

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49

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MARGARET-MARY MCGOWAN RIZER, :  
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 Plaintiff :  
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 -against- : Index No. 601676/05  
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 JOHN R. BREEN, JR., HSBC BANK USA, :  
 SALOMON SMITH BARNEY, KEGELER’S, INC., :  
 TODD L. LAVERE, NORTH COUNTRY TAVERN :  
 CORP., JEFFREY E. GRAHAM, GREATER :  
 BENEFICIAL UNION OF PITTSBURGH, RBC DAIN :  
 RAUSCHER OF NEW YORK INC., THE HARTFORD :  
 FINANCIAL SERVICES GROUP, INC., MICHAEL J. :  
 ALTERI, and UNITY FINANCIAL LIFE INSURANCE :  
 COMPANY, :  
 :  
 Defendants. :  
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**CAHN, J.**

Plaintiff Margaret-Mary McGowan Rizer, a well known supermodel, gave her stepfather, defendant John R. Breen, Jr., the authority to invest her assets. Apparently he embezzled from her, by various methods, at least \$3,000,000. This action is also brought against numerous other defendants, including banks, businesses, investment firms and individuals, on the theory that they assisted Breen in his defalcations in a variety of ways, and therefore bear liability for all or some of the losses.

Motion Sequence Nos. 007, 008, 009, 010, 012, 013 and 014 are consolidated for disposition. In these various motions, Defendants HSBC Bank USA, Community Bank, Unity Mutual Life Insurance Company, Greater Beneficial Union of Pittsburgh, N.A., Kegeler’s Inc. and Todd L. Lavere, and North Country Tavern Corp. and Jeffrey E. Graham move for summary judgment, CPLR 3212. Defendant Smith Barney (sued as “Salomon Smith Barney”) moves to

dismiss the Amended Complaint on the grounds that it fails to state a cause of action against Smith Barney, and Smith Barney has defenses based on documentary evidence, CPLR 3211 (a) (1) and (7), or for summary judgement, CPLR 3211 (c). Smith Barney also moves to compel arbitration of any claims against it that are not dismissed, CPLR 7503 (a).

For the reasons set forth below, the motions for summary judgment and for dismissal are granted with the exception of one cause of action against Unity Financial and Greater Beneficial.

### **BACKGROUND**

The following facts are alleged in the Amended Complaint:

In May 1999, Rizer, a very successful 21-year-old supermodel from the small town of Watertown, New York, gave her mother, Maureen Breen, and her stepfather, defendant Breen, powers of attorney over bank accounts that she had opened at HSBC. Am Compl ¶ 21. They accepted the responsibility of managing her finances. *Id.* ¶ 17. Rizer, whose youth, financial inexperience, and heavy work and travel schedule made it difficult for her to manage her own financial affairs, chose her mother and stepfather because she trusted them. In doing so, she relied on both her mother and stepfather to pay her bills and manage the substantial assets she was amassing in modeling fees, fees which were generally being directly deposited into her account at the Watertown branch of HSBC. *Id.* ¶¶ 17-18.

Although both her mother and stepfather originally shared the powers granted to them, at some point, Rizer's mother turned over her fiduciary obligations regarding the HSBC bank accounts to her husband, Breen. Breen was an insurance company owner, former candidate for the post of Jefferson County Treasurer, church communicant, exchange student home sponsor, and treasurer of a private business group. *Id.* ¶ 22. Thus, Breen found himself with the sole

fiduciary powers over the funds in the HSBC account.

Unknown to Rizer, Breen developed a serious addiction to alcohol and gambling. *Id.* ¶ 23. To cover his unusually heavy personal expenses and large gambling debts, Breen allegedly stole at least \$3,000,000 from Rizer, by writing hundreds of unauthorized and improperly endorsed checks on her HSBC account to cash, to his own order and to his personal creditors. He also allegedly forged documents to loot insurance and brokerage accounts in Rizer's name. *Id.* Between 1999 and 2002, Breen stole virtually all of Rizer's savings, effectively leaving her penniless and with a large tax debt. *Id.* Rizer contends that she was unaware of the activity in her accounts, and the flow of money from those accounts, for a period of more than three years. *Id.*

After his defalcation was revealed in 2002, Breen was criminally prosecuted. On October 22, 2004, he pleaded guilty in Supreme Court, Jefferson County, to three counts of grand larceny, scheme to defraud in the first degree, and criminal possession of a forged instrument in the second degree. *Id.* ¶ 24. On March 7, 2005, Breen was sentenced to a prison term of sixteen months to four years and an amount of restitution to be determined. *Id.*

Rizer alleges that Breen's misuse of her money and accounts was known by numerous financial institutions and others in Watertown, because the theft occurred over a period of years and was within the plain sight of local banks and other establishments, as well as their officers and employees. *Id.* ¶ 25. Rizer contends that Breen began to loot her bank accounts in an elaborate scheme, allegedly assisted by HSBC and other financial institutions, which failed to act on obvious signs of the defalcation. Rizer further alleges that Breen was assisted in his defalcations by the greed of tavern owners, who plied Breen with "free" drinks, encouraged him

to gamble large sums on State Lottery “Quick Draw” games broadcast on television screens at local taverns, and cashed thousands of dollars in checks drawn on her HSBC account as payment for gambling debts. *Id.* ¶ 26.

Rizer further alleges that because Watertown was a small town, where the defendants were all in close proximity, Breen’s unusual conduct could not reasonably escape notice. Rizer alleges that Breen, though clearly not working, was publicly spending more money than he had ever spent before. *Id.* ¶ 27. She argues that this should have put defendants on notice that something was amiss. She further alleges that there was no credible explanation for his conduct, other than the expenditure of funds taken improperly from her account. *Id.*

Rizer claims that Breen’s transactions were also suspect because they involved improper check endorsements, overdrafts, check kiting, suspect fund transfers between accounts, and other irregular activity. *Id.* ¶ 28. She asserts that, despite the suspect transactions, none of the defendants investigated Breen’s conduct or notified her. *Id.*

On October 19, 2005, Rizer served an Amended Complaint, pleading causes of action against Breen for conversion, fraud, breach of fiduciary duty, and unjust enrichment. Rizer also brings claims against a large group of defendants, including: HSBC, where she maintained her bank accounts; Community Bank, the bank where Breen deposited the funds he withdrew from her HSBC account; Smith Barney, where she had a brokerage account allegedly looted by Breen; and Unity Financial and GBU, where she had annuity accounts allegedly emptied by Breen. She also brings claims against Kegeler’s Inc. and North Country, corporations doing business as two taverns; and Lavere and Graham, their respective owners, on the ground that Lavere and Graham provided free alcohol to Breen to encourage him to gamble away her funds.

## DISCUSSION

A motion for summary judgment will be granted only where a movant has made “a prima facie showing of entitlement to judgment as a matter of law” and has established the absence of or “eliminate[d] any material issues of fact from the case.” *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the movant has made such a showing, the party opposing the motion has the burden of producing facts sufficient to raise triable issues of fact. *Zuckerman v City of New York*, 49 N.Y.2d 557 (1980). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” *Id.* at 562. The assertions of the non-moving party are given every favorable inference in opposition to the motion. *Myers v. Fir Cab Corp.*, 64 N.Y.2d 806, 808 (1985); *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dep’t 1997).

### **HSBC’s Motion for Summary Judgment**<sup>1</sup>

\_\_\_\_\_ Rizer brings claims against HSBC for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, unjust enrichment, aiding and abetting conversion and breach of contract, negligence. \_\_\_\_\_

\_\_\_\_\_ HSBC moves for summary judgment dismissing the Amended Complaint as to it, on the ground that the power of attorney executed by Rizer in favor of Breen forecloses her causes of action.

#### Power of Attorney:

Rizer executed a Durable Power of Attorney (POA) on May 11, 1999, at what was then Marine Midland Bank, appointing Breen and her mother as her attorneys-in-fact. This permitted them to act in the same manner as she herself could act, with respect to banking transactions at

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<sup>1</sup> Motion sequence no. 013.

HSBC. At the top of the first page, the POA reads:

CAUTION: THIS IS AN IMPORTANT DOCUMENT. IT GIVES THE PERSON(S) YOU DESIGNATE YOUR 'AGENT(S)' BROAD POWERS TO HANDLE YOUR PROPERTY DURING YOUR LIFETIME, WHICH MAY INCLUDE POWERS TO DISPOSE OF PERSONAL PROPERTY . . . WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU.

Mendola Aff, Exh H. In addition, with reference to Title 15 of Article 5 of the General Obligations Law, the POA specifically provides that with regard to her banking transactions for specified accounts, her mother and John Breen may each act separately “IN MY [PLAINTIFF’S] NAME, PLACE AND STEAD, in any way which I myself could do, if I were personally present with respect to the following matters at Marine or involving Marine either directly or indirectly . . .” *Id.*

The POA has a section entitled “Special provisions or other limitations if applicable.” This is followed by lined space to insert any limitations. Rizer, however, added no limitations to the POA. *Id.* at 2. Rizer did, however, limit the POA to “banking transactions” with regard to specifically enumerated accounts at HSBC. These included a checking account, a money market account and a credit card account. None of these accounts were special deposit accounts, such as a trust, custodial, retirement or fiduciary account. Rather, Rizer’s accounts were simply standard deposit and credit card accounts. *See Mendola Aff, Exhs D-F (deposit contracts); Id., Exh I (monthly account statements).*

In fact, in the POA, Rizer agreed to “INDEMNIFY AND HOLD MARINE HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS THAT MAY ARISE AGAINST MARINE BY REASON OF MARINE HAVING RELIED ON THE PROVISIONS OF THIS

INSTRUMENT.” Mendola Aff, Exh H, ¶ 5.

