty Plea in *United States v. Johnston*, 13-CR-142 (E.D. Ky.)
2. Judgment against Seth Johnston in *United States v. Johnston*, 13-CR-142 (E.D. Ky.)

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