Case No. _____ JEFFERSON CIRCUIT COURT
DIVISION _____
JUDGE _____

PLAINTIFF A PLAINTIFF

v. **[PLAINTIFF B]'S RESPONSE TO [DEFENDANT BANK]'S MOTION TO DISMISS CROSS-CLAIM**

[PLAINTIFF B], *et al*. DEFENDANT

* * * * * * * *

Comes now the Defendant and Cross-Claim Plaintiff, [Plaintiff B], and submits this Response to [Defendant]'s Motion to Dismiss her Cross-Claim:

I. FACTUAL BACKGROUND

The following recitation of facts is taken verbatim from the response of cross-claim Defendant [Defendant] (formerly ********* Bank) to Interrogatory No. 6 in Response of Defendant ********** Bank to Plaintiff B's First Set of Interrogatories and Requests for Production of Documents [hereinafter [Defendant]'s Response to Interrogatory No. 6, attached hereto as Exhibit 1]:

> [Bank representative] M. Smith met with Ms. [Decedent] and co-defendant, [Plaintiff B], at the Jeffersontown branch of [Bank] on September 27, 2007. Ms. [Decedent] expressed a desire to pay Ms. [Plaintiff B] for her help managing Ms. [Decedent]'s affairs. Ms. [Plaintiff B] stated that she did not believe she needed to be paid, but Ms. [Decedent] wanted to leave Ms. [Plaintiff B] something and was concerned her nieces might later prevent such a gift. Ms. Smith suggested that Ms. [Decedent] consider a certificate of deposit ("CD") with a payable-on-death ("POD") designation to Ms. [Plaintiff B].
>
> Ms. Smith explained to Ms. [Decedent] and Ms. [Plaintiff B] that Ms. [Plaintiff B], but for her rights as power of attorney and fiduciary for Ms. [Decedent], would be unable to access the money in the CD until Ms. [Decedent] died. The group met for approximately 45 minutes, and ultimately, Ms. [Decedent] determined that she wanted to open a CD with money from another bank account and have it payable to Ms. [Plaintiff B] upon her death. Ms. Smith effectuated this opening and assisted the women in completing the paperwork required.

> On or about March 17, 2008, representatives of ********** came into the [Bank] branch [address]. The representatives presented the bank with the court's appointment of guardian, and *********, an employee, assisted in changing the signature cards for all Ms. [Decedent]'s accounts. Ms. ********* did not ask ********** whether it intended for the POD designation to remain on the CD, and there was no POD designation on the CD's new signature card. The ownership of the account was not changed.
>
> After Ms. [Decedent]'s death, Ms. [Plaintiff B] came into [Bank]'s Jeffersontown branch and asked for a distribution of the CD Ms. [Decedent] had opened. Ms. Smith was aware that Ms. [Plaintiff B] had sought to be appointed Ms. [Decedent]'s guardian, but instead the court had appointed **********. Ms. Smith made a determination that [Bank] could not pay Ms. [Plaintiff B] the proceeds of the CD at that time. Recognizing that there might be a dispute over ownership of the funds, she believed it would be prudent to hold the account funds until ownership could be resolved.

[Defendant]'s Response to Interrogatory No. 6, at 5, 6.

As argued below, these facts show that Ms. [Plaintiff B], as a donee beneficiary, can succeed under Kentucky law on her claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. The genuine factual issues presented herein preclude granting [Defendant]'s Motion to Dismiss on these claims.

II. LEGAL STANDARD OF REVIEW

In ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. Mims v. Western-Southern Agency, Inc., 226 S.W.3d 833, 835 (Ky.App.2007). Additionally, a trial court's consideration of matters outside the pleadings converts a motion to dismiss into a motion for summary judgment. CR 12.02 and McCray v. City of Lake Louisvilla, 332 S.W.2d 837, 840 (Ky.1960). Because [Defendant] has asked the Court to consider matters outside the pleadings[1] in ruling on its

[1] Among other matters, in its Motion to Dismiss, at page 4, [Defendant] asks the Court to consider the implications of a recent mediation settlement between Ms. [Plaintiff B] and Ms. Plaintiff A. Such reference not only refers to matters outside the pleadings, but also appears to

Motion to Dismiss, the motion should be decided on a summary judgment standard. The facts presented therefore "must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky.1991).

III. ARGUMENT

A. As a donee beneficiary, Ms. [Plaintiff B] has a claim against [Defendant] for breach of contract under Kentucky law

1. A donee beneficiary has standing to sue for breach of contract under Kentucky law

"It is well established that a third person may, in his own right and name enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration." Presnell Const. Managers, Inc. v. EH Const., LLC, 134 S.W.3d 575, 579 (Ky.2004), *citing* 17A Am. Jur. 2d, Contracts § 435 (1991). A third-party "who was intended by the parties to benefit from the contract, namely, a donee or a creditor beneficiary, has standing to sue on a contract." Id. The Kentucky Supreme Court in Presnell went on to adopt the following definition of "donee beneficiary": "One is a donee beneficiary if the purpose of the promisee in buying the promise is to make a gift to the beneficiary." Id. The Kentucky Supreme Court had earlier clarified that

> [a]s in the case of other intangibles such as bonds or stock certificates, the right gratuitously conferred on the other party is recognized and is enforceable on the theory of third party beneficiary contract. It is not necessary that such a contract be supported by a consideration moving from the beneficiary, and it is not necessary that a 'gift' be proved.