Rizer’s accounts were governed by the Rules for Deposit Account (the Rules), which is part of the agreement between Rizer, as depositor, and HSBC. Mendola Aff., Exh G. She agreed to those terms by signing the deposit contracts upon opening the accounts (*see id.*, Exhs D-F), and by thereafter using the accounts. The Rules also, separately from the language of the POA, provide that a POA will enable an attorney-in-fact to do whatever the account holder could do, with the account:

**POWER OF ATTORNEY** If the Bank receives a power of attorney authorization in a form the Bank determines complies with New York State Law, your attorney-in-fact can do whatever you could do with your account. . . .

*Id.*, Exh G (More About Your Account Section). With respect to withdrawals, the Rules provide: “AUTHORIZED INDIVIDUALS The Bank is authorized to rely upon any document provided by you to the Bank which indicates the person(s) authorized to act on your behalf.” *Id.* (Withdrawals Section).

Rizer acknowledges that she executed the POA. Significantly, she does not allege that it was improperly executed, revoked or forged. Nor does she allege that HSBC should have declined the POA when she presented it to HSBC. Rather, Rizer’s claims rest on the theory that HSBC had a duty to do what she did not: (1) monitor Breen’s access to the accounts at issue; (2) prevent his access where necessary; and (3) supervise the use of her assets. She alleges that HSBC had a broad duty to police her accounts and supervise the use of her funds, based on principles of both tort and contract law.

In support of its motion for summary judgment, HSBC argues that the Amended

Complaint should be dismissed as to it, because Rizer's own allegations, and the POA that she executed, reveal that she has no cause of action against HSBC. HSBC contends that, by executing the POA, Rizer granted Breen broad and unrestricted authority with regard to her HSBC accounts. It further argues that, through the POA, Rizer granted Breen the right, with regard to her HSBC accounts, to take any and all acts as fully as she could, including the power to withdraw funds and write checks on the account, as set forth in GOL § 5-1502D. HSBC also argues that GOL § 5-1504 (4) specifically provides that it cannot be held liable for relying upon the authority Rizer granted to her attorney-in-fact, Breen. Further Rizer took no action to revoke or limit these broad powers, despite Breen's three-year defalcation and her own access, via various means, to her accounts and account information. HSBC argues that it was her own lack of attention and inaction that enabled Breen's defalcations.

As Title 15 of the GOL sets forth, the execution of a power of attorney authorizes another party to act in one's place as her attorney-in-fact. *Zaubler v Picone*, 100 AD2d 620, 621 (2d Dep't 1984). This authority has been described as "extraordinary." *Id.* "An attorney-in-fact is essentially an alter ego of the principal," and thus, "pursuant to a power of attorney, the attorney-in-fact is empowered to take any and all acts 'as fully as the principal might or could do.'" *Heine v Colton, Hartnick, Yamin & Sheresky*, 786 F Supp 360, 374 (SDNY 1992) (quoting *Romero v Sjoberg*, 5 NY2d 518, 523 (1959)). *See also Burton v PNC Bank*, 12 AD3d 264, 265 (1st Dep't 2004).

GOL § 5-1502D defines and describes the broad authority of the attorney-in-fact with respect to the principal's banking transactions. Specifically, by making Breen her attorney-in-fact, Rizer authorized him to: (1) make, sign and deliver checks or drafts for any purpose; (2)

withdraw by check any of her funds deposited at HSBC; (3) indorse and negotiate any of her checks or checks payable to her, and to receive any cash from such transactions; (4) receive account statements; (5) continue or close any deposit account or banking relationship at HSBC; and (6) open a deposit account in his name only. GOL § 1502D [1], [2], [3], [5] and [8]; *see also Burton v PNC Bank*, 12 AD3d at 265. In addition to these enumerated powers, by granting her attorney-in-fact general authority with respect to banking transactions, Rizer authorized Breen to do any other act which could affect her financial interests in any way. GOL § 5-1502D [17]; *see also Worms v Andre Café Ltd.*, 183 AD2d 494, 495 (1st Dep't 1992).

Indeed, the failure of a bank to accept a properly executed short form power of attorney is unlawful. GOL § 5-1504 (3). Thus, HSBC could not have lawfully refused the properly executed POA. Furthermore, HSBC cannot be held liable for acting upon the authority established by the POA. As GOL § 5-1504 (4) provides:

No financial institution receiving and retaining a statutory short form power of attorney . . . shall incur any liability by reason of acting upon the authority thereof unless the financial institution shall have actually received, at the office where the account is located, written notice of the revocation or termination of such power of attorney.

*See also Burton v PNC Bank*, 12 AD3d at 266.

Not only does Rizer fail to allege that the POA was improperly executed, or that she was under some incapacity when she signed it, she further does not allege that she revoked the POA or circumscribed her stepfather's authority in any manner. Absent proof of revocation, Rizer authorized HSBC to rely upon the duly executed POA as a matter of law. *Crandall v Personal Mortgage Corp.*, 210 AD2d 981, 982 (4th Dep't 1994); *Parr v Reiner*, 143 AD2d 427, 429 (2d Dep't 1988).

At bottom, HSBC acted in reliance on the POA, as it was entitled and required to do. In *Romero v Sjoberg*, 5 NY2d 518, 523 (1959), the Court of Appeals noted that since “the relationship between savings bank and depositor is that of debtor and creditor, there is no reason why this power of attorney was not sufficient to authorize the bank to pay out the money.” See also *Rohrbacher v BancOhio Natl. Bank*, 171 AD2d 533, 533 (1st Dep’t 1991) (power of attorney vested attorney-in-fact with power to endorse check, giving bank right to rely on endorsement, even though attorney-in-fact later converted funds).

HSBC did not have a duty to monitor or police Rizer’s accounts and the actions of her chosen attorney-in-fact. “As a general rule, the relation between a bank and its depositor is that of debtor and creditor, not of agent and principal.” *Kings Premium Serv. Corp. v Manufacturers Hanover Trust Co.*, 115 AD2d 707, 708 (2d Dep’t 1985). Under this general rule, a bank owes no fiduciary duty to its customer. *Aaron Ferer & Sons, Ltd. v Chase Manhattan Bank, N.A.*, 731 F2d 112, 122 (2d Cir 1984). Additionally, here, there is no evidence to indicate that Rizer and HSBC intended their relationship to be anything more than the normal relationship of a bank and its depositor. Although in the Amended Complaint Rizer characterizes her HSBC accounts as “fiduciary accounts,” the account opening documents, as well as the account statements and the Rules, all establish that the accounts were merely standard deposit accounts. Rizer’s appointment of an attorney-in-fact did not create a fiduciary duty on HSBC’s part, or change the nature of her relationship with HSBC. *Louros v Cyr*, 175 F Supp 2d 497, 515-16 (SDNY 2001).

As such, HSBC bank had no duty of inquiry. *Matter of Knox*, 64 NY2d 434, 438 (1985); *Home Savings of America, FSB v Amoros*, 233 AD2d 35, 38-39 (1st Dep’t 1997). Clearly, the amount and frequency of the transactions in Rizer’s accounts might have triggered some inquiry

on the part of HSBC. However, since the POA she executed put no restrictions on the size or the frequency of the transactions, it would be difficult to impose a duty of inquiry on HSBC.

*Ramanathan v Chemical Bank*, No. 88 CIV 8637, 1990 WL 144809, at \*3 (SDNY Sept 24, 1990). In fact, if HSBC had restricted Breen in his use of the POA and his transactions in the accounts it covered. HSBC itself might have incurred liability.

Rizer's attempts to support her contention that HSBC had a duty to police her accounts are insufficient to do so, as the cases to which she cites do not involve a statutory power of attorney, or the powers of an attorney-in-fact that arise pursuant to that authority.

Rizer also asserts that HSBC had a duty to inquire because Breen, her attorney-in-fact, was engaged in banking transactions while allegedly visibly intoxicated and because, given the small-town nature of Watertown, HSBC knew or should have known that Breen was using some of her money to gamble. However, Rizer can cite no statute, regulation or case that requires a financial institution to screen its customers for drug or alcohol use, and there is no law prohibiting banking while intoxicated.

Indeed, to require HSBC to either police the attorney-in-fact, or to verify with the principal every action of the attorney-in-fact, would defeat the very purpose of a power of attorney.

If parties were required to verify with the principal each instruction given to them by an attorney-in-fact, the authority given to attorneys-in-fact would be eviscerated. No party to a transaction would rely on the statements of attorneys-in-fact without independent verification from the principal and, accordingly, an attorney-in-fact would not be authorized to take any and all acts as fully as the principal. If a principal were permitted, at a future point in time, to decide that a particular instruction should have been verified, parties to a contract could not and would not be able to rely on the statements or

instructions of attorneys-in-fact.

