

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 Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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

Francis M. Wikstrom; H. Douglas Owens; Parsons Behle and Latimer; Virginia Powell; Hunton and Williams; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *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*, No. 20010272 (Utah Court of Appeals, 2001).

https://digitalcommons.law.byu.edu/byu_ca2/3222

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

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

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

**BRIEF OF DEFENDANT/APPELLEE
CRESTAR BANK**

Trial Court No. 980906287

Appellate Case No. 20010272-CA

Priority Classification 15

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE DAVID S. YOUNG, DISTRICT JUDGE**

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

Francis M. Wikstrom, USB No. 3462
H. Douglas Owens, USB No. 7762
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234

Virginia Powell
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
Telephone: (804) 788-8492

Attorneys for Defendant/Appellee Crestar
Bank

FILED
Utah Court of Appeals

NOV 30 2001

**Paulette Stagg
Clerk of the Court**

IN THE UTAH COURT OF APPEALS

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

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

**BRIEF OF DEFENDANT/APPELLEE
CRESTAR BANK**

Trial Court No. 980906287

Appellate Case No. 20010272-CA

Priority Classification 15

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE DAVID S. YOUNG, DISTRICT JUDGE**

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

Francis M. Wikstrom, USB No. 3462
H. Douglas Owens, USB No. 7762
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234

Virginia Powell
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
Telephone: (804) 788-8492

Attorneys for Defendant/Appellee Crestar
Bank

LIST OF PARTIES

Crestar Bank agrees with Plaintiffs' recitation of the parties, except notes that Josephine Mangiapane did not join Diana Group, Inc., in stipulating to judgment (R. 1246), but was instead granted summary judgment on the claims against her. (*See* R. 1200.)

TABLE OF CONTENTS

	<u>Page</u>
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	vi
JURISDICTION.....	1
STATEMENT OF ISSUES	1
STATUTORY PROVISIONS.....	3
STATEMENT OF THE CASE.....	4
A. Nature of the Case.....	4
B. Course of Proceedings and Disposition at Trial.....	6
STATEMENT OF RELEVANT FACTS.....	6
SUMMARY OF ARGUMENT	13
ARGUMENT	15
I. PLAINTIFFS FAIL TO PROPERLY CHALLENGE THE FINDINGS AND TO MARSHAL THE EVIDENCE	15
II. THE TRIAL COURT CORRECTLY RULED THAT THE MARCH 24, 1998 LETTER IS AMBIGUOUS.....	17
III. THE CHALLENGED CONCLUSIONS REGARDING THE MEANING OF THE MARCH 24 LETTER AND CREE’S LACK OF AUTHORITY ARE SUPPORTED BY THE UNCHALLENGED FINDINGS AND THE RECORD	22
A. The Trial Court Properly Found That the March 24, 1998 Letter Was, at Best, a Conditional Obligation	22
B. The Trial Court Properly Found That Cree Lacked Apparent Authority To Issue a Guaranty	25

IV. THE COURT PROPERLY DENIED PLAINTIFFS' RULE 15(B) MOTIONS	28
V. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' BREACH OF CONTRACT CLAIM THAT WAS BASED ON THE WIRE TRANSFER INSTRUCTIONS	33
VI. PLAINTIFFS DO NOT CHALLENGE TWO CONCLUSIONS OF LAW AND RELATED FINDINGS OF FACT THAT PROVIDE INDEPENDENT BASES FOR AFFIRMING THE JUDGMENT BELOW.....	42
A. There Was No Meeting of the Minds	42
B. Even if the March 24 Letter Could Be Construed as a Guaranty, the Obligation Was Discharged by Sine's Subsequent Modifications of the Underlying Agreement With Diana Group	43
CONCLUSION.....	45
CERTIFICATE OF SERVICE.....	46

ADDENDUM

ADDENDUM EX. A
12 C.F.R. § 210.25, *et seq.*

ADDENDUM EX. B
R. 1292 – Findings of Fact and Conclusions of Law, February 6, 2001

ADDENDUM EX. C
R. 1357, Excerpts of Deposition of Josephine Mangiapane

ADDENDUM EX. D
R. 1357, Excerpts of Deposition of Nancy Cree

ADDENDUM EX. E
Exhibit 19, Participant Trust Agreement

ADDENDUM EX. F
Exhibit 1, February 4, 1998 fax from LaDonna Rosellini to Ray Emery

ADDENDUM EX. G

Exhibit 3, February 6, 1998 letter from Nancy Cree to Wesley Sine

ADDENDUM EX. H

Exhibit 22, March 12, 1998 letter from Wesley Sine to Josephine Mangiapane

ADDENDUM EX. I

Exhibit 6, March 24, 1998 letter from Nancy Cree to Wesley Sine

ADDENDUM EX. J

Exhibit 23, March 26, 1998 letter from Wesley Sine to Bank of Utah

ADDENDUM EX. K

Exhibit 29, Printout of electronic data

ADDENDUM EX. L

Exhibit 9, March 28, 1998 letter from Josephine Mangiapane to Wesley Sine

ADDENDUM EX. M

Exhibit 10, March 29, 1998 letter from Wesley Sine to Josephine Mangiapane

ADDENDUM EX. N

Exhibit 11, Private Placement Agreement

ADDENDUM EX. O

Exhibit 13, May 8, 1998 letter from Josephine Mangiapane to Wesley Sine

ADDENDUM EX. P

Exhibit 14, May 8, 1998 letter from Wesley Sine to Josephine Mangiapane

ADDENDUM EX. Q.

Exhibit 18, June 5 1998 letter from Josephine Mangiapane to Wesley Sine

ADDENDUM EX. R

Exhibit 25, April 29, 1998 letter from Wesley Sine to LaDonna Rosellini

ADDENDUM EX. S

Exhibit 26, May 13, 1998 letter from Josephine Mangiapane to Wesley Sine

ADDENDUM EX. T

Exhibit 27, May 13, 1998 letter agreement between Wesley Sine and Josephine Mangiapane

TABLE OF AUTHORITIES

	<u>Page(s)</u>
FEDERAL CASES	
<i>Agri Export Coop v. Universal Sav. Ass’n</i> , 767 F. Supp. 824 (S.D. Tex. 1991)	28
<i>Donmar v. S. Nat’l Bank</i> , 64 F.3d 944 (4 th Cir. 1995)	37, 40, 41
<i>Glyfada Seafaring Corp. v. Fillmore Shipping Ltd.</i> , 685 F. Supp. 40 (S.D.N.Y. 1987)	28
<i>Grabowski v. Bank of Boston</i> , 997 F. Supp 111 (D. Mass. 1997)	28, 37, 39
<i>Impulse Trading, Inc. v. Norwest Bank Minn. N.A.</i> , 870 F. Supp. 954 (D. Minn. 1994)	38
<i>Piedmont Resolution, LLC v. Johnston</i> , 999 F. Supp. 34 (D.D.C. 1998)	36
STATE CASES	
<i>Amfac, Inc. v. Waikiki Beachcomber Inv. Co.</i> , 839 P.2d 10 (Haw. 1992)	19-20
<i>Bailey-Allen Co. v. Kurzet</i> , 945 P.2d 180 (Utah App. 1997)	16, 25
<i>C & Y Corp. v. Gen. Biometrics, Inc.</i> , 896 P.2d 47 (Utah Ct. App. 1995)	43
<i>Carrier Brokers, Inc. v. Spanish Trail</i> , 751 P.2d 258 (Utah Ct. App. 1988)	44
<i>Child v. Hayward</i> , 400 P.2d 758 (Utah 1965)	37
<i>Davies v. Olson</i> , 746 P.2d 264 (Utah Ct. App. 1987)	43
<i>Dep’t of Health & Human Servs. v. Irizarry</i> , 945 P.2d 676 (Utah 1977)	2
<i>Dixon v. Pro Image, Inc.</i> , 1999 UT 89, 987 P.2d 48	1, 17, 20
<i>Fibro Trust Inc. v. Brahman Fin., Inc.</i> , 1999 UT 13, 974 P.2d 288	30
<i>First Nat’l Bnak & Trust v. Kissee</i> , 859 P.2d 502 (Okla. 1993)	44

<i>Horrocks v. Westfalia Systemat</i> , 892 P.2d 14 (Utah Ct. App. 1995)	28
<i>In the Interest of L.M.</i> , 2001 UT App. 314, 433 Utah Adv. Rep. 6	1, 16
<i>Interwest Const. v. Palmer</i> , 923 P.2d 1350 (Utah 1996)	23
<i>Jeffer v. Stubbs</i> , 970 P.2d 1234 (Utah 1998)	2
<i>Keller v. Southwood N. Med. Pavilion, Inc.</i> , 959 P.2d 102 (Utah 1998)	3, 28, 29, 32
<i>Lawrence v. Bamberger R.R. Co.</i> , 282 P.2d 335 (Utah 1955)	33
<i>Macris v. Sculptured Software, Inc.</i> , 2001 UT 43, 24 P.3d 984	27
<i>Marion Props. Ltd. v. Goff</i> , 840 P.2d 1230 (Nev. 1992)	44
<i>Moon v. Moon</i> , 1999 UT App. 12, 973 P.2d 431	16, 18
<i>O'Hara v. Hall</i> , 628 P.2d 1289 (Utah 1981)	42
<i>Plateau Mining Co. v. Utah Div. of State Land & Forestry</i> , 802 P.2d 720 (Utah 1990)	22
<i>Richard Barton Enters., Inc. v. Tsern</i> , 928 P.2d 368 (Utah 1996)	43
<i>S. Title Guar. Co. v. Bethers</i> , 761 P.2d 951 (Utah Ct. App. 1988)	3, 33
<i>State v. Pena</i> , 869 P.2d 932 (Utah 1994)	2
<i>Trolley Square Assocs. v. Nielson</i> , 886 P.2d 61 (Utah Ct. App. 1994)	2, 23
<i>Udall v. Colonial Penn. Ins. Co.</i> , 812 P.2d 777 (N.M. 1991)	19
<i>Wade v. Stangl</i> , 869 P.2d 9 (Utah Ct. App. 1994)	23
<i>Ward v. Intermountain Farmers Ass'n</i> , 907 P.2d 264 (Utah 1995)	1, 17-18, 20
<i>Whitehouse v. Whitehouse</i> , 790 P.2d 57 (Utah Ct. App. 1990)	17
<i>Wilson Court Ltd. V. Tony Maroni's Inc.</i> , 952 P.2d 590 (Wash. 1998)	19
<i>Wood v. Strevell-Paterson Hardware Co.</i> , 313 P.2d 800 (Utah 1957)	28

<i>Yeargin v. Auditing Div. of the Utah State Tax Comm’n</i> , 2001 UT 11, 20 P.3d 287	18
<i>Young v. Young</i> , 1999 UT 38, 979 P.2d 338.....	1, 2, 16
<i>Zions First Nat. Bank v. Clark Clinic Corp.</i> , 762 P.2d 1090 (Utah 1998)	26, 27

STATUTES AND REGULATIONS

U.C.C. Article 4A.....	<i>passim</i>
U.C.C. Article 5	32
12 C.F. R. § 210.25	<i>passim</i>
Utah Code Ann. § 70A-5-101	32
Utah Code Ann § 78-2a-3(2)(j).....	1

MISCELLANEOUS

Benjamin Geva, <i>The Law of Electronic Funds Transfers</i> (1999)	39
1 Donald I. Baker & Roland E. Brandel, <i>The Law of Electronic Fund Transfer Systems</i> (rev. ed. 1999)	36
7 Lary Lawrence, <i>Lawrence’s Anderson on the Uniform Commercial Code</i> (3d ed. 2000)	37, 39, 40
Restatement (Second) of Agency § 282.....	28

JURISDICTION

Crestar Bank concurs that the Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES

Issue 1. Whether the Appellants (hereinafter “Plaintiffs”) are barred from re-arguing the facts on appeal when they have failed to identify the findings of fact they challenge and have failed to marshal the evidence in support of the challenged findings?

Standard of Review: “When an appellant fails to properly discharge his duty to marshal, we assume that ‘the evidence introduced at trial adequately supported the findings,’ and, accordingly, affirm the findings as written.” *In the Interest of L. M.*, 2001 UT App. 314, ¶ 15, 433 Utah Adv. Rep. 6, 7 (quoting *Young v. Young*, 1999 UT 38 ¶ 34, 979 P.2d 338, 345).

Issue 2. Whether the trial court properly determined that the March 24 letter is ambiguous based on the language of the document and based on extrinsic evidence of the understanding of the parties?

Standard of Review: A mixed standard of review applies to this issue. “Whether contract language is ambiguous is a question of law.” *Dixon v. Pro Image, Inc.*, 1999 UT 89, ¶ 14, 987 P.2d 48, 52. However, in determining ambiguity, the trial court should also consider extrinsic evidence of the parties’ intentions. *Ward v. Intermountain Farmers Ass’n*, 907 P.2d 264, 268 (Utah 1995). Such factual determinations, even though part of a mixed question of law and fact, should be reviewed under a deferential standard. *See*

Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998) (“Although we review legal questions for correctness, we may still grant a trial court discretion in its application of the law to a given fact situation.”); *Dep’t of Health & Human Servs. v. Irizarry*, 945 P.2d 676, 678 (Utah 1997) (in mixed question of law and fact, the “variety of fact-intensive circumstances involved weighs heavily against lightly substituting our judgment for that of the trial court”); *State v. Pena*, 869 P.2d 932, 937 (Utah 1994) (“Yet while we generally consider *de novo* a trial court’s statement of the legal rule, we often review with far less rigor the court’s determination of the legal consequences of facts.”).

Issue 3. Whether the marshaled evidence supports the trial court’s findings (a) that the March 24 letter was, at most, a conditional obligation to transfer funds if the funds were first deposited with Crestar Bank; and (b) that Nancy Cree lacked apparent authority to bind the Bank.

Standard of Review: The clearly erroneous standard applies to review of these factual issues. *Young v. Young*, 1999 UT 38, 34, 979 P.2d 338, 345; *Trolley Square Assocs. v. Nielson*, 886 P.2d 61, 64 (Utah Ct. App. 1994).

Issue 4. Whether, at the conclusion of the trial, the trial court properly denied Plaintiffs’ Rule 15(b) motion to add new causes of action that were not raised by the pleadings or tried with the express or implied consent of the parties.

Standard of Review: The trial court’s decisions under Rule 15(b) are reviewed for correctness; however, the associated questions of whether issues were tried with all parties’ implied consent is fact-intensive and the trial court is therefore granted “a fairly

broad measure of discretion in making that determination under a given set of facts.”
Keller v. Southwood N. Med. Pavilion, Inc., 959 P.2d 102, 105 (Utah 1998).

Issue 5. Whether the trial court properly dismissed, pursuant to Rule 41(b), Plaintiffs’ breach of contract claim that the “instructions” transmitted with the wire transfer created an enforceable obligation on the part of the Bank?

Standard of Review: The standard of review is mixed. Factual findings made pursuant to Rule 41(b) are reviewed under a clearly erroneous standard, while legal conclusions are reviewed for correctness. *S. Title Guar. Co. v. Bethers*, 761 P.2d 951, 954 (Utah Ct. App. 1988).

Issue 6. Whether this Court has independent grounds for affirming the judgment below based on the trial court’s unchallenged findings and conclusions (a) that there was no meeting of the minds between the parties, and (b) that the later modification of the underlying agreement between Plaintiffs and the Diana Group, without Crestar Bank’s approval, discharged any obligation the Bank may have had to Plaintiffs?

Standard of Review: This issue does not involve a review of the trial court’s findings or conclusions since they are not challenged on appeal. The question of law for this Court is whether these unchallenged findings and conclusions are an independent basis for affirming the judgment below.

STATUTORY PROVISIONS

12 C.F.R. § 210.25 *et seq.* (2000) (incorporating U.C.C. Article 4A) attached in the Addendum as Exhibit A.

STATEMENT OF THE CASE

A. Nature of the Case

The original Plaintiff, Wesley Sine (“Sine”), a local attorney and businessman, sued Crestar Bank¹ claiming that the Bank had breached a contractual obligation to guaranty a transaction he had entered into, as trustee for the current Plaintiffs, with Diana Group, Inc. According to the agreement between Sine and Diana Group, Sine was to invest \$500,000 with Diana Group and Diana Group was to return \$2.5 million to Sine within “30 banking days.” When Diana Group failed to return the money, even after several extensions agreed to by Sine, Sine sued Crestar Bank claiming that the Bank had guaranteed the transaction by means of a March 24, 1998 letter signed by Nancy Cree (“Cree”), an assistant vice president/branch manager. The letter stated that the Bank would “transfer” \$2.5 million to Sine “[o]n behalf of [its] Client, Diana Group, Inc.” after “30 banking days.”

The rather unorthodox letter was not drafted by Crestar Bank, but was the product of negotiations between Sine and Josephine Mangiapane (“Mangiapane”), who was acting on behalf of Diana Group. During the course of the negotiations before the letter was sent, Sine requested Mangiapane to change the language of the letter to make it an unconditional obligation of Crestar Bank to guaranty repayment of the \$2.5 million. Mangiapane refused to change the language that she had previously drafted. The Bank was not aware of these negotiations or of Sine’s desire for a bank guaranty. Before he

¹ During the course of the litigation, Crestar Bank was acquired by SunTrust Bank, N.A, and SunTrust was substituted as a Defendant in place of Crestar Bank. To avoid confusion, the Bank will be referred to herein as Crestar Bank, Crestar, or the Bank.

invested the \$500,000, Sine was specifically told by Nancy Cree that the Bank's obligation to transfer the \$2.5 million was conditioned on Diana Group's first depositing that sum with the Bank. With this knowledge, Sine then proceeded to wire the \$500,000 to the Diana Group account at Crestar Bank.²

At trial, the judge ruled that the March 24 letter was ambiguous. After hearing all the evidence, the court found that the letter created, at most, a conditional obligation on the part of Crestar Bank to transfer the \$2.5 million to Sine, if and when Diana Group first deposited the money with the Bank. In addition, the court also found that there was no meeting of the minds, and that Nancy Cree was without authority to obligate the Bank. Finally, the court found that any obligation of the Bank would have been discharged by later modifications of the underlying agreement by Sine and Diana Group without the Bank's approval.

Dissatisfied with the result below, Plaintiffs ask this Court to perform a *de novo* review of the facts. Plaintiffs ignore their responsibility to directly challenge findings of fact, to marshal the evidence in support of the challenged findings, and to demonstrate that they are clearly erroneous. Instead they attempt to reargue the evidence in the light most favorable to them—the losing parties below.

² The precise details underlying the \$500,000 investment by Plaintiffs, the nature of Diana Group's business, and Diana Group's promise of a 400% return in 30 banking days were never determined. Prior to trial, Diana Group stipulated to entry of judgment in favor of Plaintiffs for the amount of \$3 million.

B. Course of Proceedings and Disposition at Trial

Crestar agrees with Plaintiffs' recitation of the course of proceedings (Pls.' Br. at 7-9) with the following corrections and additions: (1) Crestar moved to dismiss the fraud and RICO claims of the Amended Complaint based on a failure to state claims, not a lack of particularity as suggested by Plaintiffs (R. 468); (2) the court dismissed the only two claims asserted against Defendant Mangiapane personally (fraud and RICO), thus dismissing her from the case (R. 1200); (3) Plaintiffs' motion to amend the complaint a second time was made one month after Crestar had submitted a notice of readiness for trial (R. 1138 at 1139); (4) Plaintiffs summarize the decision below into three "rulings" (Pls.' Br. at 8-9), but the trial court made extensive findings of fact and conclusions of law, which Plaintiffs do not attach to their Brief (R. 1292); and (5) the court entered a judgment in favor of Crestar on February 8, 2001 (R. 1313), and an amended judgment including costs on May 9, 2001 (R. 1348).

STATEMENT OF RELEVANT FACTS

The trial court made comprehensive Findings of Fact without objection from Plaintiffs. In their opening Brief, Plaintiffs completely ignore the Findings of Fact and do not include a copy in their Addendum. Plaintiffs do not directly and properly challenge any of the findings by marshaling the evidence in support of the challenged finding and then showing that it was clearly erroneous. Instead, they attempt to reargue the evidence anew.

The facts relevant to this appeal are contained in the trial court's Findings of Fact (Addendum Ex. B), which were approved as to form and never objected to by Plaintiffs,

and which are set forth verbatim as follows (with supportive citations to the record added in brackets):

1. In 1998, Plaintiff Emery was advisor to a trust, the beneficiaries of which were Plaintiffs Fisher and Franklin. Emery heard about an investment scheme involving Diana Group from LaDonna Rosselini. [R. 1355 at 42-48; R. 1357, Mangiapane Dep. at 37, 51-57 (Addendum Ex. C).]
2. Emery asked the original Plaintiff, Wesley Sine, an attorney and businessman, to investigate the investment on behalf of the trust and to make sure that the investment would be protected by a bank guaranty. [R. 1355 at 44-49, 109-10, 114-15; Ex. 19 (Addendum Ex. E).]
3. In all the conduct described herein, Sine was acting as trustee and attorney for Plaintiffs. [R. 1355 at 114.]
4. Rosellini told Sine that if his clients would invest \$25 million, they would receive a return of \$120 million after 30 banking days. Sine performed no investigation of the investment, of Rosellini, of Diana Group or any related entity, nor did he know how such large amounts of money could be made so quickly. [Ex. P-1 (Addendum Ex. F); R. 1355 at 44-49, 122-28, 135.]
5. Based on his training and experience as an attorney and businessman, Sine was familiar with the form and requirements of a bank guaranty, letter of credit, or similar bank obligation. [R. 1355 at 103-04, 115-17.]
6. Sine had numerous communications with representatives of Diana Group concerning the language to be included in a document to be issued by a bank in connection with the investment. No one from Crestar Bank was involved in these communications. [R. 1355 at 44, 48-52, 59-64, 117-23, 134-35.]
7. As a result of these communications, Sine knew or should have known that the language being proposed by Diana Group did not constitute a bank guaranty or other independent bank obligation to pay money to Sine's investors. [R. 1335 at 109-10; *see also* references supporting Findings 5, 6, and 13.]
8. Nancy Cree was an Assistant Vice President and Branch Manager for Crestar Bank. Cree had no authority to issue guaranties, letters of credit, or

other obligations on behalf of Crestar Bank. [R. 1357³, Cree Dep. at 18-19, 36, 73-76, 84-86 (Addendum Ex. D); R. 1355 at 55.]

9. Mangiapane was a customer at Cree's branch and Cree believed her to be a person with a substantial net worth. [R. 1357, Cree Dep. at 20-21, 27-28 (Addendum Ex. D).]

10. Mangiapane persuaded Cree to send a letter on Crestar letterhead to Sine in connection with the proposed investment. The body of the letter, dated February 6, 1998, read 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 \$120,000,000.00. Said transfer will be no later than 30 banking days from the date after the deposit of \$25,000,000.00, to Escrow Account Number 206745745, Account Holder – 49151.

[Ex. 3 (Addendum Ex. G); R. 1357, Cree Dep. at 33-37 (Addendum Ex. D); R. 1357, Mangiapane Dep. at 65-67 (Addendum Ex. C).]

11. Mangiapane and Cree did not believe that the letter created an independent obligation of the Bank to pay \$120 million, but was instead an agreement to transfer these funds if and when they were deposited by Diana Group. [R. 1357, Cree Dep. at 33-38 (Addendum Ex. D); R. 1357, Mangiapane Dep. at 67-68 (Addendum Ex. C).]

12. Sine called Cree and asked her if she had signed the letter. He did not ask her, or any other representative of Crestar Bank any questions concerning her authority or the meaning and effect of the language in the document. [R. 1355 at 55-56, 124-25, 129-33; *see also* references supporting Finding 23.]

13. Sine knew, or should have known, that the February 6 letter was not a guaranty or other independent obligation of the Bank. [R. 1355 at 55-56, 124-25, 129-33, 137-38; Ex. 22 (Addendum Ex. H); R. 1357, Mangiapane Dep. at 76 (Addendum Ex. C); *see also* references supporting Findings 5, 6, and 7.]

³ Portions of the videotaped depositions of Cree and Mangiapane were introduced into evidence at trial. The court viewed edited videotapes and received into evidence the deposition transcripts with portions designated for admission by the parties corresponding to the portions shown in court by video. *See* R. 1282, 1287. The depositions were not re-transcribed as part of the trial transcript, but were received as Exhibits 30 and 31. The exhibits have been designated in a supplemental index as R. 1357.

14. Sine's group was unable to come up with the \$25 million investment and the transaction was never completed. [R. 1355 at 57-58.]

15. Sine wrote to Diana Group purporting to cancel "any obligation" on the part of Crestar Bank. Sine did not send a copy to the Bank. [R. 1355 at 57-59, 135-36.]

16. Mangiapane and Sine then entered into discussions regarding the possibility of a smaller \$500,000 investment with the promise of a return of \$2.5 million after 30 banking days. These discussions did not include the Bank. [R. 1355 at 59-65; R. 1357, Mangiapane Dep. at 75-78 (Addendum Ex. C).]

17. Before Sine wired the funds, he and Mangiapane discussed the terms of the letter that Mangiapane was to obtain from Crestar. During these negotiations, which did not include the Bank, Mangiapane rejected Sine's proposal that the Bank letter contain language referring to a guaranty or promise to pay. [R. 1355 at 117-19, 137-38; Ex. 22 (Addendum Ex. H); R. 1357, Mangiapane Dep. at 75-76 (Addendum Ex. C); R. 1357, Cree Dep. at 37, 47-48 (Addendum Ex. D); *see also* references supporting Finding 16.]

18. During the course of his negotiations with Mangiapane, Sine did not communicate his concerns about the letter to Cree or anyone else at the Bank. The Bank was not on notice that Sine desired a guaranty, nor did it have any knowledge of the meaning he attached to the Bank letter. [R. 1355 at 64, 117-19, 124-25, 137-38; R. 1357, Cree Dep. at 37, 48-49, 52-53 (Addendum Ex. D); *see also* references for Findings 12, 15, 16, 17.]

19. Diana Group and Sine entered into an agreement that Sine would wire \$500,000 to Diana Group's account at Crestar Bank and that Diana Group would repay \$2.5 million within 30 banking days. [R. 1357, Mangiapane Dep. at 79 (Addendum Ex. C); *see also* references supporting Finding 16.]

20. At Mangiapane's request, Cree sent a letter, dated March 24, 1998, to Sine that was almost identical to the letter of February 6, 1998. It stated:

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.

[Ex. 6 (Addendum Ex. I); R. 1357, Mangiapane Dep. at 79-80 (Addendum Ex. C); R. 1357, Cree Dep. at 44-47 (Addendum Ex. D).]

21. The letter is ambiguous in several respects, including the following:

- a) What is meant by “warrant and certify to transfer”;
- b) What is meant by a commitment to transfer monies “on behalf of our Client, Diana Group”;
- c) The meaning and implication of the odd and unconventional language of the document itself; and
- d) The questions and ambiguity created by the purported return on investment of 400% in six weeks.

[Ex. 6 (Addendum Ex. I).]

22. Mangiapane and Cree testified consistently that they understood the March 24, 1998 letter to be akin to an escrow agreement. Neither of them understood or believed that the letter created an independent obligation on the part of the Bank. Neither Mangiapane nor Cree believed that the letter obligated the Bank to repay Sine the \$2.5 million in the event that Diana Group did not deposit the funds. The Court finds their testimony to be a more credible explanation of the letter and the transaction than the testimony of Sine. [R. 1357, Mangiapane Dep. at 59-62, 66-68, 76, 92-97, 99 (Addendum Ex. C); R. 1357, Cree Dep. at 47-49, 73-74 (Addendum Ex. D).]

23. In a telephone conversation prior to wiring the \$500,000, Cree told Sine that the Bank’s obligation to transfer under the March 24 letter was conditioned on Diana Group’s depositing the \$2.5 million with the Bank. [R. 1357, Cree Dep. at 48-49, 51-52, 60-61, 69-70 (Addendum Ex. D).]

24. Sine had no reasonable basis for believing that the letter constituted an independent obligation of the Bank to pay \$2.5 million. Moreover, Sine never forthrightly told the Bank that he considered the letter to be a guaranty or other independent obligation, or that he was relying on the Bank to repay the funds in the event Diana Group did not. Sine could have questioned the Bank about the meaning of the letter to resolve any discrepancies, but he never did. [R. 1355 at 117-19, 123-32, 136, 138; *see also* references supporting Findings 5, 7, 12, 13, 17, 18, 22, 23.]

25. Even if Sine unreasonably believed that the March 24 letter was an independent obligation of the Bank, there was no meeting of the minds between Sine and the Bank. [*Compare* Sine’s understanding of the letter (R. 1355 at 159) *with* Cree’s, as set forth in the references supporting Findings 22 and 23.]

26. Crestar Bank received no fee, commission, or other consideration for issuing the March 24 letter. [R. 1357, Mangiapane Dep. at 134-35 (Addendum Ex. C).]

27. Cree had no actual authority to issue the letter. [See references supporting Finding 8.]

28. Crestar did not impliedly delegate to Cree authority to issue a guaranty or similar obligation on behalf of the Bank. [See references supporting Finding 8.]

29. Crestar Bank did not do anything to create an apparent authority on the part of Cree to issue the letter. [R. 1357, Cree Dep. at 76-77 (Addendum Ex. D); *see also* references supporting Finding 8.]

30. Sine's failure to do even the most minimal due diligence or to ask Cree the most obvious questions constitutes a lack of good faith on his part and demonstrates that he had no reasonable basis for believing that Cree had authority to unconditionally obligate the Bank to pay \$2.5 million. [R. 1355 at 61-62, 70-71, 123-32; R. 1357, Cree Dep. at 48-49, 51-55, 60-61, 69-70 (Addendum Ex. D); *see also* references supporting Findings 5, 7, 12, 13, 17, 18, 22, 23, 24.]

31. Common sense should have dictated to an attorney-businessman of Sine's experience that banks do not guaranty large transactions by means of an unorthodox and facially ambiguous letter which speaks of a "transfer," as opposed to standard bank documents. [R. 1355 at 128-30, 137-38; *see also* references supporting Finding 5.]

32. Sine's understanding that the March 24 letter was not an independent obligation of the Bank was further demonstrated by his effort to strengthen his position when he wired the \$500,000 to Diana Group's account. He attempted to make the wire transfer a conditional transfer by asking the Bank of Utah to transmit the following language as part of the wire communication:

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.

[Ex. 23 (Addendum Ex. J); R. 1355 at 145-46.]

33. The language requested by Sine was transmitted by the Bank of Utah by abbreviating it and placing it in information fields entitled "bank-to-bank information" and "originator-to-beneficiary information." The information was received by Crestar Bank in an unintelligible form. [Ex. 29 (Addendum Ex. K); R. 1355 at 166.]

