

SUPREME COURT OF KENTUCKY
No. 2012-SC-000267-D

MARK D. DEAN, P.S.C.

APPELLANT

v. **Appeal from the Court of Appeals No. 2010-CA-002152-MR,**
Affirming Shelby Circuit Court, No. 09-CI-00050

COMMONWEALTH BANK & TRUST COMPANY

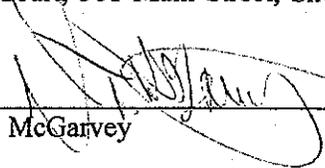
APPELLEE

BRIEF OF APPELLEE, COMMONWEALTH BANK & TRUST COMPANY

John T. McGarvey
Eric M. Jensen
Bradley S. Salyer
MORGAN & POTTINGER, P.S.C.
601 West Main Street
Louisville, KY 40202
(502) 589-2780
Counsel for Appellee,
Commonwealth Bank & Trust Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of this *Brief* was this 9th day of April, 2013, served by overnight mail upon Hon. Susan Stokely Clary, Clerk of the Kentucky Supreme Court, Capitol Building, 700 Capitol Avenue, Room 209, Frankfort, KY 40601, and that true and accurate copies were also this 9th day April, 2013, served by regular U.S. Mail, postage prepaid, upon Laurence J. Zielke, Nancy J. Schook, Karen D. Campion, ZIELKE LAW FIRM, PLLC, 462 S. Fourth Street, Suite 1250, Louisville, KY 40202, Hon. Samuel P. Givens, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, and Hon. Charles R. Hickman, Judge, Shelby Circuit Court, 501 Main Street, Shelbyville, KY 40065.



John T. McGarvey

STATEMENT CONCERNING ORAL ARGUMENT

This appeal involves important issues of interpretation and application of the Uniform Commercial Code as adopted in Kentucky, and, accordingly, Appellee, Commonwealth Bank & Trust Company, maintains that the Court's determination of same would benefit from oral argument.

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COUNTERSTATEMENT OF THE CASE

Appellee, Commonwealth Bank & Trust Company (“CB&T”), takes issue with the *Statement of the Case* presented by the Appellant, Mark D. Dean, P.S.C. (“Dean P.S.C.”), and, accordingly, submits this *Counterstatement of the Case*.

Dean P.S.C.’s suit involves numerous causes of action against CB&T arising from the embezzlement and misuse of account funds by Dean P.S.C.’s bookkeeper, Jody Wills (“Wills”), an authorized signer on the corporation’s account. On December 29, 2009, Wills pleaded guilty to 19 counts of theft by unlawful taking and received a total sentence of 10 years. Wills also agreed to pay Dean P.S.C. restitution of \$720,000.¹

Both the Shelby Circuit Court and the Court of Appeals ruled that Dean P.S.C.’s claims were subject to summary judgment. The technical legal issue before this Court on appeal is whether the Court of Appeals (1) properly decided that KRS 355.4-406 – a statute of repose and condition precedent to suit against a bank – bars all of Dean P.S.C.’s claims, and, (2) properly decided that KRS 355.4-406 bars Dean P.S.C.’s claims “sounding in common law,” as well as its Uniform Commercial Code (“UCC”) claims.

The Court of Appeals correctly determined that all of Dean P.S.C.’s claims are barred by KRS 355.4-406, meaning this Court should affirm that decision below in all regards. In the alternative, CB&T contends that Dean P.S.C.’s *Verified Complaint* (“*Complaint*”) should be dismissed because its common-law claims are displaced by Articles 3 and 4 of Kentucky’s version of the UCC (KRS 355.1-101, *et seq.*), and because any and all claims related to the transactions at the heart of Dean P.S.C.’s action, as governed by the UCC, are barred by the UCC’s general statutes of limitation found at KRS 355.3-118(7) and 355.4-111.

¹ *Commonwealth v. Wills*, Case No. 09-CR-0166 (Shelby Circuit Court).

Factual History

On or about September 17, 1998, Dean P.S.C. opened a business checking account with CB&T, Account No. 2020955 (“the Account”). *Record on Appeal (“R.”)*, *Nichols depo.*, at 265. The signature card for the Account listed two individuals, Mark D. Dean (“Mark Dean”), and Wills – both employees and agents of Dean P.S.C. – as authorized signers on the Account, with only one signature required on any check. *R.*, *Signature Card*, at 266 (the “Signature Card”). Indeed, the Signature Card states above the signature lines that “**the undersigned is acting on behalf of the business entity.**” *Id.* (emphasis added).

It is undisputed that, from the time the Account was opened in 1998 until it was closed 10 years later, CB&T mailed to Dean P.S.C. – on or about the second business day of each month to the address it designated on the Signature Card – a statement reflecting the amounts of all deposits to, and all withdrawals from, the Account during the previous month, accompanied by either the original of each check paid against the Account or a photocopy of the front of each such check. *R.*, at 261-64, 267-311.

On or about December 18, 2008 – before this suit was commenced – CB&T received a letter from Larry Zielke, Dean P.S.C.’s counsel, dated December 15, 2008, referencing the Account (“the Zielke letter”). *R.*, *Zielke letter*, at 312. Enclosed with the Zielke letter were copies of 11 checks drawn on, and paid against, the Account between September 29, 2003, and August 27, 2004 (“the Subject Checks”). *Id.*

The Zielke letter indicated that the Subject Checks were written by Wills, and, indeed, each of them includes a signature matching that of Wills on the Signature Card. *R.*, at 266. The Zielke letter also noted that these were “counterchecks,” a check written on check stock but not preprinted with an accountholder’s name or account number;

banks commonly keep a supply of these checks on their premises for the convenience of their customers. *R.*, at 260.

Each of the Subject Checks was payable to Dean P.S.C. and, based upon stamps placed on the back of each, were deposited to an account maintained by Dean P.S.C. at Citizens Union Bank (“CUB”). *R.*, at 259. The Zielke letter alleged that CB&T “failed to exercise ordinary care” in paying the Subject Checks. *R.*, at 312.

Procedural History

Dean P.S.C. alleged the following causes of action in its *Complaint* filed on January 23, 2009: (1) A violation of Articles 3 and 4 of Kentucky’s UCC; (2) “aiding and abetting” fraud and illegal activity, and breach of the duty of ordinary care; (3) punitive damages; (4) common-law negligence; and (5) breach of contract and breach of the duty of good faith and fair dealing. *R.*, *Verified Complaint*, at 4-7.

The February 17, 2010 *Opinion and Order* of the Shelby Circuit Court concluded that Dean P.S.C.’s claims based on Kentucky’s UCC were barred by one or both of the three-year statutes of limitation contained in KRS 355.3-118(7) and 355.4-111, and that, absent fraudulent concealment, the “discovery rule” did not apply to claims brought under the UCC. *R.*, at 229-32.

On CB&T’s *Renewed Motion for Summary Judgment*, the trial court granted summary judgment on Dean P.S.C.’s remaining claims on November 5, 2010, concluding as follows: (1) Dean P.S.C.’s “aiding and abetting” claim fails as a matter of law, as any concealment was perpetrated by a third party (Wills) and could not be imputed to CB&T; (2) Dean P.S.C.’s negligence claim fails as a matter of law because Dean P.S.C. cannot establish that CB&T breached any duty or violated any banking standard; (3) Dean P.S.C.’s punitive-damages claim fails because it cannot prove negligence and cannot

meet the burden for punitive damages; and (4) Dean P.S.C.'s contract claim fails because it did not identify any provision in the Customer Account Agreement as being breached, nor did it cause that Agreement to be placed into the record. *R.*, at 448-52.

Following the November 5, 2010 ruling, Dean P.S.C. filed its appeal to the Court of Appeals. The Court of Appeals, in a unanimous opinion penned by Chief Judge Taylor, affirmed the trial court, finding as follows: (1) KRS 355.4-406(3) and the parties' agreement "imposes the 'duty of a customer to examine their [sic] bank statements in a prompt and reasonable fashion,'" which duty requires examining statements for unauthorized signatures, including those which exceed actual or apparent authority; (2) among the legal repercussions of failing to promptly examine bank statements in accordance with statutory requirements is what else is contained in KRS 355.4-406, which is a "precondition to a customer's lawsuit against a bank" and "establishes a 'substantive bar that destroys the right to sue the bank, regardless of the theory on which the plaintiff brings suit'" based on the commercial certainty doctrine and underlying purposes of the UCC; and, (iii) that Dean P.S.C.'s "dilatatoriness is an inadequate basis for concluding that it could not reasonably have discovered the unauthorized payments" where Mark Dean "effectively acknowledges that when, finally, he did look at the bank statements, he was alerted. . . ." *Op. Affirming*, at 10.

Dean P.S.C. filed its *Motion for Discretionary Review* herein on May 4, 2012, and discretionary review was granted by *Order* of this Court entered December 12, 2012. The Kentucky Bankers Association ("KBA") filed an *Amicus Curiae Brief* on February 25, 2013, and the *Order* of this Court granting the filing said *Amicus Curiae Brief* was entered March 14, 2013.

Whereas the uncontroverted facts of record prove that Dean P.S.C. (1) appointed Wills as a signatory on the Account, (2) specifically acknowledged on the Signature Card that Wills was acting on behalf of Dean P.S.C., (3) specified that only one signature was required for checks written on the Account, and (4) entrusted Wills to carry out the financial activities of the corporation (including writing and depositing checks and reviewing statements, this Court should affirm the lower-court decisions granting summary judgment in favor of CB&T.

