No. 124792

**IN THE**
**SUPREME COURT OF ILLINOIS**

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| JAMES Q. WHITAKER and PATHOLOGY INSTITUTE OF MIDDLE GEORGIA, P.C., | *Plaintiffs, Appellants,* |
| | v. |
| WEDBUSH SECURITIES, INC., | *Defendant, Appellee.* |

On Petition for Leave to Appeal from the Appellate Court of Illinois,
First District, No. 1-18-1455
On Appeal from the Circuit Court of Cook County, Illinois
Law Division, No. 2015 L 2617

# BRIEF OF PLAINTIFFS-APPELLANTS, JAMES Q. WHITAKER and PATHOLOGY INSTITUTE OF MIDDLE GEORGIA, P.C.

Steven H. Lavin
Jennifer J. Gedville
Lindsey Z. Lampros
LAVIN & GEDVILLE, P.C.
1849 Green Bay Road, Suite 440
Highland Park, Illinois 60035
(312) 670-4260

Attorneys for Appellants

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Carolyn Taft Grosboll
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## POINTS AND AUTHORITIES





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## NATURE OF THE ACTION

This case involves the scope of Article 4A of the Illinois Uniform Commercial Code (Funds Transfers) and a statutory interpretation of what it means to be "engaged in the business of banking." Article 4A explicitly governs funds transfers, also called wire transfers, and because the comments to 4A state that the rules provided therein "are intended to be the exclusive means of determining the rights, duties, and liabilities of the affected parties in any situation covered" by 4A, the enactment of Article 4A terminated relief under common law and became the sole remedy for improper wire transfers. See, 810 ILCS §5/4A-102, Cmt.; 810 ILCS §5/4A-204(a). Article 4A provides protection for either a customer or the financial institution when an unauthorized wire transfer is processed. Id. A customer whose funds are wire transferred out of its account pursuant to an unauthorized payment order (or wire instruction) is protected and the financial institution is required to refund the customer's funds if there is no commercially reasonable security procedure in place between the bank and the customer or the bank is unable to prove it processed the unauthorized wire transfer in good faith. 810 ILCS §5/4A-204(a); 810 ILCS §5/4A-202(b). A bank which processes an unauthorized wire transfer is protected and is not required to refund the customer's funds if the bank and customer have agreed to a commercially reasonable security procedure and the bank proves it processed the wire transfer in good faith. 810 ILCS §5/4A-204(a); 810 ILCS §5/4A-202(b).

Wedbush Securities, Inc. ("Wedbush"), which is undoubtedly a financial institution, processed four unauthorized and fraudulent wire transfers out of the accounts of its customers, James Q. Whitaker and the Pathology Institute of Middle Georgia, P.C. ("Appellants") resulting in a loss of $374,960.00. Appellants timely notified Wedbush of



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the unauthorized wire transfers after which Wedbush refused to refund Appellants' funds, and Appellants subsequently filed a lawsuit against Wedbush seeking a return of the funds under Article 4A.[1]

A bench trial was conducted to determine if the refund requirements of 4A applied thereby requiring Wedbush to refund the lost funds, and certain evidentiary decisions were made in favor of Wedbush. Wedbush argued that it was not considered a "bank" under Article 4A and therefore the refund requirements in Section 204(a) arguably did not apply to Wedbush. The trial court found Wedbush was not a "bank" under Article 4A, and as a result did not proceed to review the other 4A issues – whether there was a commercially reasonable security procedure in place and whether Wedbush proved it processed the wire funds transfers in good faith. A3.[2]

Article 4A applies to financial institutions "engaged in the business of banking" and "includes some institutions that are not commercial banks" which act "on behalf of customers in funds transfers." 810 ILCS §5/4A-105(a)(2); 810 ILCS §5/4A-105, Cmt. 1. Article 4A does not specify what it means to be engaged in "the business of banking," and no Illinois case provides an interpretation of what that means under 4A. See, 810 ILCS §5/4A-105(a)(2); 810 ILCS §5/4A-105, Cmt. 1. So, the trial court imposed its own standard not found anywhere in Article 4A itself or in case law interpreting Article 4A and

[1] During the underlying litigation, at their sole cost and expense to reduce their damages, Appellants were successful in seeking a return of a portion of the lost funds amounting to $150,980.00 directly from mBank in Poland, which is where the funds ultimately ended up. As a result, Appellants seek a return of the remaining $223,980.00 which have not been refunded.

[2] Citations to the Common Law Record on appeal are identified as "C[#]." Citations to the Report of Proceedings are identified as "R[#]" Citations to the Exhibits in the record on appeal are identified as "E[#]." Citations to the Appendix filed herewith are identified as "A[#]."



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found Wedbush was not engaged in banking because Wedbush's actions did not rise "to a level of direct involvement in customers' finances, usually including checking…."[3] A3.

The trial court also held that Appellants' Trial Exhibit 11, consisting of a printout of Wedbush's website describing its banking activities, was inadmissible because it was not properly authenticated. R302-308; R230.

Both holdings of the trial court were affirmed on appeal to the Appellate Court of Illinois, First District after oral arguments were conducted.[4] On a *de novo* review of the applicability of Article 4A, the Appellate Court affirmed in favor of Wedbush and concluded that Appellants did not establish Wedbush was a "bank" under Article 4A. A28. In parallel reasoning to the trial court, the Appellate Court resorted to caselaw under Articles 3 and 4 after determining that 4A did not define the "business of banking" and concluded that checking services were required to be considered a bank. A25-27. Because there was no indication Wedbush offered checking services (Appellants dispute this), the Appellate Court concluded Wedbush could not be found to be "engaged in the business of banking." A27-28.

On an abuse of discretion review of the trial court's ruling that Appellants' Trial Exhibit 11 was inadmissible, the Appellate Court affirmed and concluded that the testimony by James Q. Whitaker regarding his viewing of the website was insufficient authentication. A19-20.

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[3] Even though Appellants maintain that the checking services of Wedbush are irrelevant for purposes of determining the applicability of Article 4A, there is evidence in the record to refute Wedbush's assertion that it did not offer such services. See, pp. 21-23 *infra*.

[4] Other issues were also raised by Appellants on appeal to the Appellate Court of Illinois; however, only the Article 4A claims and admissibility of Trial Exhibit 11 are now being appealed to this Court.



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On September 25, 2019, this Court allowed Appellants' timely Petition for Leave to Appeal these important issues. No questions are raised on the pleadings.

## ISSUES PRESENTED

1. Is a futures commission merchant, which directs customer funds held in a segregated account at another bank and exclusively handles all funds transfers directly with its customers, engaged in the business of banking under Article 4A of the Illinois Uniform Commercial Code and therefore subject to the refund requirements of 4A after it processes unauthorized wire instructions?

2. Is a printout of a private website properly authenticated through testimony of a witness, who is not a "webmaster" or an employee of the company who provides the website, about his personal knowledge of the website regarding when he viewed it and the URL used to access it?

## STATEMENT OF JURISDICTION

On June 14, 2018, following a bench trial, the Circuit Court of Cook County, Law Division, entered judgment in favor of Wedbush. A1-3. On July 11, 2018, Appellants filed a Notice of Appeal. The Appellate Court, First District, had jurisdiction pursuant to Illinois Supreme Court Rule 303(a)(1). On March 21, 2019, the Appellate Court affirmed the trial court judgment. A4-29. On April 25, 2019, Appellants filed their Petition for Leave to Appeal, and on September 25, 2019, this Court allowed the Petition. This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315.



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## STATUTE INVOLVED

**Uniform Commercial Code-Funds Transfers - 810 ILCS §5/4A-101 et seq.**

**Section 105: Other definitions.**

> "(a) In this Article: . . . (2) 'Bank' means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this Article." 810 ILCS §5/4A-105(a).

**Section 105 - Uniform Commercial Code Comment.**

> "1. The definition of "bank" in subsection (a)(2) includes some institutions that are not commercial banks. The definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers. Since many funds transfers involve payment orders to or from foreign countries the definition also covers foreign banks. The definition also includes Federal Reserve Banks. Funds transfers carried out by Federal Reserve Banks are described in Comments 1 and 2 to Section 4A-107." 810 ILCS §5/4A-105, Cmt. 1.

**Section 202: Authorized and verified payment orders.**

> "(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. . . ." 810 ILCS §5/4A-202(b).

**Section 204: Refund of payment and duty of customer to report with respect to an unauthorized payment order.**

> "(a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under Section 4A-202, or (ii) not enforceable, in whole or in part, against the customer under Section 4A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. . . ." 810 ILCS §5/4A-204(a).



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## STATEMENT OF FACTS

Dr. James Q. Whitaker ("Whitaker") is a pathologist who formed and owns the Pathology Institute of Middle Georgia, P.C. ("Institute") (Whitaker and Institute sometimes collectively hereinafter referred to as "Appellants") and began trading commodities in high school. R174-179; R179. In 1987, Whitaker and Institute each opened a trading account with Goldenberg, Heymeyer & Co. ("Goldenberg") in Chicago, at which time Whitaker (not Institute) signed a Customer Agreement. E1114. Over the years, various successor firms took over Goldenberg and acquired Appellants' trading accounts; Goldenberg was first acquired by Penson Financial Services in 2007, and in 2012, Appellants' accounts were transferred from Penson to KCG Knight Futures ("KCG"). R182-183. In December 2014, Wedbush acquired KCG's futures business, including Appellants' futures trading accounts. E66-67. Appellants were never offered a new customer agreement by any of Goldenberg's successors, including Wedbush. R182.

Wedbush has two different financial divisions – a futures commission merchant (FCM) division, the division at issue in this appeal, and a broker-dealer division – but, it is overall one financial institution. See, E66. FCMs are required to hold futures customer funds in segregated accounts to keep the customer funds separate from their own, and as such the funds in Appellants' accounts with Wedbush were held in segregated accounts in custody of BMO Harris Bank ("BMO"). R754; E766-773. As set forth in the Global Treasury Management Services Master Agreement and BMO's Wire Transfer Service Description, Wedbush engaged BMO to perform certain services in connection with those segregated accounts, such as providing an online portal for Wedbush employees to process



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wire transfers for Wedbush customers; BMO had no interaction with Wedbush's customers. E778-809; R754-755.

Pursuant to Wedbush's internal wire transfer procedures, which it inherited from KCG, all wire transfer requests initiated by Wedbush's customers were sent directly to Wedbush employees and were handled by Wedbush's Customer Service, Risk, and Accounting/Treasury Departments pursuant to their internal "wire transfer procedures." E430-445; R325-332. Emailed wire transfer requests were directed to the Customer Service email address which responded with an automated email. R325. The request was automatically forwarded to the assigned customer service employees. R326-327. The customer service employee then reviewed the name of the sender and his/her/its account name, account number, and customer email address to ensure the request came from an email address on the account. R332; E437. The employee responded directly to the customer via the same email that sent the request and added each wire transfer request to a spreadsheet containing all other wire transfer requests received from other customers on that day. R328.

The wire request then moved to the Risk Department where the employees reviewed the balance in the sender's account to ensure there were enough funds to complete the wire transfer request; their sole job was to avoid an overdraft. R328; R460. Finally, the wire request went to the Accounting/Treasury Department for processing, where the employees added the wire transfer request to Wedbush's banking system to generate the wire and post it to Wedbush's client system. R328; R724. The employee verified the sender's account name on the wire transfer request with the Wedbush account name to confirm an account existed, and if so, the wire was approved; Wedbush charged the



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customer a fee for each wire ($25 for domestic and $75 for international). R326-328; E437.

After Wedbush's three departments reviewed and approved a customer wire request, it was then processed through BMO's online wire transfer portal. R755. Wedbush's employees used BMO's portal, "a self-serve online portal where [Wedbush] can transact with [BMO] for wire payments." R754-755.

Prior to Wedbush taking over KCG's business in December 2014, Appellants occasionally transferred money out of their futures trading accounts to their other local bank accounts (never internationally) and to do so Appellants always communicated by telephone directly with employees of KCG, and prior to that Penson, to effectuate wire transfers. R182-185. Appellants' employees were responsible for initiating Whitaker and Institute's wire transfer requests. R177-185. The employees prepared the wire transfer instructions using a template, which were reviewed by Whitaker. E934-937. To initiate the request, a telephone call was then made by Whitaker or his employees to Wedbush's predecessors, the wire transfer template was signed by Whitaker individually or on behalf of Institute, and a follow-up email was sent from Whitaker's email attaching the scanned wire instructions of Whitaker or Institute. Id. Prior to December 2014, Appellants *always* initiated wire transfer requests in this way. See e.g., E934-937; E27; E35; E44; E47; E54.

From 2008 to 2014, Institute authorized twelve wire transfer requests from its trading account to another local bank account belonging to Institute, and from 2007 to 2014, Whitaker authorized ten wire transfer requests from his trading account to another local bank account belonging to Whitaker. Id. The same employees at KCG who handled Appellants' wire transfer requests were employed by Wedbush after the KCG acquisition. R182-185. However, before Appellants ever initiated an authorized wire transfer with



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Wedbush, in mid-December 2014, Whitaker's email account was hacked by criminals who purported to be Appellants sending the four fraudulent wire transfer requests to Wedbush, plus others that were rejected. R210-211. It is undisputed that Wedbush processed four of the requests, and as a result a total of $374,960.00 was transferred out of Appellants' accounts to bank accounts in Poland.

The first fraudulent wire transfer request was initiated by an email (not a telephone call as was customary) via Appellants' email account on December 17, 2014, at 9:09 a.m. and included an attachment with wire instructions containing the forged signature of Institute, but Wedbush did not ultimately process it. E189; E219. A second unauthorized wire transfer request was sent via Appellants' email account on the very same day at 12:20 p.m. with an attachment containing wire instructions and Whitaker's forged signature requesting funds in the amount of $78,000 be sent to a bank account in South Africa. E222. The second request was ultimately rejected because the beneficiary name (Emmanuale Olawale) did not match the account name on file with Wedbush. E232. There were six subsequent unauthorized fraudulent wire transfer requests sent to Wedbush, four of which Wedbush processed totaling $374,960.00. See, E241-242; E278-279; E310-311; E360-361.

## STANDARDS OF REVIEW

The standard of review following a bench trial is whether the judgment is against the manifest weight of the evidence. Chicago's Pizza, Inc. v. Chicago Pizza Franchise Limited USA, 384 Ill.App.3d 849, 859 (1st Dist. 2008). However, the main issue in this appeal involves the construction of a statute, which is a question of law. See, Prinova Solutions, LLC v. Process Technology Corporation Ltd., 2018 IL App (2d) 170666 at ¶11.