34. There was no evidence of any banking rule or practice that would create an obligation on Crestar Bank's part to read or respond to informational comments sent with wire transfers. Indeed, the regulations governing the Fedwire system operated by the Federal Reserve Board are clear that such instructions have no impact on a wire transfer sent by means of that system. [R. 1355 at 166-73; R. 1357, Cree Dep. at 77-78 (Addendum Ex. D).]

35. All of the foregoing plus the more credible testimony of Cree and Mangiapane demonstrate that the March 24 letter created, at most, a conditional obligation on the part of Crestar to transfer money to Sine if, and only if, Diana Group first deposited that money with the Bank. [See references supporting Findings 1-34.]

36. On Saturday, March 28, 1998, the day after Sine sent the wire transfer, and while the funds were still on deposit in Mangiapane's account at Crestar, Mangiapane faxed a letter to Sine. She accused him of trying to create an intent that the transaction was between Sine and Crestar, as opposed to Sine and Diana Group. She advised him that the transaction was cancelled, the Bank letter was "nullified," and that the \$500,000 would be wired back to him on Monday, March 30, 1998. [Ex. 9 (Addendum Ex. L); R. 1355 at 74-75, 153-54; R. 1357, Mangiapane Dep. at 96-98 (Addendum Ex. C).]

37. In a telephone conversation later that day, Mangiapane said that if the transaction was to go forward, Sine would have to enter into a "Private Placement Agreement" setting forth the terms of the transaction. [R. 1357, Mangiapane Dep. at 92-95 (Addendum Ex. C); R. 1355 at 74-75, 154-55.]

38. Sine faxed a lengthy letter to Mangiapane on Sunday, March 29, 1998, in which he objected to the Private Placement Agreement and attempted to characterize the March 24 letter from Crestar as a bank guaranty. [Ex. 10 (Addendum Ex. M); R. 1355 at 154.]

39. Sine did not send a copy of March 29 fax letter to the Bank. [R. 1355 at 155.]

40. Sine did not ask Mangiapane to return the \$500,000 as she had offered. [R. 1357, Mangiapane Dep. at 93-94 (Addendum Ex. C); R. 1355 at 153-58, 160.]

41. Notwithstanding Sine's objections to signing a Private Placement Agreement, he revised the draft document sent to him by Mangiapane and signed it on March 30, 1998. [Ex. 11 (Addendum Ex. N); R. 1355 at 84-85, 158-59; R. 1357, Mangiapane Dep. at 93-95, 100-02 (Addendum Ex. C).]

42. The Private Placement Agreement prepared and executed by Sine made it clear that the \$2.5 million that the Bank was to transfer first had to

be “returned” by the Diana Group. [Ex. 11 ¶ 4 (Addendum Ex. N); R. 1357, Mangiapane Dep. at 112 (Addendum Ex. C).]

43. The Private Placement Agreement was not approved by or sent to Crestar, nor did the Bank ever know of its existence. [R. 1355 at 158-59.]

44. On at least two occasions in May or June, 1998, Sine agreed to postpone the due date for payment from Diana Group. On the second occasion, Sine agreed to an open-ended extension in exchange for \$25,000 per day. Crestar was never consulted nor did it approve the modifications of the agreement with Diana Group. [Ex. 13 (Addendum Ex. O), Ex. 14 (Addendum Ex. P), Ex. 18 (Addendum Ex. Q), Exs. 25-27 (Addendum Exs. R-T); R. 1355 at 93-94, 160-63; R. 1357, Mangiapane Dep. at 103-06, 108-10 (Addendum Ex. C); R. 1357, Cree Dep. at 58-59 (Addendum Ex. D).]

(R. 1293-1301 (Addendum Ex. B).)

SUMMARY OF ARGUMENT

I. Plaintiffs’ Brief does not specifically challenge any of the Findings of Fact. By attempting to re-argue selected evidence on key issues, however, Plaintiffs are, in effect, attempting to challenge all of the core findings. Instead of specifically challenging particular findings and properly marshaling the evidence in support of the challenged findings, Plaintiffs seek to retry the case by selective citation of evidence. The Findings of Fact should be affirmed on that basis alone.

II. The trial court correctly ruled that the March 24 letter is ambiguous for two reasons. First, the letter is ambiguous on its face because of the language itself, the unconventional nature of the document, and the “too-good-to-be-true” return on investment stated therein. Second, extrinsic evidence of the understanding of the parties justifies the trial court’s determination that the interpretation advanced by Crestar Bank is reasonably supported by the language of the March 24 letter. Plaintiffs do not dispute most of the findings of fact that relate to the determination of ambiguity, fail to marshal

the evidence, and fail to demonstrate error. The properly marshaled evidence supports the trial court's finding of ambiguity.

III. (a) Plaintiffs assert that the trial court erroneously interpreted the letter as a conditional obligation to transfer funds. Once again, Plaintiffs fail to directly challenge the findings or to marshal the evidence, and they ask this Court to make credibility determinations that are 180 degrees opposite of those made by the trial court. The marshaled evidence supports the trial court's finding that the letter was, at most, a conditional obligation to transfer funds if and when the Diana Group deposited those funds with the Bank.

(b) Plaintiffs also dispute the court's findings that Cree lacked apparent authority to obligate the Bank. Plaintiffs fail to marshal the evidence and are unable to point to any evidence of conduct by Crestar Bank clothing Cree with apparent authority. The marshaled evidence supports the trial court's findings.

IV. Plaintiffs dispute the trial court's denial of their motion, pursuant to Utah R. Civ. P. 15(b), to amend the pleadings at the close of trial to add claims they argue were tried with the express or implied consent of the parties. The record is clear that Crestar gave no express or implied consent to try any claims other than the breach of contract claim. Crestar resisted every attempt by Plaintiffs, before and during trial, to add these claims, and all evidence admitted was related to the breach of contract claims.

V. Plaintiffs object to the trial court's dismissal, pursuant to Rule 41(b), of Plaintiffs' breach of contract claim that was based on the theory that the "instructions" sent by Sine along with the wire transfer created a binding contract with Crestar.

Plaintiffs do not challenge the findings that the “instructions” were unintelligible when received by Crestar, that there was no evidence that anyone at Crestar saw the instructions, and that there was no evidence of any practice in the banking industry to review such “instructions.” Once again, Plaintiffs fail to marshal the evidence that supports the findings. Finally, the trial court correctly ruled that the statute and regulations relating to electronic funds transfers do not impose any obligation on Crestar under the circumstances of this case.

VI. Plaintiffs did not appeal two conclusions and related findings that provide independent bases for affirming the judgment below. Plaintiffs do not challenge the court’s conclusion that there was no meeting of the minds as to the meaning of the March 24 letter, nor do they challenge the conclusion that subsequent modifications of Sine’s agreement with the Diana Group, without the Bank’s approval, operated to discharge Crestar from any obligation that might have existed under the March 24 letter.

ARGUMENT

I. PLAINTIFFS FAIL TO PROPERLY CHALLENGE THE FINDINGS AND TO MARSHAL THE EVIDENCE

On its face, Plaintiffs’ Brief appears to challenge only the trial court’s Conclusions of Law. It is clear, however, from Plaintiffs’ extensive effort to re-argue the evidence in the case, that they are really attempting to challenge all of the essential Findings of Fact made by the trial judge. In so doing, Plaintiffs fail to satisfy two basic requirements on appeal: They do not identify the specific findings they challenge and, more importantly, they make no effort whatsoever to marshal the evidence supporting the findings they

contest. Instead, Plaintiffs attempt to re-try the case on appeal by selectively citing snippets of testimony and documents in support of the theory they argued unsuccessfully at trial. Such an approach cannot succeed on appeal. “To overturn a trial court’s finding of fact, an appellant must first marshal all the evidence supporting the findings and then demonstrate that, even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings.” *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180, 186 (Utah App. 1997) (citations and internal quotation marks omitted). *See also* Utah R. App. P. 24(a)(9).

“In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.” *Moon v. Moon*, 1999 UT App. 12, ¶ 24, 973 P.2d 431, 437 (internal quotation marks and citation omitted). “After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court’s finding resting upon the evidence is clearly erroneous.” *Id.* “When an appellant fails to properly discharge his duty to marshal, we assume that ‘the evidence introduced at trial adequately supported the findings,’ and, accordingly, affirm the findings as written.” *In the Interest of L. M.*, 2001 UT App. 314, ¶ 15, 433 Utah Adv. Rep. 6, 7 (quoting *Young v. Young*, 1999 UT 38, ¶ 34, 979 P.2d 338, 345).

Instead of presenting “in comprehensive and fastidious order, every scrap of competent evidence introduced at trial” supporting the contested findings, Plaintiffs have marshaled nothing. Accordingly, the Court should affirm the findings as written.

II. THE TRIAL COURT CORRECTLY RULED THAT THE MARCH 24, 1998 LETTER IS AMBIGUOUS

As a matter of contract construction, the Utah Supreme Court has held: “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, 52 (citations and quotation marks omitted). Stated differently, ambiguity exists where the parties present “contrary, tenable interpretations.” *Id.* at ¶ 25. *See also Whitehouse v. Whitehouse*, 790 P.2d 57, 60 (Utah Ct. App. 1990) (“Language in a written document is ambiguous if the words used may be understood to support two or more plausible meanings.”).

The Utah Supreme Court has also held that, in deciding a question of ambiguity, the trial judge is not limited to the language of the document itself. Extrinsic evidence should be considered to determine whether a contract is ambiguous.

Although the terms of an instrument may seem clear to a particular reader – including a judge – this does not rule out the possibility that the parties chose the language of the agreement to express a different meaning. A judge should therefore consider any credible evidence offered to show the parties’ intention.

While there is Utah case law that espouses a stricter application of the rule and would restrict a determination of whether ambiguity exists to a judge’s determination of the meaning of the terms of the writing itself, the better-reasoned approach is to consider the writing in light of the surrounding circumstances. Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties . . . so that the court can place itself in the same

situation in which the parties found themselves at the time of contracting. If after considering such evidence the court determines that the interpretations contended for are reasonably supported by the language of the contract, then extrinsic evidence is admissible to clarify the ambiguous terms.

Ward v. Intermountain Farmers Ass’n, 907 P.2d 264, 268 (Utah 1995) (internal quotation marks and citations omitted). *See also Yeargin v. Auditing Div. of the Utah State Tax Comm’n*, 2001 UT 11, ¶ 39, 20 P.3d 287, 297 (“The test in Utah for determining whether a contract . . . is ambiguous is found in *Ward v. Intermountain Farmers Ass’n*”); *Moon v. Moon*, 1999 UT App. 12, ¶ 18, 973 P.2d 431, 435 (“When determining whether a contract is ambiguous, any relevant evidence must be considered.”) (internal quotation marks and citations omitted).

In this case, the trial court’s determination of ambiguity should be upheld for either of two reasons. First, the March 24 letter is ambiguous on its face. Second, the marshaled evidence of the surrounding circumstances and the understanding of the parties justifies the trial court’s finding that the interpretation advanced by Crestar Bank is reasonably supported by the language of the document.

The text of the March 24 letter, in its entirety, is 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.

(Ex. 6 (Addendum Ex. I) emphasis added.)

The trial court found the letter to be ambiguous in four respects. R. 1297, Finding 21. First, the letter does not make an affirmative promise to “pay,” nor does it “guaranty” payment, but instead expresses the intention to “transfer” the specified sum. R. 1297,

Finding 21(a). The use of the term “transfer” in the context of the letter implies that the funds would be moved from one account (presumably the Diana Group account at the Bank) to Sine’s designated account, rather than being paid from the general assets of the Bank.

Second, the letter states that the undertaking to transfer is made “on behalf of our client, Diana Group.” R. 1297, Finding 21(b). As the trial court reasoned: “‘On behalf of your [sic] client, Diana Group’ to me that is at least raising the question and ambiguity as to whether the Bank is obligating themselves [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.” R. 1355 at 175.

Third, the trial court found a source of ambiguity in the “odd and unconventional language of the document itself.” Instead of being in the usual form of guaranty or other bank commitment, the peculiar nature and language of the document itself created an ambiguity.

Finally, the trial court found that ambiguity was “created by the purported return on investment of 400% in six weeks.” R. 1297, Findings 21(c) and (d). In other words, the document cannot reasonably be understood to be an unconditional guaranty of a transaction that purported to quintuple Sine’s investment in “30 banking days.” *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.”); *Wilson Court Ltd. v. Tony Maroni’s Inc.*, 952 P.2d 590, 597-99 (Wash. 1998) (contract in commercial setting should be given a commercially reasonable construction); *Amfac, Inc.*

v. Waikiki Beachcomber Inv. Co., 839 P.2d 10, 25 (Haw. 1992) (“Where the language of a contract is susceptible of two constructions, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not likely enter into, the interpretation which makes a fair, rational and probable contract must be preferred.”) (internal quotation marks and citation omitted).

The foregoing demonstrates that “the language [of the letter] is reasonably capable of being understood in more than one sense.” *Dixon*, 1999 UT 89 ¶ 14, 987 P.2d at 52. Clearly, at a minimum, Crestar presented a “contrary, tenable interpretation” that justified the trial court’s conclusion that the document was ambiguous on its face. *Id.* at ¶ 25.

In addition to the correct ruling of facial ambiguity, there is a further reason to uphold the trial judge’s determination of ambiguity. Under the *Ward* standard, as noted above, the trial court must engage in “a preliminary consideration of all credible evidence offered to prove the intention of the parties . . . so that the court can place itself in the same situation in which the parties found themselves at the time of contracting.” 907 P.2d at 268. In this case, the extrinsic evidence (appropriately marshaled) supports the trial judge’s finding that the intention of the parties was consistent with the interpretation advanced by Crestar, i.e., the document created a conditional obligation to transfer funds if Diana Group first deposited the money. Moreover, the interpretation is reasonably supported by the language of the March 24 letter.

The marshaled evidence includes: Sine was an experienced attorney and businessman, and was familiar with the typical form of bank guaranties and similar

obligations. R. 1355 at 103-04, 115-17. The language of the letter was drafted by Mangiapane, not the Bank. R. 1357, Mangiapane Dep. at 67 (Addendum Ex. C). Sine attempted to negotiate different language with Mangiapane in an effort to change the document into a guaranty. Ex. 22 (Addendum Ex. H); R. 1355 at 137-38; R. 1357, Mangiapane Dep. at 75-76 (Addendum Ex. C). Mangiapane refused. R. 1357, Mangiapane Dep. at 76 (Addendum Ex. C). The Bank was never a party to the negotiations between Sine and Mangiapane and was unaware that Sine was seeking a guaranty. R. 1355 at 117-19, 138; R. 1357, Mangiapane Dep. at 67-68 (Addendum Ex. C), *see also* references supporting Finding 18, *supra*. Mangiapane and Cree (whose testimony the trial judge found more credible than Sine's) both understood the March 24 letter to be a conditional obligation of the Bank to transfer funds from Diana Group's account to Sine after Diana Group deposited the money. *See* references supporting Finding 22, *supra*. Most significantly, prior to the time Sine wired the money to the Bank, Cree told him in a phone conversation that the Bank's obligation to transfer the money to Sine was conditioned on Diana Group first depositing that amount with the Bank. R. 1357, Cree Dep. at 48-49, 51-52, 69-70 (Addendum Ex. D). Knowing all this, Sine went ahead and invested the money in Diana Group. R. 1357, Mangiapane Dep. at 91 (Addendum Ex. C).

Finally, the marshaled evidence of the intention of the parties is reasonably supported by the language of the March 24 letter stating that the Bank will "transfer" funds "on behalf of" Diana Group. Thus, the trial court's factual findings are not clearly erroneous, and the determination that the letter is ambiguous should be affirmed.

III. THE CHALLENGED CONCLUSIONS REGARDING THE MEANING OF THE MARCH 24 LETTER AND CREE'S LACK OF AUTHORITY ARE SUPPORTED BY THE UNCHALLENGED FINDINGS AND THE RECORD

Once the trial court determined that the March 24 letter was ambiguous, it admitted extrinsic evidence as to its meaning⁴ and determined that the document was, at most, a conditional obligation of the Bank to transfer money after Diana Group had deposited it with the Bank. The trial court also found that Cree was without authority to issue any type of guaranty on behalf of the Bank.

Without identifying the findings they challenge or marshaling the evidence as required, Plaintiffs argue that the trial judge erred and urge this Court to adopt their favorable interpretation of the evidence presented below. In any event, the marshaled evidence supports the trial court's findings and conclusions on both issues and the decision below should be affirmed.

A. The Trial Court Properly Found That the March 24, 1998 Letter Was, at Best, a Conditional Obligation

Plaintiffs disagree with the trial court's fact findings concerning the interpretation of the March 24 letter. Pls.' Br. at 23-28. Plaintiffs never specify which findings of fact they dispute, but apparently their argument is focused on Findings 22, 24, and 35. The effect of Plaintiffs' argument, however, is to challenge almost all of the court's findings. See R. 1300, Finding 35 (citing "all of the foregoing" findings plus other factors in

⁴ Where an agreement is ambiguous, extrinsic evidence is admissible to determine its meaning. *Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990) ("[I]f a contract is ambiguous, parol evidence is admissible to explain the parties' intent."), *appeal after remand*, 886 P.2d 514 (Utah 1994).

finding that the March 24 letter created, “at most, a conditional obligation on the part of Crestar to transfer money to Sine if, and only if, Diana Group first deposited that money with the Bank”). As noted above, Plaintiffs fail to marshal the evidence supporting these findings.

In reviewing these findings, this Court will apply a deferential standard. “A party challenging the trial court’s interpretation of ambiguous terms of a contract faces a substantial appellate burden. We affirm the trial court’s findings if they are based on sufficient evidence in the light most favorable to the trial court’s construction.” *Wade v. Stangl*, 869 P.2d 9, 12 (Utah Ct. App. 1994) (internal quotation marks and citation omitted). *See also Interwest Const. v. Palmer*, 923 P.2d 1350, 1359 (Utah 1996) (“Determining the meaning of a contract by extrinsic evidence generally presents questions of fact for the trier of fact, whose findings we [the appellate court] review[s] deferentially.”); *Trolley Square Assocs. v. Nielson*, 886 P.2d 61, 64 (Utah Ct. App. 1994) (“The findings of the trial court regarding the intent of the parties, determined by extrinsic evidence, will be overturned only if clearly erroneous.”).

Plaintiffs urge that the court erred in not adopting Sine’s interpretation of the letter. Sine testified that the letter was an unconditional promise to pay the \$2.5 million in 30 banking days and that he relied on it as such. *See* Pls.’ Br. at 24-25. Sine’s own testimony concerning his understanding of the meaning of the letter is the only evidence Plaintiffs offer in support of their interpretation. *Id.* Not only does this effort fail to satisfy the marshaling requirement, the trial court specifically found Sine’s testimony to be less credible than that of Cree and Mangiapane. R. 1297, 1300, Findings 22, 24, 35;

see also references supporting these findings, *supra*. Plaintiffs' reliance on discredited testimony is inappropriate on appeal. Likewise, it is improper for Plaintiffs to argue that "the Cree and Mangiapane interpretations [of the letter] are not credible." Pls.' Br. at 27. The trial court specifically found that the testimony of Cree and Mangiapane was more credible than Sine's. R. 1300, 1302, Finding 35, Conclusion 6. This Court should summarily reject Plaintiffs' request to perform a *de novo* determination of the credibility of the witnesses.

On the other hand, Plaintiffs ignore substantial evidence that supports the trial court's findings and conclusion that the letter was nothing more than a conditional promise to transfer. The marshaled evidence demonstrates that Sine specifically negotiated with Mangiapane to obtain stronger language in the letter, but she rejected his requests. R. 1355 at 137-38; Ex. 22 (Addendum Ex. H); R. 1357, Mangiapane Dep. at 75-76 (Addendum Ex. C). Cree testified that when Sine telephoned her, **before he had wired any money to Diana Group's account**, she told him that the Bank's obligation to transfer under the letter was conditioned on Diana Group first depositing the funds with the Bank. R. 1357, Cree Dep. at 48-49, 51-52, 60-61, 69-70 (Addendum Ex. D). Sine, himself, recognized the inadequacy of the letter because when he wired the \$500,000 he attempted to attach "instructions" purporting to change the Bank's obligation to "transfer" into a "promise to pay." R. 1355 at 145-46; Ex. 23 (Addendum Ex. J). (The ineffectiveness of these wire "instructions" is discussed below in section V.)

The evidence also demonstrates that, after Sine had wired the \$500,000, and while the money was still on deposit in the Diana Group account at Crestar, Mangiapane faxed

a letter to Sine stating that the transaction was cancelled because Sine was trying to characterize it as an obligation of the Bank rather than an obligation of Diana Group. Ex. 9 (Addendum Ex. L); R. 1355 at 74-75, 153-54; R. 1357, Mangiapane Dep. at 96-98 (Addendum Ex. C). Mangiapane also offered to return Sine’s money to him. *Id.* Instead of accepting Mangiapane’s offer to return his money, Sine renegotiated his transaction with Diana Group and signed a “Private Placement Agreement” in which he acknowledged that the \$2.5 million that the Bank was to transfer would be first “returned” by the Diana Group. Ex. 11 ¶ 4 (Addendum Ex. N); R. 1355 at 84-85, 158-59; R. 1357, Mangiapane Dep. at 93-95, 100-02 (Addendum Ex. C).

Viewed in the light most favorable to Crestar, as required by *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180, 186 (Utah App. 1997), the foregoing evidence is clearly sufficient to support the trial court’s findings concerning the meaning of the March 24 letter—that it was, at most, a conditional promise to transfer \$2.5 million if Diana Group deposited the money.

B. The Trial Court Properly Found That Cree Lacked Apparent Authority To Issue a Guaranty

Next, Plaintiffs argue that Cree had apparent authority to obligate the Bank by means of the March 24 letter. Pls.’ Br. at 28-34. This argument is moot if this Court upholds the trial court’s determination that the letter was, at most, a conditional obligation, as discussed above. This Court would not need to reach the issue of Cree’s authority unless it were to set aside the trial court’s findings and rule that the March 24 letter was a guaranty or some other unconditional obligation of the Bank.

Once again, Plaintiffs fail to specify which findings they dispute. (Findings 29 and 30 deal with apparent authority. R. 1298.) Once again, they fail to marshal the pertinent evidence but, instead, selectively cite to bits of evidence that support their position.

In *Zions First Nat. Bank v. Clark Clinic Corp.*, 762 P.2d 1090 (Utah 1998), the Utah Supreme Court explained basic agency principles as follows:

Under agency law, an agent cannot make its principal responsible for the agent's actions unless the agent is acting pursuant to either actual or apparent authority. Actual authority incorporates the concepts of express and implied authority.

In comparison [to actual authority], an agent's apparent or ostensible authority flows only from the acts and conduct of the principal. Indeed, as we stated in *City Electric v. Dean Evans Chrysler-Plymouth, Inc.*, [672 P.2d 89, 90 (Utah 1983)]: Where corporate liability is sought for acts of its agent under apparent authority, liability is premised upon the corporation's knowledge of and acquiescence in the conduct of its agent which has led third parties to rely upon the agent's actions. Nor is the authority of the agent 'apparent' merely because it looks so to the person with whom he deals. It is the principal who must cause third parties to believe that the agent is clothed with apparent authority. It follows that one who deals exclusively with an agent has the responsibility to ascertain that agent's authority despite the agent's representations.

* * * *

It is well-established that the mere fact that an employee has managerial status and is in charge of a company's office does not entitle third persons to assume that he had the authority to execute or endorse negotiable paper belonging to his employer.

Id. at 1094-95 (citations omitted).

The record supports the trial court's findings concerning Cree's lack of apparent authority. R. 1357, Cree Dep. at 76-77 (Addendum Ex. D). Plaintiffs point to nothing in the record suggesting that Crestar did anything independent of Cree's actions to lead Sine

to believe that she was clothed with apparent authority or that the Bank knew of, or acquiesced in, Cree's issuance of the March 24 letter.⁵

Sine, by his own admission, did nothing more than ask Cree herself if she was an assistant vice-president and branch manager. Pls.' Br. at 30. He made no effort to ascertain Cree's authority in any other way. R. 1355 at 55-56; references supporting Findings 29, 30. *See Zions Bank*, 762 P.2d at 1095 (mere fact that an employee has managerial status and is in charge of a company's office does not entitle third persons to assume that he had a particular authority). Sine never asked Cree or anyone else at Crestar whether Cree had authority to guaranty his \$2.5 million transaction with Diana Group.

Finally, Plaintiffs refer to Mangiapane's testimony that Cree was "one of the better employees" and that she could cash checks for customers. This third-party opinion testimony has no relevance whatsoever to whether the Bank did something to communicate to Sine that Cree had apparent authority. Pls.' Br. at 30.⁶

⁵ Plaintiffs claim that "Cree testified that her supervisor, Nancy Wilson, knew about the March 24, 1998 Letter" Pls.' Br. at 31. This is not correct, and the assertion is not supported by Plaintiffs' citation to Cree's testimony. Actually, Cree testified that none of her supervisors knew about the March 24 letter until after Sine filed this lawsuit. R. 1357, Cree Dep. at 111 (Addendum Ex. D). Plaintiffs also assert, with circular logic, that the Bank was aware of the letter because Cree herself was aware of it. Pls.' Br. at 31 & n.3. The applicable rule is that a principal is not charged with knowledge of an agent acting outside her authority unless someone other than the agent is aware of the conduct. Restatement (Second) of Agency § 280.

⁶ Plaintiffs cite to a number of authorities purportedly concerning apparent authority or imputed knowledge. These cases are inapplicable to, or distinguishable from, this case for various reasons. *See Macris v. Sculptured Software, Inc.*, 2001 UT 43, 24 P.3d 984 (agent's knowledge is imputed to principal if agent is acting within the scope

When properly marshaled, the evidence clearly supports the trial court's findings that Crestar did nothing to create an apparent authority on the part of Nancy Cree and that Sine had no reasonable basis for believing that she could unconditionally obligate the Bank to pay \$2.5 million. Accordingly, the findings should be affirmed.

IV. THE COURT PROPERLY DENIED PLAINTIFFS' RULE 15(B) MOTIONS

Rule 15(b) of the Utah Rules of Civil Procedure provides that where an issue is not raised in the pleadings, it may nevertheless be tried "by express or implied consent of the parties." A trial court's decisions under Rule 15(b) are reviewed for "'correctness,' however, because the trial court's determination of whether the issues were tried with all parties' 'implied consent' is highly fact intensive, we grant the trial court a fairly broad measure of discretion in making that determination under a given set of facts." *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 105 (Utah 1998). As the Utah Supreme Court explained:

of his authority; case has no bearing on agent acting outside scope of agency); *Wood v. Strevell-Paterson Hardware Co.*, 313 P.2d 800, 801 (Utah 1957) (principal ratified actions of agent); *Glyfada Seafaring Corp. v. Fillmore Shipping Ltd.*, 685 F. Supp. 40, 42-43 (S.D.N.Y. 1987) (apparent authority stemmed from facts that agent signing contract was treasurer of principal corporation, principal had only a handful of employees, agent routinely signed contracts of the same nature, and principal later ratified the contract); *Horrocks v. Westfalia Systemat*, 892 P.2d 14, 16 (Utah Ct. App. 1995) (agent had apparent authority because contract was of a type the agent ordinarily entered into and principal ratified agent's action after the fact); Restatement (Second) of Agency § 282 (does not impute agent's knowledge to the principal where agent is committing an unauthorized act, *see* Comment b); *Agri Export Coop. v. Universal Sav. Ass'n*, 767 F. Supp. 824, 830 (S.D. Tex. 1991) (chief executive officer of bank has apparent authority to issue a letter of credit); *Grabowski v. Bank of Boston*, 997 F. Supp. 111, 126-27 (D. Mass. 1997) (bank liable for agent's transaction that was "wholly within its knowledge and control," bank knew, through its knowledge of a document limiting agent's authority and "its normal 'channels of business,' that [agent] was exceeding the scope of his authority").

A finding of implied consent depends on whether the parties recognized that an issue not presented by the pleadings entered the case at trial. A party may give implied consent when it does not object to the introduction of evidence at trial. However, when evidence is introduced that is relevant to a pleaded issue and the party against whom the amendment is urged has no reason to believe a new issue is being injected into the case, that party cannot be said to have impliedly consented to a trial of that issue.

959 P.2d at 105 (internal quotation marks and citation omitted). In *Keller*, the Court found that the parties had tried an issue of forcible entry by implied consent because the defendant made no objection to the presentation of evidence relating to that claim, and both parties addressed the claim in their trial briefs. *Id.* at 106. “Importantly, [defendant] reviewed [plaintiff’s] supplemental trial brief that outlined the forcible entry claim before he submitted his trial brief. Instead of objecting to the claim as being outside of the pleadings or barred by a defense, [defendant] addressed the claim on the merits. And both parties addressed the issue again during closing argument.” *Id.* The circumstances in *Keller* do not exist in this case.

Plaintiffs argue that the trial court erred by denying their motion to add four new claims to their pleading. Pls.’ Br. at 34-42. Two of these claims, alleging Crestar’s negligence and breach of fiduciary duty, had never been mentioned before in these proceedings until Plaintiffs’ closing argument. R. 1355 at 195. Certainly Crestar cannot be deemed to have tried these matters by express or implied consent. All of the evidence admitted at trial related to the breach of contract claim that was being tried. There was no evidence admitted at trial that related exclusively to a negligence or breach of fiduciary duty claim. *See Keller*, 959 P.2d at 105. Therefore, Crestar never was put on notice that

it needed to object to certain evidence or be deemed to have consented to trial of these new claims. Moreover, Crestar never had notice prior to trial of these new claims and never had an opportunity to prepare for them. *See Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, n.1, 974 P.2d 288, 292 n.1 (rejecting attempt to raise rule 15(b) challenge in part because party had not had the opportunity to focus discovery efforts on the issue).

The other two claims Plaintiffs assert are based on (1) breach of U.C.C. Article 4A (dealing with electronic fund transfers), and (2) breach of U.C.C. Article 5 (dealing with letters of credit). While the parties briefed and argued the requirements of Article 4A at trial, it was solely in the context of Plaintiffs' breach of contract claim. Sine testified that he caused his bank to send "instructions" along with the wire transfer to Diana Group's account at Crestar. R. 1355 at 140-48; Ex. 23 (Addendum Ex. J). Plaintiffs argued that Crestar's acceptance of the \$500,000 accompanied by the "instructions" constituted an enforceable contract requiring the Bank to repay Sine \$2.5 million in "30 banking days." R. 1355 at 166-73. Crestar, on the other hand, argued that Sine's attempt to send the "instructions" was ineffectual, as a matter of law, to obligate the Bank. *Id.*; *see also* R. 1222 (Crestar's Trial Brief). Moreover, Crestar argued that Sine's attempt to put wording in the "instructions" such as "promise to pay" and "without protest, set off or delay" was evidence that Sine knew the March 24 letter was not a guaranty or an independent obligation to pay Sine. R. 1355 at 145-46. Both arguments related to the breach of

contract claim, Plaintiffs' sole claim at trial,⁷ and it was only on this basis that Crestar defended against the evidence.⁸ Consequently, Plaintiffs may not now assert that a

⁷ The first Amended Complaint, R. 346, was in effect at the time of trial. This complaint contained three counts. Well in advance of trial, the court dismissed the two fraud-related counts, leaving for trial only a single cause of action for breach of contract. R. 692.