ARGUMENT

I. The Standard of Review

When summary judgment is granted below, the standard of review for an appellate court in the Commonwealth is *de novo*. See *Richardson v. Rees*, 283 S.W.3d 257, 262 (Ky. App. 2009). Additionally, this Court should ascertain whether “the trial court correctly found that there were no issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Further, “an appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result.” *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009); see also *McCloud v. Commonwealth*, 286 S.W.3d 780 (Ky. 2009) (appellate court may affirm for any reason supported by record).

II. The Court of Appeals Properly Affirmed the Trial Court in Conjunction With Its Application of KRS 355.4-406

Dean P.S.C.'s *Brief* contends that the Court of Appeals' *Opinion Affirming*, rendered April 6, 2012, “wholly ignored the issues raised by the parties,” and that allowing the Court of Appeals to affirm on different grounds than those ruled on by the trial court or briefed by the parties could “deny the parties due process, and undermine the appellate process.” *Appellant's Br.*, at 7-8. Such an argument ignores the appellate

record below and also constitutes a deviation from the applicable precedent in proceedings before appellate courts of the Commonwealth.

First and foremost, the applicability of KRS 355.4-406 was a proper issue for the Court of Appeals to consider and determine because that statute was unambiguously put before the trial court in this matter. *R.* at 226-34, February 17, 2010 *Opinion and Order*. As Dean P.S.C. itself argues, “the trial court had previously rejected the idea that KRS 355.4-406 was applicable to this case.” *Appellant’s Br.*, at 7. Likewise, CB&T argued before the trial court that KRS 355.4-406 barred all of Dean P.S.C.’s claims herein.

Simply put, the fact that the trial court granted CB&T summary judgment on grounds other than KRS 355.4-406 in no way creates a duty on CB&T’s part to cross-appeal the trial court’s ruling. The issue of KRS 355.4-406 has been raised previously in this case, ruled upon by the trial court, and was properly before both the Court of Appeals and is before this Court for consideration.

Nevertheless, Dean P.S.C. makes much of the issue that neither itself nor CB&T briefed the statute of repose contained in KRS 355.4-406 to the Court of Appeals. *Appellant’s Br.*, at 6-10. Again, though, examining the procedural posture of the case, it is perfectly natural that neither side presented said issue to the Court of Appeals. Dean P.S.C., as Appellant below, limited its arguments to those it believed would lead to a reversal of the two *Opinions* of the Shelby Circuit Court. CB&T, as the successful party in the trial court, did not cross-appeal the trial court’s rulings merely to attempt to win on different grounds from those decided. Such a state of affairs is not unusual in appellate proceedings; certainly, it would be costly and inefficient to require parties to brief all of the possible legal arguments in an appellate proceeding.

Indeed, this Court has recently held that, where an appellee in the Court of Appeals became the appellant in the Supreme Court, “[a]ppellee’s failure to raise the issue in the Court of Appeals does not prevent [a]ppellant from presenting it here as he had no duty to present it to the Court of Appeals since he defended the trial court decision and it had to be affirmed if it was sustainable on any basis.” *Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006); *see also Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 n.11 (Ky. 2006). And further, “[i]f the summary judgment is sustainable on any basis, it must be affirmed.” *Fischer, supra*, 197 S.W.3d at 103. “We believe any contrary rule requiring the appellee on appeal to have briefed every conceivable alternative argument for affirming the trial court in the Court of Appeals would inundate our appellate courts with unnecessary cross-appeals and reading than they can do or is necessary.” *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009).

Finally, Dean P.S.C. claims that the appropriate course of action would have been for the Court of Appeals to remand the case to the trial court “with instructions to explore KRS 355.4-406’s applicability to the matter.” *Appellant’s Br.*, at 10. Incredibly, this statement follows the section of Dean P.S.C.’s argument wherein it claims that the trial court did consider KRS 355.4-406 but found it inapplicable to this action. *Appellant’s Br.*, at 7. Accordingly, Dean P.S.C.’s *Brief* in this regard is nonsensical and its logic is circuitous. The issue of the applicability of KRS 355.4-406 was briefed by the parties in the trial court, was ruled on by the trial court, and was the basis of the Court of Appeals’ decision to affirm, making it now properly before this Court.

III. Dean P.S.C.'s Failure to Satisfy the Statute of Repose Contained in KRS 355.4-406(6) Destroys Its Right to Sue CB&T Under Any Theory of Recovery

The Court of Appeals' *Opinion Affirming* concluded that "a rule of substantive law, KRS 355.4-406, and not a statute of limitations, prohibits the pursuit of these claims." *Op. Affirming*, at 5. The Court of Appeals then analyzed the undisputed facts of the case, the unambiguous statutory language contained in KRS 355.4-406, and this Court's 1997 ruling in *Concrete Materials Corp. v. Bank of Danville & Trust Co.*, 938 S.W.2d 254 (Ky. 1997), to properly conclude that all of Dean P.S.C.'s claims are barred for failure to report Wills' unauthorized signatures, which is a precondition to suit against a bank under any theory of recovery. *Op. Affirming*, at 7.²

A. KRS 355.4-406's Unambiguous Statutory Language and Concrete Materials Corp. Apply Here

As noted by the KBA in its *Amicus Curiae Brief* – in which CB&T joins, incorporating the same herein by reference – the UCC has been in place in Kentucky for more than 50 years and represents the express intent of the General Assembly as being "plenary and exclusive" in the areas in which it operates, except as clearly indicated to the contrary. *See Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383, 385 (Ky. 1961). "Since the Code was promulgated to lend as much stability and certainty to commercial law as possible, it should be applied whenever possible." David J. Leibson and Richard H. Nowka, *The Uniform Commercial Code of Kentucky*, § 1.3 (2nd ed. 2000).

² CB&T posits that the Court of Appeals improperly incorporated and applied a "reasonable discovery of unauthorized payment" analysis under KRS 355.4-406(6). As argued in greater detail below (*see* III.C. *infra*), this Court should correct this language included in the Court of Appeals' *Opinion Affirming*, reaffirm its own central holding in *Concrete Materials Corp.*, and hold that the failure to comply with KRS 355.4-406(6) destroys the right to sue a bank on unauthorized signatures, regardless of the stated theory of recovery.

The point here is that it is both a stated legislative and judicial policy in Kentucky that the UCC fully occupy the field in which it operates and be liberally construed to achieve the purpose of uniformity and clarity of the law.

Further, KRS 355.1-103(3) conveys a legislative policy that the Official Comments to the UCC “represent the express legislative intent of the General Assembly and shall be used as a guide for interpretation” of the Code. Official Comment 2 to KRS 355.1-103(2) provides in relevant part that:

. . . The UCC was drafted against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement its provisions in many important ways. At the same time, **the UCC is the primary source of commercial law rules in areas that it governs**, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. (Emphasis added)

As stated by a noted UCC commentator, the principle that the UCC is exclusive and plenary is particularly true with regard to the bank deposit and negotiable instruments provisions contained in Articles 3 and 4 of the UCC:

[f]or example, the rules governing check fraud loss allocation are set forth with particularity in Articles 3 and 4 of the UCC. **Because these rules “displace” common-law notions of negligence, conversion, and “account stated,” it would be improper for a court to invoke these theories in a common-law form** to reallocate fraud loss. . . . Otherwise, the careful balances struck in Articles 3 and 4 are upset. As an example, the UCC has its own statute of limitations, nonclaim provisions, and measure of damages in check fraud cases. **If a plaintiff is allowed to proceed on common-law theories that have conflicting statutes of limitations or measures of damage, the UCC has been effectively repealed.** Courts need to be very wary of the displacement principle here.

Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards*, Vol. 1, ¶ 1.02[2] (2010) (emphasis added). It is also noted in the same treatise that “Articles 3 and 4 of the UCC occupy a very large field indeed. . .” *Id.* at ¶ 10.04[3]. “Check collection is governed by the UCC [Uniform Commercial Code], a statutory

framework designed to implement, among other things, a national, uniform system of check collection . . . Where a UCC provision specifically defines parties' rights and remedies, it displaces analogous common-law theories of liability . . . Otherwise, banks would face a motley patchwork of liability standards from State to State.” *Gossels v. Fleet Nat'l Bank*, 902 N.E.2d 370, 373 (Mass. 2009) (citations omitted).

Article 4 of the UCC contains a statutory provision that imposes the “duty of a [bank] customer to examine their bank statements in a prompt and reasonable fashion.” *Concrete Materials Corp.*, 938 S.W.2d at 258.³ The rationale for such a provision is to “allocate the burden of discovering forgeries to the party best able to detect the forgery: customers are more familiar with their own signatures and transactions than a financial institution that may process thousands of transactions.” *Peters v. Riggs Nat'l Bank, N.A.*, 942 A.2d 1163, 1167 n.5 (D.C. 2008).

KRS 355.4-406(6) provides in relevant part as follows:

Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement or items are made available to the customer (subsection (1)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration.

For the purposes of determining the sufficiency of whether “the statement or items are made available,” the statute also particularly provides a “safe-harbor” provision:

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 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.**

³ See also *Environmental Equip. & Service Co. v. Wachovia Bank*, 741 F. Supp. 2d 705 (E.D. Pa. 2010); *Halifax Corp. v. First Union National Bank*, 546 S.E.2d 696, 704 (Va. 2001).