*Heine v Newman, Tannenbaum, Helpert, Syracuse & Hirschtritt*, 856 F Supp 190, 195 (SDNY 1994) (internal citation omitted).

In contrast, HSBC presents evidence that, despite ample opportunity to do so, it was Rizer herself who wholly failed to monitor the activity in her accounts. Simply through use of an HSBC ATM, a customer can obtain balance information or even a mini-statement of activity of her account. Caldwell Aff, ¶ 22. Thus, Rizer had access to her accounts through any HSBC branch or ATM. *Id.* ¶¶ 21- 22. Rizer's account statements show that she did, in fact, use her ATM card to obtain cash on a regular basis. *Id.* ¶ 22; Mendola Aff, Exh I. Despite this, Rizer claims she was unaware of the activity in her accounts, and the flow of money from those accounts, for more than three years.

The plain and unambiguous terms of the POA provide a complete defense to HSBC against all of the causes of action alleged against it in the Amended Complaint. In both the Amended Complaint and in Rizer's opposition to HSBC's motion, Rizer simply fails to raise any triable issues of fact.

Aiding and Abetting Fraud, Breach of Fiduciary Duty and/or Conversion:

Rizer alleges that HSBC aided and abetted Breen's fraud, breach of fiduciary duty and conversion. In order to state such claims against HSBC, Rizer "must allege (1) the existence of wrongful conduct by the primary wrongdoer . . . ; (2) knowledge of the wrongful conduct on the part of [the defendant]; and (3) substantial assistance of [the defendant] in achieving the wrongdoing." *Lieberman v Worden*, 1998 NY Misc LEXIS 717, at \* 9 (Sup Ct, NY County July 23, 1998). See also *Moll v U.S. Life Title Ins. Co. of NY*, 710 F Supp 476, 479 (SDNY 1989)

(aiding and abetting fraud); *Morin v Trupin*, 711 F Supp 97, 112 (SDNY 1989) (aiding and abetting breach of fiduciary duty); *Calcutti v SBU, Inc.*, 273 F Supp 2d 488, 493 (SDNY 2003) (aiding and abetting conversion). Here, the Amended Complaint does not contain allegations regarding either knowledge or substantial assistance on the part of HSBC sufficient to raise a triable issue of fact.

Liability for aiding and abetting requires actual knowledge of the underlying tort. Allegations of constructive knowledge, or that defendant was on notice as to the tortious behavior of the wrongdoer, are not legally sufficient to sustain a cause of action. *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dep't 2003); *Kolbeck v LIT America, Inc.* 939 F Supp 240, 246 (SDNY 1996). Indeed, even where a bank disregards several "badges of fraud," such as a transfer of funds from a corporate account to a personal account, actual knowledge does not exist. *Nigerian Natl. Petroleum v Citibank, N.A.*, No. 98 CIV 4960, 1999 WL 558141, at \*7 (SDNY July 30, 1999). Here, the allegations in the Amended Complaint regarding HSBC's knowledge of Breen's actions are conclusory, and do not satisfy her burden of raising triable issues of fact.

Rizer further fails to sufficiently allege substantial assistance by HSBC to Breen's actions. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Kaufman v Cohen*, 307 AD2d at 126. Here, Rizer merely alleges that HSBC substantially assisted Breen by "processing bank withdrawals, bank transfers, [and] depositing, accepting, processing and/or cashing checks." Am Compl, ¶ 79. Such acts do not constitute substantial assistance. *Williams v Bank Leumi*, No. 96 CIV 6695, 1997 WL 289865, at \*5 (SDNY May 30, 1997); *see also Renner v*

*Chase Manhattan Bank*, No. 98 CIV 926, 2000 WL 781081, at \*8 (SDNY June 16, 2000), affd 85 Fed Appx 782 (2d Cir 2004); *Ryan v Hunton & Williams*, No. 99 CIV 5938, 2000 WL 1375265, at \*9 (EDNY Sept 20, 2000).

Plaintiff also alleges that HSBC's inaction constituted substantial assistance. However, it is well-settled that, without an independent duty to disclose, such as a fiduciary duty, inaction by itself does not amount to substantial assistance for purposes of determining aider and abettor liability. See *National Westminster Bank USA v Weksel*, 124 AD2d 144, 148 (1st Dep't 1987) ("We know of no case where mere inaction by a defendant has been held sufficient to support aider and abettor liability"); *Kaufman v Cohen*, 301 AD2d at 126 ("the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff"). As there was no fiduciary duty between HSBC and Rizer, or other duty to especially monitor Breen's actions, any inaction by HSBC cannot constitute substantial assistance.

Unjust Enrichment:

Rizer also alleges that HSBC was unjustly enriched. "The theory of unjust enrichment lies as a quasi-contract claim" and "is an obligation the law creates in the absence of any agreement." *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 (2005) (citing *State of New York v Barclays Bank of NY*, 76 NY2d 533 (1990)). Where, as here, "the matter is controlled by a contract," no cause of action lies for unjust enrichment. *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d at 572 (citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987)) Here, the subject matter of Rizer's claim lies squarely within the terms of the deposit contracts between herself and HSBC, as well as the POA. As such, no valid claim can exist for unjust

enrichment.

The Breach of Contract Claim:

Rizer asserts a breach of contract claim against HSBC. Plaintiff alleges that she entered into a contract with HSBC in connection with her HSBC account and that, under that agreement, HSBC “was obliged to exercise good faith in monitoring the activity of the account,” and “failed to act on clear signs (including the fact that none of the many checks executed by Breen were endorsed properly and that they were being deposited in large part into his own personal or business accounts)” that Breen was converting her’s funds. Am Compl, ¶ 96.

Rizer’s breach of contract claim must be dismissed because the documentary evidence clearly shows that HSBC did not contract with plaintiff to monitor either the use of the money withdrawn from her accounts, or the actions of her attorney-in-fact. To the contrary, Rizer agreed to hold HSBC harmless and indemnify it for any claim arising from its reliance upon the document. Mendola Aff, Exh H, ¶ 5. Moreover, Rizer’s accounts were nothing more than standard deposit accounts and, thus, HSBC owed no fiduciary duty to plaintiff to monitor her account.

Rizer alleges that Breen’s signatures on checks written on her HSBC account were improper because Breen did not add “POA” or “attorney-in-fact” after his name. However, there is no requirement that an attorney-in-fact make such a notation of his authority when signing a document on behalf of the principal. The law specifically allows Breen, via the POA, to endorse and negotiate any check on the account covered by the POA. UCC § 3-401 (1); GOL § 5-1502D. Further, HSBC has no policy requiring Breen to sign his name on Rizer’s checks with the words “POA” or “attorney-in-fact.” Caldwell Aff, ¶ 17, Exh P, Exh Q.

In fact, the courts have specifically rejected such a requirement. In *Oquendo v Federal Reserve Bank of New York*, 98 F2d 708, 710 (2d Cir 1938) the Court stated:

The appellant makes much of the fact that Mrs. Oquendo's signature was simulated, but we think such fact immaterial. Her attorney had power to endorse her name, either by his own hand or by adopting the hand of another. It was not necessary for him to sign "per pro."

(internal citations omitted). See also *Jenkins v Evans*, 31 AD2d 597, 598 (3d Dep't 1968).<sup>2</sup>

Thus, the checks as written were properly signed.

Rizer also alleges that "[b]y enabling Defendant Breen to convert Plaintiff's funds through the use of a Power of Attorney granted on Defendant HSBC's own form, Defendant HSBC violated its contract with Plaintiff, its depositor." Am Compl, ¶ 97. However, plaintiff's allegation that some sort of contract arose because she used a form provided by HSBC to appoint Breen is insufficient as a matter of law. Indeed, the POA contractually obligated HSBC to recognize Breen as having the same rights with regard to her account as she herself would.

Negligence:

Rizer alleges that HSBC owed her a duty of care, which "included monitoring the activity of the account to ensure compliance with the terms of the Power of Attorney." *Id.* ¶ 100. Rizer further alleges that by "ignoring and failing to act upon obvious signs that Breen was misusing his Power of Attorney and converting millions of dollars of Plaintiff's money to his own use without Plaintiff's knowledge or permission, Defendant HSBC failed to perform its duty." *Id.*

However, it is "settled that a depositor may not sue [her] bank in negligence based solely

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<sup>2</sup> The only purpose of adding "POA," "attorney in fact," or some other designation that the maker is signing as an agent, is to relieve the agent of personal liability. UCC § 3-403 [2] [b]. In the case at hand, Rizer's agent was clearly Breen, not HSBC.

on the contractual relationship between bank and depositor.” *Tevdorachvili v Chase Manhattan Bank*, 103 F Supp2d 632, 643 (EDNY 2000) (citing *Calisch Assocs. Inc. v Manufacturers Hanover Trust Co.*, 151 AD2d 446, 447 (1st Dep’t 1989). New York law simply recognizes no cause of action for negligent breach of contract. *Megaris Furs, Inc. v Gimbel Bros., Inc.*, 172 AD2d 209, 211 (1st Dep’t 1991). *See also Olmeca, S.A. v Manufacturers Hanover Trust Co.*, 629 F Supp 214, 223 (SDNY 1985).