⁸ Crestar's defense on this issue consisted of briefing the Article 4A issue in their Trial Brief, R. 1222 (showing that, as a matter of law, the instructions Sine sent with the wire transfer could not create a binding contract with Crestar) and demonstrating that the "instructions" that Sine included with his wire transfer were not received by Crestar in an intelligible form. Ex. 29 (Addendum Ex. K). Thus, Crestar defended the issue solely as part of the breach of contract claim Plaintiffs had actually pled, and not with implied consent to a wholly new cause of action.

Plaintiffs misconstrue what happened at trial concerning Crestar's proffer of the expert testimony. Pls.' Br. at 36-38. What actually happened was, after Plaintiffs rested their case, Crestar moved for partial judgment as a matter of law that Sine's wire "instructions" did not constitute an independent contract with Crestar because the statutes and regulations applicable to Fedwire transactions did not permit such conditional "instructions," and Plaintiffs had introduced no evidence supporting their claim that the "instructions" would have been seen in an intelligible form by Crestar or understood to be a contract with Sine if the Bank accepted the wire transfer. R. 1355 at 166-69. In response to the motion, Judge Young said, speaking to Plaintiffs' counsel, "I haven't heard any evidence and I don't anticipate that you're going to put on any evidence, having rested, that it is common practice in a Fed Wire for them to be alert and attentive to the content that's indicated in the wire." R. 1355 at 169. Notwithstanding this opinion, Judge Young was initially inclined to reserve ruling on Crestar's motion. R. 1355 at 168-69. Thereupon, Crestar's counsel informed the court that he had an expert witness prepared to testify that as a matter of industry practice, the receiving bank would not have noted the wire instructions or understood them to bind the Bank, and requested a ruling on the motion so he would know whether or not to have the witness testify. R. 1355 at 170. There followed additional discussion, and the court found that Plaintiffs had not carried their burden of proof and granted Crestar's motion. R. 1355 at 170-73.

Given these events, Plaintiffs' complaints that the trial court "accepted" the testimony of "an unidentified, non-present expert witness," Pls.' Br. at 37, and that Plaintiffs "were not given the right to cross examine Crestar's expert," *id.* at 38, are baseless. The trial judge simply held that Plaintiffs had not introduced any evidence to sustain their burden to prove that the wire "instruction" constituted an enforceable contract with Crestar.

separate claim under Article 4A was actually litigated at trial. *Keller*, 959 P.2d at 105. In fact, immediately prior to trial, Plaintiffs attempted to amend their complaint (for the second time). One of the proposed new causes of action was a claim for breach of Article 4A. R. 1008, 1034. Crestar objected to amending the complaint on the eve of trial. *See* R. 1138 (Crestar's Memorandum in Opposition to Motion to Amend Complaint). The Court denied the request to amend. R. 1200. Thus, there is no basis for the claim that Crestar expressly or impliedly consented to trial of the Article 4A issue as a separate cause of action.

Plaintiffs also assert error in the trial court's denial of their Rule 15(b) motion concerning an alleged breach of letter of credit requirements under U.C.C. Article 5. Utah Code Ann. § 70A-5-101, *et seq.* As with the claim under Article 4A, this claim was first asserted after discovery had concluded and shortly prior to trial in a proposed second amended complaint and Crestar successfully objected to it. R. 1038. Once again, Plaintiffs introduced no evidence uniquely relating to the letter of credit issue.⁹ Consequently, Crestar did not expressly or impliedly consent to the litigation of the issue.

⁹ In connection with their argument concerning the letter of credit issue, Plaintiffs discuss the evidence relating to the failure of consideration for the March 24 letter. Pls.' Br. at 40-42. This evidence was admitted because it concerned Crestar's failure of consideration defense to the breach of contract claim (raised in the Answer, R. 23, 28, and again in its Trial Brief, R. 1236). The evidence thus did not relate exclusively to a letter of credit claim. Moreover, the evidence clearly supported the trial court's finding that Crestar received no consideration for the March 24 letter. R. 1357, Mangiapane Dep. at 134-35 (Addendum Ex. C).

V. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' BREACH OF CONTRACT CLAIM THAT WAS BASED ON THE WIRE TRANSFER INSTRUCTIONS

Plaintiffs argue that the trial court “erroneously dismissed Appellants’ wire transfer cause of action.” Pls.’ Br. at 51. As demonstrated above, only one cause of action was tried and Plaintiffs never asserted an independent “wire transfer cause of action.” *Supra* n.8. Plaintiffs did assert, however, an alternative contract theory that the conditional language transmitted by Sine’s bank along with the \$500,000 constituted an enforceable contract with Crestar upon receipt of the money. This breach of contract theory was dismissed by the court pursuant to Rule 41(b) at the close of Plaintiffs’ case. In addition to certain factual findings, the trial court found that Plaintiffs “failed to present any evidence or legal authority that Sine’s wire instructions of March 27, 1998, created any obligation on the part of Crestar.” R. 1355 at 167-69.

The standard for review of a trial court’s dismissal under Rule 41(b) is the same standard that would ordinarily apply to findings and conclusions. *See Lawrence v. Bamberger R.R. Co.*, 282 P.2d 335, 336-37 (Utah 1955) (“When the court has made findings and entered judgment thereon [pursuant to Rule 41(b)], it is then our duty to review the evidence in the light most favorable to the findings, and they must be allowed to stand if reasonable minds could agree with them.”); *S. Title Guar. Co. v. Bethers*, 761 P.2d 951, 954 (Utah Ct. App. 1988) (findings made pursuant to Rule 41(b) are reviewed under clearly erroneous standard, while legal conclusions are reviewed for correctness).

All of the evidence on this issue can be easily set forth. The trial court found that Sine attempted to make the wire transfer a conditional transfer by sending the following communication to his bank, Bank of Utah, in connection with ordering the wire transfer:

We submit for your consideration, the following proposed wording of wire transfer of funds, required to activate wire transfer of funds (within thirty banking days) into the herein referenced Sine Atty. Trust Account.

SWIFT wire wording:

Addressed to: Crestar Bank,
 Georgetown Branch Mgr.
 Nancy Y. Cree, A.VP

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.

R. 1299, Finding 32; Ex. 23 (Addendum Ex. J). This finding is unchallenged.

The trial court next found "The language requested by Sine was transmitted by the Bank of Utah by abbreviating it and placing it in information fields entitled 'bank-to-bank information' and 'originator-to-beneficiary information.' The information was received by Crestar Bank in an unintelligible form." R. 1299, Finding 33. This finding, also unchallenged, was supported by Exhibit 29 (Addendum Ex. K), reproduced below, which is a printout of the information as it would have appeared on Crestar's computer screens in conjunction with the Fedwire transfer from the Bank of Utah:

VIEW 2.0 BROWSE - WTR-INTHIST -- REC 0000000 PG 0000001.001 LOCK 00 COL 001 080
 COMMAND ==> SCROLL ==> PAGE
 ***** TOP OF DATA *****

WTR-INTHIST CNA		TRANSACTION HISTORY	TRV 980327-004081
SRC-FED CALLER:		EXT:	SND DATE 98/03/27
RPT#	AMT:	6500,000 00	CUR USD
TEST:	VAL-03/27/98	TYP FTRMTP.	FNDS:S CHG.DB N CD H COM N CBL

DBT*A/124300107	CDT *D/206849540	ADV LTR
XL RECON-	GL RECON	
DEPT:	DEPT:	RTC:
BK UTAH OGDEN	DIANA GROUP INC 10321	
OGDEN, UT		

SEND /	ADVICE INSTRUCTIONS
--------	---------------------

SND REF NUM	BNF BANK /
-------------	------------

VIEW 2.0 BROWSE - WTR-INTHIST -- REC 0000022 PG 0000001.022 LOCK 00 COL 001 080
 COMMAND ==> SCROLL ==> PAGE
 ORD BNK: /

OBK REF NUM:

ORIG: /
 SINE ATTORNEY TRUST

ORP REF NUM:

BANK-TO-BANK INFO:
 2,500,000 USD VIA BK TO BK WIRE W/O
 UT PROTEST SET OFF OR DELAY W/IN 31
 BK DAYS OF REC OF THIS WIRE TO W F
 SINE ATTY #12036086 ATTN D TAYLOR

ADVICE INSTRUCTIONS

BNF /

CH: BK?

ADVICE INSTRUCTIONS

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

VIEW 2.0 BROWSE - WTR-INTHIST -- REC 0000044 PG 0000001.044 LOCK 00 COL 001 080
 COMMAND ----> SCROLL ----> PAGE

MAY 0327L4QFAB1D00001203271521FT01

EMO:

XC MEMO:

NTRY PERSON:
 ERIFY PERSON:
 EPAIR PERSON:
 XCEPT PERSON:

AY:	980327	15:24:08 37
CV:	980327	15:24:04 95
LV:	980327	15:24:08 37

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

ADVICE INSTRUCTIONS

INT BNK: /

ADVICE INSTRUCTIONS

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

Ex. 29 (Addendum Ex. K). The exhibit is reproduced herein because it clearly supports the trial court's finding that the "instructions" were not received in an intelligible form by

Crestar. Indeed, without the benefit of Sine's letter to Bank of Utah (which Crestar did not have), one would be hard-pressed to make any sense of the "instructions." In any event, Nancy Cree never saw the "instructions," nor was she aware that anyone else at the Bank saw them. R. 1357, Cree Dep. at 77-78 (Addendum Ex. D).

The foregoing was the sum total of the evidence on this issue. Plaintiffs did not offer any testimony from the Bank of Utah to explain why it sent the transfer by means of the Fedwire System, that is owned and operated by the Federal Reserve Board, instead of the S.W.I.F.T.¹⁰ wire system, as directed by Sine. The trial court found that "There was no evidence of any banking rule or practice that would create an obligation on Crestar Bank's part to read or respond to the informational comments sent with wire transfers." R. 1299-1300, Finding 34. Finally, the court found, in the nature of a legal conclusion based on the briefing of the parties, that "the regulations governing the Fedwire system operated by the Federal Reserve Board are clear that such instructions have no impact on a wire transfer sent by means of that system." *Id.* Accordingly, the court found that Plaintiffs failed to meet their burden to show an enforceable contract as a result of the "instructions."

¹⁰ S.W.I.F.T. is an acronym for Society of Worldwide International Financial Telecommunications, a worldwide communications system. See 1 Donald I. Baker & Roland E. Brandel, *The Law of Electronic Fund Transfer Systems* 11-17 & 11-18 (rev. ed. 1999). As distinct from Fedwire, S.W.I.F.T. is a communications system with no settlement capacity. It may be possible to make a conditional wire transfer using the S.W.I.F.T. system, either alone or in combination with another system. See, e.g., *Piedmont Resolution, LLC v. Johnston*, 999 F. Supp. 34, 48 (D.D.C. 1998). Whether or not it is possible, however, is not germane to this case because the Bank of Utah chose to use the Fedwire system. The receipt of the Fedwire by Crestar is governed by the U.C.C. and federal regulations as set forth below.

A finding that Plaintiffs have not met their burden is an appropriate use of Rule 41(b). *See Child v. Hayward*, 400 P.2d 758, 758 (Utah 1965) (“when the court is the trier of the facts, and it appears . . . that under the plaintiff’s evidence he would not be able to prevail in any event, the trial court can eliminate the time and effort involved in requiring the defendant to put on evidence, and make its findings at that point”). The trial court’s finding that Plaintiffs failed to present any evidence that Sine’s wire instructions created an enforceable obligation on the part of the Bank is supported by the record and is not clearly erroneous. Once again, Plaintiffs failed to marshal the evidence supporting the trial court’s finding. More importantly, however, the trial court correctly held that the “instructions” could not have created, as a matter of law, an enforceable obligation on the part of Crestar Bank.

Article 4A of the U.C.C. (incorporated by 12 C.F.R. § 210.25(b) (2000) “Funds Transfers Through Fedwire” (Addendum Ex. A)) governs all wire transfers on the Fedwire system, including the rights and obligations of Sine (as sender of the wire transfer) and Crestar (as the receiving bank). *See* 12 C.F.R. § 210.25(b)(2) (Addendum Ex. A); *Donmar v. S. Nat’l Bank*, 64 F.3d 944, 948 n.4 (4th Cir. 1995). “The drafters’ aim in drafting Article 4A was to achieve national uniformity, speed, efficiency, certainty, and finality in the funds transfer system.” 7 Lary Lawrence, *Lawrence’s Anderson on the Uniform Commercial Code*, § 4A-101:5 (3d ed. 2000) (citing *Grabowski v. Bank of Boston*, 997 F. Supp. 111 (D. Mass. 1997)). The U.C.C. provisions on funds transfers are “intended to be the exclusive means of determining the rights, duties and

liabilities of the affected parties in any situation covered by particular provisions of the Article.” U.C.C. § 4A-102 cmt. (1998).

The short answer to Plaintiffs’ argument is that the Fedwire system is meant to be an inexpensive, rapid, efficient, and final method for transferring funds from one bank to another. Consequently, federal regulations governing the system do not permit a party to make a “conditional” transfer by attaching “instructions” of the sort Sine attempted to transmit along with his transfer of the \$500,000. The long answer, however, requires an excursion through the regulations governing wire transfers.

The scope of Article 4A is determined by the definitions of “payment order” and “funds transfer.” § 4A-102 cmt.

A “payment order” is defined as:

An instruction of a sender to a receiving bank . . . to pay, or to cause another bank to pay, a fixed . . . amount of money to a beneficiary if:

- (i) the instruction does not state a condition to payment to the beneficiary other than time of payment,**
- (ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and
- (iii) the instruction is transmitted by the sender directly to the receiving bank

U.C.C. § 4A-103(a)(1) (1999); 12 C.F.R. § 210.26(i) (Addendum Ex. A) (emphasis added). “[P]ayment orders are the communication, either written, oral or electronic, by which a sender gives the instruction to the sender’s bank to pay . . . a beneficiary.” *Impulse Trading, Inc. v. Norwest Bank Minn., N.A.*, 870 F. Supp. 954, 959 (D. Minn. 1994). A “sender” is the person (including a bank) giving an instruction to the receiving bank. See § 4A-103(a)(5), *reprinted in* 12 C.F.R. § 210.25 app. B (Addendum Ex. A). A

“receiving bank,” in turn, is a bank to which the sender’s instruction is addressed. § 4A-103(a)(4), *reprinted in* 12 C.F.R. § 210.25 app. B (Addendum Ex. A). (In a given funds transfer, there may be a number of senders and receiving banks. Here, Sine was a “sender” and Bank of Utah was a “receiving bank” and then, in turn, Bank of Utah was a “sender” and Crestar was a “receiving bank.”)

The definition of payment order excludes conditional payment instructions “because Article 4A is structured specifically to cover low-price, high-speed transactions in which a bank’s actions are purely mechanical.” *Lawrence’s Anderson on the Uniform Commercial Code* § [Rev]4A-103:9 at 486 (citing § 4A-104 cmt. 3 (1998)). *See also Grabowski v. Bank of Boston*, 997 F. Supp. 111, 121 (D. Mass. 1997) (“Conditions are anathema to Article 4A.”), *reconsideration granted on other grounds*, 997 F. Supp. 130 (1998). As another commentator has noted:

[T]he instruction to pay the beneficiary may not be subject to any condition, such as demand, delivery of documents, or transfer of securities by the beneficiary. Rather, it must be unconditional. . . .

“The function of banks in a funds transfer under Article 4A is comparable to the role of banks in the collection and payment of checks in that it is essentially mechanical in nature. The low price and high speed that characterize funds transfers reflect this fact.

Thus, on its terms, the payment order may not include any stipulation other than relating to amount, currency, time and place of payment.”

Benjamin Geva, *The Law of Electronic Funds Transfers* 2-21, 2-22 (Matthew Bender 1999) (quoting U.C.C. § 4A-104 cmt. 3).

The law is clear that once Crestar received the Fedwire transfer from the Bank of Utah, its only obligation was to credit the account listed as the beneficiary account:

The only obligation of the beneficiary's bank that results from acceptance of a payment order is to pay the amount of the order to the beneficiary. No obligation is owed to either the sender of the payment order accepted by the beneficiary's bank or to the originator of the funds transfer.

Lawrence's, § 4A-101:1 at 462 (reprinting § 4A-101:1). And, as a Fedwire member bank, acceptance by Crestar was both passive and automatic. Notwithstanding whether the Bank of Utah has any liability to Sine for not using the S.W.I.F.T. system or for failing to advise him that the Fedwire it would send would be unconditional, no obligation was created on the part of Crestar. *See Donmar Enters., Inc. v. S. Nat'l Bank*, 64 F.3d 944, 950 (4th Cir. 1995) (holding that 12 C.F.R. § 210.25 [referred to as "Regulation J"] [incorporating Article 4A] preempts state negligence and wrongful payment claims brought by originator against beneficiary's bank).

A funds transfer may involve any number of senders and receiving banks. *See Lawrence's* § 4A-104:1 (commenting on § 4A-104). Every person or bank that issues or passes on a payment instruction is a "sender" and every bank that receives the instructions is a "receiving bank." *See* § 4A-103(a)(4) & (5), *reprinted in* 12 C.F.R. § 210.25 app. B (Addendum Ex. A). Article 4A distinguishes the first sender, that is, the person asking that a payment be made from his account to the account of the beneficiary, by calling that person the "originator" (in this case, Sine). *See* § 4A-104(c), *reprinted in* 12 C.F.R. § 210.25 app. B (Addendum Ex. A). The final receiving bank in a funds transfer is called the "beneficiary's bank" (in this case, Crestar). *See* § 4A-103(a)(3), *reprinted in* 12 C.F.R. § 210.25 app. B (Addendum Ex. A). These designations are

important because under the Article 4A scheme, there are bright-line rules concerning who owes a duty to whom.

In *Donmar*, the originator thought he was making a wire transfer into a joint account controlled by a third party (the beneficiary) and himself. *See Donmar*, 64 F.3d at 948. When it turned out that the account named in the wire transfer was solely in the name of the third party (the beneficiary) who had become insolvent, the originator brought suit against the beneficiary's bank. *See id.* at 948 n.3. The *Donmar* Court held that the beneficiary's bank fulfilled its obligation under Article 4A and barred the originator's state-law claims based on negligence and wrongful payment. *See id.* at 950. The holding of *Donmar* is important in this case because here Sine was the originator of the payment order and Crestar was the beneficiary's bank. Crestar's only obligation as the beneficiary's bank was to the beneficiary (Diana Group), and that was to accurately credit the designated beneficiary's account. Crestar owed no obligation to Sine under Article 4A. *See* § 4A-302 cmt. 3 (1998). To the extent that Sine's breach of contract claim depends upon the content of his wire transfer to Diana Group, such claim is barred by Article 4A, and, as a matter of law, the wire transfer "instructions" that were transmitted from the Bank of Utah to Crestar did not create an independent obligation on the part of Crestar. Thus, the trial court properly dismissed Plaintiffs' claim pursuant to Rule 41(b).

VI. PLAINTIFFS DO NOT CHALLENGE TWO CONCLUSIONS OF LAW AND RELATED FINDINGS OF FACT THAT PROVIDE INDEPENDENT BASES FOR AFFIRMING THE JUDGMENT BELOW

Plaintiffs have raised no challenge to two of the trial court's findings of fact and related conclusions of law. The first is that there was no meeting of the minds as to the meaning of the March 24 letter, and the second is that later modifications of the underlying agreement between Sine and Diana Group, without the approval of the Bank, discharged any obligation the Bank may have had. Either of these unchallenged conclusions provides an independent basis for affirming the judgment below.

A. There Was No Meeting of the Minds

At trial, Plaintiffs presented testimony of Sine that he understood the March 24 letter to be a promise to pay or a guaranty in the amount of \$2.5 million. *See, e.g., R. 1355 at 159.* As described below, the court discredited this testimony and instead believed the testimony of Cree and Mangiapane that the letter meant the Bank would “transfer” the funds after receiving them from Diana Group. *See Finding 22 and supporting record references, supra.* The court also found that “[e]ven if Sine unreasonably believed that the March 24 letter was an independent obligation of the Bank, there was no meeting of the minds between Sine and the Bank.” R. 1298, Finding 25. Whether there is a meeting of the minds is an issue of fact. *See O’Hara v. Hall*, 628 P.2d 1289, 1291 (Utah 1981) (holding that meeting of minds is an issue of fact for the jury). Thus, in order to contest Finding of Fact 25, Plaintiffs should have marshaled all

evidence supportive of the finding and then demonstrated that the finding is clearly erroneous. Indeed, they never discussed the issue at all.¹¹

Applying the law to its finding concerning the lack of a meeting of the minds, the court concluded as a matter of law that the March 24 letter “is unenforceable.” R. 1302, Conclusion 4. Plaintiffs do not challenge this conclusion. “It is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of a contract. . . . An agreement cannot be enforced if its terms are indefinite or demonstrate that there was no intent to contract.” *Richard Barton Enters., Inc. v. Tsern*, 928 P.2d 368, 373 (Utah 1996). *See also Davies v. Olson*, 746 P.2d 264, 267 (Utah Ct. App. 1987) (affirming finding of no meeting of the minds where there was disparity in the testimony as to key contract terms); *C & Y Corp. v. Gen. Biometrics, Inc.*, 896 P.2d 47, 52-53 (Utah Ct. App. 1995) (affirming finding and conclusion that correspondence and drafts showed that the parties did not mutually agree on essential contract terms, and therefore there was no meeting of the minds). Thus, on this basis alone, the judgment below should be affirmed.

B. Even if the March 24 Letter Could Be Construed as a Guaranty, the Obligation Was Discharged by Sine’s Subsequent Modifications of the Underlying Agreement With Diana Group

Even assuming *arguendo* that the March 24 letter constituted a guaranty, the claimed guaranty would have been discharged by Sine’s subsequent agreements with Diana Group to modify the terms of the primary obligation owed to him by Diana Group

¹¹ Plaintiffs mention the issue in their Brief (Pls.’ Br. at 2, issue 4), but then ignore it thereafter.

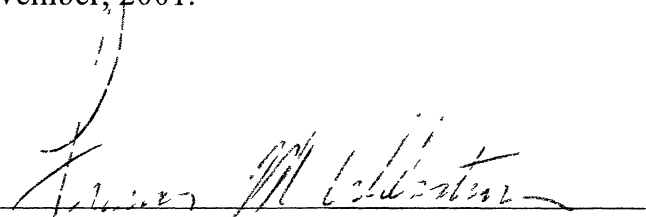
without obtaining Crestar's consent. The trial court found that such subsequent modifications of Diana Group's obligation to Sine had repeatedly occurred without the consent of Crestar. R. 1300-01, Findings 36-44. Plaintiffs do not challenge these findings.

The court correctly held as a matter of law that these subsequent modifications would have operated to release Crestar even if the letter constituted a guaranty. R. 1302, Conclusion 7. Where the primary obligor (Diana Group) reaches an agreement with the obligee (Sine), to modify the terms of their agreement, the obligation of the guarantor (allegedly Crestar) is discharged. *See First Nat'l Bank & Trust v. Kissee*, 859 P.2d 502, 508 (Okla. 1993) (extension of time for repayment discharges the guarantor's obligation unless the guarantor consents); *Carrier Brokers, Inc. v. Spanish Trail*, 751 P.2d 258, 261 (Utah Ct. App. 1988) ("guarantors are not liable when the original contract on which their undertaking was made is materially changed without their assent."); *Marion Props., Ltd. v. Goff*, 840 P.2d 1230, 1231 (Nev. 1992) ("It is well-settled that guarantors and sureties are exonerated if the creditor alters the obligation of the principal without the consent of the guarantor or surety."). Again, Plaintiffs do not contest this conclusion and it is an independent basis for affirmance.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed.

DATED this 30th day of November, 2001.

A handwritten signature in dark ink, appearing to read "Francis M. Wikstrom", is written over a horizontal line.

Francis M. Wikstrom

H. Douglas Owens

PARSONS BEHLE & LATIMER

Virginia Powell

HUNTON & WILLIAMS

Attorneys for Defendant/Appellee Crestar Bank

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2001, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing **BRIEF OF DEFENDANT/APPELLEE CRESTAR BANK** to:

James L. Christensen
Christopher G. Jessop
CORBRIDGE BAIRD & CHRISTENSEN
39 Exchange Place, Suite 100
Salt Lake City, UT 84111

Cindi Lowe

Tab A

(b) *Certification.* A Reserve Bank may certify on request as to the number of shares held by a member bank and purchased before March 28, 1942, or as to the purchase and cancellation dates and prices of shares cancelled, as the case may be.

PART 210—COLLECTION OF CHECKS AND OTHER ITEMS BY FEDERAL RESERVE BANKS AND FUNDS TRANSFERS THROUGH FEDWIRE (REGULATION J)

Subpart A—Collection of Checks and Other Items By Federal Reserve Banks

Sec.

- 210.1 Authority, purpose, and scope.
- 210.2 Definitions.
- 210.3 General provisions.
- 210.4 Sending items to Reserve Banks.
- 210.5 Sender's agreement; recovery by Reserve Bank.
- 210.6 Status, warranties, and liability of Reserve Bank.
- 210.7 Presenting items for payment.
- 210.8 Presenting noncash items for acceptance.
- 210.9 Settlement and payment.
- 210.10 Time schedule and availability of credits for cash items and returned checks.
- 210.11 Availability of proceeds of noncash items; time schedule
- 210.12 Return of cash items and handling of returned checks.
- 210.13 Unpaid items.
- 210.14 Extension of time limits.
- 210.15 Direct presentment of certain warrants.

Subpart B—Funds Transfers Through Fedwire

- 210.25 Authority, purpose, and scope.
- 210.26 Definitions.
- 210.27 Reliance on identifying number.
- 210.28 Agreement of sender.
- 210.29 Agreement of receiving bank.
- 210.30 Payment orders.
- 210.31 Payment by a Federal Reserve Bank to a receiving bank or beneficiary.
- 210.32 Federal Reserve Bank liability; payment of interest.

APPENDIX A TO SUBPART B—COMMENTARY

APPENDIX B TO SUBPART B—ARTICLE 4A, FUNDS TRANSFERS

AUTHORITY: 12 U.S.C. 248 (i), (j), and (o), 342, 360, 464, and 4001-4010.

SOURCE: 45 FR 68634, Oct. 16, 1980, unless otherwise noted.

Subpart A—Collection of Checks and Other Items By Federal Reserve Banks

§ 210.1 Authority, purpose, and scope.

The Board of Governors of the Federal Reserve System (Board) has issued this subpart pursuant to the Federal Reserve Act, sections 11 (i) and (j) (12 U.S.C. 248 (i) and (j)), section 13 (12 U.S.C. 342), section 16 (12 U.S.C. 248(o) and 360), and section 19(f) (12 U.S.C. 464); the Expedited Funds Availability Act (12 U.S.C. 4001 *et seq.*); and other laws. This subpart governs the collection of checks and other cash and noncash items and the handling of returned checks by Federal Reserve Banks. Its purpose is to provide rules for collecting and returning items and settling balances.

[53 FR 21984, June 13, 1988, as amended at Reg. J, 59 FR 22965, May 4, 1994]

§ 210.2 Definitions.

As used in this subpart, unless the context otherwise requires:

(a) *Account* means an account with reserve or clearing balances on the books of a Federal Reserve Bank. A subaccount is an informational record of a subset of transactions that affect an account and is not a separate account.

(b) *Actually and finally collected funds* means cash or any other form of payment that is, or has become, final and irrevocable.

(c) *Administrative Reserve Bank* with respect to an entity means the Reserve Bank in whose District the entity is located, as determined under the procedure described in § 204.3(b)(2) of this chapter (Regulation D), even if the entity is not otherwise subject to that section.

(d) *Bank* means any person engaged in the business of banking. A branch or separate office of a bank is a separate bank to the extent provided in the Uniform Commercial Code.

(e) *Bank draft* means a check drawn by one bank on another bank.

(f) *Banking day* means the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions.

(g) *Cash item* means —

to a Reserve Bank, the paying bank, returning bank, and any prior returning bank grant to the paying bank's or returning bank's Administrative Reserve Bank a security interest in all of their respective assets in the possession of, or held for the account of, any Reserve Bank, to secure their respective obligations due or to become due to the Administrative Reserve Bank under this subpart or subpart C of part 229 of this chapter (Regulation CC). The security interest attaches when a warranty is breached or any other obligation to the Reserve Bank is incurred. If the Reserve Bank, in its sole discretion, deems itself insecure and gives notice thereof to the paying bank, returning bank, or prior returning bank, or if the paying bank, returning bank, or prior returning bank suspends payments or is closed, the Reserve Bank may take any action authorized by law to recover the amount of an obligation, including, but not limited to, the exercise of rights of set off, the realization on any available collateral, and any other rights it may have as a creditor under applicable law.

[53 FR 21985, June 13, 1988, as amended at Reg. J, 59 FR 22966, May 4, 1994; 62 FR 48173, Sept. 15, 1997]

§ 210.13 Unpaid items.

(a) *Right of recovery.* If a Reserve Bank does not receive payment in actually and finally collected funds for an item, the Reserve Bank shall recover by charge-back or otherwise the amount of the item from the sender, prior collecting bank, paying bank, or returning bank from or through which it was received, whether or not the item itself can be sent back. In the event of recovery from such a party, no party, including the owner or holder of the item, shall, for the purpose of obtaining payment of the amount of the item, have any interest in any reserve balance or other funds or property in the Reserve Bank's possession of the bank that failed to make payment in actually and finally collected funds.

(b) *Suspension or closing of bank.* A Reserve Bank shall not pay or act on a draft, authorization to charge (including a charge authorized by §210.9(a)(5)), or other order on a reserve balance or other funds in its possession for the

purpose of settling for items under §210.9 or §210.12 after it receives notice of suspension or closing of the bank making the settlement for that bank's own or another's account.

[Reg. J, 59 FR 22966, May 4, 1994]

§ 210.14 Extension of time limits.

If a bank (including a Reserve Bank) or nonbank payor is delayed in acting on an item beyond applicable time limits because of interruption of communication or computer facilities, suspension of payments by a bank or nonbank payor, war, emergency conditions, failure of equipment, or other circumstances beyond its control, its time for acting is extended for the time necessary to complete the action, if it exercises such diligence as the circumstances require.

[Reg. J, 59 FR 22967, May 4, 1994]

§ 210.15 Direct presentment of certain warrants.