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Appellate review of a construction of a statute is conducted on a *de novo* basis independently of the lower court's determination of the legislature's intent, which is best demonstrated by the plain language of the statute. Id. The *de novo* standard of review is applicable to this Court's review of the lower courts' construction of Article 4A and what it means to be a "bank."

The standard of review of a trial court's decision to admit into evidence relevant trial exhibits is whether the trial court clearly abused its discretion. Gill v. Foster, 157 Ill.2d 304, 312 (1993). The abuse of discretion standard is applicable to this Court's review of the admissibility of Appellants' Trial Exhibit 11.

## ARGUMENT

The appellate court should be reversed on both issues in this appeal. Judgment should be entered in favor of Appellants on their Article 4A claims because Wedbush acted as a bank within the scope of Article 4A governing funds transfers and failed to meet the requirements of 4A. Appellants' Trial Exhibit 11 should be held admissible because it was properly authenticated under Illinois law.

### I. Article 4A of the Illinois Uniform Commercial Code applies to Wedbush because Wedbush engages in the business of banking by processing numerous funds transfers and offers other banking services.

The appellate court erred by excluding Wedbush from the scope of Article 4A of the Illinois Uniform Commercial Code thereby limiting 4A's reach because the court incorrectly applied the definition of "bank." A22-28. A reviewing court looks to the language of the statute itself as the "most reliable indicator of the legislative intent" and "may not depart from the plain language by reading into the statute exceptions, limitations, or conditions that the legislature did not express." Hayashi v. Illinois Dept. of Fin. and



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Professional Regulation, 2014 IL 116023 at ¶16. To the contrary, the appellate court strayed from the scope and definitions of 4A for several reasons.

***First***, Article 4A was enacted specifically to govern funds transfers such as those processed by Wedbush resulting in a loss of $374,960.00 by Appellants. ***Second***, the trial and appellate courts erred in relying upon Articles 3 and 4 and case law interpreting Articles 3 and 4, which apply to negotiable instruments and depositary accounts and have no relevance to funds transfers. ***Third***, multiple banks may be involved in any given funds transfer, and BMO's involvement in the funds transfers at issue in this appeal as an intermediary bank and custodian of Appellants' segregated funds for Wedbush as an FCM does not prevent a finding that Wedbush was the receiving bank that accepted the unauthorized payment orders. ***Fourth***, the record on appeal is replete with evidence establishing Wedbush acted as a "bank" for purposes of Article 4A. For these reasons, the appellate court's determination that Wedbush was not a "bank" under Article 4A should be reversed.

As a result of these reversible errors, neither the trial court nor the appellate court decided the other two issues involved in determining whether Wedbush was required to refund Appellants' funds under Article 4A. Had the correct determination been made that Wedbush was a "bank" under Article 4A, the next issues were whether there was a commercially reasonable security procedure to authenticate payment orders in place between Wedbush and Appellants and whether Wedbush proved it processed the unauthorized wire transfers in good faith. If there was no commercially reasonable security procedure in place and Wedbush did not prove it processed the wire transfers in good faith, then Wedbush would have been required to refund Appellants under Section 204 of Article



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4A. 810 ILCS §5/4A-204(a). Both issues were tried, and the record contains enough evidence to support a conclusion that Wedbush is required to refund the remainder of Appellants' funds under Article 4A.

### A. Article 4A was drafted to govern wire transfers and the financial institutions that process them.

A financial institution acting on behalf of customers in funds transfers should be considered a bank for purposes of Article 4A. A review of the definition of "bank" in conjunction with the intended scope of 4A warrants a reversal of the appellate court and a conclusion that Wedbush is in fact a bank under 4A.

According to the drafters themselves, Article 4A governs funds transfers, which is a "specialized method of payment" also commonly referred to as a "wholesale wire transfer." 810 ILCS §5/4A-102, Cmt. "The scope of Article 4A is determined by the definitions of "payment order" and "funds transfer. . .." Id. A "funds transfer" is defined as a "series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order." Id. at §104(a). A "payment order" is "an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary. . .." Id. at §103(a)(1). A "receiving bank" is "the bank to which the sender's instruction is addressed." Id. at §103(a)(4). A "sender" simply means the person sending the instructions to the receiving bank. Id. at §103(a)(5).

Article 4A defines "bank" as any "person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company." Id. at 105(a)(2). Comment 1 to section 105 is crucial in the analysis necessary in this appeal. The comment indicates that the definition of "bank" includes "some institutions



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that are not commercial banks." Id. at Cmt 1. "The definition reflects the fact that **many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers**." Id. (emphasis added).

Even though the statute contains the necessary elements to determine the applicability of Article 4A to Appellants' claims here and this Court's focus should rightly be on the plain language of the statute itself, the case law also follows the same approach by looking to the scope and basic definitions. See, Prinova Solutions, LLC, 2018 IL App (2d) at ¶11. There is no Illinois case law discussing what it means to be engaged in the business of banking under 4A, but other states have reviewed 4A's scope. The appellate court mentioned the non-Illinois case law discussing the issue of what constitutes a bank under 4A includes "minimal analysis" regarding the determination. A26. The scope of 4A is funds transfers, and extensive analysis is not required. See, 810 ILCS §5/4A-102. The only review necessary is stated in 4A itself, and this Court should look to whether the financial institution at issue acted "on behalf of [its] customers in funds transfers." See, 810 ILCS §5/4A-105, Cmt. 1.

In Gold v. Merrill Lynch & Co., the court concluded that Merrill Lynch, a brokerage firm, met the definition of "bank" in Article 4A. 2009 WL 2132698 at *3-4, No. 09-318-PHX-JAT (D. Ariz. Jul. 14, 2009). The very first determination made by the court in its analysis of whether Article 4A governed the claims was that the unauthorized transfers involved all constituted "funds transfers," the "specialized method of payment referred to in" Article 4A. Id. at *3. Even though Merrill Lynch did not fall within any of the examples set forth in the "bank" definition, the court looked to the comments in the



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definition of "bank" reflecting "the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers." Id. The court found 4A's comment "strongly implies" that Merrill Lynch "should be deemed a bank for purposes of the UCC." Id. Therefore, the court concluded that "in light of the clear applicability of Article 4A to funds transfers," there was no question that Article 4A governed the claims in that case. Id.

Similarly, in Covina 2000 Ventura Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., the court concluded Article 4A applied to the claims involving unauthorized wire transfers. 2008 WL 1821738, No. 06 Civ 15497 (DLC) (S.D.N.Y. Apr. 21, 2008), *aff'd sub nom* by Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 (2d Cir. 2010)). The court first determined that the claims involved funds transfers which were governed by New York's Article 4A. Covina 2000 Ventura Corp., 2008 WL 1821738 at *3. The court looked to the intent set forth in the comments, which was "to correct the perceived inadequacy of attempting to define rights and obligations in funds transfers by general principles of common law or by analogy to rights and obligations in negotiable instruments law or the law of check collection." Id., *quoting* Grain Traders, Inc. v. Citibank, N.A.,160 F.3d 97, 102 (2d Cir. 1998). There, the claims were based entirely on unauthorized wire transfers seeking to hold Merrill Lynch accountable, and the court found Article 4A was applicable. Id.

The same analysis applies in this appeal, and the result is a clear application of Illinois' Article 4A to the funds transfers at issue here. As the courts did in Gold and Covina 2000 Ventura Corp., this court, too, should look to the scope of 4A and the definitions of payment orders and funds transfers. Here, the criminals hacked into



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Whitaker's email account and initiated several funds transfers by email to Wedbush, which accepted and processed the requests without verification. R210-211. The hackers disguised as Appellants acted as the "senders" and emailed payment orders instructing Wedbush, the receiving bank, to pay a total of $374,960.00 to other bank accounts belonging to the hackers disguised as belonging to Appellants, the beneficiary. See, E241-242; E278-279; E310-311; E360-361; R210-211. The payment orders were directed to Wedbush whose employees communicated with the senders of the orders, and Wedbush's employees reviewed the orders pursuant to Wedbush's internal wire transfer procedures. E241-242; E278-279; E310-311; E360-361; E430-445; R325-332. The payment orders were reviewed by Wedbush's Customer Service, Treasury/Accounting, and Risk Departments, and the four unauthorized transfers Wedbush approved were entered by Wedbush's employees in the online portal provided by BMO in order to effectuate the transfer of funds from Appellants' accounts to the criminals/beneficiaries. R754-755. By receiving, reviewing, and entering the payment orders purporting to be from Appellants, Wedbush acted on behalf of its customers in effectuating the funds transfers. Therefore, Wedbush acted as a "bank" for purposes of Article 4A.

To conclude Wedbush was not a bank under 4A leaves Appellants without any remedy whatsoever. Many cases analyzing Article 4A have confirmed the remedies provided therein have displaced common law rules and causes of action. Negligence claims in connection with the honoring of a wire transfer request are precluded both by the *Moorman* doctrine barring "purely economic losses" and by Article 4A, which already provides the rights and responsibilities of a defendant when presented with a wire transfer request. Envision Healthcare, Inc. v. Federal Deposit Insurance Corporation, 2014 WL



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6819991 at *7, No. 11-CV-6933, (N.D.Ill. Dec. 3, 2014). Section 202(b) of Article 4A applies to determine if a wire transfer request is deemed effective providing the cause of action for a bank's mishandling wire transfer requests, and Section 204 sets forth the remedies available if the bank accepts an unauthorized wire transfer in violation of 202(b); there is no separate cause of action for negligence based upon the same facts as it is already covered in Article 4A. Id. at *6-7; see also, Travelers Casualty & Surety Co. of America, 2010 WL 1325494 at *2-3, No. 09-C-06473 (N.D.Ill. Mar. 30, 2010) (dismissing the common law breach of implied contract claim because sections 202 and 204 of 4A governed the same claims); Capten Trading Ltd. v. Banco Santander International, 2018 WL 1558272 at *3, No. 17-20264-Civ (S.D.Fla. Mar. 29, 2018) (concluding that the claims were displaced by Article 4A governing claims relating to the bank's mishandling wire transfers).

During oral argument in the appeal to the appellate court, the Justices raised questions raised regarding other potential avenues of recovery for Appellants and asked about the applicability of the Electronic Funds Transfer Act (the "EFTA") to the funds transfers at issue here. The EFTA is a federal statute applying to a different payment method not at issue in this appeal. The EFTA applies to consumer electronic funds transfers conducted through automated teller machines (ATMs), point-of-sale terminals, automated clearinghouse systems, and automated bill payment plans, which expressly excludes any transfers of funds which are not part of a "prearranged plan and under which periodic or recurring transfers are not contemplated." 15 USCA §1693a(7). In other words, the EFTA applies to recurring consumer electronic funds transfers, but not the one-off funds transfers at issue in this appeal.



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The facts here are simple. Wedbush wrongly processed four unauthorized wire transfer requests initiated by criminals. Section 202(b) provides Appellants' cause of action against Wedbush for mishandling the wire transfers, and Section 204 sets forth Appellants' remedies for Wedbush's failures. See, 810 ILCS §5/4A-202, 204. If the lower courts' analyses and conclusions are correct and Article 4A does not apply, then Appellants would be left with no recourse for Wedbush's mishandling the fraudulent wire transfers as the *Moorman* doctrine would bar this claim for purely economic losses. This is contrary to the very purpose and intent of the drafters of Article 4A – to exclusively govern the specialized method of payment referred to as a funds transfer. See, 810 ILCS §5/4A-102, Cmt.

### B. Case law under Articles 3 and 4 is irrelevant to a determination under Article 4A contrary to Wedbush's argument and the Appellate Court's conclusion.

The appellate court committed two additional errors in its interpretation of the scope of Article 4A warranting reversal. First, the appellate court "rejected [Appellants'] unsupported contention that the cases interpreting the definition of bank in Articles 3 and 4 are irrelevant to our analysis." A26. Second, the appellate court stated there would be no need for 4A to define bank if "the processing of wires was sufficient in and of itself to place a financial institution within the parameters of Article 4A." A26.

Appellants' contention that Articles 3 and 4 are irrelevant is supported by the language in Article 4A, and even Article 3. Article 3 governs "negotiable instruments" and "does not apply to . . . payment orders governed by Article 4A," and Article 4 governs bank deposits and check collection. 810 ILCS §5/3-102; 810 ILCS §5/4-101, Cmt. 1. Even though there is no specification in 4A regarding what it means to be engaged in the business



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of banking, 4A does in fact contain numerous explanations of the intended scope of 4A. The official comments of Article 4A contain the drafters' intent stating there is no need to refer to principles outside of Article 4A. 810 ILCS §5/4A-102, Cmt. Prior to its enactment, case law on wire transfers was "sparse, undeveloped, and not uniform." 810 ILCS §5/4A-102, Cmt. For example, "[j]udges have had to resolve disputes by referring to general principles of common law or equity, or they have sought guidance in statutes such as Article 4 which are applicable to other payment methods." Id. "[A] deliberate decision was made to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by the unique rules that address the particular issues raised by this method of payment." Id. The Comments further discuss the competing interests involved in the wire transfer process as follows:

> "The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, ***resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article***." 810 ILCS §5/4A-102, Cmt. (emphasis added).

Appellants' contention that Articles 3 and 4 are irrelevant was and is supported by this very language. Referring to caselaw under Articles 3 and 4 is resorting to principles of law outside of 4A. The 4A case law provides the necessary explanation and interpretation the appellate court sought, and the 4A comments specifically discourage reliance upon other Articles of the Uniform Commercial Code.

Moreover, nothing in Article 4A or the cases discussing 4A reference the checking issues involved in Articles 3 and 4, and certainly none of the 4A cases require a finding that the financial institution involved offered checking services to fall under the scope of 4A. Compare Gold v. Merrill Lynch & Co., 2009 WL 2132698 (concluding Arizona's



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Article 4A applied because the unauthorized transfers of over $300,000 from the plaintiff's retirement account by the plaintiff's ex-wife to other accounts she controlled constituted funds transfers, the "specialized method of payment referred to in the Article [4A]"), *and* Covina 2000 Ventura Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2008 WL 1821738, No. 06 Civ 15497 (DLC) (determining that New York's Article 4A preempted the common law claims because they involved funds transfers governed by 4A) with Borchers v. Vanguard Group Inc., 2011 WL 2690424, No. 2:08-CV-02138-REJ (D.Ariz. July 11, 2011) (applying Article 4, not 4A, to a fraudulent check processing claim) *and* Nisenzon v. Morgan Stanley DW, Inc., 546 F.Supp.2d 213 (E.D. Penn. 2008) (applying Articles 3 and 4, not 4A, in a fraudulent check endorsement case) *and* Asian International, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 435 So.2d 1058 (La. Ct. App. 1983) (applying Article 3 to a claim for tortious conversion of a check) *and* Lichtenstein v. Kidder, Peabody & Co., 727 F.Supp. 975 (W.D. Penn. 1989) (applying Article 4, not 4A, to a securities firm because it offered checking services) *and* Edward D. Jones & Co. v. Mishler, 983 P.2d 1086 (Oregon 1999) (applying Article 4, not 4A, to an overdrawn money market account) *and* Woods v. MONY Legacy Life Ins. Co., 84 N.Y.2d 280 (N.Y. 1994) (applying Article 4 to a money market checking account).

