



Wire Fraud is Everyone's Problem

Why All Deal Participants Are
Responsible for Wire Fraud Losses

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Created and published by:

Thomas W. Cronkright II, Esq.

CEO/Co-Founder
CertifID LLC

1410 Plainfield Ave. NE
Grand Rapids, MI 49505

616.855.0855
www.certifid.com
tcronkright@certifid.com

Lawrence Duthler, Esq.

President/Co-Founder
CertifID LLC

1410 Plainfield Ave. NE
Grand Rapids, MI 49505

616.855.7190
www.certifid.com
lduthler@certifid.com

Wire Fraud is Everyone's Problem: Why All Deal Participants Are Responsible for Wire Fraud Losses

A landmark jury verdict in Kansas has created a new standard of care for all professionals involved in a business transaction one which could, where fraud occurs, extend liability to Realtors®, brokers, attorneys, title agents and lenders, even for non-clients. The verdict has put the professional community on notice as it relates to cyber crime – every transaction participant could potentially be held liable for the loss.

Now, all real estate transaction participants can be liable for fraud.

A real estate agent and her broker were found jointly and severally liable for 85% of losses incurred by a buyer when the buyer was tricked into wiring funds to a fraudulent account in connection with a real estate transaction. The real estate agent's email account was allegedly compromised by cyber fraudsters who used the account access to send fraudulent wiring instructions to the buyer. Given that the wiring instructions appeared as if they were sent directly from the agent's account and contained information relevant to the upcoming real estate closing, the buyer relied on the fraudulent information and wired funds to the cyber perpetrator. The jury found the agent liable for negligent misrepresentation and ordered her to pay \$167,129.27. Interestingly, there was no direct privity between the buyer/victim and the agent because the agent represented the seller in the transaction – the buyer was at all times unrepresented.

This federal court decision appears to expand the standard of care in two ways. First, all transaction participants may be held liable for losses due to cyber crime if their email, system or information is compromised. Second, the standard of care may extend to all parties in a transaction regardless of direct contractual or fiduciary relationships. While this case involved a real estate transaction, it is foreseeable that its principles could be applied to many other industries.

The fraud that changed the law.

In February of 2016, the buyer entered into a contract to purchase a home in Kansas City, Missouri. The real estate agent represented the seller of the property. Prior to the closing, a cyber criminal intercepted a closing statement sent via unencrypted email from the title company to the real estate agent that included the correct wiring information for the title company. The cyber criminal replaced the correct wiring information with a new set of wiring instructions (their own); created an email address almost identical to that of the title company representative's email address; pasted the signature block and title company logo into the email; and sent the fabricated email and fraudulent wiring instructions to the agent.

The agent received the fabricated email and forwarded it to the buyer, including a message that the closing statement and wiring instructions attached were true and correct. Believing the email was authentic, the buyer sent the wiring instructions to their bank and asked them to follow the instructions. The bank wired \$196,622.76 to the fraudster's account and the buyer's funds were lost.

The litigation.

The buyer's funds were unrecoverable and they filed suit in a Kansas Federal District Court in May, 2016, alleging multiple counts against the following transaction participants:

Defendant Bank

- Violations of the Truth in Lending Act
- Violations of the Electronic Funds Transfer Act
- Violations of the Fair Credit Reporting Act
- Negligence and Gross Negligence
- Unjust Enrichment
- Breach of Fiduciary Duty
- Violations of Uniform Commercial Code Article 4A

Defendant Title Company

- Negligence and Gross Negligence
- Violations of the Kansas Consumer Protection Act
- Breach of Fiduciary Duty

Defendants Real Estate Agent and Real Estate Broker

- Negligence and Gross Negligence
- Negligent Misrepresentation
- Breach of Fiduciary Duty

A copy of the plaintiff's First Amended Complaint is attached hereto as **Exhibit A**.

The buyer argued that all defendants had a duty to protect him from the losses he incurred and that the failure of these defendants to live up to that duty led to the fraudulent loss of his funds. In response, the defendants responded by arguing that they owed no duty to the buyer because they did not serve in a formal representative or fiduciary capacity.

According to the court docket, the defendant title company and defendant bank reached a settlement with the buyer shortly after a mediation conference. An undisclosed amount was paid to the buyer in exchange for them being removed from the case. As the case proceeded to trial, only the real estate agent and broker remained as defendants.

The verdict.

On April 24, 2018, the jury found the defendant real estate agent and defendant real estate broker jointly and severally liable to the buyer on the basis of negligent misrepresentation. All of this stemmed from the email that was sent by the seller's real estate agent to the buyer which included fraudulent wiring instructions that the buyer reasonably relied upon. The jury ordered the real estate agent to pay \$167,129.27, which equaled 85% of the buyer's losses. As the judgement was joint and several, both the defendant real estate agent and the defendant real estate broker remain liable for the full amount of the judgment until it is satisfied.

A copy of the Judgment is attached hereto as **Exhibit B**.

A question from the jury.

While in deliberations, the jury submitted a simple, yet powerful, question to the court that underscores the duty the defendant real estate agent and broker owed to buyer whether there was privity or not:

Jury: "[The real estate agent] was not [the buyer's] agent. Does that absolve [the real estate agent] of responsibility to [the buyer]?"

Judge: "No."

In the clearest terms possible, the question and answer present the likelihood that the standard of care in a real estate transaction has been extended.

A copy of Question from the Jury #1 is attached as **Exhibit C**.

What this means for the industry: a new standard of care.

The Bain case sends a clear message to anyone involved in a transaction – a new standard of care has emerged, a standard that requires all transaction participants to protect themselves and each other from loss. In the age of digital communication, mobile devices and the exchange of personally identifiable information (PII), this duty now includes safeguarding devices, networks and accounts from being breached; securely collecting and storing PII; confirming the identity of the parties in a transaction; and encrypting the transfer of key information that someone is going to rely upon. Prior to this case, transaction participants have struggled with understanding the lines of liability that may exist if someone in a transaction loses money due to a cyber fraud. For example, if the buyer wires funds to a cyber perpetrator, is it the title company's fault for sharing its wiring information in a non-secure manner? Is the lender at fault for circulating Closing Disclosures and settlement statements that provide all transaction details via unencrypted email? Is it the real estate broker's or agent's responsibility to confirm wiring instructions before funds are transferred? While the jury was not able to determine fault as to the title company or bank due to their removal from the case after the settlement, a clear message has been sent – wire fraud is foreseeable and everyone involved in a transaction shares the risk and burden if a party is harmed due to a cyber fraud.

The Bain case centered on a real estate transaction and the real estate agent, real estate broker, title company, and bank involved in the deal. This is just one of several similar cases that are currently being litigated around the country. Yet, the case sets precedent for many other industries that serve in a representative or fiduciary capacity for the benefit of others. Attorneys, financial planners, consultants, and advisors face the same risk profile if they do not adhere to best practices concerning data and device security and information sharing.

What's next?

Cyber criminals prey on the weakest link in a transaction and strike with incredible timing and precision. As transaction participants and advisors, we need to take stock of our current cyber hygiene as well as that of our transaction partners.

Thus, all industry professionals must look at one another and conduct a clinical review

of everyone in their business network to confirm that best practices concerning information security and disaster response are being followed. Our Data Security and Best Practices Guide attached as **Exhibit E** may serve as a useful starting point for your internal and external analyses.

It's a journey, not a destination.

Always remember that cyber security is a journey, not a destination. A commitment to training, infrastructure, policies, and procedures concerning information security will create a multi-layered approach to combat the ever-growing and evolving cyber threat.