If a Reserve Bank elects to present direct to the payor a bill, note, or warrant that is issued and payable by a State or a political subdivision and that is a cash item not payable or collectible through a bank: (a) Sections 210.9, 210.12, and 210.13 and the operating circulars of the Reserve Banks apply to the payor as if it were a paying bank; (b) §210.14 applies to the payor as if it were a bank; and (c) under §210.9 each day on which the payor is open for the regular conduct of its affairs or the accommodation of the public is considered a banking day.

Subpart B—Funds Transfers Through Fedwire

SOURCE: 55 FR 40801, Oct. 5, 1990, unless otherwise noted.

§ 210.25 Authority, purpose, and scope.

(a) *Authority and purpose.* This subpart provides rules to govern funds transfers through Fedwire, and has been issued pursuant to the Federal Reserve Act—section 13 (12 U.S.C. 342), paragraph (f) of section 19 (12 U.S.C. 464), paragraph 14 of section 16 (12 U.S.C. 248(o)), and paragraphs (i) and (j) of section 11 (12 U.S.C. 248(i) and (j))—and other laws and has the force and

effect of federal law. This subpart is not a funds-transfer system rule as defined in Section 4A-501(b) of Article 4A.

(b) *Scope.* (1) This subpart incorporates the provisions of Article 4A set forth in appendix B to this subpart. In the event of an inconsistency between the provisions of the sections of this subpart and appendix B, to this subpart, the provisions of the sections of this subpart shall prevail.

(2) Except as otherwise provided in paragraphs (b)(3) and (b)(4) of this section, this Subpart governs the rights and obligations of:

(i) Federal Reserve Banks sending or receiving payment orders;

(ii) Senders that send payment orders directly to a Federal Reserve Bank;

(iii) Receiving banks that receive payment orders directly from a Federal Reserve Bank;

(iv) Beneficiaries that receive payment for payment orders sent to a Federal Reserve Bank by means of credit to an account maintained or used at a Federal Reserve Bank; and

(v) Other parties to a funds transfer any part of which is carried out through Fedwire to the same extent as if this subpart were considered a funds-transfer system rule under Article 4A.

(3) This subpart governs a funds transfer that is sent through Fedwire, as provided in paragraph (b)(2) of this section, even though a portion of the funds transfer is governed by the Electronic Fund Transfer Act, but the portion of such funds transfer that is governed by the Electronic Fund Transfer Act is not governed by this subpart.

(4) In the event that any portion of this Subpart establishes rights or obligations with respect to the availability of funds that are also governed by the Expedited Funds Availability Act or the Board's Regulation CC, Availability of Funds and Collection of Checks, those provisions of the Expedited Funds Availability Act or Regulation CC shall apply and the portion of this Subpart, including Article 4A as incorporated herein, shall not apply.

(c) *Operating Circulars.* Each Federal Reserve Bank shall issue an Operating Circular consistent with this Subpart that governs the details of its funds-transfer operations and other matters it deems appropriate. Among other

things, the Operating Circular may: set cut-off hours and funds-transfer business days; address available security procedures; specify format and media requirements for payment orders; identify messages that are not payment orders; and impose charges for funds-transfer services.

(d) *Government senders, receiving banks, and beneficiaries.* Except as otherwise expressly provided by the statutes of the United States, the parties specified in paragraphs (b)(2)(ii) through (v) of this section include:

(1) A department, agency, instrumentality, independent establishment, or office of the United States, or a wholly-owned or controlled Government corporation;

(2) An international organization;

(3) A foreign central bank; and

(4) A department, agency, instrumentality, independent establishment, or office of a foreign government, or a wholly-owned or controlled corporation of a foreign government.

[55 FR 40801, Oct. 5, 1990; 55 FR 47428, Nov. 13, 1990]

§ 210.26 Definitions.

As used in this subpart, the following definitions apply:

(a) *Article 4A* means article 4A of the Uniform Commercial Code as set forth in appendix B of this subpart.

(b) *As of adjustment* means a debit or credit, for reserve or clearing balance maintenance purposes only, applied to the reserve or clearing balance of a bank that either sends a payment order to a Federal Reserve Bank, or that receives a payment order from a Federal Reserve Bank, in lieu of an interest charge or payment.

(c) *Automated clearing house transfer* means any transfer designated as an automated clearing house transfer in a Federal Reserve Bank Operating Circular.

(d) *Beneficiary's bank* has the same meaning as in Article 4A, except that:

(1) A Federal Reserve Bank need not be identified in the payment order in order to be the beneficiary's bank; and

(2) The term includes a Federal Reserve Bank when that Federal Reserve Bank is the beneficiary of a payment order.

(e) *Fedwire* is the funds-transfer system owned and operated by the Federal Reserve Banks that is used primarily for the transmission and settlement of payment orders governed by this subpart. Fedwire does not include the system for making automated clearing house transfers.

(f) *Interdistrict transfer* means a funds transfer involving entries to accounts maintained at two Federal Reserve Banks.

(g) *Intradistrict transfer* means a funds transfer involving entries to accounts maintained at one Federal Reserve Bank.

(h) *Off-line bank* means a bank that transmits payment orders to and receives payment orders from a Federal Reserve Bank by telephone orally or by other means other than electronic data transmission.

(i) *Payment order* has the same meaning as in Article 4A, except that the term does not include automated clearing house transfers or any communication designated in a Federal Reserve Bank Operating Circular issued under this Subpart as not being a payment order.

(j) *Sender's account*, *receiving bank's account*, and *beneficiary's account* mean the reserve, clearing, or other funds deposit account at a Federal Reserve Bank maintained or used by the sender, receiving bank, or beneficiary, respectively.

(k) *Sender's Federal Reserve Bank* and *receiving bank's Federal Reserve Bank* mean the Federal Reserve Bank at which the sender or receiving bank, respectively, maintains or uses an account.

[55 FR 40801, Oct. 5, 1990; 55 FR 47428, Nov. 13, 1990]

§ 210.27 Reliance on identifying number.

(a) *Reliance by a Federal Reserve Bank on number to identify an intermediary bank or beneficiary's bank.* A Federal Reserve Bank may rely on the number in a payment order that identifies the intermediary bank or beneficiary's bank, even if it identifies a bank different from the bank identified by name in the payment order, if the Federal Reserve Bank does not know of such an inconsistency in identification.

A Federal Reserve Bank has no duty to detect any such inconsistency in identification.

(b) *Reliance by a Federal Reserve Bank on number to identify beneficiary.* A Federal Reserve Bank, acting as a beneficiary's bank, may rely on the number in a payment order that identifies the beneficiary, even if it identifies a person different from the person identified by name in the payment order, if the Federal Reserve Bank does not know of such an inconsistency in identification. A Federal Reserve Bank has no duty to detect any such inconsistency in identification.

§ 210.28 Agreement of sender.

(a) *Payment of sender's obligation to a Federal Reserve Bank.* A sender (other than a Federal Reserve Bank), by maintaining or using an account with a Federal Reserve Bank, authorizes the sender's Federal Reserve Bank to obtain payment for the sender's payment orders by debiting the amount of the payment order from the sender's account.

(b) *Overdrafts.* (1) A sender does not have the right to an overdraft in the sender's account. In the event an overdraft is created, the overdraft shall be due and payable immediately without the need for a demand by the Federal Reserve Bank, at the earliest of the following times:

(i) At the end of the funds-transfer business day;

(ii) At the time the Federal Reserve Bank, in its sole discretion, deems itself insecure and gives notice thereof to the sender; or

(iii) At the time the sender suspends payments or is closed.

(2) The sender shall have in its account, at the time the overdraft is due and payable, a balance of actually and finally collected funds sufficient to cover the aggregate amount of all its obligations to the Federal Reserve Bank, whether the obligations result from the execution of a payment order or otherwise.

(3) To secure any overdraft, as well as any other obligation due or to become due to its Federal Reserve Bank, each sender, by sending a payment order to a Federal Reserve Bank that is accepted by the Federal Reserve Bank, grants

to the Federal Reserve Bank a security interest in all of the sender's assets in the possession of, or held for the account of, the Federal Reserve Bank. The security interest attaches when an overdraft, or any other obligation to the Federal Reserve Bank, becomes due and payable.

(4) A Federal Reserve Bank may take any action authorized by law to recover the amount of an overdraft that is due and payable, including, but not limited to, the exercise of rights of set off, the realization on any available collateral, and any other rights it may have as a creditor under applicable law.

(5) If a sender, other than a government sender described in § 210.25(d), incurs an overdraft in its account as a result of a debit to the account by a Federal Reserve Bank under paragraph (a) of this section, the account will be subject to any applicable overdraft charges, regardless of whether the overdraft has become due and payable. A Federal Reserve Bank may debit a sender's account under paragraph (a) of this section immediately on acceptance of the payment order.

(c) *Review of payment orders.* A sender, by sending a payment order to a Federal Reserve Bank, agrees that for the purposes of sections 4A-204(a) and 4A-304 of Article 4A, a reasonable time to notify a Federal Reserve Bank of the relevant facts concerning an unauthorized or erroneously executed payment order is within 30 calendar days after the sender receives notice that the payment order was accepted or executed, or that the sender's account was debited with respect to the payment order.

[55 FR 40801, Oct. 5, 1990, as amended at 57 FR 46956, Oct. 14, 1992]

§ 210.29 Agreement of receiving bank.

(a) *Payment.* A receiving bank (other than a Federal Reserve Bank) that receives a payment order from its Federal Reserve Bank authorizes that Federal Reserve Bank to pay for the payment order by crediting the amount of the payment order to the receiving bank's account.

(b) *Off-line banks.* An off-line bank that does not expressly notify its Federal Reserve Bank in writing that it maintains an account for another bank warrants to that Federal Reserve Bank

that the off-line bank does not act as an intermediary bank or a beneficiary's bank with respect to payment orders received through Fedwire for a beneficiary that is a bank.

[55 FR 40801, Oct. 5, 1990; 55 FR 47428, Nov. 13, 1990]

§ 210.30 Payment orders.

(a) *Rejection.* A sender shall not send a payment order to a Federal Reserve Bank unless authorized to do so by the Federal Reserve Bank. A Federal Reserve Bank may reject, or impose conditions that must be satisfied before it will accept, a payment order for any reason.

(b) *Selection of an intermediary bank.* For an interdistrict transfer, a Federal Reserve Bank is authorized and directed to execute a payment order through another Federal Reserve Bank. A sender shall not send a payment order to a Federal Reserve Bank that requires the Federal Reserve Bank to issue a payment order to an intermediary bank (other than a Federal Reserve Bank) unless that intermediary bank is designated in the sender's payment order. A sender shall not send to a Federal Reserve Bank a payment order instructing use by a Federal Reserve Bank of a funds-transfer system or means of transmission other than Fedwire, unless the Federal Reserve Bank agrees with the sender in writing to follow such instructions.

(c) *Same-day execution.* A sender shall not issue a payment order that instructs a Federal Reserve Bank to execute the payment order on a funds-transfer business day that is later than the funds-transfer business day on which the order is received by the Federal Reserve Bank, unless the Federal Reserve Bank agrees with the sender in writing to follow such instructions.

§ 210.31 Payment by a Federal Reserve Bank to a receiving bank or beneficiary.

(a) *Payment to a receiving bank.* Payment of a Federal Reserve Bank's obligation to pay a receiving bank (other than a Federal Reserve Bank) occurs at the earlier of the time when the amount of the payment order is credited to the receiving bank's account or

when the payment order is sent to the receiving bank.

(b) *Payment to a beneficiary.* Payment by a Federal Reserve Bank to a beneficiary of a payment order, where the Federal Reserve Bank is the beneficiary's bank, occurs at the earlier of the time when the amount of the payment order is credited to the beneficiary's account or when notice of the credit is sent to the beneficiary.

§ 210.32 Federal Reserve Bank liability; payment of interest.

(a) *Damages.* In connection with its handling of a payment order under this subpart, a Federal Reserve Bank shall not be liable to a sender, receiving bank, beneficiary, or other Federal Reserve Bank, governed by this subpart, for any damages other than those payable under Article 4A. A Federal Reserve Bank shall not agree to be liable to a sender, receiving bank, beneficiary, or other Federal Reserve Bank for consequential damages under section 4A-305(d) of Article 4A.

(b) *Payment of interest.* (1) A Federal Reserve Bank, in its discretion, may satisfy its obligation, or that of another Federal Reserve Bank, to pay compensation in the form of interest under Article 4A by—

(i) Providing an as of adjustment to its sender, its receiving bank, or its beneficiary, as provided in the Federal Reserve Bank's Operating Circular, in an amount equal to the amount on which interest is to be calculated multiplied by the number of days for which interest is to be calculated; or

(ii) Paying compensation in the form of interest to its sender, its receiving bank, its beneficiary, or another party to the funds transfer that is entitled to such payment, in an amount that is calculated in accordance with section 4A-506 of Article 4A.

(2) If the sender or receiving bank that is the recipient of an as of adjustment or an interest payment is not the party entitled to compensation under Article 4A, the sender or receiving bank shall pass through the benefit of the as of adjustment or interest payment by making an interest payment, as of the day the as of adjustment or interest payment is effected, to the party entitled to compensation. The in-

terest payment that is made to the party entitled to compensation shall not be less than the value of the as of adjustment or interest payment that was provided by the Federal Reserve Bank to the sender or receiving bank. The party entitled to compensation may agree to accept compensation in a form other than a direct interest payment, provided that such an alternative form of compensation is not less than the value of the interest payment that otherwise would be made.

(c) *Nonwaiver of right of recovery.* Nothing in this subpart or any Operating Circular issued hereunder shall constitute, or be construed as constituting, a waiver by a Federal Reserve Bank of a cause of action for recovery under any applicable law of mistake and restitution.

**APPENDIX A TO SUBPART B—
COMMENTARY**

The Commentary provides background material to explain the intent of the Board of Governors of the Federal Reserve System (Board) in adopting a particular provision in the subpart and to help readers interpret that provision. In some comments, examples are offered. The Commentary constitutes an official Board interpretation of subpart B of this part. Commentary is not provided for every provision of subpart B of this part, as some provisions are self-explanatory.

Section 210.25—Authority, Purpose, and Scope

(a) *Authority and purpose.* Section 210.25(a) states that the purpose of subpart B of this part is to provide rules to govern funds transfers through Fedwire and recites the Board's rulemaking authority for this subpart. Subpart B of this part is federal law and is not a "funds-transfer system rule," as defined in section 4A-501(b) of Article 4A, Funds Transfers, of the Uniform Commercial Code (UCC), as set forth in appendix B of this subpart. Certain provisions of Article 4A may not be varied by a funds-transfer system rule, but under section 4A-107, regulations of the Board and Operating Circulars of the Federal Reserve Banks supersede inconsistent provisions of Article 4A to the extent of the inconsistency. In addition, regulations of the Board may preempt inconsistent provisions of state law. Accordingly, subpart B of this part supersedes or preempts inconsistent provisions of state law. It does not affect state law governing funds transfers that does not conflict with the provisions of subpart B of this part, such as Article 4A, as enacted in any state, as it applies to parties to funds transfers through Fedwire whose

(c) *Nonwaiver of right of recovery.* Several sections of Article 4A allow for a party to a funds transfer to make a claim pursuant to the applicable law of mistake and restitution. Nothing in subpart B of this part or any Operating Circular issued under subpart B of this part waives any such claim. A Federal Reserve Bank, however, may waive such a claim by express written agreement in order to settle litigation or for other purposes.

[55 FR 40801, Oct. 5, 1990; 55 FR 47428, Nov. 13, 1990]

APPENDIX B TO SUBPART B—ARTICLE 4A, FUNDS TRANSFERS

Part 1—Subject Matter and Definitions

Section 4A-101. Short Title

This Article may be cited as Uniform Commercial Code—Funds Transfers.

Section 4A-102. Subject Matter

Except as otherwise provided in section 4A-108, this Article applies to funds transfers defined in section 4A-104.

Section 4A-103. Payment Order—Definitions

(a) In this Article:

(1) *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:

(i) The instruction does not state a condition to payment to the beneficiary other than time of payment,

(ii) The receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(iii) 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.

(2) *Beneficiary* means the person to be paid by the beneficiary's bank.

(3) *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.

(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.

(b) If an instruction complying with subsection (a)(1) is to make more than one payment to a beneficiary, the instruction is a separate payment order with respect to each payment.

(c) A payment order is issued when it is sent to the receiving bank.

Section 4A-104. Funds Transfer—Definitions

In this Article:

(a) *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.

(b) *Intermediary bank* means a receiving bank other than the originator's bank or the beneficiary's bank.

(c) *Originator* means the sender of the first payment order in a funds transfer.

(d) *Originator's bank* means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank.

Section 4A-105. Other Definitions

(a) In this Article:

(1) *Authorized account* means a deposit account of a customer in a bank designated by the customer as a source of payment 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.

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

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

(4) *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.

(5) *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.

(6) *Good faith* means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(7) *Prove* with respect to a fact means to meet the burden of establishing the fact (section 1-201(8)).

(b) Other definitions applying to this Article and the sections in which they appear are

<i>Acceptance</i>	Sec 4A-209
<i>Beneficiary</i>	Sec 4A-103
<i>Beneficiary's bank</i>	Sec 4A-103
<i>Executed</i>	Sec 4A-301
<i>Execution date</i>	Sec 4A-301
<i>Funds transfer</i>	Sec 4A-104
<i>Funds-transfer system rule</i>	Sec 4A-501
<i>Intermediary bank</i>	Sec 4A-104
<i>Originator</i>	Sec 4A-104
<i>Originator's bank</i>	Sec 4A-104
<i>Payment by beneficiary's bank to beneficiary</i>	Sec 4A-405
<i>Payment by originator to beneficiary</i>	Sec 4A-406
<i>Payment by sender to receiving bank</i>	Sec 4A-403
<i>Payment date</i>	Sec 4A-401
<i>Payment order</i>	Sec 4A-103
<i>Receiving bank</i>	Sec 4A-103
<i>Security procedure</i>	Sec 4A-201
<i>Sender</i>	Sec 4A-103

(c) The following definitions in Article 4 apply to this Article

<i>Clearing house</i>	Sec 4-104
<i>Item</i>	Sec 4-104
<i>Suspends payments</i>	Sec 4-104

(d) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article

Section 4A-106 Time Payment Order is Received

(a) 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 section 1-201(27). A receiving bank may fix a cut-off time or times on a funds-transfer business day for the receipt and processing of payment orders and communications canceling or amending payment orders. Different cut-off times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders: cancellations, or amendments. A cut-off time may apply to senders generally or different cut-off 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 cut-off 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.

(b) If this Article refers to an execution date or payment date or states a day on which a receiving bank is required to take 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 treat-

ed as the date or day stated, unless the contrary is stated in this Article

Section 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 Article to the extent of the inconsistency.

Section 4A-108 Exclusion of Consumer Transactions Governed by Federal Law

This Article does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (title XX, Pub. L. 95-630, 92 Stat. 3728, 15 U.S.C. 1693 *et seq.*) as amended from time to time.

Part 2—Issue and Acceptance of Payment Order

Section 4A-201 Security Procedure

Security procedure means a procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or canceling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. 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.

Section 4A-202 Authorized and Verified Payment Orders

(a) 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.

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

(c) 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 deemed to be commercially reasonable if (i) 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 (ii) 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.

(d) The term *sender* in this Article includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection (a), or it is effective as the order of the customer under subsection (b).

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

(f) Except as provided in this section and in section 4A-203(a)(1), rights and obligations arising under this section or section 4A-203 may not be varied by agreement.

Section 4A-203. Unenforceability of Certain Verified Payment Orders

(a) If an accepted payment order is not, under section 4A-202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to section 4A-202(b), the following rules apply:

(1) 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.

(2) 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 a person (i) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or (ii) 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. Information includes any access device, computer software, or the like.

(b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

Section 4A-204. Refund of Payment and Duty of Customer To Report with Respect to Unauthorized Payment Order

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

(b) Reasonable time under subsection (a) may be fixed by agreement as stated in section 1-204(1), but the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement.

Section 4A-205. Erroneous Payment Orders

(a) If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order (i) erroneously instructed payment to a beneficiary not intended by the sender, (ii) erroneously instructed payment in an amount greater than the amount intended by the sender, or (iii) was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:

(1) If the sender proves that the sender or a person acting on behalf of the sender pursuant to section 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 paragraphs (2) and (3).

(2) If the funds transfer is completed on the basis of an erroneous payment order described in clause (i) or (iii) of subsection (a),

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.

(3) If the funds transfer is completed on the basis of a payment order described in clause (ii) of subsection (a), 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.

(b) If (i) the sender of an erroneous payment order described in subsection (a) is not obliged to pay all or part of the order, and (ii) 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 liable to 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.

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

Section 4A-206. Transmission of Payment Order Through Funds-Transfer or Other Communication System

(a) 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 does not apply to a funds-transfer system of the Federal Reserve Banks.

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

Section 4A-207. Misdescription of Beneficiary

(a) Subject to subsection (b), 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.

(b) 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, the following rules apply:

(1) Except as otherwise provided in subsection (c), if the beneficiary's 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.

(2) 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.

(c) If (i) a payment order described in subsection (b) is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1), the following rules apply:

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

(2) 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.

(d) In a case governed by subsection (b)(1), 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 restitution as follows:

(1) If the originator is obliged to pay its payment order as stated in subsection (c), the originator has the right to recover.

(2) 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.

Section 4A-208. Misdescription of Intermediary Bank or Beneficiary's Bank

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

(1) 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.

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

(1) 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.

(2) 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 (b)(1), 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.

(3) 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.

(4) 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 section 4A-302(a)(1).

Section 4A-209. Acceptance of Payment Order

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

(b) Subject to subsections (c) and (d), a beneficiary's bank accepts a payment order at the earliest of the following times:

(1) When the bank (i) pays the beneficiary as stated in section 4A-405(a) or 4A-405(b), 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;

(2) When the bank receives payment of the entire amount of the sender's order pursuant to section 4A-403(a)(1) or 4A-403(a)(2); or

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

(c) Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under subsection (b)(2) or (b)(3) 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.

(d) A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank. 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 section 4A-211(b), the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution.

Section 4A-210. Rejection of Payment Order

(a) 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 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, (i) any means complying with the agreement is reasonable and (ii) any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

(b) 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 4A-211(d) 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 credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

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

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

Section 4A-211. Cancellation and Amendment of Payment Order

(a) 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 commu-

nication 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.

(b) Subject to subsection (a), 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.

(c) 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.

(1) 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.

(2) 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.

(d) 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.

(e) 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.

(f) 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

fective, is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.

(g) A payment order is not revoked by the 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.

(h) A funds-transfer system rule is not effective to the extent it conflicts with subsection (c)(2).

Section 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 provided in the agreement or in this Article, 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 Article or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in section 4A-209, and liability is limited to that provided in this Article. 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 Article or by express agreement.

Part 3—Execution of Sender's Payment Order by Receiving Bank

Section 4A-301. Execution and Execution Date

(a) 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.

(b) *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 may 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.

Section 4A-302. Obligations of Receiving Bank in Execution of Payment Order

(a) Except as provided in subsections (b) through (d), if the receiving bank accepts a payment order pursuant to section 4A-209(a), the bank has the following obligations in executing the order:

(1) 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 (i) any intermediary bank or funds-transfer system to be used in carrying out the funds transfer, or (ii) 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.

(2) 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.

(b) 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. 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.

(c) Unless subsection (a)(2) 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 reasonable in the circumstances. If the receiving bank is instructed to execute the sender's order by a particular means, the receiving bank may issue its payment order by transmitting its

payment order by the means stated or by any means as expeditious as the means stated.

(d) Unless instructed by the sender, (i) 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 (ii) may not instruct a subsequent receiving bank to obtain payment of its charges in the same manner.

Section 4A-303. Erroneous Execution of Payment Order

(a) A receiving bank that (i) 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 (ii) 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 under section 4A-402(c) 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.

(b) 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 under section 4A-402(c) 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. 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.

(c) 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.

Section 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 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 refundable to the sender under section 4A-402(d) 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.

Section 4A-305. Liability for Late or Improper Execution or Failure To Execute Payment Order

(a) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of section 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 (c), additional damages are not recoverable.

(b) If execution of a payment order by a receiving bank in breach of section 4A-302 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank designated by the originator, or (iii) 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 (a), resulting from the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(c) In addition to the amounts payable under subsections (a) and (b), damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank.

(d) If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to 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.

(e) Reasonable attorney's fees are recoverable if demand for compensation under subsection (a) or (b) is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under subsection (d) and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under subsection (d) is made and refused before an action is brought on the claim.

(f) Except as stated in this section, the liability of a receiving bank under subsections (a) and (b) may not be varied by agreement.

Part 4—Payment

Section 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.

Section 4A-402. Obligation of Sender To Pay Receiving Bank

(a) This section is subject to sections 4A-205 and 4A-207.

(b) 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.

(c) This subsection is subject to subsection (e) and to section 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 that sender's payment order.

(d) 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 4A-204 and 4A-304, interest is payable on the refundable amount from the date of payment.

(e) If a funds transfer is not completed as stated in subsection (c) and an intermediary bank is obliged to refund payment as stated in subsection (d) but is unable to do so because not permitted by applicable law or be-

cause the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in section 4A-302(a)(1), 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 (d).

(f) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) or to receive refund under subsection (d) may not be varied by agreement.

Section 4A-403. Payment by Sender To Receiving Bank

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

(1) 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.

(2) 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.

(3) 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.

(b) 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.

(c) 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 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.

(d) In a case not covered by subsection (a), the time when payment of the sender's obligation under section 4A-402(b) or 4A-402(c) occurs is governed by applicable principles of law that determine when an obligation is satisfied.

Section 4A-404. Obligation of Beneficiary's Bank To Pay and Give Notice to Beneficiary

(a) Subject to sections 4A-211(e), 4A-405(d), and 4A-405(e), 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.

(b) If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify 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, 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 attorney's fees are also recoverable if demand for interest is made and refused before an action is brought on the claim.

(c) The right of a beneficiary to receive payment and damages as stated in sub-

section (a) may not be varied by agreement or a funds-transfer system rule. The right of a beneficiary to be notified as stated in subsection (b) may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer.

Section 4A-405. Payment by Beneficiary's Bank To Beneficiary

(a) If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under section 4A-404(a) occurs when and to the extent (i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank.

(b) 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 section 4A-404(a) occurs is governed by principles of law that determine when an obligation is satisfied.

(c) Except as stated in subsections (d) and (e), 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.

(d) A funds-transfer system rule may provide that payments made to beneficiaries of funds transfer 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. 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 4A-406.

(e) 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. 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 4A-406, and (iv) subject to section 4A-402(e), each sender in the funds transfer is excused from its obligation to pay its payment order under section 4A-402(c) because the funds transfer has not been completed.

Section 4A-406. Payment by Originator to Beneficiary; Discharge of Underlying Obligation

(a) Subject to sections 4A-211(e), 4A-405(d), and 4A-405(e), the originator of a funds transfer pays the beneficiary of the originator's payment order (i) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (ii) 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.

(b) If payment under subsection (a) 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 (a) 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. 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 section 4A-404(a).

(c) For the purpose of determining whether discharge of an obligation occurs under subsection (b), 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.

(d) 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.

Part 5—Miscellaneous Provisions

Section 4A-501. Variation by Agreement and Effect of Funds-Transfer System Rule

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

(b) *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. Except as otherwise provided in this Article, 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 Article 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 sections 4A-404(c), 4A-405(d), and 4A-507(c).

Section 4A-502. Creditor Process Served on Receiving Bank; Setoff by Beneficiary's Bank

(a) 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.

(b) 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.

(c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(1) The bank may credit the beneficiary's account. 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.

(2) The bank may credit the beneficiary's account and 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.

(3) If creditor process with respect to the beneficiary's 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.

(d) 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 owned by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

Section 4A-503. Injunction or Restraining Order with Respect to Funds Transfer

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. 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.

Section 4A-504. Order In Which Items and Payment Orders May Be Charged to Account; Order of Withdrawals from Account

(a) 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.

(b) 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.

Section 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.

Section 4A-506. Rate of Interest

(a) If, under this Article, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined (i) by agreement of the sender and receiving bank, or (ii) by a funds-transfer system rule if the payment order is transmitted through a funds-transfer system.

(b) If the amount of interest is not determined by an agreement or rule as stated in subsection (a), 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.

Section 4A-507. Choice of Law

(a) The following rules apply unless the affected parties otherwise agree or subsection (c) applies:

(1) 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.

(2) 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.

(3) 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.

(b) If the parties described in each paragraph of subsection (a) 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.

(c) 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. A choice of law made pursuant to clause (i) is binding on participating banks. A choice of law made pursuant to clause (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, when 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.

(d) In the event of inconsistency between an agreement under subsection (b) and a choice-of-law rule under subsection (c), the agreement under subsection (b) prevails.

(e) 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.

[55 FR 40801, Oct. 5, 1990; 55 FR 47428, Nov. 13, 1990]

PART 211—INTERNATIONAL BANKING OPERATIONS (REGULATION K)

Subpart A—International Operations of United States Banking Organizations

Sec.

- 211.1 Authority, purpose, and scope.
- 211.2 Definitions.
- 211.3 Foreign branches of U.S. banking organizations.
- 211.4 Edge and Agreement corporations.
- 211.5 Investments and activities abroad.
- 211.6 Lending limits and capital requirements.
- 211.7 Supervision and reporting.
- 211.8 Reports of crimes and suspected crimes.

Subpart B—Foreign Banking Organizations

- 211.20 Authority, purpose, and scope.
- 211.21 Definitions.

211.22 Interstate banking operations of foreign banking organizations.

211.23 Nonbanking activities of foreign banking organizations.

211.24 Approval of offices of foreign banks; procedures for applications; standards for approval; representative-office activities and standards for approval; preservation of existing authority; reports of crimes and suspected crimes; government securities sales practices.

211.25 Termination of offices of foreign banks.

211.26 Examination of offices and affiliates of foreign banks.

211.27 Disclosure of supervisory information to foreign supervisors.

211.28 Limitation on loans to one borrower.

211.29 Applications by state-licensed branches and agencies to conduct activities not permissible for federal branches.

211.30 Criteria for evaluating the U.S. operations of foreign banks not subject to consolidated supervision.

Subpart C—Export Trading Companies

211.31 Authority, purpose, and scope.

211.32 Definitions.

211.33 Investments and extensions of credit.

211.34 Procedures for filing and processing notices.

Subpart D—International Lending Supervision

211.41 Authority, purpose, and scope.

211.42 Definitions.

211.43 Allocated transfer risk reserve.

211.44 Reporting and disclosure of international assets.

211.45 Accounting for fees on international loans.

INTERPRETATIONS

211.601 Status of certain offices for purposes of the International Banking Act restrictions on interstate banking operations.