KRS 355.4-406(1) (emphasis added). The term “item” is defined as “an instrument or a promise or order to pay money handled by a bank for collection or payment.” KRS 355.4-104(1)(i); *see Concrete Materials Corp.*, 938 S.W.2d at 257-58 (term “item” includes deposit slips as well).

Despite the clear statutory burden placed on bank customers by KRS 355.4-406,⁴ Dean P.S.C. attempts to shift the burden of detecting unauthorized activity in its account to CB&T. *Appellant’s Br.*, at 18. Kentucky law holds that, if a bank provides a statement of account, the customer must promptly examine the statement, and, if an unauthorized transaction has occurred, **“the customer must promptly notify the bank of the relevant facts.”** KRS 355.4-406(3) (emphasis added). In *Concrete Materials*, this Court acknowledged that “the burden of prompt and reasonable inspection of bank statements” is on the customer. *See* 938 S.W.2d at 257. Accordingly, the statute plainly and purposefully placed the burden on Dean P.S.C. to promptly examine its statements and to report items containing unauthorized signatures to CB&T.

Other courts have come to same conclusion set out in *Concrete Materials*. In *Euro Motors, Inc. v. Southwest Financial Bank and Trust Co.*, 696 N.E.2d 711 (Ill. App.

⁴ The general duty of all bank customers to promptly review bank statements is supplemented, in this case, by Kentucky’s Rules of Professional Conduct, which required Mark Dean, as the sole practitioner at Dean P.S.C., to hold the property of others with the care of a “professional fiduciary.” SCR 3.115(b), Official Comment. The admission in Dean P.S.C.’s *Brief* that Dean never reviewed the bank statements provided to him on the Account, and the admission that Dean’s “primary area of practice is real estate closings[; a]s such, there are often numerous large deposits and withdrawals occurring within its accounts” is particularly troubling in light of his fiduciary responsibilities. As a recent, comparable example, the Virginia State Bar Disciplinary Board revoked the license of an attorney to practice law when he failed to reconcile his trust account, which failure enabled an employee to embezzle nearly \$38,000 from his account. *In the Matter of Gregory Dean Foster*, Virginia State Bar Disciplinary Board, Docket Nos. 12-031-090545 and 12-000-090861 (citing to the attorney’s duty under Virginia’s Rule 1.15 and Rule 5.3 of Professional Conduct).

Ct. 1998), the bank customer sued for breach of contract and conversion more than one year after the bank paid and accounted for two checks bearing unauthorized signatures. After summarizing numerous appellate decisions from other jurisdictions holding that the one-year statute of limitations in UCC 4-406 applies to this factual scenario, the Illinois appellate court held as follows:

[T]here are strong practical and public policy concerns which favor such an interpretation. First, employers have a comparative advantage over financial institutions to prevent diversion of company funds by their own employees.... [T]he public would be poorly served by a rule that effectively shifted responsibility for careful bookkeeping away from those in the best position to monitor accounts and employees. Likewise, allowing the one-year period in section 4-406(f) of the UCC to be subject to a 'discovery rule' would shift the burden of reviewing accounts and monitoring employees away from the customer and to the bank, which is less equipped to do so.

Id., at 715; *see also Haddad's of Illinois, Inc. v. Credit Union 1 Credit Union*, 678 N.E.2d 322 (Ill. 1997). The Court also stated that giving UCC 4-406 the interpretation urged by the plaintiff-customer would "be in complete disregard for the principle of commercial certainty and the underlying rationale of the UCC" and thus open a "Pandora's Box" in which claims against a bank might be brought 50 years or more after the date of payment. *Id.* at 715-16. CB&T urges the Court to adopt this reasoning, mandating that the customer remain, as dictated by statute, the one chiefly responsible for monitoring its account.

It is undisputed that CB&T provided Dean P.S.C. regular monthly bank statements – on or about the second business day of each month to the address shown on the Signature Card⁵ – detailing activity within the Account during the previous month,

⁵ KRS 355.4-406(3) is clear that the customer's duty is triggered by the proper sending of the statement, and that it is irrelevant whether or not the customer actually received the statement. *Lawrence's Anderson on the U.C.C.* 3d § 4-406:14 [Rev.] (2007 ed.); *see also Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567 (Minn. 1997) (once statements placed in mail the account holder bears the risk the statements will be intercepted or lost); *Union Planters Bank*,

and accompanied by either the original of each check paid against the Account or a photocopy of the front of each such check. *R.*, at 261-264, 267-311. There can be no dispute that the copies of checks, counterchecks, and deposit slips are all “items” (as that term is broadly defined in KRS 4-104(1)(i)), and that these items were sufficiently described in each statement by item number, amount, and date of payment.

With this legally sufficient notice of activity in the Account in place, KRS 355.4-406(6) contains a substantive duty that was a pre-condition to any suit Dean P.S.C. brought against CB&T based on any items paid on the Account, namely (1) to promptly examine bank statements, and (2) to “discover and report the customer's unauthorized signature on . . . the item. . . .” Dean P.S.C.'s failure to discover and report the unauthorized signatures within one year “destroys the right to sue the bank, regardless of the theory on which the plaintiff brings the suit.” *Concrete Materials Corp.*, 938 S.W.2d at 259.

Returning to *Concrete Materials Corp.*, this Court therein examined claims brought by a customer in which it alleged that the conduct of the bank allowed the embezzlement of customer funds by an employee. *Id.* at 256. Unlike in this action, the embezzling employee in *Concrete Materials Corp.* was not authorized to sign checks. *Id.* However, the definition of “unauthorized signature” contained in the UCC clearly contemplates the type of actions involved in this case. “Unauthorized signature” means a signature made without actual, implied, or apparent authority. The term includes “a forgery.” KRS 355.1-201(2)(ao). The Court of Appeals noted that “[Wills] exceeded her authority when she engaged in the check-kiting scheme. Therefore, hers was an unauthorized signature that Dean (P.S.C.) would have discovered if it had complied with

N.A. v. Rogers, 912 So.2d 116 (Miss. 2005) (a reasonable bank customer who has not received a monthly statement would promptly ask the bank for a copy).

its duty under KRS 355.4-406(3) to examine its bank statements.” *Op. Affirming*, at 6.

The relevant facts here are thus abundantly clear: Wills’ negotiation of the Subject Checks for purposes of engaging in check-kiting constituted unauthorized signatures under Kentucky law; CB&T unquestionably mailed statements to Dean P.S.C.’s designated address each month containing legally sufficient descriptions of the Subject Checks; and Dean P.S.C. did not report the unauthorized signatures within one year as required by KRS 355.4-406(3). Under these uncontroverted facts, this Court should properly apply the substantive bar contained in KRS 355.4-406(6) en route to affirming the trial court’s grant of summary judgment.

B. Dean P.S.C.’s Failure to Comply With KRS 355.4-406 Destroys The Right to Sue Under Any Other Legal Theory

The Court of Appeals, citing to *Concrete Materials Corp., supra*, correctly held that the failure to comply with the one-year period contained in KRS 355.4-406 establishes a “substantive bar that destroys the right to sue the bank, regardless of the theory on which the plaintiff brings suit.” *Op. Affirming*, at 7.

But Dean P.S.C. now argues that its common-law causes of action are not premised upon the embezzlement of funds accomplished through the unauthorized signatures on the Subject Checks, but rather on violations of “safe bank practices in providing pre-printed and counter checks” to Wills. *Appellant’s Br.*, at 19. Because this is a transparent effort on Dean P.S.C.’s part to avoid the applicable statute of repose and the consequences for failing to comply with KRS 355.4-406, this Court should affirm the Court of Appeals decision that all of Dean P.S.C.’s claims are barred by KRS 355.4-406.

In its *Opinion Affirming*, the Court of Appeals notes that “[j]ust as *Concrete Materials* holds, UCC section 4-406 has been consistently interpreted as barring any

untimely claims, whether under the UCC or under the common law.” *Op. Affirming*, at 7. In support of this conclusion, the Court of Appeals cited to decision reaching the same conclusion from Illinois, Michigan, Massachusetts, the U.S. Court of Appeals for the District of Columbia, and the U.S. Court of Appeals for the Eighth Circuit. Additionally, the *Concrete Materials Corp.* decision has been favorably cited in other jurisdictions, as noted in the KBA’s *Amicus Curiae Brief*.⁶ Accordingly, the Court of Appeals correctly held that Dean P.S.C.’s failure to report unauthorized signatures or alterations within one-year destroyed its right to pursue its UCC and its common-law causes of action.⁷

An illustrative decision on this point is *Dave’s Heavy Towing, Inc. v. PNC Bank*, 2010 WL 2195567, 71 UCC Rep. Serv. 2d 904 (N.J. Super. Ct. App. Div. 2010). In that case, the bank customer’s bookkeeper embezzled more than \$670,000 from her employer over the course of seven years. *See id.*, at 904. It was undisputed that monthly statements and cancelled checks were sent to the customer. *See id.* The bank customer alleged that the bookkeeper discarded bank documentation, and that the forgery scheme would have been undetectable, even had the customer reviewed the monthly statements. *See id.*, at 905. The customer sued PNC on theories of strict liability, breach of contract, ordinary negligence, and also sought punitive damages. *See id.* The New Jersey appeals court held that, despite the embezzlement by a trusted employee, “the burden remained with the

⁶ *See also Harvey v. First Nat’l Bank*, 924 P.2d 83 (Wyo. 1996) (regarding plaintiff’s “attempt to avoid the statutory time limitation by couching their unauthorized signatures claim in different terms; i.e., claims under tort and contract and fiduciary duty theories. **They cannot overcome the one-year bar by attempting to assert their claims in different terms:** Plaintiffs’ argument is without merit. . . .”) (emphasis added).