That said, before funds are transferred and the cyber criminal gets paid, it is imperative that identity be verified and bank account credentials be confirmed. To learn more about how CertifID can help eliminate the wire fraud risk, please contact me at tcronkright@certifid.com

About CertifID

CertifID is the most secure way to send and receive wiring information. Guaranteed. CertifID helps prevent fraud by restoring trust in transactions. Harnessing and analyzing billions of combined personal, digital and bank credentials, a “digital truth” is established that confirms you are exchanging information with the person you intend to. This allows you to act with confidence and focus on the customer experience rather than worrying about fraud.

For more information, or to start a conversation, please visit www.certifid.com.

About the authors

Lawrence R. Duthler, Co-Founder and President, CertifID

Thomas W. Cronkright II, Co-Founder and CEO, CertifID

Lawrence and Tom are co-founders of CertifID, a real-time and guaranteed identity and document verification system to help prevent wire fraud in the title, lending and real estate industries. They created the solution in response to a fraud incident they experienced in 2015 and the accelerating instances of fraud in real estate transactions. Both of them are licensed attorneys, and frequent speakers on identity, cyber fraud, real estate and financial topics and an award-winning business leaders.

Lawrence and Tom also co-founded Sun Title. Over the past twelve years, Sun Title has grown into one of the largest commercial and residential title agencies in Michigan and has been recognized as an Inc. 5000 company for five consecutive years, 101 Best and Brightest Companies to Work For and 50 Businesses to Watch in Michigan.



1410 PLAINFIELD AVE. NE, GRAND RAPIDS, MI 49505
PHONE NUMBER: (616) 855-0855
WWW.CERTIFID.COM
SUPPORT@CERTIFID.COM

Exhibit A

First Amended Complaint

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

JERRY BAIN and JENNIFER BAIN,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
CONTINENTAL TITLE HOLDING)	
COMPANY, INC., FIRST NATIONAL BANK)	
OF OMAHA, INC., PLATINUM REALTY, LLC)	
and KATHRYN SYLVIA COLEMAN,)	
)	
Defendants,)	

Case No. 16-CV-02326

FIRST AMENDED COMPLAINT

Plaintiffs Jerry Bain and Jennifer Bain, by and through undersigned counsel, for their causes of action against defendants Continental Title Holding Company, Inc., First National Bank of Omaha, Inc., Platinum Realty, LLC and Kathryn Sylvia Coleman, state and allege as follows:

PARTIES

1. Plaintiffs Jerry and Jennifer Bain are husband and wife and are citizens and residents of Kansas.
2. Defendant Continental Title Holding Company, Inc. (hereinafter "Continental Title") is a Missouri corporation registered to do business in Kansas with its principal place of business located at 8455 College Blvd., Overland Park, KS 66210.
3. Continental Title's registered agent for service of process in Kansas is Corporation Registration Services, Inc., 9393 W. 110th Street, Suite 200, Overland Park, KS 66210.

4. At all times relevant Continental Title, through its employees and agents, actual, apparent or otherwise, operated, managed, maintained and controlled Continental Title located at 8455 College Blvd., Overland Park, KS 66210 and Continental Title located at 13571 S. Mur Len Rd, Olathe, KS 66062.

5. All actions and omissions of Continental Title's employees and agents, actual, apparent or otherwise, as described herein, were performed within the scope of their duties as employees and agents of Continental Title and Continental Title is vicariously liable for the acts and/or omissions of its employees and agents, actual, apparent or otherwise.

6. Defendant First National Bank of Omaha, Inc. (hereinafter "FNBO") is a Kansas limited liability company with its principal place of business located at 4650 College Blvd., Overland Park, KS 66211.

7. FNBO's registered agent for service of process in Kansas is CT Corporation System, 112 SW 7th Street, Suite 3C, Topeka, KS 66603.

8. FNBO, through its employees and agents, actual, apparent or otherwise, operated, managed, maintained and controlled several FNBO's branches located in and around the Kansas City Metropolitan area including FNBO, 4650 College Blvd., Overland Park, KS 66211.

9. All actions and omissions of FNBO's employees and agents, actual, apparent or otherwise, as described herein, were performed within the scope of their duties as employees and agents of FNBO and FNBO is vicariously liable for the acts and/or omissions of its employees and agents, actual, apparent or otherwise.

10. Defendant Platinum Realty, LLC (hereinafter "Platinum Realty") is a Kansas limited liability company with its principal place of business located at 9393 W. 110th Street, Suite 170, Overland Park, KS 66210.

11. Platinum Realty's registered agent for service of process in Kansas is Platinum Realty, LLC, 9393 W. 110th Street, Suite 170, Overland Park, KS 66210.

12. All actions and omissions of Platinum Realty's employees and agents, actual, apparent or otherwise, as described herein, were performed within the scope of their duties as employees and agents of Platinum Realty and Platinum Realty is vicariously liable for the acts and/or omissions of its employees and agents, actual, apparent or otherwise.

13. Defendant Kathryn Sylvia Coleman (hereinafter "Sylvia") is citizen and resident of Missouri residing at 8229 Barrybrooke Court, Kansas City, MO 64151-1086.

14. At all times relevant Sylvia was an agent and/or employee of Platinum Realty and Platinum Realty is vicariously liable for her acts and omissions as described herein.

15. At all times relevant Sylvia was a real estate agent licensed by the Kansas and Missouri Real Estate Commissions.

JURISDICTION & VENUE

16. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has supplemental jurisdiction over plaintiffs' state law claims pursuant to 28 U.S.C. § 1367 because they are related to plaintiffs' federal claims and form part of the same case or controversy.

17. Venue is proper pursuant to 28 U.S.C. § 1391(b)(1) and (3) because a substantial part of the acts and omissions giving rise to plaintiffs' claims occurred in Kansas and defendants are subject to personal jurisdiction in Kansas.

FACTUAL ALLEGATIONS

18. On or about February 2, 2016, plaintiff Jerry Bain and FNBO entered into a Consumer Pledge Agreement whereby plaintiff obtained a \$200,000.00 line of credit to purchase a home (hereinafter "Plaintiffs' Account").

19. In February of 2016, plaintiffs entered into a contract to purchase a house located at 7339 North West Richmond Ave., Kansas City, MO 64158 (hereinafter the "Property").

20. At all times relevant Sylvia was the real estate agent for the sellers of the Property.

21. At all times relevant Continental Title was the escrow agent and closing company for purchase of the Property.

22. At all times relevant Continental Title, FNBO, Platinum Realty and Sylvia were in a fiduciary relationship with plaintiffs and obtained confidential, personal and private information about plaintiffs related their purchase of the Property. All defendants had a legal and fiduciary duty to maintain the confidentiality of plaintiffs' nonpublic information (hereinafter "NPI") and to exercise the utmost care to ensure no persons or entities obtained plaintiffs' NPI.

23. On or about February 16, 2016, Brenda Williams of Continental Title sent Sylvia an unencrypted email containing the HUD-1 settlement statement and the instructions for wiring the funds due and owing on the Property.

24. At all times relevant Continental Title and Brenda Williams had the means and ability to encrypt the email Ms. Williams sent to Sylvia. If Continental Title and/or Ms. Williams had encrypted the email Ms. Williams email sent to Sylvia all of the damages sustained by plaintiffs as alleged herein would have been avoided.

