

2001

Wesley F. Sine, Ray D. Emery, Roy P. Fisher, and
William R. Franklin v. Crestar Bank, Diana Group
Inc., Nancy Y. Cree, and Josephine Mangiapane :
Brief of Appellant

Utah Court of Appeals

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James L. Christensen; Christopher G. Jessop; Corbridge Baird & Christensen; Attorneys for Appellants.

Francis M. Wikstrom; H. Douglas Owens; Parsons Behle & Latimer.

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IN THE UTAH COURT OF APPEALS

Trial Court No.	980906287
Appellate Case No.	20010272-CA
Priority Classification	15

WESLEY F. SINE, RAY D. EMERY, ROY P.
FISHER, and WILLIAM R. FRANKLIN,

Plaintiffs/Appellants,

v.

CRESTAR BANK, N.A., DIANA GROUP INC.,
NANCY Y. CREE, and JOSEPHINE
MANGIAPANE,

Defendants/Appellees.

Appeal from a ruling of the Honorable David S. Young
Judge of the Third District Court

BRIEF OF APPELLANTS

James L. Christensen, USB No. A0639
Christopher G. Jessop, USB No. 8542
CORBRIDGE BAIRD & CHRISTENSEN
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111
Telephone: (801) 534-0909
Attorneys for Appellants

Francis M. Wikstrom, USB No. 3462
H. Douglas Owens, USB No. 7762
PARSONS BEHLE & LATIMER
201 S. Main Street, Suite 1800
Salt Lake City, Utah 84145
Telephone: (801) 532-1234

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SEP 18 2001
Paulette Stagg
Clerk of the Court

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Utah Court of Appeals

SEP 24 2001

Paula Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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Wesley F. Sine, Ray D. Emery,
Roy P. Fisher and William R.
Franklin, individuals,

Plaintiffs and Appellants,

v.

Crestar Bank, N.A., Diana
Group Inc., Nancy Y. Cree, and
Josephine Mangiapane,

Defendants and Appellant.

ORDER

Case No. 20010272-CA

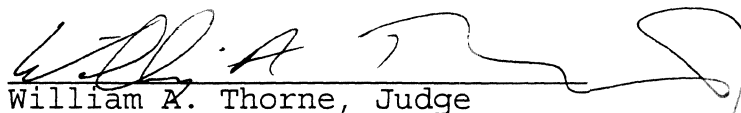
This matter is before the court upon two motions filed by appellant on September 14, 2001, for an extension of time to file appellant's brief, and on September 19, 2001, to allow filing of over-length brief. Appellee stipulated to both motions.

On September 18, 2001, the court lodged appellant's brief on the basis that it was over-length.

IT IS HEREBY ORDERED that appellant's brief is accepted as timely filed and appellant's motion to allow filing of an over-length brief is granted. Appellee's brief shall be filed within thirty (30) days of the date of this order.

Dated this 24 day of September, 2001.

FOR THE COURT:


William A. Thorne, Judge

CERTIFICATE OF MAILING

I hereby certify that on September 26, 2001, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

JAMES L. CHRISTENSEN
CHRISTOPHER G. JESSOP
CORBRIDGE BAIRD & CHRISTENSEN
39 EXCHANGE PL STE 100
SALT LAKE CITY UT 84111-2705

FRANCIS M. WIKSTROM
H. DOUGLAS OWENS
PARSONS BEHLE & LATIMER
201 S MAIN STE 1800
PO BOX 45898
SALT LAKE CITY UT 84145-0898

Dated this September 26, 2001.

By Jaymie Nau
Deputy Clerk

Case No. 20010272-CA

IN THE UTAH COURT OF APPEALS

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CORBRIDGE BAIRD & CHRISTENSEN
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111
Telephone: (801) 534-0909
Attorneys for Appellants

Francis M. Wikstrom, USB No. 3462
H. Douglas Owens, USB No. 7762
PARSONS BEHLE & LATIMER
201 S. Main Street, Suite 1800
Salt Lake City, Utah 84145
Telephone: (801) 532-1234

PARTIES

The parties to this appeal are Appellants Roy P. Fisher (“Fisher”) and William R. Fanklin, and Appellee Crestar Bank (“Crestar”) which is now doing business as Sun Trust Bank, Inc. Plaintiff Wesley F. Sine was dismissed by the trial court and is not a party to this appeal. Plaintiff Ray D. Emery passed away on January 20, 2001 and is thus not a party to this appeal. As for the remaining defendants, none of them are parties to this appeal. Nancy Y. Cree, a former vice-president and branch manager of Crestar Bank was dismissed by the trial court. The Diana Group, Inc. and Josephine Mangiapane (president of Diana Group, Inc.) stipulated to judgment prior to the trial and are not parties to this appeal.

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MANGIAPANE,

Defendants/Appellees.

Appeal from a ruling of the Honorable David S. Young
Judge of the Third District Court

BRIEF OF APPELLANTS

Appellants Fisher and Franklin respectfully submits the following brief:

JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code
Ann. § 78-2a-3(2)(j) (1953, as amended).

ISSUES PRESENTED FOR REVIEW

The issues presented for review are as follows:

Issue 1: Did the court commit reversible error in ruling that the March 24, 1998 letter was ambiguous?

Standard of Review: This issue is a question of law and is reviewed for correctness. *See, e.g., Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), *cert denied*, 119 S.Ct. 1803 (1999); *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180 (Utah Ct. App. 1997).

Issue 2: Did the court commit reversible error in ruling that extrinsic evidence was admissible to determine the meaning of the March 24, 1998 letter and the intent of the parties?

Standard of Review: This issue is a question of law and is reviewed for correctness. *See, e.g., Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), *cert denied*, 119 S.Ct. 1803 (1999); *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180 (Utah Ct. App. 1997).

Issue 3: Did the court commit reversible error in ruling that there was no consideration for the March 24, 1998 letter?

Standard of Review: This issue is a question of law and is reviewed for correctness. *See, e.g., Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), *cert denied*, 119 S.Ct. 1803 (1999); *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180 (Utah Ct. App. 1997).

Issue 4: Did the court commit reversible error in ruling that there was no meeting of the minds as to the meaning of the March 24, 1998 letter?

Standard of Review: This issue is a question of law and is reviewed for correctness. *See, e.g., Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), *cert denied*, 119 S.Ct. 1803 (1999); *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180 (Utah Ct. App. 1997).

Issue 5: Did the court commit reversible error in ruling that the March 24, 1998 letter created, at most, a conditional obligation on the part of Crestar Bank to transfer money to Sine if, and only if, Diana Group first deposited that money with Crestar Bank?

Standard of Review: This issue is a question of law and is reviewed for correctness. *See, e.g., Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), *cert denied*, 119 S.Ct. 1803 (1999); *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180 (Utah Ct. App. 1997).

Issue 6: Did the court commit reversible error in ruling that Appellants' interpretation of the March 24, 1998 letter is commercially unreasonable?

Standard of Review: This issue is a question of law and is reviewed for correctness. *See, e.g., Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), *cert denied*, 119 S.Ct. 1803 (1999); *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180 (Utah Ct. App. 1997).

Issue 7: Did the court commit reversible error in ruling that Nancy Cree had no actual, implied or apparent authority to issue a guaranty or other obligation on behalf of Crestar Bank?

Standard of Review: This issue is a question of law and is reviewed for correctness. *See, e.g., Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), *cert denied*, 119 S.Ct. 1803 (1999); *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180 (Utah Ct. App. 1997).

Issue 8: Did the court abuse its discretion by denying Appellants' Rule 15(b) motion to amend to add a cause of action for breach of Article 4A of the Uniform Commercial Code that conformed to the evidence?

Standard of Review: This issue is reviewed under a conditional discretionary standard. *See Fibro Trust Inc. v. Brahman Fin., Inc.* 974 P.2d 288 (Utah 1999); *see also England v. Horbach*, 944 P.2d 340 (Utah 1997).

Issue 9: Did the court abuse its discretion by denying Appellants' Rule 15(b) motion to amend to add a cause of action for violation of a letter of credit that conformed to the evidence?

Standard of Review: This issue is reviewed under a conditional discretionary standard. *See Fibro Trust Inc. v. Brahman Fin., Inc.* 974 P.2d 288 (Utah 1999); *see also England v. Horbach*, 944 P.2d 340 (Utah 1997).

Issue 10: Did the court abuse its discretion by denying Appellants' Rule 15(b) motion to amend to add a cause of action for negligence that conformed to the evidence?

Standard of Review: This issue is reviewed under a conditional discretionary standard. *See Fibro Trust Inc. v. Brahman Fin., Inc.* 974 P.2d 288 (Utah 1999); *see also England v. Horbach*, 944 P.2d 340 (Utah 1997).

Issue 11: Did the court abuse its discretion by denying Appellants' Rule 15(b) motion to amend to add a cause of action for Crestar Bank's breach of fiduciary duty that conformed to the evidence?

Standard of Review: This issue is reviewed under a conditional discretionary standard. *See Fibro Trust Inc. v. Brahman Fin., Inc.* 974 P.2d 288 (Utah 1999); *see also England v. Horbach*, 944 P.2d 340 (Utah 1997).

Issue 12: Did the court commit reversible error by granting Appellee Crestar Bank’s Rule 41(b) motion for partial dismissal when no findings were entered by the court pursuant to Rule 41(b) and Rule 52(a) of the Utah Rules of Civil Procedure, which motion dismissed Appellants’ claims that the wire instructions sent with the wire transfer of \$500,000.00 to Crestar Bank created an enforceable contract or obligation on the part of Crestar Bank pursuant to Article 4A of the Uniform Commercial Code?

Standard of Review: This issue is reviewed according to the standard set forth in *Merino v. Albertsons, Inc.*, 975 P.2d 467 (Utah 1999), which states, “A trial court is justified in granting a directed verdict only if, examining all evidence in a light most favorable to the non-moving party, there is no competent evidence that would support a verdict in the non-moving party’s favor.” *Merino*, at 468.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Ann. § 70A-4a-101 *et.seq.* (1953, as amended) . . . Addendum, Exhibit G
Utah Code Ann. § 70A-5-101 *et.seq.* (1953, as amended) Addendum, Exhibit H

STATEMENT OF THE CASE

A. Nature of the case

The central issue in this case is whether a reputable, billion-dollar bank is liable for inducing the Plaintiff to disgorge \$500,000.00 in exchange for the bank's promise to pay him \$2.5 million after 30 banking days.

Appellants seek to recover \$2.5 million from Appellee Crestar Bank in this action. In the early months of 1998, Josephine Rita Mangiapane, the president of Diana Group, Inc. ("Diana Group") approached Wesley F. Sine, the trustee of Appellants' trust ("Trustee Sine"), with regard to a business transaction. She proposed that Appellants place \$500,000.00 into Diana Group's account at Crestar Bank in return for the placement of \$2,500,000.00 in Appellants' account thirty banking days later. Appellants rejected Ms. Mangiapane's offer but stated that if she could get a bank to guarantee the transaction they would reconsider her offer. Ms. Mangiapane was successful in locating such a bank.

On March 24, 1998, Crestar Bank issued a letter warranting and certifying to pay \$2,500,000.00 to Trustee Sine thirty banking days after the deposit of \$500,000.00 into Diana Group's account at Crestar Bank. Three days later, in reliance on Crestar Bank's warranty to pay, Trustee Sine wired \$500,000.00 to Diana Group's account at Crestar. Appellants would not have placed their money into Diana Group's account without the March 24, 1998 warranty from Crestar Bank. At the time Appellants wired their funds to Crestar Bank, Appellants also sent special wire instructions to Crestar Bank instructing

Crestar Bank to pay the \$2,500,000.00 to Appellants' trust account within 30 banking days without further setoff or delay. Crestar Bank accepted the wire transfer and the wire instructions without question or objection. Crestar Bank did not give Appellants any indication that it would not honor the March 24, 1998 letter or the wire instructions. Rather, Crestar Bank accepted the wired funds and allowed Ms. Mangiapane to draw against them.

Thirty banking days came and went with no payment from Crestar Bank. Shortly thereafter it became apparent to Appellants that Crestar Bank had no intention of performing at all. Appellants therefore sued Crestar Bank through Trustee Sine (who was also serving as Appellants' attorney) in June, 1998 to recover the \$2,500,000.00 from Crestar Bank.

B. Course of Proceedings and Disposition at Trial

Sine's original complaint contained three causes of action: 1) breach of contract; 2) RICO violations; and 3) fraud. Following the filing of the original complaint, Crestar, and Cree filed motions to dismiss. (R. 31, 57.) Crestar moved to dismiss the fraud and RICO causes of action for lack of particularity. Cree moved to be dismissed for lack of personal jurisdiction, among other things. Sine countered by filing a motion for summary judgment. (R. 82.) Following a round of discovery, Sine moved to amend the complaint. (R. 344, 346.) The parties stipulated to allow the amendment. The purpose of the amendment was to plead the fraud and RICO causes of action with more particularity. The

filing of the amended complaint was again followed by a round of motions to dismiss from Crestar and Cree. (R. 435, 465.)

Ultimately, the trial court granted Crestar's motion to dismiss the RICO and fraud causes of action (R. 684.) and dismissed Nancy Cree for lack of jurisdiction (R. 695.). The trial court also denied Sine's motion for summary judgment. (R. 739.)

Appellants were joined as parties to the lawsuit on March 24, 2000. (R. 813.) Shortly thereafter, Sine withdrew as a party to the action. (R. 949.) Appellants filed a second motion to amend the complaint to add several other causes of action, including, but not limited to: fraud, RICO violations (both pleaded with more particularity), conversion, false pretenses, breach of Article 4A of the Uniform Commercial Code and breach of a letter of credit. (R. 1015.) Judge Young denied the motion. (R. 1200.)

The trial of the case took place in the Third District Court, Salt Lake Department on January 4 and 5, 2001 before Judge David S. Young. At the beginning of the trial, Judge Young allowed Appellants to substitute Sun Trust Bank as a defendant as the successor in interest to Crestar. (R. 1273. *See also* Trial Transcript at 4, lines 8-10.) Mr. Sine was the only witness to testify live before the court. Thereafter portions of the video-taped deposition testimonies of Ms. Cree and Ms. Mangiapane were played into the record. (*See* Trial Exhibits 30 and 31.) In the end Judge Young ruled that: 1) the March 24, 1998 letter was not binding upon Crestar Bank; 2) that the wire instructions sent with

the \$500,000.00 wire transfer were not enforceable; and 3) that Appellants were not entitled to the \$2,500,000.00 Crestar Bank promised to pay.

Believing the foregoing rulings to be errors of law, Appellants filed this appeal.

STATEMENT OF FACTS

The following material facts are relevant to this appeal (all citations to the record on appeal are indicated by the letter “R” followed by the page number and citations to the relevant paragraphs on that page, if any; exhibits entered into evidence at trial are cited as “Trial Exhibit”; all citations to the trial transcript are indicated by the words “Trial Transcript at” followed by the page number):

A. Crestar’s Initial Dealings with Wesley F. Sine

1. On February 6, 1998, Nancy Cree, in her capacity as Branch Manager and Assistant Vice President of Crestar, issued a letter to Wesley F. Sine, Trustee, whereby Crestar warranted and certified to transfer \$120 Million to Sine’s trust account at the Bank of Utah after 30 banking days in exchange for an immediate deposit of \$25 Million into the Diana Group’s account at Crestar. (Trial Exhibit 3.)
2. The \$25 Million was never acquired and, thus, never deposited in the Diana Group’s account. Consequently, Sine cancelled the February 6, 1998 transaction in a letter to Ms. Mangiapane dated March 12, 1998. (Trial Exhibit 4.)

3. Notwithstanding the cancellation of the February 6, 1998 transaction, Sine and Mangiapane began negotiating a similar transaction with smaller amounts of money after March 12, 1998. (*See* Trial Exhibit 5.)

B. The March 24, 1998 Letter

4. On March 23, 1998, the Diana Group sent a letter to Sine memorializing the outcome of the new negotiations, i.e., that Sine and the Diana Group would enter into the same transaction contemplated by the February 6, 1998 letter but with smaller amounts of money (\$500,000.00 from Sine instead of \$25 Million and \$2.5 Million in return instead of \$120 Million) and with a different account of Diana Group at Crestar. (Trial Exhibit 5.)
5. The next day, March 24, 1998, Crestar issued a letter to Sine that warranted and certified to transfer \$2.5 Million to Trustee Sine's trust account at the Bank of Utah after 30 banking days. The body of the letter reads as follows:

On behalf of our Client, Diana Group, Inc., we warrant and certify to transfer to you, directly, on a bank-to-bank basis, to your designated account, the sum of \$2,500,000.00. Said transfer will be no later than 30 banking days from the date after the deposit of \$500,000.00, to Escrow Account Number 206849540, Account Holder - 10321.

The letter is signed by Nancy Y. Cree, "Assistant Vice President and Branch Manager."

(Trial Exhibit 6; *see* Addendum, Exhibit A.)

C. Confirmation of the Letter and Wire Transfer of Funds

6. Trustee Sine transmitted the language of the March 24, 1998 letter issued to him by Crestar to Dave Taylor, an officer at the Bank of Utah, on March 26, 1998 in order to confirm that Crestar was obligated to transfer \$2.5 Million after 30 banking days even if the Diana Group failed to have that amount of money in its specified account on that date. (*See* Trial Exhibit 23.)
7. On March 27, 1998, in reliance on the representations of Crestar and the Diana Group, Sine wire transferred \$500,000.00 to the Diana Group's specified account at Crestar Bank. The wire transfer sent by Sine on March 27, 1998 included an instruction that read as follows:

The receipt and acceptance (by Crestar Bank) of this \$500,000.00USD wire, serves to reconfirm Bra. Mgr. letter dated 24 Mar.98. Said letter warrants & certifies Crestar's promise to pay, & transfer \$2,500,000USD (via bank to bank wire) without protest, set off or delay, within 31 banking days of receipt of this wire, to the account of Wesley F. Sine, atty. Trust Acct.#12036086, Bank of Utah, to the attn. of Mr. Dave Tayler, [sic.] Mgr.

(Trial Exhibits 7, 29; *see* Addendum, Exhibits B, D.)

8. At no time did Crestar object either orally or in writing to the wire transfer of the \$500,000.00 or to the special instruction sent with the wire transfer of the funds. (R. 1-11.)

D. Aftermath of the Wire Transfer

9. As a result of the issuance of the March 24, 1998 letter by Crestar and Crestar's acceptance of the wire transfer of funds, and because Crestar exercised a degree of control over the Diana Group's escrow account, Plaintiffs were looking to Crestar to pay the promised \$2.5 Million. (Trial Transcript at 150, 153.)
10. On March 28, 1998, the Diana Group sent a letter to Sine in which Ms. Mangiapane (not Crestar Bank) attempted to cancel the transaction memorialized in the March 24, 1998 letter to Sine from Crestar. (Trial Exhibit 9.)
11. Though Ms. Mangiapane is not an agent of Crestar Bank and does not represent Crestar Bank in any way, she attempted to nullify the transaction on behalf of Crestar as well. The March 28, 1998 letter further states, "We are thus terminating the transaction; and, nullifying the bank letter provided on our behalf. A letter from Crestar Bank N.A., will also be issued to you nullifying the March 24th., [sic.] letter referencing the Escrow Account. . . ." (Trial Exhibit 9)
12. The transaction was not, in fact, ever cancelled by the Diana Group. Nor did Crestar Bank ever withdraw the March 24, 1998 letter or return Plaintiffs' \$500,000.00. (R. 1203-1221.)

13. Instead, Crestar allowed Ms. Mangiapane to withdraw the funds at her leisure, which funds were completely consumed by Ms. Mangiapane and the Diana Group within only a couple of weeks after the deposit. (R. 1208.)
14. On April 1, 1998, the Diana Group wired \$400,000.00 of the original \$500,000.00 deposited by Sine to the Barry J. Marcus Trust Account in Hollywood, Florida. On April 15, 1998, the Diana Group wired an additional \$95,000.00 of the remaining \$100,000.00 to the Barry J. Marcus Trust Account in Hollywood, Florida. (R. 1208.)
15. In the interim, on March 30, 1998, Ms. Mangiapane, as president of the Diana Group, Inc., entered into a Private Placement Agreement with Sine with regard to the use and/or placement of the \$500,000.00. (Trial Exhibit 11.)
16. According to the terms of the Private Placement Agreement, the Diana Group was obligated to return \$2.5 Million to Sine's trust account after 30 banking days in exchange for the deposit of \$500,000.00 into the Diana Group's account at Crestar Bank. (Trial Exhibit 11.)

E. Defaults and Extensions

17. On May 5, 1998, Sine informed the Diana Group, by way of a faxed letter, that the deadline to pay the promised \$2.5 Million was May 8, 1998, the 30th

banking day following the March 27, 1998 transfer of the \$500,000.00 into Diana's account. (R. 1208.)

18. On May 7, 1998, Sine sent instructions to Crestar Bank about how to wire transfer the \$2.5 Million to his trust account at the Bank of Utah. (Trial Exhibit 12.)
19. Diana did not perform according to the terms of the Private Placement Agreement on May 8, 1998; the \$2.5 Million she agreed to transfer to Sine, as Trustee, were not transferred on that date. Neither did Crestar transfer \$2.5 Million to Sine on that date. (*See* Trial Exhibit 13)
20. The Diana Group requested an extension of time to perform on May 8, 1998, by way of a letter to Sine. (Trial Exhibit 13.)
21. Sine granted the extension to May 13, 1998 and authorized Crestar to delay payment until May 13, 1998. (Trial Exhibit 14.)
22. The Diana Group sent a letter to sine on May 13, 1998 requesting another extension of time to pay to May 15 but no later than May 18, 1998. Sine granted this extension of time to pay as well as evidenced in the correspondence traded between the parties on that date. (Trial Exhibit 26.)
23. Neither the Diana Group nor Crestar wired \$2.5 Million to Sine's trust account at the Bank of Utah on May 18, 1998. (R. 1209.)

24. On May 20, 1998, Sine demanded confirmation from Ms. Mangiapane that the funds were being wired on that day. The funds were not, in fact, wired on that day. (R. 1209.)
25. The following day, May 21, 1998, Sine informed Crestar that he was looking to Crestar for payment of the \$2.5 Million based on the letter Crestar issued on March 24, 1998. (Trial Exhibit 16.)
26. Ms. Mangiapane sent a letter to Crestar on that same day assuring the bank that the Diana Group would pay the money to Sine that day and that she only lacked one signature to release the funds. Sine sent a follow up letter to both the Diana Group and Crestar that same day. (Trial Exhibit 17.)
27. Despite two extensions of time to perform, Diana did not perform and has never performed according to the terms of the Private Placement Agreement. Neither has Crestar Bank ever performed according to the terms of the March 24, 1998 letter or according to the terms of the wire transfer instruction. (R. 1247, ¶¶ 6, 8 and 9.)
28. The entire amount owing by Crestar is \$2.5 Million plus interest at the highest legal rate. (See Trial Exhibits 6, 7 and 29; see Addendum, Exhibits A, B and D.)