If Article 3 and 4 cases serve any use in this appeal, it is that we are able to draw a parallel analysis from them. For example, in Lichtenstein v. Kidder, Peabody & Co., a fraudulent check forgery case, the court looked to the scope of Article 4 governing check collection and deposits to determine whether the brokerage firm acted as a "bank" under Article 4 thereby precluding the common law claims. 727 F.Supp. 975, 977. Pennsylvania's Article 4 defined "bank" as "any person engaged in the business of



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banking," but did not specify what that meant, so the court looked to the scope of Article 4 governing check collection and deposits and whether the brokerage firm received deposits and allowed withdrawals in the regular course of business. Id. Here, this Court should look to the scope of Article 4A applying to funds transfers and the fact that Wedbush regularly provided funds transfers as a service to its customers. Wedbush routinely processed wire transfers for its customers employing three separate departments for reviewing and communicating with customers. See, E430-445; R325-332. Wedbush's Accounting Department received wire requests from the Customer Service Department three times a day, and Wedbush admittedly processed such a large volume that it was hard for the employees to keep track of details of the transactions. R359; R728. Wedbush also adopted the internal procedures of KCG relating to funds transfers. E66; E430-447. There can be no doubt Wedbush offered wire transfer services to its FCM customers.

The appellate court was also wrong in stating Article 4A does not require its own "bank" definition if the only requirement to be considered a bank was to offer funds transfer services. Article 4A defines "bank" in order to follow the intent to provide "the exclusive means of determining the rights, duties and liabilities of the affected parties" in funds transfers and to remain a separate and distinct method of payment apart from the other Articles of the Uniform Commercial Code. See, 810 ILCS §5/4A-102, Cmt. Articles 3 and 4 both define "bank," and Article 3 refers to Article 4 for the definition, which added its definition of "bank" after the enactment of Article 4A. 810 ILCS §5/3-103(c); 810 ILCS §5/4-105. Article 4 could have simply referred to the Article 4A definition and comments if the meanings were meant to cover the same type of financial institutions, but it did not.



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In fact, Article 4 and 4A define "bank" in the same way on their face until you look to the comments. See, 810 ILCS §5/4-105(1); 810 ILCS §5/4A-105(a)(2).

Article 4 comments discuss issues involving payment collection and deposits relevant to depositary accounts, the subject of Article 4. See, 810 ILCS §5/4-105, Cmt. 1-2; 810 ILCS §5/4-102. On the other hand, Article 4A comments discuss funds transfer issues relevant to funds transfers, the subject of 4A. See, 810 ILCS §5/4A-105, Cmts. 1-4. In order to carry out the intent that 4A provide the exclusive governing law on funds transfers, a separate definition and explanatory comments regarding what it means to be a bank were adopted in Article 4A. Otherwise, courts would need to resort to other laws applicable to other types of payment methods.

### C. Appellants propounded ample evidence supporting a conclusion that Wedbush acted as a bank.

In many ways, Wedbush conducted itself as a bank. In the broadest sense, looking solely to the definitions and scope of Article 4A as set forth above, Wedbush acted as a bank under Article 4A because it processed numerous wire transfers, which is all that is relevant to this appeal. However, Wedbush still acted as a bank by offering other banking services besides just funds transfers.

As explained above, Wedbush was the receiving bank in the overall fraudulent funds transfers because it is the bank to which the first payment order was directed by its customer. See, *supra* pp. 14-15. Finally, Wedbush charged the customer a wire transfer fee, and transmitted account statements to the customer. Id.; see, e.g. E928. In sum, Wedbush received the payment orders directly from its customers, reviewed the orders for internal approval, entered the orders in BMO's online portal, charged a fee to the customer, and after processing the funds transfers noted the transfers in and out of customers'



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accounts on Wedbush's account statements it provided to the customers.

In all these ways, Wedbush acted on behalf of its customers, such as Appellants, in funds transfers. As explained above, this is all that Article 4A requires in order to be considered a "bank." Because Wedbush frequently acted on behalf of its customers in funds transfers, Wedbush should be considered a "bank" within the scope of Article 4A. This is the only analysis required under Article 4A. However, considering the broader interpretation by the appellate court requiring more involvement to be considered a bank, the record also provides ample evidence that Wedbush offered other traditional banking services.

First and foremost, Wedbush's own website (Appellants' Trial Exhibit 11) demonstrated many types of banking services offered by Wedbush. E79. Appellants discuss the errors committed by the courts below in denying the admissibility of Trial Exhibit 11. *Infra* pp. 38-41. Wedbush's banking services consisted of business banking and personal banking. E79. The business banking services included "deposit accounts, cash management services and tailored financing solutions for businesses of all sizes." Id. The personal banking services included "**[c]hecking**, savings, collateral loans and more to meet all your personal banking and lending needs." Id. (emphasis added). Appellants' expert witness, George F. Thomas, also testified regarding the numerous banking functions performed by Wedbush. R846-847.

In addition to Appellants' Trial Exhibit 11, the record on appeal contains other evidence supporting Wedbush's other banking services, including the checking services offered. Wedbush's future trading customers, such as Appellants, were able to deposit and withdraw funds from their futures accounts. E435, E444-446, E456-457. According to



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Wedbush's Customer Service Procedures adopted from KCG, Wedbush implemented similar internal procedures for reviewing customer's incoming and outgoing checks, as well as wires and ACHs. E66; E433-447 at E435, E444-446; E456-457. Appellants conducted hedge and arbitrage functions, which meant that Appellants often traded opposite their position in metals, requiring physical storage space to hold the metals, and so each month Wedbush deducted from Appellants' accounts fees for sales taxes and storage fees, rather than sending those bills to be paid by the customer. E1147; E1160; R179; R183-186. Even if this Court adopts the approach taken by the appellate and trial courts requiring checking services to be offered, both courts erred in concluding Wedbush was not a bank because the record includes evidence that Wedbush offered those and other banking services.

### D. BMO's involvement as an intermediary bank has no effect on Wedbush's liability as the receiving bank.

After determining Wedbush acted as a bank under Article 4A, we next look to the requirements in section 204. The receiving bank that accepts an unauthorized payment order issued in the customer's name effective under section 202 is required to refund the customer's funds transferred per the unauthorized payment order. 810 ILCS §5/4A-204(a). During oral argument, questions were raised regarding BMO's involvement, and Wedbush argued it was not liable to Appellants because it could not be considered the receiving bank. Wedbush claimed it simply forwarded wire requests to BMO for processing. According to the basic definitions of 4A, however, Wedbush was the receiving bank that accepted the unauthorized payment orders.

Several banks and payment orders may be involved in any given funds transfer. Funds transfer is defined as a *series* of transactions beginning with the originator's payment



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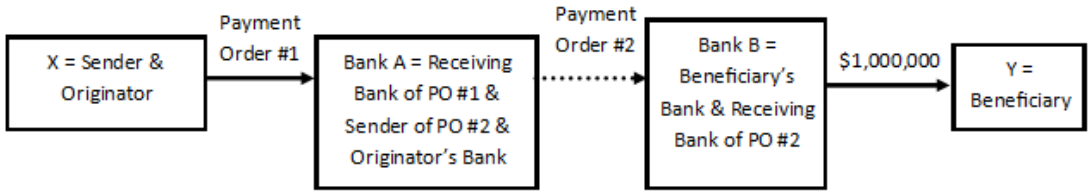
order, and a payment order is an instruction from a sender to a receiving bank. 810 ILCS §5/4A-104(a); 810 ILCS §5/4A-103(a)(1). "Originator" is the "sender of the first payment order in a funds transfer." 810 ILCS §5/4A-104(c). "Intermediary bank" means "a receiving bank other than the originator's bank or the beneficiary's bank." 810 §5/4A-104(b).

The comments to section 104 provide a very simple example to demonstrate what a funds transfer looks like in reality. 810 ILCS §5/4A-104, Cmt. 1., Case #2. X, which has an account in Bank A, instructs Bank A to pay $1,000,000 to Y's account in Bank B. Id. "With respect to this payment order, X is the sender, Y is the beneficiary, and Bank A is the receiving bank. Id. Bank A carries out X's order by instructing Bank B to pay $1,000,000 to Y's account." Id. See illustration below for this example.




If Bank A and Bank B do not have a relationship, Bank A could utilize an intermediary bank. Id. at Cmt. 1, Case #3. Bank A carries out the first payment order by issuing a second payment order to Bank C, which carries out the second payment order by issuing a third payment order to Bank B. Id. Bank B then carries out the third payment order and pays the beneficiary. Id. See illustration below for this example.



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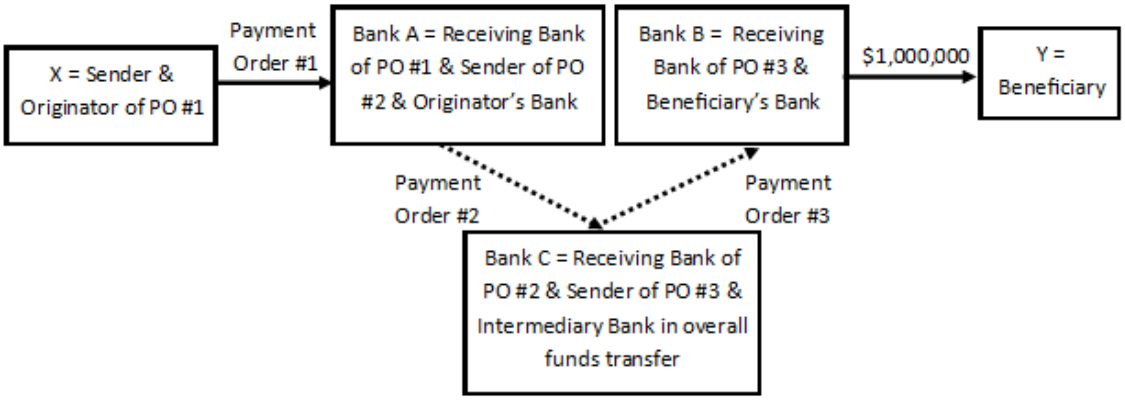


"As [these examples] demonstrate, a payment under Article 4A involves an overall transaction, the funds transfer, in which the originator, X, is making payment to the beneficiary, Y, but the funds transfer may encompass a series of payment orders that are issued in order to effect the payment initiated by the originator's payment order." Id.

The wire transfers at issue in this appeal are similar to the latter example using three banks. The criminals disguised as Appellants sent the first payment order to Wedbush, making it the receiving bank (Bank A in the examples), directing payment to the beneficiaries (Y in the examples), which were the criminals disguised as Appellants. The beneficiaries' account was at mBank, making mBank the beneficiary bank (Y's bank in the examples). If Wedbush approved the wire request, then Wedbush carried out the first payment order by issuing a second to BMO (Bank C in the latter example); Wedbush's employees entered a second payment order through BMO's portal, not because Wedbush and mBank did not have a relationship, but because Wedbush was required to hold Appellants' funds in segregated accounts with BMO. In the second payment order, Wedbush acted as the sender and BMO as the receiving bank. BMO carried out the second payment order by issuing a third payment order to mBank directing mBank, the beneficiary bank, to pay the beneficiaries. See illustration below.



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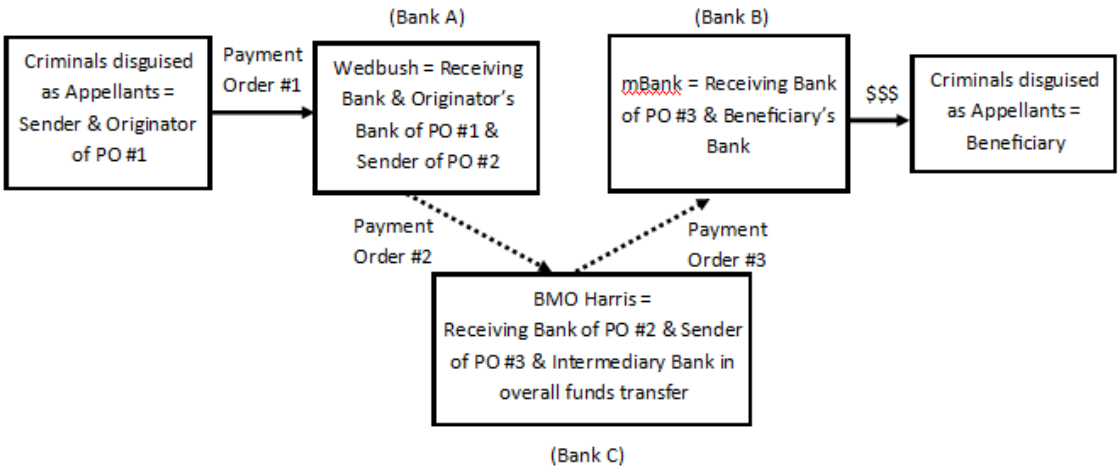


Here, as in the second example, Wedbush was the receiving bank which accepted the four fraudulent payment orders issued in the name of its customer, Whitaker or Institute, when it issued the second payment order through BMO's online portal. See, R755. BMO cannot be the obligated receiving bank because Appellants are not customers of BMO, they are customers of Wedbush, and Appellants never directed any payment orders to BMO. R755. Additionally, Wedbush, not BMO, charged Appellants for the wire fee. E437.

For these reasons, Wedbush was the receiving bank accepting the unauthorized payment orders of the hackers. Therefore, section 204 obligates Wedbush to issue the refund because, as discussed below, Wedbush did not meet the requirements in section 202.

### E. This Court should decide and find that Wedbush did not meet the requirements of Article 4A because it did not have a commercially reasonable security procedure and did not prove it processed the unauthorized wires in good faith.