211.602 Investments by United States banking organizations in foreign companies that transact business in the United States.

211.603 Commodity swap transactions.

211.604 Data processing activities.

AUTHORITY: 12 U.S.C. 221 *et seq.*, 1818, 1835a, 1841 *et seq.*, 3101 *et seq.*, and 3901 *et seq.*

Subpart A—International Operations of United States Banking Organizations

SOURCE: 56 FR 19565, Apr. 29, 1991, unless otherwise noted.

Tab B

FILED DISTRICT COURT
Third Judicial District

FEB 06 2001

By SALT LAKE COUNTY
Deputy Clerk

FRANCIS M. WIKSTROM (3462)
H. DOUGLAS OWENS (7762)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234

VIRGINIA W. POWELL
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
Telephone: (804) 788-8492

Attorneys for Defendant Crestar Bank

IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I

SALT LAKE COUNTY, STATE OF UTAH

* * * * *

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

Plaintiffs,

vs.

CRESTAR BANK, DIANA GROUP INC.,
NANCY Y. CREE & JOSEPHINE
MANGIAPANE,

Defendants.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Case No. 980906287

Judge David S. Young

* * * * *

This matter came on for trial on January 4 and 5, 2001. Plaintiffs Ray D. Emery, Roy P. Fisher, and William R. Franklin were represented by James L. Christensen and Christopher G. Jessop, Corbridge Baird & Christensen, and Defendant Crestar Bank was represented by Francis M. Wikstrom and H. Douglas Owens, Parsons, Behle & Latimer. Prior to the commencement of the trial, Plaintiffs and Defendant Diana Group, Inc., stipulated to the entry of judgment against Diana Group, Inc., in the amount of \$3 million plus interest, which judgment was entered by the Court. Also at the commencement of trial, the Court granted Plaintiffs' unopposed Motion to Substitute SunTrust Bank for Defendant Crestar Bank on the grounds that SunTrust Bank has acquired the interests of Crestar Bank. For ease of reference herein, however, the Defendant will be referred to as Crestar Bank, Crestar, or the Bank.

Having heard the evidence offered by the parties and the arguments of counsel, and being fully advised in the premises, the Court hereby makes the following

FINDINGS OF FACT

1. In 1998, Plaintiff Emery was advisor to a trust, the beneficiaries of which were Plaintiffs Fisher and Franklin. Emery heard about an investment scheme involving Diana Group from LaDonna Rosselini.

2. Emery asked the original Plaintiff, Wesley Sine, an attorney and businessman, to investigate the investment on behalf of the trust and to make sure that the investment would be protected by a bank guaranty.

3. In all the conduct described herein, Sine was acting as trustee and attorney for Plaintiffs.

4. Rosellini told Sine that if his clients would invest \$25 million, they would receive a return of \$120 million after 30 banking days. Sine performed no investigation of the investment, of Rosellini, of Diana Group or any related entity, nor did he know how such large amounts of money could be made so quickly.

5. Based on his training and experience as an attorney and businessman, Sine was familiar with the form and requirements of a bank guaranty, letter of credit, or similar bank obligation.

6. Sine had numerous communications with representatives of Diana Group concerning the language to be included in a document to be issued by a bank in connection with the investment. No one from Crestar Bank was involved in these communications.

7. As a result of these communications, Sine knew or should have known that the language being proposed by Diana Group did not constitute a bank guaranty or other independent bank obligation to pay money to Sine's investors.

8. Nancy Cree was an Assistant Vice President and Branch Manager for Crestar Bank. Cree had no authority to issue guaranties, letters of credit, or other obligations on behalf of Crestar Bank.

9. Mangiapane was a customer at Cree's branch and Cree believed her to be a person with a substantial net worth.

10. Mangiapane persuaded Cree to send a letter on Crestar letterhead to Sine in connection with the proposed investment. The body of the letter, dated February 6, 1998, read 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 \$120,000,000.00. Said transfer will be no later than 30 banking days from the date after the deposit of \$25,000,000.00, to Escrow Account Number 206745745, Account Holder – 49151.

11. Mangiapane and Cree did not believe that the letter created an independent obligation of the Bank to pay \$120 million, but was instead an agreement to transfer these funds if and when they were deposited by Diana Group.

12. Sine called Cree and asked her if she had signed the letter. He did not ask her, or any other representative of Crestar Bank any questions concerning her authority or the meaning and effect of the language in the document.

13. Sine knew, or should have known, that the February 6 letter was not a guaranty or other independent obligation of the Bank.

14. Sine's group was unable to come up with the \$25 million investment and the transaction was never completed.

15. Sine wrote to Diana Group purporting to cancel "any obligation" on the part of Crestar Bank. Sine did not send a copy to the Bank.

16. Mangiapane and Sine then entered into discussions regarding the possibility of a smaller \$500,000 investment with the promise of a return of \$2.5 million after 30 banking days. These discussions did not include the Bank.

17. Before Sine wired the funds, he and Mangiapane discussed the terms of the letter that Mangiapane was to obtain from Crestar. During these negotiations, which did not include the Bank, Mangiapane rejected Sine's proposal that the Bank letter contain language referring to a guaranty or promise to pay.

18. During the course of his negotiations with Mangiapane, Sine did not communicate his concerns about the letter to Cree or anyone else at the Bank. The Bank was not on notice that Sine desired a guaranty, nor did it have any knowledge of the meaning he attached to the Bank letter.

19. Diana Group and Sine entered into an agreement that Sine would wire \$500,000 to Diana Group's account at Crestar Bank and that Diana Group would repay \$2.5 million within 30 banking days.

20. At Mangiapane's request, Cree sent a letter, dated March 24, 1998, to Sine that was almost identical to the letter of February 6, 1998. It stated:

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.

21. The letter is ambiguous in several respects, including the following:

- a. What is meant by “warrant and certify to transfer”;
- b. What is meant by a commitment to transfer monies “on behalf of our Client, Diana Group”;
- c. The meaning and implication of the odd and unconventional language of the document itself; and
- d. The questions and ambiguity created by the purported return on investment of 400% in six weeks.

22. Mangiapane and Cree testified consistently that they understood the March 24, 1998 letter to be akin to an escrow agreement. Neither of them understood or believed that the letter created an independent obligation on the part of the Bank. Neither Mangiapane nor Cree believed that the letter obligated the Bank to repay Sine the \$2.5 million in the event that Diana Group did not deposit the funds. The Court finds their testimony to be a more credible explanation of the letter and the transaction than the testimony of Sine.

23. In a telephone conversation prior to wiring the \$500,000, Cree told Sine that the Bank’s obligation to transfer under the March 24 letter was conditioned on Diana Group’s depositing the \$2.5 million with the Bank.

24. Sine had no reasonable basis for believing that the letter constituted an independent obligation of the Bank to pay \$2.5 million. Moreover, Sine never forthrightly told

the Bank that he considered the letter to be a guaranty or other independent obligation, or that he was relying on the Bank to repay the funds in the event Diana Group did not. Sine could have questioned the Bank about the meaning of the letter to resolve any discrepancies, but he never did.

25. Even if Sine unreasonably believed that the March 24 letter was an independent obligation of the Bank, there was no meeting of the minds between Sine and the Bank.

26. Crestar Bank received no fee, commission, or other consideration for issuing the March 24 letter.

27. Cree had no actual authority to issue the letter.

28. Crestar did not impliedly delegate to Cree authority to issue a guaranty or similar obligation on behalf of the Bank.

29. Crestar Bank did not do anything to create an apparent authority on the part of Cree to issue the letter.

30. Sine's failure to do even the most minimal due diligence or to ask Cree the most obvious questions constitutes a lack of good faith on his part and demonstrates that he had no reasonable basis for believing that Cree had authority to unconditionally obligate the Bank to pay \$2.5 million.

31. Common sense should have dictated to an attorney-businessman of Sine's experience that banks do not guaranty large transactions by means of an unorthodox and facially ambiguous letter which speaks of a "transfer," as opposed to standard bank documents.

32. Sine's understanding that the March 24 letter was not an independent obligation of the Bank was further demonstrated by his effort to strengthen his position when he wired the \$500,000 to Diana Group's account. He attempted to make the wire transfer a conditional transfer by asking the Bank of Utah to transmit the following language as part of the wire communication:

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.

33. The language requested by Sine was transmitted by the Bank of Utah by abbreviating it and placing it in information fields entitled "bank-to-bank information and "originator-to-beneficiary information." The information was received by Crestar Bank in an unintelligible form.

34. There was no evidence of any banking rule or practice that would create an obligation on Crestar Bank's part to read or respond to informational comments sent with wire transfers. Indeed, the regulations governing the Fedwire system operated by the Federal Reserve

Board are clear that such instructions have no impact on a wire transfer sent by means of that system.

35. All of the foregoing plus the more credible testimony of Cree and Mangiapane demonstrate that the March 24 letter created, at most, a conditional obligation on the part of Crestar to transfer money to Sine if, and only if, Diana Group first deposited that money with the Bank.

36. On Saturday, March 28, 1998, the day after Sine sent the wire transfer, and while the funds were still on deposit in Mangiapane's account at Crestar, Mangiapane faxed a letter to Sine. She accused him of trying to create an intent that the transaction was between Sine and Crestar, as opposed to Sine and Diana Group. She advised him that the transaction was cancelled, the Bank letter was "nullified," and that the \$500,000 would be wired back to him on Monday, March 30, 1998.

37. In a telephone conversation later that day, Mangiapane said that if the transaction was to go forward, Sine would have to enter into a "Private Placement Agreement" setting forth the terms of the transaction.

38. Sine faxed a lengthy letter to Mangiapane on Sunday, March 29, 1998, in which he objected to the Private Placement Agreement and attempted to characterize the March 24 letter from Crestar as a bank guaranty.

39. Sine did not send a copy of March 29 fax letter to the Bank.

40. Sine did not ask Mangiapane to return the \$500,000 as she had offered.

41. Notwithstanding Sine's objections to signing a Private Placement Agreement, he revised the draft document sent to him by Mangiapane and signed it on March 30, 1998.

42. The Private Placement Agreement prepared and executed by Sine made it clear that the \$2.5 million that the Bank was to transfer first had to be "returned" by the Diana Group.

43. The Private Placement Agreement was not approved by or sent to Crestar, nor did the Bank ever know of its existence.

44. On at least two occasions in May or June, 1998, Sine agreed to postpone the due date for payment from Diana Group. On the second occasion, Sine agreed to an open-ended extension in exchange for \$25,000 per day. Crestar was never consulted nor did it approve the modifications of the agreement with Diana Group

Based on the foregoing Findings of Fact, the Court now makes the following

CONCLUSIONS OF LAW

1. The March 24, 1998 letter is ambiguous.

2. Extrinsic evidence is admissible to determine the meaning of the document and the intention of the parties.

3. There was no consideration for the March 24, 1998 letter and, as such, it is unenforceable.

4. There was no meeting of the minds as to the meaning of the March 24, 1998 letter and, as such, it is unenforceable.

5. The interpretation of the March 24, 1998 letter urged by Plaintiffs is commercially unreasonable. It is commercially unreasonable to conclude that a bank would guaranty such an unusual transaction that promised a return of more than 4,000% on an annual basis.

6. Crestar's interpretation, which is that the March 24 letter merely confirms the Bank's willingness to make a transfer to Sine after a deposit was made by Diana Group, is the more reasonable interpretation and is supported by the more credible testimony of Cree and Mangiapane. At most, the March 24 letter created a conditional obligation on the part of Crestar to transfer \$2.5 million to Sine if, and only if, Diana Group first deposited that money with the Bank.

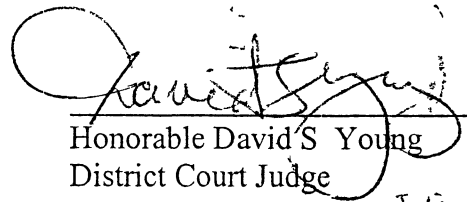
7. Even if the March 24, 1998 letter constituted a guaranty, it would have been discharged by Sine's subsequent agreements with Diana Group to modify the terms of the primary obligation owed to him by Diana Group without the consent of Crestar. That primary agreement was modified by Sine's entry into the Private Placement Agreement and by his subsequent agreements to postpone the due date for Diana Group's repayment of the \$2.5 million.

8. Cree had no actual, implied or apparent authority to issue a guaranty or other obligation on behalf of Crestar Bank.

9. The instructions Sine's local bank attempted to send along with the wire transfer could not, as a matter of law, constitute a condition or form the basis for an independent obligation on the part of Crestar Bank.

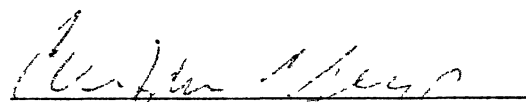
JUDGMENT in favor of Defendant Crestar Bank shall be entered in accordance with the foregoing Findings of Fact and Conclusions of Law.

DATED this 6th day of Feb., 2001.



Honorable David S. Young
District Court Judge

Approved as to form:

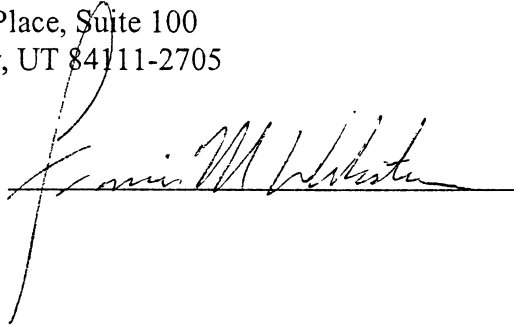


James L. Christensen
Christopher G. Jessop
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of January 2001, I caused to be hand delivered a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** to:

James L. Christensen
Chris Jessop
Corbridge Baird & Christensen
39 Exchange Place, Suite 100
Salt Lake City, UT 84111-2705

A handwritten signature in black ink, appearing to read "James L. Christensen", is written over a horizontal line.

Tab C

SINE VS. CRESTAR BANK JOSEPH R. MANGIAPANE AUGUST 29, 2000

Page 1 to Page 138

**CONDENSED TRANSCRIPT AND CONCORDANCE
PREPARED BY:**

***TURNER REPORTING SERVICES
10510 Sideburn Court
Fairfax, VA 22032
Phone: 703-425-0139***

1 starts out? Is that -- is it '98 or '7?
 2 Q The first letter we are going to talk about
 3 was February 6, 1998.
 4 A So it is in early February, a few days,
 5 really only a few days before that, if any.
 6 Q Okay. And what caused you to become aware of
 7 Mr. Sine or have any dealings with him?
 8 A I was introduced to him through Mr. Herman
 9 Flowers, and that was indirect insofar as Herman
 10 Flowers introduced me to him in named LaDonna
 11 Rosellini. She in turn introduced me to Ray Emery, and
 12 Ray Emery brought into effect Wesley Sine, who he
 13 represented as a trustee and an attorney in the matter
 14 representing his interests.
 15 Q And when you say introduced, are you talking
 16 about telephone introduction?
 17 A Solely telephone introduction. I have never
 18 seen any of these people in person.
 19 Q All right. Now, Mr. Flowers on the other hand
 20 was someone you had known previously. Is that right?
 21 A I had known him for a number of years, since
 22 the mid eighties. I have never seen him in person.

1 Q You have not met Mr. Flowers?
 2 A No.
 3 Q And how did you come to know Herman Flowers?
 4 A I was introduced to him through some people
 5 out of New York state. It was just that simple.
 6 Q In connection with some business venture or
 7 what?
 8 A That's right, with funding.
 9 Q What kind of business venture was that that
 10 caused you to first become aware of Mr. Flowers in the
 11 mid eighties?
 12 A I was looking for funding.
 13 Q For what kind of business?
 14 A I think operating capital.
 15 Q Was that for your coal business?
 16 A No, not for the coal business. Just in
 17 general terms, we had plans to develop this, these two
 18 energy systems, and these involved proprietary concepts
 19 and I really did not want to go out into the open
 20 market and have to overexpose something before patents
 21 and serious work had been engaged, and so I was trying
 22 to seek some operating capital and that was initially

1 how I came into contact with him.
 2 Q Was this your alternative energy project?
 3 A That is correct.
 4 Q And where did Mr. Flowers live at that time?
 5 A As a matter of fact, I think that he lived in
 6 New York City.
 7 Q And what was your understanding of his source
 8 of --
 9 A And, you know, excuse me, I take that back.
 10 He had moved to Florida.
 11 Q And did you understand him to be a financial
 12 broker, or that he had funding of his own to invest, or
 13 what was the nature of his --
 14 A No, I don't know that he -- I don't know what
 15 his financial status was. But he is a person who
 16 claimed to be an attorney, a nonpracticing attorney who
 17 had access to a number of high-net individuals, who was
 18 involved in commodities trading himself, and who had a
 19 number of contacts both domestically and
 20 internationally.
 21 Q What became of the prospective financing that
 22 you dealt with Mr. Flowers on in the mid eighties? Did

1 anything develop out of that?
 2 A No.
 3 Q And then when you came in contact with him
 4 again in the late nineties had there been a gap --
 5 A Yes, there was.
 6 Q -- in which you had not dealt with him?
 7 A There was. And it is interesting because I
 8 sort of pride myself on being able to recognize people
 9 by phone. And I really didn't recognize him, and he
 10 remembered me, and I was quite embarrassed by that. But
 11 then we got to talking about differen. projects and
 12 different business interests and renewed our
 13 relationship.
 14 Q Did he initiate that conversation or did you?
 15 A Actually, I was calling him and simply
 16 literally failed to recognize him.
 17 Q You had forgotten that you had dealt with him
 18 before?
 19 A Yes. And I found that quite surprising, but
 20 that is as a matter of fact the case.
 21 Q And how was it that you happened to be
 22 calling him?

1 A His name was given to me through a third
 2 party.
 3 Q And who was that?
 4 A A lady by the name of Diane. And I have no
 5 idea where she is at at this time. And he called her
 6 and said, "You know, I already know her." And so we
 7 started talking directly.
 8 Q And what was the venture that caused you to
 9 contact Mr. Flowers in the nineties?
 10 A That was this particular situation that I'm
 11 involved in right now. I was interested in acquiring
 12 some timber properties and I had decided that that is
 13 an arena I wanted to get into.
 14 Q And the timber property that you were
 15 interested in was in Florida. Am I correct?
 16 A That is correct.
 17 Q And I believe you have referred to it in our
 18 conversation just now as the Foley tract. Is that
 19 right?
 20 A That is correct.
 21 Q And how many acres was that?
 22 A Five hundred fifty thousand acres, more or

1 less.
 2 Q And what part of Florida was that?
 3 A Northeast Florida. It occupies about four
 4 different counties.
 5 Q And is that undeveloped or developed timber
 6 property?
 7 A No, that is a timber property. It represents
 8 a tree farm. It has a captive sales for pulpwood to
 9 Proctor and Gamble for Pampers diapers.
 10 Q And were you interested, in 1998, in
 11 purchasing that property?
 12 A That is correct.
 13 Q And were there others who were involved with
 14 you in that business interest or was --
 15 A No.
 16 Q -- or that was you alone?
 17 A No, that is me alone.
 18 Q And how did you come to be interested in
 19 purchasing five hundred fifty thousand acres of timber
 20 in Florida?
 21 A It is a project. It is an income. It is a
 22 business. It is something that I'm familiar with,

something that I enjoy. And it seemed to me that it would be a solid enterprise that I could get involved with.

Q And had you had any timber business before or any interest in timber properties before?

A Yes. As I had said, coal mining is a process of construction, demolition, reclamation and timber.

You go into areas where there are vast timberlands and you have to take down the trees before you can get to the coal. So it is an arena that I'm familiar with and have had experience in in the past.

Q And was the first person that you talked to about financing this purchase in Florida, was that Herman Flowers?

A No, it was not.

Q Was it this other person who gave you Herman Flowers' name?

A No, it was not.

Q Who was it?

A I had tried to ascertain what the markets were like for financing. I had gone from institutional markets in general to private funders. And in that

1 Q -- besides the Foley tract of land in
2 Florida?

3 A I don't think so but I can't tell you that
4 categorically.

5 Q And were all of your discussions with Mr.
6 Leach?

7 A Yes, they were.

8 Q And I may have asked you, where was he
9 located?

10 A He is located in San Francisco.

11 Q Did you understand him to be a part owner of
12 the property?

13 A I understood him to be an authorized
14 representative of the company. The extent of his
15 representation and ownership I'm absolutely not certain
16 of.

17 Q When did you come to this understanding with
18 Mr. Leach respecting the price for that Foley tract?

19 A Oh, I would say that that took the better
20 part of a year.

21 Q Culminating when? Ending when?

22 A Just about 1998. April, in through there.

process -- and that was just for purposes of general information, to do some research and to understand the best way of approaching this. I really had not gotten specifically into something. Mr. Cunningham was engaged eventually by me to also assist me.

Q He's a lawyer?

A That is right, with Steptoe and Johnson.

Q Now, how did you become aware -- well, let me back up and ask you this. Was the Foley tract in Florida for sale?

A Well, nothing is really for sale unless you ask. And that was a rather spectacular contiguous piece of property. And I did research on a number of properties that were in different locations, and made direct inquiries, and contacted the people that own the property.

Q Did you discuss price with the people who own the property?

A Yes, I did.

Q And what kind of pricing did you discuss?

A We are talking \$451 million.

Q And was that the amount that they said they

1 And it corresponds to the correspondence from
2 Sutherland, Asbill and Brennan.

3 Q And what was Sutherland's role in this
4 matter?

5 A They would be the attorneys that would be
6 used for the settlement, the contracting, closing,
7 purchasing and the related matters relative to this
8 acquisition process.

9 Q Whose attorney was Sutherland? Diana Group?

10 A Mine, yes.

11 Q What was the role again of Mr. Cunningham at
12 Steptoe and Johnson?

13 A He was an additional attorney.

14 Q For you?

15 A Yes, and for Diana. This is a very engaging
16 process. I'm sure you can appreciate it. And, you know,
17 it is not unusual to engage more than one attorney.

18 Q Did you have other attorneys besides Mr.
19 Cunningham at Steptoe and Johnson and Sutherland,
20 Asbill?

21 A There was a third attorney that I brought in,
22 too, for very limited-use only because one of the

would take to sell the property?

A Well, we negotiated the price. Given that price, you then do a lot of appraisal, you do a lot of survey work. And at the time of the closing there are determinations, formulas, that are put into place in order to establish whether that is a firm price or whether adjustments are made to it. But that is the general arena on how you approach a property of that nature and how you begin to deal with it.

Q And who were those owners that you negotiated with?

A I negotiated directly with a man by the name of Harold Leach, who represented Foley Timber and Land Company.

Q Is he a lawyer or a broker or something else?

A No, he is part owner and/or an officer of that company.

Q And where is that company located?

A That company is located in San Francisco.

Q Does that company have other interests besides --

A I have no idea.

1 parties that I became involved in a litigatory process
2 with was also associated with the timberland
3 indirectly, and -- it was a Mr. Powell. And he, in
4 conjunction with Sutherland, tried a case on my behalf
5 which was successfully dismissed in my favor.

6 Q And this case was between you and was it a
7 broker?

8 A That is correct.

9 Q And that was with respect to some other
10 timberland in Florida?

11 A It was a small plantation which neighbored
12 the timberland.

13 Q Did you have any kind of written undertaking
14 or understanding or agreement with respect to the
15 prospective purchase of this property?

16 A We have a contract which was stopped dead in
17 its tracks.

18 Q You have a written contract?

19 A We have a written contract. We have not
20 signed it, but Sutherland, Asbill and Brennan provided
21 I think it is about a 64-page contract which we were in
22 the process of negotiating and finalizing.

1 Q And that was a contract between Diana Group
2 Inc. and Foley Timber and Land Company?
3 A That is right.
4 Q For the purchase by Diana Group of the Foley
5 tract?
6 A That is right.
7 Q And no one signed that contract? It was in
8 the drafting stage?
9 A Well, it was not in the drafting stage. It
10 was a fixed contract. We were going to -- we were at
11 the point of determining the formulas that we would use
12 to be applied to the final settlement price. And we had
13 anticipated utilizing Deutschebank. However,
14 Deutschebank evidently got a hold of Mr. Foley and
15 advised him that they were advised from Crestar Bank
16 that I had misrepresented myself and, effectively, a
17 series of very derogatory statements were made about me
18 which caused Mr. Leach to sort of withdraw and take a
19 second look at this, and was a very damaging situation.
20 Q I will move to strike that answer as
21 nonresponsive. My next question for you is whether the
22 Sutherland Asbill firm drafted the final document for

1 the purchase of the Foley tract.
2 A Yes, they did.
3 Q And whether anyone signed that document.
4 A No one has signed that. It was stopped.
5 Q Now, I believe you said that Herman Flowers
6 was to obtain financing for you for that purchase. Is
7 that right?
8 A That is correct, in three stages.
9 Q All right.
10 A He had accomplished the first, which was the
11 \$500,000 for fees and expenses. There was a second
12 bridge loan which would have taken out that loan. And
13 there was a third loan that was coming forward.
14 Q Originally the transaction that you worked on
15 with Mr. Flowers was for more than \$500,000. Is that
16 right?
17 A That is correct.
18 Q And that original amount was to be, was that
19 \$120 million -- well, I'm sorry, \$25 million?
20 A No.
21 Q How much was that original amount to be?
22 A That original amount to be was about \$25

1 million, more or less.
2 Q Okay. So, the original amount that Mr.
3 Flowers was to obtain in connection with this Foley
4 tract transaction was \$25 million. Is that right?
5 A Approximately.
6 Q And that was not successful. Am I right?
7 A That was not successful.
8 Q And we will get into that in just a minute,
9 but first I want to ask you about some of the other
10 players or people who were involved in this. I believe
11 you said that Mr. Flowers introduced you to LaDonna
12 Rosellini. Is that right?
13 A That is right.
14 Q What was to be her role in this transaction
15 as you understood it?
16 A She had indicated that she had secured the
17 \$25 million. She had a client who was willing to lend
18 that money.
19 Q Did she say what kind of client that was?
20 A Yes, she introduced -- she said it was a
21 trust, and she said that one of the members was Ray
22 Emery.

1 Q And did you speak with Ray Emery?
2 A I did.
3 Q And what was your understanding of his role
4 with respect to this transaction?
5 A Well, he told me that he was one of the
6 people in the trust, not a trustee, but one of the
7 people in the trust, and that they had, were waiting --
8 that there were three other people, and they were
9 waiting for funding. And there was a series of stories
10 of why that did and did not happen. After a while it
11 made no sense, and I recognized that there was nothing
12 forthcoming.
13 Q What was the purpose of the \$25 million
14 funding?
15 A I needed to pay attorneys' expenses. There
16 were a series of attorneys. I needed to pay for survey
17 work for the foresters. I needed to pay for bank
18 expenses, settlement fees, a number of things that are
19 associated with setting up the ultimate funding and
20 financing of the property.
21 Q What was your understanding of the role of
22 Mr. Sine with respect to this \$25 million initial --

1 A Mr. Sine was introduced to me by Ray Emery.
2 He was identified as an attorney for Ray Emery as well
3 as an attorney for the trust. And the trust was the
4 Sine Trust and he was also a trustee for the Sine
5 Trust.
6 Q And did you understand that Mr. Sine was both
7 trustee and attorney for the Sine Trust?
8 A That is what I was led to believe.
9 Q Who were the other participants in the trust
10 or were you told?
11 A I have no idea.
12 Q Were you ever told anything about Roy Fisher?
13 A The first I heard of Roy Fisher was the --
14 and I cannot remember whether it was either the
15 complaint or whether it was on the deposition. I think
16 it really was the deposition that Mr. Sine gave
17 relative to the initial complaint.
18 Q So that is after this lawsuit was filed --
19 A That is correct.
20 Q -- was the first you knew about Mr. Fisher?
21 A That is correct.
22 Q What about William Franklin; did you know

1 anything about him before the lawsuit was filed?
2 A No, I did not.
3 Q Did you have telephone conversations with Mr.
4 Emery and Mr. Sine?
5 A Yes, I did at various times.
6 Q And what was the role of Barry Marcus in this
7 transaction?
8 A Barry Marcus was an attorney residing in
9 Florida. Barry Marcus was the son-in-law of Herman
10 Flowers. And Barry Marcus served as -- I formulated the
11 company St. Clair, I believe it was Real Estate and
12 Timber Group. And it was a Florida corporation, and, as
13 such, you are required in Florida to have a resident
14 agent in the state and he served as that.
15 Q And what was the purpose of the formation of
16 the St. Clair Company in Florida?
17 A There were other properties, timber
18 properties, that were available in Florida, and was
19 interested in those as well.
20 Q Was there a reason to form St. Clair rather
21 than using Diana Group for those properties?
22 A Certainly, because you don't put all of your

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

that. And the statements that she made didn't seem to be in keeping with that, but they were to a degree 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?

1 A Well, unfortunately he insisted on a ratio of
2 five times the principal amount. And his rationale for
3 that was that he could make that kind of money on that
4 money through other channels.

5 Q So was your arrangement with Mr. Sine that if
6 he would place \$25 million in an escrow account, you
7 would pay him \$120 million?

8 A I would deduct that from the funding, the
9 overall funding that was going to be had, and would pay
10 that amount, yes.

11 Q And was your agreement with him as well that
12 you would pay that amount within 30 days?

13 A Yes, it was.

14 Q And was it your idea to set up the escrow
15 account at Crestar Bank because that was where Diana
16 Group's account was?

17 A That's right.

18 Q Did anyone else propose doing it any
19 differently?

20 A No.

21 Q And did you talk with Nancy Cree about
22 setting up that escrow account or about this

1 had initially represented this transaction to the
2 Rosellini/Ray Emery group, and so he then represents
3 this evidently to Zahra Ghods and probably used the
4 very same basis of what was going to happen with the
5 other. And so I was sort of caught in the middle of
6 what these people had been trying to negotiate.

7 Q Was the initial financing from Zahra Ghods
8 also in the amount of \$25 million?

9 A No.

10 Q Or was it in a different amount?

11 A No, it was much less.

12 Q And that, you say, fell through?

13 A It fell through.

14 Q Now --

15 A It fell through not because she didn't have
16 the funds. It is because she wanted a guaranty, which
17 did not exist, and she wanted a guaranty not only -- I
18 believe she insisted that there was some kind of
19 investment program that the bank had, and I mean it was
20 totally unrelated to any reality. This is something
21 that she just insisted existed.

22 Q Did she have a company called Unisource

1 transaction?

2 A Yes, I did.

3 Q Did you already have an existing escrow
4 account for Diana Group Inc. or did you set --

5 A Yes.

6 Q -- or did you set one up just for this?

7 A No, I had one existing, but that was relative
8 to another party that did not perform. And I did not
9 want to confuse the issue, since each one should be for
10 a separate situation, that they would remain
11 unencumbered and exclusively for the benefit of that
12 transaction.