F. The Unisource Letter

29. Crestar issued another letter, identical in all respects except for money amounts and account numbers, to Zahra Ghods at Unisource Capital, which letter warranted and certified to transfer \$2 Million to Unisource, after 15 banking days. (The “Unisource Letter”.) The Unisource Letter says, in its entirety:

On behalf of our Client, Diana Group, Inc., we warrant and certify to transfer to you, directly, on a bank-to-bank basis, to your designated account, the sum of \$2,000,000.00. Said transfer will be no later than 15 banking days from the date after the deposit of \$1,000,000.00, to Escrow Account Number 206849540, Account Holder - 10321.

(Trial Exhibit 38; *see* Addendum, Exhibit E.) Like the March 24, 1998 Letter, the Unisource letter is signed by Nancy Y. Cree, “Assistant Vice President and Branch Manager.”

30. On March 30, 1998 Crestar rescinded the letter of March 24, 1998 it sent to Ms. Ghods at Unisource Capital, saying, “As per our internal guidelines, we are not in a position to make this commitment until we actually have the funds on deposit and written instructions from our customer.” (Trial Exhibit 39; *see* Addendum, Exhibit F.)
31. No such letter of rescission was ever issued to Sine by Crestar or anyone purporting to act on behalf of Crestar. (R. 1210.)

G. Legal Proceedings Commenced

32. The final, extended deadline for Diana and Crestar to perform was June 10, 1998. Both Diana and Crestar failed to perform on that date. (Trial Exhibit 18.)
33. Sine informed the Diana Group on that date that he was going to file a lawsuit against it, Ms. Mangiapane and Crestar. (R. 1210.)
34. Ms. Mangiapane was personally served with the original complaint in this action on June 11, 1998. (R. 16.) Both Crestar and Ms. Cree was personally served with the original complaint on June 12, 1998. (R. 17, 18.)
35. On June 17, 1998, Ms. Mangiapane wired the remaining \$5,000 from the original \$500,000.00 deposit to Jones Waldo Holbrook and McDonough in Salt Lake City, Utah to begin funding her defense to this action. (R. 1211.)

H. Judgment Against Diana Group, Inc.

36. On January 3, 2001, the Diana Group, Inc. stipulated that judgment should be entered against it in the amount of \$3 Million, plus interest at the highest legal rate from June 10, 1998 to the present. (R. 1246.)

SUMMARY OF ARGUMENTS

Appellants have condensed the twelve issues presented above into five arguments.

Those arguments are summarized as follows:

1. The March 24, 1998 Letter is clear on its face. The trial court should not have allowed extrinsic evidence to determine the intent of the parties with regard to the letter.
2. Even if the March 24, 1998 Letter is ambiguous, the trial court erred in its interpretation of the letter. The only two interpretive choices before the Court were: a) that the letter constituted a primary obligation to pay on the part of Crestar (as Sine testified); and b) that the letter was merely an escrow instruction (as Cree and Mangiapane testified). Rather than choose either of these interpretations the trial court wrongly created its own interpretation of the letter, which interpretation was completely inconsistent with the testimony of the witnesses at trial.
3. The trial court erroneously held that Nancy Cree did not have any actual, implied or apparent authority to issue the March 24, 1998 Letter.
4. The trial court wrongly denied Appellants' Rule 15(b) motions to amend the pleadings to conform to the evidence. At trial, Appellants put on evidence that showed: (1) Crestar breached Article 4A of the Uniform Commercial Code; (2) the March 24, 1998 Letter constituted a letter of credit which Crestar violated; (3) Crestar was negligent in its issuance of the letter; and (4) Crestar breached its fiduciary duty to Appellants. Notwithstanding the

evidence the trial court erroneously rejected each of Appellants' Rule 15(b) motions.

5. The trial court erroneously granted Appellee Crestar Bank's Rule 41(b) motion for partial dismissal which motion dismissed Appellants' claims that the wire instructions sent with the wire transfer of \$500,000.00 to Crestar Bank created an enforceable contract or obligation on the part of Crestar Bank pursuant to Article 4A of the Uniform Commercial Code. The trial court granted Crestar's motion when no findings were entered by the court pursuant to Rule 41(b) and Rule 52(a) of the Utah Rules of Civil Procedure and when the only evidence on the record militated against granting the motion.

ARGUMENT

FIRST ISSUE ON APPEAL: IS THE MARCH 24, 1998 LETTER AMBIGUOUS?

On March 24, 1998, Crestar Bank issued a letter to Wesley F. Sine, Trustee, that reads, in its entirety, as follows:

On behalf of our Client, Diana Group, Inc., we warrant and certify to transfer to you, directly, on a bank-to-bank basis, to your designated account, the sum of \$2,500,000.00. Said transfer will be no later than 30 banking days from the date after the deposit of \$500,000.00, to Escrow Account Number 206849540, Account Holder - 10321.

The letter is signed by Nancy Y. Cree, "Assistant Vice President and Branch Manager."

At trial, Crestar argued, and Judge Young agreed, that the letter was ambiguous.

Specifically, the court said:

The Court: I do find that it is ambiguous. I will tell you the language that I find ambiguous, “on behalf of our client.” That language is ambiguous. . . . “On behalf of your client, Diana Group,” to me that is at least raising the question and ambiguity as to whether the bank is obligating itself [sic.] or whether the bank is saying that we will do it on behalf of our client when our client provides the \$2.5 million. Do either of you wish to focus on any other words that may be ambiguous?

Mr. Wikstrom: Try the “warrant and certified transfer” languages.

The Court: At the top?

Mr. Wikstrom: Whether that means unconditional obligation to pay or something else.

The Court: Okay, and I would accept that as ambiguous as well. It does seem to me that this can be read in two ways and one way is to read it as you are, that is that the bank is obligating itself and the other is that the bank is not obligating itself, and so the language is ambiguous.

(Trial Transcript at 174-175.) Because the court found the letter was ambiguous the court allowed extrinsic evidence to come in at trial to determine the intent of the parties with regard to the letter. In the end, not only did Judge Young find that the letter was ambiguous, he found that it was unenforceable against Crestar Bank. Judge Young is wrong.

In order to accept oral testimony as to the intent of the parties to a particular agreement or contract, a court must find that the document in question is ambiguous on its face. *See Ward v. Intermountain Farmers Assoc.*, 907 P.2d 264, 268 (Utah 1995) (“A court may consider extrinsic evidence if the meaning of the contract is ambiguous or

uncertain."). With regard to determining whether a document is ambiguous, the Utah Supreme Court has said, "An ambiguity exists where the language 'is reasonably capable of being understood in more than one sense.'" *Dixon v. Pro Image, Inc.*, 1999 UT 89, ¶ 14, 987 P.2d 48 (citing *R & R Energies v. Mother Earth Indus., Inc.*, 936 P.2d 1068, 1074 (Utah 1997)). The March 24, 1998 letter is not ambiguous according to this standard.

The March 24, 1998 letter is crystal clear on its face. In two simple, unambiguous sentences, Crestar Bank warrants and certifies to transfer to Trustee Sine's designated account \$2,500,000.00 no later than 30 banking days after the deposit of \$500,000.00 to a certain escrow account at Crestar Bank, period, the end. When taken together, there is no way to reasonably understand the language of the letter in more than one way. Contrary to how Judge Young *wanted* the March 24, 1998 Letter to read, the letter contains no conditions, requirements or prerequisites for Crestar's transfer of \$2.5 million to Sine other than the deposit of \$500,000.00 into the indicated account. Sine wired that exact amount to Crestar on March 27, 1998 in reliance on Crestar's representations. Appellants have not seen a dime of their money since.

Nevertheless, Judge Young held that the phrase "On behalf of our client, Diana Group" was ambiguous. (See Trial Transcript at 174.) Judge Young said this language was ambiguous because it was unclear whether the bank was obligating itself to pay \$2.5 million to Appellants or whether it meant that Crestar would only transfer the money when Diana Group had \$2.5 million in its account. (*Id.*) In truth, only the first interpretation

can reasonably be read into the words “on behalf of our client.” Even when interpreting contracts that are ambiguous on their face, a court must give “all words used by the parties . . . their usual and ordinary meaning and effect.” *Commercial Building Corporation v. Blair*, 565 P.2d 776, 778 (Utah 1977). There is no way a reasonable person could look at the words “on behalf of our client” and honestly come away thinking they mean anything but what they say, *i.e.*, that Crestar is about to do something for the benefit of its client, Diana Group.¹

The second phrase Judge Young found ambiguous was the “warrant and certify to transfer” phrase. Said the Judge, “. . . this can be read in two ways and one way is to read it . . . that the bank is obligating itself and the other is that the bank is not obligating itself. . . .” (Trial Transcript at 175.) Here again, giving the words their usual and ordinary meaning and effect, there is no way to come to the conclusion that “warrant and certify” means that maybe the bank is *not* obligating itself to do anything or that the bank is only *conditionally* obligating itself to do something. There is no way to avoid the conclusion that the bank warranted, certified, and therefore obligated itself to transfer \$2.5 million to Trustee Sine. No matter how badly the Court wanted to read other conditions into the letter they simply are not there.

¹According to Black’s Law Dictionary (6th ed. 1990), the word “for” means “In behalf of, in place of, in lieu of [and], instead of. . . “ among other things. The word “behalf” is defined as “Benefit, support, defense, or advantage.”

Crestar Bank desperately wanted Judge Young to rule that the March 24, 1998 letter was ambiguous. The court's ruling gave Crestar the opportunity to have its own witnesses attempt to explain away the plain language of the letter. *See Ward*, at 268 (“[I]f . . . the court determines the language of the contract is not ambiguous then the parties’ intentions must be determined solely from the language of the contract.”) The letter is clear on its face. Crestar manufactured ambiguity where there was none. Crestar was successful in doing so at trial by convincing the court to look past the words on the page and ask why a bank would issue such a letter in the first place. Ultimately the answer to the question “why” is irrelevant. The March 24, 1998 Letter says what it says. Appellants relied on it to their detriment. The commercially-sophisticated bank that drafted it ought to be bound by it.

SECOND ISSUE ON APPEAL: IF THE MARCH 24, 1998 LETTER IS AMBIGUOUS, DID JUDGE YOUNG INTERPRET IT CORRECTLY?

Judge Young interpreted the March 24, 1998 Letter incorrectly. Despite the clear language of the March 24, 1998 Letter, Judge Young found it was ambiguous. In so finding, Judge Young opened the door for extrinsic evidence of the parties’ intent to come in. (*See Dixon*, at ¶ 14) (“‘When a contract provision is ambiguous . . . extrinsic evidence is admissible to explain the intent of the parties.’” *Id.*, citing *Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co.* 899 P.2d 766, 770 (Utah 1995).) Judge Young heard testimony from both Sine and Ms. Cree as to what they thought the March 24, 1998 Letter

was. Sine testified that the letter created a primary obligation on the part of Crestar to pay the \$2.5 Million. Ms. Cree and Ms. Mangiapane testified that the letter was not a primary obligation, nor even a guaranty but merely constituted an escrow instruction.

Having heard this testimony, it was incumbent upon Judge Young to decide which of the two options was reasonable. (*See Udall v. Colonial Penn. Ins. Co.*, 812 P.2d 777, 784 (N.M. 1991) (“In construing a contract, the law favors a reasonable rather than unreasonable interpretation.”).) An examination of the reasonableness of the two interpretations is therefore in order.

A. Sine’s Interpretation.

At the outset, it is important to recognize that no reasonable investor would agree to give half a million dollars to an unsecured third party and expect to get \$2.5 million back in thirty days. However, if the third party can get a reputable, billion-dollar national Bank to guarantee the return payment, then the transaction is legitimized, no matter how fantastic it appears on its face, and it becomes reasonable for the investor to proceed. That is what happened in this case. Appellants were unwilling to enter into the transaction based on the Diana Group’s bare promise alone. But when Josephine Mangiapane, president of the Diana Group, acquired Crestar Bank’s backing, Appellants proceeded with the transaction.

Sine testified that the letter constituted a primary obligation on the part of Crestar Bank as follows:

Mr. Wikstrom: But before you sent the funds, were you at all concerned about where this money was going to go?

Mr. Sine: The Crestar Bank had said that they would pay us at the end of 30 banking days the \$2.5 million. She (Ms. Mangiapane) obtained that letter from them (Crestar Bank) and I figured that she'd simply put up assets or funds that were sufficient to cover that.

Mr. Wikstrom: You really didn't care how she used the money?

Mr. Sine: The bank was involved, I would suspect that it was legal if the bank was involved. I depended upon the bank because I didn't know her (Ms. Mangiapane).

Mr. Wikstrom: You didn't care how she used the money. You were looking to the bank?

Mr. Sine: I was looking to the bank. (Trial Transcript at 150.)

* * *

Mr. Sine: The bank in my mind was verifying that she (Ms. Mangiapane) was legitimate and they were saying that they (Crestar Bank) would pay the funds. What the relationship between her and the bank was, I assumed that she was a good client and they were doing this for her. (Trial Transcript at 153)

Sine's testimony is reasonable and consistent with legal principles. Sine testified, in essence, that the March 24, 1998 letter and the wire transfer that accompanied it function as a contract and warranty to transfer \$2.5 Million from Crestar Bank to Sine's Trust account in Utah. As one court observed,

A guaranty is a collateral undertaking to answer for the debt, performance, or default of another. . . . (Citations omitted.) A warranty, on the other hand, is a primary obligation wherein the undertaking is that the subject matter of a contract is or will be what it has been represented to be.

Nicolaysen v. Flato, 204 So.2d 547, 549 (Fla. Dist. Ct. App. 1967). The March 24, 1998 letter functions as a warranty because of its express language, "we *warrant* and certify to transfer to you . . . \$2,500,000.00. . . ." (Emphasis added.) Crestar's warranty and

certification to transfer funds is a primary obligation on Crestar's part that is enforceable as a contract.

B. Cree's and Mangiapane's interpretation.

Nancy Cree and Josephine Mangiapane offered a different interpretation of the letter. In essence they testified that the letter was, at best, an escrow instruction. Ironically, Ms. Cree did not testify so much as to what the letter was, as to what it *was not*. She testified as follows:

Q: Did you have any discussion with Ms. Mangiapane about the language – a discussion similar to the one that you had about the February 6 letter?

A: Well, basically, you know, that this was not a bank guarantee and the bank wouldn't be held accountable. So I pretty much, you know, was assured that there shouldn't be a problem.

Q: Did she tell you that this letter was required because of her arrangement with Mr. Sine and her escrow account arrangement that she had with Mr. Sine?

A: She may have repeated it. I can't recall the exact conversation. . . .
(Cree deposition, p. 47 lines 4-17; *see Addendum*, Exhibit I.)

Following Ms. Cree, Ms. Mangiapane expressly testified that the letter was an escrow instruction as follows:

Q: Did there come a time when you requested Crestar to write some sort of letter?

A: Yes, I did, as part of what would have been escrow account instructions.

(Mangiapane depo, p. 59, line 14-60). Mangiapane then testified that the letter, "was simply an escrow statement." (*Id.*, page 95, lines 6-13.)

This “escrow instruction” interpretation of the letter is not reasonable. The letter cannot be an escrow instruction. Escrow instructions are issued by persons or entities *to* the lending institution, not the other way around as is the case here. For the letter to be an escrow instruction it would have had to have been an instruction to Crestar from Mangiapane telling the bank to not transfer \$2.5 million to Sine unless the funds were on deposit in Diana Group’s account. For Cree and Mangiapane to say that the letter is an escrow instruction defies logic, not to mention common business practice.

Furthermore, the Cree and Mangiapane interpretations are not credible and, in the case of Mangiapane, wholly without foundation. Again, Ms. Cree testified as to what the letter was not. Mangiapane, who was not even a party or signatory to the letter, testified that the letter was an escrow instruction. Judge Young allowed Mangiapane’s testimony to come in over counsel for Appellants’ objection to any such testimony as hearsay. (*See* Trial Transcript, at 176, lines 1 -12.) Thus, the only reasonable, credible interpretation of the letter with any foundation is Sine’s, *i.e.*, that the letter constitutes a primary obligation on the part of Crestar.

The Judge ignored Sine’s testimony and instead adopted the position taken by Mr. Fran Wikstrom, counsel for Crestar, who was not a party to the transaction, and who is not allowed to testify, that “at most, [the] letter constituted an agreement to transfer when and if the funds were available from Diana and nothing more.” (Trial Transcript, at 39,

lines 21-23.) The Court's acceptance of Mr. Wikstrom's testimony of what the letter meant, for which there was no evidence, was clearly erroneous and should be overturned.

**THIRD ISSUE ON APPEAL: WAS THE COURT'S RULING THAT MS. CREE
DID NOT HAVE ANY AUTHORITY TO ISSUE THE MARCH 24, 1998
LETTER ERRONEOUS?**

In addition to finding that the March 24, 1998 Letter was ambiguous, Judge Young also found Nancy Cree had no actual, implied or apparent authority to issue a guaranty or other obligation on behalf of Crestar Bank. Here again, Judge Young is wrong.

Crestar argued at trial, and Judge Young agreed, that Nancy Cree did not have the authority to commit the bank to this transaction. After all, argued Crestar, she was only an assistant vice-president. Regardless of her title or position, Nancy Cree was an agent of Crestar Bank clothed with apparent authority from the Bank.

A. An agent with apparent authority can bind its principal.

It has long been recognized in Utah that a principal can be bound by the acts of an agent clothed with apparent authority. The Utah Supreme Court recently reaffirmed this doctrine in *Marcis v. Sculptured Software, Inc.*, 2001 UT 43, 24 P.3d 984 (2001), where it said, "An agent's knowledge of matters within the scope of his or her authority is imputed to his or her principal, for it is presumed that such knowledge will be disclosed to the principal. (Citations omitted.)" ¶ 21. *See also Wood v. Strevell-Paterson Hardware Co.*, 313 P.2d 800, 801 (Utah 1957) ("All such acts and contracts of the agent as are within the apparent scope of the authority conferred on him, although no actual authority

to do such acts or to make such contracts has been conferred, are also binding upon the principal.”).

Agents with apparent authority can bind their employer corporations by executing guaranties like the one contained in the March 24, 1998 Letter. In *Glyfada Seafaring Corp. v. Fillmore Shipping Ltd.*, 685 F.Supp. 40 (So. Dist. N.Y. 1987), the United States District Court for the Southern District of New York said, “We hold that when [defendant] executed the guarantee of April 6, he was in fact authorized to do so. We further hold that, even if he were not actually authorized, [defendant] had the apparent authority to execute the guarantee on which apparent authority plaintiff reasonably relied.” *Glyfada* at 43.² Thus, if Cree had apparent authority, she had the power to bind Crestar Bank.

B. Cree was an agent of the bank clothed with apparent authority; the bank is bound by her actions.

The evidence at trial showed that Cree was clothed with the indicia of authority. The March 24, 1998 Letter was issued on official Crestar letterhead and signed by Cree in her capacity as branch manager. Furthermore, Both Sine and Mangiapane testified at trial that they thought Cree had the authority to do what she did. Sine testified as follows:

Mr. Christensen: Did you talk to Ms. Cree?

²In this case a guarantee and warranty was given to Trustee Sine by the branch manager of a bank, who appeared to have the authority to enter into these kinds of transactions. Sine was given absolutely no reason to believe that Cree did not have the authority to act on behalf of the bank in this transaction. Sine’s reliance on Cree’s apparent authority was thus reasonable.

Mr. Sine: I did.

Mr. Christensen: What did you ask Ms. Cree?

Mr. Sine: I asked Ms. Cree if she had prepared the letter.

Mr. Christensen: And what did she say to you?

Mr. Sine: She said that she had. . . .

Mr. Christensen: Was there any other discussion between the two of you?

Mr. Sine: No. I just verified that she was the assistant vice president of the bank and she was the branch manager and that she know Geopane.

Mr. Christensen: Mangiapane?

Mr. Sine: Mangiapane, that was it. She told me that she had been, that Mangiapane had been a long time client of the bank and was held in very high respect. (Transcript, pp. 55-56.)

Furthermore, Ms. Mangiapane testified, “Cree *was* the authority at the bank.” (Mangiapane deposition, page 34, lines 19-21; *see Addendum*, Exhibit J.) She also testified, “Cree was one of the better employees at Crestar” (*Id.*, page 36, lines 1-4) and that, “It was obvious that every time you had to cash a check, Cree would have to okay it, so why go through a surreptitious route when you could deal with her?” (*Id.*, page 35, lines 8-11.)

Finally, Cree herself testified that in addition to managing employees, meeting sales goals, performing customer service and handling new accounts, her responsibilities included insuring that the bank followed procedures. (Cree deposition p. 18, line 19 through p. 19 line 13; *see Addendum*, Exhibit I.) It is clear from the evidence that Cree was clothed with apparent authority to issue the March 24, 1998 Letter.

C. Crestar knew about the March 24, 1998 Letter within days of its issuance.

Aside from the parties' perceptions of Cree's authority, it is important to note that Crestar Bank knew about Cree's dealings with Mangiapane and knew within days that Cree issued the March 24, 1998 Letter. Cree testified that her supervisor, Nancy Wilson, knew about the March 24, 1998 Letter and that Ms. Wilson was also aware that Ms. Cree had sent an identical letter on the same day to a company called Unisource on behalf of Ms. Mangiapane, which Crestar rescinded a few days later. (Cree deposition, pages 109 - 110; *see Addendum*, Exhibit I.) Ms. Cree further testified that: 1) she had been terminated from the bank; 2) that a termination meeting was held by Nancy Cree's supervisors and Cree; and 3) that the only reason given for Cree's termination was that she should have been more careful in her transactions (plural) with Mangiapane. (*Id.*, pages 109 - 110.)

In spite of Ms. Cree's testimony, Judge Young held that just because the bank was aware of Cree and Mangiapane's Unisource transaction it did not follow that the bank was aware of Cree and Mangiapane's transaction with Sine. After all, said Judge Young, a corporation can't be charged with the knowledge of *all* its agents.³

³Mr. Christensen and Judge Young engaged in the following exchange at trial.
The Court: I don't have any evidence that they (Nancy Cree's superiors) knew that the transaction with Sine existed.

Mr. Christensen: The bank knew that.

The Court: No, they didn't. I don't have -

Mr. Christensen: Isn't Nancy Cree the bank?

The Court: Nancy Cree knew that.

Mr. Christensen: Sure. Nancy Cree and that's the bank.

The Court: Yeah, but Nancy Cree is not sending out the rescission letter that Wilson is sending out [for the Unisource transaction].

Mr. Christensen: I understand what you're saying but the bank is the bank. I don't

With regard to what knowledge a principal can be charged with this Court said, in *Horrocks v. Westfalia Systemat*, 892 P.2d 14, 15-16 (Utah Ct. App. 1995):

Basic agency law dictates that a principal is bound by the acts of an agent clothed with apparent authority. (Citations omitted.) In *Harrison v. Auto Securities Co.*, 70 Utah 11, 257 P. 677 (1927), the Utah Supreme Court stated:

It is a general principle of the law of agency, running through all contracts made by agents with third parties, that the principals are bound by the acts of their agents which fall within the apparent authority of the agents, and that the principals will not be permitted to deny the authority of their agents against innocent third parties, who have dealt with those agents in good faith.