The appellate court concluded in favor of Wedbush, albeit erroneously, that the wire transfers at issue in this appeal were not covered by Article 4 because Wedbush did not act as a bank. A28. As a result, the appellate court did not decide the commercial



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reasonableness and good faith issues. A28. In instances where the parties have briefed the issues and the full record is available, this Court may decide merits of a cause not decided by the appellate court in the interest of judicial economy. Krasnow v. Bender, 78 Ill.2d 42, 47 (1979); Williams v. BNSF R. Co., 2015 IL 117444 at ¶56 (declining to decide issues for not reviewed by appellate court distinguishable reasons because appellate court dismissed for lack of jurisdiction and did not decide any issues). This Court is equipped to decide all issues because these issues were tried, are briefed here on appeal, and the record contains necessary evidence supporting Appellants' claims in all respects.

Here, this Court should decide whether Wedbush met the requirements in section 202 necessitating a refund to Appellants. Section 202(b) of Article 4A protects either a bank that processes an unauthorized wire transfer if it meets both requirements set forth therein or protects a customer if the bank does not meet one or both requirements. 810 ILCS §5/4A-202(b). The bank is protected if, and only if, the bank and its customer have agreed upon a commercially reasonable security procedure for verifying the authenticity of wire requests and the bank proves it processed the wire transfer request in good faith in accordance with such commercially reasonable security procedure and any written agreement or instruction of the customer. Id. If the bank does not have a commercially reasonable security procedure in place with its customer or it fails to prove it processed an unauthorized wire transfer in good faith, then the customer's remedy is a refund to the customer for all money that was wrongfully transferred in accordance with the unauthorized wire transfer, plus interest. Id. at §204. Wedbush failed to meet the only two requirements by ignoring years of course of dealing between Appellants and Wedbush's predecessors and processing the four unauthorized wire transfers unilaterally without



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verifying that the requests came from Appellants.

**1. Wedbush failed to implement commercially reasonable security procedures.**

The issue of whether the bank had an agreed upon commercially reasonable security procedure with the customer involves two determinations – whether there was a security procedure in place with Wedbush and whether that security procedure was commercially reasonable. The result in both instances in this case is no.

First, there was no security procedure in place between Wedbush and Appellants. "Security procedure" is defined as a "procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication." 810 ILCS §5/4A-201. The term "security procedure" "does not apply to procedures that the receiving bank may follow unilaterally in processing payment orders." Id. at Cmt.

Upon opening the original account with Goldenberg in 1987, Whitaker signed a customer agreement, but Institute did not; however, nothing in the agreement contemplated wire transfers. E1114-1115. Appellants were never offered a new customer agreement by any of Goldenberg's successors, including Wedbush. R182. Wedbush's internal procedures do not apply because they were unilateral and were not an agreement with Appellants. Accordingly, there exists no agreement between Wedbush and Appellants governing verification of payment orders to initiate funds transfers.

Even so, over the course of Appellants' dealing with Wedbush's predecessors (Goldenberg, Penson, and KCG), Appellants had a clear, established protocol for handling wire transfers, which always began with Whitaker or one of his employees telephoning in



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a request, followed by an email containing the signed wire transfer details. R182-185; R177-185; E934-937; E27; E35; E44; E47; E54. When Wedbush took over for KCG on December 1, 2014, and began receiving the fraudulent wire requests sent by criminals purporting to be Appellants, Wedbush completely disregarded all established protocol that Appellants and Goldenberg, Penson, and KCG had in place, ignoring the fact that the fraudulent requests were never initiated or even followed by a telephone call from the customer. Wedbush simply accepted wire transfers received via email without any telephone call because the emails were being sent via an email account associated with Appellants' Wedbush accounts.

While Wedbush's expert witness testified that receiving wire instructions by email was a commercially reasonable security procedure, Article 4A is clear that a unilateral procedure decided by the bank is not considered a security procedure at all under Article 4A. R1064-1065. See, 810 ILCS 5/4A-201, Cmt. Appellants had never previously agreed that their wire requests would be accepted by email only without any verification whatsoever. Therefore, Wedbush and Appellants did not agree to a security procedure.

In the event Appellants' established protocol with KCG and the other Wedbush predecessors for handling wire transfers is considered a "security procedure," then the second step under Article 4A is to evaluate the procedure's commercial reasonableness. "Commercial reasonableness of a security procedure is a question of law. . .." 810 ILCS §5/4A-202(c). The court must consider "the wishes of the customer expressed to the bank; the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank; alternative security procedures offered to the customer; security procedures in general use by



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customers and receiving banks similarly situated." Id.

Applying the four basic commercial reasonableness factors to the protocol established by Appellants and disregarded by Wedbush overwhelmingly supports a finding that Wedbush's security procedure was **commercially unreasonable**. Appellants had expressed their wishes to Wedbush's predecessors simply by establishing the usual course of submitting wire transfers initiated by telephone followed by email with signed wire instructions. R177-185; E934-937. At no point in time prior to the fraudulent processing of the unauthorized wire transfers were Appellants ever offered a security procedure for verification of wire transfer requests. R182; R772.

Article 4A presumes commercial reasonableness of a security procedure if the bank offers one, the customer refuses it, and the customer expressly agrees "in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer." Id. Here, Appellants were never offered a security procedure to authenticate wire transfer requests to have been able to refuse one at any point in time prior to the fraudulent wire transfers. Appellants have not agreed in writing to be bound by any payment orders whether authorized or not. Therefore, the Article 4A factors of commercial reasonableness support Appellants' position.

Further to the four explicit factors of commercial reasonableness in Article 4A, courts often look to the Federal Financial Institutions Examination Council agencies (which consist of various governmental banking groups such as the Board of Governors of the Federal Reserve System) for guidance on authentication procedures ("FFIEC Guidance"). E707; see, Patco Construction Co. v. People's United Bank, 684 F.3d 197,



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209 (1st Cir. 2012); Texas Brand Bank v. Luna & Luna, LLP, 2015 WL 12916411 at *4, No. 3:14-CV-1134-P (N.D. Tex. Feb. 27, 2015). The FFIEC Guidance "was intended to aid financial institutions in 'evaluating and implementing authentication systems and practices . . .'" Patco Construction Co. 684 F.3d at 209. Generally, there are three basic factors used for authentication: information the customer knows, such as a password; something the customer has, such as an ATM card; and something the user is, such as a fingerprint. Id. An example of a single-factor authentication utilizes only one of the three factors, such as using a username and password to log onto an online portal.

In Texas Brand Bank, the court held that "industry standards require security procedures to use more than one level of authentication to be commercially reasonable." 2015 WL 12916411 at *4. In Patco Construction Co., part of the bank's security system allowed the bank (not the customer) to set a threshold amount above which a wire transfer would automatically trigger challenge questions, and the bank had lowered the threshold to $1. 684 F.3d at 203. The plaintiff (customer) argued, and the court agreed, that lowering the threshold to $1 was commercially unreasonable because it triggered the challenge questions for every transfer and created more opportunity for hackers to obtain the answers. Id. at 210. The bank had the option to utilize the threshold security measure for the customer and failed to do so. Therefore, the court found the security procedure to be commercially unreasonable. Id.

Among its other failures, Wedbush failed to follow any FFIEC Guidance to protect its customers resulting in its lack of commercially reasonable procedures as required by Article 4A. These industry norms were clearly available and feasible alternatives for Wedbush, which did not have even one level of authentication in place – the precise reason



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for the requirement that financial institutions adopt security procedures to verify the authenticity of wire requests, especially when they are received by unsecured email. See, 810 ILCS §5/4A-203 at Cmt. 3 (placing the onus of having authentication procedures on the receiving bank). Communications with Appellants were done via an unsecure email channel and all that was done to "verify" an email was to ensure the email address transmitting the wire request belonged to a Wedbush customer. R772. This fails to authenticate who really is the sender of the email – the customer who owns the email account or a hacker who may have gotten access to the customer's email address. Simply accepting an emailed wire request from a customer's email is not a method of authentication. As courts have concluded, one level of authentication is insufficient, and Wedbush failed to do even that.

Appellants' expert, George F. Thomas, testified extensively regarding the commercial reasonableness issue. Since 1981, Mr. Thomas has had experience in the field of wire transfer transactions in connection with various financial institutions. R769. His expert report and trial testimony proved that Wedbush did not conform to industry standards and practice regarding wire transfers because Wedbush failed to implement any security procedures for funds transfers. R799-801; E673-704; R772. Wedbush communicated with the customer via unsecured email to accept funds transfer instructions. E678; E682. Wedbush failed to enforce a security log-in procedure with multi-factor authentication to ensure that fraudulent payment instructions were not issued. E678; R828. Wedbush failed to institute and follow the previously established call-back system or an out-of-band authentication method (i.e., communication via a method different from the



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method used to transmit the initial request) when rejected or suspect transactions were identified. E678.

Wedbush could have easily seen that the fraudulent requests in this case did not come from Whitaker in Georgia by checking the metadata on the emails. At trial, the Director of Wedbush's IT Department admitted that the metadata on the incoming emails could have been checked to see where the emails were coming from to realize they were not coming from Appellants' location in Georgia. R580. Mr. Thomas pointed out that most financial institutions have tools to detect customers using new devices/computers (e.g., in different locations). R876-877.

The four unauthorized and fraudulent wire transfer requests Wedbush processed could have been avoided in many ways. Wedbush simply received an email from someone purporting to be a customer, such as Whitaker and Institute, and cross-checked Wedbush's records to see if the email account sending the request belonged to a customer. This so-called "process" ignores the entire purpose of a security procedure – to verify authenticity of the sender. Wedbush did not have an authentication procedure in place with Appellants in December of 2014, and one was never offered to Appellants. Therefore, Wedbush cannot meet one of the two requirements in section 202, and as a result Wedbush should be held liable to Appellants to refund the extensive losses they sustained.

**2. Wedbush failed to prove it processed the unauthorized wire transfers in good faith.**

If this Court disagrees and concludes there was a commercially reasonable security procedure in place between Wedbush and Appellants, then the final step is to determine if Wedbush proved it processed the unauthorized wire transfers in good faith and in compliance with the security procedure. 810 ILCS §5/4A-202(b)(ii).



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Article 4A defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Id. at §105(a)(6). The comments state banks may train employees to "test" a wire transfer according to its security procedure. 810 ILCS §5/4A-203, Cmt. 3. If fraud goes undetected because the employee did not follow its security procedure, then the bank did not process the wire in good faith, and the bank is responsible for its employees. Id. In reviewing the good faith issue, courts review prior authorized wire transfers in comparison to the unauthorized wire transfers at issue. For example, in Experi-Metal, Inc. v. Comerica Bank, the issue of whether wire transfer requests were processed in good faith was significantly impacted by the facts that the fraudulent requests were in different amounts than the customer's previous requests and were directed to unusual destinations such as Moscow, China, and Estonia where funds had never before been sent by the customer. 2010 WL 2720914 at *7, No. 09-14890 (E.D. Mich., July 8, 2010).

Wedbush failed to prove it processed the wire transfers in good faith as evidenced by the glaring discrepancies in the unauthorized wire transfers compared to Appellants' authorized requests. All prior information regarding both accounts had been sent to Wedbush by KCG, and employees of KCG familiar with the accounts and the prior procedures became employees of Wedbush, but they ignored all prior legitimate requests. See, E66. Whitaker testified extensively regarding the differences between Appellants' authorized requests and the unauthorized or fraudulent requests. R219-222. Wedbush employees testified at length regarding how little any of the red flags were noticed (even disregarding incorrect Wedbush account numbers when typically a customer would not make a mistake in his/her/its own account number), the lack of effort to compare the



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questionable fraudulent wire requests with prior requests, and how they disregarded the protocol Appellants had established with Wedbush's predecessors. See, e.g., R133; R336; R339-349; R374-R377; R567-569; R733-737. Finally, no one at Wedbush realized that over the course of the previous eight years, Appellants collectively had only initiated twenty-two wire transfers, in stark contrast to the eight wire transfers attempted (four of which were successful) over the course of only thirteen days, sometimes with two or three requests happening on the same day, while the criminals had hacked Appellants' email account. See, E27-59; E189-194.

Despite the red flags, the unauthorized wire requests were processed by Wedbush without any verification and in complete disregard to the historical course of dealing for the prior authorized wire transfers. As a result, Wedbush could not prove it processed the four unauthorized wire transfers in good faith.

Wedbush failed to offer and adopt commercially reasonable security procedures with Appellants by simply accepting fraudulent wire transfer requests via email without any verification whatsoever, ignoring years of established conduct of Appellants for initiated wires, and Wedbush failed to prove it processed the wire transfers in good faith. Therefore, Wedbush did not avail itself of the section 202 protections, and for these reasons, Appellants are entitled to a complete refund plus interest and the other damages sought.

**3. Appellants should be awarded all of their damages.**

The basic damages sought to be awarded for Appellants' Article 4A claims were the total amounts of the four fraudulent wire transfers of $374,960 ($189,480 to Institute and $185,480 to Whitaker), plus the wire transfer fees charged to their accounts in the



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amount of $300. Because of the efforts of Appellants' counsels, the amount of $150,980 was returned by the Polish authorities, thereby making the basic damages claim a total of **$239,552**, including: $223,980 in fraudulently transferred funds not returned to Appellants, $300 in wire transfer fees charged for the fraudulent transfers ($150 to Whitaker and $150 to Institute), $8,088 in litigation expenses, and $7,184 in expenses paid to Appellants' technology advisers after the fraudulent wire transfers were discovered.

Appellants should also be awarded interest on the amounts to be refunded. Section 204(a) of Article 4A requires Wedbush to "pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund . . .." but not if the customer did not notify the bank within 90 days. 810 ILCS §5/4A-204(a). Appellants notified Wedbush of the fraudulent wire transfers immediately after learning of them on January 13, 2015, well within the 90-day period. Therefore, Appellants are entitled to interest on the refunded amount of $150,980 through March 14, 2017, when the funds were received from Poland, and on the remaining refundable amount of $223,980 through the date of complete satisfaction of the refund.[5]

Appellants should also be awarded the attorneys' fees and expenses they have paid to legal counsel pursuing all activities in Poland to retrieve the fraudulently transferred funds blocked and held by the Polish prosecutors, which totaled $41,938 in attorneys' fees and expenses to Marta Rupieta and Michael Traison for Institute and $41,938 in attorneys' fees and expenses to Marta Rupieta and Michael Traison for Whitaker. R270.

Illinois law is clear that plaintiffs "may recover attorneys' fees expended in an effort to cure the damage caused by the defendant." Federal Deposit Insurance Corp. v. Chicago

[5] Appellants sought a general award of interest in its Amended Verified Complaint. C138. Comment 2 to Section 204 of Article 4A refers to Section 506 for the rate of interest. 810 ILCS §5/4A-204(a), Cmt. 2.