HSBC does not owe an independent common law or fiduciary duty to Rizer, beyond honoring the depositor-bank contract. *Fallon v Wall St. Cleaning Co.*, 182 AD2d 245, 250 (1st Dep’t 1992). *See also Stella Flour & Feed Crop. v Natl. City Bank*, 285 AD 182, 183-84 (1st Dep’t 1954) (payments charged to a depositor’s account by a bank on an allegedly forged or altered draft does not result in a tort action). Rizer fails to allege factual circumstances that created a fiduciary relationship and, indeed, the documentary evidence refutes her allegations that her HSBC accounts were fiduciary in nature. Hence, the negligence claim against HSBC is dismissed.

Rizer argues, in general, that summary judgment is premature, because further discovery is required. However, the mere hope that further discovery will reveal something helpful to a plaintiff’s case is no basis to postpone determination of a summary judgment motion. *Doherty v City of New York*, 16 AD3d 124, 125 (1st Dep’t 2005). Here, the Amended Complaint and the opposition to HSBC’s motion contain no allegations that would indicate that further discovery would support her claims, particularly as there exists deposition testimony that directly contradicts Rizer’s assertions. Rizer’s speculation that facts may exist which could establish liability is insufficient to defeat HSBC’s motion for summary judgment. *Kennerly v Campbell*

*Chain Co.*, 133 AD2d 669, 670 (2d Dep't 1987).

Accordingly, HSBC's motion for summary judgment dismissing the Amended Complaint as to it, is granted.

**Community Bank's Motion for Summary Judgment**<sup>3</sup>

Rizer brings claims against Community Bank for aiding and abetting fraud, aiding and abetting breach of fiduciary duty and for unjust enrichment.

Rizer alleges that Community Bank is also liable for Breen's conversion of her funds because Breen deposited some of the checks he drew on her HSBC account into an account he maintained at Community Bank. Am Compl, ¶¶ 41-45. When the checks were deposited into a Community Bank account, Community Bank acted as a "collecting bank" and forwarded the checks to HSBC for collection. HSBC thereupon made payment on the checks and debited Rizer's account.

Rizer alleges that the checks were signed by Breen in an improper manner, by failing to indicate that he was signing pursuant to a power of attorney. She also alleges that Breen made large overdrafts in his Community Bank account and was considered a check kiting suspect. She asserts that these facts were "red flags" that were ignored by the bank. Rizer further alleges that Community Bank failed to notify her, or HSBC or to issue a report to other banks through Check Systems, of Breen's misconduct, and that failing to do so was in knowing violation of Community Bank's standards and procedures, and rules of commercial good faith.

Inasmuch as Community Bank did not owe any duty to plaintiff to monitor the activities of her attorney-in-fact, Community Bank's motion for summary judgment is granted.

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<sup>3</sup> Motion sequence no. 009.

Rizer had no relationship with Community Bank. Rather, Community Bank was a “collecting bank,” forwarding items to HSBC on behalf of a depositor. The obligations of collecting banks are set forth in Article 4 of the Uniform Commercial Code. As a collecting bank, Community Bank made warranties with regard to any item transferred for payment, to the “payor bank,” but not to the drawer of the check. *See* UCC § 4-207. Thus, Community Bank made warranties with regard to the checks deposited by Breen to HSBC, but not to either Rizer or Breen. Indeed, it is “the general rule that a drawer does not have a direct cause of action against a depository bank for collecting an improperly endorsed check.” *Horovitz v Road Works of Great Neck, Inc.*, 76 NY2d 975, 977 (1990) (citations omitted); *see also Leonard Smith, Inc. v Merrill Lynch*, 113 AD2d 387, 391 (3d Dep’t 1985) (the drawer of a check has no direct action against a bank where a check was deposited); *Low v Merchants Natl. Bank & Trust Co. of Syracuse*, 24 AD2d 322, 323 (3d Dep’t 1966) (“there is no privity of contract between the drawer of a check and the collecting bank”). Even when there is an explicit claim of forgery, the drawer has no remedy against the bank that accepted the allegedly forged check for deposit. *Central Cadillac, Inc. v Stern Haskell, Inc.*, 356 F Supp 1280, 1282 (SDNY 1972) (dismissing the claim and holding that the UCC warranties were only in favor of the “payor bank” and not in favor of the “payor bank’s” customer and noting that this UCC rule is consistent with the common law rule in New York). Rather, the drawer’s remedy is to bring suit against the bank that debited the account, which in this case would be HSBC. The fact that Rizer has not alleged a viable claim against HSBC does not create a claim against Community Bank.

New York law does not require a collecting bank to inquire about the circumstances under which a check was issued. For example, in *Chartered Bank v American Trust Co.*, 48

Misc 2d 314 (Sup Ct, NY County 1965), 123 checks drawn on plaintiff's account were deposited in a bank over a false name by one of plaintiff's employees. The plaintiff alleged that the collecting bank had a duty to inquire "into the facts and circumstances surrounding the issuance of the checks," and that its failure to do so constituted "commercial bad faith." *Id.* at 315. The court dismissed the claims, ruling that the collecting bank had no duty to go behind the checks to inquire into the circumstances of their issuance and that "recovery, if any, must be sought from the drawee bank." *Id.* at 317. *See also Brokerage Data Processing Corp. v Eastchester Sav. Bank*, 39 AD2d 895 (1st Dep't 1972). Thus, Community Bank had no duty to Rizer to investigate why Breen, her attorney-in-fact, was drawing on the HSBC account.<sup>4</sup>

The only circumstance in which the Court of Appeals has found an exception to this general rule is where the depository bank's employees directly participated in a fraud on the drawer of the checks. *Prudential-Bache Sec. v Citibank*, 73 NY2d 263, 274 (1989) (drawer of checks could proceed on commercial bad faith theory where it showed "out and out dishonesty" by the depository bank). Here, plaintiff has made no allegations that Community Bank committed "out and out dishonesty." Rather, plaintiff simply claims that Community Bank should have advised her that her authorized agent was endorsing and depositing checks from her HSBC account into his own account at Community Bank. However, this is information that plaintiff could have easily learned by reviewing her monthly statements over the course of three years, or even by checking the balance in her account on an ATM machine.

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<sup>4</sup> The Court notes that Community Bank did note the manner in which the checks were signed and made an inquiry to HSBC, which confirmed that Breen did have signature authority on Rizer's account through the POA. *See McGuire Dep.* at 17-30.

Aiding and Abetting Fraud and/or Breach of Fiduciary Duty:

The Court notes that even if plaintiff could assert a claim against Community Bank as a “collecting bank,” Rizer has failed to submit evidence to support the elements of her claims for aiding and abetting fraud and breach of fiduciary duty, i.e., the defendant’s actual knowledge of the wrongful conduct, and the defendant’s substantial assistance in achieving the wrongdoing. Rizer has not alleged that Community Bank had actual notice of Breen’s alleged conversions and fails to alleged any facts that would support a claim that it substantially assisted Breen in his defalcations. Accordingly, there is no basis for Rizer’s claims of aider and abettor liability against Community Bank.

Unjust Enrichment:

Rizers’s claim for unjust enrichment against Community Bank must also be dismissed. To state a cause of action for unjust enrichment, a plaintiff must allege that she conferred a benefit upon defendant, and that defendant will obtain the benefit without adequately compensating plaintiff for that benefit. *Nakamura v Fujii*, 253 AD2d 387, 390 (1st Dep’t 1998). *See also Bazak Intl. Corp. v Tarrant Apparel Group*, 347 F Supp2d 1, 3-4 (SDNY 2004) (“To state a claim of unjust enrichment under New York law, the plaintiff must allege (1) that the defendant was enriched; (2) that the enrichment was at the plaintiff’s expense; and (3) that the circumstances are such that in equity and good conscience the defendant should return the money or benefit to plaintiff”). Rizer has not alleged facts that would support her contention that Community Bank was enriched at her expense. Hence, her claim for unjust enrichment is dismissed against Community Bank.

Although Rizer argues that Community Bank’s motion should be denied because she has

not completed discovery, her counsel acknowledges that he has already conducted the deposition of Community Bank's branch manager at the Watertown branch and that, pursuant to his subpoena, Community Bank produced the bank records for the account at issue. Rizer does not identify what further discovery from Community Bank she requires in order to properly oppose the motion, and she has therefore presented no reason for denial of the motion.

Accordingly, the motion for summary judgment is granted and the Amended Complaint is dismissed against Community Bank.

**Smith Barney's Motion to Dismiss**<sup>5</sup>

Rizer brings claims against Smith Barney for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, unjust enrichment, aiding and abetting conversion, breach of contract and negligence.<sup>6</sup>

Rizer claims that she opened a brokerage account at Smith Barney, at its Watertown office. In doing so, she executed an Account Application and Client Agreement. *See* Zeichner Aff, Exh F. Rizer claims that Breen used forged documents to withdraw \$522,009.85 from her account, all without her knowledge or authorization. She seeks \$514,500 in damages from Smith Barney, advising that she has received a \$7,509.85 recovery from another financial institution.