13 Q Was the other escrow account that you had
14 already set up that you said it didn't come through,
15 was that in connection with this same Foley tract or
16 was that some other venture?

17 A No, it was the same thing.

18 Q Okay. And who was the funding source for that
19 one that didn't work out?

20 A That was a woman by the name of Zahra Ghods.

21 Q And what was your understanding of who Zahra
22 Ghods was?

1 Capital LLC?

2 A I don't know whether that is her company. I
3 don't know whether she worked for it. I don't know -- I
4 really don't know anything about the company.

5 Q When you talked to Nancy Cree about opening
6 the escrow account for Diana Group Inc. to receive the
7 \$25 million payment from the Sine group, did you
8 propose the form of a letter for Crestar Bank to write
9 in connection with that escrow account?

10 A Yes, I did.

11 Q Let me ask you to look at a document from the
12 Diana Group's files which I will ask the reporter to
13 mark as exhibit number five.

14 (No. 5 - Specimen Text/Bank Letter, marked
15 for identification.)

16 BY MS. POWELL:

17 Q And I will ask you whether this is the form
18 of the letter that you gave to Crestar Bank.

19 A This is correct.

20 Q And it has up at the top exhibit one. Do you
21 know why it has that up there?

22 A No, I don't, other than -- I really can't

1 A Again Zahra Ghods was a money broker. We had
2 discussed with Zahra Ghods the fact that this was not a
3 bank guaranty, that this simply was the escrow account
4 information and instructions. She approved, accepted
5 the whole thing. And then all of a sudden she insisted
6 that we provide her with a bank guaranty and that in
7 effect it was a bank guaranty and in effect it was
8 some kind of investment with the bank. And I very
9 honestly do not know where she came upon this, but she
10 was insistent; you could not rationalize with her. And
11 I tried to describe to her that there was no such thing
12 involved. She pursued evidently going through your
13 security department, I believe, out of Baltimore, and
14 going through a number of people in the bank, demanding
15 and insisting that that was the condition. And finally,
16 when she acknowledged that that was not the case, she
17 did send a letter to me, to Ms. Cree, and, I believe,
18 to the bank apologizing for her disruption.

19 Q What were your repayment terms with Zahra
20 Ghods?

21 A It was something similar to that, but,
22 remember, that what had happened was that Mr. Flowers

1 remember now why I would have put exhibit one on it.

2 Q Did you just use this letter in talking with
3 Ms. Cree or did you give this document to her at
4 Crestar Bank, exhibit five?

5 A I gave her a copy of this to review and read.

6 Q And did Crestar Bank prepare a letter that
7 was ultimately sent to Mr. Sine February 6, 1998
8 concerning this \$25 million escrow payment?

9 A Yes.

10 Q Let me ask you to look at a document from Mr.
11 Sine's files which I will ask the reporter to mark as
12 exhibit six.

13 (No. 6 - Fax w/ltr 2/6/98 Cree to Sine,
14 marked for identification.)

15 BY MS. POWELL:

16 Q The second page of exhibit six appears to be
17 a letter dated February 6, 1998 from Nancy Cree at
18 Crestar Bank to Wesley Sine, J.D., Esquire, in Salt
19 Lake City, Utah. And it references account Wesley F.
20 Sine, Attorney-at-Law, Fiduciary and Trust Account,
21 Account Number 12036086, Bank Officer, Dave Taylor.
22 What is your understanding of what this letter is and

how it came to be written?

A As I had indicated and stated before, I authored the content of the letter. It was sent in letter form. But this would be the escrow instructions concerning the account, the account number for the escrow, and the terms of the escrow, and the instructions.

Q And what was your -- did you talk with Nancy Cree about this letter?

A Yes, I did.

Q And did you explain to her what you've just explained to us about the purpose of letter?

A Yes, I did.

Q And did you talk to her about whether there was any obligation on the part of Crestar Bank with respect to payment of any of these funds?

A There was no obligation stated nor implied. It was an agreement to transfer on a bank-to-bank basis. It was devoid of promising to pay or guaranteeing to pay on my behalf. And there would be no reason why I would expect Crestar to undertake that, and certainly not anything of this nature. It was an

escrow account.

Q Was there any discussion between Ms. Cree and you about the language in exhibit five and the language that ultimately appeared in exhibit six? In other words, it looks like it is approximately the same language.

A It is the same.

Q And was there any, was there ever any different version of this?

A No.

Q Did you talk with Mr. Sine about the form of the language or what this letter would look like before it was generated?

A Evidently he had seen the context of this, and that would have been something of this nature.

Q You are referencing exhibit five, the form?

A Yes. But I'm not saying it was this piece of paper. The language simply such as that was typed out by myself. And I had discussed this with Herman Flowers.

Q As of the time of exhibits five and six --

A Excuse me.

Q I'm sorry.

A And I assumed that Mr. Flowers discussed it with Sine and with Ray Emery and with LaDonna, because that would have been the basis upon which they either decided to go ahead or not.

Q As of the time that the February 6, 1998 letter was written, did you have any other written understanding between yourself or Diana Group and Mr. Sine?

A No.

Q So, this letter was the only indication of the amount that Mr. Sine would receive from Diana Group in the event that he made the deposit of \$25 million?

A That is correct.

Q And was that one of the purposes of this letter, to have that in writing?

A No, I had anticipated that there would be a contract which would stipulate the terms and conditions and be an operative agreement.

Q Okay. Did such a contract get written in fact?

A No, the deal never went that far.

1 Q Okay. With respect to the later transaction, which we will get to in a minute, you did have a written contract with Mr. Sine?

2 A I did. And I insisted on it.

3 Q And you expected to have that same kind of written contract with regard to the \$25 million transaction?

4 A Yes, I did.

5 Q And I believe you said that this transaction didn't go through. Is that right?

6 A That is right.

7 Q Did you not receive the \$25 million from Mr. Sine?

8 A No, I did not.

9 Q And I will ask you next to take a look at what is a from Mr. Sine to you at Diana Group from Mr. Sine's files, which we will ask to be marked as exhibit seven.

10 (No. 7 - Ltr Sine to Mangiapane 3/12/98, marked for identification.)

11 BY MS. POWELL:

12 Q Did you actually receive a copy of this

1 letter, exhibit seven, from Mr. Sine?

2 A To the best of my recollection, I do not think I did.

3 Q He recites in the letter that the transaction basically is canceled. This is as of March 12, 1998. Is that correct?

4 A In the letter he states that, yes.

5 Q And was it your understanding at this time or before this time that in fact the \$25 million transaction was canceled or terminated?

6 A Well, it was obvious it never happened, it never materialized to any point of reality. So that was a given. Why he insisted on writing this I don't know.

7 Q Did you know anything more about why the funding did not materialize, other than --

8 A After the fact, much after the fact, I received a letter from a group called Omni, indicating that Ray Emery had been trying to use the Crestar letter as a guaranty for funding, and they could never do that because it wasn't a guaranty, they were never able to get any funds, and that Mr. Emery did not have those moneys, and that he was very much involved in

1 trying to assist them in that effort and it never materialized to any degree. But up until then I had no insight. And the letter that was sent to me was a mysterious letter. I mean I had no point of reference. As a matter of fact, it was after a couple of weeks of having it in my possession that I even resorted to calling the group and engaging them and finding this out.

2 Q Let me show you another document that we received from your files. This one is apparently a version of a February 6, 1998 letter from Nancy Cree at Crestar Bank to Wesley Sine, with some handwriting notations on it, and I will ask the reporter to mark this one as exhibit eight.

3 (No. 8 - Ltr Cree to Sine 2/6/98 w/notes, marked for identification.)

4 BY MS. POWELL:

5 Q Is exhibit eight a document that Mr. Sine sent you, or Mr. Emery, or someone else?

6 A In preparation for the March transaction?

7 Q Yes.

8 A I no longer had a copy of this verbiage. I

1 had shredded it. It was not useful any more. There was
2 nothing forthcoming. And I did not want to call Ms.
3 Cree and ask her for a copy. So, in speaking to Mr.
4 Sine, I asked him if he had a copy of that original
5 letter and if he would send it to me. He said he didn't
6 have one, but that Ray Emery had one and he would have
7 Ray send it. And this is what they sent me, with the
8 notations on it.

9 Q Do you know whose handwriting the notations
10 are?

11 A I do not. There are initials. I see one RE
12 that I think represents what might have been Ray
13 Emery's initials. But I can't say that with any
14 certainty.

15 Q It says up at the top "Please: All very
16 confidential." Do you have any understanding of why
17 that is written there?

18 A I have no idea. I did not negotiate the
19 language of this letter earlier on, nor later on, with
20 Ray Emery, nor Mr. Sine.

21 Q Did you ask Mr. Emery or Mr. Sine what the
22 significance was of these notations on this letter,

1 A That is correct.

2 Q Mr. Sine refers in the letter to projected
3 language for "the bank guaranty." Did you take issue
4 with Mr. Sine about that?

5 A I have never promised to give anyone a bank
6 guaranty, and that is beyond my ability, was beyond my
7 ability, and there was no reason that that was
8 forthcoming, and I made that abundantly clear to him.

9 Q Was it during this period in time when you
10 were discussing with Mr. Sine obtaining \$500,000 from
11 him?

12 A That is correct.

13 Q And what was his reaction to that?

14 A That he had several sources and that he would
15 try to find a source that would be satisfied with the
16 bank letter as it was.

17 Q And what was the purpose of getting the
18 \$500,000 amount at this point in time?

19 A It was because the firm of Sutherland, Asbill
20 and Brennan demanded the deposit of several hundred
21 thousand in order to undertake and proceed with this
22 acquisition or to drop it.

1 exhibit eight?

2 A Yes, I did. I believe I asked Sine.

3 Q And what did he tell you?

4 A Well, that -- he really avoided answering it.
5 And it seemed fairly obvious to me that they had hoped
6 to be able to alter the letter in some way. But there
7 was never any discussion on my part that I would ever
8 even entertain doing that.

9 Q You have mentioned the March transaction.
10 After the \$25 million funding did not materialize, did
11 you discuss with Mr. Sine, or Mr. Emery, or others, or
12 Mr. Flowers, a different funding?

13 A No, this was part of the same thing. I did
14 discuss with Herman the fact that I really did need,
15 even if it was a lesser amount, to sustain the minimal
16 of legal expenses that was required. And I did call, I
17 initiated the call to Sine to ask him if he had any
18 alternative sources that might be more reliable and
19 that could be used in this undertaking.

20 Q And what was his response?

21 A That he had, there were several people that
22 he could go to. And I believe that is memorialized in a

1 Q Let me ask you next to take a look at a
2 document from your files, or Diana Group's files, which
3 I will ask the reporter to mark as exhibit ten.

4 (No. 10 - Ltr 3/23/98 Diana Group to Sine,
5 marked for identification.)

6 BY MS. POWELL:

7 Q This is a letter dated March 23, 1998, from
8 Diana Group Inc. addressed to Wesley F. Sine, and it
9 references a letter dated February 6, 1998, et cetera.
10 Can you tell me first of all whether this is in fact a
11 copy of a letter from your files?

12 A Yes, it is.

13 Q And what was the purpose of this letter?

14 A The purpose of this letter was to establish
15 the fact that this was going to be a different
16 transaction. There was a new designation for the escrow
17 account. The amount was different. And it reinstated
18 the transaction but provided for the changes that were
19 made.

20 Q And the changes included a change in the
21 payment by Mr. Sine to \$500,000 in lieu of \$25 million.
22 Is that right?

1 letter that he writes.

2 Q Before we get to that I want to ask you about
3 another letter that Mr. Sine has written apparently
4 which I will ask the reporter to mark as exhibit nine.

5 (No. 9 - Ltr Sine to Mangiapane 3/12/98,
6 marked for identification.)

7 BY MS. POWELL:

8 Q This is a letter that is addressed to
9 Josephine Rita Mangiapane, Diana Group Inc., and
10 apparently dated March 12, 1998. And first let me ask
11 you whether you received a copy of this letter at or
12 about the time it was dated.

13 A I really do not remember receiving this
14 letter. I do remember discussing with him some of the
15 issues that are involved in the letter. I do remember
16 seeing the draft of exhibit eight that is attached to
17 the letter and absolutely dismissing it out of hand.
18 And the information contained in the letter relates to
19 the remark I had previously made about having other
20 sources.

21 Q So this is the letter that you were referring
22 to about his other sources?

1 A That is correct, because I didn't seek to do
2 as much, obviously, but simply to generate what I would
3 need as a minimum floor.

4 Q Is this the same escrow account as the
5 February 6th transaction or a different escrow account?

6 A Well, I believe that it was a different
7 account number. Yes. The other was 49151 and this for
8 the lesser amount is 10321.

9 Q And why did you establish a different escrow
10 account?

11 A So as not to have any confusion. It was a
12 different escrow account, a different agreement, a
13 different transaction.

14 Q And were you agreeing with Mr. Sine in this
15 document that you would -- or Diana Group -- would pay
16 him five times the principal amount, which in this case
17 was \$500,000 in principal?

18 A Yes, they held me to that.

19 Q And did Mr. Sine ever sign a copy of this
20 document?

21 A Uh, I believe he did. And I would have to go
22 through my paperwork to find it.

Q At a break we'll take a look at our copies of these documents to see if we can find one. I don't think I saw one that had a signature by Mr. Sine, but --

A You never saw one? I will have to look at what I have at home.

Q Okay.

A It could be that he didn't. But I -- as a matter of fact, I cannot remember whether I have a signed document or not.

Q Did you have any discussion with Mr. Sine or Mr. Emery or anyone else about the terms of this letter, exhibit ten, your March 23, 1998 letter?

A At this time, no.

Q It was all agreed to at this point?

A Everything was agreed to. The first time that we started to battle over language was the day after the transfer.

Q Okay. And we will get it that. Did there come a time when you asked Ms. Cree at Crestar Bank to write an escrow letter for this March transaction similar to the one that had been written in February?

A Yes, I did.

Q Let me show you a copy of -- first let me show you a copy of a document from Mr. Sine's files that appears to have a fax cover sheet to Diana and then the second page appears to be a letter from Nancy Cree at Crestar Bank to Mr. Sine dated March 24, 1998. And I will ask the reporter to mark this one as exhibit 11.

(No. 11 - Fax w/ltr Cree to Sine 3/24/98, marked for identification.)

THE WITNESS: There seems to be a discrepancy between the two dates -- well, not necessarily. I guess he could have sent it after the fact.

BY MS. POWELL:

Q The fax cover sheet bears a typed date of 3-27-98.

A I see above there's the 24th on there as well, but I don't know whose fax that is from.

Q Do you know whether you got this fax from Mr. Sine? This copy I have is from his files rather than your files.

A Well, if he received it, Ms. Cree would have

had to send it to him and I would have had a copy. And I did send him the original, so I would have also sent him a fax copy.

Q Let me ask you about that. Let's back up to the February 6 letter. Did you send Mr. Sine the original of the February 6 letter?

A I believe Ms. Cree sent it to his banker.

Q Okay. Did you --

A And his banker, I think, would have given him a copy of it.

Q Did you ever see the original of the February 6 letter?

A Of course.

Q But it is your understanding that Ms. Cree was the one that sent it to Utah and that she sent it to Mr. Sine's banker, not to Mr. Sine himself?

A Uh, my memory does not serve me on that. I can't make that distinction for you.

Q Okay. Let me ask you then about the March 24, 1998 letter, a copy of which is marked as exhibit 11. Did you ever see the original of that letter?

A Yes, I did.

Q And did you know who sent it to Utah, if anyone did?

A I sent it by Fed. Express to Mr. Sine.

Q And did you also fax him a copy of it?

A I believe did, yes.

Q And the Federal Express that you sent to Mr. Sine was directly to him, not through some other person?

A No, it was to him. He was the person that seemed to be conducting all of the banking arrangements for the group that he represented, or the people, or himself, or whatever.

Q The letter of March 24, 1998 recites that after deposit of \$500,000 in the designated escrow account the sum of \$2,500,000 would be transferred. What was your understanding of where that \$2,500,000 would come from?

A Herman Flowers represented that he had arranged a \$10 million loan for me and that that would come into play within the time frame we are talking about and that from that I could withdraw \$2.5 million to repay Sine.

Q And why was it necessary to pay Mr. Sine such a high rate of return for that money?

A Because he demanded it and that was the only way that I could secure the funding. Those were his terms and conditions.

Q Did you ever receive the financing that Mr. Flowers indicated was forthcoming?

A Unfortunately, I did not.

Q What did Mr. Flowers tell you in terms of that financing? Did he tell you it was concluded, or that it would be done, or what?

A No, he said he had it in hand. He said he had, at one point, a cashier's check for the money and that it had to be reconfirmed by the bank, and that confirmation seemed to take for ever. And he even sent me a deposit slip that part of it was deposited and would be sent to me. And I waited and waited and never received it. So I then called bank, and that was a fictitious representation.

Q With respect to that \$10 million that Mr. Flowers had committed to procure, how was that to be repaid and by whom? --

A Out of the large funding for the -- I would repay that. And it would be out of the larger funding which was for the acquisition of the property.

Q So both of these amounts, both the \$500,000 and, before that, the \$25 million commitment, were for costs in getting the deal in place. Is that correct?

A That is correct.

Q Now, after this letter was sent -- and let me just mark another copy which came from your files, but it may -- it has exhibit two at the top and it may have been sent to you later. I will ask the reporter to mark as exhibit 12 a copy of a letter dated March 24, 1998 from Nancy Cree at Crestar Bank to Wesley Sine. And this document is similar to the second page of exhibit 11 except for some notations on it.

(No. 12 - Ltr Cree to Sine 3/24/98 "Exb. 2", marked for identification.)

BY MS. POWELL:

Q Can you tell us how you got this letter or what it is?

A This is the same letter. This is the letter that we've been discussing.

1 have typed it on to the original?
 2 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
 5 this for some other purpose. I mean that was the
 intent. And I have no problem saying that to you. That
 3 was the intent.

7 Q Okay. Did Mr. Sine in fact wire the \$500,000
 into Diana Group's escrow account?

8 A Yes, he did.

9 Q Was that on or about March 27?

10 A I believe so. There is a bank statement which
 I would give you the exact date.

11 Q And --

12 A Is that corroborated by that bank statement?

13 Q I don't have that before me at the moment. I
 just have that in my notes.

14 A Okay. Well, there was a document here.

15 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 D000070, 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

1 to, which said that I had terminated the transaction
 2 and I would send them back their money. And it points
 3 to the fact that they had attempted to first use the
 4 bank letter as some kind of an instrument with a third
 5 party, which they were not entitled to do and it wasn't
 6 that kind of thing. It simply was the escrow statement.
 7 And the second is that I was not interested nor did I
 8 ever agree to negotiate any kind of guaranty. And the
 9 third page reinforces the fact that this was sent to
 10 that, to Mr. Sine's fax number, so he did receive this.
 11 This was a declaration of my intent and it was rather
 12 strongly worded. I don't think I left a lot to his
 13 imagination.
 14 Q And again --
 15 A But this is the first time that he starts out
 16 to ask for a difference in what we had agreed to.
 17 Q And that difference was what?
 18 A That difference was that he wanted a bank
 19 guaranty.
 20 Q And in your letter you make clear that that
 21 is not a part of the deal?
 22 A That is correct.

1 Q And that he can have his money back?
 2 A That is right.
 3 Q Then just for the record let's mark his
 4 response, although I don't propose to ask you about it,
 5 as exhibit 16. And exhibit 16 appears to be a letter
 6 from Mr. Sine to you dated March 29, 1998.
 7 (No. 16 - Ltr Sine to Mangiapane 3/29/98,
 8 marked for identification.)
 9 BY MS. POWELL:
 10 Q And we received it from your files. Is this
 11 in fact a copy of a letter that Mr. Sine sent you?
 12 A Yes, he did.
 13 Q And I take it you take issue with most of
 14 what he says in this letter?
 15 A Well, I find that a lot of this has a spin to
 16 it which is self-serving, and unless we go through it
 17 statement by statement -- there are a few portions of
 18 it which are correct, in particular the fact that I
 19 sent the original of the bank letter as you had asked
 20 me before by Fed. Express, which I did.
 21 Q Right. He says also, after that paragraph on
 22 page two he references your request that he sign a

1 Private Placement Agreement. Was that request by you
 2 something that you made in response to his
 3 communication or was that always going to be part of
 4 the transaction?
 5 A Well, from my point of view the one thing
 6 that this all lacked was an agreement. I mean that to
 7 me is usually the operative statement that you begin
 8 with. You have an agreement in fact and principal. And
 9 he seemed to be willing to simply transfer funds on the
 10 escrow agreement. But when in fact he then began to ask
 11 for -- or not began to, he asked for, the day after the
 12 transmission, the bank guaranty, and mind you, I was
 13 not aware of the fact at that time that he had sent in
 14 a conditional Swift Wire. I had no knowledge of that.
 15 Q What are you referring to as the conditional
 16 Swift Wire? Would you describe that?
 17 A The transfer of funds with the message that
 18 was added to it. I had no knowledge of that. Evidently
 19 the bank had no knowledge of that. And he never
 20 referenced any of that. Having said that, when he
 21 confronted me with this request, there was no reason
 22 for me to keep the money because obviously this was a

1 requirement. This is what I understood. And it's not a
 2 requirement that I was even going to try to support
 3 because it wasn't forthcoming. And so I told him that
 4 I would send back the funds. And he insisted that I not
 5 do that. And I said the only way that I would keep the
 6 money is if in fact we had an agreement that specified
 7 that this was a loan to Diana and it did not involve
 8 the bank.
 9 MS. POWELL: The videographer needs to change
 10 tapes, and we have been going for a couple of hours, so
 11 why don't we take a break and we will try to finish up.
 12 (At 2:53 p.m., a recess was taken.)
 13 BY MS. POWELL:
 14 Q Ms. Mangiapane, before we took the break I
 15 had asked you some questions about the Private
 16 Placement Agreement that you entered into with Mr.
 17 Sine, and I would like to show you a copy of what I
 18 believe to be the final version of that document, which
 19 I will ask the reporter to mark as exhibit 17.
 20 (No. 17 - Private Placement Agreement Diana
 21 04, marked for identification.)
 22 BY MS. POWELL:

1 Q This is a document that was produced in the
 2 litigation from the Diana Group and is entitled Private
 3 Placement Agreement, and says it is entered into as of
 4 the 30th day of March, 1998, by and between Diana Group
 5 Inc. and Dr. Wesley F. Sine, J.D., Trustee. And there
 6 appear to be signatures on the second page on behalf of
 7 Diana Group, by you, and Wesley Sine, Trustee, by
 8 Wesley Sine. Have I identified this document correctly?
 9 A Yes.
 10 Q And is this in fact the final version of the
 11 Private Placement Agreement that you entered into with
 12 Mr. Sine?
 13 A Yes, it is.
 14 Q And is this the document that you have
 15 testified about that you thought you should have in
 16 place to clarify the terms of the understanding between
 17 you to?
 18 A That is true.
 19 Q And this document indicates that the \$500,000
 20 has been paid and that Diana Group will return
 21 \$2,500,000 to Mr. Sine at the end of a specified term.
 22 Is that right?

1 A It indicates that the \$500,000 were
 2 transferred.
 3 Q Right.
 4 A Yes.
 5 Q And received in Diana's designated escrow
 6 account?
 7 A Yes.
 8 Q I'm just looking at paragraph one there. And
 9 Mr. Sine did in fact sign this document, did he not?
 10 A I gather that was his signature. It seems to
 11 be similar to everything else that he signed.
 12 Q And was this document entered into on or
 13 about the 30th day of March, 1998?
 14 A Yes, it was.
 15 Q And that was after --
 16 A After the transfer.
 17 Q -- Mr. Sine had transferred the funds to the
 18 escrow account?
 19 A That's right. It was a precondition to my
 20 keeping the funds.
 21 Q Otherwise you were going to send them back?
 22 A That is right. And I stated it in the other

letter which was received by him.

Q After the date of the Private Placement Agreement, March 30, 1998, did you then have a series of letters with Mr. Sine concerning the payment date for the \$2,500,000 for him?

A Yes. I was in default of the payment.

Q And what was the reason for that?

A The reason for that, the immediate funding that I anticipated receiving from Herman Flowers seemed to be delayed and delayed and delayed.

Q Did you and Mr. Sine enter into a series of letter agreements to delay the due date for your payment to him?

A Yes, to extend the due date.

Q And did you also agree to provide some additional compensation to him as a result --

A I did.

Q -- of the delay? Let's just mark these documents for the record. The first is a letter dated May 5, 1998, which I will ask the reporter to mark as exhibit 18.

(No. 18 - Ltr Sine to Mangiapane 5/5/98,

1 explanation for the delay?

2 A Yes, I do. And that is the account that was
3 given to me by Herman Flowers concerning the supposed
4 \$10 million cashier's check.

5 Q And next I'm going to show you a letter dated
6 May 13, 1998, from you to Mr. Sine, which I will ask
7 the reporter to mark as exhibit 22, and ask you first
8 if this is in fact a copy of a letter that you sent to
9 Mr. Sine.

10 A Yes, it is.

11 (No. 22 - Ltr Mangiapane to Sine 5/13/98
12 Diana 14, marked for identification.)

13 BY MS. POWELL:

14 Q And does this letter refer to some additional
15 compensation of \$25,000 that you agreed to pay Mr. Sine
16 as a result of the delay in payment to him?

17 A Yes, it does.

18 Q And is this letter signed by you and by Mr.
19 Sine as approved and accepted?

20 A Yes.

21 Q The letter shows a CC to Dick Cunningham at
22 Steptoe and Johnson. Had you involved him at this

marked for identification.)

BY MS. POWELL:

Q Which we received from the files of Diana Group, and which appears to be a letter from Mr. Sine to Diana Group confirming that the payment due date would be May 8, 1998. Is that right?

A That is correct.

Q And you took no issue with that?

A No.

Q Next I'm going to ask the reporter to mark as exhibit 19 a copy of a letter, also apparently from Diana Group's files, from you to Mr. Sine dated May 8, 1998, and discussing the possibility of a continuance of the payment due date and your proposal that the \$2,500,000 be sent on May 15th instead of May 8th. Is that right?

A That is correct.

Q And is this in fact a letter from your files that indicates that?

A Yes, it is.

Q And was that okay with Dr. Sine?

A At that time, yes.

1 point in --

2 A You know, excuse me, if I could just think
3 back on this letter.

4 Q Sure.

5 A The content of the letter is not
6 objectionable. I did indicate to him that I agreed to
7 do that. But there have been two places where there's
8 something about the way the letter was printed that
9 does not seem in keeping with what I would have
10 stated. The pro rata with the add five percent of the
11 \$500,000 is very unlike what I would do. And the
12 interesting thing is that I really don't recall putting
13 a copy to Ms. Cree and to Mr. Cunningham. And I could
14 be, you know, wrong, but there's just something about
15 it.

16 Q You are referring to exhibit 21 now?

17 A Yes -- 22.

18 Q The May 13 letter?

19 A Twenty-two.

20 Q Twenty-two doesn't have "pro rata" in it, I
21 don't believe. It is 21 that --

22 A Is this Diana with the 14 at the bottom?

(No. 19 - Ltr Mangiapane to Sine 5/8/98,
marked for identification.)

BY MS. POWELL:

Q Okay. Let's mark next as exhibit 20 a letter from Mr. Sine to you dated May 8, 1998 and referencing a due date of May 13. And I will ask you if this is in fact a copy of a letter that you received from Mr. Sine referencing the extension of the due date.

A Yes, it is.

(No. 20 - Ltr Sine to Mangiapane 5/8/98,
marked for identification.)

MS. POWELL: Next I will ask the reporter to mark as exhibit 21 a letter that appears to be from you to Mr. Sine dated May 13, 1998 regarding the delay in payment.

(No. 21 - Ltr Mangiapane to Sine 5/13/98
DOOOO20, marked for identification.)

BY MS. POWELL:

Q Is this in fact a letter from you to Mr. Sine of that date?

A Yes, it is.

Q And do you, in this letter, give him some

1 Q Yes, it is?

2 A Exhibit 22?

3 Q Twenty-two, right.

4 A If you come here, reference March 30th.

5 Q Oh, I'm sorry, in the in re line, okay.

6 A Uh-huh (affirmative response). And there's
7 another document that has that as well which struck me
8 as being odd. But, you know, I'm not going to take
9 extreme difference with it. I just, I just can't help
10 but to state that.

11 Q Did you get this pro rata language from Mr.
12 Cunningham at Steptoe and Johnson?

13 A No, no, no. This is my signature. This is his
14 signature. You know, and maybe I've just looked at too
15 many documents recently, but there's just something
16 funny about it. And I did make that agreement. I'm not
17 stating that I did not. I did. I'm the one that offered
18 that. And I did it in good faith. But I just want to
19 annotate that issue.

20 Q Let me next show you a letter dated May 13,
21 1998 from Mr. Sine to Nancy Cree at Crestar Bank, which
22 I will ask the reporter to mark as exhibit 23.

1 (No. 23 - Ltr Sine to Cree 5/13/98, marked
2 for identification.)
3 BY MS. POWELL:
4 Q It shows a copy to Josephine Rita Mangiapane,
5 and my copy indicates it was produced from you or your
6 counsel. Did you in fact receive a copy of this letter
7 from Mr. Sine?
8 A Excuse me, you said that it was produced by,
9 "from you or your counsel."
10 Q From Diana Group or your counsel.
11 A I understand what now you were referencing.
12 Yes, I did receive a copy of this.
13 Q And once again this just refers to a change
14 in the date of payment, is that right, or transfer?
15 A That's right.
16 Q Next I want to show you another letter. This
17 one is dated May 20, 1998 appears to be from Mr. Sine
18 to you at Diana Group. And I will ask that it be
19 marked as exhibit 24.
20 (No. 24 - Ltr Sine to Mangiapane 5/20/98,
21 marked for identification.)
22 THE WITNESS: And your question?