Saylor v. Saylor, 389 S.W.2d 904, 905 (Ky. 1965). The U.S. Supreme Court has stated the rule succinctly: "A promise in a contract creates a duty in the promisor to any intended beneficiary to

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run contrary to Rules of the Supreme Court, Mediation Rule 12, regarding confidentiality, and KRE 408.

perform the promise, and the intended beneficiary may enforce the duty." Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 476 (2006), *citing* 2 Restatement (Second) of Contracts § 304, p. 448 (1979).

In the instant case, [Defendant]'s (the promisor's) promise in its contract to follow Ms. [Decedent]'s (the promisee's) expressed desire to make a gift to Ms. [Plaintiff B] as the POD beneficiary, in return for the bank's making temporary use of Ms. [Decedent]'s money, created a duty in [Defendant] to perform this promise, and Ms. [Plaintiff B] is entitled to enforce this duty under Kentucky law as an intended donee beneficiary.

2. Ms. [Plaintiff B] is a donee beneficiary on these facts

The plain language of the contract itself makes clear Ms. [Decedent]'s donative intent: Ms. [Plaintiff B] is the named beneficiary on the consumer signature card, attached hereto as Exhibit 2. In addition, the facts surrounding the formation of the contract make clear that the purpose of the promisee, Ms. [Decedent], in contracting with the bank, was to make a gift to Ms. [Plaintiff B]. Indeed, "gift" is the very word Ms. Smith, [Bank]'s representative, has used to characterize the nature of the POD CD that Ms. Smith recommended Ms. [Decedent] open.

On September 27, 2007, Ms. [Decedent] visited a [Bank] branch to inquire how she might, after her death, compensate Ms. [Plaintiff B] "for her help managing Ms. [Decedent]'s affairs." [Defendant]'s Response to Interrogatory No. 6, at 5. Based on Ms. Smith's recommendations after a 45-minute conversation, Ms. [Decedent] contracted with [Bank] Bank to take funds from an existing [Bank] bank account she held and use those funds to create a new POD CD account with Ms. [Plaintiff B] as the beneficiary. Id. In assisting with the paperwork for opening the new POD CD account, Ms. Smith was well aware that creating an instrument for the benefit of Ms. [Plaintiff B] was Ms. [Decedent]'s intent and the very reason for her visit to

the bank that day: Ms. Smith, Ms. [Decedent] and Ms. [Plaintiff B] had just had a 45 minute conversation regarding Ms. [Decedent]'s expressed desire to "leave Ms. [Plaintiff B] something" for Ms. [Plaintiff B]'s help in managing Ms. [Decedent]'s affairs. Id. Moreover, Ms. Smith was aware that Ms. [Decedent] was "concerned her nieces might later prevent such a gift." Id. The plain language of dontative intent on the signature card, as well as the facts recited by the bank's representative, when viewed in the light most favorable to Ms. [Plaintiff B], unambiguously indicate that Ms. [Plaintiff B] was the donee beneficiary of the contract Ms. [Decedent] entered into on that day.

3. The purpose of the POD CD was to benefit Ms. [Plaintiff B]

In addition to the plain language of the contract making Ms. [Plaintiff B] the donee beneficiary, the facts as recited by the bank's representative, Ms. Smith, also belie [Defendant]'s contention that this was an ordinary CD and that the POD designation of Ms. [Plaintiff B] is immaterial to the contract. If the purpose of the POD CD had been only "for the deposit and safeguarding of certain funds, for a fixed period of time, for a fixed interest rate," [see [Defendant]'s Motion to Dismiss Cross-Claim, at 7], then surely Ms. Smith would not have counseled Ms. [Decedent] to open a CD with Ms. [Plaintiff B] as POD beneficiary. Instead, Ms. [Decedent] would have simply left the funds in her previous [Bank] account, where the funds were already being safeguarded by the bank, or opened a CD with no POD beneficiary.

To the contrary, the bank's representative, Ms. Smith, has acknowledged that the purpose of Ms. [Decedent]'s 45-minute visit to the Jeffersontown [Bank] branch on September 27, 2007 was for Ms. [Decedent] to discuss ways in which she might make a "gift" to Ms. [Plaintiff B] that Ms. [Decedent]'s nieces could not "prevent." [Defendant]'s Response to Interrogatory No. 6, at 5. The POD CD, with Ms. [Plaintiff B] as the named beneficiary, was the specific contractual

vehicle that Ms. Smith, and thus the bank, recommended to this end. Providing a gift to Ms. [Plaintiff B] was clearly important to Ms. [Decedent] on these facts, and constituted the very reason for her visit to the bank. The POD beneficiary designation is therefore an essential and material provision of the contract. To deny that providing a gift to Ms. [Plaintiff B] was an essential, material term of the contract is contrary to both the plain language of the contract and the facts as [Defendant] itself has presented them. By unilaterally removing Ms. [Plaintiff B] as POD beneficiary, [Defendant] breached its promise to Ms. [Decedent] to make Ms. [Plaintiff B], absent a clear directive from Ms. [Decedent] to do otherwise before the CD's maturity date, the beneficiary of the CD.