The *Horrocks* court continued, “‘Where a loss is to be suffered though the misconduct of an agent, it should be borne by those who put it in his power to do the wrong.’” *Id.* at 16 citing *County of Macon v. Shores*, 97 U.S. 272, 279, 24 L.Ed. 889, 890 (1877). So it should be in this case.

Crestar will argue that Cree’s knowledge cannot be imputed to Crestar because she was acting adversely to Crestar’s interests. Again, the *Horrocks* Court said on this issue:

Even when the agent is acting adversely to the principal’s interest, the knowledge of the agent may still be imputed to the principal. The Restatement provides: The principal is affected by the knowledge of an agent

think the bank can hide behind the fact that one of their agents knows something another agent might know something different. I think the bank is charged with the knowledge in a combined sense of all of its agents.

The Court: I’ve got your position but I deny your request to amend. . . .
(Trial Transcript at 197, lines 4-20.)

who acts adversely to the principal: (a) if the failure of the agent to act upon or to reveal the information results in a violation of a contractual or relational duty of the principal to a person harmed thereby; [or] (b) if the agent enters into negotiations within the scope of his powers and the person with whom he deals reasonably believes him to be authorized to conduct the transaction. . . . Restatement (Second) of Agency § 282 (1958).

Id., at 17. Ms. Cree clearly failed to inform her superiors ahead of time that she was issuing letters like the March 24, 1998 Letter or obtain permission from the bank to do so. In fact Ms. Cree had been reprimanded by her superiors several months before for making misleading representations to third parties about Ms. Mangiapane's financial strength. (*See* R. 1223, footnote 1.) Cree was under an affirmative duty to keep the bank informed about all of Mangiapane's suspicious activities. Cree failed to do so in a timely manner and Appellants were harmed thereby in the amount of \$2.5 million.

D. Case law dictates that Crestar must be held liable for Cree's actions.

As has already been demonstrated, the law is replete with cases that hold principals responsible for their agent's actions. Two additional cases have particular bearing on the issues at hand. Said the District Court for the Southern District of Texas,

Even without actual authority to execute [a] letter of credit, apparent authority may arise by a principle's action which lacks such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority he purports to exercise. (Citations omitted.)

Agri Export Cooperative v. Universal Savings Assoc., 767 F.Supp. 824, 830 (S.D. Texas 1991).

Furthermore, in *Grabowski v. Bank of Boston*, 996 F. Supp 111 (Mass. Dist. Ct. 1997), a case that specifically concerns banks and wire transfer transactions, the court said, “[W]here . . . a bank can easily ascertain whether an agent is exceeding his authority on the face of documents necessary to the transaction, *it will be liable for the unauthorized transaction.*” *Id.*, at 127. (Emphasis added.) So it was with Nancy Cree and Crestar Bank. Crestar Bank issued the March 24, 1998 Letter, warranting and certifying to transfer \$2.5 Million to Trustee Sine after 30 banking days. Sine accepted this offer and wired \$500,000.00 to Diana’s account at Crestar, with the instruction that the \$2.5 Million was to be paid 30 after 30 banking days without protest, setoff or delay. Crestar never communicated to Sine that Cree was not in a position to make this kind of commitment on behalf of the bank, or that Crestar was not in a position to transfer the \$2.5 Million unless it was already in Diana’s account, neither did Crestar ever object to the wire instruction. Thus Crestar obligated itself to transfer \$2.5 Million to Trustee Sine 30 days after the deposit of the \$500,000.00. The trial court erroneously ruled otherwise.

**FOURTH ISSUE ON APPEAL: DID THE COURT CORRECTLY DENY
APPELLANTS’ RULE 15(b) MOTIONS?**

In addition to the foregoing, the Court erroneously denied Appellants’ four Rule 15(b) motions. Rule 15(b) of the Utah Rules of Civil Procedure specifically allows a cause

of action to be brought at trial even if that cause of action was not pleaded in the complaint. Rule 15(b) says, in relevant part:

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment* (Emphasis added.)

Appellants put on evidence that showed: (1) Crestar had breached Article 4A of the Uniform Commercial Code (“UCC”); (2) Crestar violated a letter of credit and thus breached Article 5 of the UCC; (3) negligence on the part of Crestar Bank; and (4) breach of fiduciary duty on the part of Crestar Bank. The trial court erroneously rejected each of Appellants’ motions to amend the pleadings to conform to the evidence.

A. Breach of Article 4A of the Uniform Commercial Code

In addition to their cause of action for Breach of Contract against Crestar, Plaintiffs also have a cause of action against Crestar for Breach of Article 4A of the UCC as codified in § 70A-4a-101 *et.seq.* of the Utah Code Annotated (1953, as amended). Article 4A governs wire transfers of funds. Though the mechanics of Article 4A are dealt with in greater detail in section V, *infra*, suffice it to say at this point that in certain circumstances, Article 4A requires a bank that receives payment instructions with a wire transfer to honor those instructions or reject the transfer and refund the sender’s money. (*See generally* Utah Code Ann. §§ 70A-4a-103, 70A-4a-201, 70A-4a-204.) In order for Appellants to

state a cause of action for breach of Article 4A, Appellants had to put on evidence that:

1) Trustee Sine wired funds to Crestar Bank with proper instructions; 2) that Crestar received the wire and the instructions; and that 3) Crestar did not follow the instructions or reject the wire transfer. *See id.* Appellants put on all of this evidence at trial.

Sine testified that he wired \$500,000.00 to Crestar on March 27, 1998. (Trial Transcript, 74 lines 16-19.) This evidence was uncontroverted as was Sine's testimony that he sent the following wire instructions with the funds.

The receipt and acceptance (by Crestar Bank) of this \$500,000.00USD wire, serves to reconfirm Bra. Mgr. letter dated 24 Mar.98. Said letter warrants & certifies Crestar's promise to pay, & transfer \$2,500,000USD (via bank to bank wire) without protest, set off or delay, within 31 banking days of receipt of this wire, to the account of Wesley F. Sine, atty. Trust Acct.#12036086, Bank of Utah, to the attn. of Mr. Dave Tayler, Mgr.⁴

(*Addendum*, Exhibits B and D.) The instructions were received and seen by Crestar as evidenced by Trial Exhibit D, which is a printout of the instructions Sine sent as printed by Crestar's own wire-ops department. Finally, it is clear from the evidence that Crestar did not follow the wire instructions, nor did Crestar reject the transfer of \$500,000.00 because it was unable to comply with the instructions. The instructions were simply

⁴Sine testified, on cross examination, that he talked to his bank officer, Dave Taylor, at the Bank of Utah - a banker of 30 years - who said that Crestar would be bound by the Fedwire instructions sent with Appellants' wire of \$500,000.00 to Crestar. (*See* Trial Transcript, at 72.)

ignored. All of this evidence amounts to a cause of action against Crestar for breach of Article 4A of the UCC.

In spite of Appellants' evidence Judge Young denied Appellants' Rule 15(b) motion to amend to add a cause of action for breach of Article 4A of the UCC. This alone shows that Judge Young clearly stepped beyond his bounds. But what is equally, if not more disturbing, was Judge Young's sanction of Crestar's response to Appellants' evidence on this issue.

In response to Appellants' evidence, and *prior* to the time Appellants made their Rule 15(b) motion,⁵ Crestar *proffered* testimony, which the judge accepted over Appellants' objections, from an unidentified, non-present expert witness, that the bank was not obligated to follow the wire instructions. The proffer occurred as follows:

Mr. Wikstrom: Your Honor, can I tell you my dilemma?

The Court: Yes.

Mr. Wikstrom: I've got a potential expert witness to testify about this that I don't think I need because as a matter of law, I'm entitled to a judgment on that and I need to tell her one way or the other and plan accordingly. So, at some point I would like to argue this fully and get the Court's ruling because the law is what it is. . . .

The Court: You're entitled to a motion for a [directed] verdict from that respect.

⁵Interestingly, Judge Young granted Crestar's motion to dismiss the wire transfer cause of action before the cause of action was even officially presented to the court. Crestar made its motion to dismiss when Appellants' rested. Appellants did not move to amend to add the wire transfer cause of action pursuant to Rule 15(b) until after Crestar rested, at the close of *all* the evidence.

Mr. Christensen: Your Honor, the only problem there is we don't even have a cause of action on this point.

The Court: What I'm saying to you both is, it doesn't mean that you might not prevail on the basis of what you've presented. I'm saying to you right now, that you're not going to prevail on the basis of the wire aspect of it.

Mr. Christensen: And I understand what your predilection is what you're actually ruling now. But again you've asked [us] whether or not I've put on evidence and I said yes. The very last document that I put on not five minutes ago, makes it clear that the wire transfer that was received by the bank has advice instructions on it and the advice instructions have everything that I told you that they did and that it that [sic.] this money was sent to the bank subject to the instructions that were included on the advice that was sent by Mr. Sine from Utah Bank. . . .

The Court: I didn't say you hadn't met the burden of showing that they received the instructions. I'm saying you haven't met the burden of showing that they had an obligation to be aware and attentive to the instructions.

(Trial Transcript, at 170-171.) Not only were Appellants not given the right to cross examine Crestar's expert, Appellants were not even allowed to know her identity or what bank she worked for. Indeed, Mr. Wikstrom clearly indicated later in his proffer that the non-present, unidentified expert would testify that:

[T]he bank has to pay attention to the details of whose account they put the money in, what date they do, but what they don't have to pay attention to are the information fields which are called bank to bank info and (inaudible) BNF info, that those fields have no impact, legal impact, on wire transfers. *That's what our wire expert will say is a matter of practice.* (Trial Transcript, at 172-173.) (Emphasis added.)

Mr. Wikstrom made no indication that Crestar's expert would testify with regard to bank practices generally, the practices of Crestar bank or the practices at the expert's particular bank.

In the end it did not matter. Judge Young simply ignored the evidence, allowed the proffer, granted Crestar's motion to dismiss Appellants' wire transfer cause of action and denied Appellants' Rule 15(b) motion to amend. Judge Young's ruling on this point was erroneous and should be overturned.

B. The March 24, 1998 Letter was a letter of credit.

In addition to Appellants' Rule 15(b) motion to amend to add a cause of action for breach of Article 4A, Appellants moved the court to amend their pleadings add a cause of action for breach of a letter of credit under Article 5 of the UCC as codified in Utah Code Ann. § 70A-5-101, *et.seq.* (Trial Transcript at 194.) This too was erroneously denied by Judge Young.

The March 24, 1998 Letter is, if anything, a letter of credit as defined in Utah Code Ann. § 70A-5-102(10). Section 70A-5-102(10) defines "letter of credit" as:

[A] definite undertaking that satisfies the requirements of Section 70A-5-104⁶ by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to

⁶Section 70A-5-104 says, "A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a record and is authenticated: (1) by a signature; or (2) in accordance with the agreement of the parties or the standard practice referred to in Subsection 70A-5-108(5)."

honor a documentary presentation by payment or delivery of an item of value.

The March 24, 1998 Letter meets all of the requirements under § 70A-5-102(10) to be a letter of credit. Therefore, Crestar was obligated pursuant to Utah Code Ann. § 70A-5-108 (Issuer's rights and Obligations) to honor the March 24, 1998 Letter and pay Trustee Sine as Crestar agreed to do. Crestar did not honor the March 24, 1998 Letter and therefore violated article 5 of the UCC as codified in Utah Code Ann. § 70A-5-101 *et.seq.* Nevertheless, Judge Young would not allow Appellants to amend its pleadings to conform to the evidence of Crestar's violation.

At this point, it is appropriate to observe that Crestar argued, and Judge Young agreed, that the Letter was not supported by consideration and is therefore unenforceable. This is wrong for three reasons, the first of which relates to letters of credit. Under Article 5 of the UCC no consideration from the beneficiary is required for the issuance of the letter of credit.⁷ This is so because the bank is not looking to the beneficiary (Trustee Sine) for repayment, it is looking to its customer (Mangiapane and/or Diana Group). As indicated above, Sine testified that he was looking primarily to Crestar to pay according to the terms of the Letter, precisely in the manner of a letter of credit.

⁷See Utah Code Ann. § 70A-5-105 (Consideration is not required to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation.).

The second reason Crestar's lack of consideration argument fails is that Cree herself testified that the bank *did* benefit from Appellants' transfer of \$500,000. In this regard, Cree testified as follows:

Q: Can you recall the words that Ms. Mangiapane said to you that caused you to write that letter?

A: No, other than the fact that she would be opening an escrow account that would be a substantial account for the bank. . . . (Cree deposition, page 99, line 20 through Page 100, line 3; *see Addendum*, Exhibit I.) (*See also* Trial Exhibit 28.)

Finally, Sine's reasonable reliance on Crestar's representations is a consideration substitute. *See Topik v. Thurber*, 739 P.2d 1101 (Utah 1987); *see also Stangl v. Ernst Home Center, Inc.*, 948 P.2d 356 (Utah Ct. App. 1997). Sine reasonably relied on Crestar's representation that it would transfer \$2.5 million to his trust account 30 banking days after his deposit of \$500,000. Thus Judge Young ruled incorrectly that there was no consideration for the March 24, 1998 Letter.

C. Crestar's negligence.

Along with breach of Article 4A and letter of credit motions, Appellants moved the court pursuant to Rule 15(b) to add a cause of action for negligence against Crestar. This motion was likewise denied. It is clear from the evidence outlined above that Crestar was negligent in that: 1) Crestar had a duty to inform Sine that Cree had made false and misleading representations about Mangiapane and/or Diana Group's financial strength and stability. This duty arose from Cree's previous misrepresentations to other parties about

Mangiapane; 2) Crestar breached that duty by not informing Sine of Cree's misrepresentations and by allowing Cree to issue the March 24, 1998 Letter without ever rescinding it as it did with regard to the letter issued to Unisource; 3) Crestar's breach of its duty to warn Sine of Cree's propensity to misrepresent Mangiapane and/or Diana Group and Crestar's failure to rescind the March 24, 1998 Letter caused Appellants to give the bank half a million dollars; and 4) Appellants have been damaged because of Crestar's breach in the amount of \$2.5 million. Judge Young should have therefore granted Appellants' Rule 15(b) motion on this issue.

D. Crestar's breach of fiduciary duty.

Finally, Appellants' moved to add a cause of action for breach of its fiduciary duty. As with the other three Rule 15(b) motions, Judge Young denied this last motion. Crestar knew that Nancy Cree and Josephine Mangiapane were up to something. Indeed Cree was reprimanded by her superiors for her dealings with Mangiapane many months prior to the issuance of the March 24, 1998 Letter. Crestar Bank therefore had a fiduciary duty to Appellants to warn them that Cree did not have authority to do what she was doing, that Mangiapane was not all that Cree made her out to be, and that the March 24, 1998 Letter was unenforceable. Crestar did none of these things and thereby breached its fiduciary duty to the Appellants. Judge Young should have granted Appellants' Rule 15(b) motion on this issue.

FIFTH ISSUE ON APPEAL: DID THE TRIAL COURT RULE CORRECTLY ON THE WIRE TRANSFER ISSUE?

The final issue in this appeal revolves again around the wire transfer of \$500,000.00 and the “advice instructions” that accompanied that transfer. As noted above, Judge Young dismissed Appellants’ wire transfer cause of action. In so doing, Judge Young misapplied the law that governs wire transfers.

A. Governing Law: Article 4A v. Regulation J

Generally speaking, the wire transfer of funds is governed by Article 4A of the Uniform Commercial Code and its corresponding provisions in §70A-4a-101 *et. seq.* of the Utah Code Annotated (the “Utah Uniform Commercial Code”). Section 70A-4a-102 provides that Utah’s version of Article 4A applies to “funds transfers” which are not governed by The Electronic Fund Transfer Act of 1978 (which applies specifically to consumer transactions and, hence, does not apply here). (*See* § 70A-4a-102; *see also* § 70A-a-108.)

Article 4A of the UCC is not the only body of law that governs the wire transfer of funds. For example, the Bank of Utah, the bank which issued the wire transfer and the instruction to Crestar, uses a system for wire transfers called “Fedwire,” which is the Federal Reserve Banks’ wire-transfer system. Consequently, the wire transfer is technically governed by Regulation J as codified as 12 C.F.R. § 210.25 *et.seq.* (*See also Grossman v. Nationsbank*, 225 F.3d 1228, 1232 (11th Cir. Ct. App. 2000) (“The district

court held . . . that the provisions of Regulation J exclusively apply to the fund transfer in this case because it was effected by the use of Fedwire. . . .” (Citations omitted.)). Nevertheless, Regulation J “incorporates the provisions of Article 4A [of the UCC].” 12 C.F.R. § 210.25(b)(1). To the extent Regulation J and Article 4A are inconsistent, Regulation J governs. *Id.* The relevant provisions of Article 4A as they appear in § 70A-4a-101 *et.seq.* of the Utah Code and as they appear in Regulation J are identical. Therefore, for convenience, we refer to the wire transfer at issue as being governed by Article 4A of the UCC.⁸

B. Funds Transfers and Payment Orders

In order to fall within the provisions of Article 4A, a wire transfer must constitute a “payment order, made for the purpose of making payment to the beneficiary of the order.” Utah Code Ann. § 70A-4a-104. A “payment order” is “an instruction of a sender (Trustee Sine) to a receiving bank (Crestar), transmitted orally, *electronically*, or *in writing*, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary (Trustee Sine)” (Emphasis added.) Utah Code Ann. § 70A-4a-

⁸Some of the documents at issue indicate that Trustee Sine intended to send a S.W.I.F.T. wire to Crestar. (See Trial Exhibit 20.) Although technically a different wiring system with its own set of rules, S.W.I.F.T. wire transfers also generally fall under Article 4A of the UCC. See *Piedmont Resolution, L.L.C. v. Johnston, Rivlin & Foley, L.L.P.* 999 F. Supp 34 at 47 (D.C. 1998). However, Crestar conceded in its trial memorandum that it would have some liability to Sine if the wire were sent by the S.W.I.F.T. system. (R. 1231, footnote 3.)

103(3). Furthermore, in order to be enforceable, the instruction must not “state a condition to payment to the beneficiary other than time of payment. . . .” *Id.* Finally, Article 4A dictates that, in order to be an enforceable payment order, “the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender; and . . . the instruction [must be] transmitted by the sender directly to the receiving bank or to an agent, funds transfer system, or communication system for transmittal to the receiving bank.” *Id.*

C. Crestar’s Obligations with regard to the Wire Transfer

In this case, Crestar received a wire transfer of \$500,000.00 from Plaintiffs on March 27, 1998 together with an accompanying instruction, which was an integral part of the wire transfer. That instruction said:

The receipt and acceptance (by Crestar Bank) of this \$500,000 USD wire, serves to reconfirm Bra. Mgr. Letter dated 24 Mar.98 Said letter warrants and certifies Crestar’s promise to pay & Transfer \$2,500,000 USD (via bank to bank wire) without protest, set off or delay, within 31 banking days of receipt of this wire, to the account of Wesley F. Sine xxx...xxx

This wire transfer of \$500,000.00 constitutes a “payment order” in that it directs Crestar to deposit the funds into Diana Group’s account. In this case the payment order was sent with an instruction to return \$2.5 Million within 31 banking days. Under these circumstances, Crestar had two options when it received the wire transfer and the accompanying instruction under the UCC: 1) Crestar was obliged to give notice to Sine

that the payment order had been rejected, or 2) Crestar was obliged to follow the instructions. Crestar did neither.

Section 70A-4a-210 specifically obligates a receiving bank (Crestar) to reject a payment order if the payment order cannot be fulfilled. (*See* § 70A-4a-210(1), (2) (“This subsection applies if a receiving bank other than the beneficiary’s bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance. . . .”).)⁹ Crestar did not object to these instructions in any way or inform Plaintiffs that Crestar had no intent of following these instructions as required under §70A-4a-210 of Utah’s UCC.

In addition to the provisions cited above, § 70A-4a-204(a) of Utah’s UCC says,

If a receiving bank accepts a payment order issued in the name of its customer as sender which is not authorized and not effective as the order of the customer under Section 70A-4a-202, or not enforceable, in whole or in part, against the customer under Section 70A-4a-203, the bank *shall refund any payment of the payment order received from the customer* to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. (Emphasis added.)

The key word in § 70A-4a-204 is “customer.” As defined in § 70A-4a-105(1), a “customer”, for the purposes of Article 4A, is “a person . . . with an account with the bank (Mangiapane in this case) *or from whom the bank has agreed to receive payment*

⁹As explained below, the ultimate “beneficiary” of the wire was supposed to have been Trustee Sine. Thus the beneficiary’s bank is Sine’s bank, the Bank of Utah, not Crestar.

orders (Sine).” (Emphasis added.) By issuing the March 24, 1998 Letter, Crestar agreed to receive Sine’s payment order, *i.e.*, Sine’s wire transfer of funds with its accompanying instruction to repay \$2.5 million in 30 banking days. Thus Sine, along with Mangiapane, is a “customer” of Crestar and Crestar must either follow the payment order or reject and refund the payment to Trustee Sine. Crestar did not follow Trustee Sine’s instructions. Neither did Crestar reject the payment order or refund the \$500,000.00.

Crestar’s failure to follow the instructions constitutes a breach of § 70A-4a-204 of the Utah Uniform Commercial Code. Crestar argued at trial, and Appellants do not disagree, that the purpose of Article 4A is to better facilitate the wire transfer of funds. (R. 1232.) However Article 4A does not operate to negate basic contract law. The moment Crestar received the wired funds with the instructions, Crestar had two choices under §70A-4a-204: 1) reject the wire and refund the \$500,000.00; or 2) accept the wired funds subject to the instructions. Crestar accepted the funds. In so doing Crestar waived its right to refund Appellants’ money and became obligated to pay Appellants \$2.5 million after 30 banking days. Appellants were damaged in the amount of \$2,500,000.00 as a result of Crestar’s failure to object to or follow the wire instructions. Crestar is therefore liable to Plaintiffs for that amount plus interest, costs, and additional consequential damages because of Crestar’s prior agreement to transfer the \$2.5 Million to Trustee Sine (*See* the March 24, 1998 Letter). Utah Code Ann. § 70A-4a-305(3)(4).