1 BY MS. POWELL:
2 Q My question is whether this is in fact a copy
3 of a letter that you received from Mr. Sine.
4 A Yes.
5 Q The letter references some delay and some
6 communications he says he had with you. Does he refer
7 correctly to his communications with you or do you
8 recall?
9 MR. MARSHALL: What paragraph are you
10 referring to?
11 MS. POWELL: Just the letter in general and
12 the references to his conversations with Ms.
13 Mangiapane.
14 THE WITNESS: Well, if I may take this within
15 its context, the very first paragraph reiterates the
16 cause here as being stated that "They," meaning the
17 bank, I presume, "warranted and certified to transfer
18 on your behalf," which effectively they did. They
19 didn't guarantee to pay; they warranted to transfer.
20 The second refers to the cashier's check,
21 which I had been told was the format for the funding by
22 Herman Flowers. And I communicated not the fact that

1 it was from Herman but that this is what I had been
2 told. So, that is correct.
3 Within 17 seconds; that's not anything that I
4 would relate to. I don't know anybody who does -- if
5 there's a transfer, I believe a wire transfer takes 17
6 seconds to be completed. But that's neither here nor
7 there. And, of course, he is upset that the funds have
8 not been transferred, and he's entitled to be because
9 I'm in default.
10 MR. MARSHALL: You or your company?
11 THE WITNESS: My company is in default. And
12 I'm speaking as Diana Group Inc., not as myself
13 personally, but the company is in default of the
14 repayment.
15 BY MS. POWELL:
16 Q In the first paragraph of Mr. Sine's letter
17 which has been marked as exhibit 24 he says, "Pursuant
18 to your request, I have extended the due date on the
19 bank letter from Crestar Bank and have not requested
20 payment from them of the \$2,500,000 which they
21 warranted and certified to transfer me on your behalf."
22 Is this the first time Mr. Sine had indicated to you

1 that he might expect payment from Crestar Bank as
2 opposed to payment from you?
3 A This kind of terminology is probably the
4 first time that I have seen this. At this stage he
5 seems to be restating the issue in different ways, and
6 that's the first time that I have seen that particular
7 statement made by him.
8 Q Did Mr. Sine ever indicate to you before this
9 date that he expected payment from Crestar Bank instead
10 of payment from Diana Group which would then be
11 transferred by Crestar Bank?
12 A No. And of course I go back to my contention
13 with him and the subsequent agreement, Private
14 Placement Agreement, that was drawn up, and those
15 issues were supposedly laid to rest with that.
16 Q Let me ask you next about a letter that
17 appears to be one that you sent to Crestar Bank, which
18 I will ask the reporter to mark as exhibit 25.
19 (No. 25 - Ltr Mangiapane to Crestar 5/21/98,
20 marked for identification.)
21 BY MS. POWELL:
22 Q It's dated May 21, 1998, appears to be signed

1 by you, and sent to the attention of Nancy Cree,
2 reference Dr. Wesley Sine transaction. Is exhibit 25 in
3 fact a letter that you sent, or a copy of a letter that
4 you sent to Crestar?
5 A Yes, it is.
6 Q And what was your purpose in sending this
7 letter?
8 A Well, I recognized that Mr. Cree -- "Mr.
9 Cree" -- Mr. Sine had been sending her communications,
10 and I wanted to simply confirm with her the fact that I
11 had difficulty in meeting the deadline and that I was
12 apologizing for the inconvenience that was resulting.
13 Q And on the second page were you also
14 referencing that Mr. Sine was apparently not wanting to
15 abide by the Private Placement Agreement which defines
16 the obligation as one by Diana Group and not Crestar
17 Bank?
18 A And your question?
19 Q Was that the import of what you were saying
20 on the second page --
21 A That's right.
22 Q -- as well?

1 A Because he started to talk in terms of
2 Crestar guaranteeing this. But please take into
3 account there was that transmission, the conditional
4 wire, which was totally unaware of. And I'm assuming at
5 this stage, after the fact, that somehow he's
6 incorporating that concept in some of this. But that's
7 an assumption on my part. I don't know that for a fact.
8 I'm just trying to rationalize. Because there was no
9 reason for him to start this line of rebuttal as an
10 issue. I mean there was not an argument between he and
11 I where he starts to tell me this. He at this point is
12 now sending letters stating this in writing for the
13 record.
14 Q Had he wanted a bank guaranty from the
15 beginning?
16 A No.
17 Q Had he asked for a bank guaranty before the
18 February 6th letter was sent?
19 A Absolutely not. And I've testified to that
20 before.
21 Q And it's your testimony that the first time
22 he asked for a bank guaranty was after he had made his

1 your response objects but does provide information as
 2 follows, and then an account number is listed. Is that
 3 the account with respect to the March escrow?
 4 A The 10321?
 5 Q Yes.
 6 A That is on item number four?
 7 MR. MARSHALL: No, it's this one.
 8 THE WITNESS: Okay.
 9 BY MS. POWELL:
 10 Q You have listed one account in response to
 11 question number three, and I'm asking you which account
 12 that is.
 13 A Yes, that is correct, yes. And that is the
 14 account referenced with this transaction.
 15 Q And the question in subparagraph D asks for
 16 the amount of any fees, commissions, or payments made
 17 to Crestar Bank from the account, et cetera. And your
 18 answer is, "No fees, commissions, or payments have been
 19 made to Crestar Bank from the account or taken out of
 20 any account except for regular and normal fees and
 21 nominal amounts for wire transmission fees as wire
 22 transfers were made from such account." Is that

1 whether you want to sign it.
 2 MR. MARSHALL: We would request the right to
 3 review it and sign it.
 4 MS. POWELL: Certainly. All right. Thank you
 5 very much.
 6 (At 3:53 p.m., the deposition was concluded.)
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22

1 correct?
 2 A Yes.
 3 Q And there was no fee or commission or payment
 4 made by Diana Group to Crestar in connection with the
 5 transaction that is the subject of this suit --
 6 A No.
 7 Q -- was there?
 8 A No, because there was nothing that the bank
 9 did.
 10 Q And then in interrogatory number five the
 11 question asks, "State what your agreement was with
 12 Crestar Bank with regard to the letter dated March 24,
 13 1998 (attached hereto as Exhibit A) which letter is
 14 addressed to Dr. Wesley F. Sine, J.D., and which letter
 15 warrants and certifies to transfer to Sine 'directly,
 16 on a bank-to-bank basis...the sum of \$2,500,000.'"
 17 Your response, could you just read paragraph A,
 18 which asks for the specific agreement between you and
 19 Crestar Bank with respect to the letter, what was your
 20 response?
 21 A The response is that "There was no agreement
 22 between these defendants and Crestar Bank with regard

1 AFFIDAVIT OF DEPONENT
 2
 3 I have read the foregoing deposition, which
 4 contains a correct transcription of the answers given
 5 by me to the questions therein recorded, except as to
 6 errors which may be indicated on any attached errata
 7 sheet.
 8
 9
 10 Josephine Mangiapane
 11
 12 Subscribed and sworn to before me this
 13 day of , 19 , in
 14
 15 Notary Public
 16
 17 My Commission Expires:
 18 , 19
 19
 20
 21
 22

1 to the letter dated March 24" -- pardon me -- "March
 2 24, 1998. Crestar Bank issued the letter at the request
 3 of and as an accommodation to Diana Group Inc. without
 4 receiving any consideration thereof."
 5 Q And again the question asks in B and C for
 6 any fees, commissions or payments made to Crestar Bank
 7 as a result of the issuance of the letter. And your
 8 answer is none. Is that right?
 9 A That is correct, in both instances.
 10 MS. POWELL: Thank you. Let's mark that, if
 11 we haven't already, as the next exhibit.
 12 MR. MARSHALL: Is that the one you just
 13 questioned her about?
 14 MS. POWELL: Yes. I think if we could just
 15 take a three-minute break, I'm finished.
 16 (At 3:49 p.m., a recess was taken.)
 17 MS. POWELL: Thank you, Ms. Mangiapane.
 18 That's all the questions that I have at this time. I
 19 appreciate it.
 20 THE WITNESS: Thank you very much.
 21 MS. POWELL: Your attorney will advise you
 22 about your right to read and sign this and let us know

1 CERTIFICATE OF NOTARY PUBLIC
 2 I, James M. Turner, the officer before whom the
 3 foregoing deposition was taken, do hereby certify that
 4 the witness whose testimony appears in the foregoing
 5 deposition was duly sworn by me; that the testimony of
 6 said witness was taken by me in stenotype and
 7 thereafter reduced to typewritten form under my
 8 supervision; that said deposition is a true record of
 9 the testimony given by said witness; that I am neither
 10 counsel for, related to, nor employed by any of the
 11 parties to the action in which this deposition was
 12 taken, and further that I am not a relative or employee
 13 of any attorney or counsel employed by the parties
 14 thereto, nor financially or otherwise interested in the
 15 outcome of the action.
 16
 17
 18
 19 James M. Turner, Notary Public for the
 20 District of Columbia
 21 My Commission Expires:
 22 July 31, 2003

Tab D

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**

1 you remember?
 2 A Let's see. I went to that department in
 3 1969. So around '70, '71.
 4 Q And what was your next position with
 5 National Savings Trust?
 6 A My boss was promoted to president. And I
 7 worked as his executive secretary.
 8 Q And how long did you have that position?
 9 A Shortly after that, he was also made
 10 chairman of the board. And I was his executive
 11 secretary until 1984.
 12 Q And what happened then?
 13 A Then he retired and I was transferred to
 14 the trust area, Trust Department.
 15 Q Okay. When you were executive secretary
 16 for the president of the National Savings Trust, who
 17 then became chairman of the board, what were your
 18 responsibilities?
 19 A Executive duties, secretarial duties.
 20 Basically, writing letters, preparing documents for
 21 loans, and that sort of thing, and ratifying minutes
 22 and things that had to be presented to the board.

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 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 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 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 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.

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

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 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

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?

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 certain size?
2 A Yes. And to be honest with you, I can't
3 remember the amount that has to be approved by an
4 officer. But there would be checks that had to be
5 initialed.

6 Q All right. Other than giving her the
7 curtesy and the service of faster check processing,
8 were there any other dealings that you had with
9 Ms. Mangiapane at that time?

10 A Well, we became good friends. And there
11 was a time when she needed a reference letter, which
12 I prepared for her.

13 Q And after that, were there other -- any
14 other services until we get to the -- I am going to
15 ask you about the letter that was written with
16 respect to Mr. Sine, February 6. But before that
17 point, you had provided services for her as a
18 depositor to get her checks cashed?

19 A Uh-huh.

20 Q You had written a reference letter at her
21 request. Were there any other banking services that
22 you provided to her?

1 amount. And she was always on the large balance
2 list, which indicated that, you know, she was
3 carrying good balances.

4 Q And when you say high balance list or good
5 balances, can you tell us an approximate dollar
6 range?

7 A I think most of these were probably around
8 \$50,000 or over, so.

9 Q What was the largest amount that you were
10 aware of that the Diana Group ever had in the
11 account?

12 A I am not really sure. I remember, I think,
13 the account showing up a \$260,000 balance in it at
14 one time.

15 MR. MARSHALL: Would you say how much it
16 was again?

17 THE WITNESS: Around \$260,000.

18 BY MS. POWELL:

19 Q Was there an occasion when Ms. Mangiapane
20 showed you some bonds or some kind of evidence of
21 worth in the form of certificates or bonds?

22 A Uh-huh. She showed me a copy of some

1 A Well, they had a safe deposit box. I
2 opened that for her. If she needed a cashier's check
3 or something along that line, which comes under the
4 preferred banking service. Pretty much regular
5 banking services really.

6 Q Okay. Did -- what was your understanding
7 of the Diana Group, Inc. and the relationship between
8 Ms. Mangiapane and Diana Group, Inc.?

9 A I knew that she was basically the president
10 or whatever, chairman or whatever, that the company
11 belonged to her.

12 Q And in the course of getting to know
13 Ms. Mangiapane, you said we became friends. Did you
14 see her socially outside the bank?

15 A We had dinner on an occasion. And that was
16 about it.

17 Q What did Ms. Mangiapane say to you about
18 herself or her company or her assets?

19 A Well, basically, we discussed some of her
20 private life. We had a common interest with
21 animals. She had pets and I had pets. And we kind
22 of shared stories with, you know, each other about

1 bonds, Brazilian bonds, I believe they were,
2 indicating they were worth over \$600 million.

3 Q And what was her stated purpose in showing
4 you those bonds?

5 A That she had these bonds to be used at her
6 discretion.

7 Q And those bonds were not deposited or at
8 Crestar Bank, were they?

9 A No.

10 Q She just showed them to you?

11 A Right.

12 Q Was that in connection with her asking you
13 for a letter of reference or do you recall?

14 A It led up to that, yes.

15 Q Did Ms. Mangiapane or the Diana Group ever
16 seek any loan from you or from Crestar Bank through
17 you?

18 A I know that she did speak with our
19 commercial lending officer Roy Johnson. I am not
20 sure or I can't remember the amount that she was even
21 discussing with him since we aren't part of the
22 lending.

1 that and kind of got to know each other better.

2 Q What did she tell you about her business
3 dealings or her assets?

4 A Basically, that she was involved with
5 investments and that sort of thing.

6 Q What was your impression of her standing or
7 net worth or asset picture?

8 A Well, I felt she had a very high net
9 worth. And --

10 Q Was that because of things she had told you
11 or indicated to you?

12 A When I first arrived at the bank branch,
13 she had substantial balances in the accounts for the
14 Diana Group. And she had shown me statements and
15 things that indicated that, you know, these funds
16 were available to her.

17 Q When you say substantial balances, what do
18 you mean?

19 A I can -- we receive a high balance list
20 each day in the branch. And it shows all the
21 commercial accounts and personal accounts that
22 customers have and exceed a balance over a certain

1 Q When you say we aren't part of the lending,
2 what do you mean?

3 A Well, I mean, we have no lending authority
4 in the branches. So that information is turned over
5 to the commercial account manager to follow up with
6 that.

7 Q So there is no loan officer at the
8 Georgetown branch?

9 A No.

10 Q And no lending authority at the Georgetown
11 branch?

12 A No.

13 Q And did Ms. Mangiapane make you aware that
14 she wanted to talk with someone about a commercial
15 loan?

16 A I believe so. I am sure that's why she was
17 brought in to the --

18 Q So you would have sent her or did send her
19 to Rod Johnson?

20 A Uh-huh.

21 Q And he was in commercial lending?

22 A Right.

Q And where was he located?
A He was located at the 15th and New York Avenue office.
Q Did she go over there and see him or do you know?
A I think she just had a phone conversation with him. And basically, he told her, if I think correctly, I think she was talking about letters of credit and -- mainly. And the only way we could actually do a letter of credit would be to have collateral. And I think she was discussing that type of a transaction.
Q And what ever came of that?
A Nothing.
Q And why was that, do you know?
A Other than that he would require financial statements and, you know, information in order to complete it, so.
Q Did she decline to provide financial statements?
A Well, according to Rod, she never pursued it further.

Page 32

1 A She indicated she wanted to open up an
2 escrow account and that these funds -- a large amount
3 of money would be coming in into the escrow. And she
4 asked me to write a letter to Mr. Sine indicating
5 that once these funds were received that we, the
6 bank, would wire-transfer to Mr. Sine the amount that
7 was specified in the letter. She said it was an
8 escrow letter and had to be worded. And she gave me
9 the verbiage to use.
10 Q Did she indicate that after Mr. Sine sent
11 money into the escrow account that then the Diana
12 Group would transfer money in a particular amount
13 back to Mr. Sine?
14 A Yes, it was indicated in the letter that
15 once she received her funds that we would -- once
16 they were on deposit, that upon her authorization, of
17 course, that we would wire-transfer the amount
18 specified in the letter back to Mr. Sine.
19 Q Okay. And did she have the form or the
20 language for the letter that she wanted?
21 A Yes. She brought in and requested that I
22 sign or write the letter accordingly, that this was

Page 35

Q Were there any instances you were aware of
in which Ms. Mangiapane or Diana Group sought any
kind of financing or loan from Crestar Bank?
A No.
Q Have you told me about -- now, have you
told me about all the dealings that you had with
Ms. Mangiapane or Diana Group leading up to the Sine
matters that bring us here today?
A Uh-huh.
Q No other business dealings or transactions
that she approached you about?
A Other than the reference letters. And at
one point, she had talked to someone in our trust
area about opening a custodial account for the funds
that she would be bringing in because she needed to
keep them in a custodial account.
Q And you said she talked to someone in the
Trust Department about that?
A Right, uh-huh.
Q An where would that have been located?
A Also at 15th and New York.
Q And did you refer her to someone over

Page 33

1 the way the wording had to be because of the escrow.
2 And I basically was a little concerned by some of the
3 wording because it could be interpreted in some way
4 as to the bank being liable. And she said, you know,
5 this is not guaranteeing anything by the bank and
6 assured me
7 that -- and she explained to me how it read and why
8 it was reading the way it was and that the bank would
9 not be held liable.
10 MS. POWELL: Let me show you a copy of a
11 letter from Crestar's files, which I will ask the
12 reporter to mark as Exhibit 1 -- Johnson Exhibit 1,
13 please.
14 (Johnson Exhibit No. 1 -- 2/6/98 letter
15 from Sine, marked for identification.)
16 BY MS. POWELL:
17 Q Johnson Exhibit 1 is what looks like a file
18 copy. It doesn't have any letterhead on it, and it
19 doesn't have a signature on it. And it is a letter,
20 dated February 6, 1998, to Wesley Sine, reference
21 account Wesley F. Sine, attorney at law, fiduciary
22 and trust account number 120 -- I think that's a

Page 36

there?
A Yes, I had. She called me and she was real
excited because she had some access to some
treasuries. And she wanted to know how quickly we
could have them placed for her in the custodial
account. And she needed to act on it very quickly.
So I called someone immediately in our trust area,
and she met with them.
Q And what ever came of that?
A Nothing to my knowledge.
Q What did Ms. Mangiapane tell you was the
value of these treasuries?
A Around \$500 million.
Q All right. Does that complete the sort of
transactions or dealings that you had with
Ms. Mangiapane to that point?
A Pretty much so.
Q Now, did there come a time when
Ms. Mangiapane asked you to write a letter to Wesley
Sine in 1998?
A Yes.
Q Would you tell us about that, please?

1 36086, Bank Officer, Dave Taylor. And at the bottom,
2 it has your name as assistant vice president and
3 branch manager, Georgetown office. Is this the file
4 copy of the letter that Ms. Cree asked you to send or
5 do you know?
6 A Ms. Mangiapane.
7 Q I am sorry. I misspoke. Ms. Mangiapane.
8 A Yes.
9 Q When she presented -- when Ms. Mangiapane
10 presented the language to you, was it this exact
11 language or were there any changes that were
12 discussed?
13 A I am pretty sure it was exactly.
14 Q And -- excuse me. What did Ms. Mangiapane
15 explain to you in terms of the need for this
16 language -- why she wanted this letter?
17 A Well, this was up for an escrow account.
18 It had to be worded as such so that it complied with
19 the escrow agreement that she had with Mr. Sine.
20 Q Did she tell you that she had an escrow
21 agreement with Mr. Sine?
22 A She didn't outright say it, but she said it

1 had to be worded or at least -- I don't remember
2 exactly the conversation. But it was something to
3 the effect that it required this language in the
4 letter.
5 Q And she called the account an escrow
6 account. That was her terminology, wasn't it?
7 A Yes, that's how we opened it. And for each
8 transaction, she would always open a separate account
9 pertaining to that transaction.
10 Q Which she referred to as an escrow account?
11 A Right.
12 Q Now, after your discussion with
13 Ms. Mangiapane about this February 6, 1998 letter,
14 did you discuss it with anybody else at the bank or
15 elsewhere?
16 A No.
17 Q Did you discuss it -- had you ever heard of
18 Wesley Sine before?
19 A No.
20 Q And I take it, you didn't have any
21 conversations with him at that time?
22 A No.

1 Q Did you sign a version -- that's s-i-g-n --
2 of this letter which we have marked as Exhibit 1?
3 A When you say version --
4 Q Right. Well, this letter itself. This one
5 has no letterhead on it, because I think it's a file
6 copy.
7 A Yeah. The one I signed was Crestar
8 letterhead, uh-huh.
9 MS. POWELL: Let me just ask you to take a
10 look at a document from Mr. Sine's files, which I
11 will ask the reporter to mark as Exhibit 2.
12 (Johnson Exhibit No. 2 -- Fax of Letter,
13 Dated 2/6/98, marked for identification.)
14 BY MS. POWELL:
15 Q And this document was also marked in
16 Ms. Mangiapane's deposition as Exhibit 6 in her
17 deposition. The first page appears to be a fax cover
18 sheet from Nancy Cree to Wesley Sine. Did you
19 recognize the fax cover sheet?
20 A Yes. She asked me to fax it and then mail
21 it.
22 Q Did you fax it and then mail the original?

1 A As far as I know.
2 Q Okay. And then the second page of Exhibit
3 2 is a letter, dated February 6, 1998. Does that
4 appear to be a fax of the letter that you sent
5 to Mr. Sine?
6 A I am sorry. I didn't quite understand.
7 Q Right. This is Exhibit 2. The yellow
8 sticker on the front says Exhibit 2, and then the
9 second page of it is a letter, dated February 6.
10 Does this look like a fax copy of the letter that you
11 faxed to Mr. Sine?
12 A Yes, uh-huh.
13 Q And after you faxed this letter to him,
14 what occurred about it?
15 A This is where I get a little fuzzy. I am
16 not sure if he called to confirm that I had written
17 the letter. I know we did have that conversation,
18 and I specifically remember the one after -- for the
19 March 24. But I don't remember speaking with him on
20 this letter.
21 Q Okay. Did you speak with Ms. Mangiapane
22 about the fact that you had sent it or was she there

1 with you when you had sent it?
2 A I think she may have been there that day
3 for this one.
4 Q And what happened next in terms of -- this
5 letter recites that Mr. Sine would deposit \$25
6 million in a designated escrow account. Do you see
7 that part in the letter?
8 A Yes.
9 Q And then it indicates that Diana Group
10 would transfer to him within 30 days \$120 million.
11 Do you see that?
12 A Yes.
13 Q Did you request Ms. Mangiapane at all about
14 the nature of this transaction?
15 A Well, she basically had indicated this was
16 part of the large transaction that she was working on
17 for the \$500 million. And --
18 Q The same one that she had showed you or
19 told you that she wanted to talk to the Trust
20 Department on with respect to treasuries?
21 A Yes, uh-huh.
22 Q She told you this was part of that?

1 A Uh-huh.
2 Q Did she say anything else about the nature
3 of the transaction?
4 A Other than that, you know, if the bank
5 would be the custodial holder, that it could be
6 really beneficial for the bank as well as herself.
7 Q In what way did she say it would be
8 beneficial?
9 A The fees, opening up the custody account.
10 And apparently, her return would be very good as well
11 and that, basically, it would be worth, you know,
12 returning the \$120 million on.
13 Q To her?
14 A To her. I mean, to Mr. Sine even after
15 this transaction took place.
16 Q And, of course, that custodial account was
17 never opened, was it?
18 A Yes, it was.
19 Q Custodial or the escrow?
20 A Oh, no. The custodial account was never
21 opened.
22 Q Did you become aware after sending this

1 letter whether Mr. Sine ever wired the amount into
2 the escrow account?
3 A The \$24 million?
4 Q Right.
5 A No. She came in and showed me a letter
6 where the transaction had been cancelled.
7 Q Did she tell you anything more about it?
8 A We closed out the account.
9 Q You closed out the escrow account?
10 A Uh-huh.
11 Q So the escrow account was basically opened
12 for this purpose?
13 A This transaction.
14 Q This transaction and then closed when the
15 transaction didn't occur?
16 A Right.
17 Q Did Ms. Mangiapane tell you anything about
18 why the money wasn't wired in or what happened?
19 A Other than the fact that he could not come
20 up with the \$25 million.
21 Q You said she showed you a letter. Was it a
22 letter from Mr. Sine?

A Mr. Sine cancelling it, yes.

MS. POWELL: Let me just ask you to look at what has previously been marked as Exhibit 7 in Ms. Mangiapane's deposition, which I will ask the reporter to mark as Exhibit 3 in deposition.

(Exhibit No. 3 -- Sine Letter 3/12/98, marked for identification.)

BY MS. POWELL:

Q This is a letter from Mr. Sine's files, not from the bank files or Ms. Mangiapane's files. But can you tell whether this is the letter that she showed you or not or do you remember?

A It looks similar. I can't say for sure this is the exact one because I can't remember, to be honest with you. But the wording was basically that the transaction was being cancelled.

Q Okay. So the important part of whatever the letter was that she showed you was to the effect that it was cancelled?

A Yeah. She just wanted to let me know that this was not going to happen.

Q Okay. Now, do you remember about when that

was or how long after the February 6 letter that was?

A Not really. I just -- it may have been a few weeks or maybe a month or so. I can't really recall the exact time. I do remember her telling me that.

Q Okay. And did there come a time when she asked you -- Ms. Mangiapane asked you to write another letter -- a similar letter with different amounts in it?

A Yes. She said they had had a new amount that he could -- actually had pulled together and that -- and asked me to write the second letter changing the amounts.

Q Did she tell you that it was still in connection with this same matter involving treasuries in the amount of \$500 million or was this a different matter?

A It was -- I don't recall her telling me anything different other than it was still the same transaction, only a smaller amount.

Q And in between the time that you wrote the March -- I am sorry -- the time you wrote the

February 6 letter at Ms. Mangiapane's request and the time that you wrote the second letter in March, which we will talk about, were there any other things going in terms of the Diana Group or their dealings with the bank?

A I can't really say.

Q Okay. Nothing that stands out in your mind?

A No, I can't think of anything at this time.

MS. POWELL: Now, I want to show you next a copy of what appears to be a fax cover sheet and letter, which was previously marked as Exhibit 11 in Ms. Mangiapane's deposition and which we will mark as Exhibit 4.

(Johnson Exhibit No. 4 -- Letter from Cree to Sine, 3/24/98, marked for identification.)

BY MS. POWELL:

Q And I want to point out to you that the numbers down at the bottom right where the 5 and the zero's and the 18 and 19 are indicate that this was a 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

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

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 aware of that. And I said upon -- we just kind of
2 went over the letter. And I said, of course, upon
3 receipt of the funds into the account for the Diana
4 Group that we would wire-transfer back to him per her
5 authorization the amount stated in the letter. And
6 he said he was aware of that.
7 Q Did you fax the March 24 letter to Mr. Sine
8 or mail it or do you remember?
9 A I think I faxed this one to him as well. I
10 think she wanted to make sure that he received it in
11 the mail as well as to know that -- that she had
12 basically opened the account.
13 Q What about the original? Was that sent by
14 you or Ms. Mangiapane or do you remember?
15 A I know I had FedEx'd some things for her.
16 And I don't know if it was this one or the one before
17 that or how it was mailed.
18 Q Okay. Now, I want to show you a copy of a
19 letter that was also dated March 24, 1998, that is
20 similar to the one we just looked at, which was
21 marked as Exhibit 4. But this one has some language
22 added at the end. I want you to take a look at

1 and you told me about the conversation you had with
2 Mr. Sine -- did you have any other conversations with
3 Mr. Sine after this letter of March 24 was sent?
4 A I am not sure how many times he did call,
5 but he did call me several times. And each time he
6 called, I reiterated that this was not a bank
7 transaction and when Ms. Mangiapane didn't meet her
8 deadline that he would have to discuss this with her
9 because the bank was not guaranteeing anything other
10 than upon receipt of the funds that we would
11 wire-transfer to him what was stated, but this was
12 not a bank transaction and he would have to discuss
13 this with her.
14 Q Did you speak with Mr. Sine in between the
15 time that you wrote the letter and the time that he
16 wired -- I mean, you have told us about the
17 conversation that you had with him in which he wanted
18 to verify that you had sent the letter.
19 A Uh-huh.
20 Q And you had the conversation about it not
21 being a bank guarantee or obligation?
22 A Uh-huh.

1 that.
2 MS. POWELL: And I will ask the reporter to
3 mark this as Exhibit 5, please.
4 (Johnson Exhibit No. 5 -- Letter from Cree
5 to Sine, 3/24/98, marked for
6 identification.)
7 BY MS. POWELL:
8 Q If you will take Exhibit 4 and the second
9 page of it, which is the March 24 letter, and just
10 put it side by side with Exhibit 5 that I just handed
11 you, which is also a letter, dated March 24. It
12 appears to me to be the same except for an asterisk
13 and a sentence at the end. Do you see that?
14 A Uh-huh.
15 Q And the sentence besides the asterisk says,
16 The rights and obligations of the parties hereto may
17 not be transferred, nor assigned. And then next to
18 that there is something that looks like initials.
19 A Uh-huh.
20 Q Did Ms. Mangiapane ever come in and ask you
21 to execute a new letter or to add this language to
22 the March 24 letter?

1 Q And then he at some point wired the funds?
2 A Right.
3 Q Did you have any other conversations with
4 him in between that first conversation and the time
5 he wired the funds or do you know?
6 A I can't really remember exactly. I knew
7 that I needed to fax him a copy showing that the
8 money has been deposited. And I can't remember if he
9 called and asked me to do that or if Ms. Mangiapane
10 asked me to do it. But I did let him know that we
11 had received the funds.
12 Q And then after you received the funds, did
13 you have any conversations with Mr. Sine before the
14 time that the money was due under the terms of his
15 agreement with the Diana Group, or what was the
16 timing of those conversations, do you know or do you
17 remember?
18 A Well, he -- once he verified that I signed
19 the letter and we had the conversation about
20 explaining it wasn't a bank transaction and so forth,
21 I think his next call -- if he initiated the call to
22 verify the funds had been deposited or the next call

1 A I did not add the language to the letter.
2 Q Okay. The initials beside the asterisk
3 sentence, are those not your initials?
4 A No, they are not.
5 Q Were you even aware of the existence of
6 this letter with the asterisk language in the
7 lawsuit, or when did you become aware that it
8 existed?
9 A When I received a copy of it.
10 Q And when was that?
11 A I don't know if it was part of the package
12 that Mr. Sine had sent to my attorneys and that was
13 forwarded to me.
14 Q You are talking about after he sued the
15 bank and you?
16 A Yes, uh-huh.
17 Q Do you have any knowledge or understanding
18 as to how this language got added or who did it? Do
19 you know anything about that?
20 A Well, I don't quite understand what it
21 pertains to, but I know I didn't add it.
22 Q Now, after the March 24 letter was sent --

1 was basically because the funds had not been
2 transferred according to the letter on the date it
3 was due. And Ms. Mangiapane had told me that she had
4 satisfied him with the fact that she was willing to
5 pay him an additional \$25,000 for the delay of funds
6 and that the money would be forthcoming any day.
7 Q And during the month of May, did you have
8 conversations with Ms. Mangiapane about the delay in
9 her payment to Mr. Sine?
10 A Yeah, we discussed it. And she basically
11 had reassured me that there were holdups and these
12 things would be worked out and that the money would
13 be forthcoming and would certainly meet the deadline.
14 Q Did -- how many conversations do you think
15 you had with Mr. Sine all together concerning the
16 March 24 letter?
17 A Two or three.
18 Q Okay. So that would have been one
19 initially to verify that you had sent the letter and
20 in which you confirmed with him your mutual
21 understanding of the bank's not having any
22 obligation, and then another conversation perhaps

when he wanted some verification that his funds had been received by the bank. And you had another conversation with him about the meaning of the letter, and then a third conversation after the time that the funds were delayed in which you referred him to Ms. Mangiapane.

A Right.

Q Is that basically the sequence?

A Right, uh-huh.

MS. POWELL: Let me just show you a copy of a letter, which I will ask the reporter to mark as Exhibit 6.