4. [Defendant] had no right under the terms of the contract or under Kentucky law to remove Ms. [Plaintiff B] as the POD beneficiary

a. A promisor has a duty to a donee beneficiary to perform under the terms of the contract entered into with the promisee

Fundamental to the law of contracts in the Commonwealth of Kentucky is the duty of the promisor to perform his promise. A promise to discharge a duty creates a duty to both the promisee and to the third party beneficiary. Hendrix Mill & Lumber Co. v. Meador, 16 S.W.2d 482, 484 (Ky.App.1929).

Just as fundamental as is the notion that, "[a]bsent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 385 (Ky.App.2002). "The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms." Id. "The rule is well settled that where the provisions of a contract are clear, and free of any ambiguity or uncertainty of meaning, no reference will be had to evidence outside the agreement to determine

its meaning." Gesing v. Grand Rapids Hardware Co., 362 F.2d 363, 366 (6th Cir.1966). The contract in the instant case has no provision allowing the bank to avoid its duty to perform its promise to make Ms. [Plaintiff B] the POD beneficiary of the CD account, nor any provision allowing the bank to remove Ms. [Plaintiff B] as the POD beneficiary.

b. The terms of the contract did not allow [Defendant] to remove Ms. [Plaintiff B] as the POD beneficiary

There is no provision in the contract in this case that would allow the bank to remove the POD beneficiary. In the instant case, the contract comprises the language of the Consumer Signature Card [attached hereto as Exhibit 2], the Time Deposit Account Agreement and Pricing Schedule (hereinafter "the CD Agreement") [Exhibit 3], , and the Certificate of Deposit Receipt [Exhibit 4], all of which were executed on or about September 27, 2007. These documents do not refer to any other documents or instruments that may control the agreement made between the parties, including any undisclosed bank policies regarding such accounts. The contract unambiguously provides that, as long as Ms. [Decedent] did not choose to change the POD beneficiary designation, Ms. [Plaintiff B] would be the POD beneficiary of the CD account upon Ms. [Decedent]'s death: "Upon Depositor's death, or the death of the last surviving Depositor if the Account is a joint Account, each beneficiary surviving Depositor shall be paid his or her share, and the share of each beneficiary not surviving Depositor will be payable to Depositor's estate." CD Agreement, at 2. Paying the named beneficiary was the bank's duty under the contract.

Just as importantly, only the *depositor* retains the right to cancel or change the designated beneficiary under the contract: "Depositor reserves the right to change or cancel any beneficiary designation by an instrument satisfactory to Bank, which is delivered to Bank during the lifetime of Depositor." Id. No such right is reserved by the bank. Were such a provision to be made part

of the contract, it would inarguably be a material term, and, per the contract itself and per Kentucky contract law, require, at a minimum, notice to all parties. [2]

The facts relating to the 45-minute meeting of September 27, 2007, indicate that the POD designation in favor of Ms. [Plaintiff B] was material to the subject matter of the contract Ms. [Decedent] entered into. Even more obviously, Ms. [Plaintiff B] is the named beneficiary on the face of the contract. A contract that is sufficiently definite and certain in its terms is enforceable. Story v. Gibbs, 309 S.W.2d 334, 335 (Ky.1958). The plain and unambiguous language of the contract itself leaves no room for [Defendant] to argue that it at any time had the power to remove Ms. [Plaintiff B] as POD beneficiary under the contract terms.

c. Kentucky law does not allow a bank to unilaterally remove a POD beneficiary from an account

Under Kentucky law,

> If the account is a P.O.D. account, on death of the original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the original payee.

KRS § 391.315(2).

[Defendant] can cite to no authority in Kentucky statutory or case law that allows a bank to thwart the clear intention of a depositor to a POD account by unilaterally removing a POD beneficiary, including upon the transfer of that account to a guardian. To the contrary, Kentucky law makes clear that, Ms. [Decedent] having now passed away, the "sums remaining on deposit belong" to Ms. [Plaintiff B]. Not in the CD Agreement, nor any other part of the contract into

[2] "Bank may from time to time adopt new provisions or fees or amend this Agreement or Bank's Pricing Schedule which shall be binding upon Depositor after notice has been mailed to Depositor at the last address shown for the Account on Bank's records, by posting in branches of Bank or as otherwise permitted by law." CD Agreement, Exhibit 2, at 1.

which Ms. [Decedent] entered with [Bank] Bank, does the bank reserve the right to change or cancel the POD beneficiary: the contract clearly reserves that right to the depositor alone.[3] Even if there were a colorable argument that a state-appointed *guardian* might be able to change or cancel a beneficiary designation, no authority in law or in the contract allows a *bank* to make such a decision. Such sweeping authority to unilaterally, and without notice to any other party, instantly terminate a POD beneficiary designation on a CD, and thereby thwart the expressed desire of an elderly woman to make a gift to her neighbor and friend, has no basis in the law of Kentucky. This unilateral removal of a term material to the contract constituted a breach of that contract by the bank.