⁷ CB&T will not belabor here the numerous cases cited by both the Court of Appeals and the KBA in connection with the legal theory that failure to comply with UCC 4-406(6) destroys the right to sue the bank under any legal theory; nevertheless, it fully incorporates those decisions and the legal precedent contained therein.

account holder.” *Id.* A customer is “not relieved from the obligation to discover the forgery merely because it is committed by the very person charged with the responsibility of balancing the account.” *Id.*⁸ The court further held that where a customer does not promptly examine bank statements, “the customer is precluded from asserting claims against the bank,” including negligence, breach of contract, and strict liability. *Id.*, at 906.

It is obvious that Dean P.S.C.’s claims – and any damages that might have been recoverable as a result thereof – are based solely on the embezzlement carried out by Wills, and that such claims are necessarily premised on her unauthorized signatures used to accomplish check-kiting. Yet, in an attempt to avoid its fate under KRS 355.4-406, Dean P.S.C. disingenuously argues it does not seek redress for unauthorized signatures but rather for CB&T’s alleged violations of safe banking practices via the provision of checks to Wills, who was Dean P.S.C.’s authorized signatory on the account designated to act on the entity’s behalf. *Appellant’s Br.*, at 19.

This argument is nothing more than a red herring. Long-standing Kentucky law dictates that a litigant not manipulate the characterizations of claims in order to control applicable legal principles, and that courts ascertain the true scope and nature of causes of action. *See Chesapeake & Ohio R. Co. v. State Nat. Bank of Maysville*, 133 S.W.2d 511 (Ky. 1939). To accomplish this, the rule “is that it is the *object* rather than the *form* of the action which controls in determining the limitations period.” *Carr v. Texas Eastern Transmission Corp.*, 344 S.W.2d 619, 620 (Ky. App. 1961) (emphasis original). In short, the substance of this case is not the provision of counterchecks to a fully authorized agent

⁸ *See also Henrichs v. Peoples Bank*, 992 P.2d 1241 (Kan. 1999) (holding that the sending of returned checks and statements to a dishonest agent remains effective as to the bank customer who designated the agent to receive the items).

on a corporate account; rather, the basis of this action is the negotiation of instruments and theft of funds by that signatory.

Likewise, Dean P.S.C.'s purported distinction between a "pre-printed" check and a countercheck has no basis (in fact or law) and thus should be disregarded by this Court. Indeed, while Dean P.S.C. claims that providing counterchecks to Wills was a departure from "safe banking practices," it points to no law supporting such an allegation.

A "check" is defined under Kentucky law as a "draft, other than a documentary draft, payable on demand and drawn on a bank; or, cashier's check or teller's check.... An instrument may be a check even though it is described on its face by another term, such as 'money order.'" KRS 355.3-104(6)(a)-(b). A "draft" is simply an order. *See* KRS 355.3-104(5). Under these definitions, a countercheck and a "pre-printed" check are effectively the same under Kentucky law. In fact, even a "pre-printed" check has blanks, including those left for the date, the amount, the signature, and the payee, meaning that Dean P.S.C.'s argument presents nothing more than a distinction without a difference.⁹

Moreover, the logic of Dean P.S.C. on this point is questionable. The basis of the argument appears to be that Dean P.S.C. appointed Wills as its agent, specifically allowed her to act on its behalf by giving her signatory power on the Account, but that CB&T was negligent in allowing her to fill out checks. As the trial court noted, "the bank could obviously provide her with checks, be they counter checks or pre-printed checks. Dean PSC's argument is nonsensical that the bank must honor checks drawn on the Dean

⁹ Any such distinction is rendered further inapposite by the fact that images of all "pre-printed" checks and all counterchecks were provided to Dean P.S.C. each and every month in the monthly statements, and mailed to the address that Dean P.S.C. designated on the Signature Card. *R.*, at 261-64, 267-311.

PSC account signed by Wills . . . but the basis of the bank's liability is that it provided Wills with the actual checks." November 5, 2010 *Opinion and Order*, at 4.

The Court of Appeals correctly concluded that *Concrete Materials Corp.* and jurisprudence from Kentucky's sister states make it clear that failure to satisfy section 4-406 of the UCC destroys the right to seek recovery against the bank under any legal theory, including but not limited to the characterization of claims now advanced by Dean P.S.C. Accordingly, this Court should not hesitate to reaffirm that holding in this matter.

C. The Court of Appeals Erred by Proposing That a Customer May Avoid the Absolute Bar Contained in KRS 355.4-406(6) Under a "Reasonable Discovery" Analysis

Despite that the Court of Appeals correctly applied KRS 355.4-406 to bar Dean P.S.C.'s claims in this action, the *Opinion Affirming* nevertheless improperly established a purported method by which a bank customer may avoid the absolute bar set out in KRS 355.4-406(6). *Op. Affirming*, at 8-10. CB&T respectfully posits that the Court of Appeals improperly applied an Official Comment for subsections (3) and (4) of UCC 4-406 to KRS 355.4-406(6) to create a judicial exception not found in the statute itself.¹⁰ *Id.* For that reason, this Court should take the opportunity to affirmatively declare that such an exception does not exist under KRS 355.4-406(6).

On this point, CB&T agrees with and adopts the statutory interpretation articulated in the KBA's *Amicus Curiae Brief*. More specifically, the loss-allocation rules set forth in subsections (3) and (4) of KRS 355.4-406 apply only when the parties have agreed to shorten the time period for reporting unauthorized signatures or

¹⁰ Despite the incorrect application of the statute, the Court of Appeals ultimately concluded that even under the "reasonable discovery" approach Dean P.S.C. should have discovered the unauthorized transactions. Obviously, CB&T agrees with the result, but believes the application of the law was incorrect.

alterations. The shortening of such time periods was an issue in *Concrete Materials Corp.*, wherein this Court found enforceable contractual provisions that shorten the time for reporting. *See id.*, 938 S.W.2d at 257. Due to the substantial delay by Dean P.S.C. in reporting the unauthorized signatures, though, such a provision is not an issue herein.

While incorporating the KBA's argument on this point, CB&T offers that that the statutory interpretation of KRS 355.4-406 rendered by commentator Barkley Clark (set out in his newsletter summarizing the Court of Appeals' decision below) represents the correct approach:

We disagree with the Kentucky appellate court on one point. **We don't think that the lack of negligence of the customer in reviewing bank statements should affect the one-year deadline.** The Official Comments cited by the court in the Kentucky case refer to the general negligence rule found in subsection (c) of 4-406 [KRS 355.4-406(3)]. In contrast, the one-year rule in subsection (f) [KRS 355.4-406(6)] applies, by its terms, "without regard to care or lack of care of either the customer or the bank." **The fact that Dean didn't notify the bank until more than one year after the monthly statements were available to it was enough. In short, subsection (f) trumps subsection (c).** The court's unnecessary language on this point is unfortunate.¹¹

Vol. 21, No. 4, *Clark's Bank Deposits And Payments Monthly*, "Failure To Report Check Kite Within One Year Bars Plaintiff's Common Law And UCC Claims," (Apr. 2012), at p. 4 (emphasis added).

The Court of Appeals' engrafting of a "reasonable discovery" requirement upon the non-claim provision of KRS 355.4-406(6) is clearly contrary to the plain language of the statute. The subsection specifically applies "without regard to care or lack of care of either the customer or the bank" Kentucky courts have uniformly held that questions of statutory interpretation are matters of law, and that the courts are bound to follow legislative enactments through their plain language, without attempting to

¹¹ Clark's citations to subsection (f) and (c) are to model UCC provisions. The identical Kentucky citations are KRS 355.4-406(6) and 355.4-406(3).

discover meaning not reasonably ascertainable from said language. *See, e.g., Commonwealth v. Gaitherwright*, 70 S.W.3d 411 (Ky. 2002); *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005). As between a customer and a bank, the UCC (as adopted by all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands) requires that a bank customer have complete knowledge of its account and the duty to detect activity therein. Simply put, it is not the province of the judiciary to change this legislative enactment. Had the General Assembly intended to include a “reasonable discovery” requirement in KRS 355.4-406(6), it could have done so. Indeed, by including such a provision in subsection (3) of the statute – when the parties have contractually shortened the discovery period – but then choosing not to include such a provision within the one-year absolute bar of subsection (6), the General Assembly has indicated its intent in an unambiguous manner.