Crestar will argue that the wire instructions Sine sent contain unacceptable conditions that preclude them from being enforceable under Article 4A. Again, Article 4A states that an instruction that accompanies a payment order is enforceable only if it “does not state a condition to payment to the beneficiary other than time of payment.” Utah Code Ann. § 70A-4a-103(3)(a). According to this standard the instructions Sine sent with the wire are not improper. It is clear from the March 24, 1998 Letter and again from the wire instructions that the ultimate destination of the funds Sine wired was not Diana Group’s account - it was Trustee Sine’s account at the Bank of Utah. Thus, though Mangiapane was the initial beneficiary of the wire transfer, she was not the ultimate beneficiary. The ultimate beneficiary was Trustee Sine. As the ultimate beneficiary, Sine instructed Crestar to wire \$2.5 million to his trust account at the Bank of Utah “within 31 banking days of receipt of this wire.” The instruction contains no conditions other than time of payment. Thus the wire instructions fall within the protection of Article 4A and are enforceable against Crestar.¹⁰

However, even if the wire instructions were impermissible, under § 70A-4a-402, Crestar was obligated to refund Appellants’ money. It is worth noting that Article 4A

¹⁰According to official comment 3 to section 4A-104 of the Uniform Commercial Code, an example of an impermissible wire conditions contemplated by section 4a-103(3)(a) is if the instruction authorizes payment to the beneficiary by the bank only if the beneficiary presents appropriate shipping documents to the bank to prove shipment of the goods paid for by the wired funds. Sine’s instructions contain no such condition.

allows for certain instructions to be sent with a wire transfers, *i.e.*, time of payment. Banks must look at least for that instruction with every wire transfer that comes in. It follows that in searching for the one permissible instruction Crestar would have seen any impermissible instructions and should have then either rejected the wire transfer anyway, especially one that obligated the bank to pay \$2.5 million to Trustee Sine. Crestar will argue that the wire instructions were unintelligible at the time they were received by the bank and were therefore not binding on the bank in any case. (R. 1299, ¶ 33.) The same logic that applies to instructions generally also applies here. If Crestar could not understand the instructions, they should have refused the wire and refunded the money. Instead Crestar accepted the funds and the instruction and allowed Mangiapane to draw against the funds to her heart's content.

D. Case law supports Appellants.

To this point, the wire transfer has been analyzed through strict statutory construction. This is primarily because Article 4A has only been in existence for about ten years. In Utah, for example, there are no cases on point. However, there are cases from other jurisdictions that are instructive.

Piedmont Resolution, L.L.C. v. Johnston, Rivlin & Foley, L.L.P. 999 F. Supp 34 (D.C. 1998), is a wire transfer case that concerns a deal that sounded too good to be true. In *Piedmont*, the sender of the wire transfer sent two pages of instructions with a S.W.I.F.T. wire transfer. The *Piedmont* court ultimately concluded that because the wire

at issue was sent over the S.W.I.F.T. system, and because it contained a conditions other than the time of payment it fell outside the protection of Article 4A. *See id.* However, the *Piedmont* court recognized that if the transfer had fallen under Article 4A, the bank would have incurred “an obligation to the beneficiary . . . upon acceptance of the funds.” *Id.*, at 36. Interestingly, the *Piedmont* court took pains to cite the testimony of one of the defendant’s expert who testified that “virtually all funds transfers are unconditional and banks will almost always refuse to send or execute a conditional funds transfer because of the added cost, difficulty, and unknown liability attendant upon it.” *Id.* It stands to reason under *Piedmont* that if Crestar felt Sine’s wire contained unacceptable conditions it should have refused the wire and refunded the \$500,000.00.

In *Grabowski v. Bank of Boston*, 997 F.Supp. 111 (Mass. Dist. Ct. 1997), the Massachusetts District Court unequivocally set forth the first fundamental principle that governs the relationship between banks and their depositors with regard to wire transfers. Said the *Grabowski* court, “[A] bank has a duty to follow *all* of its depositors’ instructions after accepting a deposit.” *Grabowski.*, at 128. (Emphasis added.) The *Grabowski* court found that the Bank of Boston was liable under Article 4A for allowing an attorney to make wire transfers that were contrary to the powers of attorney on hand at the bank that controlled the transferor’s actions. While it is true that the *Grabowski* court stated that inappropriate instructions “are anathema to [wire transfers governed by] article 4A,” there were no improper instructions sent to Crestar with Sine’s wired funds. *Id.*, at 121.

Furthermore, as observed above, Sine was a “customer” of Crestar for purposes of Article 4A. Under *Grabowski* and the provisions of Article 4A, Crestar should therefore have followed the instructions he sent with the \$500,000.00.

In light of the foregoing, Judge Young erroneously dismissed Appellants’ wire transfer cause of action.

CONCLUSION

Trustee Sine had an agreement with Crestar Bank. That agreement was that the bank warranted to pay \$2.5 Million into Trustee Sine’s escrow account after 30 banking days in exchange for a deposit of \$500,000.00. Trustee Sine performed under the agreement while the bank did not. The bank had an affirmative obligation under Article 4A of the Uniform Commercial Code to either reject the wire transfer and return the money or comply with the terms of the instruction it voluntarily accepted. The bank also had an affirmative obligation to warn Sine of Cree’s prior dealings with Mangiapane or to rescind the March 24, 1998 Letter altogether. The bank did none of these things.

Appellants acknowledge that the trial court awarded Plaintiffs a \$3 million judgment against the Diana Group. That judgment is uncollectible; it is not worth the paper it is printed on. Even Judge Young acknowledged that granting the judgment was, in essence, cold comfort for Plaintiffs.¹¹ In the end whatever Appellants’ arrangements were with

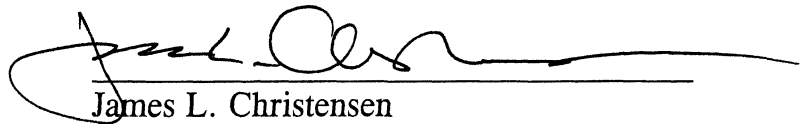
¹¹During closing argument counsel for Appellants and the Court engaged in the following exchange:

Mangiapane and Diana Group do not matter. Crestar obligated itself to perform under the March 24, 1998 Letter and the wire transfer instructions and then refused to perform.

Banks should be held to a higher standard. They handle and often control people's life-blood: money. When a bank like Crestar issues a letter that induces a third party to give up half a million dollars, that bank should be held accountable. When a bank like Crestar accepts a wire transfer with an accompanying instruction that is neither followed nor refused, that bank should be held accountable. For these reasons and for all of the preceding reasons, this Court should overturn Judge Young's rulings.

DATED this 18th day of September.

CORBRIDGE BAIRD & CHRISTENSEN
Attorneys for Appellants



James L. Christensen

The Court: No, I don't have any trouble protecting your client. Your client has a \$3 million judgment. I've already issued it.

Mr. Christensen: That's right, and we both know what that's worth.

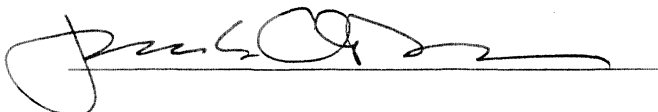
The Court: I don't know what it's worth but I have suspicions.

Mr. Christensen: As do I. (Trial Transcript at 211.)

CERTIFICATE OF SERVICE

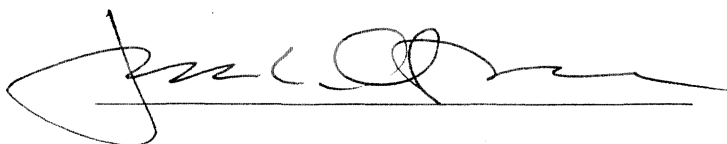
The undersigned hereby certifies that on this 18th day of September, 2001, he hand-delivered two true and correct copies of the foregoing brief to:

Francis M. Wikstrom, USB No. 3462
H. Douglas Owens, USB No. 7762
PARSONS BEHLE & LATIMER
201 S. Main Street, Suite 1800
Salt Lake City, Utah 84145



The undersigned hereby certifies that on this 18th day of September, 2001, he mailed a true and correct copy of the foregoing brief to:

Virginia Powell
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219



ADDENDUM

Tab A

Crestar Bank N.A.
1445 New York Avenue, NW
Washington, DC 20005-2108
(202) 879-6000



March 24, 1998

Dr. Wesley F. Sine, J.D.
Beneficial Towers, 12th, Floor
36 South State Street
Salt Lake City, UT

Ref: Bank of Utah; Account Holder/Wesley F. Sine, Attorney-at-Law Fiduciary
and Trust Account; Account No. 12036086; Bank Officer, Dave Taylor;

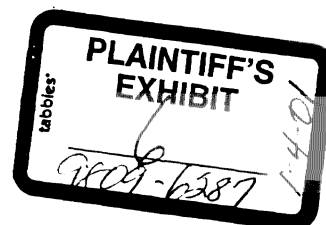
Dear Sir:

On behalf of our Client, Diana Group, Inc., we warrant and certify to transfer to you, directly, on a bank-to-bank basis, to your designated account, the sum of \$2,500,000.00. Said transfer will be no later than 30 banking days from the date after the deposit of \$500,000.00, to Escrow Account Number 206849540, Account Holder - 10321.

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy Y. Cree", written over the printed name.

Nancy Y. Cree
Assistant Vice President
and Branch Manager
Georgetown Office
2929 M Street, N.W.
Washington, D.C. 20007
202-879-6662



S000019

Tab B

Bank of Utah
Wire Transfer Payment Order

16589	Dollar Amount	500,000.00	Date	3/27/98
ABA	054000522	SEQ #		
Name	Crestar Bank	Time		
Address		Type		
Phone		Field		
Recur		Recur		
Entered by				
Counting Use Only				

Beneficiary (receiver)	
Name	10321-Diana Brown
Other	Inc 206849540

recurring Funds Transfer	
person Name (F int)	Wesley F. Stone Trust & Fiduciary Acct
Address	BENEFICIAL TRUSTS 1214 RFLW 36 SOUTH STATE ST SALT LAKE CITY UTAH 84111
Signature	Wesley F. Stone
SS#	528-525952 Other 10210160012798
Effective Date of Transfer	3/27/98

Current Funds Transfer	
quest Made	Signature
Person	
SS#	Other
Customer Authorized	
By Phone	
By Mail	
By Fax	
Person Contacted	
Call Made by	
PLAINTIFF'S EXHIBIT	
9809-6287	104-01

Rev 3/96	
Pre transmission Approval	Post transmission Approval

S000022

Message to be attached to Joint
Attorney Trust.

TO: CRESTAR BANK'S BRANCH MGR. NANCY Y. CREE ASS' V.P.

THE RECEIPT AND ACCEPTANCE (BY CRESTAR BANK) OF THIS \$500,000.00USD WIRE, SERVES TO RECONFIRM BRA. MGR. LETTER DATED 24 MAR.98. SAID LETTER WARRANTS & CERTIFIES CRESTAR'S PROMISE TO PAY, & TRANSFER \$2,500,000USD (VIA BANK TO BANK WIRE) WITHOUT PROTEST, SET OFF OR DELAY, WITHIN 31 BANKING DAYS OF RECEIPT OF THIS WIRE, TO THE ACCOUNT OF WESLEY F.SINE, ATTY. TRUST ACCT.#12036086, BANK OF UTAH, TO THE ATTN. OF MR DAVE TAYLER, MGR.END OF WIRE.

.....THANK YOU FOR YOUR COOPERATION ON THIS MATTER..... JY
1Y

S000023

12/93

DDA / DDL - DEBIT TRANSACTION FORM

NAME Sine Attorney Trust DATE 3/27/98
BY Myron J. Wren, A. Bruce
ION Writ to Crestar Bk

REGULAR DEMAND DEPOSIT TRANSACTIONS
DRAFT CHARGE 059 - OFFICER APPROVED CHECK
CHECK HANDLING CHARGE 075 - FEDERAL WITHHOLDING
DEBIT MEMO 079 - CLOSE ACCOUNT WITHDRAWAL

DEMAND DEPOSIT LOAN TRANSACTIONS
043 - LOAN ADVANCE

ACCOUNT NUMBER
1203 6086

TRAN CODE
0519

AMOUNT
500,000.00

S000024

Tab C

Bank of America
Wire Transfer Payment
Dollar Amount 500,000.00

ABA 054000522
(9 digit)

Name Crestar Bank

Address _____

Phone _____
(9 digit)

SEQ # _____
Time Rec. _____
Type _____
Prod _____
Recur _____
Entered by _____
Verified by _____
ACCOUNTING USE ONLY

Bank
able)

Name _____

Address _____

Phone _____

Beneficiary: (receiver)

Name _____

Account # _____

Other _____

10321 - Diana Brown
206849540

inator: (sender)

Sine Attorney Trust
See attached

essages.

Non-recurring Funds Transfer

In person.

Name (print) _____

Address _____

Signature _____

SS# _____

(Foreign ID Card)

Wesley F. Sine Trust & Fiduciary Acct
BENEFICIAL TRUSTS
36 SOUTH STATE ST
SALT LAKE CITY UT 84111

To be wired
on 3/25/98
Day without
any other condition
only receipt of
funds - 70125
Info to
see 3/27/98

Recurring Funds Transfer

Request Made

In Person

SS# _____

(Foreign ID Card)
Customer Authoriz
(Requestor)

Call Back

Person Contacted
(Verifier(s))

Call Made by

Request Made

☐ By Phone

☐ By Mail

☐ By Fax

Branch Contact

11:20
Time

3/27/98
Effective Date of Transfer

1203-608
Source of Funds
(Cash, DDA, Loan, Account)

Hold Placed On Funds

Fee 71.00

Post-transmission Approval

Rev 3/96

Pre transmission Approval

PLAINTIFF'S
EXHIBIT

8
9809-6287

S000021

Tab D

PRINTOUT OF ELECTRONIC DATA – PRINTED AFTER MAY 29, 1998



CRESTAR000149

98 THU 12:30 FAX 804 273 7382 CRESTAR WIRE OPS 001
2.0 BROWSE - WTR-INTHIST -- REC 0000000 PG 0000001.001 LOCK 00 COL 001 080
AND ==> SCROLL ==> PAGE
***** TOP OF DATA *****

INTHIST CNA TRANSACTION HISTORY TEV 980327-004081
ED CALLER: EXT: SNO DATE:98/03/27
RPT# AMT: \$500,000.00 CUR USD
VAL:03/27/98 TYP:FTRMTP: FNDS:S CHG:DH N CD H COM N CBL

1/124300107 CDT/D/206849540 ADV LTR
CON: GL RECON:
RTC: DEPT: RTC:
AH OGDEN DIANA GROUP INC 10321
I, UT
ADVICE INSTRUCTIONS
REF NUM BNF BANK /

REF NUM:

ADVICE INSTRUCTIONS

ATTORNEY TRUST

BNF /

CH: BK?

REF NUM:

TO-BANK INFO:
1,000 USD VIA BK TO BK WIRE W/O
NOTEST SET OFF OR DELAY W/IN 31
DAYS OF REC OF THIS WIRE TO W F
ATTY #12036086 ATTN D TAYLOR

ADVICE INSTRUCTIONS

ORIG TO BNF INFO:
REC & ACCEPT BY CRESTAR OF THIS 500
1,000.00 WIRE SERVES TO RECONF BR MG

0 BROWSE - WTR-INTHIST -- REC 0000044 PG 0000001.044 LOCK 00 COL 001 080
AND ==>

SCROLL ==> PAGE

0327L4QFAB1D00001203271521FT01

R LTR DD 032498 SAID LMR WRNTS & CE
RT CRESTARS PROMISE TO PAY & TRANS
1 INT BK /

ADVICE INSTRUCTIONS

EMO:

INT BNK: /

PERSON:

PERSON:

PERSON:

PERSON:

980327 15:24:08.37

980327 15:24:04.95

980327 15:24:08.37

ADVICE INSTRUCTIONS

***** BOTTOM OF DATA *****

Tab E

Crestar Bank N.A.
1445 New York Avenue, NW
Washington, DC 20005-2108
(202) 879-6000

CRESTAR

March 24, 1998

Transaction Code: UNI/SAL3M98;

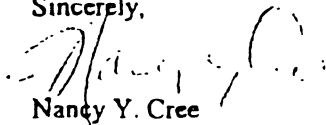
Unisource Cap LLC
4400 Mac Arthur Blvd., #500
Newport Beach, CA 92660

Attn: Ms. Zahra Ghods

Dear Sir:

On behalf of our Client, Diana Group, Inc., we warrant and certify to transfer to you, directly, on a bank-to-bank basis, to your designated account, the sum of \$2,000,000.00. Said transfer will be no later than 15 banking days from the date after the deposit of \$1,000,000.00, to Escrow Account Number 206849540, Account Holder - 10321.

Sincerely,



Nancy Y. Cree
Assistant Vice President
and Branch Manager
Georgetown Office
2929 M Street, N.W.
Washington, D.C. 20007
202-879-6662



CRESTAR000145

Tab F

March 30, 1998

Unisource Cap LLC
4400 MacArthur Blvd., #500
Newport Beach, CA 92660

Attn: Ms. Zahra Ghods

Dear Sir:

This letter is sent on behalf of Crestar Bank to rescind our letter dated March 24, 1998 (Please see attached copy of referenced letter).

Per our internal guidelines, we are not in a position to make this commitment until we actually have the funds on deposit and written instructions from our customer.

We regret any inconvenience this may have caused you. The undersigned may be contacted at 202 879-6542.

Sincerely,

Nancy L. Willson
Vice President

cc: Andrew J. Dolson



Tab G

CHAPTER 4a
FUNDS TRANSFERS

Part 1		Section	
Subject Matter and Definitions		70A 4a 302	Obligations of receiving bank in execution of payment order
Section		70A 4a 303	Erroneous execution of payment order
70A 4a 101	Short title	70A 4a 304	Duty of sender to report erroneously executed payment order
70A 4a 102	Subject matter		
70A 4a 103	Payment order — Definitions	70A 4a 305	Liability for late or improper execution or failure to execute payment order
70A 4a 104	Funds transfer — Definitions		
70A 4a 105	Other definitions		
70A 4a 106	Time payment order is received		
70A 4a 107	Federal reserve regulations and operating circulars		
70A 4a 108	Exclusion of consumer transactions governed by federal law		
Part 2		Part 4	
Issuance and Acceptance of Payment Order		Payment	
70A 4a 201	Security procedure	70A 4a 401	Payment date
70A 4a 202	Authorized and verified payment orders	70A 4a 402	Obligation of sender to pay receiving bank
70A 4a 203	Unenforceability of certain verified payment orders	70A 4a 403	Payment by sender to receiving bank
70A 4a 204	Refund of payment and duty of customer to report with respect to unauthorized payment order	70A 4a 404	Obligation of beneficiary's bank to pay and give notice to beneficiary
70A 4a 205	Erroneous payment orders	70A 4a 405	Payment by beneficiary's bank to beneficiary
70A 4a 206	Transmission of payment order through funds transfer or other communication system	70A 4a 406	Payment by originator to beneficiary — Discharge of underlying obligation
70A 4a 207	Misdescription of beneficiary		
70A 4a 208	Misdescription of intermediary bank or beneficiary's bank		
70A 4a 209	Acceptance of payment order		
70A 4a 210	Rejection of payment order		
70A 4a 211	Cancellation and amendment of payment order		
70A 4a 212	Liability and duty of receiving bank regarding unaccepted payment order		
Part 3		Part 5	
Execution of Sender's Payment Order by Receiving Bank		Miscellaneous Provisions	
70A 4a 301	"Execution" and "execution date"	70A 4a 501	Variation by agreement and effect of funds transfer system rule
		70A 4a 502	Creditor process served on receiving bank — Setoff by beneficiary's bank
		70A 4a 503	Injunction or restraining order with respect to funds transfer
		70A 4a 504	Order in which items and payment orders may be charged to an account — Order of withdrawals from an account
		70A 4a 505	Preclusion of objection to debit of customer's account
		70A 4a 506	Rate of interest
		70A 4a 507	Choice of law

PART 1
SUBJECT MATTER AND DEFINITIONS

70A-4a-101. Short title.

This chapter is known as Uniform Commercial Code — Funds Transfers

History: C. 1953, 70A-4a-101, enacted by District of Columbia have adopted UCC Article L. 1990, ch. 294, § 4. 4A Funds Transfers
Uniform Laws — Forty nine states and the

70A-4a-102. Subject matter.

Except as otherwise provided in Section 70A-4a 108, this chapter applies to funds transfers defined in Section 70A-4a-104

History: C. 1953, 70A-4a 102, enacted by L. 1990, ch. 294, § 5

70A-4a-103. Payment order — Definitions.

- (1) "Beneficiary" means the person to be paid by the beneficiary's bank
- (2) "Beneficiary's bank" means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account
- (3) "Payment order" means an instruction of a sender to a receiving bank transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if
- (a) the instruction does not state a condition to payment to the beneficiary other than time of payment,
- (b) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and
- (c) the instruction is transmitted by the sender directly to the receiving bank or to an agent, funds transfer system, or communication system for transmittal to the receiving bank
- (4) "Receiving bank" means the bank to which the sender's instruction is addressed
- (5) "Sender" means the person giving the instruction to the receiving bank
- (6) If an instruction complying with Subsection (3) is to make more than one payment to a beneficiary, the instruction is a separate payment order with respect to each of the payments
- (7) A payment order is issued when it is sent to the receiving bank

History: C. 1953, 70A-4a-103, enacted by L. 1990, ch. 294, § 6; 1993, ch. 237, § 133
Amendment Notes. — The 1993 amendment effective July 1 1993, redesignated the subsections into alphabetical order and inserted complying with Subsection (3) in Subsection (6)

70A-4a-104. Funds transfer — Definitions.

(1) “Funds transfer” means the series of transactions, beginning with the originator’s payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator’s bank or an intermediary bank intended to carry out the originator’s payment order. A funds transfer is completed by acceptance by the beneficiary’s bank of a payment order for the benefit of the beneficiary of the originator’s payment order.

(2) “Intermediary bank” means a receiving bank other than the originator’s bank or the beneficiary’s bank.

(3) “Originator” means the sender of the first payment order in a funds transfer.

(4) “Originator’s bank” means:

(a) the receiving bank to which the payment order of the originator is issued if the originator is not a bank; or

(b) the originator if the originator is a bank.

History: C. 1953, 70A-4a-104, enacted by 1990, ch. 294, § 7; 1993, ch. 237, § 134. **Amendment Notes.** — The 1993 amendment, effective July 1, 1993, redesignated the subsections into alphabetical order and made stylistic changes throughout the section.

70A-4a-105. Other definitions.

(1) In this chapter:

(a) “Authorized account” means a deposit account of a customer in a bank designated by the customer as a source of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.

(b) “Bank” means a person engaged in the business of banking, and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this chapter.

(c) “Customer” means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.

(d) “Funds transfer business day” of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

(e) “Funds transfer system” means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

(f) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(g) “Prove” with respect to a fact means to meet the burden of establishing the fact under Subsection 70A-1-201(8).

(2) Other definitions applying to this chapter and the sections in which they appear are:

(a) “Acceptance,” Section 70A-4a-209;

(b) “Beneficiary,” Section 70A-4a-103;

(c) “Beneficiary’s bank,” Section 70A-4a-103;

(d) “Executed,” Section 70A-4a-301;

(e) “Execution date,” Section 70A-4a-301;

(f) “Funds transfer system rule,” Section 70A-4a-501;

(g) “Funds transfer,” Section 70A-4a-104;

(h) “Intermediary bank,” Section 70A-4a-104;

(i) “Originator,” Section 70A-4a-104;

(j) “Originator’s bank,” Section 70A-4a-104;

(k) “Payment by beneficiary’s bank to beneficiary,” Section 70A-4a-405;

(l) “Payment by originator to beneficiary,” Section 70A-4a-406;

(m) “Payment by sender, to receiving bank,” Section 70A-4a-403;

(n) “Payment date,” Section 70A-4a-401;

(o) “Payment order,” Section 70A-4a-103;

(p) “Receiving bank,” Section 70A-4a-103;

(q) “Security procedure,” Section 70A-4a-201; and

(r) “Sender,” Section 70A-4a-103.