5. [Defendant] is bound under the terms of the contract to honor the depositor's "request" that Ms. [Plaintiff B] be made and remain the POD beneficiary

[Defendant]'s contention that the POD beneficiary designation is merely a "request" and thereby not a "material term of the agreement" [[Defendant]'s Motion to Dismiss Cross-Claim, at 7] is specious, unsupported by the facts or the law, and contrary to the very terms of the contract itself. [Defendant] *agreed* to Ms. [Decedent]'s request by entering into the contract.

The CD Agreement unambiguously states that "*Bank agrees* to maintain the Account for Depositor and *to perform according to this Agreement*." CD Agreement, Exhibit 2, at 1 (emphasis added). For Kentucky POD accounts, that agreement means that "*Upon Depositor's death*, or the death of the last surviving Depositor if the Account is a joint Account, *each beneficiary* surviving Depositor *shall be paid his or her share*, and the share of each beneficiary not surviving Depositor will be payable to Depositor's estate." Id., at 2 (emphasis added).

[3] "Depositor reserves the right to change or cancel any beneficiary designation by an instrument satisfactory to Bank, which is delivered to Bank during the lifetime of Depositor." CD Agreement, Exhibit 2, at 2.

[Defendant] cites no authority, from any jurisdiction, for its contention that a "request" by a party to an executed contract is not part of that contract. By entering the contract, the bank agreed to Ms. [Decedent]'s request, and thereby undertook a duty to fulfill it. In light of the facts as recited by Ms. Smith regarding the 45-minute meeting on September 27, 2007, the primary purpose of that meeting was Ms. [Decedent]'s motivation to make a gift to Ms. [Plaintiff B] upon Ms. [Decedent]'s demise. Such gift was clearly foremost in Ms. [Decedent]'s mind and the time of her visit, and therefore not only a part of the contract she subsequently entered into, but *material* to said contract as well. [Defendant]'s contention that Ms. [Decedent]'s intent to make a gift to Ms. [Plaintiff B] was merely a "request" and was not material to the contract is contrary both to the plain language on the face of the contract and to the facts as recited by [Defendant] itself.

Nowhere in the contract does the bank reserve the right to terminate the interests of a POD beneficiary without an instrument from the depositor so stating. Nowhere does the bank reserve the right *not* to "perform according to this Agreement" with regard to POD beneficiary designations. Nowhere does the contract refer to documents outside the contract that may be relevant to the interests of POD beneficiaries, or indeed, to the interests of depositors. As argued in detail above, the facts as recited by [Defendant] itself show that the purpose and intent of Ms. [Decedent]'s contracting with the bank was to provide a gift to Ms. [Plaintiff B] upon Ms. [Decedent]'s death. By failing to honor Ms. [Decedent]'s "request," which the bank had agreed to by entering the contract, the bank breached the contract it made with Ms. [Decedent]. As an intended donee beneficiary, Ms. [Plaintiff B] now has the right to enforce the bank's duty to perform.

6. [Defendant]'s undisclosed policy for the unilateral cancellation of Ms. [Plaintiff B]'s POD beneficiary designation was not made part of the contract between Ms. [Decedent] and [Defendant]

a. The Doctrine of Incorporation by Reference is the law in Kentucky

It is an ancient law of the Commonwealth that "[o]ne writing cannot be connected with another unless it refer to it." Dillingham v. Estill, 3 Dana 21 (Ky.App.1835). Under the doctrine of incorporation by reference, where one contract refers to another document or instrument, the second document may properly constitute part of the original contract. *See, e.g.,* Childers Venters, Inc. v. Sowards, 460 S.W.2d 343 (Ky.1970) (holding that the doctrine of incorporation has not been abolished in Kentucky); Bartelt Aviation, Inc. v. Dry Lake Coal Co., Inc., 682 S.W.2d 796 (Ky.1985). Conversely, where the second document is nowhere referred to in the first, the second document is not made part of the contract. *See* id. Whether the terms of a document extrinsic to a contract are incorporated by reference into that contract is a question of fact. *See*, *e.g.*, Bartelt, *supra*, at 797-98; Home Lumber Co. v. Appalachian Regional Hospitals, Inc., 722 S.W.2d 912, 914 (Ky.App.1987) ("Whether or not the prime contract providing for arbitration is incorporated by reference into the purchase order contract is a question of fact").

Equally fundamental to Kentucky contract law is the notion that "[t]he parol evidence rule prevents a party from introducing testimony or other extrinsic evidence to vary or alter the terms of a written agreement." Caudill v. Acton, 175 S.W.3d 617, 620 (Ky.App.2004). Parol evidence may not be used to vary or contradict the terms of a written contract which embodies the parties' entire agreement. Stallard v. Adams, 228 S.W.2d 430, 431 (Ky.1950).