Allowing for an additional “reasonable discovery” analysis when considering KRS 355.4-406(6) also undermines the policy of the UCC and the allocation of duties and responsibilities unique to Articles 3 and 4. Again, the rationale for requiring the customer to examine statements and to report unauthorized activity is to “allocate the burden of discovering forgeries to the party best able to detect the forgery: customers are more familiar with their own signatures and transactions than a financial institution that may process thousands of transactions.” *Peters v. Riggs Nat'l Bank, N.A.*, 942 A.2d 1163, 1167 n.5 (D.C. 2008). “It is reasonable to preclude a customer who does not report the forgery or alteration for over one year. A customer has little excuse.” *Lawrence’s Anderson on the U.C.C.* 3d § 4-406:39 [Rev.] (2007 ed.). Moreover, deviating from the

carefully crafted provisions of Articles 3 and 4 of the UCC could have other, unforeseen consequences. *Id.*¹²

To illustrate the importance of upholding the one-year absolute rule in KRS 355.4-406(6) – without allowing an exception for items “not reasonably discoverable” – this Court need only look to Dean P.S.C.’s *Brief*. Jumping on the Court of Appeals’ misinterpretation of the statute, Dean P.S.C. has devoted nearly eight full pages of its *Brief* to argue that it could not have “reasonably discovered” the unauthorized signatures, even had it actually reviewed its bank statements over the course of several years. *Appellant’s Br.* at 10-17. Adopting such a test will result in this “defense” being advanced in every case in which a customer’s dilatoriness is a substantive bar to bringing suit, notwithstanding that the statutory language has provided a bright line legal rule. Accordingly, the Court should take this opportunity to correct what Clark described in his newsletter as the “unfortunate” language of the Court of Appeals on this point.

IV. Even if this Court Were to Conclude That KRS 355.4-406 is Inapplicable Here , the General UCC Statutes of Limitation Contained in KRS 355.3-118(7) and 355.4-111 Bar All of Dean P.S.C.’s Claims

A. Dean P.S.C.’s UCC Claims are Barred by the UCC General Statutes of Limitation, To Which the Discovery Rule is Inapplicable

With respect to the UCC claims advanced by Dean P.S.C. in its *Complaint* – filed in Shelby Circuit Court on January 23, 2009 – those arise under KRS 355.4-401 and 355.3-405 and, as a matter of law, are barred by the applicable statutes of limitation set out in KRS 355.3-118(7) and 355.4-111.

¹² For example, there would be an impact on the statutory framework relating to the presentment warranty between a payor bank and a presenting bank and the ability of a bank to recover payments from persons not protected by UCC 3-418.

KRS 355.3-118(7) reads as follows:

Unless governed by other law regarding claims for indemnity or contribution, an action:

- (a) For conversion of an instrument, for money had and received, or like action based on conversion;
- (b) For breach of warranty; or
- (c) **To enforce an obligation, duty, or right arising under this article and not governed by this section must be commenced within three (3) years after the claim for relief accrues.** (Emphasis added)

Similarly, KRS 355.4-111 reads as follows:

An action to enforce an obligation, duty or right arising under this article must be commenced within three (3) years after the claim for relief accrues.

Applying these statutes to the facts here, Dean P.S.C.'s UCC-based claims against CB&T arose (at the latest) when it received comprehensive bank statements reflecting payment of the Subject Checks that it claims led to its losses, or (at the earliest) on the day the countercheck was negotiated. In either instance, Dean P.S.C.'s claims were not pursued in a timely manner.

The record reflects the last countercheck paid against the Account was processed on August 27, 2004. CB&T mailed that check to Dean P.S.C. early the following month (in September 2004), together with Dean P.S.C.'s monthly bank statement. *R.*, at 278-279. Dean P.S.C. was thus required to examine that statement or item with "reasonable promptness." *See* KRS 355.4-406(3). In turn, KRS 355.4-406(4) suggests that "reasonable promptness" means within 30 days at most. As a matter of law, then, Dean P.S.C. knew or should have known of any irregularities in the Account no later than 30 days after its receipt of each bank statement reflecting an alleged irregularity.

In *Concrete Materials Corp. v. Bank of Danville & Trust Co.*, 938 S.W.2d 254, 259 (Ky. 1997), this Court – en route to upholding the dismissal of a bank customer's claim for failure to comply with its duties under KRS 355.4-406(3) – cited favorably to a

Tennessee decision applying the same UCC section, stating that “Tennessee held that the effect of the [UCC] is to charge the depositor with the knowledge of all facts that a reasonable person could learn from examination of the bank statement and cancelled checks.”

Even as to the final countercheck paid against the Account, the latest possible time when Dean P.S.C. knew or should have known of any irregularity was sometime during the first week of October 2004 (30 days after it received its bank statement summarizing transactions that August). Given the statutory mandate that a bank customer review its statement with reasonable promptness, it follows that any claim for relief that Dean P.S.C. may have had with respect to CB&T’s payment of the Subject Checks accrued, at the latest, at the end of a reasonable period following transmittal of each statement reflecting said payment. As noted above, the last of such periods expired in October 2004, more than four years before Dean P.S.C.’s *Verified Complaint*, well outside the applicable statutes of limitation.¹³

Dean P.S.C. tries to maneuver around this inescapable conclusion by arguing that its cause of action did not accrue until Mark Dean (as an individual) “discovered” the fraud of perpetrated by Dean P.S.C. employee Wills. The problem here is that courts from numerous jurisdictions have rejected application of a “discovery rule” in the context of UCC Articles 3 and 4. For example, in *Psak, Graziano, Piasecki & Whitelaw v. Fleet National Bank*, 61 UCC Rep. Serv. 2d 855, 860 (N.J. Super. Ct. App. Div. 2007), the New Jersey appellate court stated that, “[t]he application of the discovery rule to

¹³ The trial court noted – using the more conservative date of March 2005, the last time there was activity of any type in the Account – that, “[t]he Verified Complaint was not filed until January 23, 2009, which was three years and ten months after Wills’ last transactions in the [Account].” *R.*, at 229-231.

negotiable instruments would be inimical to UCC policies of finality and negotiability.” Other courts have refused to invoke a “discovery rule” under even harsher facts (such as the incapacitation of a plaintiff, the mental incompetence of a plaintiff, and a fraudster intercepting statements to prevent an accountholder from knowing about the fraud).¹⁴

KRS 355.3-118(7) and 355.4-111 use identical language: The action “must be commenced within three (3) years after the claim for relief accrues.” Although Kentucky courts have not applied the word “accrue” in the context of Articles 3 and 4, they have defined generally when a cause of action “accrues”: A cause of action “accrues” when the event happens, not when it is “discovered.” See *Forwood v. City of Louisville*, 140 S.W.2d 1048 (Ky. 1940). Also, Kentucky courts have generally refused to extend the “discovery rule” in the absence of statutory authority to do so.¹⁵

CB&T agrees with the reasoning set forth in the KBA’s *Amicus Curiae Brief* regarding the discovery rule’s inapplicability to the statute of repose in KRS 355.4-406 and the general statutes of limitation contained in KRS 355.4-118(7) and 355.4-111.¹⁶

¹⁴ See *Peters v. Riggs National Bank, N.A.*, 942 A.2d 1163 (D.C. 2008) (summary of these holdings).

¹⁵ See, e.g., *Housing Now – Village West, Inc. v. Cox & Crawley, Inc.*, 646 S.W.2d 350 (Ky. App. 1982); *Plummer v. Summe*, 687 S.W.2d 543 (Ky. App. 1984). Applying these same principles in the context of Articles 3 and 4, courts in Ohio have declared that “a cause of action accrues at the time the harm is committed and not when it is discovered. The discovery rule is an exception, either statutorily or judicially imposed. There is no applicable statutory exception [in Articles 3 and 4].” *Loyd v. Huntington National Bank*, 69 UCC Rep. Serv. 2d 295 (N.D. Ohio 2009).

¹⁶ CB&T also points out here that the Kentucky General Assembly is well-versed in codifying discovery rules in the body of statutes of limitation. Just this session, the General Assembly passed HB 145, 2013 Ky. Acts Ch. 48, which was signed into law on March 21, 2013, to amend the one-year statute of limitations contained in KRS 413.140(1) to include actions for damages against licensed professional land surveyors, and to further amend KRS 413.140(3) to specifically incorporate a discovery rule to such causes of action.

And the trial court correctly held in its February 17, 2010 *Opinion and Order* that the unpublished decision of the Kentucky Court of Appeals in *Bradley v. National City Bank of Kentucky*, 2004 WL 3017297 (Ky. App. 2004) (citing *Haddad's of Illinois, Inc. v. Credit Union 1 Credit Union*, 678 N.E.2d 322 (Ill. App. 1997)), is persuasive that the “discovery rule” does not apply to UCC claims absent fraudulent concealment, given that the UCC’s twin goals of efficient resolution of commercial disputes and promotion of finality and stability in commercial transactions would be undermined by applying a “discovery rule.” *R.*, at 230 (copy of *Bradley, supra*, in Appendix hereto).

Dean P.S.C. does not dispute it was provided with regular monthly bank statements that included copies of checks, counterchecks, and deposit slips. *See Appellant's Br.*, at 3.¹⁷ In that these statements met statutory requirements, and in that there is no question Dean P.S.C. received them each month regarding all transactions in the Account, the “discovery rule” is inapposite to the facts here and thus inapplicable as a matter of law.¹⁸

¹⁷ Appellant also states it “did not actually receive the statements,” which are said to have been “intercepted” by Wills. This distinction is an invalid one because there is no dispute Wills was Dean P.S.C.’s employee and agent, and because a principal is charged with the knowledge of its agent, who in this instance (not inconsequentially) was an authorized signer on the Account. At no juncture has Dean P.S.C. pointed any tribunal hearing this matter to an obligation of CB&T to police the conduct of its customers’ employees. Indeed, the policy of Article 3 of the UCC is that a customer bears the risk of loss for instruments fraudulently endorsed by an employee entrusted with respect to the instrument. *See* KRS 355.3-405.