Pursuant to the terms of the Client Agreement, Rizer was required to provide Smith Barney with written notification of any inaccurate information contained in any monthly account statement, within ten days of receiving the monthly statement. Failure to do so, renders the

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<sup>5</sup> Motion sequence no. 012.

<sup>6</sup> Smith Barney's motion sought dismissal of the Amended Complaint, CPLR 3211 (a) (1) and (7) or that the Court treat the motion as one for summary judgement, CPLR 3211 (c). The Court is treating the motion as one for summary judgment.

information contained in such statement to be conclusively accurate. The Client Agreement clearly provides that:

SB [Smith Barney] shall provide me with periodic statements reflecting activity in such account(s). *I agree that transactions reflected on such . . . statements shall be conclusively deemed accurate as stated unless I notify SB in writing within . . . ten (10) days of receipt . . . that the information contained in such . . . statement is accurate. Such notice must be sent by me to SB by telegram or letter directed to the attention of the Branch Office Manager of the office servicing the account. . . . Failure to so notify SB shall also preclude me from asserting at any later date that such transaction was unauthorized.*

*Id.* ¶ 4 (emphasis added).

Rizer alleges that on July 17, 2001, Breen presented Smith Barney with a “Standing Authorization for Third-Party Check Pickups.” Am Compl ¶ 47. She claims that her signature on this document was forged. *Id.* Rizer alleges that, after presenting Smith Barney with the Third-Party Check Pickup, Breen withdrew \$522,009.85 from the Smith Barney account and then closed the account in 2002. *Id.* ¶ 48.

Smith Barney presents evidence that it mailed Rizer her monthly statements reflecting the activity in her Smith Barney account, and that they were mailed to the address Rizer listed on her New Account Application and on the Smith Barney Account. *See Zeichner Aff, Exh F.; Tom Aff, ¶¶ 2-4.* Smith Barney also presents evidence that Rizer never submitted to it any written notice of objection, as required by the Client Agreement, that any of the withdrawals reflected in the monthly statements were unauthorized. *Couch Aff, ¶¶ 3-6.*

Of the withdrawals from Rizer’s account, \$484,500 was deposited to her HSBC account. *Zeichner Aff, Exh D.* The remaining \$37,509.85 was deposited by Breen in his own accounts; \$30,000 into Breen’s account at Community Bank and \$7,509.85 into Breen’s account at

Northern Federal Credit Union. Rizer acknowledges that she recovered the money deposited at Northern Federal Credit Union. Am Compl ¶ 49.

Aiding and Abetting Fraud, Breach of Fiduciary Duty and/or Conversion:

Rizer's claims against Smith Barney for aiding and abetting fraud and aiding, abetting breach of fiduciary duty and aiding and abetting conversion must be dismissed. Although she claims that Smith Barney aided and abetted Breen's fraud, breach of fiduciary duty and/or conversion, the Amended Complaint does not adequately contain factual allegations supporting such claims. Rizer fails to plead that Smith Barney had actual knowledge of Breen's defalcations. Nor does she plead that Smith Barney lent Breen substantial assistance in perpetrating his defalcations.

All Rizer does plead, and that solely in the context of her aiding and abetting conversion claim, is that Smith Barney "had actual knowledge that placed it on notice that conversion of Plaintiff's funds was afoot. It failed to make reasonable inquires when it allowed Defendant Breen to make four separate, large withdrawals and close out an account . . . incurring substantial penalties, without consulting Plaintiff." Am Compl ¶ 107. This does not adequately plead actual knowledge and substantial assistance, as required for aiding and abetting fraud, aiding and abetting breach of fiduciary duty an aiding and abetting conversion.

Accordingly, Rizer's claims against Smith Barney for aiding and abetting fraud, aiding and abetting breach of fiduciary duty and aiding and abetting conversion are dismissed.

Unjust Enrichment:

Rizer's claim against Smith Barney for unjust enrichment must also be dismissed. The relationship between Rizer and Smith Barney stemmed from her Client Agreement and, as such,

the relationship was contractual in nature. Inasmuch as the claim of unjust enrichment lies only in quasi-contract, it creates an obligation, if at all, only where there is an absence of any contractual agreement. *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d at 572. Since there is clearly a controlling contractual agreement between Rizer and Smith Barney, her claim against it for unjust enrichment is dismissed.

Breach of Contract:

Rizer claims that Smith Barney “violated its contract” with her by “failing to identify forged documents and failing to communicate directly with her when large withdrawals were made from her account.” Am Compl ¶ 114. Rizer’s breach of contract claim against Smith Barney must be dismissed, however, because the documentary evidence clearly shows that her Client Agreement with Smith Barney required her to provide it with notification of inaccuracies and/or unauthorized transactions.

The Client Agreement with Smith Barney explicitly requires the customer to provide it with notification within ten days of receiving the monthly statement that reflects inaccuracies and/or unauthorized transactions. The fact that Rizer did not review her statements does not change the obligations delineated in the Client Agreement.

By not providing timely written notification to Smith Barney of any inaccuracies or unauthorized transactions reflected in a statement, as required, the transactions in Rizer’s account are deemed conclusive as a matter of law. In *Modern Settings, Inc. v Prudential-Bache Sec., Inc.*, 936 F2d 640, 645-46 (2d Cir 1991), the Second Circuit upheld a provision in a brokerage account agreement which required the customer to give written notification of any objection regarding an unauthorized transaction in the account within ten days of receiving a monthly

statement reflecting that transaction. In reaching this conclusion, the Court found that “broker-customer agreements requiring written notice of objection within a limited amount of time after the customer receives confirmation of the transaction have generally been enforced by the courts.” *Id.* at 646 (citations omitted). *See also Goldberg v Kidder Peabody & Co., Inc.*, 991 F Supp 215 (SDNY 1997) (plaintiff ratified the transaction, as a matter of law, by not objecting in writing to unauthorized trades in his brokerage account within ten days of receiving his monthly statements, as required by the account agreement); *In re Drexel Burnham Lambert Group, Inc.*, 157 BR 539, 548 (SDNY 1993) (the customer’s failure to give written objection of disputed transaction within ten days of receiving monthly statement, as required by the account agreement, constituted ratification of the transactions).

Rizer did not provide Smith Barney with written notice of objection to Breen’s withdrawals within the ten day period specified in the Client Agreement. As such, she ratified those transactions as a matter of law, they are conclusively deemed accurate and she cannot now assert a breach of contract claim against Smith Barney based upon those allegedly unauthorized transactions.

In her opposition, Rizer raises only immaterial factual issues. For example, Rizer contends that she specifically told her financial consultant at Smith Barney, John Crapser, that she had a low tolerance for risk, and that she never told him that she intended to withdraw the money from the account in the near future. Rizer Aff, ¶¶ 2-3. This factual dispute, however, is irrelevant to the issues raised by Smith Barney’s motion for summary judgment. Rizer does not create a material issue of fact regarding her failure to provide Smith Barney written notification of any alleged inaccurate information or unauthorized transactions reflected in the monthly Smith

Barney Account statements. Thus, this purported factual dispute does not present a valid basis on which to deny the motion.

Accordingly, Rizer's claim against Smith Barney for breach of contract claim is dismissed.

Negligence:

Rizer claims that Smith Barney was negligent and breached its duty of care to her by "failing to identify forged documents or speak with Plaintiff directly regarding withdrawals that connoted material changes in her account." Am Compl ¶ 111. However, Rizer's relationship with Smith Barney is governed by the Client Agreement, and is therefore subject to that contract.

Rizer cannot assert tort claims, such as negligence, where Smith Barney's liability arises from a breach of the parties' contract. *Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 121 (1st Dep't 1999) ("Allegations that a defendant was grossly negligent in failing to perform its contractual duty do not transform a breach of contract action into a tort action"); *17 Vista Fee Assocs. v Teachers Ins. and Annuity Assn. of Am.*, 259 AD2d 75, 82 (1st Dep't 1999) ("A simple breach of contract does not give rise to a tort claim unless a legal duty independent of the contract has been violated"). Consequently, since Rizer is "merely seeking to enforce [her] bargain, a tort claim will not lie." *New York University v Continental Ins. Co.*, 87 NY2d 308, 316 (1995).

Smith Barney's obligations to Rizer arise from the Client Agreement. Smith Barney does not owe an independent common law or fiduciary duty to Rizer, beyond honoring the Client Agreement. *Fallon v Wall St. Cleaning Co.*, 182 AD2d at 250; *Stella Flour & Feed Crop v National City Bank*, 285 App Div at 183-84. Therefore, Smith Barney cannot, as a matter of law,

be held liable to plaintiff in negligence for permitting Breen's alleged unauthorized withdrawals from the Smith Barney Account under some "negligent performance of contract" theory. *Chase Manhattan Bank, N.A. v Remington Prods., Inc.*, 865 F Supp 194, 200 (SDNY 1994) ("New York does not recognize a cause of action for negligent performance of a contract"). Thus, Rizer's claim against Smith Barney for negligence is dismissed.

Accordingly, Smith Barney's motion for summary judgment and to dismiss the Amended Complaint is granted. Smith Barney's motion to compel arbitration of any claims against it that are not dismissed is denied as moot.