[Defendant] now wishes to vary the material terms of the contract, namely, its promise to Ms. [Decedent] to make Ms. [Plaintiff B] the POD beneficiary of the account, by relying on an

internal bank policy that was at no time disclosed to Ms. [Decedent] prior to, during, or after the making of the contract. As argued below, this attempt by the bank to renege on its promise to Ms. [Decedent] and shirk its duty to Ms. [Plaintiff B] cannot stand under Kentucky law.

b. No extrinsic bank policies are referred to in the instant contract, thus such policies are excluded as to material terms under Kentucky law under the Doctrine of Incorporation by Reference

The contract in the instant case makes no reference to extrinsic bank polices that will cancel the material terms of the account, including any policies relating to guardianships and/or POD accounts. As such, any extrinsic policies that are undisclosed to the contracting parties and that affect the *material* terms of the contract are not part of the contract under Kentucky law.

As noted in Section III.A.4.b., above, the contract in the instant case comprises the language of the Consumer Signature Card [Exhibit 2], the CD Agreement [Exhibit 3], and the Certificate of Deposit Receipt [Exhibit 4], all of which were executed on or about September 27, 2007. These documents do not refer to any other documents or instruments that may control the agreement made between the parties. Amendments or new provisions of the agreement require notice from the bank to the depositor.[4]

c. The bank's undisclosed policy has neither a basis in law nor a rationale under its own terms

[Defendant] contends that had no duty to disclose to Ms. [Plaintiff B] any "information particular to the bank's policy regarding guardianship appointments and accounts." [Defendant]'s Motion to Dismiss Cross-Claim, at 7. [Defendant] also claims that "continuing the POD designation in favor of Ms. [Plaintiff B] would not have been permitted in the guardian

[4] "Bank may from time to time adopt new provisions or fees or amend this Agreement or Bank's Pricing Schedule which shall be binding upon Depositor after notice has been mailed to Depositor at the last address shown for the Account on Bank's records, by posting in branches of Bank or as otherwise permitted by law." [CD Agreement, Exhibit 2, at 1]

account." [Response of Defendant [Bank] Bank to Rebecca [Plaintiff B]'s First Set of Interrogatories and Requests for Production of Documents, Exhibit 5, at 4.] The policy to which the bank appears to be referring is the bank's internal policy, which is does not disclose to its customers and did not disclose to Ms. [Decedent] or Ms. [Plaintiff B], that upon transfer of any of its customers' POD CD accounts to the care of a guardian, the bank instantly terminates the interests of any joint owner, power of attorney, or POD beneficiary. *See* Document Entitled "Kentucky Variances – Guardian", attached hereto under seal as Exhibit 6, at 2, 3. Quite astoundingly, the bank appears to terminate these interests without notification to any interested person, including any joint owners, powers of attorney, or POD beneficiaries. Id.

There is no Kentucky statute, case, or other authority that prevents POD beneficiaries from being named in guardianship accounts, nor does any authority require the removal of POD beneficiaries from such accounts. Nor, as noted in Section III.A.4.c., above, does any authority grant a *bank* the sweeping power to unilaterally cancel a POD beneficiary on an account. The overreaching powers of this undisclosed, internal policy therefore simply have no basis in Kentucky law.

Nor is any rationale for this policy provided. To compare, the same internal bank document clearly explains the rationale for the bank's policy, also undisclosed, of refusing to permit "restricted guardian accounts," namely, that such accounts are impracticable to enforce. Exhibit 6, at 1. In sharp contrast, the policy at issue here, whereby the bank can unilaterally terminate the interests of a joint owner, power of attorney, or POD beneficiary in any CD account placed under guardianship, is supported by no such rationale. Under this undisclosed policy, the bank allows itself to terminate these interests for no reason at all.

Even if this policy had a basis in the law or in reason, there is no basis for [Defendant] to argue that said policy applies to the September 27, 2007 POD CD contract between the bank and Ms. [Decedent]. None of the contract documents refer to this policy, as is required under Kentucky's doctrine of incorporation by reference for its terms to affect or to be made part of the material terms of the contract. Moreover, the internal bank policy clearly constitutes parol evidence, as it is entirely extrinsic to the contract documents, even intentionally hidden by the bank from its customers. The policy at issue thus never formed part of the contract with Ms. [Decedent] and cannot control that contract. "The court cannot read words into the contract which it does not contain." Goff v. Blackburn, 299 S.W. 164, 165 (Ky.App.1927).

Finally, even if the bank's policy were applicable to the contract Ms. [Decedent] made with the bank, the policy provides no excuse for the bank to avoid performing its duty under the contract. Even "impossibilities arising from the inability of the promisor to perform an act do not discharge the duty created by the contract." Raisor v. Jackson, 225 S.W.2d 657, 659 (Ky.1950). The bank's policy of secretly and unilaterally removing POD beneficiaries from guardianship accounts represents a self-created "impossibility" that provides no excuse for the bank to avoid its duty to perform on its promise to Ms. [Decedent].