25. On or about February 16, 2016, an unknown person intercepted Ms. Williams' unencrypted email to Sylvia, changed the wiring instructions to an unknown person's bank account, created an email address almost identical to Ms. Williams' Continental Title email address, pasted Ms. Williams' signature block and Continental Title's logo into the email and sent the fabricated email and wiring instructions to Sylvia in Missouri.

26. On or about February 16, 2016, Sylvia received the hacker's fabricated email and, without reading the fabricated wiring instructions, forwarded it to plaintiffs in Kansas. Sylvia represented to plaintiffs that the HUD-1 and the fraudulent wiring instructions attached to her email were from Continental Title and that they were true and accurate.

27. If Sylvia and/or Platinum Realty had read the hacker's fabricated email address which purported to be Ms. Williams' email address and/or if Sylvia and/or Platinum Realty had read the fraudulent wiring instructions, they would have known that the wiring instructions were fraudulent and all of the damages sustained by plaintiffs as alleged herein would have been avoided.

28. Plaintiffs were unaware of and had no way of knowing that the email Sylvia sent them was not from Continental Title and had instead been intercepted and contained fraudulent wiring instructions.

29. Believing Sylvia's representation that her email was from Continental Title, plaintiffs sent Sylvia's email and the fabricated wiring instructions to FNBO and asked the bank to follow Sylvia's wiring instructions.

30. Upon receipt of Sylvia's email from plaintiffs and without taking any steps to verify the accuracy of the wiring instructions, First National Bank wired the settlement funds (\$196,622.76) from Plaintiffs' Account to the hacker's account at Citi Bank (Account Number 499 813 7913) (hereinafter the "Fraudulent Transfer").

31. The Fraudulent Transfer was facilitated by FNBO's negligent, reckless and/or intentional failure to maintain and/or exercise adequate security and monitoring procedures of Plaintiffs' Account and FNBO's negligent, reckless and/or intentional failure to abide by its contractual, statutory, common law and/or fiduciary obligations to plaintiffs.

32. Upon FNBO's receipt of Sylvia's email, FNBO failed:

a. to abide by its own policies and procedures, or to adopt and implement commercially reasonable and commercially accepted security procedures to alert plaintiffs about the Fraudulent Transfer;

b. to abide by its own policies and procedures, or to adopt and implement commercially reasonable and commercially accepted security procedures to obtain the verified approval of plaintiffs, prior to First National Bank facilitating the Fraudulent Transfer; and

c. to abide by its own policies and procedures, or to adopt and implement commercially reasonable and commercially accepted security procedures to require that plaintiffs answer security questions or otherwise verify, authenticate, or confirm plaintiffs' identity, as well as verify, authenticate, or confirm that plaintiffs had made and/or authorized the Fraudulent Transfer.

33. FNBO knew or should have known that the wiring instructions were unauthorized, suspicious, forged, fraudulent, wrongful, did not conform with FNBO's policies, regulations, and rules, or the commercially reasonable or commercially accepted security procedures of the banking industry.

34. Plaintiffs and their attorneys have requested information and documents relating to the Fraudulent Transfer from FNBO but FNBO and its attorneys have refused to provide the requested information and documents relating to the Fraudulent Transfer.

35. The Fraudulent Transfer was made without plaintiffs' knowledge or consent, and occurred as a proximate result of Continental Title, Platinum Realty, FNBO and/or Sylvia's misconduct, recklessness, negligence, unlawful actions, wrongful conduct, intentional conduct, breach of fiduciary duties, and/or failure to comply with commercially reasonable and/or commercially accepted security procedures.

36. FNBO has failed to conduct a timely and reasonable investigation into the Fraudulent Transfer and has failed to reimburse plaintiffs for the Fraudulent Transfer.

37. All defendants knew years before the Fraudulent Transfer that the same or similar cyber fraud described herein had been perpetrated on numerous innocent consumers throughout the United States. Despite such knowledge and despite

defendants' realization of the imminent dangers of the cyber fraud, defendants recklessly disregarded the known and probable consequences.

**COUNT I – VIOLATIONS OF ELECTRONIC FUNDS TRANSFER ACT
(Against First National Bank)**

Plaintiffs, for Count I of their cause of action against FNBO, state and allege as follows:

38. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 37 of this Complaint as though fully set forth herein.

39. Plaintiffs are both "consumers" as that term is used in 15 U.S.C. § 1693(a)(5) of the Electronic Funds Transfer Act ("EFTA").

40. FNBO is a "financial institution" as that term is used in 15 U.S.C. § 1693(a)(8).

41. Plaintiffs' Account is an "account" as that term is used in 15 U.S.C. § 1693(a)(2).

42. The Fraudulent Transfer is an "unauthorized electronic transfer" as that phrase is used and defined in 15 U.S.C. § 1693(a)(11).

43. FNBO violated its obligations under the EFTA by failing to provide plaintiffs with the disclosures and notices required under that Act and under Regulation E.

44. FNBO violated its obligations under the EFTA by failing to perform a good faith investigation into the Fraudulent Transfer and by failing to provide plaintiffs with the results of the investigation within ten (10) business days in violation of 15 U.S.C. § 1693f(a).

45. FNBO violated its obligations under the EFTA by failing to correct the account errors caused by the Fraudulent Transfer in violation of 15 U.S.C. § 1693f(b).

46. FNBO unlawfully, recklessly, negligently, and/or willfully denied plaintiffs the protections set forth in Regulation E including, but not limited to, the limitations on consumer liability set forth in 12 C.F.R. § 205.6.

47. Pursuant to 15 U.S.C. § 1693g, plaintiffs' maximum liability for the Fraudulent Transfer is Fifty Dollars (\$50.00).

48. FNBO has demanded payment of \$196,622.76 plus interest from plaintiffs as a result of the Fraudulent Transfer which is well in excess of plaintiffs' maximum liability and which demand is in violation of 15 U.S.C. § 1693g.

49. FNBO has and continues to willfully violate the EFTA and Regulation E and FNBO is liable to plaintiffs for a declaratory judgment that FNBO's conduct violated the EFTA.

50. As a direct and proximate result of FNBO's violations of the EFTA, plaintiffs sustained damages in excess of \$200,000.00 and FNBO is liable to plaintiffs for the full amount of statutory and actual damages along with the attorneys' fees and the costs of this litigation, as well as such further relief as may be permitted by law.

WHEREFORE, plaintiffs pray for Judgment on Count I of their claim against FNBO for a sum in excess of Seventy Five Thousand Dollars (\$75,000.00); for the attorney's fees and costs plaintiffs have incurred attempting to mitigate the damages caused by FNBO's violations of the EFTA; for prejudgment interest on the \$200,000.00 plaintiffs lost as a result of FNBO's violation of the EFTA; for their costs, expenses and attorney's fees in

bringing this action; and for such other relief as they may be entitled to by law or as the Court deems just and proper.

**COUNT II – NEGLIGENCE – GROSS NEGLIGENCE
(Against First National Bank)**

Plaintiffs, for Count II of their cause of action against FNBO, state and allege as follows:

51. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 50 of this Complaint as though fully set forth herein.

52. FNBO owed a duty to plaintiffs to use reasonable care in obtaining, reading, analyzing, verifying and using the wiring instructions and in wiring money from Plaintiffs' Account for purchase of the Property.