#### **Unity Mutual's Motion for Summary Judgment**<sup>7</sup>

Rizer brings claims against Unity Mutual for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, unjust enrichment, aiding and abetting conversion, and conversion.

Unity Mutual is an insurance company authorized to issue annuity contracts, with headquarters in Syracuse, New York.

In 1998, Rizer purchased a single premium annuity from Unity Mutual for \$200,000. Rizer asserts that Breen secured the annuity for her with Union Mutual, and then prematurely withdrew funds for his own use. Unity Mutual concedes that the agent for the sale of the Annuity Contract was Breen, who was a Unity Mutual agent.

Between March and October 2002, Breen submitted surrender requests to Unity Mutual with respect to the Annuity Contract. Rizer alleges that Breen forged her signature on those surrender requests. Unity Mutual honored the surrender requests and drew five checks, payable

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<sup>7</sup> Motion sequence no. 008.

to plaintiff, on its account at J.P. Morgan Chase. These totaled \$237,839.48, representing the value of the annuity account, minus \$8,589.53 in early withdrawal penalties. The checks issued by Unity Mutual were payable to Rizer, and were endorsed by Breen, and deposited in Rizer's HSBC account, from where Breen withdrew the funds by exercising his authority under the POA.

In January 2003, Rizer contacted Unity Mutual to inquire about the status of the Annuity Contract. She was advised that the Annuity Contract had been surrendered and that checks had been issued to her representing its proceeds. Rizer denied that she had endorsed and deposited those checks and then submitted affidavits of forgery to Unity Mutual, and to JP Morgan Chase, Unity Mutual's bank.

JP Morgan Chase forwarded the affidavits of forgery to HSBC. JP Morgan Chase declined to credit Unity Mutual's account for the amount of the checks. JP Morgan Chase submitted documentation indicating that HSBC had declined to remit the balances of the checks, because the funds were deposited into Rizer's HSBC account.

Rizer incurred surrender charges in the amount of \$8,589.53 for the surrender of the Annuity Contract. However, other than the amount of the surrender charges, the balance of the proceeds of the Annuity Contract, Unity Mutual's checks were deposited in her HSBC account.

Aiding and Abetting Fraud and Breach of Fiduciary Duty:

Rizer's claims against Unity Mutual for aiding and abetting fraud and aiding and abetting breach of fiduciary duty are dismissed, as she fails to allege actual knowledge by Unity Mutual of Breen's defalcations of her assets.

Rizer argues that by allowing Breen to present forged documents to accomplish a large withdrawals with surrender penalties, Unity Mutual "ignored clear notice that conversion was

taking place.” Am Compl ¶ 142. This is far from sufficient to allege, must less establish, that Unity Mutual had the required actual knowledge of any wrongdoing by Breen.

Rizer also fails to allege facts that would support that Unity Mutual “substantially assisted” Breen in his defalcations of her assets. The allegations in the Amended Complaint only assert, at bottom, that Unity Mutual accepted forged documents from Breen. That, without more, is insufficient.

Accordingly, Rizer’s claims against Unity Mutual for aiding and abetting fraud and aiding and abetting breach of fiduciary duty are dismissed.

Unjust Enrichment:

Rizer’s claim against Unity Mutual for unjust enrichment must also be dismissed. The relationship between Rizer and Unity Mutual stemmed solely from the annuity contract and was contractual in nature. The claim of unjust enrichment, however, lies only in quasi-contract and is an obligation that the law creates only, if at all, in the absence of any contractual agreement.

*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d at 572. As there is clearly a controlling contract between Rizer and Unity Mutual, her claim against it for unjust enrichment must be dismissed.

Aiding and Abetting Conversion:

With respect to actions for aiding and abetting conversion, the First Department has been clear. Where, as here, a wrongdoer transfers a victim’s assets from one account owned by the victim to another account owned by the victim, and then converts them from the second account, the proximate cause of any injury to the victim is the conversion from the second account, rather than the transfer from the first account. *Davis v Aircraft Products Co., Inc. v Bankers Trust Co.*, 36 AD2d 705, 705 (1st Dep’t 1971) (since “plaintiff initially received the proceeds of the checks

which defendant paid, it suffered no loss which is recoverable from defendant.”). *See also Geotel, Inc. v Wallace*, 162 AD2d 166, 168 (1st Dep’t 1990) (“Any loss was the result of the manipulation of those accounts by [another] over which defendant [in this action] exercised no control.”); *Lieberman v Worden*, 1998 NY Misc LEXIS 717 at \*13 (“when a check is deposited in a party’s account over a forged or unauthorized endorsement and subsequently the proceeds of the checks are converted by the individual responsible for the deposit, such diversion is the proximate cause of the loss.”). Thus, Rizer’s injury occurred not when Breen transferred funds from her Annuity Contract to her HSBC account, but when he withdrew the funds from the HSBC account and converted them to his own use. Since Unity Mutual paid Rizer the proceeds of her Annuity Contract when it issued the checks, and those checks were deposited in her HSBC account, she cannot recover from Unity Mutual.

Rizer’s opposing papers dispute neither the facts nor the law relating to Unity Mutual. The sole argument Rizer advanced in opposition to the motion is that she incurred surrender charges in connection with the surrender of the Annuity Contract, and these charges were not deposited into her HSBC account. These surrender charges are referenced in both the Amended Complaint and the moving affidavits of Unity Mutual, and are not in dispute. According to the Amended Complaint, these early withdrawal penalties total \$8,589.53. Am Compl ¶ 54. Unity Mutual has offered to refund the surrender charges to Rizer, in order to resolve this action, and thus argues that her cause of action for aiding and abetting conversion “should be dismissed as against Unity Mutual except as to the amount of the surrender charges.” Reply Mem at 2 (emphasis added).

Inasmuch as these early withdrawal penalties were not deposited into Rizer’s account, she

cannot be deemed to have received them. Accordingly, the Rizer's claim against Unity Mutual fir aiding and abetting conversion is dismissed, except with regard to the \$8,589.53 in early withdrawal fees.

Conversion:

Rizer alleges that Unity Mutual is liable for Breen's conversion "because Breen was acting within the scope of his authority as an agent for Unity and in furtherance of Unity's business when he committed the conversions complained of herein." Am Compl ¶ 145. An employer is liable for the acts of its employee when the employee "is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control, directly or indirectly, over the employee's activities." *Lundberg v State of New York*, 25 NY2d 467, 470 (1969). "An employer may be vicariously liable for conversion by an employee where the employee is acting within the scope of his apparent authority." *Sports Car Centre of Syracuse, Ltd. v Bombard*, 249 AD2d 988, 989 (4th Dep't 1998) (citations omitted); *see also Rocks & Jeans, Inc. v Lakeview Auto Sales & Serv.*, 184 AD2d 502, 502-03 (2d Dep't 1992). Accordingly, Unity Mutual could be vicariously liable for Breen's conversion if evidence were presented demonstrating that Breen was acting within the scope of his authority.

Although Unity Mutual moves to dismiss the entire Amended Complaint against it, it fails to establish a prima facie right to such relief with respect to this cause of action. Unity Mutual does not address this cause of action in its papers, but concedes that Breen was its paid agent. In view of the factual issues of Breen's authority, etc. as Unity Mutual's agent, the motion as to this cause of action is premature. Hence, this cause of action is not dismissed.

Accordingly, Unity Mutual's motion for summary judgment is granted to the limited

extent of dismissing the causes of action for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, unjust enrichment, and aiding and abetting conversion, except as to Rizer's claim for \$8,589.53 in surrender charges. Unity Mutual's motion for summary judgment as to the conversion claims against it, is denied.

### **Greater Beneficial's Motion for Summary Judgment**<sup>8</sup>

Rizer brings claims against Greater Beneficial for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, unjust enrichment, aiding and abetting conversion, and conversion.

Rizer alleges that Breen secured an annuity for her from Greater Beneficial, and then prematurely withdrew funds for his own use. Rizer asserts that Breen forged her signature to open this account with her money, and that Breen was acting as Greater Beneficial's insurance agent.

Rizer alleges that Breen also used forged documents to prematurely withdraw funds from the annuity, incurring penalties for early withdrawals in the amounts of \$1,081.58 and \$687.78. Am Compl ¶¶ 56, 129.<sup>9</sup> Breen allegedly forged Rizer's name to endorse each of these checks for deposit into her HSBC account.

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<sup>8</sup> Motion sequence no. 014.

<sup>9</sup> Although Rizer alleges that following these withdrawals, on November 25, 2002, Breen surrendered the policy and received a check for \$14,452.54, representing the value of the account, minus an early withdrawal penalty of \$4,814.58 (Am Compl ¶ 57), she does not seek to recover that withdrawal penalty. Rizer alleges that a settlement was reached with Northern Federal Credit Union, where Breen maintained a checking account, pursuant to which she was refunded the \$14,452.54 withdrawn by Breen from the Greater Beneficial account. *Id.* ¶ 60. According to Rizer, a "Mutual Release was signed on that date, barring any further legal action in regard to that check." *Id.*

Rizer claims that Greater Beneficial should have “spoken with plaintiff or confirmed that these withdrawals were with her consent,” considering that they were “two very large transactions that incurred substantial penalties” and that these circumstances “were red flags that Defendant GBU simply ignored.” *Id.* ¶¶ 129-30. Rizer seeks damages against Greater Beneficial in the amount of \$84,769, and compensatory and punitive damages in the amount of at least \$500,000. *Id.* at 33 (f).