7. Whether [Defendant]'s unilateral removal of Ms. [Plaintiff B]'s name from the POD CD constitutes a breach of contract is a question of fact under Kentucky law

Whether a breach of contract has occurred is a generally a question of fact for a jury to decide. *See, e.g.*, Pauline's Chicken Villa, Inc. v. KFC Corp., 701 S.W.2d 399, 401 (Ky.1985); Chaplin v. Bessire & Co., 361 S.W.2d 293, 295 (Ky.1962); Straney v. Smith, 255 S.W.2d 653, 655 (Ky.1953). Where there is evidence that the contract was made for the benefit of a third party, a factual question precluding summary judgment is created concerning that third party's

right to enforce the contract. *See* Sexton v. Taylor County, 692 S.W.2d 808, 810 (Ky.App.1985) (a case in which no evidence was presented that appellant was a donee beneficiary).

There is no Kentucky case that precisely addresses the narrow issue of whether a bank that, without direction from the depositor, removes the name of a POD beneficiary from a POD CD has breached its contract with the depositor and thereby to the third-party beneficiary. Nevertheless, "[t]he fact that no case has been found in which relief has been granted under similar circumstances is not a controlling reason for refusing it; otherwise, the court would often find itself powerless to grant adequate relief, solely because the precise question had never arisen." Henkin, Inc. v. Berea Bank & Trust Co., 566 S.W.2d 420, 423 (Ky.App.1978), *citing* 27 Am.Jur.2d, Equity, Section 121.

There are of course cases that have decided similar issues. The Kentucky Court of Appeals has recently concluded that the issue of whether a bank has wrongly changed the name of a death beneficiary of a CD creates a genuine issue of material fact for a jury. Barnett v. Community Trust Bank, Inc., not reported in S.W.3d, *8, 2009 WL 4877691 (Ky.App.2009).[5] In Barnett, the depositor, Donnie, wished to change the death beneficiary of a CD account he owned jointly with his brother, Phillip. Id. at *2. A bank employee, without checking the ownership status of the account and without following the bank's internal policies, presented Donnie with a revised signature card indicating a change of the death beneficiary from Phillip to Donnie's wife. Id. The Kentucky Court of Appeals reversed the trial court's entry of summary judgment against Phillip, finding that evidence obtained in discovery suggested factual questions remained concerning whether Donnie actually intended to divest Phillip of his beneficial interest in the CD and, more importantly, whether the bank's mistake constituted a breach of its contract

[5] Opinion not yet final; cited here pursuant to CR 76.28(4)(c), and attached hereto as Exhibit 7.

with its depositor. Id. at *5-*8. Similar questions in the instant case are outlined in the preceding sections of this Response.

In Mims v. Western-Southern Agency, Inc., 226 S.W.3d 833, 834 (Ky.App.2007), an insurance company failed to properly execute a change of designated beneficiary form for an insurance policy. The Kentucky Court of Appeals held that, in the context of a life insurance policy in which the intent of the deceased regarding a change to the designated beneficiary is in dispute, summary judgment is inappropriate. Id. at 836-37.

In the instant case, factual issues abound concerning the bank's performance of its duty under the contract. Ms. [Decedent] made clear that she "wanted to open a CD with money from another [Bank] account and have it payable to Ms. [Plaintiff B] upon her death." [Defendant]'s Response to Interrogatory No. 6, Exhibit 1, at 5. There are no facts whatsoever to suggest that Ms. [Decedent] ever changed her mind regarding keeping Ms. [Plaintiff B] as the intended beneficiary. Additionally, the bank's secret policy of removing POD beneficiaries from guardianship accounts presents questions both of fact and of law. As noted above, the language of the contract allows only the depositor, not the bank, to remove a POD beneficiary. [Defendant] admits that its employee, **********, did not follow the bank's standard procedures in performing the transactions necessary to comply with the presentation of an order for court appointment of a guardian. Response of Defendant [Bank] Bank to Rebecca [Plaintiff B]'s First Set of Interrogatories and Requests for Production of Documents, Exhibit 5, at 4. Inexplicably, however, the bank declines to state what procedures Ms. ******** *did* follow. Id.

These issues of fact, which are material to the question of the bank's breach of its contract with Ms. [Decedent], preclude the granting of a motion to dismiss under Kentucky law,

and [Defendant]'s motion to dismiss Ms. [Plaintiff B]'s breach of contract claim should therefore be denied.

B. Ms. [Plaintiff B] has a claim under Kentucky law for breach of the Implied Covenant of Good Faith and Fair Dealing on these facts

"Within every contract, there is an implied covenant of good faith and fair dealing, and contracts impose on the parties thereto a duty to do everything necessary to carry them out." Farmers Bank and Trust Co. of Georgetown, Ky. v. Willmott Hardwood, Inc., 171 S.W.3d 4, 11 (Ky.2005), *citing* Ranier v. Mount Sterling National Bank, 812 S.W.2d 154, 156 (Ky.1991). On September 27, 2007, [Defendant], formerly [Bank], agreed to [Decedent]'s request to make her neighbor and friend, Rebecca [Plaintiff B], an intended donee beneficiary of the POD CD account. [Defendant] now has a duty under Kentucky law and the terms of its own contract to do everything necessary to carry out that agreement.