(3) The following definitions in Chapter 4 apply to this chapter:

(a) “Clearinghouse,” Section 70A-4-104;

(b) “Item,” Section 70A-4-104; and

(c) “Suspends payments,” Section 70A-4-104.

(4) In addition, Title 70A, Chapter 1, Uniform Commercial Code — General Provisions, contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History: C. 1953, 70A-4a-105, enacted by 1990, ch. 294, § 8; 1993, ch. 237, § 135. **Amendment Notes.** — The 1993 amendment, effective July 1, 1993, made stylistic changes in Subsections (1)(b) and (4).

70A-4a-106. Time payment order is received.

(1) The time of receipt of a payment order or communication canceling or amending a payment order is determined by the rules applicable to receipt of a notice stated in Subsection 70A-1-201(27). A receiving bank may fix a cutoff time or times on a funds transfer business day, as a cutoff time for the receipt and processing of payment orders and communications canceling or amending payment orders. Different cutoff times may apply to receipt of payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cutoff time may apply to senders generally or different cutoff times may apply to different senders or categories of payment orders. If a payment order or communication canceling or amending a payment order is received after the close of a funds transfer business day or after the appropriate cutoff time on a funds transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds transfer business day.

(2) If this chapter refers to an execution date or payment date or states a day on which a receiving bank is required to take any action, and the date or day does not fall on a funds transfer business day, the next day that is a funds transfer business day is treated as the date or day stated, unless the contrary is stated in this chapter.

History: C. 1953, 70A-4a-106, enacted by L. 1990, ch. 294, § 9; 1993, ch. 237, § 136. **Amendment Notes.** — The 1993 amend-

ment, effective July 1, 1993, inserted “cutoff” in the second sentence of Subsection (1) and made stylistic changes.

70A-4a-107. Federal reserve regulations and operating circulars.

Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of this chapter to the extent of the inconsistency.

History: C. 1953, 70A-4a-107, enacted by L. 1990, ch. 294, § 10.

Federal Law. — For provisions relating to the Federal Reserve System and to Federal

Reserve Banks, see Title 21 U.S.C. and the regulations authorized and promulgated pursuant thereto.

70A-4a-108. Exclusion of consumer transactions governed by federal law.

This chapter does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978, Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. Section 1693 et seq., as amended.

History: C. 1953, 70A-4a-108, enacted by L. 1990, ch. 294, § 11.

PART 2

ISSUANCE AND ACCEPTANCE OF PAYMENT ORDER

70A-4a-201. Security procedure.

(1) “Security procedure” means a procedure established by agreement of a customer and a receiving bank for the purpose of:

- (a) verifying that a payment order or communication amending or canceling a payment order is that of the customer; or
- (b) detecting error in the transmission or the content of the payment order or communication.

(2) A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure.

History: C. 1953, 70A-4a-201, enacted by L. 1990, ch. 294, § 12.

70A-4a-202. Authorized and verified payment orders.

(1) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(2) (a) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if:

(i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders; and

(ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer.

(b) The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(3) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is considered to be commercially reasonable if:

(a) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer; and

(b) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name, and accepted by the bank in compliance with the security procedure chosen by the customer.

(4) The term “sender” in this chapter includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under Subsection (1), or it is effective as the order of the customer under Subsection (2).

(5) This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(6) Except as provided in this section and in Subsection 70A-4a-203(2), rights and obligations arising under this section or Section 70A-4a-203 may not be varied by agreement.

History: C. 1953, 70A-4a-202, enacted by L. 1990, ch. 294, § 13.

70A-4a-203. Unenforceability of certain verified payment orders.

(1) This section applies to an accepted payment order that, pursuant to Subsection 70A-4a-202(1), is not an authorized order of a customer identified as sender, but which is effective as the order of the customer pursuant to Subsection 70A-4a-202(2).

(2) By express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

(3) (a) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by

- (i) a person entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or
- (ii) a person who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault

(b) Information includes any access device, computer software or the like

4) This section applies to amendments of payment orders to the same extent it applies to payment orders

History: C. 1953, 70A 4a-203, enacted by 1990, ch. 294, § 14

70A-4a-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.

1) (a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is not authorized and not effective as the order of the customer under Section 70A 4a 202, or not enforceable, in whole or in part, against the customer under Section 70A 4a 203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment, and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund

(b) However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order

(c) The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section

2) Reasonable time under Subsection (1) may be fixed by agreement as stated in Subsection 70A-1-204(1), but the obligation of a receiving bank to refund payment as stated in Subsection (1) may not otherwise be varied by agreement

History: C. 1953, 70A-4a-204, enacted by 1990, ch. 294, § 15, 1993, ch. 237, § 137
Amendment Notes — The 1993 amendment effective July 1 1993, made stylistic changes throughout the section

70A-4a-205. Erroneous payment orders.

(1) The rules listed in Subsections (2) through (5) apply if an accepted payment order was transmitted pursuant to a security procedure for the detection of error and payment order

(a) erroneously instructed payment to a beneficiary not intended by the sender,

(b) erroneously instructed payment in an amount greater than the amount intended by the sender, or

(c) is an erroneously transmitted duplicate of a payment order previously sent by the sender

(2) If the sender proves that the sender or a person acting on behalf of the sender pursuant to Section 70A 4a 206 complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in Subsections (3) and (4)

(3) If the funds transfer is completed on the basis of an erroneous payment order described in Subsection (1)(a) or (c) the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution

(4) If the funds transfer is completed on the basis of a payment order described in Subsection (1)(b), the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution

(5) This subsection applies if the sender of an erroneous payment order described in Subsection (1) is not obliged to pay all or part of the order, and the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order. The sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time not exceeding 90 days after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is obliged to reimburse the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order

(6) This section applies to amendments to payment orders to the same extent it applies to payment orders

History: C. 1953, 70A 4a-205, enacted by 1990, ch. 294, § 16, 1991, ch. 5, § 77, 1993, ch. 237, § 138

Amendment Notes — The 1993 amendment effective July 1 1993 substituted "The rules listed in Subsections (2) through (5) apply if" for "This section applies to" in Subsection (1) substituted Subsections (3) and (4) for Subsection (3) in Subsection (2) designated the former second and third sentences of Subsection (3) as Subsection (4) and redesignated former Subsections (4) and (5) as Subsections (5) and (6) and made stylistic changes throughout the section

70A-4a-206. Transmission of payment order through funds transfer or other communication system.

If a payment order addressed to a receiving bank is transmitted to a funds transfer system or other third-party communication system for transmittal to the bank, the system is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank. If there is a discrepancy between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system. This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders. This section does not apply to a funds transfer system of the Federal Reserve Banks.

History: C. 1953, 70A-4a-206, enacted by L. 1990, ch. 294, § 17.

70A-4a-207. Misdescription of beneficiary.

(1) Subject to Subsection (2), if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.

(2) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons then the following rules apply.

(3) Except as otherwise provided in Subsection (5), the beneficiary's bank may treat the person identified by number as the beneficiary of the order if the bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(4) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(5) If the conditions listed in Subsections (5)(a), (b), and (c) are present, the rules listed in Subsections (6) and (7) apply:

- (a) a payment order described in Subsection (2) is accepted;
- (b) the originator's payment order described the beneficiary inconsistently by name and number; and
- (c) the beneficiary's bank pays the person identified by number as permitted by Subsection (2)(a).

(6) If the originator is a bank, the originator is obliged to pay its order.

(7) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies

a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(8) In a case governed by Subsection (2)(a), if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and rescission as follows:

(a) If the originator is obliged to pay its payment order as stated in Subsection (5), the originator has the right to recover.

(b) If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover.

History: C. 1953, 70A-4a-207, enacted by L. 1990, ch. 294, § 18; 1993, ch. 237, § 139.

Amendment Notes. — The 1993 amendment, effective July 1, 1993, redesignated former Subsections (2)(a) and (2)(b) as Subsections (3) and (4), substituted "Subsection (5)" for "Subsection (3)" and added the language beginning "it may rely" in the first sentence and substituted "The beneficiary's bank need not"

for "If the beneficiary's bank pays the person identified by number, it has no duty to" in the last sentence of Subsection (3), deleted former Subsections (3) and (4) relating to the originator's obligation upon inconsistent name and number description and a right to recover restitution, added Subsections (5) through (8), and made stylistic changes in Subsections (2) and (4).

70A-4a-208. Misdescription of intermediary bank or beneficiary's bank.

(1) This subsection applies to a payment order identifying an intermediary bank or beneficiary's bank by an identifying number.

(a) The receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank and need not determine whether the number identifies a bank.

(b) The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(2) This subsection applies to a payment order identifying an intermediary bank or beneficiary's bank both by name and an identifying number if the name and number identify different persons.

(a) If the sender is a bank, the receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank if the receiving bank, when it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person or whether the number refers to a bank. The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(b) If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by Subsection (2)(a), as though the

sender were a bank. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(c) Regardless of whether the sender is a bank, the receiving bank may rely on the name as the proper identification of the intermediary or beneficiary's bank if the receiving bank, at the time it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person.

(d) If the receiving bank knows that the name and number identify different persons, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in Subsection 70A 4a 302(1)(a).

History C. 1953, 70A 4a-208, enacted by L. 1990, ch. 294, § 19, 1993, ch. 237, § 140. **Amendment Notes** — The 1993 amendment effective July 1, 1993 substituted "This subsection applies to" for "This section applies to" at the beginning of Subsection (1) deleted former Subsections (1)(a) and (1)(b) relating to where the name and number identify different persons and where the number identifies a person that is not a bank redesignated the former second sentence of Subsection (2) as Subsection (1)(a) and deleted the former first sentence of that subsection which read "This subsection applies if the payment order identifies the intermediary or beneficiary's bank only by number" redesignated the former third sentence of Subsection (2) as Subsection (1)(b) redesignated former Subsection (3) as Subsection (2) and added "if the name and number identify different persons" at the end of that subsection and made stylistic changes throughout the section.

70A-4a-209. Acceptance of payment order.

(1) Subject to Subsection (4), a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order.

(2) Subject to Subsections (3) and (4), a beneficiary's bank accepts a payment order at the earliest of the following times

(a) when the bank

(i) pays the beneficiary as stated in Subsection 70A 4a-405(1) or (2), or

(ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order,

(b) when the bank receives payment of the entire amount of the sender's order pursuant to Subsection 70A-4a-403(1)(a) or (b), or

(c) the opening of the next funds transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless the order was rejected before that time or is rejected within

(i) one hour after that time, or

(ii) one hour after the opening of the next business day of the sender following the payment date if that time is later

(d) If notice of rejection is received by the sender after the payment date and the authorized account of the sender does not bear interest, the bank

is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the payment date to the day the sender receives notice or learns that the order was not accepted, counting that day as an elapsed day.

(e) If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest payable is reduced accordingly.

(3) Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under Subsection (2)(b) or (c) if the beneficiary of the payment order does not have an account with the receiving bank, the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account.

(4) (a) A payment order issued to the originator's bank cannot be accepted until

(i) the payment date if the bank is the beneficiary's bank, or

(ii) the execution date if the bank is not the beneficiary's bank

(b) If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently canceled pursuant to Subsection 70A 4a 211(2), the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution.

History C. 1953, 70A 4a 209, enacted by L. 1990, ch. 294, § 20, 1993, ch. 237, § 141. **Amendment Notes** — The 1993 amendment effective July 1, 1993 made stylistic changes throughout the section.

70A-4a-210. Rejection of payment order.

(1) A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not commercially reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order.

(a) any means complying with the agreement is commercially reasonable, and

(b) any means not complying is not commercially reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

(2) This subsection applies if a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order. If the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is canceled pursuant to Section 70A-4a 211 or the day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable

redit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

(3) If a receiving bank suspends payments, all unaccepted payment orders issued to the bank are deemed rejected at the time the bank suspends payments.

(4) Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order.

History: C. 1953, 70A-4a-210, enacted by the day the order is canceled pursuant to Section 1990, ch. 294, § 21; 1993, ch. 237, § 142. Amendment Notes. — The 1993 amendment, effective July 1, 1993, deleted “or otherwise” and substituted “the final day of the period” for “that day” in the second sentence of Subsection (2), and made stylistic changes in Subsections (1) and (2).

70A-4a-211. Cancellation and amendment of payment order.

(1) A communication of the sender of a payment order canceling or amending the order may be transmitted to the receiving bank orally, electronically, or in writing. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.

(2) Subject to Subsection (1), a communication by the sender canceling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

(3) After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds transfer system rule allows cancellation or amendment without agreement of the bank:

(a) With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.

(b) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order:

- (i) that is a duplicate of a payment order previously issued by the sender;
- (ii) that orders payment to a beneficiary not entitled to receive payment from the originator; or
- (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(4) An unaccepted payment order is canceled by operation of law at the close of the fifth funds transfer business day of the receiving bank after the execution date or payment date of the order.

(5) A canceled payment order cannot be accepted. If an accepted payment order is canceled, the acceptance is nullified and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be cancellation of the original order at the time of amendment and issue of a new payment order in the amended form at the same time.

(6) Unless otherwise provided in an agreement of the parties or in a funds transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable attorneys' fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.

(7) A payment order is not revoked by death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.

(8) A funds transfer system rule is not effective to the extent it conflicts with Subsection (3)(b).

History: C. 1953, 70A-4a-211, enacted by the 1993, made stylistic changes in Subsections (1), (6), and (7). Amendment Notes. — The 1993 amendment, effective July 1, 1993, ch. 237, § 143.

70A-4a-212. Liability and duty of receiving bank regarding unaccepted payment order.

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent as provided in the agreement or in this chapter, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in this chapter or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in Section 70A-4a-209 and liability is limited to that provided in this chapter. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this chapter or by express agreement.

History: C. 1953, 70A-4a-212, enacted by the 1993, made stylistic changes in the first sentence and substituted “Section 70A-4a-209” for “Section 70A-4a-207” in the second sentence. Amendment Notes. — The 1993 amendment, effective July 1, 1993, inserted “to the extent” and made stylistic changes in the first sentence and substituted “Section 70A-4a-209” for “Section 70A-4a-207” in the second sentence.

PART 3
EXECUTION OF SENDER'S PAYMENT ORDER BY
RECEIVING BANK

70A-4a-301. "Execution" and "execution date."

(1) A payment order is "executed" by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary's bank can be accepted but cannot be executed.

(2) "Execution date" of a payment order means the day on which the receiving bank may properly issue a payment order in execution of the sender's order. The execution date can be determined by instruction of the sender but cannot be earlier than the day the order is received and, unless otherwise determined, is the day the order is received. If the sender's instruction states a payment date, the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the beneficiary on the payment date.

History: C. 1953, 70A-4a-301, enacted by L. 1990, ch. 294, § 24.

70A-4a-302. Obligations of receiving bank in execution of payment order.

(1) Except as provided in Subsections (2) through (4), if the receiving bank accepts a payment order pursuant to Subsection 70A-4a-209(1), the bank has the following obligations in executing the order:

(a) The receiving bank is obliged to issue, on the execution date, a payment order complying with the sender's order and to follow the sender's instructions concerning any intermediary bank or funds transfer system to be used in carrying out the funds transfer, or the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts.

(b) If the sender's instruction states that the funds transfer is to be carried out telephonically or by wire transfer or otherwise indicates that the funds transfer is to be carried out by the most expeditious means, the receiving bank is obliged to transmit its payment order by the most expeditious available means, and to instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is feasible.

(2) (a) Unless otherwise instructed, a receiving bank executing a payment order may:

(i) use any funds transfer system if use of that system is reasonable in the circumstances; and

(ii) issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank if the receiving bank exercises ordinary care in the selection of the intermediary bank.

(b) A receiving bank is not required to follow an instruction of the sender designating a funds transfer system to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer.

(3) Unless Subsection (1)(b) applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first class mail or by any means that are reasonable in the circumstances. If the receiving bank is instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated if the means used are reasonable in the circumstances.

(4) Unless instructed by the sender:

(a) the receiving bank may not obtain payment of its charges for services and expenses in connection with the execution of the sender's order by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges; and

(b) may not instruct a subsequent receiving bank to obtain payment of its charges in the same manner.

History: C. 1953, 70A-4a-302, enacted by L. 1990, ch. 294, § 25; 1993, ch. 237, § 145; 1994, ch. 12, § 106.

Amendment Notes. — The 1993 amendment, effective July 1, 1993, deleted the former first sentence, which read: "This subsection is

subject to Subsections (2) through (4)," added the proviso at the beginning of Subsection (1) and made stylistic changes in Subsection (1)(a).

The 1994 amendment, effective May 2, 1994, corrected references in Subsection (1).

70A-4a-303. Erroneous execution of payment order.

(1) A receiving bank that executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order, or issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order in accordance with Subsection 70A-4a-402(3) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

(2) (a) A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order in accordance with Subsection 70A-4a-402(3) if:

(i) that subsection is otherwise satisfied; and

(ii) the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order.

(b) If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order it accepted only to the extent of the amount of the erroneous order. This

subsection does not apply if the receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender.

(3) If a receiving bank executes the payment order of the sender by issuing a payment order to a beneficiary different from the beneficiary of the sender's order and the funds transfer is completed on the basis of that error, the sender of the payment order that was erroneously executed and all previous senders in the funds transfer are not obliged to pay the payment orders they issued. The issuer of the erroneous order is entitled to recover from the beneficiary of the order the payment received to the extent allowed by the law governing mistake and restitution.

History: C. 1953, 70A-4a-303, enacted by *struction of the sender" for "Section 70A-4a-302(4)" at the end of Subsection (2)(b) and made stylistic changes throughout Subsection (1).*
L. 1990, ch. 294, § 26; 1993, ch. 237, § 146.
Amendment Notes. — The 1993 amendment, effective July 1, 1993, substituted "in-

70A-4a-304. Duty of sender to report erroneously executed payment order.

If the sender of a payment order that is erroneously executed as stated in section 70A-4a-303 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount that is refundable to the sender under Subsection 70A-4a-402(4) for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section.

History: C. 1953, 70A-4a-304, enacted by *ment, effective July 1, 1993, substituted "exceeding" for "to exceed" near the middle of the section.*
L. 1990, ch. 294, § 27; 1993, ch. 237, § 147.
Amendment Notes. — The 1993 amend-

70A-4a-305. Liability for late or improper execution or failure to execute payment order.

(1) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of Section 70A-4a-302 results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in Subsection (3), additional damages are not recoverable.

(2) (a) If execution of a payment order by a receiving bank in breach of Section 70A-4a-302 results in noncompletion of the funds transfer, failure to use an intermediary bank designated by the originator, or issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the

extent not covered by Subsection (1), resulting from the improper execution.

(b) Except as provided in Subsection (3), additional damages are not recoverable.

(3) In addition to the amounts payable under Subsections (1) and (2), damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank.

(4) If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is obliged to compensate the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank, but are not otherwise recoverable.

(5) Reasonable attorneys' fees are recoverable if demand for compensation under Subsection (1) or (2) is made and refused before an action is brought on the claim. If a claim is made for breach of the agreement under Subsection (4) and the agreement does not provide for damages, reasonable attorneys' fees are recoverable if demand for compensation under Subsection (4) is made and refused before an action is brought on the claim.

(6) Except as stated in this section, the liability of a receiving bank under Subsections (1) and (2) may not be varied by agreement.

History: C. 1953, 70A-4a-305, enacted by *ment, effective July 1, 1993, made stylistic changes in Subsection (2)(a).*
L. 1990, ch. 294, § 28; 1993, ch. 237, § 148.
Amendment Notes. — The 1993 amend-

**PART 4
PAYMENT**

70A-4a-401. Payment date.

"Payment date" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank.

History: C. 1953, 70A-4a-401, enacted by *ment, effective July 1, 1993, substituted "may be" for "can be" in the second sentence.*
L. 1990, ch. 294, § 29; 1993, ch. 237, § 149.
Amendment Notes. — The 1993 amend-

70A-4a-402. Obligation of sender to pay receiving bank.

(1) This section is subject to Section 70A-4a-205.

(2) With respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order.

(3) This subsection is subject to Subsection (5) and to Section 70A-4a-303. With respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the

sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of that sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of the sender's payment order.

(4) If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided in Sections 70A-4a-204 and 70A-4a-304, interest is payable on the refundable amount from the date of payment.

(5) If a funds transfer is not completed as stated in Subsection (3) and an intermediary bank is obliged to refund payment as stated in Subsection (4), but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in Subsection 70A-4a-302(1)(a), to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in Subsection (4).

(6) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in Subsection (3) or to receive refund under Subsection (4) may not be varied by agreement.

History C 1953, 70A-4a-402, enacted by L 1990, ch 294, § 30, 1993, ch 237, § 150
Amendment Notes — The 1993 amend

ment effective July 1 1993 made stylistic changes throughout the section

70A-4a-403. Payment by sender to receiving bank.

(1) Payment of the sender's obligation under Section 70A 4a 402 to pay the receiving bank occurs as follows:

(a) If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a Federal Reserve Bank or through a funds transfer system.

(b) If the sender is a bank and the sender

(i) credited an account of the receiving bank with the sender, or
(ii) caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact.

(c) If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent the debit is covered by a withdrawable credit balance in the account.

(2) If the sender and receiving bank are members of a funds transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order

transmitted to the sender by the receiving bank through the funds transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system. The aggregate balance is determined after the right of setoff stated in the second sentence of this subsection has been exercised.

(3) If two banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under Section 70A-4a-402 will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff each bank has made payment to the other.

(4) In any case not covered by Subsection (1), the time when payment of the sender's obligation under Subsection 70A 4a 402(2) or (3) occurs is governed by applicable principles of law that determine when an obligation is satisfied.

History C 1953, 70A 4a 403, enacted by L 1990, ch 294, § 31

70A-4a-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.

(1) Subject to Subsection 70A 4a 211(5) and Subsections 70A 4a 405(4) and (5), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds transfer business day of the bank, payment is due on the next funds transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

(2) If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to give notice to the beneficiary of receipt of the order before midnight of the next funds transfer business day following the payment date. If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order. Notice may be given by first class mail or any other means reasonable in the circumstances. If the bank fails to give the required notice as required by this subsection, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank. No other damages are recoverable. Reasonable attorneys' fees are also recoverable if demand for interest is made and refused before an action is brought on the claim.

(3) The right of a beneficiary to receive payment and damages as stated in Subsection (1) may not be varied by agreement or a funds transfer system rule. The right of a beneficiary to be notified as stated in Subsection (2) may be varied by agreement of the beneficiary or by a funds transfer system rule if the beneficiary is given notice of the rule before initiation of the funds transfer.