53. FNBO was careless, negligent and/or grossly negligent in several material respects including but not limited to:

- a. failing to observe that the wiring instructions were fabricated;
- b. failing to abide by its own policies and procedures, or to adopt and implement commercially reasonable and commercially accepted security procedures to alert the plaintiffs about the Fraudulent Transfer;
- c. failing to abide by its own policies and procedures, or to adopt and implement commercially reasonable and commercially accepted security procedures to obtain the verified approval of plaintiffs, prior to FNBO facilitating the Fraudulent Transfer; and
- d. failing to abide by its own policies and procedures, or to adopt and implement commercially reasonable and commercially accepted security procedures to require that plaintiffs answer security questions or otherwise verify, authenticate, or confirm plaintiffs'

identity, as well as verify, authenticate, or confirm that plaintiffs had made and/or authorized the Fraudulent Transfer.

e. wiring plaintiffs' funds to an unknown person for purchase of the Property without plaintiffs' knowledge or consent.

54. As a direct and proximate result of FNBO's negligence and gross negligence, plaintiffs sustained damages in excess of \$200,000.00.

WHEREFORE, plaintiffs pray for Judgment on Count II of their claim against FNBO for a sum in excess of Seventy Five Thousand Dollars (\$75,000.00); for the attorney's fees and costs plaintiffs have incurred attempting to mitigate the damages caused by FNBO's negligence and/or gross negligence; for punitive damages as warranted by the evidence; for prejudgment interest on the \$200,000.00 plaintiffs lost as a result of FNBO's negligence and/or gross negligence; for their costs, expenses and attorney's fees in bringing this action; and for such other relief as they may be entitled to by law or as the Court deems just and proper.

**COUNT III – UNJUST ENRICHMENT
(Against First National Bank)**

Plaintiffs, for Count III of their cause of action against FNBO, state and allege as follows:

55. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 54 of this Complaint as though fully set forth herein.

56. FNBO has benefitted from plaintiffs establishing and maintaining Plaintiffs' Account.

57. FNBO has benefitted from the proceeds derived from the alleged obligations caused by the Fraudulent Transfer by requiring plaintiffs to make payments to FNBO for the amounts wrongfully and fraudulently taken through the Fraudulent Transfer, including alleged principal, interest and late payments.

58. FNBO has and will benefit from its demand upon plaintiffs for the alleged obligations caused by the Fraudulent Transfer.

59. FNBO has failed and refused and continues to fail and refuse to acknowledge that plaintiffs have no liability to First National for the amounts wrongfully and fraudulently taken through the Fraudulent Transfer.

60. FNBO should not benefit from the aforementioned proceeds derived from the alleged obligations caused by the Fraudulent Transfer.

61. FNBO will continue to benefit through the alleged obligations caused by the Fraudulent Transfer, which presents circumstances which would make it unjust to permit First National to benefit from the alleged obligations caused by Fraudulent Transfer.

62. FNBO has been unjustly enriched and injustice can only be avoided by ordering payment for damages by FNBO to plaintiffs for the full amount of statutory and actual damages, along with the attorneys' fees and the costs of litigation, as well as such further relief as may be permitted by law.

63. As a direct and proximate result of FNBO's wrongful conduct, plaintiffs sustained damages in excess of \$200,000.00.

WHEREFORE, plaintiffs pray for Judgment on Count III of their claim against FNBO for a sum in excess of Seventy Five Thousand Dollars (\$75,000.00); for the attorney's fees

and costs plaintiffs have incurred attempting to mitigate the damages caused by FNBO's unjust enrichment; for punitive damages as warranted by the evidence; for prejudgment interest on the \$200,000.00 plaintiffs lost as a result of FNBO's unjust enrichment; for their costs, expenses and attorney's fees in bringing this action; and for such other relief as they may be entitled to by law or as the Court deems just and proper.

**COUNT IV – NEGLIGENCE – GROSS NEGLIGENCE
(Against Continental Title)**

Plaintiffs, for Count IV of their cause of action against Continental Title, state and allege as follows:

64. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 63 of this Complaint as though fully set forth herein.

65. For years prior to the cyber fraud and Fraudulent Transfer described herein, Continental Title was a member of the American Land Title Association ("ALTA") which is the national trade association and voice of the abstract and title insurance industry.

66. For years prior to the cyber fraud and Fraudulent Transfer described herein, Continental Title received from ALTA and others newsletters, emails, alerts, warnings, documents and other materials describing the same or similar cyber fraud described herein and how to prevent the cyber fraud described herein by among other things ensuring that all emails from Continental Title containing NPI were encrypted before being sent to customers, buyers, sellers, real estate agents, banks and others involved in the purchase and/or sale of real property.

67. Continental Title owed a duty to plaintiffs to use reasonable care in obtaining, sending and disclosing plaintiffs' personal information, plaintiffs' banking information, plaintiffs' NPI and other information relating to the purchase of the Property.

68. Continental Title was careless, negligent and grossly negligent by sending an unencrypted email to Sylvia with the HUD-1 and wiring instructions.

69. Continental Title's failure to encrypt the email it sent to Sylvia allowed a hacker to intercept the email and fabricate the wiring instructions which caused the Fraudulent Transfer.

70. As a direct and proximate result of Continental Title's negligence and gross negligence, plaintiffs sustained damages in excess of \$200,000.00.

WHEREFORE, plaintiffs pray for Judgment on Count IV of their claim against Continental Title for a sum in excess of Seventy Five Thousand Dollars (\$75,000.00); for punitive damages warranted by the evidence; for the attorney's fees and costs plaintiffs have incurred attempting to mitigate the damages caused by Continental Title's negligence and gross negligence; for prejudgment interest on the \$200,000.00 plaintiffs lost as a result of Continental Title's negligence and gross negligence; for their costs, expenses and attorney's fees in bringing this action; and for such other relief as he may be entitled to by law or as the Court deems just and proper.

**COUNT V – VIOLATIONS OF THE KANSAS CONSUMER PROTECTION ACT
(Against Continental Title)**

Plaintiffs, for Count V of their cause of action against Continental Title, state and allege as follows:

71. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 70 of this Complaint as though fully set forth herein.

72. Plaintiffs are “consumers” within the meaning of the Kansas Consumer Protection Act, K.S.A. § 50-623, *et seq.* (hereinafter “KCPA”).

73. Continental Title is a “supplier” within the meaning of the KCPA.

74. The “services” Continental Titled provided to plaintiffs are encompassed within the meaning of the KCPA.

75. Continental Title held itself out to plaintiffs as “providing outstanding search, examination, and closing services for the real estate industry.” It represented to plaintiffs that it focused on “security with each and every transaction.”

76. Continental Title represented to plaintiffs that all information plaintiffs provided to it would be kept confidential, secured and would not be disclosed to any persons or entities without plaintiffs’ permission.

77. Continental Title’s violated the KCPA and engaged in deceptive acts and practices in connection with a consumer transaction which include but are not limited to the following:

a. Failing to inform plaintiffs that the information plaintiffs provided to Continental Title would not be kept confidential, secured, encrypted and would not be disclosed to any persons or entities without plaintiffs’ permission.

b. Representing to plaintiffs that Continental Title would ensure all information plaintiffs provided to Continental Title would be kept confidential, secure, encrypted and not disclosed to any persons or entities without plaintiffs’ permission.

c. Misleading plaintiffs about its practices and abilities of sending encrypted communications containing plaintiffs' confidential information.

d. Failing to disclose material facts to plaintiffs about Continental Title's practice of not encrypting emails containing plaintiffs' confidential and personal information.

78. The aforesaid acts and omissions constitute deceptive acts and practices in violation of the KCPA.

79. As a direct and proximate result of Continental Title's violations of the KCPA, plaintiffs suffered damages in excess of \$200,000.00.