Aiding and Abetting Fraud and Breach of Fiduciary Duty:

Rizer fails to plead the necessary elements for aiding and abetting fraud and aiding and abetting breach of fiduciary duty. She does not allege actual knowledge. Rather, she alleges only that because substantial early withdrawal fees were incurred as a result of these transactions, “red flags” were created. Rizer asserts that these ‘red flags’ should have put Greater Beneficial on notice that something was wrong. However, “mere allegations of constructive knowledge or that defendant was on notice as to the tortious behavior” is not sufficient to allege aider and abetter liability. *Lieberman v Worden*, 1998 NY Misc LEXIS 717 at \*10.

Further, Rizer makes no allegations that Greater Beneficial substantially assisted Breen in the defalcation of her assets. The allegations in the Amended Complaint essentially assert that Greater Beneficial accepted forged documents from Breen. That, without more, is insufficient to allege that Greater Beneficial substantially assisted Breen.

Accordingly, Rizer’s claims against Greater Beneficial for aiding and abetting fraud and aiding and abetting breach of fiduciary duty are dismissed.

Unjust Enrichment:

Rizer’s claim against Greater Beneficial for unjust enrichment must also be dismissed.

The relationship between Rizer and Greater Beneficial stemmed from the annuity contract and the relationship was solely contractual in nature. The claim of unjust enrichment, however, lies in quasi-contract and is an obligation that the law creates only, if at all, in the absence of any contractual agreement. *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d at 572. As there is clearly a controlling contract between Rizer and Greater Beneficial, her claim against it for unjust enrichment must be dismissed.

Aiding and Abetting Conversion:

Rizer concedes that the checks written by Greater Beneficial, for \$60,000 and \$23,000, were made payable to her and were directly deposited into her HSBC account. Am Compl ¶ 59; Opp Br at 21. As previously determined, where, “a check is deposited in a party’s account over a forged or unauthorized endorsement and subsequently the proceeds of the checks are converted by the individual responsible for the deposit, such diversion is the proximate cause of the loss.” *Liberman v Worden*, 1998 NY Misc LEXIS 717 at \*13 (citations omitted). Inasmuch as Rizer was “deemed to receive the proceeds when the funds were paid into [her] account” (*id.*), it was Breen’s subsequent conversion of the funds in her HSBC account that was the proximate cause of Rizer’s injury. Thus, even if Breen had forged her signature on the initial account documents, the eventual deposit of the funds into Rizer’s HSBC account defeats any claim against Greater Beneficial for aiding and abetting conversion.

However, Rizer also alleges that she incurred surrendered charges in connection with Breen’s early withdrawals from the Greater Beneficial annuity. These surrender charges were not deposited into her HSBC account and, as such, she cannot be deemed to have received them. According to the Amended Complaint, these charges were in the amounts of \$1,081.58 and

\$687.78, for a total of \$1,769.36. Am Compl ¶ 56. Thus, Rizer's claim against Greater Beneficial for aiding and abetting conversion is dismissed, except as to the \$1,769.36 in early withdrawal charges.

Conversion:

Rizer alleges that Greater Beneficial is "vicariously liable for the conversion committed by its paid agent, Defendant John Breen, in that Breen acted within the scope of his authority and in furtherance of Defendant's [Greater Beneficial] business in the transactions described above." Am Compl ¶ 133.

Although Greater Beneficial moves for summary judgment dismissing Rizer's claim against it for conversion, it fails to establish a prima facie right to such relief. Greater Beneficial contends that it cannot be held vicariously liable for Breen's actions because he was an independent contractor, rather than an employee of Greater Beneficial. However, a review of the General Agent Agreement between Greater Beneficial and Breen reveals no language stating that Breen was an independent contractor. *See* Quinn Aff, Exh M. If Breen was an employee and acting in furtherance of his duties to Greater Beneficial, Greater Beneficial may be vicariously liable. *Lundberg v State of New York*. 25 NY2d at 470. As such, summary judgment would be premature at this time.

Moreover, even if Greater Beneficial is correct in its assertion that Breen functioned solely as an independent contractor, that, alone, is insufficient to preclude Rizer's claim for conversion. Simply, a principal can be held vicariously liable for the acts of an independent contractor if the principal is negligent in selecting, instructing or supervising the independent contractor. *Adams v Hilton Hotels, Inc.*, 13 AD3d 175, 177 (1st Dep't 2004); *Leeds v D.B.D.*

*Services, Inc.*, 309 AD2d 666, 667 (1st Dep't 2003). As such, Rizer's claim for conversion against Greater Beneficial will not be dismissed.

Accordingly, Greater Beneficial's motion for summary judgment is granted to the limited extent of dismissing Rizer's claim against it for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, unjust enrichment, and aiding and abetting conversion, except as to Rizer's claim for \$1,769.36 in early withdrawal charges. Greater Beneficial's motion for summary judgment of Rizer's claim against it for conversion is denied.

**Kegeler's/Lavere's<sup>10</sup> and North Country/Graham's<sup>11</sup> Motions for Summary Judgment**

Rizer brings claims against Kegeler's Inc., Lavere, North Country and Graham for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, aiding and abetting conversion, and for unjust enrichment.

Kegler's Inc. is a corporation that does business as a bar called Kegeler's Lounge in Watertown. Lavere is its owner.

Rizer alleges that Lavere was a friend of Breen and that Breen was a regular customer of Kegeler's Lounge. She alleges that Breen used funds from the HSBC account to play Quick Draw at Kegeler's Lounge. Quick Draw is a lawful New York State lottery game that was available at Kegeler's Lounge, Speak Easy and numerous other establishments throughout New York State. Rizer alleges that Breen amassed considerable debts from losses at that game.<sup>12</sup>

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<sup>10</sup> Motion sequence no. 007.

<sup>11</sup> Motion sequence no. 010.

<sup>12</sup> Breen's Quick Draw losses accrued primarily to the State Lottery. Kegeler's Lounge and the Speak Easy received a 6% commission on lottery sales as an agent of the State Lottery.

Rizer also alleges that from January 10, 2000 through July 25, 2001, Kegeler's and Lavere accepted nine checks from Breen that were drawn on her HSBC account, and that these checks were accepted and endorsed by Lavere.

North County is a corporation that does business as a bar called Speak Easy in Watertown; Graham is its principle owner.

Rizer alleges that Breen used funds from her HSBC account to play Quick Draw at Speak Easy. Rizer also alleges that North Country and Graham accepted eleven checks from Breen that were drawn on her HSBC account. Ten of the checks were payable to cash and were endorsed by Graham. These ten checks were "counter checks," the generic checks provided by the bank without the name or number of the account printed on them. The eleventh check referenced in the Amended Complaint was drawn by Breen on the HSBC account on November 8, 1999, payable to Arcade Tavern Corporation, a non-party in this action. This amount was advanced as a loan in connection with the opening of another tavern, known as the Paddock Club, in 1999.

Statute of Limitations Defense:

Rizer alleges that Kegeler's and Lavere aided and abetted Breen's conversion of her assets by accepting checks drawn from her HSBC account as payment for gambling losses. A claim for aiding and abetting conversion is governed by the three-year statute of limitations for the tort of conversion. *Heffernan v Marine Midland Bank*, 283 AD2d 337, 338 (1st Dep't 2001). However, all nine checks identified in the Amended Complaint were drawn in 2000 and 2001, more than three years prior to the commencement of this action on May 11, 2005. Accordingly, the claim against Kegeler's and Lavere for aiding and abetting conversion must be dismissed.

Rizer similarly alleges that North Country and Graham aided and abetted in Breen's

conversion of her assets. Of the ten “counter checks” identified in the Amended Complaint, nine were drawn and negotiated more than three years prior to the commencement of this action on May 11, 2005. The eleventh check, payable to Arcade Tavern Corp., was also drawn more than three years prior to the commencement of this action. Only one of the “counter checks” was drawn less than three years prior to the commencement of this action, on July 25, 2002.

Accordingly, with respect to the ten checks that were drawn and negotiated more than three years prior to May 11, 2005, Rizer’s claims are barred by the statute of limitations. However, her causes of action with respect to the July 25, 2002 check are not barred by the statute of limitations.

With the exception of the July 25, 2002 check endorsed by Graham, Rizer’s causes of action for aiding and abetting fraud and breach of fiduciary duty must also be dismissed against Kegeler’s, Lavere, North Country and Graham as barred by the statute of limitations. Inasmuch as the legal remedy for conversion would have afforded Rizer full and complete relief, these causes of action are incidental to the underlying cause claim of conversion. As such, the three-year statute of limitations for conversion is also applicable to her causes of action for aiding and abetting fraud and aiding and abetting breach of fiduciary duty. *Gold Sun Shipping Ltd. v Ionian Transport, Inc.*, 245 AD2d 420, 421 (2d Dep’t 1997); *accord Mohan v Hollander*, 303 AD2d 473, 474 (2d Dep’t 2003). In addition, where a party seeks monetary damages for an alleged breach of fiduciary duty, the statute of limitations is three years. *See Svenska Finans Intl. BV v Scolaro, Schulman, Cohen, Lawler & Burstein, P.C.*, 37 F Supp2d 178, 183-84 (NDNY 1999). Hence, Rizer’s causes of action against Kegeler’s, Lavere, North Country and Graham for aiding and abetting breach of fiduciary duty are also independently barred by the statute of limitations.