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Title Insurance Co., 2015 WL 5276346 at *9, No. 12-CV-05198 (N.D.Ill. Sept. 9, 2015), *citing* Duignan v. Lincoln Towers Insurance Agency, 282 Ill.App.3d 262, 268 (1st Dist. 1996). See also, Citadel Group Limited v. Merle West Medical Center, 2007 WL 5160444 at *6, No. 06-C-6162 (N.D.Ill. June 13, 2007). As explained in the leading case of Sorenson v. Fio Rito, the policy against awarding attorneys' fees incurred in connection with the lawsuit at hand is not meant to prevent recovery of "losses directly caused by the defendant's conduct simply because those losses happen to take the form of attorneys' fees. . . ." 90 Ill.App.3d 368, 372 (1st Dist. 1980). See also, Harvey v. Carponelli, 117 Ill.App.3d 448, 454 (1st Dist. 1983) (concluding that "when one's wrongful conduct forces another into litigation with third parties, he is liable for all of the costs of that litigation including attorney fees").

Here, the attorneys' fees Appellants paid to Ms. Rupieta and Mr. Traison in connection with their work relating to the issues in Poland were directly caused by the wrongdoing of Wedbush. Had Wedbush followed the Article 4A section 202 requirements, Appellants' funds would not have ended up in Poland, a place where one must have local counsel to seek a return of funds. Polish law required Plaintiffs to obtain legal counsel in Poland as a method to mitigate its damages. Significantly, the Polish prosecutor advised that under Polish law Dr. Whitaker must have local counsel in the Polish proceedings. E510; E515. Appellants followed these requirements by hiring Ms. Rupieta and Mr. Traison, who were successful in seeking a return of a portion of the funds from Poland. Lastly, the best indication of the reasonableness of attorneys' fees is the client's willingness to pay, which was done in this case. See, Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp., 73 F.3d 150, 153 (7th Cir. 1996). Accordingly, these attorneys' fees and



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expenses should be awarded to Appellants.

Appellants seek damages in the amount of $2,599,368 representing lost trading profits by not having the fraudulently transferred $374,960 available for such use for over three years. See, Apa v. National Bank of Commerce, 374 Ill.App.3d 1082, 1085 (1st Dist. 2007) (affirming award of lost profits and concluding the plaintiff had presented estimates with reasonable certainty through bank statements), *citing* Tri-G, Inc. v. Burke, Bosselman & Weaver, 222 Ill.2d 218, 248 (2006); Oakleaf of Illinois v. Oakleaf & Associates, Inc., 173 Ill.App.3d 637, 648 (1st Dist. 1988) (requiring evidence "with a fair degree of probability" can establish lost profits damages). The lost trading profits are also recoverable as consequential damages because the losses flow indirectly from a party's wrongful act. Westlake Financial Group, Inc. v. CDH-Delnor Health System, 2015 IL App (2d) 140589 at ¶31. The amount sought here is based upon Appellants' prior track record of successful trading, as indicated by their 1099 documents reflecting trading profits, and testimony from Whitaker himself. E613-644; R319; R271-280. These documents establish the basis for this element of damages because they present "with reasonable certainty" the evidence of Appellants' past trading profits and as supported by the testimony of Whitaker's prior broker, Efstratios Tsalas. R536-539.

## II. Appellants' Trial Exhibit 11 was improperly excluded from evidence.

During trial, Appellants offered into evidence Trial Exhibit 11, a printout of an excerpt of Wedbush's website highlighting the many "Banking Services" provided by Wedbush, including business banking, personal banking, and margin lending, which was not admitted. E79; R302-308. The trial court excluded Exhibit 11 because a website without proper authentication is not admissible. R302. The appellate court reasoned that



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authentication of a website may be made with the "statement or testimony of a witness with knowledge of the website, e.g., a webmaster or someone else with personal knowledge" and affirmed the trial court's exclusion of Exhibit 11 concluding that "no such testimony or similar verification of authenticity" was provided. A19. Ultimately, the trial court's exclusion of Exhibit 11, and the appellate court's affirmation thereof, were both erroneous, and this Court should reverse in favor of Appellants.

Illinois Rule of Evidence 901(a) requires the authentication of evidence to "support a finding that the matter in question is what its proponent claims" as a condition precedent to admissibility. Ill. R. Evid. 901(a). An example of authentication is testimony from a witness with knowledge that a matter is what it is claimed to be. Ill. R. Evid. 901(b)(1). The proof required for authentication is not a high bar, and the proponent is not required to "rule out all possibilities inconsistent with authenticity." People v. Kent, 2017 IL App (2d) 140917 at ¶¶96-97. Proof may be direct or circumstantial. Id.

The District Court for the Northern District of Illinois has evaluated the admissibility of private websites under Federal Rule of Evidence 901, which is identical to Illinois Rule of Evidence 901. See, SEC v. Berrettini, 2015 WL 5159746 at *6, No. 10-CV-1614 (N.D. Ill. Sept. 1, 2015). The Federal Rule "requires only a prima facie showing of genuineness and leaves it to the [factfinder] to decide the true authenticity and probative value of the evidence." SEC v. Berrettini, *quoting* United States v. Harvey, 117 F.3d 1044, 1049 (7th Cir. 1997). In determining whether a private website was properly authenticated, a court looks to whether the document contained the URL, date of printing, or other identifying information to support the factfinder in believing the document is what the proponent says it is. Id.



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Illinois courts have evaluated authentication requirements for social media websites, which are admittedly not at issue here but are relevant to the analysis considering the lack of Illinois case law discussing authentication of websites. Authenticating a post on a social media website involves a concern that it is relatively easy to "create a fictitious account and masquerade under another person's name or can gain access to another's account." People v. Kent, 2017 IL App (2d) 140917 at ¶106. Therefore, proof that the evidence is what it is claimed to be is necessary. Id. at ¶97. For example, testimony from a witness who obtained access to a photograph on a social media account was sufficient to authenticate the photograph. People v. Flores, 2014 IL App (1st) 121786 at ¶¶73-75.

In this case, the appellate court indicated that testimony from a website's webmaster or someone else with knowledge is proper authentication. A19. This would essentially require that for anything printed from Wedbush's website to have been admitted in this case, Wedbush's webmaster or someone similar would have been required to testify. This conclusion is contrary to what Illinois law requires and sets the bar much higher, effectively eliminating many websites from being admitted into evidence in cases today unless those websites' webmasters are able to testify. This is not the bar for authentication of websites and less proof has been held sufficient.

Appellants are not required to rule out all possibilities of inauthenticity regarding Exhibit 11. Appellants met their burden and propounded ample proof to authenticate Exhibit 11. Exhibit 11 is a printout of Wedbush's private website, which is not something as readily subject to counterfeit like a social media profile may be. Appellants submitted proof that the exhibit was what Appellants claimed it to be – Wedbush's website listing its banking services.



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First, Whitaker testified about accessing the website himself and stated that he accessed the website in November 2014 and printed it in November 2015. R196. Additionally, Exhibit 11 contained the URL (http://www.wedbush.com/services/pcs/banking-services) where the website was accessed by Whitaker and the date on which the website was printed. E79. The exhibit itself contained proof that it was a website of Wedbush accessible on Wedbush's website through a display of the URL. Moreover, Whitaker's testimony demonstrated his personal knowledge. This is the type of authentication required by Rule 901, and Appellants met their burden.

To conclude and hold otherwise by the trial court and appellate court was to impose a stricter standard of admissibility than Illinois Rule of Evidence 901 requires and was an abuse of discretion. In sum, Appellants request this Court to reverse the trial court and hold that Exhibit 11 is admissible.

## CONCLUSION

For the reasons set forth above, Appellants request this Court to reverse the judgment entered by the trial court on Appellants' Article 4A claims and find that Wedbush did not have a commercially reasonable security procedure and failed to prove it processed the unauthorized wire transfers in good faith; to reverse the decision of the trial court and admit Appellants' Trial Exhibit 11; and to grant such other and further relief as this Court deems just and appropriate.

**JAMES Q. WHITAKER and PATHOLOGY INSTITUTE OF MIDDLE GEORGIA, P.C.**

By: */s/ Steven H. Lavin*
One of Their Attorneys



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Steven H. Lavin
Jennifer J. Gedville
Lindsey Z. Lampros
LAVIN & GEDVILLE, P.C.
1849 Green Bay Road
Suite 440
Highland Park, Illinois 60035
(312) 670-4260
shlavin@lavinlawpc.com
jgedville@lavinlawpc.com
llampros@lavinlawpc.com



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## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 42 pages.

**STEVEN H. LAVIN**

*/s/ Steven H. Lavin*

Steven H. Lavin
Jennifer J. Gedville
Lindsey Z. Lampros
LAVIN & GEDVILLE, P.C.
1849 Green Bay Road
Suite 440
Highland Park, Illinois 60035
(312) 670-4260

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# APPENDIX

E-FILED
10/29/2019 4:21 PM
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

| | | |
|---|---|---|
| **James Q. Whitaker and Pathology Institute of Middle Georgia, P.C.** | ) | |
| | ) | **No. 2015 L 2617** |
| **Plaintiffs,** | ) | **Commercial Calendar T** |
| **v.** | ) | |
| | ) | **Judge Daniel J. Kubasiak** |
| **Wedbush Securities, Inc.,** | ) | |
| **Defendant.** | ) | |

## OPINION and ORDER

On June 5, 2018, Plaintiffs, represented by counsel Dennis C. Waldon and Lindsey Z. Lampros of the firm Lavin & Waldon, P.C., and Defendant, represented by Jeffry M. Henderson and Robert B. Christie of the firm Greenberg Traurig, LLP, appeared before the court for a trial on Counts I and III of Plaintiffs' Amended Verified Complaint, Counts II and IV having been previously dismissed with prejudice on February 22, 2017. The court heard testimony from witnesses on June 5, 6, 7, and 8. At the close of Plaintiffs' case, Defendant presented a Motion for Directed Verdict. The court considered the arguments of the parties and denied Defendant's motion. Defendant then presented its case.

The parties had previously stipulated to the admission of certain exhibits and certain documents were admitted into evidence during the trial. At the close of the trial, the parties agreed to a list of trial exhibits that were admitted into evidence and those that were denied. That list is included in the record with this Order.

I have reviewed the cases cited by each party. In several instances, the parties relied upon the same case, but reached opposite conclusions. Neither party cited an Illinois case to support its argument regarding the interpretation and application of Article 4A of the Illinois Uniform Commercial Code, 810 ILCS 5/4A-102, 104, 105. Rather, they relied upon five state cases and six federal cases from courts outside Illinois in disputing whether Defendant constituted a "Bank" for purposes of Article 4A. Having reviewed this case law, there is a general narrative that the financial institutions that meet Article 4A's definition of a "Bank" are commercial in nature more often than not.





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I heard arguments of counsel and testimony of witnesses. I have reviewed my trial notes, and documents stipulated to and documents admitted into evidence. I judged the credibility of witnesses and determined the weight to be given to those witnesses and their testimony. In considering the witnesses I assessed their memory, manner of responding, their interest in the outcome, possible bias, their qualifications, their relevant work experience, and any inconsistent statements concerning an issue important to the case.

I considered all evidence without regard to which party produced it. I considered facts proven by evidence or reasonable inferences drawn from the evidence. I used common sense gained from my experience in life, when appropriate, in evaluating what I saw and heard.

I did not base my decision on speculation, prejudice or sympathy. I only considered admissible evidence.

I must be persuaded, considering all evidence in the case, that the proposition on which the party who has the burden of proof is more probably true than not true.

I have heard witnesses give opinions about matters requiring special knowledge or skill. I judge this testimony in the same way I judge the testimony from any other witness. The fact that such individuals have given an opinion does not mean that I am required to accept it. I give their testimony the weight that I think it deserves, considering the reasons given for the opinion, the witness's qualifications and experience, and all of the other evidence in the case.

A verbatim transcript was taken so an exhaustive recitation of the testimony and evidence is not necessary. The record is available for any reviewing court to make its evaluation and determination.

In order to prove its cause of action, Plaintiffs had the burden of establishing Defendant is subject to Article 4A of the Illinois Uniform Code. The official comment to 5/4A-102 recites that "Article 4A governs a specialized method of payment referred to in the Article as a funds transfer but also commonly referred to in the commercial community as a wholesale wire transfer." "Funds transfer" is defined in 5/4A-105. The official comment to 5/4A-104 recites that "Article 4A governs a method of payment in which the person making payment (the "originator") directly transmits an instruction to a bank either to make payment to the person receiving payment (the "beneficiary") or to instruct some other bank to make payment to the beneficiary." The definition of "Bank" is set forth in 5/4A-105(a)(2) and "means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company." The official comment to 5/4A-105 recites that "the definition of "bank" in subsection (a)(2) includes some institutions that are not commercial banks. The definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers."

If Defendant is determined to be subject to Article 4A, Plaintiffs must establish that Defendant failed to establish a security procedure required by 5/4A-201, or that the security





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procedure established was not commercially reasonable. The framework for establishing commercial reasonableness is set forth in 5/4A-202(c). If Plaintiffs meet their burden, 5/4A-204 provides a remedy.

In accordance with the foregoing, Plaintiffs must establish that Defendant was "a person engaged in the business of banking." 810 ILCS 5/4A-105(a)(2). The UCC recognizes that this can include institutions that are not commercial banks, and that many financial institutions now perform functions previously restricted to commercial banks. Nonetheless, the case law on which both parties rely have required a high level of involvement in customers' finances, usually including checking, deposit, and withdrawal services, and even in some circumstances debit and credit cards. Considering all of the above, and all of the cases, I cannot conclude that the actions of the Defendant rises to a level of direct involvement necessary to constitute a "Bank" for purposes of Article 4A of the UCC. Because Defendant does not meet the definition of a bank, there is no reason to proceed to whether Defendant's actions were commercial reasonable. I rule summarily in favor of Defendant and against Plaintiffs on Counts I and III of Plaintiffs' Amended Verified Complaint.

I am denying Defendant's request for the costs of suit. The Customer Agreement does not provide for Defendant to recover these costs in this litigation, and there was no Indemnity Agreement entered into evidence.