WHEREFORE, plaintiffs pray for judgment on Count V of their cause of action against Continental Title for a sum to be determined by the Court in accordance with the KCPA; for their costs, expenses and attorneys' fees in bringing this action as provided for in the KCPA; for civil penalties as provided for in the KCPA; and for such other relief as plaintiffs may be entitled to by law or as the Court deems just and proper.

**COUNT VI – NEGLIGENCE – GROSS NEGLIGENCE
(Against Platinum Realty and Kathryn Sylvia Coleman)**

Plaintiffs, for Count VI of their cause of action against Platinum Realty and Sylvia, state and allege as follows:

80. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 79 of this Complaint as though fully set forth herein.

81. For years prior to the cyber fraud and Fraudulent Transfer described herein, Platinum Realty and Sylvia were members of the National Association of Realtors ("NAR") which is the national trade association and voice of real estate brokers and real estate agents in the United States.

82. For years prior to the cyber fraud and Fraudulent Transfer described herein, Platinum Realty and Sylvia received from NAR and others newsletters, emails, alerts, warnings, documents and other materials describing the same or similar cyber fraud described herein and how to prevent the cyber fraud described herein by among other things: (a) never using an unsecured email address such as a Yahoo.com email address; (b) never accepting an unencrypted email containing wiring instructions; and (c) never forwarding or sending an unencrypted email containing wiring instructions.

83. Platinum Realty and Sylvia owed a duty to plaintiffs to use reasonable care in obtaining, evaluating, reading, sending and disclosing plaintiffs' personal information, plaintiffs' banking information, plaintiffs' NPI and other information relating to the purchase of the Property.

84. Platinum Realty and Sylvia were careless, negligent and grossly negligent in several material respects including but not limited to:

a. Using an unsecured Yahoo email address to send and receive plaintiffs' confidential financial, banking and personal information.

b. Failing to read the fabricated wiring instructions to ensure they were accurate which would have prevented the Fraudulent Transfer.

c. Forwarding the email to plaintiffs without encrypting it and without ensuring the wiring instructions were accurate and truthful.

d. Representing to plaintiffs that the wiring instructions were from Continental Title and were true and accurate.

85. As a direct and proximate result of Platinum Realty and Sylvia's negligence

and gross negligence, plaintiffs sustained damages in excess of \$200,000.00.

WHEREFORE, plaintiffs pray for Judgment on Count VI of their claim against Platinum Realty and Sylvia for a sum in excess of Seventy Five Thousand Dollars (\$75,000.00); for punitive damages warranted by the evidence; for the attorney's fees and costs plaintiffs have incurred attempting to mitigate the damages caused by Platinum Realty and Sylvia's negligence and gross negligence; for prejudgment interest on the \$200,000.00 plaintiffs lost as a result of Platinum Realty and Sylvia's negligence and gross negligence; for their costs, expenses and attorney's fees in bringing this action; and for such other relief as he may be entitled to by law or as the Court deems just and proper.

**COUNT VII – NEGLIGENT MISREPRESENTATION
(Against Platinum Realty and Sylvia)**

Plaintiffs, for Count VII of their causes of action against Platinum Realty and Sylvia, state and allege as follows:

86. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 85 of this Complaint as though fully set forth herein.

87. Platinum Realty and Sylvia owed a duty to plaintiffs to use reasonable care in obtaining, receiving, evaluating, reading, sending and disclosing material information to plaintiffs about where to wire the funds for the purchase of the Property.

88. Platinum Realty and Sylvia, in the course of their businesses, professions and employment in which they had a pecuniary interest, negligently supplied false and/or incorrect information to plaintiffs about where to wire the funds for purchasing the Property.

89. Plaintiffs justifiably relied on Platinum Realty and Sylvia's negligent misrepresentations and/or false information about where to wire the funds for purchase of the Property.

90. Plaintiffs were within the group of persons for whose benefit and guidance Platinum Realty and Sylvia supplied information about where to wire the funds to purchase the Property and Platinum Realty and Sylvia intended plaintiffs to rely on the information they sent plaintiffs about where to wire the funds to purchase the Property.

91. Platinum Realty and Sylvia breached their duty of care to plaintiffs by negligently supplying false and/or incorrect information to plaintiffs about where to wire the funds for purchase of the Property.

92. If plaintiffs had been apprised of all material information about where to wire the funds to purchase the Property, the Fraudulent Transfer would have been prevented.

93. As a direct and proximate result of Platinum Realty and Sylvia's negligent misrepresentations, plaintiffs sustained damages in excess of \$200,000.00.

WHEREFORE, plaintiffs pray for Judgment on Count VII of their claim against Platinum Realty and Sylvia for a sum in excess of Seventy Five Thousand Dollars (\$75,000.00); for punitive damages warranted by the evidence; for the attorney's fees and costs plaintiffs have incurred attempting to mitigate the damages sustained because of Platinum Realty and Sylvia's negligent misrepresentations; for prejudgment interest on the \$200,000.00 plaintiffs lost as a result of Platinum Realty and Sylvia's negligent misrepresentations; for their costs, expenses and attorney's fees in bringing this action; and for such other relief as they may be entitled to by law or as the Court deems just and

proper.

**COUNT VIII – BREACH OF FIDUCIARY DUTY
(Against All Defendants)**

Plaintiffs, for Count VIII of their cause of action against all defendants, state and allege as follows:

94. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 93 of this Complaint as though fully set forth herein.

95. Plaintiffs placed their trust and confidence in all defendants based upon defendants' expertise, experience and representations.

96. Defendants knew that plaintiffs were placing their trust and confidence in them based upon their expertise, experience and representations.

97. Defendants had a duty to establish security protocols and procedures to protect the safety and security of plaintiffs' NPI and to prevent the Fraudulent Transfer.

98. Plaintiffs relied on defendants to maintain and establish security protocols and procedures to protect the safety and security of plaintiffs' NPI and to prevent the Fraudulent Transfer.

99. The trust and confidence placed upon defendants by plaintiffs created a fiduciary relationship between defendants and plaintiffs.

100. As a result of the fiduciary relationship between defendants and plaintiffs, defendants owed plaintiffs a fiduciary duty to maintain and protect plaintiffs' NPI and to prevent the Fraudulent Transfer.

101. Defendants breached their fiduciary duties to plaintiffs by failing to establish and maintain commercially accepted security protocols and procedures to prevent the

Fraudulent Transfer which directly caused or directly contributed to cause the Fraudulent Transfer.

102. Defendants breached their fiduciary duties to plaintiffs by refusing to reimburse plaintiffs for the amount wrongfully and fraudulently taken from Plaintiffs' Account.

WHEREFORE, plaintiffs pray for Judgment on Count VIII of their claims against all defendants for a sum in excess of Seventy Five Thousand Dollars (\$75,000.00); for punitive damages warranted by the evidence; for the attorney's fees and costs plaintiffs have incurred attempting to mitigate the damages sustained because of defendants' breaches of their respective fiduciary duties; for prejudgment interest on the \$200,000.00 plaintiffs lost as a result of defendants' breaches of their respective fiduciary duties; for their costs, expenses and attorney's fees in bringing this action; and for such other relief as he may be entitled to by law or as the Court deems just and proper.

**COUNT IX -VIOLATIONS OF UNIFORM COMMERCIAL CODE ARTICLE 4A
(Against First National Bank)**

Plaintiffs, for Count IX of their cause of action against FNBO, state and allege as follows:

103. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 102 of this Complaint as though fully set forth herein.