¹⁸ Dean P.S.C. also contends the testimony of CB&T’s Nathan Evans establishes that “suspicious activity” could not be uncovered using information contained in these statements. The “irregular activity” involved – check-kiting – is defined as “drawing checks on an account in one bank and depositing them in an account in a second bank when neither bank has sufficient funds to cover the amounts drawn.” *U.S. v. Stone*, 954 F.2d 1187, 1188, n. 1 (6th Cir. 1992). Evans testified that detecting check-kiting involves examining the records of the second bank where the deposit was made. *R.*, at 183. Under no cognizable theory can CB&T

Because the monthly statements met the statutory requirements for notice, Dean P.S.C. cannot argue there is a genuine issue of material fact on that issue. Moreover, the statute of repose contained in KRS 355.4-406(6) cannot be tolled.¹⁹ Accordingly, because Kentucky courts have restricted application of the “discovery rule” to those cases in which it is authorized by statute, because there is no dispute CB&T timely delivered to Dean P.S.C. every month a statement sufficient for purposes of Kentucky law, and because uncontroverted testimony of record establishes that CB&T (in any event) made Dean aware of potential check-kiting in February 2005, there is no question that Dean P.S.C.’s UCC claims are barred by the applicable statutes of limitations.

B. The UCC Displaces Each and Every of Dean P.S.C.’s Common-Law Claims

Dean P.S.C.’s remaining claims consist of a variety of common-law theories of recovery against CB&T. These common-law claims are (1) aiding and abetting Wills’

be said to have had the responsibility to audit records from another financial institution to uncover potential fraud against one of its customers. Any difficulties Dean P.S.C. supposedly had in uncovering “irregular activity” cannot be put at the feet of CB&T; the bank met the statutory requirement of providing notice through monthly statements, and Dean P.S.C. was best situated to monitor not only its CB&T accounts but also accounts at other depository institutions to determine whether a loss had been sustained. Likewise, KRS 355.4-406(6) required Dean P.S.C. to report “the customer’s unauthorized signature on . . . the item” and, even if CB&T suspected “suspicious activity,” the duty to report particular items containing unauthorized signatures remained with Dean P.S.C. (see II.C. of *Appellant’s Brief*). Case law is clear that “the customer must sufficiently identify the item and account so as to enable the bank to know which items the customer claims have been altered or forged.” *Lawrence’s Anderson on the U.C.C.* 3d § 4-406:22 [Rev.] (2007 ed.) (citing *Wateska First Nat. Bank v. Horney*, 686 N.E.2d 1175 (Ill. App. 3rd Dist. 1997)).

¹⁹ “The absolute nature of the time limit (of Section 4-406) distinguishes it from a statute of limitations. The statute establishes a precedent to an action which, unlike a statute of limitations, cannot be tolled.” *Euro Motors, Inc. v. Southwest Financial Bank and Trust Company*, 696 N.E.2d 711, 716 (Ill. App. Ct. 1998). See also *Pinigis v. Regions Bank*, 942 So.2d 841 (Ala. 2006).

fraud and illegal activity and breach of the duty of ordinary care (Count II), (2) punitive damages (Count III), (3) common-law negligence (Count IV), and (4) breach of contract and breach of duty of good faith and fair dealing (Count V).²⁰

The overarching problem with these common-law claims is that they are displaced by Kentucky's version of the UCC. As noted above, **“the UCC preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies. . . .”** KRS 355.1-103(2), Official Comment 2 (emphasis added). It is a stated legislative and judicial policy in Kentucky that the UCC is meant to occupy the field in which it operates, and to be construed liberally to achieve the purpose of uniformity and clarity of the law; further, “the Code is plenary and exclusive except where the legislature has clearly indicated otherwise.” *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383 (Ky. 1961) (citations omitted).

Commercial-law commentators agree with Kentucky's approach to liberal interpretation of the UCC as plenary and exclusive with regard to displacement of common-law claims. *Lawrence's Anderson* notes that “[w]hen the court finds in the UCC the intention to make a comprehensive regulation of a particular subject matter, any common-law limitation will be preempted.” *Lawrence's Anderson on the U.C.C.* 3d § 1-103:145 [Rev.] (2007 ed.). Moreover, *Lawrence's Anderson* – citing to *Lincoln Bank, supra*, along with decisions from other jurisdictions – emphasizes that, where there exists conflict between the common law and the UCC, the prior common law must yield, and that, if plaintiffs “were permitted to avoid the remedies of the UCC and plead

²⁰ The trial court correctly noted in its February 17, 2010 *Opinion and Order* that the UCC does contemplate the application of law outside of its own provisions. See KRS 355.1-103(2). Nevertheless, it is clear that the common-law claims advanced by Dean P.S.C. are displaced by particular provisions of the UCC, and that legislative intent and case law support this conclusion, all of which entitles CB&T to this Court's affirmance of the trial court and the Court of Appeals.

common-law causes of action, the reliability, uniformity, and certainty of the UCC would disappear.” *Id.*

Similarly, on the issue of UCC 1-103 and its displacement of common-law causes of action, Barkley Clark states: “If a plaintiff is allowed to proceed on common-law theories that have conflicting statutes of limitations or measures of damage, the UCC has been effectively repealed. Courts need to be very wary . . . here.” Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards*, Vol. 1, ¶ 1.02[2] (2010). Commenting upon a common-law negligence claim brought in a commercial setting, Clark noted: “A plaintiff should not be able to end-run the UCC statutory scheme by the use of common-law claims, unless the drafters clearly intended to allow such claims to fill gaps deliberately left in the statute.” *Id.*, ¶ 10.04[3].

Another noted commentator on the UCC agrees that the UCC’s displacement of common-law causes of action is meant to be interpreted broadly, stating as follows:

[The] paramount rule is one of preemption by the Code of non-Code law, and that preemption extends to the displacement of any law that is inconsistent with the Code’s express terms, or its purposes and policies; that is, **supplementation no longer stands on an equal footing with Code purposes and policies** but rather is one of several considerations to be balanced rather than separately accommodated.

Hawkland, Miller & Cohen, U.C.C. Series § 1-103:12 (Rev. Art. 1) (emphasis added).

It is thus apparent – upon review of the statutes, the Official Comments thereto, and Justice Palmore’s opinion in *Lincoln Bank, supra* – that Kentucky takes a strong view of the preemptive power of the UCC over common-law causes of action. This interpretation, when coupled with the identical conclusion of a host of commercial-law commentators, compels the conclusion that Dean P.S.C.’s common-law claims (Counts II-V of its *Complaint*) have been displaced by the UCC, meaning that the trial court’s

grant of summary judgment as relates to these claims (subsequently upheld by the Court of Appeals) should be affirmed by this Court.

C. **Dean P.S.C.'s Common-Law Claims are Preempted by Specific Provisions of the UCC and the Applicable Statutes of Limitation**

a. **Dean P.S.C.'s "Aiding and Abetting" Claim**

Dean P.S.C. maintains that CB&T "aided and abetted" Wills in her illegal activity by providing her with counter-checks and pre-printed checks. *Appellant's Br.*, at 25-26. Dean P.S.C. further alleges that it had no evidence of check-kiting, and that CB&T failed to inform Mark Dean as to such activity in the Account. *Id.*

The Kentucky Court of Appeals, however, recently held that the Commonwealth does not recognize a civil cause of action for "aiding and abetting" a breach of fiduciary duty. *See People's Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co.*, 277 S.W.3d 255, 260 (Ky. App. 2008). Also, as the trial court herein correctly noted, "the bank sent Dean PSC bank statements which detailed the account activity, and Dean PSC has not presented the Court with any statute, case law, etc. from which the Court could conclude that Commonwealth was required to do more." *R.*, at 450.²¹

Dean P.S.C. argues that CB&T also failed to provide any notice to Mark Dean that it was providing counter-checks and pre-printed checks to Wills. *Appellant's Br.*, at 25-26. This statement is both misleading and untrue in that the uncontroverted evidence of record demonstrates that each and every bank statement provided by CB&T to Dean P.S.C. contained copies of every check, countercheck, and deposit slip. *R.*, at 258,

²¹ Dean P.S.C. has done no better in the *Brief* filed with this Court. Importantly, attorney allegations and argument are inadequate to replace any reference to evidence of record. *See Morton v. Allen Construction Company*, 416 S.W.2d 733 (Ky. App. 1967).

261-64, 266-311. Likewise, it was not an individual (Mark Dean) who was a bank customer and possessed the right to receive monthly bank statements; rather, it was an entity – namely Dean P.S.C. – that was so entitled, and the record is clear it did receive the statements and copies of all items paid on the Account.