History: C. 1953, 70A-4a-404, enacted by L. 1990, ch. 294, § 32; 1993, ch. 237, § 151. **Amendment Notes.** — The 1993 amendment, effective July 1, 1993, made stylistic changes throughout the section.

70A-4a-405. Payment by beneficiary's bank to beneficiary.

(1) If a beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under Subsection 70A-4a-404(1) occurs when and to the extent:

- (a) the beneficiary is notified of the right to withdraw the credit;
- (b) the bank lawfully applies the credit to a debt of the beneficiary; or
- (c) funds with respect to the order are otherwise made available to the beneficiary by the bank.

(2) If the beneficiary's bank does not credit an account of the beneficiary of a payment order, the time when payment of the bank's obligation under Subsection 70A-4a-404(1) is governed by applicable principles of law that determine when an obligation is satisfied.

(3) Except as stated in Subsections (4) and (5), if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable.

(4) (a) A funds transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. A beneficiary's bank that makes a payment that is provisional under the rule is entitled to refund from the beneficiary if:

- (i) the rule requires that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated;
- (ii) the beneficiary, the beneficiary's bank, and the originator's bank agreed to be bound by the rule; and
- (iii) the beneficiary's bank did not receive payment of the payment order that it accepted.

(b) If the beneficiary is obliged to refund payment to the beneficiary's bank, acceptance of the payment order by the beneficiary's bank is nullified and no payment by the originator of the funds transfer to the beneficiary occurs under Section 70A-4a-406.

(5) (a) This subsection applies to a funds transfer that includes a payment order transmitted over a funds transfer system that:

- (i) nets obligations multilaterally among participants; and
- (ii) has in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of one or more participants that do not meet their settlement obligations.

(b) If the beneficiary's bank in the funds transfer accepts a payment order and the system fails to complete settlement pursuant to its rules with respect to any payment order in the funds transfer:

- (i) the acceptance by the beneficiary's bank is nullified and no person has any right or obligation based on the acceptance;
- (ii) the beneficiary's bank is entitled to recover payment from the beneficiary;

(iii) no payment by the originator to the beneficiary occurs under Section 70A-4a-406; and

(iv) subject to Subsection 70A-4a-402(5), each sender in the funds transfer is excused from its obligation to pay its payment order under Subsection 70A-4a-402(3) because the funds transfer has not been completed.

History: C. 1953, 70A-4a-405, enacted by L. 1990, ch. 294, § 33; 1993, ch. 237, § 152. **Amendment Notes.** — The 1993 amendment, effective July 1, 1993, inserted "the time when" in Subsection (2) and made stylistic changes in Subsections (1)(a), (3), and (5)(a).

70A-4a-406. Payment by originator to beneficiary — Discharge of underlying obligation.

(1) Subject to Subsection 70A-4a-211(5) and Subsections 70A-4a-405(4) and (5), the originator of a funds transfer pays the beneficiary of the originator's payment order:

(a) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer; and

(b) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order.

(2) (a) If payment under Subsection (1) is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money, unless:

(i) the payment under Subsection (1) was made by a means prohibited by the contract of the beneficiary with respect to the obligation;

(ii) the beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment;

(iii) funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary; and

(iv) the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract.

(b) If payment by the originator does not result in discharge under this section, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under Subsection 70A-4a-404(1).

(3) For the purpose of determining whether discharge of an obligation occurs under Subsection (2), if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one or more receiving banks in the funds transfer, payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.

(4) Rights of the originator or of the beneficiary of a funds transfer under this section may be varied only by agreement of the originator and the beneficiary.

History: C. 1953, 70A-4a-406, enacted by L. 1990, ch. 294, § 34; 1993, ch. 237, § 13. **Amendment Notes.** — The 1993 amendment, effective July 1, 1993, made a stylistic change near the end of Subsection (2)(b).

PART 5

MISCELLANEOUS PROVISIONS

70A-4a-501. Variation by agreement and effect of funds transfer system rule.

(1) Except as otherwise provided in this chapter, rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.

(2) (a) “Funds transfer system rule” means a rule of an association of banks:

(i) governing transmission of payment orders by means of a funds transfer system of the association or rights and obligations with respect to those orders; or

(ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a Federal Reserve Bank, acting as an intermediary bank, sends a payment order to the beneficiary’s bank.

(b) Except as otherwise provided in this chapter, a funds transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this chapter and indirectly affects another party to the funds transfer who does not consent to the rule. A funds transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in Subsection 70A-4a-404(3), Subsection 70A-4a-405(4), and Subsection 70A-4a-507(3).

History: C. 1953, 70A-4a-501, enacted by L. 1990, ch. 294, § 35; 1993, ch. 237, § 154. **Amendment Notes.** — The 1993 amendment, effective July 1, 1993, made stylistic changes throughout the section.

70A-4a-502. Creditor process served on receiving bank — Setoff by beneficiary’s bank.

(1) As used in this section, “creditor process” means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(2) This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order.

(3) If a beneficiary’s bank has received a payment order for payment to the beneficiary’s account in the bank the rules listed in Subsections (4) through (6) apply.

(4) The bank may credit the beneficiary’s account and the amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(5) The bank may credit the beneficiary’s account and may allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(6) If creditor process with respect to the account has been served and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process.

(7) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary’s bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

History: C. 1953, 70A-4a-502, enacted by L. 1990, ch. 294, § 36; 1993, ch. 237, § 155. **Amendment Notes.** — The 1993 amendment, effective July 1, 1993, substituted “to” for “if” after “applies” and inserted “if the creditor process” in the first sentence of Subsection (2), deleted “This subsection applies” at the beginning and added “the rules listed in Subsections (4) through (6) apply” at the end of Subsection (3), and redesignated former Subsections (3)(a), (3)(b), (3)(c), and (4) as Subsections (4) through (7).

70A-4a-503. Injunction or restraining order with respect to funds transfer.

(1) For proper cause and in compliance with applicable law, a court may restrain:

(a) a person from issuing a payment order to initiate a funds transfer;

(b) an originator’s bank from executing the payment order of the originator; or

(c) the beneficiary’s bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds.

(2) A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

History: C. 1953, 70A-4a-503, enacted by L. 1990, ch. 294, § 37.

70A-4a-504. Order in which items and payment orders may be charged to an account — Order of withdrawals from an account.

(1) If a receiving bank has received more than one payment order of the sender or one or more payment orders and other items that are payable from the sender’s account, the bank may charge the sender’s account with respect to the various orders and items in any sequence.

(2) In determining whether a credit to an account has been withdrawn by the holder of the account or applied to a debt of the holder of the account, credits first made to the account are first withdrawn or applied.

History: C. 1953, 70A-4a-504, enacted by L. 1990, ch. 294, § 38.

70A-4a-505. Preclusion of objection to debit of customer’s account.

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer’s objection to the payment within one year after the notification was received by the customer.

History: C. 1953, 70A-4a-505, enacted by L. 1990, ch. 294, § 39.

70A-4a-506. Rate of interest.

(1) If, under this chapter, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined:

- (a) by agreement of the sender and receiving bank; or
- (b) if the payment order is transmitted through a funds transfer system, by a funds transfer system rule.

(2) If the amount of interest is not determined by an agreement or rule as stated in Subsection (1), the amount is calculated by multiplying the applicable Federal Funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable Federal Funds rate is the average of the Federal Funds rates published by the Federal Reserve Bank of New York for each of the days for which interest is payable divided by 360. The Federal Funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank.

History: C. 1953, 70A-4a-506, enacted by L. 1990, ch. 294, § 40; 1993, ch. 237, § 156. **Amendment Notes.** — The 1993 amendment, effective July 1, 1993, substituted “under this chapter” for “pursuant to this chapter” near the beginning of Subsection (1).

70A-4a-507. Choice of law.

(1) The following rules apply unless the affected parties otherwise agree or Subsection (3) applies:

- (a) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(b) The rights and obligations between the beneficiary’s bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary’s bank is located.

(c) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary’s bank is located.

(2) If the parties described in Subsections (1)(a), (b), and (c) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

(3) (a) A funds transfer system rule may select the law of a particular jurisdiction to govern:

- (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system; or
- (ii) the rights and obligations of some or all parties to a funds transfer, any part of which is carried out by means of the system.

(b) A choice of law made pursuant to Subsection (a)(i) is binding on participating banks. A choice of law made pursuant to Subsection (a)(ii) is binding on the originator, other sender, or a receiving bank having notice that the funds transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, at the time the funds transfer is initiated, the beneficiary has notice that the funds transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this subsection may govern whether or not that law bears a reasonable relation to the matter in issue.

(4) In the event of inconsistency between an agreement under Subsection (2) and a choice of law rule under Subsection (3), the agreement under Subsection (2) prevails.

(5) If a funds transfer is made by use of more than one funds transfer system and there is inconsistency between choice of law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue.

History: C. 1953, 70A-4a-507, enacted by L. 1990, ch. 294, § 41; 1993, ch. 237, § 157. **Amendment Notes.** — The 1993 amendment, effective July 1, 1993, substituted “in Subsections (1)(a), (b), and (c)” for “in each of the subparagraphs of Subsection (1)” near the beginning of Subsection (2) and “that has” for “which has” near the end of Subsection (5).

**CHAPTER 5
LETTERS OF CREDIT**

Section		Section	
70A-5-101.	Short title.	70A-5-105.	Consideration.
70A-5-102.	Scope.	70A-5-106.	Time and effect of establishment of credit.
70A-5-103.	Definitions and index of definitions.	70A-5-107.	Advice of credit — Confirmation
70A-5-104.	Formal requirements — Signing.		— Error in statement of terms.

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payment or acceptance, at the time of presentment, and a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that:

- (a) the warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;
- (b) the draft has not been altered;
- (c) the warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized; and
- (d) if the draft is a demand draft, creation of the demand draft according to the terms on its face was authorized by the person identified as drawer.

(2) A drawee making payment may recover from a warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft:

- (a) breach of warranty is a defense to the obligation of the acceptor; and
- (b) if the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from a warrantor for breach of warranty the amounts stated in this subsection.

(3) If a drawee asserts a claim for breach of warranty under Subsection (1) based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under Section 70A-3-404 or 70A-3-405, or the drawer is precluded under Section 70A-3-406 or 70A-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(4) If a dishonored draft is presented for payment to the drawer or an indorser, or any other item is presented for payment to a party obliged to pay the item, and the item is paid, the person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the item, a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(5) The warranties stated in Subsections (1) and (4) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(6) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

(7) A demand draft is a check, as provided in Section 70A-3-104.

(8) If the warranty in Subsection (1)(d) is not given by a transferor under applicable conflict of law rules, the warranty is not given to that transferor when that transferor is a transferee.

History: C. 1953, 70A-4-208, enacted by L. 1993, ch. 237, § 111; 1998, ch. 60, § 6.
Amendment Notes. — The 1998 amendment, effective July 1, 1998, added Subsection (1)(d), making a related change, and added Subsections (7) and (8).

70A-4-210. Security interest of collecting bank in items, accompanying documents, and proceeds.

(1) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

- (a) in case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;
- (b) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or
- (c) if it makes an advance on or against the item.

(2) If credit given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part, the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(3) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Title 70A, Chapter 9a, Uniform Commercial Code — Secured Transactions, but:

- (a) no security agreement is necessary to make the security interest enforceable, Subsection 70A-9a-203(2)(c)(i);
- (b) no filing is required to perfect the security interest; and
- (c) the security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds.

History: C. 1953, 70A-4-210, enacted by L. 1993, ch. 237, § 113; 2000, ch. 252, § 28.
Amendment Notes. — The 2000 amendment, effective July 1, 2001, updated the references in Subsection (3).

CHAPTER 5
LETTERS OF CREDIT

Repeals and Reenactments. — Laws 1997, ch. 241 repealed former Chapter 5 (§§ 70A-5-101 through 70A-5-117), as enacted by Laws 1965, ch. 154, relating to letters of credit, and enacted this chapter in its place effective July 1, 1997.

Section	Title.	Section	Remedies.
70A-5-101.	Definitions.	70A-5-111.	Transfer of letter of credit.
70A-5-102.	Scope.	70A-5-112.	Transfer by operation of law.
70A-5-103.	Formal requirements.	70A-5-113.	Assignment of proceeds.
70A-5-104.	Consideration.	70A-5-114.	Statute of limitations.
70A-5-105.	Issuance, amendment, cancellation, and duration.	70A-5-115.	Choice of law and forum.
70A-5-106.	Confirmer, nominated person, and adviser.	70A-5-116.	Subrogation of issuer, applicant, and nominated person.
70A-5-107.	Issuer's rights and obligations.	70A-5-117.	Security interest of issuer or nominated person.
70A-5-108.	Fraud and forgery.	70A-5-118.	Applicability.
70A-5-109.	Warranties.	70A-5-119.	Savings clause.
70A-5-110.		70A-5-120.	

70A-5-101. Title.

This chapter shall be known as “Uniform Commercial Code — Letters of Credit.”

History: C. 1953, 70A-5-101, enacted by L. 1997, ch. 241, § 3.

Repeals and Reenactments. — Laws 1997, ch. 241, § 3 repeals former § 70A-5-101,

as enacted by Laws 1965, ch. 154, § 5-101, setting out the chapter title, and enacts the present section, effective July 1, 1997.

70A-5-102. Definitions.

As used in this chapter:

(1) “Adviser” means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended.

(2) “Applicant” means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.

(3) “Beneficiary” means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.

(4) “Confirmer” means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.

(5) “Dishonor” of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.

(6) “Document” means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion:

(a) which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in Subsection 70A-5-108(5); and

(b) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.

(7) “Good faith” means honesty in fact in the conduct or transaction concerned.

(8) “Honor” of a letter of credit means performance of the issuer’s undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, “honor” occurs:

(a) upon payment;

(b) if the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment; or

(c) if the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.

(9) “Issuer” means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family, or household purposes.

(10) “Letter of credit” means a definite undertaking that satisfies the requirements of Section 70A-5-104 by an issuer to a beneficiary at the

request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.

(11) “Nominated person” means a person whom the issuer:

(a) designates or authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit; and

(b) undertakes by agreement or custom and practice to reimburse

(12) “Presentation” means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.

(13) “Presenter” means a person making a presentation as or on behalf of a beneficiary or nominated person.

(14) “Record” means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) “Successor of a beneficiary” means a person who succeeds substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver.

History: C. 1953, 70A-5-102, enacted by L. 1997, ch. 241, § 4.

Repeals and Reenactments. — Laws 1997, ch. 241, § 4 repeals former § 70A-5-102,

as enacted by Laws 1965, ch. 154, § 5-102, establishing the scope of the chapter, and enacts the present section, effective July 1, 1997.

70A-5-103. Scope.

(1) This chapter applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

(2) The statement of a rule in this chapter does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this chapter.

(3) With the exception of this Subsection (3), Subsections (1) and (4) Subsections 70A-5-102(9) and (10), 70A-5-106(4), and 70A-5-114(4), and except to the extent prohibited in Subsections 70A-1-102(3) and 70A-5-117(4), the effect of this chapter may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this chapter.

(4) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

History: C. 1953, 70A-5-103, enacted by L. 1997, ch. 241, § 5.

Repeals and Reenactments. — Laws 1997, ch. 241, § 4 repeals former § 70A-5-103,

as last amended by Laws 1996, ch. 204, § 7, defining terms and cross-referencing other definitions, and enacts the present section, effective July 1, 1997.

70A-5-104. Formal requirements.

A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a record and is authenticated:

- (1) by a signature; or
- (2) in accordance with the agreement of the parties or the standard practice referred to in Subsection 70A-5-108(5).

History: C. 1953, 70A-5-104, enacted by L. 1997, ch. 241, § 6. as enacted by Laws 1965, ch. 164, § 5-104, pertaining to formal requirements, and enacts the present section, effective July 1, 1997
Repeals and Reenactments. — Laws 1997, ch. 241, § 6 repeals former § 70A-5-104,

70A-5-105. Consideration.

Consideration is not required to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation.

History: C. 1953, 70A-5-105, enacted by L. 1997, ch. 241, § 7. as enacted by Laws 1965, ch. 154, § 5-105, relating to consideration, and enacts the present section, effective July 1, 1997
Repeals and Reenactments. — Laws 1997, ch. 241, § 7 repeals former § 70A-5-105,

70A-5-106. Issuance, amendment, cancellation, and duration.

(1) A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.

(2) After a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer, and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent.

(3) If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one year after its stated date of issuance or, if none is stated, after the date on which it is issued.

(4) A letter of credit that states that it is perpetual expires five years after its stated date of issuance, or if none is stated, after the date on which it is issued.

History: C. 1953, 70A-5-106, enacted by L. 1997, ch. 241, § 8. as enacted by Laws 1965, ch. 154, § 5-106, relating to time and effect of establishing credit, and enacts the present section, effective July 1, 1997.
Repeals and Reenactments. — Laws 1997, ch. 241, § 8 repeals former § 70A-5-106,

70A-5-107. Confirmer, nominated person, and adviser.

(1) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

(2) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.

(3) A person requested to advise may decline to act as an adviser. An adviser that is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment, or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation, or amendment is enforceable as issued.

(4) A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment, or advice has the rights and obligations of an adviser under Subsection (3). The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the letter of credit, confirmation, amendment, or advice received by the person who so notifies.

History: C. 1953, 70A-5-107, enacted by L. 1997, ch. 241, § 9. as enacted by Laws 1965, ch. 154, § 5-107, relating to advice of credit and confirmation, and enacts the present section, effective July 1, 1997.
Repeals and Reenactments. — Laws 1997, ch. 241, § 9 repeals former § 70A-5-107,

70A-5-108. Issuer's rights and obligations.

(1) Except as otherwise provided in Section 70A-5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in Subsection (5), appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in Section 70A-5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(2) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents:

- (a) to honor;
- (b) if the letter of credit provides for honor to be completed more than seven business days after presentation, to accept a draft or incur a deferred obligation; or
- (c) to give notice to the presenter of discrepancies in the presentation.

(3) Except as otherwise provided in Subsection (4), an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.

(4) Failure to give the notice specified in Subsection (2) or to mention fraud, forgery, or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in Subsection 70A-5-109(1) or expiration of the letter of credit before presentation.

(5) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(6) An issuer is not responsible for:

- (a) the performance or nonperformance of the underlying contract arrangement, or transaction;
- (b) an act or omission of others; or
- (c) observance or knowledge of the usage of a particular trade other than the standard practice referred to in Subsection (5).

(7) If an undertaking constituting a letter of credit under Subsection 70A-5-102(10) contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(8) An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter.

(9) An issuer that has honored a presentation as permitted or required by this chapter:

(a) is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;

(b) takes the documents free of claims of the beneficiary or presenter;

(c) is precluded from asserting a right of recourse on a draft under Sections 70A-3-414 and 70A-3-415;

(d) except as otherwise provided in Sections 70A-5-110 and 70A-5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and

(e) is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

History: C. 1953, 70A-5-108, enacted by L. 1997, ch. 241, § 10. as enacted by Laws 1965, ch. 154, § 5-108, relating to notation credit, and enacts the

Repeals and Reenactments. — Laws 1997, ch. 241, § 10 repeals former § 70A-5-108, present section, effective July 1, 1997

70A-5-109. Fraud and forgery.

(1) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(a) the issuer shall honor the presentation, if honor is demanded by:

(i) a nominated person who has given value in good faith and without notice of forgery or material fraud;

(ii) a confirmer who has honored its confirmation in good faith;

(iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person; or

(iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and

(b) the issuer, acting in good faith, may honor or dishonor the presentation in any other case.

(2) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

(a) the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

(b) a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;

(c) all of the conditions to entitle a person to the relief under the law of this state have been met; and

(d) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under Subsection (1)(a).

History: C. 1953, 70A-5-109, enacted by L. 1997, ch. 241, § 11. as enacted by Laws 1965, ch. 154, § 5-109, describing an issuer's obligation to its cus-

Repeals and Reenactments. — Laws 1997, ch. 241, § 11 repeals former § 70A-5-109, tomer, and enacts the present section, effective July 1, 1997

70A-5-110. Warranties.

(1) If its presentation is honored, the beneficiary warrants:

(a) to the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in Subsection 70A-5-109(1); and

(b) to the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

(2) The warranties in Subsection (1) are in addition to warranties arising under Title 70A, Chapter 3, Negotiable Instruments, Chapter 4, Bank Deposits and Collections, Chapter 7, Documents of Title, and Chapter 8, Investment Securities, because of the presentation or transfer of documents covered by any of those chapters.

History: C. 1953, 70A-5-110, enacted by L. 1997, ch. 241, § 12. as enacted by Laws 1965, ch. 154, § 5-110, relating to availability of credit in portions, and

Repeals and Reenactments. — Laws 1997, ch. 241, § 12 repeals former § 70A-5-110, enacts the present section, effective July 1, 1997

70A-5-111. Remedies.

(1) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this Subsection (1). If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

(2) If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.

(3) If an adviser or nominated person other than a confirmer breaches an obligation under this chapter or an issuer breaches an obligation not covered

in Subsection (1) or (2), a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this Subsection (3) and Subsections (1) and (2).

(4) An issuer, nominated person, or adviser who is found liable under Subsection (1), (2), or (3) shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.

(5) Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this chapter.

(6) Damages that would otherwise be payable by a party for breach of an obligation under this chapter may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

History: C. 1953, 70A-5-111, enacted by L. 1997, ch. 241, § 13.

Repeals and Reenactments. — Laws 1997, ch. 241, § 13 repeals former § 70A-5-111,

as enacted by Laws 1965, ch. 154, § 5-111, relating to warranties on transfer and presentment, and enacts the present section, effective July 1, 1997.

70A-5-112. Transfer of letter of credit.

(1) Except as otherwise provided in Section 70A-5-113, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.

(2) Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:

(a) the transfer would violate applicable law; or

(b) the transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in Subsection 70A-5-108(5) or is otherwise reasonable under the circumstances.

History: C. 1953, 70A-5-112, enacted by L. 1997, ch. 241, § 14.

Repeals and Reenactments. — Laws 1997, ch. 241, § 14 repeals former § 70A-5-112,

as enacted by Laws 1965, ch. 154, § 5-112, relating to time allowed for dishonor and rejection, and enacts the present section, effective July 1, 1997.

70A-5-113. Transfer by operation of law.

(1) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(2) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in Subsection (5), an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in Subsection 70A-5-108(5) or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

(3) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

(4) Honor of a purported successor's apparently complying presentation under Subsection (1) or (2) has the consequences specified in Subsection 70A-5-108(9) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of Section 70A-5-109

(5) An issuer whose rights of reimbursement are not covered by Subsection (4) or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under Subsection (2).

(6) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

History: C. 1953, 70A-5-113, enacted by L. 1997, ch. 241, § 15.