104. FNBO failed to establish, implement, and/or apply, as required by the Uniform Commercial Code, as adopted in Kansas ("UCC"), Article 4A, a security procedure that was a commercially reasonable and/or commercially acceptable method against unauthorized payment orders or unauthorized electronic transactions.

105. FNBO of Omaha accepted an unsecured and unencrypted e-mail chain with fraudulent wiring instructions from Plaintiffs and construed the email as a payment order causing FNBO to be liable for the loss of funds under UCC §§ 4A-202, 203 and K.S.A. § 84-4a-101, et. seq. (hereinafter collectively "UCC Article 4A").

106. Pursuant to UCC Article 4A, FNBO is liable to plaintiffs for the unauthorized and unverified payment order or unauthorized electronic transfer of funds.

107. The Fraudulent Transfer was not authorized by the Plaintiffs, nor initiated by the Plaintiffs or their agent who had access to confidential security information, nor by a person who obtained that confidential security information from a source controlled by the Plaintiffs.

108. FNBO failed to take reasonable measures to authenticate or verify the accuracy of the email request to wire funds even though the email request breached FNBO's advertised policy of safeguarding customer monies and was also in violation of a commercially reasonable security measure.

109. FNBO's did not have a written agreement with Plaintiffs defining an acceptable security procedure causing it to be liable for the loss of funds. FNBO failed to adopt and implement or follow a security procedure to protect against wrongful, unauthorized and/or fraudulent money Transfer.

110. Alternatively, if there was an agreement defining a security procedure, FNBO failed to comply with commercially reasonable and/or commercially accepted security procedures when it initiated a funds transfer, by among other things:

- a. failing to confirm the identify of any of the people who created the emails;

b. failing to require a reasonable method of instigating a funds transfer from the plaintiffs;

c. failing to notice the beneficiary of the funds was an unknown entity in New York although FNBO knew the funds were for a local real estate transaction and that funds were due at a local entity;

d. failing to verify and confirm the transaction with plaintiffs and Continental Title;

e. failing to require an alternative method of requesting the wire transfer to instigate the wire transfer;

f. failing to exercise reasonable care when approving the unencrypted and unsecured email chain as a method of initiating the transfer of funds;

g. failing to exercise reasonable care when approving the fraudulent wiring instructions;

h. approving an email chain to initiate a fraudulent wire transfer of approximately \$200,000 which is not a commonly accepted practice in the industry;

i. failing to properly investigate the wrongful and unauthorized Fraudulent Transfer;

j. failing to verify the accuracy of the email chain; and

h. violating their duty of good faith in accepting an email chain as a payment order and initiating a funds transfer based on the payment order.

111. As a direct and proximate result of FNBO's violations of UCC Article 4A, plaintiffs sustained damages in excess of \$200,000 and FNBO is liable to plaintiffs for the

full amount of statutory and actual damages along with the attorneys' fees and costs of this litigation, as well as such further relief as committed by law.

WHEREFORE, plaintiffs pray for Judgment on Count IX of their claim against FNBO for a sum in excess of Seventy Five Thousand Dollars (\$75,000.00); for the attorney's fees and costs plaintiffs have incurred attempting to mitigate the damages caused by FNBO's violations of UCC Article 4A; for prejudgment interest on the \$200,000 plaintiffs lost as a result of FNBO's violation of Article 4A; for their costs, expenses and attorney's fees in bringing this action; and for such other relief as they may be entitled to by law or as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby request a trial by jury in the above-captioned case.

HAMILTON LAW FIRM LLC

By: /s/ Patrick A. Hamilton
Patrick A. Hamilton - KS#16154
13420 Santa Fe Trail Drive
Lenexa, Kansas 66215
PHONE: (913) 888-7100
FAX: (913) 888-7388
patrick@lenexalaw.com
ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was filed with the Court' CM/ECF system on this 26th day of January, 2017, which will send copies of the same to all parties of record.

John T. Coghlan
Ryan Edward Shaw
Lathrop & Gage, LLP
2345 Grand Blvd., Suite 2200
Kansas City, MO 64108-2618
ATTORNEYS FOR DEFENDANT
CONTINENTAL TITLE HOLDING COMPANY, INC.

Diane Hastings Lewis
Brown & Ruprecht, PC
2323 Grand Blvd., Suite 1100
Kansas City, MO 64108
ATTORNEYS FOR PLATINUM REALTY, LLC and
KATHRYN SYLVIA COLEMAN

and

Matthew W. Geary
Amanda Pennington Ketchum
DYSART TAYLOR COTTER McMONIGLE & MONTEMORE, P.C.
4420 Madison Avenue
Kansas City, MO 64111
ATTORNEYS FOR DEFENDANT FIRST NATIONAL BANK OF OMAHA, INC.

By: /s/ Patrick A. Hamilton
Attorney for Plaintiffs

Exhibit B

Judgement

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JERRY BAIN and JENNIFER BAIN,)	
)	
Plaintiffs,)	
)	CIVIL ACTION
v.)	
)	No. 16-2326-JWL
PLATINUM REALTY, LLC and)	
KATHRYN SYLVIA COLEMAN,)	
)	
Defendants.)	
)	

JUDGMENT

Pursuant to the Memorandum and Order filed on February 14, 2018, the defendants Platinum Realty, LLC and Kathryn Sylvia Coleman are granted judgment as to the claims by plaintiffs Jerry Bain and Jennifer Bain for breach of fiduciary duty and negligence and their claim for punitive damages.

Pursuant to the agreement of the parties, the claims of plaintiff Jennifer Bain are dismissed.

Pursuant to the Verdict returned by a jury on April 24, 2018, the plaintiff Jerry Bain is granted judgment against defendants Platinum Realty, LLC and Kathryn Sylvia Colman, jointly and severally, on his claim for negligent misrepresentation in the amount of \$167,129.27, plus post judgment interest at the rate of 2.25% per annum.

IT IS SO ORDERED.

Dated this 24th day of April, 2018, in Kansas City, Kansas.

s/ Sharon Scheurer

By Deputy Clerk

TIMOTHY M. O'BRIEN

Clerk of the District Court

Form approved this 24th day of April, 2018, in Kansas City, Kansas.

s/ John W. Lungstrum

JOHN W. LUNGSTRUM

UNITED STATES DISTRICT JUDGE

Exhibit C

Question from the jury #1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JERRY BAIN,

Plaintiff(s),

vs.
Platinum Realty, LLC
Kathryn Sylvia-Coleman
Defendant(s).

Case No. 16-2326-JWL

QUESTION FROM THE JURY #1

YOUR HONOR,

Ms Sylvia was not Mr Bain's agent.
Does that absolve her of responsibility
to Mr Bain?

Dated at 04/24/18 on _____, Time 3:00

Signature of Presiding Juror

ANSWER OF THE JUDGE,

No.

Dated at Kansas City, KS on 24 April 2018, Time 3:07 p.m.

Signature of Judge

Exhibit D

Memorandum and Order

(in response to Defendant's post-trial motion
to reduce the verdict amount)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JERRY BAIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 16-2326-JWL
)	
PLATINUM REALTY, LLC and)	
KATHRYN SYLVIA COLEMAN,)	
)	
Defendants.)	
)	
)	
)	

MEMORANDUM AND ORDER

This matter comes before the Court on defendants’ posttrial motion for judgment as a matter of law or alternatively for remittitur (Doc. # 127). For the reasons set forth below, the Court **denies** the motion.