Rizer's opposes the statute of limitations defense, contending that a claim against a fiduciary does not accrue until the fiduciary relationship has been terminated, (*Golden Pacific Bank Corp. v Federal Deposit Ins. Corp.*, 273 F 3d 509 (2d Cir 2001)), and that she "acted in a timely fashion once Breen repudiated his fiduciary responsibilities to Plaintiff in [October] 2004 when he pleaded guilty." Opp Br at 14. However, she fails to cite any case in which this has been applied not to the fiduciary himself, but to a third-party allegedly responsible for "aiding and abetting" the fiduciary. The law on this point is contrary to her position. In *Kaufman v Cohen*, 307 AD2d at 126-27, for example, the First Department held that different statutes of limitations may apply to a breach of fiduciary claim against the fiduciary, and an aiding and abetting claim against co-defendants. The court held the "equitable estoppel or a discovery rule" did not apply to the claims for aiding and abetting against third-parties. *Id.* Although the court found that the claim against the actual fiduciary was not time-barred, the claim against the alleged aider and abettor was time-barred. *Id.*

Rizer also argues that the defendants should be "equitably estopped" from asserting the statute of limitations because "Breen's acts of conversion, fraud and larceny were concealed by the defendants from Plaintiff until Breen was sentenced in March 2005." Opp Br at 16. This argument is without merit. Equitable estoppel "requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the misrepresentation and that the reliance caused plaintiff to delay bringing timely action." *Kaufman v Cohen*, 307 AD2d at 122. Yet, both the Amended Complaint and Rizer's opposition to the summary judgment motions are devoid of any facts demonstrating that Lavere or Graham made any misrepresentations to her, or that either Lavere or Graham had a

fiduciary relationship with her that required them to make disclosures to her. Lavere and Graham simply negotiated checks tendered to them by Breen, which checks were honored by HSBC. These facts are insufficient to estop defendants from asserting the statute of limitations as a defense.

Accordingly, Rizer's claims against Kegeler's North Country and Graham and Lavere for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and aiding and abetting conversion are barred by the statute of limitations and are dismissed, except with respect to the July 25, 2002 check endorsed by Graham.

Aiding and Abetting Fraud, Breach of Fiduciary Duty and/or Conversion:

Rizer's claims against North Country and Graham, for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and aiding and abetting conversion, with respect to the July 25, 2002 check endorsed by Graham, are not barred by the statute of limitations. However, as a matter of law, Rizer cannot make out a cause of action for these claims.

These claims require allegations that, among other things, the defendants had actual knowledge of Breen's wrongful conduct and substantially assisted him. Rizer fails to make any allegation that, if true, would support her contention that North Country and Graham had actual knowledge of Breen's defalcations. Rather, Rizer alleges only that Graham "encouraged" Breen to play Quick Draw, and that Graham should have known that Breen was using her assets to play, in light of Breen's "modest" financial situation and because they lived in a small town. Am Compl ¶ 64. These allegations, however, are insufficient to establish that North Country and Graham had actual knowledge of Breen's wrongdoing. At most, these assertions merely imply constructive knowledge, which is insufficient. *See Kaufman v Cohen*, 307 AD2d at 125.

In essence, Rizer is asserting that the law places a duty on members of the general public to inquire as to whether the person they are dealing with is using funds that belong to another. However, no such duty exists. The duty to monitor the conduct of an agent falls upon the principal, not third parties. *See Thomson v New York Trust Co.*, 293 NY 58, 69 (1944). Accordingly, Graham, who had no fiduciary or other relationship to Rizer, had no duty to report Breen's Quick Draw losses to her. Furthermore, Rizer had expressly authorized Breen's access to her account and failed to review account information which would have disclosed Breen's conduct and, thus she bears the responsibility for her stepfather's defalcations. *Depew Devel., Inc. v AT&A Trucking Corp.*, 210 AD2d 974, 975 (4th Dep't 1994) ("the loss should be placed on plaintiff, whose inattention allowed its [agent] to misappropriate funds, undetected, for several years").

Moreover, Rizer's assertion that the defendants could not have been unaware of Breen's defalcation of her assets, because "there was no credible explanation for [Breen's] conduct other than as the expenditure of funds taken improperly from his daughter's account" (Am Compl ¶ 27), is no more than an unsupported conclusion. Although the Court makes no assumptions of either normative or appropriate parent/child relationships, the Court is unwilling to accept as fact the conclusion that a parent, step-parent or other family member of a person who has earned a great deal of money would necessarily have to commit some wrongdoing in order to be publically spending that money. What, if any, portion of Rizer's money she wanted her step-father to spend on himself and/or other members of the family is not an issue in this motion. However, even if Rizer is correct that third-parties who saw Breen spending large amounts of money would have assumed that it was money earned by her, that does not constitute actual

knowledge regarding the source of the funds. And even if it could be considered a basis for actual knowledge, without more, the conclusion that third-parties who saw Breen spending money must have known that it was obtained through actions Rizer would consider wrong and/or illegal is untenable.

Rizer also fails to present evidence that North Country and Graham “substantially assisted” Breen in achieving a conversion of her assets. The Amended Complaint and Rizer’s opposition to the motion merely contains assertions that the defendants “encouraged” Breen to play Quick Draw and that Graham knew that Breen had a drinking problem. These allegations, however, even if true, do not constitute the elements of a tort. Quick Draw is a lawful game in the State of New York. North Country was a New York State Lottery sales agent and marketed Quick Draw to numerous patrons. Further, given the fact that North Country is a bar, many of these other patrons may have also been drinking. Thus, the fact that Breen played Quick Draw at this establishment does not amount to assistance given to effectuate the defalcation of Rizer’s assets.

Rizer’s allegations do not, as a matter of law, satisfy the elements of “actual knowledge” or “substantial assistance.” Accordingly, with respect to the July 25, 2002 check, the causes of action against North Country and Graham for aiding and abetting fraud, breach and fiduciary and conversion are dismissed.

#### Unjust Enrichment:

Rizer’s cause of action against Kegeler’s, Lavere, North Country and Graham for unjust enrichment must also be dismissed, as the Amended Complaint fails to set forth allegations that would support the claim. “The essential inquiry in any action for unjust enrichment or restitution

is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. . . . [and] [g]enerally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law . . . and whether the defendant's conduct was tortious or fraudulent." *Manufacturer's Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 117 (1st Dep't 1990) (internal citations omitted). Here, the money paid by Breen to these defendants was for legally incurred gambling debts. There was no mistake of fact or law, and equity and good conscience does not in any way demand that they not retain the commissions they earned from Breen's playing of Quick Draw. Accordingly, Rizer's claims against Lavere, Kegeler's, North Country and Graham for unjust enrichment are dismissed.

Therefore, both motions for summary judgment are granted, and the Amended Complaint is dismissed against Kegeler's, Lavere, North Country and Graham.

Accordingly, it is

ORDERED that HSBC's motion for summary judgment is granted; and it is further

ORDERED that Community Bank's motion for summary judgment is granted; and it is further

ORDERED that Smith Barney's motion for summary judgment and to dismiss the complaint is granted; and it is further

ORDERED that Smith Barney's motion to compel arbitration of any claims against it that are not dismissed by the Court is denied as moot; and it is further

ORDERED that Unity Mutual's motion for summary judgment is granted as to the claims against it for aiding and abetting fraud, aiding and abetting breach of fiduciary duty and unjust enrichment; and it is further

ORDERED that Unity Mutual's motion for summary judgment is denied with regard to that portion of the claim against it for aiding and abetting conversion regarding surrender charges and/or early withdrawal fees, and is otherwise granted as to the claim against it for aiding and abetting conversion, and; and it is further

ORDERED that Unity Mutual's motion for summary judgment is denied as to the claim against it for conversion; and it is further

ORDERED that Greater Beneficial's motion for summary judgment is granted as to the claims against it for aiding and abetting fraud, aiding and abetting breach of fiduciary duty and unjust enrichment; and it is further

ORDERED that Greater Beneficial's motion for summary judgment is denied with regard to that portion of the claim against it for aiding and abetting conversion regarding surrender charges and/or early withdrawal fees, and is otherwise granted as to the claim against it for aiding and abetting conversion, and; and it is further

ORDERED that Greater Beneficial's motion for summary judgment is denied as to the claim against it for conversion; and it is further

ORDERED that Kegeler's and Lavere's motion for summary judgment is granted; and it is further

ORDERED that Graham and North Country's motion for summary judgment is granted; and it is further

ORDERED that the remainder of the action shall continue and it is further  
ORDERED that the clerk shall enter judgment accordingly.

Dated: January 29, 2007

ENTER:

\_\_\_\_\_/s/\_\_\_\_\_  
J.S.C.