Repeals and Reenactments. — Laws 1997, ch. 241, § 15 repeals former § 70A-5-113,

as enacted by Laws 1965, ch. 154, § 5-113, relating to indemnities, and enacts the present section, effective July 1, 1997

70A-5-114. Assignment of proceeds.

(1) In this section, "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary's drawing rights or documents presented by the beneficiary.

(2) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.

(3) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.

(4) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.

(5) Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

(6) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by Title 70A, Chapter 9a, Uniform Commercial Code — Secured Transactions, or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by Title 70A, Chapter 9a, Uniform Commercial Code — Secured Transactions, or other law.

History: C. 1953, 70A-5-114, enacted by L. 1997, ch. 241, § 16; 2000, ch. 252, § 29.
Repeals and Reenactments. — Laws 1997, ch. 241, § 16 repeals former § 70A-5-114, as last amended by Laws 1996, ch. 204, § 6, concerning right to reimbursement, and enacts

the present section, effective July 1, 1997
Amendment Notes. — The 2000 amendment, effective July 1, 2001, added “Chapter 9a, Uniform Commercial Code” twice in Subsection (6).

COLLATERAL REFERENCES

A.L.R. — Applicability of waiver or estoppel to preclude claim of nonconformance of documents as ground for dishonor or presentment

under letter of credit under UCC § 5-114, 53 A L R 5th 667

70A-5-115. Statute of limitations.

An action to enforce a right or obligation arising under this chapter must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

History: C. 1953, 70A-5-115, enacted by L. 1997, ch. 241, § 17.

Repeals and Reenactments. — Laws 1997, ch. 241, § 17 repeals former § 70A-5-115,

as enacted by Laws 1965, ch. 154, § 5-115, relating to remedy for improper dishonor, and enacts the present section, effective July 1, 1997

70A-5-116. Choice of law and forum.

(1) The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in Section 70A-5-104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(2) Unless Subsection (1) applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this Subsection (2).

(3) (a) Except as otherwise provided in this Subsection (3)(a), the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject.

(b) If this chapter would govern the liability of an issuer, nominated person, or adviser under Subsection (1) or (2):

(i) the relevant undertaking incorporates rules of custom or practice; and

(ii) there is conflict between this chapter and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Subsection 70A-5-103(3).

(4) If there is conflict between this chapter and Title 70A, Chapter 4, Commercial Paper, Chapter 4, Bank Deposits and Collections, Chapter 4, Funds Transfers, or Chapter 9, Secured Transactions, this chapter governs.

(5) The forum for settling disputes arising out of an undertaking within this chapter may be chosen in the manner and with the binding effect the governing law may be chosen in accordance with Subsection (1).

History: C. 1953, 70A-5-116, enacted by L. 1997, ch. 241, § 18.

Repeals and Reenactments. — Laws 1997, ch. 241, § 18 repeals former § 70A-5-116,

as last amended by Laws 1977, ch. 272, § 6 relating to transfer and assignment, and enacts the present section, effective July 1, 1997

COLLATERAL REFERENCES

A.L.R. — Validity, construction, and application of the uniform customs and practice for documentary credits (UCP), 56 A L R 5th 565

70A-5-117. Subrogation of issuer, applicant, and nominated person.

(1) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

(2) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in Subsection (1).

(3) A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of:

(a) the issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;

(b) the beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary, and

(c) the applicant to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.

(4) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in Subsections (1) and (2) do not arise until the issuer honors the letter of credit or otherwise pays and the rights in Subsection (3) do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person, and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defense, or excuse.

History: C. 1953, 70A-5-117, enacted by L. 1997, ch. 241, § 19.

Repeals and Reenactments. — Laws 1997, ch. 241, § 19 repeals former § 70A-5-117,

as enacted by Laws 1965, ch. 154, § 5-117 relating to insolvency of banks, and enacts the present section, effective July 1, 1997.

70A-5-118. Security interest of issuer or nominated person.

(1) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.

(2) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under Subsection (1), the security interest continues and is subject to Chapter 9, but:

(a) a security agreement is not necessary to make the security interest enforceable under Subsection 70A-9a-203(2)(c);

(b) if the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and

(c) if the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicting security interest in the document so long as the debtor does not have possession of the document.

History: C. 1953, 70A-5-118, enacted by L. 2000, ch. 252, § 30.

Repeals and Reenactments. — Laws 2000, ch. 252, § 30 repeals former § 70A-5-118,

as enacted by Laws 1997, ch. 241, § 20, describing the applicability of the chapter, and enacts the present section, effective July 1, 2001.

70A-5-119. Applicability.

This act applies to a letter of credit that is issued on or after July 1, 1997. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before July 1, 1997.

History: C. 1953, 70A-5-119, enacted by L. 2000, ch. 252, § 31.

Repeals and Reenactments. — Laws 2000, ch. 252, § 31 repeals former § 70A-5-119, as enacted by Laws 1997, ch. 241, § 21, a savings clause for transactions before the enactment of this chapter, and enacts the present section, effective July 1, 2001.

Meaning of “this act.” — Laws 2000, ch. 252 repeals Chapter 9 of this title, enacts Chapter 9a of this title, and makes conforming changes throughout the Utah Code. In context, however, the term “this act,” as used in this section, probably means “this chapter,” especially since this section is identical to former § 70A-5-118.

70A-5-120. Savings clause.

A transaction arising out of or associated with a letter of credit that was issued before July 1, 1997, and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.

History: C. 1953, 70A-5-120, enacted by L. 2000, ch. 252, § 32.

Meaning of “this act.” — Laws 2000, ch. 252 repeals Chapter 9 of this title, enacts Chapter 9a of this title, and makes conforming changes throughout the Utah Code. In context,

however, the term “this act,” as used in this section, probably means “this chapter,” especially since this section is identical to former § 70A-5-119.

Effective Dates. — Laws 2000, ch. 252, § 177 makes the act effective on July 1, 2001.

**CHAPTER 6
BULK SALES [REPEALED]**

70A-6-101 to 70A-6-111. Repealed.

Repeals. — Laws 1996, ch. 42, § 2 repeals §§ 70A-6-101 to 70A-6-110, as last amended by L. 1990, ch. 294, § 42 and L. 1991, ch. 5, § 78 and as enacted by L. 1990, ch. 294, §§ 44 to 51, regulating bulk sales, effective April 29, 1996. Laws 1990, ch. 294, § 52 repeals § 70A-6-111,

as enacted by L. 1965, ch. 154, § 6-111, providing for limitation of actions and levies, effective April 23, 1990.

Compiler's Notes. — The Title 70A, Chapter 6, repeal note is set out to correct an omission from the bound volume

**CHAPTER 7
WAREHOUSE RECEIPTS, BILLS OF
LADING AND OTHER
DOCUMENTS OF TITLE**

Part 5

**Warehouse Receipts and Bills
of Lading — Negotiation
and Transfer**

Section

70A-7-503. Document of title to goods defeated in certain cases.

PART 5

**WAREHOUSE RECEIPTS AND BILLS
OF LADING — NEGOTIATION
AND TRANSFER**

70A-7-503. Document of title to goods defeated in certain cases.

(1) A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who neither:

(a) delivered or entrusted them or any document of title covering the goods to the bailor or his nominee with actual or apparent authority to ship, store or sell or with power to obtain delivery under this chapter (Sections 70A-7-403) or with power of disposition under this act (Sections 70A-2-401 and 70A-9a-320) or other statute or rule of law; nor

(b) acquiesced in the procurement by the bailor or his nominee of any document of title.

(2) Title to goods based upon an unaccepted delivery order is subject to the rights of anyone to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. Such a title may be defeated under the next section to the same extent as the rights of the issuer or transferee from the issuer.

(3) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the freight forwarder

Tab I

SINE VS. CRESTAR BANK NANCY CREE-JOHNSON AUGUST 30, 2000

Page 1 to Page 117

**CONDENSED TRANSCRIPT AND CONCORDANCE
PREPARED BY**

***TURNER REPORTING SERVICES
10510 Sideburn Court
Fairfax, VA 22032
Phone: 703-425-0139***

you remember?

A Let's see. I went to that department in 1969. So around '70, '71.

Q And what was your next position with National Savings Trust?

A My boss was promoted to president. And I worked as his executive secretary.

Q And how long did you have that position?

A Shortly after that, he was also made chairman of the board. And I was his executive secretary until 1984.

Q And what happened then?

A Then he retired and I was transferred to the trust area, Trust Department.

Q Okay. When you were executive secretary for the president of the National Savings Trust, who then became chairman of the board, what were your responsibilities?

A Executive duties, secretarial duties. Basically, writing letters, preparing documents for loans, and that sort of thing, and ratifying minutes and things that had to be presented to the board.

1 Q Okay. And over what period of time did you
2 serve as trainee in that position?

3 A I was at that particular office for almost
4 two years.

5 Q And what was your next position after being
6 trainee as branch manager?

7 A I was then sent to the United Unions branch
8 as the manager at 1750 New York Avenue.

9 Q And what did you call that branch? I am
10 sorry.

11 A United Unions. It was basically a branch
12 for the unions in the building.

13 Q And what was your next position?

14 A I was then transferred back to the main
15 office at 15th and New York Avenue as the manager.

16 Q Over what period of time were you the
17 manager of that office?

18 A Probably about four or five months.

19 Q Okay. Let's back up a second. When you
20 were a trainee to the branch manager initially in
21 1990, what were your responsibilities?

22 A I was serving as the assistant manager.

1 Q And after you were transferred to the Trust
2 Department in about 1984, what were your
3 responsibilities?

4 A I was the trust administrative person. And
5 basically, I over -- I was overseeing all the
6 administrative responsibilities of the trust,
7 including word processing and mail distribution and
8 also the secretary to the Trust Committee. I would
9 go in and take the minutes and prepare them for the
10 next meeting and for the board meetings.

11 Q Okay. And how long were you in that
12 position?

13 A Six years.

14 Q And that takes us to about when? About
15 1990?

16 A Uh-huh.

17 Q And what was your next position?

18 A I was then transferred to Branch Management
19 as a trainee.

20 Q And was this still with National Savings
21 Trust?

22 A It was United Virginia Bank, which shortly

1 Q And what did that involve?

2 A Waiting on customers, basically opening new
3 accounts, doing the overdraft list, approving checks,
4 and those kinds of things, reviewing reports.

5 Q All right. After you became manager of the
6 United Unions Branch, what were your
7 responsibilities?

8 A Basically, overseeing the branch. I was
9 given assigned goals, and I had to meet my goals and
10 make sure that the branch was operating in the proper
11 auditing procedures and still opening new accounts,
12 sales, and that sort of thing, but no lending
13 authority.

14 Q Up to that point in time, had you ever had
15 any lending authority?

16 A No, I never had that at a bank.

17 Q At any time?

18 A At any time.

19 Q You have never been a loan officer?

20 A No.

21 Q After you transferred back to the main
22 office as a manager or as manager, what were your

1 thereafter became Crestar Bank.

2 Q Do you remember about when that was that
3 UVB acquired National Savings Trust?

4 A It was either 1986 or '87.

5 Q So during the time that you were in the
6 trust administrative position, UVB actually owned the
7 bank?

8 A Yes.

9 Q Did your former boss retire at the time of
10 the acquisition by Crestar Bank -- by UVB, I mean?

11 A He actually retired prior to that. I think
12 the acquisition really wasn't until about two years
13 later.

14 Q And which branch did you work at as a
15 trainee in 1990?

16 A I worked at the main office, which was at
17 15th and New York Avenue.

18 Q And this would be the main office of United
19 Virginia Bank at that time?

20 A It wasn't the main office of United
21 Virginia. It was the main office of the Washington,
22 D.C. area.

1 responsibilities?

2 A Basically, the same as, you know, at
3 Unions, overseeing the branch operation to make sure
4 that auditing procedures were being followed and
5 sales goals, customer service, managing employees.

6 Q What was your next position?

7 A I was then transferred to the Georgetown
8 branch.

9 Q And what's the address there?

10 A 30th and M.

11 Q When were you transferred to the Georgetown
12 branch?

13 A May of '95.

14 Q Was there any particular reason for that
15 transfer that you were aware of?

16 A They wanted -- they were needing a branch
17 manager. And because of my years of experience, they
18 transferred me to a higher asset branch.

19 Q And what were your duties and
20 responsibilities as branch manager of the Georgetown
21 branch?

22 A Basically the same, making sure that the

branch was following auditing procedures, managing employees, operations, sales goals, customer service, opening new accounts.

Q And when you say sales goals, what do you mean by that?

A Each branch is assigned revenue dollars that have to be earned. And we would have certain amounts of dollars for particular accounts that we opened, and we were assigned basically, depending on the market area whether we were successful in doing equity loans or commercial accounts, you know, to meet our goals. And the goals were set according to the assets of the branch.

Q I take it from your prior answer that after you were manager of the Georgetown branch, you still had no lending authority?

A No lending.

Q And at that position, did you have any authority to commit the bank to expend its own funds through loans or guarantees or letters of credit or other instruments?

A Absolutely not.

1 her at any time?

2 A Other than actually meeting her. And then
3 there was an incident where she became upset with
4 Gilda regarding having to complete a currency
5 transaction report.

6 Q What was that incident?

7 A If a customer comes in and cashes checks
8 totalling over \$10,000, we have to complete a report
9 for the IRS. And basically, it is to see if people
10 are laundering money. And she became very upset with
11 Gilda because Gilda did not advise her that this
12 would transpire and would require additional
13 information from her. And she was very upset with
14 Gilda and then later called me to explain that she
15 should have been informed that this would be done if
16 she cashed checks in excess of \$10,000.

17 Q And what did you do about that?

18 A Well, basically, she was very upset. And I
19 apologized to her for not being informed. And she
20 said at the time that she would probably close her
21 accounts.

22 Q And what about the forms themselves? Did

Q Now, what was your next position, if any, after being manager of the Georgetown branch in May of 1995?

A Retirement

Q Pardon?

A I retired.

Q And when did you retire?

A September of '99 or was it '98? I am sorry It had to be '98, I guess, yeah

Q Now, I want to ask you a little bit about the facts that bring us here today. Of course, you are aware that you were sued along with Crestar Bank by Wesley Sine in a case out in Utah, correct?

A That is correct.

Q And Ms. Rita Mangiapane or Rita Josephine Mangiapane and the Diana Group, Inc. were also named as defendants in that case. Are you aware of that?

A Yes, I am.

Q Now, I want to ask you when you first became acquainted with Ms. Mangiapane or the Diana Group, Inc.?

A Gilda Davis, who is my customer service

1 you explain to her that that was a government
2 requirement?

3 A Yes, I did explain that this had to be
4 completed for anyone that came in there. And that
5 even though a person would go from one branch to
6 another, each transaction was counted for the day as
7 a total regardless of where they went. And this had
8 to be done because it totals in the system whenever a
9 customer would exceed the \$10,000.

10 Q And is that a form or a documentation that
11 the bank does or that the customer does?

12 A No. It is done by both. We actually
13 request information from the customer to be completed
14 on a form and then we submit it.

15 Q Did Ms. Mangiapane object to providing that
16 information?

17 A Yes, she did. She was very upset and did
18 not want to provide. So we completed it as much as
19 we could with the information that we had, but it had
20 to be submitted because it is the law -- a bank law.

21 Q And I take it, then, you followed the law
22 on that?

representative at Georgetown, introduced me to her and classified her as a preferred banking customer of high net worth. And basically, she was a good customer.

Q And who was Gilda Davis at the time or what was her position?

A She was a customer service representative.

Q Did Ms. Mangiapane have a personal account at the branch or a business account for her company Diana Group?

A When I first arrived, she had business accounts. And I am not really sure about this. But she may have been on a joint account with Mr. Mitchell.

Q And did Ms. Mangiapane have a business account in the name of Diana Group or more than one account for Diana Group?

A There were several accounts when I first got there for Diana Group.

Q At the time that Gilda Davis told you about Ms. Mangiapane and Diana Group, did you have any interactions with Ms. Mangiapane or any dealings with

1 A Oh, yes.

2 Q Now, what were your next dealings with --
3 if any, with Ms. Mangiapane?

4 A Well, because of the misunderstanding with
5 Gilda, she started to come to me for her banking
6 needs. And basically, I, you know, would cash her
7 checks for her and try to give her good service.

8 Q You weren't a teller at the time, were you?

9 A No.

10 Q And so when she came in to cash a check,
11 why would there be any need for you to be involved in
12 that?

13 A Well, we always try to give our preferred
14 customers the excellence service. And I had several
15 other customers that I did this for as well. And
16 basically, they would come over and bring their
17 checks. And if they were drawing on Crestar, they
18 would, you know, issue the check. And I would take
19 it behind the line personally and get them the money
20 and bring it back.

21 Q All right. And were there any occasions
22 when some sort of approval was required for checks of

1 A Mr. Sine cancelling it, yes.
 2 MS. POWELL: Let me just ask you to look at
 3 what has previously been marked as Exhibit 7 in
 4 Ms. Mangiapane's deposition, which I will ask the
 5 reporter to mark as Exhibit 3 in deposition.
 6 (Exhibit No. 3 — Sine Letter
 7 3/12/98, marked for identification.)
 8 BY MS. POWELL:
 9 Q This is a letter from Mr. Sine's files, not
 10 from the bank files or Ms. Mangiapane's files. But
 11 can you tell whether this is the letter that she
 12 showed you or not or do you remember?
 13 A It looks similar. I can't say for sure
 14 this is the exact one because I can't remember, to be
 15 honest with you. But the wording was basically that
 16 the transaction was being cancelled.
 17 Q Okay. So the important part of whatever
 18 the letter was that she showed you was to the effect
 19 that it was cancelled?
 20 A Yeah. She just wanted to let me know that
 21 this was not going to happen.
 22 Q Okay. Now, do you remember about when that

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1 was or how long after the February 6 letter that was?
 2 A Not really. I just — it may have been a
 3 few weeks or maybe a month or so. I can't really
 4 recall the exact time. I do remember her telling me
 5 that.
 6 Q Okay. And did there come a time when she
 7 asked you — Ms. Mangiapane asked you to write
 8 another letter — a similar letter with different
 9 amounts in it?
 10 A Yes. She said they had had a new amount
 11 that he could — actually had pulled together and
 12 that — and asked me to write the second letter
 13 changing the amounts.
 14 Q Did she tell you that it was still in
 15 connection with this same matter involving treasuries
 16 in the amount of \$500 million or was this a different
 17 matter?
 18 A It was — I don't recall her telling me
 19 anything different other than it was still the same
 20 transaction, only a smaller amount.
 21 Q And in between the time that you wrote the
 22 March — I am sorry — the time you wrote the

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1 February 6 letter at Ms. Mangiapane's request and the
 2 time that you wrote the second letter in March, which
 3 we will talk about, were there any other things going
 4 on in terms of the Diana Group or their dealings with
 5 the bank?
 6 A I can't really say.
 7 Q Okay. Nothing that stands out in your
 8 mind?
 9 A No, I can't think of anything at this time.
 10 MS. POWELL: Now, I want to show you next a
 11 copy of what appears to be a fax cover sheet and
 12 letter, which was previously marked as Exhibit 11 in
 13 Ms. Mangiapane's deposition and which we will mark as
 14 Exhibit 4.
 15 (Johnson Exhibit No. 4 — Letter from Cree
 16 to Sine, 3/24/98, marked for
 17 identification.)
 18 BY MS. POWELL:
 19 Q And I want to point out to you that the
 20 numbers down at the bottom right where the 5 and the
 21 zero's and the 18 and 19 are indicate that this was a
 22 document from Mr. Sine's files that we got in this

1 litigation, okay. It is not anything from the bank's
 2 files, but from his files after he filed suit. But I
 3 want you to look at the second page of Exhibit 4,
 4 which appears to be a copy of a letter, dated March
 5 24, 1998, from you at Crestar to Wesley Sine,
 6 reference Bank of Utah, account holder Wesley F.
 7 Sine, attorney at law, fiduciary and Trust Account
 8 No. 12036086; Bank Officer, Dave Taylor.
 9 Does this appear to be a copy of or similar
 10 to a letter that you sent to Mr. Sine at
 11 Ms. Mangiapane's request?
 12 A Yes, it does.
 13 Q And the amounts shown in this letter are
 14 that Mr. Sine would deposit \$500,000 to Diana Group's
 15 escrow account and Diana Group would transfer to him
 16 \$2,500,000. Do you recall those as being the numbers
 17 that were in the letter that you sent?
 18 A Yes.
 19 Q When Ms. Mangiapane asked you to write the
 20 letter of March 24, did she have with her the
 21 February 6 letter or the wording to give you for this
 22 one as well, or did you pull out the February 6

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1 letter? How did that work?
 2 A I really can't remember exactly whether she
 3 had a copy or I had my copy there or when I did it.
 4 Q Did you have any discussion with
 5 Ms. Mangiapane about the language — a discussion
 6 similar to the one that you had about the February 6
 7 letter?
 8 A Well, basically, you know, that this was
 9 not a bank guarantee and the bank wouldn't be held
 10 accountable. So I pretty much, you know, was assured
 11 that there shouldn't be a problem.
 12 Q Did she tell you that this letter was
 13 required because of her arrangement with Mr. Sine and
 14 her escrow account arrangement that she had with
 15 Mr. Sine?
 16 A She may have repeated it. I can't recall
 17 the exact conversation. But she said he is fully
 18 aware that, you know, this is not a bank transaction,
 19 that it is strictly between her and him, so.
 20 Q And other than a conversation you may have
 21 had in February to verify to him that you had sent
 22 the February 6 letter, had you had any conversation

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1 with Mr. Sine at this point?
 2 A No.
 3 Q Had you had any conversations with anybody
 4 connected with this transaction for Diana Group or
 5 anybody else at this time?
 6 A No.
 7 Q Besides Ms. Mangiapane?
 8 A No.
 9 Q Did you show the March 24, 1998 letter to
 10 anyone at the bank or seek any approval of anyone to
 11 send this letter?
 12 A No.
 13 Q Did you talk to anyone about it other than
 14 Ms. Mangiapane?
 15 A No.
 16 Q After you sent the letter, did you hear
 17 from Mr. Sine?
 18 A Yes. He called to verify that I had
 19 written the letter. And we had a very brief
 20 conversation. And basically, I wanted to reiterate
 21 that for my own — to protect the bank, that this was
 22 not a bank transaction. And he stated he was fully

1 Q Is that the document that has a fax cover
2 sheet for the first page?
3 A Yes.
4 Q And the second page is the letter of
5 February 6 that you said you signed?
6 A Yes.
7 Q Does the first page of this indicate to you
8 that you sent a copy of the second page, that is, the
9 letter of February 6 to Mr. Sine by a facsimile?
10 A Well, I faxed the letter to him as she
11 requested. And then the original letter was mailed.
12 Q You mailed the original letter to Mr. Sine
13 or to whom?
14 A Well, I know there was one instance where
15 she actually mailed one and I mailed one.
16 Q Do you know which it was?
17 A No.
18 Q And did you send it by U.S. Mail?
19 A She normally would like to have them sent
20 overnight express. So it may have gone out FedEx or
21 something like that.
22 Q Do you have a recollection?