I. Background

In April 2018, the Court conducted a jury trial of the claim of negligent misrepresentation by plaintiff Jerry Bain against defendant Kathryn Sylvia Coleman (“Ms. Sylvia”) and her realty agency, Platinum Realty, LLC. The case arose from a real estate transaction in which plaintiff was the buyer and Ms. Sylvia represented the seller. An unknown criminal inserted himself into the transaction through emails, including with the use of fake email accounts with names similar to the accounts used by participants in the transactions, with the result that plaintiff lost the purchase price of \$196,622.67 when he

wired that amount to a bank account controlled by the criminal. Plaintiff alleged that Ms. Sylvia emailed the fake wiring instructions to him, thereby misrepresenting that those instructions were correct. The jury found against defendants, assigning 85 percent of the fault to Ms. Sylvia and 15 percent of the fault to plaintiff. Accordingly, the Court entered judgment against defendants in the amount of \$167,129.27. By the present motion, plaintiff argues that the evidence was insufficient to support the jury's finding for plaintiff on his claim of negligent misrepresentation. Alternatively, plaintiff argues that the judgment should be reduced by the amount of settlement proceeds received by plaintiff from two other parties who were originally defendants in the case.

II. Governing Standards

Judgment as a matter of law under Fed. R. Civ. P. 50(b) is improper “unless the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion.” *See Crumpacker v. Kansas Dept. of Human Resources*, 474 F.3d 747, 751 (10th Cir. 2007). In determining whether judgment as a matter of law is proper, a court may not weigh the evidence, consider the credibility of witnesses, or substitute its judgment for that of the jury. *See Sims v. Great American Life Ins. Co.*, 469 F.3d 870, 891 (10th Cir. 2006). In essence, a court must affirm a jury verdict if, viewing the record in the light most favorable to the nonmoving party, the record contains evidence upon which the jury could properly return a verdict for the nonmoving party. *See Bartee v. Michelin North America, Inc.*, 374 F.3d 906, 914 (10th Cir. 2004). Conversely, the court must enter judgment as a matter of law in favor of the moving party if “there is no legally

sufficient evidentiary basis for a reasonable jury to find for the issue against that party.”

See Sims, 469 F.3d at 891.

III. Sufficient Evidence of Negligent Misrepresentation

Defendants argue that the evidence was insufficient to support the jury’s finding in favor of plaintiff on his claim of negligent misrepresentation. The Court instructed the jury concerning the elements of that claim as follows:

One who, in the course of his or her business, supplies false information for the guidance of another person in such other person’s business transactions, is liable for damages suffered by such other person caused by reasonable reliance upon the false information if:

1. The person supplying the false information failed to exercise reasonable care or competence in obtaining or communicating the false information; and,
2. The person who relies upon the information is the person for whose benefit and guidance the information is supplied; and,
3. The damages are suffered in a transaction that the person supplying the information intends to influence.

Defendants do not argue that this instruction was erroneous in any way; they argue instead that no reasonable jury could have found that these elements were satisfied based on the evidence. The Court disagrees.

First, defendants argue that Ms. Sylvia did not send the email with the fake wiring instructions that plaintiff actually received, and that she therefore did not make the false representation to him. The Court rejected this same argument at the summary judgment stage, as follows:

Defendants concede that Ms. Sylvia received the fake wiring instructions and attempted to forward them to Mr. Bain. That email (sent at 11:48 a.m. on February 23, 2016), however, was sent not to Mr. Bain's correct email address, but was sent to a very similar address, presumably created by the hacker, from which Ms. Sylvia had received a prior communication. Mr. Bain received the fake wiring instructions in an email sent at 11:54 a.m. on February 23, 2016, which on its face appears to have come from Ms. Sylvia's actual email address. Ms. Sylvia denies that she sent the 11:54 email that Mr. Bain actually received. Defendants thus argue that the hacker sent the fake wiring instructions to Mr. Bain, and that because Ms. Sylvia's email with the fake instructions went elsewhere, she never actually sent the fake instructions to Mr. Bain—which would mean that she did not make any representation to plaintiffs concerning where the money should be wired, and thus cannot be liable for negligent misrepresentation.

The Court is unable to resolve this issue as a matter of law, however, as there is at least some evidence that Ms. Sylvia sent the 11:54 email to Mr. Bain. Most significant is the fact that the email came from Ms. Sylvia's actual address, from which she had previously communicated with Mr. Bain. Ms. Sylvia denies having sent the email, but the use of her actual address—while fake email addresses were employed to impersonate CTC and Mr. Bain—provides evidence in plaintiffs' favor. The credibility of Ms. Sylvia's denial thus becomes a matter for the jury to decide. Other evidence also supports plaintiffs' claim. . . . Mr. Bain also testified that after he received the fake wiring instructions, Ms. Sylvia confirmed to him on the telephone that the funds should be wired prior to closing. Mr. Bain also states that none of his emails to Ms. Sylvia's account were ever returned as undeliverable. Ms. Sylvia did intend to forward the incorrect wiring instructions to Mr. Bain (by the 11:48 email, which she admits sending). Before testifying at her deposition that emails could be recovered from her computer, Ms. Sylvia first testified that she had deleted any emails concerning the transactions, which could indicate an initial desire to conceal evidence. Finally, defendants do not dispute that Ms. Sylvia did nothing after the discovery of the theft to investigate with her email provider how the unauthorized use of her address could have occurred.

See Bain v. Platinum Realty, LLC, 2018 WL 862770, at *2 (D. Kan. Feb. 14, 2018) (Lungstrum, J.). The jury heard this same evidence at trial. As at summary judgment, *see id.* at *3, defendants point to contrary evidence, such telephone records that do not show a call to Ms. Sylvia after the wiring instructions were sent. Again, however, the evidence

must be viewed in plaintiff's favor, and the jury was free to assess Ms. Sylvia's credibility and to reject her testimony that she did not send the email that bore her email address.¹ The Court concludes that the evidence was sufficient to support a finding for plaintiff.

Second, defendants argue that the email with the fake wiring instructions did not contain any false assertion. The Court also rejected this argument at summary judgment, noting that under the Restatement (which Kansas has adopted) the basis for a misrepresentation may be an implied assertion. *See id.* at *3. Defendants have not addressed that prior ruling in their present briefs. In this case, the jury could reasonably have found that in supplying wiring instructions to plaintiff, Ms. Sylvia was asserting that those instructions were correct. The Court therefore rejects this argument for judgment as a matter of law.

Third, defendants argue that the evidence was insufficient to show a lack of reasonable care by Ms. Sylvia in obtaining or communicating the fake wiring instructions. Ms. Sylvia conceded in her testimony, however, that she did not confirm that she had the correct instructions (despite oddities in the instructions, such as an incomplete out-of-the-area bank address) and that she had the responsibility to make sure that she sent accurate information to plaintiff. The Court concludes that the jury could reasonably have concluded that Ms. Sylvia failed to act with reasonable care.²

¹ Ms. Sylvia conceded that the email also bore her usual signature block and end quote.

² Defendants note that plaintiff did not offer expert testimony to establish a duty as realtor going beyond that of ordinary care. The Court's instructions, however, required only a breach of the duty of reasonable care and not some heightened duty, and the evidence Continued...

Finally, defendants argue that plaintiff, an experienced real estate investor, could not have relied reasonably on the misrepresentation as a matter of law. The Court disagrees; the evidence—including Ms. Sylvia’s own testimony that it was reasonable for plaintiff to rely on information from her—was sufficient to allow a reasonable finding in plaintiff’s favor on this element of the claim. Accordingly, the Court denies defendants’ motion for judgment as a matter of law.