1. The facts show the bank did not deal fairly or in good faith with Ms. [Decedent]

At the time of the September 27, 2007 meeting, Ms. Smith was aware that Ms. [Decedent] was declining in health and that she was concerned with making provisions to bestow a gift on her friend and neighbor, Ms. [Plaintiff B], before Ms. [Decedent] passed away. Ms. [Decedent]'s concern that her nieces might "prevent such a gift" to Ms. [Plaintiff B] was also made clear to Ms. Smith. [Defendant]'s Response to Interrogatory No. 6, Exhibit 1, at 5.

In such circumstances, it was readily foreseeable to Ms. Smith that a guardian might soon be appointed for Ms. [Decedent]. Thus, given that the bank, in the person of Ms. Smith, was fully aware that appointment of a guardian would instantly terminate Ms. [Plaintiff B]'s beneficiary designation under the bank's undisclosed policy, Ms. Smith's failure to inform Ms.

[Decedent] that her attempt to provide a gift on Ms. [Plaintiff B] would be wholly thwarted by that undisclosed bank policy constitutes a failure of the bank to deal fairly with Ms. [Decedent].

The bank knew that the reason for Ms. [Decedent]'s visit that day was to inquire as to how she might make a posthumous gift to Ms. [Plaintiff B]. The bank knew of the strong likelihood that it would unilaterally remove Ms. [Plaintiff B] as beneficiary once a guardian was appointed for Ms. [Decedent], yet never told Ms. [Decedent] of this likelihood. The bank knew that wiping out the POD designation would lead Ms. [Decedent]'s nieces to "prevent" the gift to Ms. [Plaintiff B] and to claim the funds for themselves, bringing to pass the very scenario Ms. [Decedent] told Ms. Smith she feared would transpire.

Good faith and fair dealing would have required that Ms. Smith disclose these readily foreseeable possibilities in advising Ms. [Decedent] how best to make a gift to Ms. [Plaintiff B]. By not doing so, the bank breached its duty to deal fairly and in good faith with Ms. [Decedent], and Ms. [Plaintiff B] has standing to enforce that promise, as is argued immediately below.

2. A donee beneficiary has standing to make a claim for breach of the duty of good faith and fair dealing

There is simply no authority in Kentucky, or any in other jurisdiction, for [Defendant]'s contention that a third-party beneficiary has no standing to sue for breach of the implied covenant of good faith and fair dealing. [[Defendant]'s Motion to Dismiss Cross-Claim, at 8] Although this specific, narrow issue has never been addressed directly by the Kentucky appellate courts, courts in other states that have looked at this precise issue have invariably sustained such claims. *See*, *e.g.*, Ensign Yachts, Inc v. Arrigoni, Slip Copy, 2010 WL 918107 (D.Conn., March 11, 2010) ("If a plaintiff adequately pleads third party beneficiary status under a contract, it may assert a claim for breach of the covenant of good faith and fair dealing."); Baker v. Goldman Sachs & Co., 656 F.Supp.2d 226, 236 (D.Mass.2009) ("Since the Court has found that Janet

Baker has sufficiently alleged that she was a third-party beneficiary of the contract between Dragon and Goldman, she may proceed with her claim for breach of the implied covenant of good faith and fair dealing."); Mandarin Trading Ltd. v. Wildenstein, 65 A.D.3d 448, 460 (N.Y.App.2009) ("Mandarin also pled sufficient facts to establish that it was an intended beneficiary to the appraisal contract and thus its claims for breaches of contract and the implied covenant of good faith and fair dealing should not have been dismissed.")

In the instant case, Ms. [Plaintiff B] is the donee beneficiary of the account, and as such has standing to sue to enforce a breach of that contract (as argued in Section III.A., above). Because the implied covenant of good faith and fair dealing attended that contract, as it does all Kentucky contracts, Ms. [Plaintiff B] has standing to sue for its breach, just as she has standing to sue for the breach of the contract itself.

3. Ms. [Plaintiff B] has presented sufficient facts to show a breach of the implied covenant of good faith and fair dealing under Kentucky law

Contrary to [Defendant]'s assertion, no Kentucky court has held that a plaintiff must "demonstrate bad faith and intentional conduct" [[Defendant]'s Motion to Dismiss Cross-Claim, at 8] to succeed on a claim for breach of the implied covenant of good faith and fair dealing. [Defendant]'s reliance on an *unpublished* Sixth Circuit decision[6] for such a proposition is unsupportable in light of the Kentucky decisions that make no such finding, especially the *published* Sixth Circuit opinion of In re Sallee, 286 F.3d 878, 891 (6th Cir.2002) ("The duty of good faith and fair dealing merely requires the parties to 'deal fairly' with one another and does

6 In re Russell Cave Co., Inc., 125 Fed.Appx. 27 (6th Cir. 2005). Inexplicably, [Defendant] makes no mention in its Motion to Dismiss that the Russell decision was not selected for publication.

not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty.")