IT IS HEREBY ORDERED:

8002

(1) Judgment is entered for Defendant Wedbush Securities, Inc. and against Plaintiffs James Q. Whitaker and Pathology Institute of Middle Georgia, P.C. on Counts I and III of Plaintiffs' Amended Verified Complaint;

(2) Defendant Wedbush Securities, Inc.'s request for fees and costs is denied. 5293

Judge Daniel J. Kubasiak

ENTERED:

JUN 14 2018

Circuit Court-2072

Judge Daniel J. Kubasiak, No. 2072







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NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

2019 IL App (1st) 181455-U

FOURTH DIVISION
March 21, 2019

No. 1-18-1455

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| JAMES Q. WHITAKER and PATHOLOGY INSTITUTE OF MIDDLE GEORGIA, P.C., | ) | Appeal from the Circuit Court of Cook County |
| Plaintiffs-Appellants, | ) | |
| v. | ) | No. 15 L 2617 |
| WEDBUSH SECURITIES, INC., | ) | Honorable John C. Griffin and Daniel J. Kubasiak, |
| Defendant-Appellee. | ) | Judges Presiding. |

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where the trial court properly granted summary judgment for a futures commission merchant on its customer's fraudulent concealment claim and ruled in favor of the futures commission merchant on the customer's claim under Article 4A of the Illinois Uniform Commercial Code.

¶ 2 Plaintiffs James Q. Whitaker (Whitaker) and Pathology Institute of Middle Georgia, P.C. (Institute) maintained futures trading accounts with defendant Wedbush Securities, Inc. (Wedbush), a futures commission merchant (FCM). In December 2014, criminals hacked Whitaker's email account and transmitted multiple wire transfer requests directing Wedbush to transfer plaintiffs' funds to foreign bank accounts. Wedbush rejected one request but processed others, resulting in the transfer of approximately $375,000. In a complaint filed in the circuit



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court of Cook County, plaintiffs asserted claims against Wedbush pursuant to Article 4A of the Illinois Uniform Commercial Code (UCC), which applies to wire transfers. See 810 ILCS 5/4A-101 *et seq.* (West 2014). Plaintiffs also asserted fraudulent concealment claims based on Wedbush's alleged failure to disclose the unauthorized wire transfer requests. The circuit court granted summary judgment in favor of Wedbush on the fraudulent concealment counts and ruled in favor of Wedbush on the UCC counts following a bench trial. On appeal, plaintiffs challenge these rulings and certain evidentiary rulings during the trial. As discussed herein, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Whitaker, a physician who resides in Georgia, owns and controls Institute. In 1987, Whitaker entered into a customer agreement[1] with Goldenberg, Hehmeyer & Co. (Goldenberg), authorizing Goldenberg to purchase and sell futures contracts in accordance with his instructions. Goldenberg was acquired by Penson Worldwide (Penson) in 2007, and plaintiffs' two futures trading accounts – the Whitaker account and the Institute account – were transferred to Penson. As part of another sale in 2012, the two accounts were transferred to KCG Futures (KCG). When KCG sold its FCM business to Wedbush on December 1, 2014, the accounts were assigned to Wedbush. Plaintiffs did not enter into any new agreement with Wedbush.

¶ 5 Wedbush is registered as an FCM and as a broker-dealer, *i.e.*, a brokerage firm that buys and sells securities. Although a single legal entity, Wedbush has represented that it has separate employees, separate back offices, and separate policies and procedures with respect its broker-dealer business and its FCM business. Plaintiffs interacted solely with the FCM side.

¶ 6 Before December 2014, plaintiffs periodically had directed KCG (and its predecessors) to wire transfer funds to plaintiffs' bank accounts in Georgia. Shortly after KCG's sale of the FCM business, Wedbush received multiple wire transfer requests via email, ostensibly from plaintiffs

[1] The record is unclear as to whether Institute executed a customer agreement.



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but actually from foreign criminals who had hacked Whitaker's email account. The first occurred on December 17, 2014, when a Wedbush employee received a request to wire transfer $78,600 to a third party in South Africa from Institute's account. Later that day, a second Wedbush employee who received the same wire transfer request responded via email that the wire transfer would not be processed because it requested the transmission of funds to a third party. Wedbush then received another email minutes later, requesting the transfer of $128,600 from the Institute account to an account purportedly held by Institute at a bank in Poland. The wire transfer was completed the next day. Wedbush subsequently received requests to transfer additional funds from plaintiffs' account to a Polish bank account on December 19 ($124,600 from the Whitaker account), December 22 ($60,880 from the Institute account), and December 29 ($60,880 from the Whitaker account). In each instance, a Wedbush employee sent an email to Whitaker's email address acknowledging receipt of the request and a subsequent email confirming completion of the wire transfer.

¶ 7 Although Whitaker (but not Institute) received daily account statements from Wedbush via email, the wire transfers and the corresponding reductions in the account balance did not appear on the statements. The record suggests that the account statements emailed by Wedbush were intercepted by the hackers and either modified or deleted. Whitaker contacted Wedbush on December 29, 2014, after receiving account statements containing inaccurate information regarding the balance. After repeatedly requesting account information from Wedbush, Whitaker received account statements on January 12, 2015, reflecting the December 2014 transfers. On the next day, plaintiffs demanded return of the transferred funds from Wedbush.

¶ 8 Plaintiffs subsequently filed an action in the circuit court of Cook County against Wedbush. In their four-count amended verified complaint (complaint), each plaintiff asserted



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claims based on fraudulent concealment and Article 4A of the UCC. Article 4A addresses how to allocate the risk of loss from unauthorized payment orders. Under Article 4A, if a bank accepts a payment order in good faith that purports to be from its customer and verifies its authenticity by complying with a security procedure agreed to by the bank and the customer, the customer is required to pay the order even if it was not authorized. 810 ILCS 5/4A-202 (West 2014). The bank is entitled to such payment, however, only if the court finds that the security procedure was a commercially reasonable method of providing security against unauthorized payment orders. *Id.* Conversely, if the bank accepts an unauthorized payment without verifying it in compliance with a security procedure, the bank is responsible for the loss. *Id.*

¶ 9 Wedbush filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). Wedbush noted that plaintiffs' funds were not deposited with Wedbush, but were in a segregated account at BMO Harris Bank, N.A. (BMO Harris). When Wedbush received an instruction from plaintiffs to wire money to a specific beneficiary, Wedbush would electronically instruct BMO Harris to wire the money to the bank account identified by plaintiffs. Wedbush argued that the UCC counts should be dismissed because Wedbush – as an FCM registered with the Commodity Futures Trading Commission (CFTC)[2] – is not a "bank," and Article 4A is thus inapplicable. As to the fraudulent concealment counts, Wedbush contended that plaintiffs did not, and could not, allege that Wedbush withheld information with an intent to deceive.

¶ 10 The circuit court denied Wedbush's motion to dismiss without prejudice. As to the UCC claims, the circuit court cited the definition of "bank" in section 4A-105 of the UCC: "a person engaged in the business of banking and includes a savings bank, savings and loan association,

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[2] The CFTC is the federal agency charged with the regulation of commodity futures trading. *First American Discount Corp. v. Jacobs*, 324 Ill. App. 3d 997, 1007 (2001).



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credit union, and trust company." 810 ILCS 4A-105(a)(2) (West 2014). The circuit court noted that the official comment to section 4A-105 provides that the definition of "bank" includes some institutions that are not commercial banks. 810 ILCS 5/4A-105 (West 2014), Uniform Commercial Code Comment 1 (1991). The official comment further states that the definition reflects the fact that "many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers." *Id.* The circuit court concluded that plaintiffs sufficiently alleged that they had grounds to bring a claim under Article 4A and questions of fact existed as to whether Wedbush was engaged in the business of banking. As to the fraudulent concealment claims, the circuit court determined that questions of fact existed as to whether Wedbush had a duty to disclose to plaintiffs the allegedly unauthorized requests to wire transfer funds, including the rejected request on December 17, 2014, and whether Wedbush intended to deceive plaintiffs.

¶ 11 Wedbush filed a verified answer and affirmative defenses. Wedbush alleged, in part, that by failing to properly secure their email accounts, plaintiffs assumed the risk that a hacker could access their email accounts. Wedbush also filed a motion to reconsider the denial of its motion to dismiss the fraudulent concealment counts.

¶ 12 In its opposition to the motion to reconsider, plaintiffs detailed various ways in which the fraudulent wire transfer requests differed from plaintiffs' prior requests: (a) they were not in round numbers; (b) they did not direct funds to be sent to plaintiffs' bank in Georgia; (c) they were not initiated by a telephone call from Whitaker;[3] (d) they bore a European-style date (*e.g.*, "18/12/2014"); (e) they were sent to a specific individual at Wedbush, rather than to the customer service department; (f) they bore the exact same forged signature (apparently copied

[3] Whitaker has averred that all of his wire transfer requests "were initiated by a telephone call by me to the Trading Desk, which transferred me to the Wire Transfer Desk, and which was followed up by an email request generated by my staff sent to Customer Service to notify them of the wiring instruction."



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from a legitimate wire transfer request transmitted to KCG in November 2014); (g) they contained grammatical errors that would be unusual for a physician from the United States; (h) they listed different beneficiaries to receive the transferred funds, but provided for deposit into the same Polish bank account; and (i) the requests regarding the Whitaker account listed the incorrect account number, beginning with "CH1" instead of "CHI." Because the same employees who handled plaintiffs' accounts at KCG were also employed by Wedbush and continue to handle the accounts, plaintiffs asserted that any one of the foregoing "red flags" should have prompted, at a minimum, a telephone call with Whitaker. Plaintiffs also asserted that if Wedbush had timely responded to an inquiry by Whitaker's employee on the morning of December 29, 2014, regarding inaccuracies in the account statements, the transfer of funds later that day could have been stopped.

¶ 13 The circuit court denied the motion to reconsider. After the parties engaged in extensive discovery, Wedbush filed a motion for summary judgment on the fraudulent concealment counts of the complaint (counts II and IV). Wedbush again asserted that it had sent plaintiffs all of the information they claimed was fraudulently concealed and that plaintiffs' failure or inability to receive the information occurred as a result of its failure to secure its own email account or server. Wedbush also argued that it did not have any intent to deceive plaintiffs and did not have any duty to speak. According to Wedbush, a CFTC regulation requires an FCM such as Wedbush to issue a daily confirmation statement or monthly statements to reflect the customer funds carried or deposited with the FCM. See 17 C.F.R. § 1.33 (2012). Wedbush asserted that there was no other common law, statutory, or regulatory duty that required Wedbush to inform plaintiffs of the wire transfers. Although Wedbush argued that it had no duty to "pick up the phone," it also asserted that it did, in fact, "speak" every time it confirmed receipt of a wire



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transfer request or notified Whitaker that a wire transfer was processed by emailing him at the address he supplied.

¶ 14 Wedbush's support for its motion for summary judgment included an affidavit from Greg Hostetler (Hostetler), the chief compliance officer for Wedbush at the time of the events in question. He averred, in part, that none of Wedbush's systems, computers, or servers were breached or compromised. He also stated that Wedbush did not have an agreement with plaintiffs requiring Wedbush to notify or advise them by telephone regarding the wire transfer requests. According to Hostetler, Wedbush had no knowledge of the hacking before January 13, 2015. Wedbush also attached deposition testimony from Whitaker, wherein he acknowledged that he had probably not changed his passwords in the months leading up to the hacking.

¶ 15 The circuit court entered an order on February 22, 2017, granting summary judgment in favor of Wedbush on the fraudulent concealment counts and dismissing the counts with prejudice. The circuit court subsequently denied two motions regarding the UCC claims: plaintiffs' motion for summary judgment and Wedbush's motion to dismiss pursuant to section 2-619 of the Code. The case proceeded to a multi-day bench trial.[4]

¶ 16 Whitaker testified, in part, that that the originating IP address[5] for the fraudulent requests was in Johannesburg, South Africa. In late January 2015 – after the fraudulent transactions – Wedbush offered Whitaker access to account statements through a password-protected portal.

¶ 17 Stacy Kipp (Kipp), an Institute employee, testified regarding the usual procedures for effectuating transactions as authorized by Whitaker. She noted that her coworkers shared a password list, and the passwords were changed infrequently. Kipp described an instance in late

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[4] Judge John C. Griffin had ruled on the summary judgment motion regarding the fraudulent concealment counts; Judge Daniel J. Kubasiak presided over the subsequent trial regarding the UCC claims.

[5] "IP stands for Internet Protocol. An IP address is a series of numbers that identifies a computer or other device on a network." *Choice Escrow and Land Title, LLC v. BancorpSouth Bank*, 754 F.3d 611, 614 n.1 (8th Cir. 2014)



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December 2014 when an email disappeared from her computer screen while she was viewing it, as if someone with remote access had deleted it. Kipp testified that plaintiffs' information technology consultants discovered the hacking in January 2015.

¶ 18 The witnesses also included multiple current and former Wedbush employees, most of whom had also worked for KCG and Penson. The employees described the process for handling wire transfer requests. The customer service department would receive the request from the customer; the department typically processed 15 to 20 wire transfer requests per day, including transfers to foreign accounts. The customer service employees would verify that the name on the account, the account number and the email address matched the information Wedbush had on file. According to multiple employees, the wire transfer requests emailed by customers often included errors. None of the employees testified that they were aware of any rule or policy that required them to telephone the customer or to compare the customer's current request to their prior requests. Wedbush's risk department would then verify that adequate funds were available, and the accounting department would process the transfer.

¶ 19 Hostetler was questioned regarding a CFTC regulation (17 C.F.R. § 1.33(g)(2) (2012)), which required the FCM to obtain the customer's signed consent acknowledging the disclosure of the information set forth in the rule regarding the means of electronic transmission of account statements. He did not recall viewing a signed consent for either plaintiff. Hostetler also did not know whether Whitaker had actually been notified regarding the availability of the online portal prior to the fraudulent transactions.

¶ 20 Megan Kells (Kells), the vice president of international operations at BMO Financial Group in December 2014, testified that Wedbush was BMO Harris's client; BMO Harris held Wedbush's customer segregated funds. Kells indicated that Wedbush utilized the BMO Harris



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online business banking portal to transact for wire payments. Although Wedbush was listed as an "OGB" – meaning an "originator bank" – on the BMO Harris system, she described "OGB" as a system-generated internal descriptor utilized by BMO Harris for its financial institution group, or "FIG," clients. According to Kells, BMO Harris defined clients by sector, and the FIG sector would include other banks, as well as FCMs, broker-dealers, and other institutional clients. Kells testified that BMO Harris did not believe that Wedbush was acting or transacting as a bank.