Regardless of whether the “aiding-and-abetting” claim against CB&T is recognized under Kentucky law – or whether Dean P.S.C. has properly preserved its argument on this point – the claim is preempted by the UCC. Any assertion that CB&T “aided and abetted” the diversion of Dean P.S.C.’s funds due to an alleged failure to provide sufficient notice of the use of checks by Wills is a claim specifically provided for under the UCC. In Kentucky, as discussed above, the sufficiency of bank statements is governed by statute:

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 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.**

KRS 355.4-406(1) (emphasis added). The uncontroverted evidence in this case establishes that such statements were mailed every month by CB&T to the address provided by Dean P.S.C. in the signature card. *R.*, at 258, 261-64, 266-311. Therefore, as a matter of law, CB&T provided sufficient notice of the activity in the Account.²²

As explained above, the UCC includes definitions regarding the sufficiency of bank statements’ reporting of account activity and the measure of damages for failure to do so. Thus, it is beyond dispute that Dean P.S.C.’s common-law claims of “aiding and

²² The consequence for failing to provide sufficient notice is also included in the UCC, namely that the statute of limitations does not begin to run until a bank provides the required notice.

abetting” have been displaced by the UCC. Since the common-law “aiding and abetting” claim made by Dean P.S.C. is pre-empted by the UCC, said claim is likewise subject to the UCC’s statutes of limitations contained in KRS 355.3-118(7) and 355.4-111, meaning that the trial court’s decision to grant summary judgment to CB&T should be affirmed.

b. Dean P.S.C.’s “Negligence” Claim

Dean P.S.C. argues that CB&T had a duty to exercise ordinary care in the handling of its Account, that CB&T breached this duty by the provision of counter-checks to Wills, and that said breach caused Dean P.S.C. to suffer damages. *Appellant’s Br.*, at 24-25.

Astutely, the trial court in its November 5, 2010 *Opinion and Order* pointed out the fatal flaw in Dean P.S.C.’s arguments on this point:

Wills as a signatory on the Dean PSC account was authorized to write checks on the Dean PSC account, therefore, the bank could obviously provide her with checks, be they counter checks or pre-printed checks. **Dean PSC’s argument is nonsensical that the bank must honor checks drawn on the Dean PSC account signed by Wills by virtue of the signature card, but the basis of the bank’s liability is that it provided Wills with the actual checks.**

R., at 449 (emphasis added).

Moreover, the duty to exercise ordinary care is expressly provided for in KRS 355.3-103(1)(i), 355.4-104(3)(k), and 355.4-103. “Ordinary care” is defined in the UCC as follows:

“Ordinary care” in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank’s prescribed procedures and the bank’s procedures do not vary unreasonably from general banking usage not disapproved by this article or Article 4 of this chapter.

KRS 355.3-103(1)(i).²³ Also, the UCC limits the ability of the parties to disclaim the duty of ordinary care or limit the measure of damages by agreement or otherwise. See KRS 355.4-103(1).

Finally, the UCC further provides as follows:

The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there is also bad faith it includes any other damages the party suffered as a proximate consequence.

KRS 355.4-103(5). This provision specifically deals with “handling an item.” The UCC defines “item” as “an instrument or a promise or order to pay money handled by a bank for collection or payment.” KRS 355.4-104(1)(i). Dean P.S.C. is seeking a recovery based on the breach of ordinary care in the handling and processing of counter-checks, and the policies and procedures concerned therewith. As such, it is clear that the UCC has expressly and specifically displaced Dean P.S.C.’s common-law negligence cause of action in this case.

Other courts examining the issue of common-law negligence claims have found that displacement under the UCC does indeed apply in this context. In *Environmental Equipment & Service Company v. Wachovia Bank, N.A.*, 741 F. Supp. 2d 705 (E.D. Pa. 2010), a federal court examined a negligence claim in light of the UCC’s displacement principles and concluded as follows:

The PCC (Pennsylvania’s enactment of the UCC) establishes an elaborate and comprehensive negligence regime. . . . This scheme provides a comprehensive remedy for the parties to the transaction – a delicate balance that would be disrupted by the allowance of common-law negligence claims . . . barring EES’s common law negligence action.

Id., at 713-14.

²³ Separately, this definition is expressly incorporated into Article 4 by KRS 355.4-104(3)(k).

In *C-Wood Lumber Co., Inc. v. Wayne County Bank*, 233 S.W.3d 263 (Tenn. Ct. App. 2007), the Tennessee Court of Appeals, in reversing the trial court's decision to permit the plaintiff's common-law negligence claim to proceed in addition to its UCC claims, held:

Articles 3 and 4 of the UCC embody a delicately balanced statutory scheme governing the endorsement, negotiation, collection, and payment of checks. They provide discrete loss-allocation rules uniquely applicable to banks. While this scheme is not comprehensive, it is nearly so. Therefore, **courts dealing with "hard cases" should be hesitant to recognize common-law or non-UCC claims or to employ common-law or non-UCC remedies in the mistaken belief that they are dealing with one of the rare transactions not covered by the UCC.**

The weight of the case law comes down against permitting common-law actions to displace the UCC's provisions regarding transactions governed by Articles 3 and 4. Accordingly, **a large number of courts have refused to recognize common-law or non-UCC claims in general, and specifically common-law or non-UCC negligence claims** or conversion claims, arising from transactions governed by Articles 3 and 4.

Id., at 281 (citations omitted) (emphasis added).

Likewise, in *Shelby Resources, LLC v. Wells Fargo Bank*, 160 P.3d 387, 62 UCC Rep. Serv. 2d 344 (Colo. Ct. App. 2007), the Colorado Court of Appeals, in upholding the trial court's ruling that plaintiff's common-law claim was displaced by the UCC, noted:

When analyzing whether the UCC displaces a common law negligence claim with respect to bank deposits and collections, we first note that an objective of the UCC is to displace scattered legislation or decisional law, and to state as fully as practicable a comprehensive and workable set of rules and principles for the governing of all aspects of transactions in the field to which it applies. In addition, by its own language the UCC does not purport to displace the entire body of common law. Accordingly, **when the UCC prescribes particular standards of care or limitations on liability, "the common law is annulled to the extent it modifies these standards or changes these limitations. . . ."**

When a common law negligence claim and the UCC claim necessitate the same legal analysis, there is a suggestion “that the Code cause of action comprehensively covers the field of legal theories.”

Id., at 391-392 (internal cites omitted) (emphasis added). Similarly, a New Jersey court found that “the existence of such a comprehensive remedy [Article 4] precludes a common law negligence claim.” *Psak, Graziano, Piasecki & Whitelaw v. Fleet National Bank*, 915 A. 2d 42, 61 UCC Rep. Serv. 2d 855, 858 (N.J. Super. Ct. App. Div. 2007).²⁴

The UCC has expressly displaced common-law causes of action based on the theory of negligence. The above statutory provisions and case law from other jurisdictions considering the issue demonstrate beyond argument that Articles 3 and 4 recognize and encompass claims for breach of the duty of ordinary care. Accordingly, Dean P.S.C.’s claims in that regard must be viewed as UCC claims and, as such, are subject to its statutes of limitations contained in KRS 355.3-118(7) and 355.4-111, meaning the trial court’s summary judgment should be affirmed.

c. **The “Breach of Contract” and “Breach of Duty of Good Faith and Fair Dealing” Claims**

Dean P.S.C. argues that the trial court erred in granting summary judgment to CB&T on its claim for breach of contract for failing to follow commercially reasonable banking policies and procedures in its relationship with Dean P.S.C. *See Appellant’s Br.*, at 27. Dean P.S.C. also alleges that CB&T breached the parties’ contractual relationship by providing counter-checks to an individual authorized by Dean P.S.C. to act on its behalf. *Id.* Lastly, Dean P.S.C. generally maintains that CB&T’s breach included a breach of the covenant of good faith and fair dealing. *Id.*

²⁴ *See also Pertierra v. Bank of America*, 66 UCC Rep. Serv. 2d 577 (Cal. 2008) (UCC displaced plaintiff’s common-law negligence claim); *Vedos v. King*, 2003 WL 289424, 49 UCC Rep. Serv. 2d 1269, 1272 (Wash. Ct. App. 2003) (common-law negligence claim identical to UCC’s imposition of duty of “due care”).

First and foremost, the trial court properly found that Dean P.S.C.'s breach-of-contract claim was wholly unsupported by the evidence on record because Dean P.S.C. failed to submit the Customer Account Agreement as evidence. *R.*, at 452. But, even if Dean P.S.C. had properly supported its breach-of-contract claim, that claim would be time-barred by the applicable UCC statute of limitations given that the UCC has displaced such claims. Indeed, Dean P.S.C.'s own reliance on terms such as "commercially reasonable" and "good faith" are indicative of this claim's displacement by the applicable UCC provisions. More specifically, the UCC provides as follows:

"Good faith," except as otherwise provided in Article 5 of this chapter, means honesty in fact and the observance of **reasonable commercial** standards of fair dealing.

KRS 355.1-201(2)(t) (emphasis added). The UCC also expressly states:

Every contract or duty within the Uniform Commercial Code **imposes an obligation of good faith** in its performance and enforcement.

KRS 355.1-304 (emphasis added).

Other jurisdictions have likewise found that common-law breach-of-contract actions are displaced by the UCC. In *Environmental Equipment & Service Company, supra*, the plaintiff asserted contract claims for the defendant's failure to act in accordance with its own policies, thereby breaching the implied duty of good faith and fair dealing. *See* 741 F. Supp. 2d at 714. The court in that case ultimately held that the claim was displaced by the UCC:

Furthermore, the PCC's good faith-related provisions confirm the displacement of EES's common law contract claims, and clearly displace EES's duty of good faith and fair dealing claims. . . . PCC §§ 3405, 3406, and 4406 each have provisions that require consideration of the bank's good faith. **By thoroughly treating the role of good faith in commercial transactions, the PCC supplants EES's breach of duty of good faith**

and fair dealing claim, and therefore its breach of contract claim which relies exclusively on that duty.

Id. (emphasis added).