IV. Offset for Settlement Proceeds

In the alternative, defendants argue that the judgment should be reduced to account for amounts received by plaintiff in settlements reached with two other entities that were originally defendants in this case. The Court rejected this same argument in ruling on motions in limine prior to trial, based on the ruling by the Kansas Supreme Court in *Glenn v. Fleming*, 240 Kan. 724 (1987). In *Glenn*, the plaintiff settled with four defendants and obtained a verdict against a fifth defendant, and the trial court (after reducing the verdict by the plaintiff’s own fault) reduced the judgment to account for the amount of the settlements. *See id.* at 725. The supreme court held that the trial court had no authority to make that reduction because Kansas’s statutory comparative fault scheme abolished joint and several liability among joint tortfeasors, and the remaining defendant had the opportunity (which he failed to use) to ask the jury to compare the fault of the settling defendants. *See id.* at 725-32. The straightforward application of *Glenn* in this case means

was sufficient to meet that standard. Defendants have not cited any authority to suggest that expert testimony was required in this case concerning the ordinary standard of care.

that the judgment here may not be reduced by the amounts of the settlements reached with the other parties, as defendants had the opportunity to and did compare those parties' fault at trial.³ Although the Court cited this case in making its limine ruling, defendants failed in their initial posttrial brief to address *Glenn*, which still represents good law. *See, e.g., Adams v. Via Christi Reg. Med. Ctr.*, 270 Kan. 824, 833 (2001) (citing *Glenn* with approval). In their reply brief, defendants have attempted to distinguish *Glenn*, arguing that the amount of damages was fixed in the present case. *Glenn*, however, does not contain any suggestion that the rule is different in such a case. Moreover, the key is that although the amount of total damages was undisputed, the allocation of fault to the settling defendants for those damages was not fixed. Thus, in settling with those defendants, plaintiff bore the risk that the jury could assign even greater fault to them. Contrary to defendants' argument, a settling plaintiff will not always receive a windfall; for instance, if the jury in this case had assigned most of the fault to the settling defendants and little fault to Ms. Sylvia, plaintiff would have failed to recover as much of his damages as he could have. *Glenn* controls here, and the Court therefore denies defendants' alternative motion for remittitur.⁴

³ The jury declined to assign any fault to those two parties.

⁴ On the first day of trial, defendants moved (Doc. # 117) to amend the pretrial order to assert this defense of being allowed setoffs for the settlements. The Court has permitted defendants to pursue that defense by this motion, and thus the motion to amend is **granted**, although it has rejected that defense as a matter of law herein.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' posttrial motion for judgment as a matter of law or for remittitur (Doc. # 127) is hereby **denied**.

IT IS SO ORDERED.

Dated this 25th day of June, 2018, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

Exhibit E

Data Security and Best Practices Guide

Exhibit E

Data security encompasses a wide variety of practices, methods, and procedures based on the type of organization, technology topology (on-premises, cloud, or hybrid) and type of data being protected. While not all of these combinations can be accounted for in a single document, there are general concepts that can help direct the planning process for any organization. These practices can be divided in terms of Systems, People, and Processes which can address the confidentiality, integrity and availability of systems and data.

All the practices below should be put into the context of standards. The most popular standards in the market place today can help guide you through the implementation of your security program and ensure the right security posture for your organization. While not comprehensive, below are some of the most popular standards in use today:

- [ISO/IEC 27001 - Information security management systems](#)
- [NIST Cyber Security Framework](#)
- [NIST Small Business Security \(The Fundamentals\)](#)
- [Center for Internet Security - Best Practices](#)
- [ISACA - Control Objectives for Information and Related Technologies \(COBIT\)](#)
- [Open Web Application Security Project \(OWASP\)](#)
- [Information Technology Infrastructure Library \(ITIL\)](#)

While the list below is not exhaustive its purpose is to show the base building blocks of controls that should be in place to ensure a sound and secure environment. For expanded views into other controls, review the [ISO 27002](#) and [NIST 800-53](#) control documents which go into much greater detail and explanation.

Systems

Perimeter

Appliances such as firewalls, routers, and specialized equipment for Intrusion Detection, Log Monitoring and Artificial Intelligence (AI) can all play a role in hardening an environment such as:

- Web content filtering
- Anti-virus scanning
- Reputation, application, and protocol protection
- Advanced threat protection for zero-day exploits
- Data loss prevention and auditing policies
- Deep Packet Inspection of HTTPS traffic
- Geolocation-based blocking
- Intrusion detection

Wireless security

- Identity-based 802.1x authentication
- Wireless intrusion prevention
- Properly separated guest, employee and production networks
- Mobile device management

Systems monitoring

- Collection of logs at every critical point in the network, including firewall/router and front-end and back-end systems
- Security monitoring and alerting based on smart triggers

Use of AI to spot hard to see intrusion and data exfiltration attempts

Infrastructure

- Redundant, robust, and encrypted backup strategy including cloud and other off-premise backups
- Data classification
- Data encryption at rest and in transit
- Data tokenization
- Email digital signatures
- Email encryption
- Use industry leading spam, malware, and virus filters, to filter and protect against spam, viruses, phishing, and malicious attachments
- Enable two-factor authentication to domain registrar, DNS, and other hosting environments
- Implement DNSSEC to ensure that DNS records cannot be compromised or taken over
- DKIM and SPF record to protect against malicious domain spoofing
- Ensure OS and third party applications are patched according to vendor recommendations

People

Perimeter

- Train employees to be aware of anything that might look different outside of their normal world. This can include email, phone, other forms of communication, or people without proper identification. Train with real examples to make a strong impact. Red team exercises are also beneficial
- Never enter login information outside of the normal outlets, especially email
- Don't open unexpected, unsolicited, or suspicious attachments. Always verify with IT when possible
- Ensure data is saved to trusted network/server locations and do not allow USB storage devices
- Conduct unannounced phishing testing on a periodic basis using a trusted, third party firm
- Conduct and track regular training of employees using a trusted, third party firm
- Prevent "Shadow IT" cloud services by auditing access logs, financial records, and user behavior
- Ensure all users have access to and have read and acknowledge security policy documents

Physical

- Locked doors with proper access to employee and infrastructure areas
- Clean desk policies
- Proper identification for staff and vendors
- Security cameras

Processes

Access controls

- Role-based file permissions
- File system and application specific permissions
- Dedicated service accounts to isolate access to critical systems if one is compromised
- Least privileged accounts with minimum required access
- Complex, yet enforceable, user password policies
- Multi-factor authentication
- VPN connections for remote users
- Penetration testing utilizing services

Client and endpoint security

- Software restriction policies
- Removing administrator permissions from users
- Regular antivirus scans and reporting

Infrastructure

- Disaster recovery and incident response planning
- Emergency preparedness for natural and manmade events

Audits

- Conduct scheduled internal audits of your security program to determine any actions that need to be taken to remediate the program. A plan that includes the: DO, CHECK, and ACT process can help you continuously monitor and improve your security stance
- Conduct annual external audits led by third parties to ensure compliance with best practices and current standards
- Conduct third party risk assessments on all vendors annually or more frequently as the business process requires



1410 PLAINFIELD AVE. NE, GRAND RAPIDS, MI 49505
PHONE NUMBER: (616) 855-0855
WWW.CERTIFID.COM
SUPPORT@CERTIFID.COM