¶ 21 George Thomas (Thomas), an expert who was retained by plaintiffs, testified regarding Wedbush's security procedures with respect to emailed communications from customers. Thomas opined that Wedbush should have had multifactor authentication, *i.e.*, a security system which requires more than one method of authentication to verify the sender's identity. According to Thomas, Wedbush had "no factor authentication," which was not the industry practice. Although he also testified that most financial institutions utilized technology to identify the IP address of an originator, Thomas acknowledged that there were no rules or regulations which required an FCM to use such tool as a fraud detection or prevention advice.

¶ 22 Over Wedbush's objection, Thomas further testified that Wedbush performed many banking functions, including: initiating wire transfers; maintaining customer accounts; following banking regulations regarding anti-money laundering; rendering trading statements; performing customer due diligence because of the risk associated with margin accounts; and complying with the Bank Secrecy Act. Wedbush argued, in part, that neither plaintiffs' disclosures regarding Thomas's testimony pursuant to Illinois Supreme Court Rule 213 (eff. Jan. 1, 2018) nor Thomas's written report referenced or offered an opinion regarding Wedbush acting as a bank.

¶ 23 On cross-examination, Thomas acknowledged that he had never worked at an FCM and



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his experience was exclusively in banking. He also testified that Wedbush was not registered as a bank. Thomas confirmed that there was no requirement that Wedbush telephone Whitaker to inform him that it rejected a funds transfer request, although Thomas maintained that "common sense" and industry practice would dictate otherwise.

¶ 24 After the circuit court denied Wedbush's motion for a directed finding, Elizabeth James (James) testified as an expert for Wedbush. She testified regarding her experience in the FCM industry and opined that Wedbush's policies and procedures were reasonable for a firm of its complexity and size. She questioned Thomas's reference to "industry standards," noting the futures industry and the banking industry are "very different." According to James, Wedbush was not a bank or "acting as a bank."

¶ 25 Over plaintiffs' objection, Wedbush called Carl Gilmore (Gilmore) – an attorney and former employee of Goldenberg, Penson, KCG, and Wedbush – as a rebuttal witness. Gilmore was questioned regarding Thomas's characterization of Wedbush's activities as "banking" activities. According to Gilmore, wire transfers were a "back office process" performed for the convenience of an FCM's client. He testified that Wedbush solely facilitated the trading of futures. According to Gilmore, FCMs do not extend credit to customers. Gilmore also testified that anti-money laundering procedures and the rendering of account statements were CFTC requirements and did not constitute a banking activity. When asked about FCMs conducting due diligence on their customers, Gilmore testified that many different institutions which are not banks are subject to the provisions of the Bank Secrecy Act.

¶ 26 After the bench trial, the circuit court entered an opinion and order on June 14, 2018, granting judgment in favor of Wedbush on the UCC counts of the complaint (counts I and III) and denying Wedbush's request for fees and costs. The circuit court stated that it could not



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conclude that Wedbush's actions rose to the level of direct involvement necessary to constitute a "bank" for purposes of Article 4A of the UCC. Because Wedbush did not meet the definition of a "bank," the circuit court indicated that there was no reason to proceed to whether its actions were commercially reasonable. Plaintiff timely filed the instant appeal.

¶ 27 II. ANALYSIS

¶ 28 Plaintiffs advance multiple arguments on appeal. As to their fraudulent concealment claims, they contend that the trial court incorrectly granted summary judgment in favor of Wedbush. Plaintiffs further contend that the trial court erred with respect to multiple evidentiary rulings and the ultimate judgment in favor of Wedbush on the UCC claims. We address each argument below.

¶ 29 A. Fraudulent Concealment Counts

¶ 30 The trial court granted Wedbush's motion for summary judgment as to the fraudulent concealment claims. Pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2016)), summary judgment should be granted only where the pleadings, admissions, depositions, and affidavits on file, when viewed in the light most favorable to the nonmovant, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Thounsavath v. State Farm Mutual Automobile Insurance Co.*, 2018 IL 122558, ¶ 15. We review the grant of summary judgment *de novo*. *Id.* ¶ 16. We may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the circuit court relied on that ground. *Village of Bartonville v. Lopez*, 2017 IL 120643, ¶ 34.

¶ 31 To state a claim for fraudulent concealment, a plaintiff must allege the following elements: (1) the defendant concealed a material fact under circumstances that created a duty to speak; (2) the defendant intended to induce a false belief; (3) the plaintiff could not have



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discovered the truth through reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and justifiably relied upon the defendant's silence as a representation that the fact did not exist; (4) the concealed information was such that the plaintiff would have acted differently if he had been aware of it; and (5) the plaintiff's reliance resulted in damages. *Abazari v. Rosalind Franklin University of Medicine and Science*, 2015 IL App (2d) 140952, ¶ 27. There is a high standard of specificity required for pleading fraud claims (*Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1085 (1998)), and a plaintiff must prove fraudulent concealment by clear and convincing evidence. *Benson v. Stafford*, 407 Ill. App. 3d 902, 918 (2010).

¶ 32 In their complaint, plaintiffs alleged that Wedbush had a duty to the plaintiffs to disclose the fraudulent wire transfer requests, and, if such disclosures had been made, plaintiffs would have informed Wedbush that the wire transfers should not have been completed. Wedbush asserted in its motion for summary judgment that it owed no duty to disclose, and, even if such duty was owed, Wedbush satisfied the duty by emailing plaintiffs at the address they provided.

¶ 33 On appeal, Wedbush instead relies on plaintiffs' admission in a response to a statement of uncontested facts, *i.e.*, that Wedbush did not know until January 2015 that Whitaker's email account had been hacked. Wedbush thus asserts that it is "inconceivable" for plaintiffs to suggest that Wedbush fraudulently concealed the hacker's activities in December 2014. Although Illinois courts have observed that a party cannot conceal information that it does not know (*Abazari*, 2015 IL App (2d) 140952, ¶ 28), we view Wedbush's contention as an oversimplification of the issue. The allegations of the complaint were *not* that Wedbush knew of the hacking at the time of the wire transfers, but rather that it failed to disclose the wire transfer requests to plaintiffs. For the reasons discussed below, we conclude that the circuit court properly granted summary judgment in Wedbush's favor.



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¶ 34 Plaintiffs assert that Wedbush owed a "duty to speak." A duty to disclose a material fact may arise out of several situations. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 500 (1996). First, if a plaintiff and a defendant are in a confidential or fiduciary relationship, then the defendant owes a duty to disclose all material facts. *Id.* "Such a relationship exists as a matter of law between: attorneys and clients; principals and agents; guardians and wards; and members of a partnership or joint venture." *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 59. Second, a duty to disclose material facts may arise out of a situation where the plaintiff places confidence and trust in the defendant, thus placing the defendant in a position of superiority and influence over the plaintiffs. *Connick*, 174 Ill. 2d at 500. Such position of authority may arise by reason of friendship, agency, or experience. *Id.* "Where a fiduciary or confidential relationship does not exist as a matter of law, 'facts from which a fiduciary relationship arises must be pleaded and proved by clear and convincing evidence.' " *D'Attomo*, 2015 IL App (2d) 140865, ¶ 58, citing *Magna Bank of Madison Co. v. Jameson*, 237 Ill. App. 3d 614, 618 (1992).

¶ 35 In its arguments regarding the UCC claims, Wedbush contends that its agency relationship with plaintiffs was not a fiduciary relationship, given the non-discretionary nature of plaintiffs' trading accounts. An agency relationship, however, presumably would give rise to a duty to disclose material facts. *E.g., D'Attomo*, 2015 IL App (2d) 140865, ¶ 58. Assuming *arguendo* such duty existed, however, the record indicates that Wedbush did not "conceal" information.

¶ 36 To state a claim for fraudulent concealment, a plaintiff must allege that the defendant *concealed a material fact* when he or she was under a duty to the plaintiffs to disclose that fact. *Connick*, 174 Ill. 2d at 500. "Mere silence in a transaction does not amount to fraud." *Hirsch*, 299 Ill. App. 3d at 1086. Accord *Henderson Square Condominium Ass'n v. LAB Townhomes,*





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*L.L.C.*, 2014 IL App (1st) 130764, ¶ 99. Silence accompanied by deceptive conduct or suppression of material facts, however, may give rise to concealment, and the party who has concealed the information has a duty to speak. *Id.*; *Hirsch*, 299 Ill. App. 3d at 1086.

¶ 37 In the instant case, Wedbush employees sent emails to Whitaker's email account confirming the receipt, processing, and rejection/completion of the wire transfer requests. Wedbush was neither silent nor engaged in the concealment or suppression of information. Plaintiffs also contend that "Wedbush's active concealment by ignoring several emails and telephone calls from Plaintiffs specifically mentioning that account statements were missing or were unusual looking, triggered Wedbush's duty to speak further." Plaintiffs fail to include any citation to the record for this proposition, in violation of Illinois Supreme Court Rule 341. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). In any event, Wedbush's alleged lack of timeliness in responding to the inquiries of plaintiffs' employees on and after December 29, 2014, did not affect the challenged wire transfer requests which had already been completed. Finally, plaintiffs point to the absence of a signed consent by plaintiffs with respect to the electronic transmission of account statements to non-institutional customers (see 17 C.F.R. § 1.33(g) (2012)). Notwithstanding any potential noncompliance with such CFTC regulation, Wedbush electronically transmitted the account statements and other information regarding the transfers to the email address provided by plaintiffs, as had been the practice in the preceding years. Plaintiffs provided no evidence that a telephone call from Wedbush was required.

¶ 38 Plaintiffs also contend that their request for punitive damages "provided an additional issue of material fact" and another reason why summary judgment in favor of Wedbush should not have been granted. None of the cases cited by plaintiffs, however, support the proposition that a request for punitive damages with respect to a fraudulent concealment claim precludes the



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entry of summary judgment in favor of the defendant. *E.g.*, *Cirrincione v. Johnson*, 184 Ill. 2d 109, 116 (1998) (holding that the decision of the jury to award punitive damages to the plaintiff based on the defendant's willful and wanton behavior was not again the manifest weight of the evidence). In any event, because we find no genuine issue of material fact regarding the "concealment" element of plaintiffs' claims (*Abazari*, 2015 IL App (2d) 140952, ¶ 27), we need not address this contention.

¶ 39 For the reasons discussed above, we affirm the grant of summary judgment in favor of Wedbush on the fraudulent concealment counts (counts II and IV) of the complaint.

¶ 40 B. UCC Counts

¶ 41 The trial court conducted a bench trial with respect to the UCC counts (counts I and III) of the complaint. On appeal, plaintiffs challenge various evidentiary rulings during the trial, as well as the ultimate judgment in favor of Wedbush. We address these arguments in turn.

¶ 42 1. Evidentiary Rulings

¶ 43 Plaintiffs argue on appeal that the trial court erred in multiple evidentiary rulings. As discussed further below, the admission of evidence is within the sound discretion of a trial court and a reviewing court will not reverse the trial court unless that discretion was clearly abused. *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003). "The threshold for finding an abuse of discretion is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court." *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 29.

¶ 44 Plaintiffs initially contend that the circuit court erred in denying the admission of the following exhibits: (a) printouts of pages referencing banking services, purportedly printed from the Wedbush website on November 24, 2015 (Exhibit 11), although Whitaker testified that he



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viewed the website in November 2014;[6] (b) printouts of geo-location searches attached to printouts of the alleged fraudulent emails, reflecting the sender's location in South Africa (Exhibits 34 and 35); and (c) a printout of pages from a website referencing "SWIFT Codes" used to identify banks globally, purportedly printed on June 29, 2016 (Exhibit 90). Among other things, the parties disagree regarding whether there was proper authentication with respect to these exhibits.

¶ 45 "A party provides the foundation for admitting a document by identifying and authenticating it." *In re Marriage of LaRocque*, 2018 IL App (2d) 160973, ¶ 76. Illinois Rule of Evidence 901(a) provides that the requirements of identification and authentication are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *Id.;* Ill. R. Evid. 901(a) (eff. Jan. 1, 2011). Illinois courts may look to federal cases for guidance when interpreting the rules of evidence. *Lamorak Insurance Co. v. Kone, Inc.*, 2018 IL App (1st) 163398, ¶ 76.

¶ 46 Courts have found that private websites are not self-authenticating. *E.g.*, *Bibolotti v. American Home Mortgage Servicing, Inc.*, 2013 WL 2147949, at *3 (E.D. Tex. May 15, 2013). See also *Specht v. Google Inc.*, 758 F. Supp. 2d 570, 582 (N.D. Ill. 2010), *aff'd* 747 F.3d 929 (7th Cir. 2014) (noting that a printed newspaper or periodical is unlikely to be a forgery because of the "high magnitude of work and expense involved in printing a serial newspaper or magazine" whereas a printout from a website "can be easily manipulated" and "lacks the same degree of authenticity as its printed counterpart"). Proper authentication may be made with the statement or testimony of a witness with knowledge of the website, *e.g.*, a webmaster or someone else with personal knowledge. *Fraserside IP, L.L.C. v. Youngtek Solutions, Ltd.*, 2013

[6] The trial court stated, "Exhibit 11 is not going to be admitted into evidence. There's already been a stipulation as to Wedbush being subject to FINRA [Financial Industry Regulatory Authority] regulations."



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WL 139510, at *14 (N.D. Iowa Jan. 10, 2013); *Bibolotti*, 2013 WL 2147949 at *3. In the instant case, no such testimony or similar verification of authenticity from a knowledgeable person was provided. Based on the foregoing, we conclude that the trial court did not abuse its discretion in denying the admission of Exhibits 11, 34, 35, and 90.

¶ 47 Plaintiffs next contend that the trial court erred in denying the admission of three exhibits containing flowcharts purportedly illustrating the steps of a typical wire transfer vis-à-vis Goldenberg, Penson, and KCG, as well as flowcharts purportedly illustrating the fraudulent transfers that are the subject of the claims against Wedbush (Exhibits 8, 36, and 62). Plaintiffs also assert that a chart containing a summary of their purported damages (Exhibit 48) should have been admitted.

¶ 48 The flowcharts and damages chart constitute demonstrative evidence, *i.e.*, evidence that "has no probative value in and of itself and is merely admitted or used as a visual aid to the trier of fact." *Sharbono*, 2014 IL App (3d) 120597, ¶ 30. A trial court's ruling on the admissibility of demonstrative evidence will not be reversed absent an abuse of discretion. *Id.* ¶ 29.

¶ 49 As to the flowcharts, neither Whitaker nor his expert Thomas provided proper authentication, and we cannot otherwise conclude that the court abused its discretion in denying their admission. Furthermore, in light of our decision to affirm the trial court's rulings in favor of Wedbush, we need not consider plaintiffs' contentions regarding the trial court's decision to not admit an exhibit containing a summary of plaintiffs' purported damages.