In *Vedos v. King*, 2003 WL 289424, 49 UCC Rep. Serv. 2d 1269 (Wash. Ct. App. 2003), the court, assessing the common-law breach-of-contract claim alleged by a depositor, concluded as follows:

...[P]rinciples of contract law will not apply to an action under the UCC if displaced by a particular provision of the UCC. Article 4 sets forth a customer's rights against a bank for the improper payment of checks drawn on the customer's account. These provisions displace principles of contract law. **Even if, therefore, the customer account agreement would support a breach of contract claim, such a claim would nevertheless be governed by Article 4's statute of limitations, not the contract statute of limitations.**

Id., at n.9 (citations omitted) (emphasis added). This case involved facts parallel to those here because the contractual relationship between Dean P.S.C. and CB&T is based on the Customer Account Agreement.

The Virginia Supreme Court, evaluating a breach of contract claim based on a customer account agreement and relying on Virginia's codification of UCC 1-103 and Article 4, ruled as follows:

We hold that [Article 4], which governs the relationships between a bank and its customers, delineates the rights of a customer against its drawee bank for the improper payment of checks drawn on the customer's account. **The principles of contract law**, which Halifax purportedly pled, **have been displaced by the UCC**, which was enacted to promote uniformity, predictability, and finality in certain types of commercial transactions. We will not permit Halifax to circumvent the UCC by asserting a breach of contract claim that has been displaced.

Halifax Corporation v. First Union National Bank, 546 S.E.2d 696, 704 (Va. 2001) (emphasis added).

Finally, a decision of the U.S. District Court for the Northern District of Ohio holds that displacement of common-law claims by the UCC in the context of negotiable

instruments is so clear that causes of action premised upon the common law should be dismissed for failure to state a claim for relief. *See Loyd v. Huntington National Bank*, 2009 WL 1767585, 69 UCC Rep. Serv. 2d 296 (N.D. Ohio 2009).

At bottom, Dean P.S.C. would like to treat its assertion of common-law claims as an election of remedies; in other words, because the remedies of the UCC are unavailable to it, Dean P.S.C. hopes to be able to pursue more favorable claims under the common law. But, simply put, that election is not available because the UCC occupies the field to the exclusion of any and all common-law claims.

It is clear that the depository relationship between a bank and its customers is intended to be governed by the UCC, leaving no room for common-law breach-of-contract claims; if it were otherwise, the UCC's goals of consistency and uniformity in commercial transactions would be undermined. Accordingly, this Court should conclude that Dean P.S.C.'s common-law contract claims are displaced by the UCC and, as such, are subject to the UCC's statutes of limitations set out in KRS 355.3-118(7) and 355.4-111, meaning that said claims must be dismissed as being time-barred.

V. Federal Law Prohibits Reporting "Suspicious Activity" to a Banking Client

At numerous junctures, Dean P.S.C.'s *Brief* emphasizes that CB&T did not file a "Suspicious Activity Report," and that, as a result, Dean P.S.C. suffered damages. *See, e.g., Appellant's Br.*, at 25-27. Dean P.S.C. even incorporates this allegation into its purported aiding-and-abetting, negligence, and breach-of-contract claims. *Id.*

The main problem with this contention is that there is no evidence to support it; indeed, Dean P.S.C. never cites the record in an attempt to verify such an assertion. Dean P.S.C. instead premises the allegation on the deposition testimony of CB&T employee Nathan Evans, who maintained only that he personally never filed a Suspicious Activity

Report (“SAR”). *R.*, at 162. Thus, there is no evidence in the record unequivocally establishing that a SAR was never filed by someone at the bank.

Secondly, Dean P.S.C.’s entire argument on this point ignores that disclosure of an SAR is prohibited by federal law. Under 31 U.S.C. § 5318(g)(2)(A), a financial institution that decides to report a suspicious transaction cannot – under threat of civil and criminal penalties – notify any person involved in said transaction that it has been so reported to authorities. Furthermore, under 31 C.F.R. § 103.18(e), any person requested or subpoenaed to disclose a SAR is compelled to decline such a request.²⁵ Accordingly, as a matter of federal law, Dean P.S.C. was not entitled to receive notice of any SAR (if there were one) and thus cannot turn the alleged lack of notice into a cause of action.

Without any record basis, Dean P.S.C. also argues that CB&T had a duty to report any “suspicious activity” it suspected to the accountholder. Dean P.S.C. also overlooks the clear and uncontroverted evidence that each and every bank statement provided by CB&T to Dean P.S.C. contained copies of every check, countercheck, and deposit slip, which conduct represents the affirmative provision of notice of all activity to this particular accountholder. *R.*, at 258, 261-64, 266-311. The bottom line, then, is that activity of which Dean P.S.C. complains was reported to it by CB&T.

²⁵ Dean P.S.C.’s supposed common-law claims based upon CB&T’s failure to notify Dean of the filing of a SAR are further estopped by 31 U.S.C. § 5318(g)(3), which states that “[a]ny financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection...shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State...for such disclosure or failure to provide notice of such disclosure to the person that is the subject of the disclosure or any other person identified in the disclosure.” See *Hanninen v. Fedoravitch*, 583 F. Supp. 2d 322 (D. Conn. 2008) (USA Patriot and Bank Secrecy Acts do not authorize a private right of action); *Medical Supply Chain v. Neoforma, Inc.*, 419 F. Supp. 2d 1316 (D. Kan. 2006) (same).

Finally, Dean P.S.C. alleges that, had CB&T appropriately filed a SAR, federal authorities would have alerted Mark Dean about problems at the business, and “it would have allowed for early detection of Wills’ embezzlement.” *Appellant’s Br.*, at 26. Again, Dean P.S.C. produces absolutely no proof supporting this assertion, and, as noted above, CB&T is prohibited from disclosing if it did file a SAR. The proper inquiry in considering summary judgment is “whether, **from the evidence of record**, facts exist which would make it possible for the non-moving party to prevail. In the analysis, **the focus should be on what is of record rather than what might be presented at trial.**” *Welch v. American Publishing Co. of Ky.*, 3 S.W.3d 724, 730 (Ky. 1999) (emphasis added). Here, as with all of its various claims, Dean P.S.C. makes bald assertions without record evidence to point to, relying instead on the baseless conjecture of its counsel, who ignores federal law directly on point. As the trial court succinctly stated:

Dean PSC states that had Commonwealth filed a SAR about the transaction activity in the Dean PSC account that the FBI would have investigated the situation earlier, and Wills’ fraud and embezzlement would have been uncovered earlier resulting in smaller amount of loss from her fraud. **This argument is based on pure speculation. . . .**

R., at 451 (emphasis added).

On this point – as is the case with all of its arguments herein – had Dean P.S.C. exercised even a modicum of responsibility in its financial affairs, and had Mark Dean met his ethical and professional responsibilities with regard to escrow funds, Dean P.S.C. would have avoided embezzlement at the hands of a dishonest bookkeeper. Yet, due to its own negligent hiring practices, its wrongful entrustment, its failure to monitor its bank account, its total disregard for duly transmitted bank statements it was required to review, and its other acts of misfeasance and nonfeasance, Dean P.S.C. sustained a self-inflicted loss for which CB&T is not, as a matter of law, responsible. The record and law are clear

that CB&T fulfilled its obligations in its handling of Dean P.S.C.'s Account, and, accordingly, this Court should affirm the opinions of the trial court and the Court of Appeals.

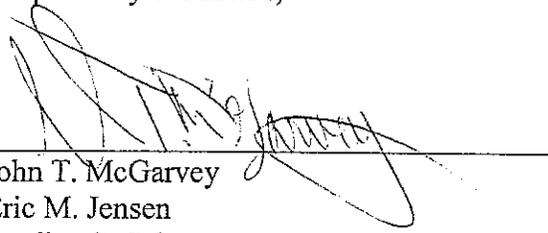
CONCLUSION

The clear and uncontroverted evidence before the Court proves that CB&T mailed to Dean P.S.C.'s designated address each month a statement together with originals or copies of all items paid from the account; and Dean P.S.C. did not report the unauthorized signatures within one year as required by KRS 355.4-406. Under these facts, this Court should properly apply KRS 355.4-406(6) as a substantive bar to all of Dean P.S.C.'s causes of action, and sustain the trial court's grant of summary judgment.

Alternatively, the Court should find that, as a matter of law, the general UCC statutes of limitation, KRS 355.3-118(7) and 355.4-111, bar Dean P.S.C.'s UCC causes of action. Further, the Court should hold that Dean P.S.C.'s purported common-law claims have been displaced by the relevant provisions of Kentucky's UCC, and are also barred by the UCC's statutes of limitation.

Finally, the Court should correct the Court of Appeals' Opinion only to the extent it improperly uses an Official Comment, not applicable to KRS 355.4-406(6), to create a judicial exception to the statute's clear and unambiguous language. The Court should clearly pronounce that a bank customer's failure to promptly examine its bank statements and report any unauthorized signatures or alterations within one year is a substantive bar that destroys the right of the customer to sue the bank on any theory, without regard to care or lack of care of the customer or the bank.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John T. McGarvey", is written over a horizontal line.

John T. McGarvey
Eric M. Jensen
Bradley S. Salyer
MORGAN & POTTINGER, P.S.C.
601 W. Main Street
Louisville, KY 40202
(502) 589-2780
*Counsel for Appellee,
Commonwealth Bank & Trust Company*

APPENDIX

- **TAB A** – Cited decisions from foreign jurisdictions
- **TAB B** – *Bradley v. National City Bank of Kentucky*, 2004 WL 3017297 (Ky. App. 2004)