The fact is that *no* Kentucky court has established a set of elements or requirements that must be met for such a claim to succeed. The Kentucky Court of Appeals has recently noted that "As a rule, the duty of good faith and fair dealing merely requires the parties to 'deal fairly' with one another," Hinton Hardwoods, Inc. v. Cumberland Scrap Processors Transport, LLC, not reported in S.W.3d, 2008 WL 5429569, at *7 (Ky.App.2008),[7] reflecting the precise language used in the Kentucky federal courts in the published opinions of In re Sallee, *supra*, at 891, and Westlake Vinyls, Inc. v. Goodrich Corp., 518 F.Supp.2d 902, 916 (W.D.Ky.2007). Other published Kentucky opinions that consider the good faith and fair dealing issue in the context of an implied duty within a contract invariably treat it as a factual question. *See*, *e.g.*, Farmers Bank and Trust Co. of Georgetown, Ky. v. Willmott Hardwood, Inc., 171 S.W.3d 4, 11 (Ky.2005); Pearman v. West Point Nat. Bank, 887 S.W.2d 366, 368 (Ky.App.1994); Ranier v. Mount Sterling National Bank, 812 S.W.2d 154, 156 (Ky.1991).

Regarding banks and their customers, at least one Kentucky court has found that "there is implied in the duty of good faith and fair dealing a duty on the part of the bank to account to its customer at the customer's request." Ousley v. First Commonwealth Bank of Prestonburg, Ky., 8 S.W.3d 45, 47 (Ky.App.1999). If a bank must provide an *account* to its customer, then surely it must disclose to that customer the *terms* of that account, including any bank policies that the bank will use to cancel any material terms of the contract. By failing to disclose its policies regarding guardianship accounts in any documents presented to Ms. [Decedent], or in any conversations held with her, the bank breached its duty to deal with Ms. [Decedent] fairly and in

[7] Unpublished opinion, cited here cited here pursuant to CR 76.28(4)(c), and attached hereto as Exhibit 8.

good faith, a breach for which Ms. [Plaintiff B] as donee beneficiary now has standing to bring suit, precluding the dismissal of her claim on these facts under Kentucky law.

C. Ms. [Plaintiff B] can maintain a claim for Breach of Fiduciary Duty on these facts

Kentucky courts treat the existence of a fiduciary relationship as a factual issue. *See*, *e.g.*, Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 485-86 (Ky.1991); Lemaster v. Caudill, 328 S.W.2d 276, 281 (Ky.1959); Morton v. Bank of the Bluegrass and Trust Co., 18 S.W.3d 353, 359 (Ky.App.1999). Where the evidence shows that a bank knows of a customer's intention in making transactions with the bank, and the bank fails to disclose information material to the customer's being able to fulfill that intention, the bank may have breached a fiduciary duty. *See* Steelvest, *supra*, at 485-86 (analyzing the bank/customer relationship in detail in the context of a commercial loan). "The [fiduciary] relation[ship] may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." Id. at 485, *citing* Security Trust Co. v. Wilson, 210 S.W.2d 336, 338 (1948).

In the instant case, Ms. [Decedent] placed precisely such a "special confidence" in Ms. Smith at the Jeffersontown branch of [Bank] Bank, asking that Ms. Smith advise her honestly and fairly about how Ms. [Decedent] could make a posthumous gift to Ms. [Plaintiff B].

Ms. Smith was aware of all of the following facts: (1) Ms. [Decedent]'s wish to make a posthumous gift to Ms. [Plaintiff B]; (2) Ms. [Decedent]'s declining health; (3) the bank's policy for unilateral cancellation of POD CD beneficiaries on guardianship accounts; and (4) Ms. [Decedent]'s concern that her nieces would interfere and "prevent such a gift" to Ms. [Plaintiff B]. Viewing these facts in the light most favorable to Ms. [Plaintiff B], Ms. Smith's withholding

the information that, were the aged Ms. [Decedent] to be declared a ward, the bank would not honor Ms. [Decedent]'s request to make a gift of the POD CD account to Ms. [Plaintiff B] constituted a betrayal of the trust Ms. [Decedent] had placed in Ms. Smith to advise her honestly. Thus did the bank breach its fiduciary duty to Ms. [Decedent], whose donee beneficiary, Ms. [Plaintiff B], now has standing to sue under Kentucky law (see Section III.A., above). For these reasons, the bank's Motion to Dismiss Ms. [Plaintiff B]'s claim must fail.

IV. CONCLUSION

Ms. [Decedent]'s fears, as expressed to M. Smith, the bank representative, have unfortunately come to pass: Ms. [Decedent]'s nieces have unabashedly attempted to prevent the gift Ms. [Decedent] sought to make to her neighbor and friend, Ms. [Plaintiff B]. The facts as recited above, when applied to the law of the Commonwealth and viewed in the light most favorable to Ms. [Plaintiff B], indicate genuine issues of material fact that preclude the granting of [Defendant]'s Motion to Dismiss Ms. [Plaintiff B]'s Cross-Claim.

WHEREFORE, the cross-claim Plaintiff B respectfully requests that this honorable Court enter the attached proposed Order denying [Defendant]'s Motion to Dismiss Cross-Claim as to Ms. [Plaintiff B]'s claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty, and thereby allow discovery in this matter to continue.

Respectfully submitted,

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