¶ 50 Plaintiffs further assert that the trial court erred in barring the admission of the English translation of a Polish court judgment (Exhibit 44) and a printout from the website of the Polish bank where plaintiffs' funds were transferred (Exhibit 105). In the absence of a certified translation, we cannot conclude that the trial court abused its discretion in excluding the Polish



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court judgment. See, *e.g.*, *Valdivia v. Chicago & Northwestern Transportation Co.*, 87 Ill. App. 3d 1123, 1127 (1980) (requiring a certified translation of the plaintiff's affidavit from Spanish to English); *Kreda v. Kreda*, 255 Ill. App. 462, 463 (1930) (concluding that the circuit court erroneously admitted a purported Russian divorce decree without an oath or affirmation that the translation was correct). While Wedbush argues that the same rationale applies to the printed pages from the Polish bank's website, plaintiffs contend that the English language pages were on the website, *i.e.*, no translation was performed. Assuming plaintiffs' representations are accurate, however, such document was nevertheless not properly authenticated, *e.g.*, with the statement or testimony of a webmaster or someone else with personal knowledge of the website. *Fraserside IP, L.L.C*, 2013 WL 139510, at *14.

¶ 51 Finally, plaintiffs assert that Carl Gilmore should not have been allowed to testify because he was not disclosed as a rebuttal witness until shortly before the trial. According to plaintiffs, Gilmore should not have been permitted to testify given Wedbush's failure to comply with the disclosure requirements of Illinois Supreme Court Rule 213 (eff. Jan. 1, 2018).

¶ 52 The admission of evidence pursuant to Rule 213 is within the sound discretion of the trial court, and the trial court's ruling will not be disturbed absent an abuse of that discretion. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2004). See also *Snelson*, 204 Ill. 2d at 24 (noting that the decision of whether to admit expert testimony is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion). Rule 213 states that, upon written interrogatory, a party must disclose the subject matter, qualifications, opinions, conclusions, and all reports of a witness who will offer opinion testimony. *Warrender v. Millsop*, 304 Ill. App. 3d 260, 265 (1999); Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2018). Rule 213(g) provides that an answer to a Rule 213(f) interrogatory limits the testimony that can be given by a



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witness on direct examination. *Id.*

¶ 53 Although plaintiffs contend that Wedbush failed to comply with Rule 213 by failing to make timely disclosures with respect to Gilmore, plaintiffs seemingly ignore the deficiencies of their own disclosures. For example, the scope of the testimony of plaintiffs' expert witness, Thomas, exceeded the scope of Thomas' expert report. Specifically, Thomas did not opine in the report regarding the issue of whether Wedbush is a bank. Rather than barring Thomas's testimony, the trial court allowed Wedbush to call Gilmore as a rebuttal witness. See *In re Marriage of Liszka*, 2016 IL App (3d) 150238, ¶ 33 (providing that "barring a witness's testimony is a drastic sanction and should be exercised with caution").

¶ 54 "Rebuttal evidence is evidence which tends to explain, repel, contradict, counteract or disprove facts already placed in evidence by an adverse party." *Hall v. Northwestern University Medical Clinics*, 152 Ill. App. 3d 716, 721 (1987). The decision to allow the introduction of rebuttal testimony is charged to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Id.* Under the circumstances herein, we cannot conclude that the trial court abused its discretion in allowing Gilmore to narrowly testify as a rebuttal witness regarding whether Wedbush is a bank. Such decision was consistent with the purpose of the discovery rules: "to avoid surprise and to discourage tactical gamesmanship." *Schuler v. Mid-Central Cardiology*, 313 Ill. App. 3d 326, 331 (2000).

¶ 55 Judgment After Trial

¶ 56 Plaintiffs contend that the trial court's judgment in favor of Wedbush following the bench trial was erroneous. Because we agree with the trial court that plaintiffs did not prove by a preponderance of the evidence that Wedbush was a "bank" for purposes of Article 4A of the UCC, we affirm the judgment.



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¶ 57 As a threshold matter, the parties disagree regarding the applicable standard of review. Plaintiffs contend that the appeal involves conclusions of law, which should be reviewed *de novo*. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). See also *Prinova Solutions, LLC v. Process Technology Corporation Ltd.*, 2018 IL App (2d) 170666, ¶ 11 (noting that the construction of a statute is a question of law which we review *de novo*). Wedbush contends that we should apply a manifest weight of the evidence standard of review. "In a bench trial, the trial court must weigh the evidence and make findings of fact." *Eychaner*, 202 Ill. 2d at 251. "In close cases, where findings of fact depend on the credibility of witnesses, it is particularly true that the reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence." *Id.* A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be arbitrary, unreasonable, or not based on the evidence. *Id.* at 252.

¶ 58 While we acknowledge that the trial judge was in a superior position to judge the credibility of the witnesses and to determine the weight to be given to their testimony (*id.* at 270-71), we view the key issues herein as primarily *legal* issues, *i.e.*, what constitutes a "bank" for purposes of Article 4A and whether Wedbush met that definition. Except as otherwise noted, our review is *de novo*.

¶ 59 "Article 4A was drafted in 1989 to account for a dramatic increase in wire transfers between financial institutions and other commercial entities, commonly called wholesale wire transfers to differentiate them from wire transfers by consumers, which are governed by a separate federal statute." *Choice Escrow and Land Title*, 754 F.3d at 616. While Article 4A applies to funds transfers (810 ILCS 5/4A-102 (West 2014)), payments by check are covered in Articles 3 and 4 of the UCC.





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¶ 60 Article 4A sets forth a detailed scheme concerning a bank's rights and responsibilities when presented with an electronic payment order. *Envision Healthcare, Inc. v. Federal Deposit Insurance Corp.*, 2014 WL 6819991, at *7 (N.D. Ill. Dec. 3, 2014). As noted above, the term "bank" is defined in Article 4A, in pertinent part, as a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. 810 ILCS 5/4A-105(a)(2) (West 2014). The official comment to section 4A-105 provides that the definition of "bank" in subsection (a)(2) includes some institutions that are not commercial banks, which "reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers." 810 ILCS 5/4A-105 (West 2014), Uniform Commercial Code Comment 1 (1991). A "receiving bank" is defined as the bank to which the sender's instruction is addressed. 810 ILCS 5/4A-103(a)(4) (West 2014).

¶ 61 Sections 4A-202 addresses how the risk of loss from an unauthorized payment order is to be allocated. 810 ILCS 5/4A-202 (West 2014). If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the customer's name as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the customer's order, whether or not authorized, if (a) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (b) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer. *Id.* A "security procedure" generally is a procedure established by the agreement of the customer and the bank for the purpose of (a) verifying that a payment order is that of the customer or (b) detecting error in the transmission or content of the payment order or communication. 810 ILCS 5/4A-201



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(West 2014). While a security procedure may require the use of algorithms, encryption, callback procedures, or similar security devices, Article 4A provides that a comparison of the signatures on a payment order or communication with an authorized specimen signature is not by itself a security procedure. *Id.*

¶ 62 Section 4A-202 further provides that the commercial reasonableness of a security procedure is a question of law to determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, and security procedures in general use by customers and receiving banks similarly situated. 810 ILCS 5/4A-202 (West 2014).

¶ 63 Section 4A-204 provides remedies for when the bank accepts a payment order that is unauthorized or unenforceable. *Envision Healthcare*, 2014 WL 6819991, at *7. If a receiving bank accepts a payment order issued in the name of the customer as sender which is not authorized and not effective as to the order of the customer pursuant to section 4A-202, the bank is generally required to refund the payment plus interest. 810 ILCS 5/4A-204 (West 2014).

¶ 64 Based on the foregoing, the threshold issue is whether Wedbush was a "bank," *i.e.*, "a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company." 810 ILCS 5/4A-105(a)(2) (West 2014). The parties agree that Wedbush was not any of the enumerated examples, *e.g.*, a savings bank. The question is thus whether Wedbush was "engaged in the business of banking."

¶ 65 Article 4A of the UCC does not define the "business of banking," and most of the cases addressing Article 4A involve traditional banks which are unequivocally within the scope of the section 4A-105 definition. The parties have not cited any Illinois cases directly addressing the



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definition of a "bank," and we thus examine cases from other jurisdictions. *Patrick v. Wix Auto Co.*, 288 Ill. App. 3d 846, 850 (1997) (noting that "[w]hen there is a lack of Illinois cases interpreting the Illinois Commercial Code, this court has looked to the Uniform Commercial Code decisions in other jurisdictions").

¶ 66 In a number of cases from other jurisdictions, Merrill Lynch – a brokerage firm – has argued that it is a "bank" so as to invoke Article 4A's one-year statute of repose as a defense. *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88 n.3 (2d Cir. 2010); *Gold v. Merrill Lynch & Co.*, 2009 WL 2132698, at *3 (D. Ariz. July 14, 2009). These cases, however, provide minimal analysis in support of the court's conclusion regarding Merrill Lynch's status as a "bank." *E.g.*, *Ma*, 597 F.3d at 88 n.3 (stating in a conclusory fashion that the Article 4A definition of bank encompasses Merrill Lynch). Relying on these cases and the official comment to section 4A-105, plaintiffs contend that Wedbush operates as a bank because it processes wire transfers. If the processing of wire transfers was sufficient in and of itself to place a financial institution within the parameters of Article 4A, however, the definition of "bank" would not be necessary. See *In re D.M.*, 2016 IL App (1st) 152608, ¶ 28 (providing that a court may not construe a statute in a manner that would render a provision of the statute meaningless).

¶ 67 Wedbush relies upon cases addressing the definition of "bank" in Articles 3 and 4 of the UCC, which is substantially similar to the Article 4A definition. 810 ILCS 5/3-103 (West 2014); 810 ILCS 5/4-105 (West 2014). Although we recognize that the focus of Articles 3 and 4 is different from Article 4A – generally checks versus wire transfers – we reject plaintiffs' unsupported contention that the cases interpreting the definition of bank in Articles 3 and 4 are irrelevant to our analysis.

¶ 68 In cases under Articles 3 and 4 of the UCC, courts have concluded that a key factor in the



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determination that an entity is a "bank" is whether it offers checking services. *E.g.*, *Borchers v. Vanguard Group, Inc.*, 2011 WL 2690424, at *1 (D. Ariz. July 11, 2011) (finding that a mutual fund company was a bank because the check-writing service it provided for its customer "functioned as a traditional bank checking account that provided checks, honored drafts, and mailed out account statements"); *Nisenzon v. Morgan Stanley DW, Inc.*, 546 F. Supp. 2d 213, 224 (E.D. Pa. 2008) (noting that brokerage firms offering checking services are considered banks for the purposes of the UCC); *Edward D. Jones & Co. v. Mishler*, 161 Or. App. 544, 559 (1999) (stating that "[b]y offering defendant a checking account, and by participating in the bank collection process related to the checks that plaintiff had provided and that bore its name," the plaintiff had engaged in banking activities); *Woods v. MONY Legacy Life Insurance Co.*, 84 N.Y.2d 280, 285 (1994) (concluding that the defendant insurance company was a bank for UCC purposes; noting that "there is no reason to treat the account at issue differently from a checking account administered at a bank"); *Asian Int'l, Ltd. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 435 So.2d 1058, 1062 (La. Ct. App. 1983) (stating that where an investment brokerage firm provided its customers with a general securities and a checking account, "much like that provided by a depositary bank," the relationship between the brokerage and the customer "is analogous to that of a bank and its customer").

¶ 69 During oral arguments, plaintiffs' counsel directed this Court to the official comments of multiple UCC provisions. *E.g.*, 810 ILCS 5/4A-203 (West 2014), Uniform Commercial Code Comments (1991). We may examine the pertinent UCC comments to discern the legislature's intent (*Milledgeville Community Credit Union v. Corn*, 307 Ill. App. 3d 8, 13 (1999)), and we recognize that certain comments discuss the respective liabilities of banks and their customers in various "hacking" scenarios. The comments do not squarely address, however, the core issue in



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this appeal, *i.e.*, what exactly constitutes the "business of banking."

¶ 70 After reviewing the appellate record, the language of the UCC and the official comments, and the case law interpreting Article 3, 4, and 4A, we cannot conclude that Wedbush was engaged in the business of banking. Based on the admissible evidence, there is no indication that Wedbush offered checking services to its FCM customers like plaintiffs. Although plaintiffs contend without citation to the record – in violation of Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018) – that "Wedbush offered deposit accounts and loan services in connection with the margin trading accounts used by customers such as Plaintiffs," the admissible evidence does not appear to support this statement. While plaintiffs also assert – without citation to the record – that "Wedbush wrote checks out of Plaintiffs' accounts monthly as shown on their account statements showing debits for payment to a storage company holding silver and for payment of sales tax on such storage," plaintiffs do not elucidate how such activity would constitute the "business of banking." Plaintiffs further contend that Wedbush's compliance with federal banking law regarding anti-money laundering means that it was engaged in the business of banking. The cases addressing the business of banking do not suggest, however, that such compliance is a relevant factor. Finally, to the extent that the trial court weighed the conflicting testimony from plaintiffs' expert (Thomas) and Wedbush's rebuttal expert (Gilmore) regarding, among other things, the import of Wedbush's adherence to federal anti-money laundering statutes or regulations, we conclude that its findings were not against the manifest weight of the evidence. *Eychaner*, 202 Ill. 2d at 251.

¶ 71 Given our conclusion that Wedbush was not a "bank" for purposes of Article 4A of the UCC, we need not consider whether a commercially reasonable security procedure was in place. We affirm the trial court's judgment in favor of Wedbush on plaintiffs' UCC claims.



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¶ 72 III. CONCLUSION

¶ 73 For the reasons discussed herein, the judgment of the circuit court is affirmed in its entirety.

¶ 74 Affirmed.





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**TRIAL EXHIBITS**

**Plaintiffs' Trial Exhibits**





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## CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that on October 29, 2019, a copy of the foregoing Brief of Plaintiffs-Appellants, including the Appendix, were filed and served upon the Clerk of the Illinois Supreme Court via the efileIL system through an approved electronic filing service provider and served on counsel of record below via email.

Jeffry M. Henderson, Esq.
Greenberg Traurig LLP
77 West Wacker Drive
Suite 3100
Chicago, Illinois 60601
hendersonj@gtlaw.com

*Counsel for Defendant-Respondent*

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will send thirteen copies of the Brief and Appendix to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol, Springfield, Illinois 62701.

*/s/ Steven H. Lavin*
Steven H. Lavin

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