1 A No, other than the fact that she would be
2 opening an escrow account with us and which meant
3 that it could be a substantial account for the bank
4 and that, you know, basically assured me that this
5 was not any kind of a -- the wording on it did not
6 implement or implicate the bank was guaranteeing
7 anything.
8 Q Do you have a recollection of that
9 conversation in your mind?
10 A Well, other than that she reassured me
11 that --
12 Q No. My question is, do you have a
13 recollection in your mind about her coming in and
14 talking to you about that or are you reconstructing
15 it from the face of the letter?
16 A No, I can't tell you verbatim. All I know
17 is that she indicated to me that it had to be worded
18 this way and that in no way was it implicating the
19 bank to be guaranteeing the funds.
20 Q Do you recall what you said to her?
21 A No.
22 Q You don't?

1 A No.
2 Q Now, with respect to the letter of
3 March 24 -- and I think that is -- I believe that's
4 Exhibit 4.
5 A Okay.
6 Q Do you know whether you faxed this letter
7 to Mr. Sine?
8 A I am sure -- I think she said I needed to
9 fax it to him as well. I remember he called me
10 shortly after he received it.
11 Q Okay.
12 A Okay. So I am sure I faxed it.
13 Q And when you say he called you shortly, was
14 that within minutes or within hours or within days?
15 A No. It was the same day.
16 Q Same day?
17 A Uh-huh.
18 Q Was Ms. Mangiapane there when he called you
19 at the bank? That is, was she present with you when
20 he called?
21 A I don't recall.
22 Q Do you recall her being present with any

1 A Huh-uh.
2 Q Did she ever tell you or did you ever ask
3 her what the purpose of the letter was?
4 A To open up the escrow.
5 Q You did ask her that or did she tell you
6 that or what?
7 A She told me.
8 Q She told you that the purpose of the letter
9 was to open an escrow?
10 A Well, that she needed to open an account
11 for each client or transaction that she did and it
12 had to be in a separate account for that specific
13 transaction and it had to be titled as such.
14 Q And did she open an escrow account at that
15 time?
16 A Uh-huh.
17 Q Or was the escrow already opened?
18 A Well, I can't remember if she opened it
19 prior to or we did open it.
20 Q You knew there was an escrow account by
21 that number in your bank?
22 A Yeah, or I wouldn't have been able to put

1 conversations that you had with Mr. Sine on the
2 telephone?
3 A No. I don't really remember.
4 Q Okay. Do you know what happened to the
5 original of the letter -- this is the March 24
6 letter?
7 A Other than it being mailed or FedEx'd, I
8 really can't remember exactly.
9 Q You think you would have sent it to
10 Mr. Sine?
11 A I may have or she may have.
12 Q Do you have a recollection?
13 A No.
14 Q Is it possible you would have given her a
15 copy and then sent the original to Mr. Sine?
16 A That's possible.
17 Q With respect to the letter, dated
18 February 26 -- pardon me -- February 6.
19 A Uh-huh.
20 Q Can you recall the words that
21 Ms. Mangiapane said to you that caused you to write
22 that letter?

1 it in the letter.
2 Q Right. Do you have any other recollection
3 about the origin of this letter, that is, what
4 prompted you to write it other than what you have
5 already testified to?
6 A No.
7 Q Okay.
8 MS. POWELL: The videographer says he needs
9 to change his tape.
10 MR. MARSHALL: Okay.
11 THE VIDEOGRAPHER: Okay. It is 12:02, and
12 we are going off the record.
13 (A recess was held.)
14 (12 06 43) THE VIDEOGRAPHER: Okay. It is
15 beginning tape two. We are back on the record.
16 BY MR. MARSHALL:
17 Q Mrs. Cree, did you ever ask Ms. Mangiapane
18 about the transaction that the letter of February 6
19 related to?
20 A As I told you before, she --
21 Q My question was, did you ever ask her?
22 A She volunteered. I mean, she told me what

1 now that Crestar Bank filed a suspicious activity
2 report on Ms. Mangiapane?
3 A Yes.
4 Q When did you become aware of that?
5 A At the time I was terminated.
6 Q And when were you terminated?
7 A September sometime in '98.
8 Q Okay. And how did you become aware of it?
9 A It was discussed at my meeting.
10 Q At your termination meeting?
11 A Uh-huh.
12 Q Who was present at the meeting besides
13 yourself?
14 A Someone from our Human Resources
15 Department.
16 Q Do you know the name of the attorney?
17 A Jean Williams.
18 Q Weems?
19 A Williams. And our regional manager, which
20 I can't remember. I think it was Gene Kirby and my
21 market manager Cheryl Shackerfort.
22 Q What was said at the meeting?

1 A Basically, that I had violated auditing
2 procedures.
3 Q Did they specify how you had violated it?
4 A That I should have been aware of -- I can't
5 remember exactly how they worded it because I was
6 very upset. But something to the effect that I
7 should have been more cautious with my transactions
8 with --
9 Q Go ahead.
10 MS. POWELL I just want to make sure she
11 is able to finish her answer.
12 BY MR. MARSHALL:
13 Q Go ahead.
14 A My transactions with Ms. Mangiapane.
15 Q So was this specifically directed at the
16 transaction with Ms. Mangiapane?
17 A Yes.
18 Q And not other transactions?
19 A No.
20 Q Is that the sum of the substance of the
21 conversation at that time?
22 A Uh-huh.

1 Q Prior to your termination at the bank, had
2 you ever had any discussions with any of your
3 superiors about either the letter of February 6 or
4 the letter of March 24?
5 A It was after Mr. Sine had summoned me is
6 when all of this was brought to conversation.
7 Q After the lawsuit started?
8 A Uh-huh.
9 Q So far as you know, were any of your
10 superiors aware prior to the time the lawsuit started
11 that you had written the letters, dated February 6
12 and March 24?
13 A Not to my knowledge.
14 Q I see. They had never discussed it with
15 you and you had never discussed it with them?
16 A No.
17 Q Are you now receiving any income from
18 Crestar Bank?
19 A I receive a retirement.
20 Q A retirement?
21 A Uh-huh.
22 Q Had you reached the -- had you fulfilled

1 the qualification for retirement at the time of your
2 termination?
3 A Yes.
4 Q All right. And do you have any present
5 relationship with Crestar Bank other than receiving
6 your retirement from them?
7 A That's it.
8 Q Did you say that's it?
9 A Uh-huh.
10 Q Do you receive your retirement compensation
11 directly from the bank or is it from some other fund?
12 A It is directly from the bank. It goes
13 right into my checking account.
14 Q And is Crestar Bank financing your defense
15 in this case?
16 A Yes, they are.
17 Q And are you under any obligation to repay
18 the bank for your defense?
19 A No.
20 Q No conditions?
21 A Other than I didn't criminally involve the
22 bank.

1 Q And are you aware that Crestar Bank filed a
2 suspicious activity report on you?
3 A No.
4 Q You are not aware of that today?
5 A No.
6 Q Okay. Would you refer to Exhibit 8?
7 A Okay.
8 Q Now, I was a little confused before about
9 your testimony. Do you have a recollection of having
10 received that letter?
11 A No, I don't really. I don't remember it,
12 but if I --
13 Q Does it look strange to you?
14 A It doesn't look familiar.
15 Q Okay. Would you refer to Exhibit 6? Do
16 you have a recollection of having received that
17 letter?
18 A I really can't remember. And I think if I
19 received any of them, I would have immediately called
20 Ms. Mangiapane.
21 Q Well, do you know -- I think that what you
22 are saying is that it was your customary practice if

1 you received a letter about this transaction, you
2 would call her; is that correct?
3 A Well, any involvement regarding her
4 transaction with Mr. Sine, which involved me, yes, I
5 would because she kept reassuring me that this would
6 be handled.
7 Q And so really it was your customary
8 practice. You don't recall specifically having a
9 conversation with her about Exhibit 6, do you?
10 A I may have said, I have received a letter
11 from him. And she may have told me basically that,
12 you know, this would all be taken care of, that the
13 funds would be forthcoming and I would have nothing
14 to worry about.
15 Q Do you have a recollection that that
16 conversation took place, or is it just that this was
17 the usual course of dealings?
18 A This was usually the course of dealings.
19 Q And tell me again, do you have a
20 recollection of having received that letter from
21 Mr. Sine?
22 A I may have and I may have read it. And in

Tab J

SINE VS. CRESTAR BANK JOSEPH R. MANGIAPANE AUGUST 29, 2000

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**CONDENSED TRANSCRIPT AND CONCORDANCE
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***TURNER REPORTING SERVICES
10510 Sideburn Court
Fairfax, VA 22032
Phone: 703-425-0139***

en in connection with getting checks or --

A That is correct.

Q Or what other -- any kind of business dealings at all with her that you had?

A No, nothing more extensive than that.

Q Did you ever try to arrange for any kind of letters of credit?

A No.

Q Or any bond transfers or anything of that kind?

A Not with her.

Q All right.

A But may I ask what you mean by bond transfers?

Q Well, I'm just trying to get a feel for the nature of the kind of banking business that Diana Group had with Crestar Bank during the time that Ms. Davis was the account representative.

A I have never viewed Crestar Bank as an institution that would engage in business activities. I have seen it more as a consumer oriented bank. Since effectively some years have passed before I had --

nce I had had a substantial financial statement of net worth and dealt with other institutions, the only thing that I would look to Crestar Bank for was a repository in the normal course of business or every day consumer activities as well as a reference, as well as the paying of bills which unfortunately they have handled in the manner they used to have which was either convenient. But that is really the extent of it. I mean I did not look to them as a repository for enormous amounts of money, nor anything of that nature.

Q Did you look to other banks as repositories for enormous amounts of money?

A Yes, I did.

Q Which banks were those?

A Well, Deutschebank would be one of them.

Q Did Diana Group have an account there?

A It was issued an account and that was all.

Q They did at one time have an account there?

A We didn't do anything with it, but they did send us account numbers, yes.

Q For Diana Group Inc.?

A Diana Group Inc.

Q And did there come a time when you started dealings with Nancy Cree at Crestar Bank instead of Gilda Davis?

A Yes.

Q Was there a reason for that?

A Yes, there was a reason for that. Gilda -- I wanted to withdraw money from my account, from the Diana account. And I wanted I want to preface this. I may fall back and say my account, but I'm talking basically of the corporate account of Diana Group Inc. and she wanted me to fill out a form. And I asked her what it was about. And she said that was because a certain amount of money had been withdrawn which collectively exceeded \$10,000. And I said, well, rather than do that, I don't have to take that sum of money out, and I will simply take less than that and leave the rest in the bank and come back, even though it's a little cumbersome right now, at another date. And in so doing Ms. Cree got involved in that and said that she would handle the matter for me. She saw that I was a little displeased with the fact that I was not made

1 aware of that. And that simply was what happened. From
2 my understanding, though, Gilda did not stay in the
3 bank that much longer anyway.

4 Q Do you know approximately when this was that
5 Ms. Nancy Cree first became involved with respect to
6 the Diana Group account?

7 A Datewise, I can't remember when that was to
8 be frank with you.

9 Q The transaction that is being, that is the
10 subject of this lawsuit was in 1998. Was it --

11 A This was several years before that.

12 Q Several years before that?

13 A That is correct.

14 Q Now, I'll ask you the same question with
15 respect to your dealings with Nancy Cree. Was there
16 anything different in that than had been your dealings
17 with Crestar Bank while Gilda Davis was handling, or
18 was your customer representative?

19 A Well, I recognized and felt that Ms. Cree
20 seemed to be a much more responsible person. She was
21 the authority at the bank. And it was easier to relate
22 to her. I just felt more confidence in doing so.

1 Q And the nature of the transactions, were they
2 still basically that Diana Group Inc. was a depositor
3 at the bank?

4 A That is right.

5 Q So you would have interacted with anybody who
6 was there, I guess, if you were there to cash a check
7 or to make a deposit?

8 A Well, yes. But it was obvious that every
9 time you go to cash a check Ms. Cree would have to okay
10 it, so why go through a surreptitious route when you
11 could deal with her.

12 Q Was that checks under or over a certain
13 amount or are you saying that all the checks of Diana
14 Group had to be okayed by Nancy Cree?

15 A No, I really don't know what your limitations
16 are and I don't know what your internal control systems
17 are, but it seemed to me that checks which were a few
18 hundred dollars still had to be okayed by her. And I'm
19 not saying that absolutely, but by and large that was a
20 factor.

21 Q Were your --

22 A I had never asked for special consideration.

1 It simply is that one of the better employees that
2 Crestar had at the time was Ms. Cree. She seemed to be
3 a lot more responsible. She seemed to be a lot more
4 responsive to the clients.

5 Q Did Diana Group Inc. ever have any
6 transactions in which you sought any type of funding
7 from Crestar Bank?

8 A No.

9 Q So you never dealt with Nancy Cree concerning
10 any type of financing by Crestar Bank?

11 A Absolutely nothing.

12 Q And your dealings with Nancy Cree at Crestar
13 Bank would have been solely in her capacity as the
14 person who worked at the bank and you were representing
15 a depositor at the bank?

16 A That's correct.

17 Q Now, I want to ask you now about the
18 transaction that, or the events that form the basis for
19 this lawsuit. And first let me ask you about the
20 plaintiff, Wesley F. Sine. When did you first have any
21 knowledge of Mr. Sine or any dealings with him?

22 A Early February in 19 -- was it '98 that this

assets in one company or one corporation. You try to extend ownership to different entities.

Q Were you the president and incorporator of St. Clair as well?

A Yes, I was.

Q Is that a Florida corporation?

A That was. It does not exist any longer.

Q Did St. Clair ever derive any income?

A No, it did not.

Q Or have any business operations?

A No, it did not. It was dissolved.

Q Was Lamar International Limited Ms.

Rosellini's company or did you have any understanding of that entity?

A Her name and that name were associated together in written correspondence; that was the company name that she gave. Anything about it in reality I don't know. I know very little about her. I have had several conversations with her and I really chose not to continue conversing with her. I found her very problematic.

Q Where did you understand she lived?

A I thought she lived somewhere in the Southwest.

Q And her company, Lamar International, did you have any understanding of where it was?

A No. I really took very little interest in her.

Q Is it fair to say that once you were introduced to Ray Emery you didn't have further dealings with Mr. Rosellini, or did you?

A No, I spoke with her several times and, quite frankly, she didn't make any sense, and I thought the better part of discretion would be not to talk with her because I really could not understand where she was coming from. Things that she said seemed to be very contradictory, and it occurred to me that she was not a person that you could rely on. And it was just an instinctive thing. We did not seem to agree on anything and I really could not understand her. It is not that she didn't speak English well or something of that nature, but I mean I could not understand her mentality or what her interests were. To me she was a broker who had facilitated an introduction, nothing more than

1 that. And the statements that she made didn't seem to
2 be in keeping with that, but they were to a degree
3 irrational to be frank with you.

Q Who was A.M. Nardo?

A Evidently that is another broker. That person is the president or somehow associated with a mortgage company, and she and Nardo seemed to be closely allied.

Q Did you ever have any conversations with or dealings with Mr. Nardo?

A I had conversations with him. I found him a very caustic, disrespectful, belligerent kind of person and I didn't care to talk to him or relate to him.

Q With respect to the initial \$25 million financing what were the roles of Mr. Emery and Mr. Flowers?

A Well, curiously enough, after the introduction, what precipitated it or what ended it I have no idea, but both men seemed to dislike each other intensely. They were both brokers. And the curious — and it really was curious after the fact, after I had completed this funding of \$500,000 — Herman Flowers said, "I wish that you had never done this." And I

1 said, "Why?" He said, "You have no idea what a person
2 Ray Emery is like."

3 "Well," I said, "so why didn't you tell me
4 that before?" And he would not talk to him any more.
5 What that was about I don't know. And that's it.

6 Q So, were Mr. Emery and Mr. Flowers, I believe
7 you said they are both brokers. Is that right?

8 A That is correct.

9 Q And you are using the term "brokers" to mean
10 brokers of financing?

11 A That's right, or alluding to be brokers.

12 Q And Mr. Sine's role on the other hand, was
13 that different?

14 A Not really. It's just that he added baggage
15 to the transaction by virtue of being this "trustee"
16 for this trust, and the trust struck me as being odd
17 because this is the man who is the attorney and it is
18 yet in his name. But beyond that I had no particular
19 insight. He also alluded to having sources that he knew
20 of separate and apart from the activities of Ray Emery,
21 and "sources" implying sources of funding.

22 Q So, as you worked your way through and worked

1 with these various people we have discussed, and
2 focusing first now on the initial attempt to obtain \$25
3 million, what was your understanding was to be the
4 source of that funding? Was it Mr. Sine's trust, or
5 other investors, or did you know?

6 A I did not know because the term "trust" was
7 used ambiguously. Not until — let me take that back,
8 because the letter, the initial letter that was sent
9 dated February 6 was addressed to the Sine Trust. Now,
10 that was for a transaction involving \$500,000. Whether
11 they meant the trust on the earlier transaction that
12 was contemplated in February and they are talking about
13 the same trust, I do not know.

14 Q Did there come a time when you requested
15 Crestar Bank to write some sort of letter with respect
16 to that \$25 million transaction?

17 A Yes, I did, as part of what would have been
18 escrow account instructions.

19 Q And would you tell me, please, what was the
20 reason for your contact with Crestar Bank with regard
21 to that \$25 million transaction and what the role of
22 Crestar Bank was to be?

1 A Simply an escrow agent. There was an account
2 that was opened for the receipt of funds, and the
3 identification of the account number, the wiring
4 instructions, and the fact that the funds should be
5 transferred to that account, and the fact that when
6 funding in repayment was transferred in they would
7 transfer out on a bank-to-bank basis to the designated
8 account that the trustee would provide.

9 Q Now, with respect to that initial \$25,000
10 amount —

11 A You mean million.

12 Q I'm sorry, these numbers are very large to
13 me. With respect to that initial \$25 million funding,
14 what repayment arrangements did you make?

15 A The repayment arrangements would be made out
16 of the large funding, which would have been the overall
17 financing of the property, to include operating costs,
18 et cetera.

19 Q And, focusing on Mr. Sine or his trust as the
20 source of the \$25 million, what arrangements did you
21 make with him in terms of what you would pay him back
22 for that?

have typed it on to the original?

A No, no, he would not -- I am telling you that I typed this. I'm assuming the responsibility for having that statement there. And the statement there was critically to negate his ability to take and use this for some other purpose. I mean that was the intent. And I have no problem saying that to you. That was the intent.

Q Okay. Did Mr. Sine in fact wire the \$500,000 into Diana Group's escrow account?

A Yes, he did.

Q Was that on or about March 27?

A I believe so. There is a bank statement which would give you the exact date.

Q And --

A Is that corroborated by that bank statement?

Q I don't have that before me at the moment. I just have that in my notes.

A Okay. Well, there was a document here.

Q After the money was wired did you continue in your discussions with Mr. Flowers about the funding that he was to come up with on his part?

1 And he again protested not to send it back. I
2 said, "Well, the only way that I would keep it is that
3 if we enter into an operative agreement that says,
4 because," I said, "I've seen now that you, all of a
5 sudden, are starting to relate to this situation in
6 terms that had not been understood, anticipated, nor
7 accepted. So, I would like to have an agreement which
8 fully declares the fact that this is a transaction not
9 between you and the bank but between you and Diana, and
10 I want to set down the terms and conditions, and that
11 there has never been a bank guaranty, in other words,
12 this is the operative statement for the transfer of
13 funds and it is not being guaranteed."

14 Q And did you in fact send Mr. Sine a document
15 to use as that agreement?

16 A Yes, I did.

17 Q And was that document called Private
18 Placement Agreement?

19 A Yes, it was.

20 Q Let me show you next -- I have a couple of
21 versions of this. Let me show you first the one-page
22 document which I will ask the reporter to mark as

A Yes.

Q And what came of that?

A He assured me that it was forthcoming.

Q And I take it at some -- well, it never was forthcoming, was it, to you?

A I never received it.

Q Right. Do you know whether in fact he got the \$10 million?

A I do not know that. He stopped communicating with me. I called, I had endless calls to him, and he had a voice answering device. No matter what number I called I was not able to contact him at all.

Q After Mr. Sine wired or his group or whoever wired the \$500,000 to Diana Group's escrow account, what communications did you have with Mr. Sine immediately after that?

A Mr. Sine communicated with me and asked me to have the bank issue a bank guaranty of payment.

Q That is of the \$2,500,000?

A That is correct.

Q And was that on the phone that he asked you to get that?

1 exhibit 14.

2 (No. 14 - Private Placement Agreement
3 0000070, marked for identification.)

4 BY MS. POWELL:

5 Q Exhibit 14 has a fax transmission indication
6 at the top indicating March 27 and it is entitled
7 Private Placement Agreement. And it has some whereas
8 clauses and some numbered paragraphs. And this is a
9 document that came from your files. Can you identify
10 what this is?

11 A This was the original Private Placement
12 Agreement which he subsequently amended and sent back
13 to me and I redid.

14 Q And were there any terms of substance that
15 were changed, or was it the form, or what changed?

16 A Well, he did correct the fact that the funds
17 had already -- as you can see, the first whereas
18 relates to unencumbered funds and seeks to place said
19 funds. And he corrected that to relating to the fact
20 that the funds had been sent, past tense. He objected
21 to the categories that begin each paragraph, such as
22 private placement, such as amount, term, escrow

A That is the only way I have ever communicated with him other than by fax.

Q So this was an oral communication?

A That is correct.

Q And what was your response to him?

A I told him that I did not have the ability to provide him with a bank guaranty, that I would not ask for a bank guaranty, and that no bank is going to give me a bank guaranty.

Q And what was his response to that?

A He -- this is the first time he ever really seriously pressed for it, and insisted that he wanted that. And so I told him that I would send him the money directly back, instantly; but that was not part of the negotiations, nor the intention, nor anything relevant to what we had as a transaction in front of us.

Q When you offered to send him the \$500,000 back instantly, what was his response?

A He said, "No, don't do that." I said, "Well, obviously this is what you want," and I said, "I am not in a position to give it, nor have I ever indicated that I would give it. And I want to send it back."

1 account, and so on. And, in general, that was the kind
2 of editing that he sought to have memorialized.

3 Q All right. And I will show you just in a
4 second a copy of what I believe is the final version of
5 that. But in between we have a couple of letters that I
6 want to ask you about. First is a letter dated March
7 28, 1998 which I will ask the reporter to mark as
8 exhibit 15, which appears to be a three-page document.
9 The first page says it is from Diana Group Inc. and has
10 a signature that looks like your signature and is dated
11 March 28. The second page is identified at the top as
12 page two of March 28th letter, also with your
13 signature. And then the third page appears to be a fax
14 confirmation.

15 (No. 15 - Ltr Mangiapane to Sine 3/28/98
16 w/attachments, marked for
17 identification.)

18 BY MS. POWELL:

19 Q Have I identified this correctly?

20 A Yes, you have.

21 Q What is this letter?

22 A This letter states what I had been testifying