(Johnson Exhibit No. 6 -- Letter from Sine 5/7/98, marked for identification.)

BY MS. POWELL:

Q Exhibit 6 appears to be a copy of a letter on Mr. Sine's letterhead to you with a copy to Ms. Mangiapane, dated May 7, 1998. And I will tell you that the number down at the bottom right with the D indicates that this was produced to us in this litigation by the Diana Group by Ms. Mangiapane and her lawyers. This did not come from Crestar's

files.

But I wanted to ask you whether you believe you received a copy of this letter with or without its enclosures in May of 1998?

A I think I did receive it. I am not real clear. But I know I called Ms. Mangiapane and discussed it with her or she came into the bank however. But we did talk about his letter.

Q Okay.

A And she told me that it was going to be resolved and not to worry about it.

Q Did the letter cause you any concern?

A No, because she assured me that everything was going to be taken care of.

Q The letter refers to Exhibit A and says that that's your letter of March 24, 1998. And then the first -- the next attachment has Exhibit A up at the top. And it is a March 24 letter with the asterisked language that we discussed earlier?

A Uh-huh.

Q Do you know whether you -- this was the first time you saw this changed version of the letter

or not?

A I don't remember him sending any of this information. He just sent his letter.

Q Okay. After discussing this letter with Ms. Mangiapane in May of 1998, did you do anything further about this matter?

A No, because I assumed she would handle it.

Q And I do have actually a version of this May 8 letter produced by Crestar with -- no, it does not have any attachments.

MS. POWELL: And I will ask the reporter to mark that as Exhibit 7.

(Johnson Exhibit No. 7 -- Letter from Sine, 5/8/98, marked for identification.)

BY MS. POWELL:

Q Exhibit 7 appears to be a copy of a letter, dated May 8, 1998, from Mr. Sine and shows at the bottom that Crestar produced it in this litigation. It doesn't indicate anything about when Crestar received the document. But in any event -- it has no attachments. And you think you saw something similar to this at about this time?

1 A Yeah, I am sure I saw something.

2 Q Did you have any conversations or
3 discussions with Mr. Sine as a result of receiving
4 this letter?

5 A No, only with Ms. Mangiapane.

6 Q And was she confident at that time that she
7 would be able to send the money to Mr. Sine?

8 A Yes.

9 MS. POWELL: Now, I want to show you next a
10 letter from the Diana Group's files, dated May 13,
11 1998, which I will ask the reporter to mark as
12 Exhibit 8.

13 (Johnson Exhibit No. 8 -- Letter from DGI,
14 5/13/98, marked for identification.)

15 BY MS. POWELL:

16 Q Exhibit 8 purports to be a letter, dated
17 May 13, 1998, from Mr. Sine to you with a copy to
18 Ms. Mangiapane. And it says, Pursuant to a request,
19 I am hereby authorizing that you change the transfer
20 date for the \$2,500,000 mentioned in your letter of
21 March 24, 1998, and the transfer date mentioned in my
22 letter of May 8, 1998, from May 13, 1998 to Friday,

1 May 15, 1998, but no later than Monday, May 18,
2 1998.

3 Do you believe you received or saw a letter
4 like this from Mr. Sine at this time?

5 A I don't remember it. But I am sure if I
6 received it, I would always call Ms. Mangiapane
7 whenever I received any letters from him and ask her,
8 you know, what does this mean? And basically, she
9 said that she was handling it, so.

10 Q Okay. And when the letter says, Pursuant
11 to request, did you understand that to mean
12 Ms. Mangiapane's request or did you have any
13 knowledge of that -- of how they came to change the
14 date?

15 A I was assuming that he had negotiated this
16 with Ms. Mangiapane.

17 Q In any event, it was not anything you had
18 discussed with him?

19 A No. I had never discussed any, you know,
20 changing of the transfer date or whatever as he so
21 calls mentioning in the letters. I had no
22 conversation regarding that.

1 Q Okay.

2 MS. POWELL: Next, I want to show you a
3 letter from -- that purports to be a letter from
4 Mr. Sine to you, dated May 21, 1998, which I will ask
5 the reporter to mark as Exhibit 9.

6 (Johnson Exhibit No. 9 -- Letter from Sine
7 to Cree, 5/21/98, marked for
8 identification.)

9 BY MS. POWELL:

10 Q Let me just give you a moment to read over
11 this document, Exhibit 9, before I ask you anything?

12 A Yeah, I remember. Yes.

13 Q Do you believe you received a copy -- this
14 letter is from Diana Group's files. But do you think
15 you saw or received it?

16 A I think I got something later after I
17 talked with Mr. Sine and, once again, told him that,
18 as I told him from her first conversation, that this
19 was not a bank transaction. It was between him and
20 Diana Group. And, you know, once we received the
21 funds, we would wire transfer. And then he was
22 trying to turn it around to say that this was a bank

1 guarantee. And I said that was incorrect. And he
2 knew it from the first conversation we had. So --
3 and then I -- once again, I referred him to
4 Ms. Mangiapane.

5 MS. POWELL: Okay. I now want to show you
6 a letter from -- it appears to be from Diana Group to
7 Crestar Bank, which I will ask to be marked as
8 Exhibit 10.

9 (Johnson Exhibit No. 10 -- Letter from
10 Mangiapane to Crestar, 5/21/98, marked
11 for identification.)

12 BY MS. POWELL:

13 Q Exhibit 10 appears to be a letter to your
14 attention to Crestar Bank, dated May 21, 1998, from
15 Ms. Mangiapane for and on behalf of Diana Group, Inc.
16 And if you just take a minute to read that to
17 yourself, then I want to ask you about it.

18 A The letter looks familiar.

19 Q Do you know whether you received a copy of
20 this letter Exhibit 10?

21 A Not really. I can't remember, to be honest
22 with you.

1 Q Did you have conversations with
2 Ms. Mangiapane similar to what she says in this
3 letter?

4 A Yes.

5 Q And did she tell you that Dr. Sine was not
6 abiding by the terms of her agreement with him?

7 A Yes.

8 Q Did she tell you that it was her
9 understanding and Dr. Sine's understanding that the
10 letter created no obligation on the part of Crestar,
11 but that Dr. Sine was evidently trying to disregard
12 that?

13 A Yes.

14 Q And did she apologize to you as she did in
15 this letter evidently of May 21, 1998?

16 A Uh-huh, she sure did.

17 Q What did she tell you in terms of, you
18 know, whether she would take care of this or whether
19 there was anything you should do?

20 A She told me that she would handle the
21 situation completely and that she would satisfy
22 Mr. Sine very soon and this would all be forgotten.

1 Q And how frequently were you speaking with
2 Ms. Mangiapane in May of 1998?

3 A I guess basically whenever I had a
4 conversation or a letter from Sine, I would let her
5 know the situation at hand. And --

6 Q Did there come a time when you became aware
7 that the money had not been transferred and was not
8 going to be transferred?

9 A Later.

10 Q All right. How long did this stretch out,
11 do you remember?

12 A Of course, once I received the subpoena
13 from Mr. Sine, I was still told that the transaction
14 would take place.

15 Q You mean --

16 A And that there were some holdups that was
17 being worked up.

18 Q After Mr. Sine filed suit against the bank
19 and you personally and you received the summons or
20 documentation that you had been sued --

21 A Right.

22 Q -- then did you talk to Ms. Mangiapane

1 about the fact that you had been sued?

2 A Yes.

3 Q And what did she tell you then?

4 A She told me not to worry, that, you know,
5 she would handle it, and that this would all be
6 resolved before it even would be considered to go to
7 court, so.

8 Q And at that point in time, was she still
9 indicating that she was going to receive the funds
10 and pay them to Mr. Sine?

11 A That is correct, and that she was still
12 communicating with Sine and trying to work something
13 out.

14 Q And what were the next events that
15 occurred?

16 A Well, basically, the transaction was never
17 completed. And, of course, we continued on with the
18 case. And it resulted in the fact that I was
19 terminated from the bank and basically defending
20 myself to be sued by Mr. Sine.

21 Q And did you have any further conversations
22 with Mr. Sine about this matter other than the ones

1 you have told us about already?

2 A No.

3 Q Did you have any further dealings with
4 Ms. Mangiapane after those conversations that you
5 have just described to me?

6 A Well, I was on administrative leave from
7 the bank. We did have several conversations when I
8 was at home and basically telling me that, you know,
9 this was going to be taken care of and apologized for
10 the delay, that there were certain things that were
11 supposed to happen that didn't happen. And she was
12 still making the effort and still reassuring me that
13 the funds would be there and that the case would
14 never go further.

15 Q Did you have any further conversations
16 with Mr. Sine at that point?

17 A No.

18 Q Did you ever have any conversations with
19 Ray Emery?

20 A No.

21 Q Did you ever have any conversations or
22 knowledge of Roy Fisher?

1 A No.

2 Q Did you have any conversations or dealings
3 with William R. Franklin?

4 A No.

5 Q Did you ever have any conversations or
6 dealings with La Donna Rosellini?

7 A No.

8 Q Did you ever have any dealings or
9 conversations with Lamar International, Limited?

10 A No.

11 Q Did you ever have any conversations or
12 dealings with Herman Flowers?

13 A No.

14 MS. POWELL: Let's take a break at this
15 point. It is about five after 11. And then I will
16 have some more questions for you -- not too many.

17 (11:09:24) THE VIDEOGRAPHER: It is and we
18 are going off the record.

19 (A recess was held.)

20 (11:21:59) THE VIDEOGRAPHER: Okay. It is
21 and we are back on the record.

22 BY MS. POWELL:

Q All right. Ms. Johnson, I would like to show you some affidavits that you filed in connection with this lawsuit, okay?

A Okay.

MS. POWELL: The first one I will ask the reporter to mark as the next exhibit, which is going to be 11.

(Johnson Exhibit No. 11 -- Affidavit, 7/30/98, marked for identification.)

BY MS. POWELL:

Q Exhibit 11 is entitled Affidavit of Nancy Y. Cree, and it is the matter of Sine versus Crestar Bank, et al. And on the last page, the signature page, your name appears or it appears to be your signature and date of 30th of July, 1998. Do you see that?

A Yes.

Q And is that your signature?

A Yes, it is.

Q And was this a statement that you submitted under oath to the court?

A Yes, it is.

Page 68

Q And did you review it carefully with your counsel to make sure that it was correct?

A Yes, I did.

Q And did you, in fact, give your lawyers information for them to use in preparing this affidavit?

A Yes, I did.

Q All right. Let's look at paragraph five of the affidavit. This recites that on or about February 5, 1998, Ms. Mangiapane provided me with Mr. Sine's address and asked you to send the letter. Does this paragraph describe what we have talked about today in terms of the way that that letter got sent?

A Yes.

Q And is this a correct statement here?

A Yes.

Q Then you say, When I questioned her about the wording of the letter, Ms. Mangiapane insisted it had to be worded exactly as she requested and assured me the bank was in no way guaranteeing the funds itself, but was acting on behalf of DGI. Is that

Page 69

also a correct statement?

A Right.

Q And, of course, that's what you have testified here about today as well?

A Right.

Q And is this your testimony here today?

A Yes.

Q Now, with respect to the March 24 letter, there is a reference to it as Exhibit 2 to this affidavit. And I believe your counsel later corrected the fact that the wrong document was attached as the March 24 letter because this one has the asterisked language in it. Do you remember that?

A Right.

Q Now, looking back at the affidavit itself on page -- well, they don't have page numbers. On the paragraph that's numbered 13?

A Uh-huh.

Q Would you read that paragraph, please, into the record?

A "Mr. Sine telephoned me at Crestar Bank on March 24, 1998, to verify that I had sent the

1 letter. I told Mr. Sine in that telephone
2 conversation that Crestar would only wire the money
3 when the bank received the funds from DGI and that it
4 was not a bank transaction. Mr. Sine said he
5 understood that and further understood that Crestar
6 would only wire money in accordance with instructions
7 from Ms. Mangiapane."

8 Q And is this your testimony here today?

9 A Yes, it is.

10 Q And this is a correct statement of
11 paragraph 13 of your affidavit?

12 A Yes, it is.

13 Q Paragraphs 14 and 15 concern your other
14 conversations with Mr. Sine. Could you read those as
15 well, please?

16 A "Mr. Sine also called at least two other
17 times regarding the payment from DGI. Each time he
18 called, I reiterated that the transaction was between
19 him and DGI and the bank could only act when it
20 received funds from its customer DGI."

21 Q And are those correct statements, also?

22 A Yes, they are.

Page 71

1 Q Is this your testimony here today?

2 A Yes, it is.

3 MS. POWELL: Let me ask you next to look at
4 another affidavit, which I will ask the reporter to
5 mark as the next exhibit, which is going to be what?

6 THE REPORTER: Twelve.

7 MS. POWELL: Twelve.

8 (Johnson Exhibit No. 12 -- Affidavit,
9 8/31/98, marked for identification.)

10 BY MS. POWELL:

11 Q Exhibit 12 is an affidavit filed in this
12 case. And on the signature page, it is dated August
13 31, 1998, and appears to be signed by you. Is that
14 your signature?

15 A Yes, it is.

16 Q And did you, once again, go over this
17 affidavit with your counsel and make sure that it was
18 correct?

19 A Yes, I did.

20 Q I would like to refer you to paragraph
21 seven of the affidavit concerning a letter from
22 Mr. Sine, dated May 8. And in this paragraph seven,

Page 72

1 you state, Contrary to Mr. Sine's assertion, I did
2 not request any such agreement regarding the payment
3 date. And I did not request that Mr. Sine send me
4 such a letter.

5 Was that -- is this a correct statement?

6 A Yes, it is.

7 Q And is this your testimony here today as
8 well?

9 A Yes, it is.

10 Q You also say, However, even if I had
11 noticed it at that time, it would not have caused me
12 to communicate with Mr. Sine about the error because
13 it was my understanding that the transaction
14 discussed in the letter was one between Mr. Sine and
15 DGI and was not a bank transaction. Moreover, as
16 indicated in my earlier affidavit, I had already
17 talked with Mr. Sine back in late March 1998 and
18 expressly told him that the bank would not transfer
19 the funds to him until the bank received the funds
20 from DGI. And Mr. Sine told me that he understood
21 that fact.

22 Is that a correct statement?

1 A Yes, it is.
 2 Q And is that your testimony here today as
 3 well?
 4 A Yes, it is.
 5 Q Would you read into the record paragraph
 6 nine of the affidavit, please?
 7 A "At all times, it was my understanding that
 8 the transaction discussed in my letter of March 24 to
 9 Mr. Sine was one between Mr. Sine and DGI and was not
 10 a bank transaction. I never understood or believed
 11 that the March 24 letter was any sort of guarantee of
 12 the transfer of the funds from DGI to Sine but,
 13 rather, it was merely a confirmation that the funds
 14 would be transferred to Sine after the bank received
 15 the funds DGI. If I had understood that I was being
 16 requested to issue a guarantee on behalf of the bank
 17 of the transfer of the funds to Sine, I would have
 18 declined to sign the letter. Among other reasons,
 19 during the time that I had an assistant vice
 20 president of Crestar Bank and branch manager of its
 21 Georgetown branch, I have never had authority to
 22 issue any kind of guarantee on behalf of the bank.

1 Indeed, during that time, I have never even had
 2 discretionary lending authority in any amount,
 3 although I have had discretionary authority to cover
 4 overdrafts of bank customers up to a limit of
 5 \$5,000. The issuance of guarantees in any amount is
 6 not and has never been a part of my authorized
 7 duties."
 8 Q And is this paragraph that you just read
 9 for us a correct statement?
 10 A Yes, it is.
 11 Q And is this your testimony here today as
 12 well?
 13 A Yes, it is.
 14 Q And so that if there had ever been any
 15 contention that the letter of March 24 in any way
 16 obligated the bank to pay any funds, you would never
 17 have signed such a letter. Is that what you are
 18 saying?
 19 A Yes, I am.
 20 Q And are you also saying that you would have
 21 had no authority to sign off such a letter?
 22 A No, I would not have.

1 Q And I believe you indicate here that you
 2 had no lending authority other than the authority to,
 3 in your discretion, cover overdrafts up to \$5,000; is
 4 that right?
 5 A That is correct.
 6 Q And what was that authority with respect to
 7 covering overdrafts?
 8 A I could actually overdraw a
 9 customer's account up to \$5,000 based on other
 10 relationships with the bank. And anything that
 11 exceeded the \$5,000 had to be approved by a market
 12 manager.
 13 Q And when you say other accounts or other
 14 relationships --
 15 A Other accounts.
 16 Q -- what do you mean?
 17 A Other money market account with substantial
 18 balance to cover a new bank debt. They forgot to
 19 make a transfer or they could have had other
 20 relationships in the Trust Department. They could
 21 have had a trust account. They could have had a
 22 certificate of deposit of some other funds within the

1 bank that were not accessible to us. And without
 2 their authorization, we cannot make the transfer.
 3 Q So in those instances where you would have
 4 a customer who has obviously funds at the bank and
 5 has presumably just through oversight gotten into an
 6 overdraft situation, you would have had authority to
 7 cover that overdraft up to \$5,000; is that correct?
 8 A That is correct.
 9 Q And that's the only authority you had with
 10 respect to committing funds at the bank or
 11 potentially funds of the bank?
 12 A That is correct.
 13 Q Would you read paragraph ten into the
 14 record, please?
 15 A "To my knowledge, neither I, nor any other
 16 employee or agent of Crestar Bank has ever said or
 17 otherwise indicated to any of our customers or any
 18 other members of the public that I or any individual
 19 employee at the bank could issue any form of
 20 guarantee on behalf of the bank or that the bank had
 21 ever consented to allow me or any individual employee
 22 of the bank to issue any form of guarantee on behalf

1 of the bank."
 2 Q And is this a correct statement?
 3 A Yes, it is.
 4 Q And is this your testimony here today?
 5 A Yes, it is.
 6 Q And I take it, then, that you have never
 7 indicated in any way to anyone that you had any
 8 authority to issue any kind of guarantee on behalf of
 9 Crestar Bank?
 10 A That is correct.
 11 Q And that there is nothing that you have
 12 ever said to Mr. Sine or Ms. Mangiapane or anybody
 13 else to indicate that you had any such authority?
 14 A That is correct.
 15 Q Now, would you read paragraph 11 into the
 16 record, please?
 17 A "The instructions referred to by Mr. Sine in
 18 the complaint, paragraph 13, and in the reply
 19 memorandum to Crestar Bank's motion to dismiss and
 20 memorandum for summary judgment, page four, were not
 21 viewed by me prior to the transmission of funds to
 22 the Diana Group account. Moreover, in the ordinary

1 course of business, neither I, nor any other Crestar
 2 employee would review such instructions."
 3 Q And is that a correct statement?
 4 A Yes, it is.
 5 Q Is that your testimony here today as well?
 6 A Yes, it is.
 7 Q And what does this refer to in terms of
 8 wire instructions? What were you referring to her?
 9 A This is instructions that Mr. Sine claimed
 10 that a company sending of the wire transfer for the
 11 \$500,000 to the bank and when it is done
 12 electronically -- first of all, the branches do not
 13 receive any notification other than the funds being
 14 deposited to the account, that if he had a message or
 15 written instructions, we would never be notified or
 16 aware of them. And also, the Wire Transfer
 17 Department would not have access to the message as
 18 well.
 19 Q So no one would have seen any purported
 20 message that he says accompanied his wire?
 21 A Absolutely not.
 22 Q Now, paragraphs 12 and 13 relate to the

sentence that was added to the March 24 letter, don't they?

A Uh-huh.

Q Do you see that?

A Uh-huh.

Q And are these statements accurate here today and are they your testimony here today as well?

A Yes, they are.

Q And referring to paragraph 13 of the affidavit, the letter attached as Exhibit 2 to your earlier affidavit, which is the one with the asterisked sentence, appears to be an altered copy of the letter of March 24. Would you read into the record what you said about that in your affidavit here. It starts with, "I was not aware," paragraph 13?

A Oh, 13. I was not aware of -- excuse me. "I was aware of nor involved in the making of such altered copy of my letter, and the alteration, i.e., the addition of the last sentence of the letter, which is preceded by an asterisk, was added without my knowledge or consent. Although the alteration

appears to be initialed by me, I did not initial the document. In fact, I had never seen the altered version of the document until several months later."

Q And that's the same as you have testified about here today; isn't it?

A That is correct.

Q So that's a correct statement and is your testimony here today as well?

A Yes, it is.

Q Let me ask you next to look at another exhibit, this one submitted in this case in connection with Crestar Bank's opposition to Plaintiff's Amended Motion For Summary Judgment.

MS. POWELL: And I will ask the reporter to mark this one as the next exhibit, which will be?

THE REPORTER: Thirteen.

(Johnson Exhibit No. 13 -- Affidavit, 4/14/99, marked for identification.)

BY MS. POWELL:

Q Exhibit 13 appears to be a copy of an affidavit you submitted in this case. And it has a signature for you, dated April 15, 1999. Do you see

that signature page?

A Yes, I do.

Q Is that your signature?

A Yes, it is.

Q And was this, again, an affidavit that you reviewed with counsel and made sure it was accurate before you signed it?

A That is correct.

Q This affidavit refers to concepts of verification and certification, does it not?

A Yes.

Q And they -- the affidavit was filed in response to some contentions that Mr. Sine had made in one of the briefs that he filed with the court. Was that your understanding?

A Yes.

Q And what was the distinction that you describe in this affidavit between something that's certified, such as certified check? Why don't we go at it this way. Why don't you just describe what a certified check is?

A A certified check is an actual check

1 written by a customer and is brought into the bank to
2 have it certified. And basically, what happens is
3 the customer will present the check, a certification
4 stamp is paid on it, the funds are immediately held.
5 And they have to be available in order to certify the
6 check. There is a magnetic strip on the bottom where
7 the account number is because they do not want to
8 process the check twice. And then it is given back
9 to the customer. And once they present it to their
10 client or if they are closing on a loan or whatever,
11 then they, too, at that point can deposit it, because
12 the funds have been certified that they have been
13 held.

14 Q And in paragraph five of your affidavit,
15 you say, My March 24, 1998 letter does not constitute
16 the certification of a check. There was no check
17 from the Diana Group or any other Crestar depositor
18 to Mr. Sine that could have been certified.
19 Moreover, even if there had been a check, the
20 certification of the check would have to have been
21 made on the check itself, not by separate letter. In
22 banking practice, it is my understanding that a

1 separate letter cannot be used to certify
2 availability of funds.

3 Was that a correct statement?

4 A That is correct.

5 Q And is that your testimony here today?

6 A Yes, it is.

7 Q And then you talk about this concept of
8 verification of funds that Mr. Sine referred to in
9 his brief in paragraph six. Can you explain to us
10 what is understood or what you understood to be the
11 concept of verification and what this letter is and
12 isn't?

13 A Well, when you are verifying a customer's
14 balances, the funds actually have to be in the
15 account. And this verification is only done through
16 our Credit Department. And basically, it is usually
17 done because someone is buying a mortgage or applying
18 for a mortgage to buy a house and those types of
19 transactions. But the funds have to be showing in
20 the balance in order to be verified.

21 Q Okay. And was there anything about the
22 March 24 letter that made it a verification of

1 anything?

2 A Absolutely not.

3 Q Would you also read into the record,
4 please, paragraph seven of your affidavit?

5 A "While I was employed by Crestar Bank, I
6 never had authority to issue letters or other
7 documents to third parties verifying funds or
8 otherwise disclosing a depositor's account balances,
9 nor did I have authority to issue letters or other
10 documents indicating the sufficiency of funds in an
11 account to cover a promise to pay funds. Issuing
12 such letters or other documents was never part of my
13 authorized duties. Letters or other documents
14 disclosing account balances or otherwise indicating
15 the level of an account balance could only be issued
16 to third parties, such as Mr. Sine at the request of
17 a depositor by Crestar's Credit Department Inquiry
18 Department. Such letters or documents could not be
19 issued by me or by the branch office I manage. The
20 only exception to this was when I or my branch could
21 disclose an account balance in rare instances to
22 facilitate last-minute mortgage loan closures. And

1 even then, we had to obtain the information and
2 approval to disclose it from the Credit Inquiry
3 Department."
4 Q Is this statement a correct statement
5 today?
6 A Yes, it is.
7 Q And did this statement accurately describe
8 the authority that you had or didn't have at Crestar
9 Bank?
10 A Yes, it does.
11 Q And is this your testimony here today as
12 well?
13 A Yes, it is.
14 Q Would you also read paragraph eight into
15 the record, please?
16 A "To my knowledge, neither I, nor any other
17 employee or agent of Crestar Bank has ever said or
18 otherwise indicated to any of our customers or any
19 other member of the public that I or any individual
20 employee at the branch I manage could issue letters
21 or other documents verifying account balances with
22 the exception noted in the previous paragraph."

1 Q And that exception was the last-minute
2 mortgage situation?
3 A That is correct.
4 Q And is this a true statement as well?
5 A Yes, it is.
6 Q And is this your testimony here today?
7 A Yes, it is.
8 MS. POWELL: Thank you, Ms. Johnson. Those
9 are all the questions I have at this time. I
10 appreciate your time.
11 EXAMINATION BY COUNSEL FOR THE DEFENDANTS
12 DIANA GROUP, INC. and JOSEPHINE MANGIAPANE
13 BY MR. MARSHALL:
14 Q I would like to ask you some questions. My
15 name is John Marshall. In this action, I represent
16 the Diana Group, Inc. and Josephine Mangiapane. I
17 hope you will pardon me if I refer to you to as
18 Mrs. Cree.
19 A That's fine.
20 Q Rather than Mrs. Johnson because that's the
21 only way I have ever known you in all of the
22 correspondence and everything else that's happened in

1 this lawsuit up to this time, so. I am sure I would
2 make a slip. In the interest of consistency, I will
3 just refer to you as Mrs. Cree if that's all right
4 with you.
5 A That's fine.
6 Q Thank you. Would you state the date as
7 best you can -- I don't need the exact date -- but a
8 time frame in which you first became acquainted with
9 Ms. Mangiapane?
10 MS. POWELL: Objection. Asked and
11 answered.
12 MR. MARSHALL: Well, I haven't asked and
13 answered it before.
14 MS. POWELL: It's been asked and it's been
15 answered.
16 MR. MARSHALL: Well, I have a right to ask
17 it.
18 MS. POWELL: You don't have a right to be
19 repetitive.
20 MR. MARSHALL: I do. It's not being
21 repetitive if I haven't asked it before.
22 MS. POWELL: I have made my objection.

1 BY MR. MARSHALL:
2 Q All right. Would you answer that, please?
3 MS. POWELL: You can answer.
4 THE WITNESS: I can answer?
5 MS. POWELL: (Nodding.)
6 THE WITNESS: Well, I came to the branch in
7 May of '95. And some period during that time, I was
8 introduced to her.
9 BY MR. MARSHALL:
10 Q So it was shortly after you came to the
11 branch?
12 A Right.
13 Q Do you have any idea or any estimate of how
14 often you would see Ms. Mangiapane in the branch that
15 you were managing -- the Georgetown branch, that is?
16 A That would be hard to say because in the
17 first year I just was really getting to know her.
18 And then towards the period of time that we started
19 knowing each other better, I would see her more
20 frequently.
21 Q Do you have any idea how frequently you
22 would have seen her in the latter time period?

1 A No, I couldn't really tell you.
2 Q Would it normally be more than once a week?
3 A Well, it could be once a week. It could
4 have been twice a week or not at all.
5 Q Okay. Did she ever -- did Ms. Mangiapane
6 ever tell you how long she and her companies had been
7 customers of Crestar Bank or its predecessor?
8 A Yes, she did.
9 Q And can you remember when she said that?
10 A I can't tell you the exact time, but it was
11 prior to writing a reference letter for her. And she
12 had indicated that she was a customer of United
13 Virginia Bank and had accounts in Richmond.
14 Q And did she say how long she had been a
15 customer of United Virginia Bank?
16 A Well, she said she thought it was either
17 the latter part of the '70s or early '80's. We
18 couldn't really come up with an exact date.
19 Q Did you ever try to verify her statement?
20 A We tried looking in the records to see if
21 any of the old UVB accounts actually showed
22 anything. And all those records were either in the

1 old files or couldn't really be verified.
2 Q Was that because you couldn't access those
3 files?
4 A Well, the bank changed names, and some of
5 the records are only kept for certain periods of time
6 and then they are destroyed, so.
7 Q Okay. Would you tell me when you were the
8 branch manager at the Georgetown branch who were your
9 immediate superiors in the banking system?
10 A Well, Mike Seahack was my market manager.
11 And then I had an operations person and a salesperson
12 that I reported to.
13 Q Say the name again? ---
14 A Mike Seahack.
15 Q Yes. But the other one?
16 A I had an operations person and a sales
17 manager I reported to.
18 Q And who was the operations person?
19 A Nancy Wilson.
20 Q Nancy Russon?
21 A Wilson.
22 Q Wilson. Pardon me. And who was the

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 in
 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 E

PARTICIPANT TRUST AGREEMENT, ENHANCED PROJECTS FUNDING PROGRAM

THIS TRUST AGREEMENT IS ENTERED INTO THIS 09TH OF JUNE, 1997 BY AND BETWEEN THE FOLLOWING PARTIES, ROY P. FISHER, PRINCIPAL, AS TRUSTOR, REPRESENTING UNITED CAPITAL GROUP, LTD., AGREES TO APPOINT, DR WESLEY F. SINE, JR. AS TRUSTEE, WITH CPF CAPITAL MANAGEMENT INC., (CPF) RAY D. EMERY PRES., AS ADVISOR TO TRUSTEE, AND PROGRAM COORDINATOR, FOR A ONE YEAR TERM PARTICIPATION IN SPECIAL PROJECTS FUNDING PROGRAM.

WHEREAS, TRUSTOR CURRENTLY HOLDS &/OR CONTROLS CERTAIN USD CASH FUNDS TO BE PLACED BY TRUSTOR/TRUST TO CAPITALIZE PARTICIPATION IN ONE YEAR PROJECT FUNDING PROGRAM, IN EXCHANGE FOR BANK ISSUED GUARANTEE TO DELIVER \$1.5MILUSD FOR EACH OF TEN MONTHLY FUNDING, DELIVERED OVER TWELVE MONTH PERIOD, AS SUPERVISED BY TRUSTEE. AND

WHEREAS, TRUSTOR DESIRES SAID USD CASH, BE DELIVERED TO DESIGNATED DUAL SIGNATURE ATTY/TRUSTEE ACCOUNT, IN BANK OF AMERICA, AS DIRECTED BY TRUSTEE. TRUSTEE SHALL SUPERVISE EXCHANGE OF SAID CASH FOR ACCEPTABLE (BANK FORM & WORDING TO BE PRE-APPROVED BY TRUSTOR & TRUSTEE & ADVISOR) BANK ISSUED GUARANTEE TO DELIVER TEN MONTHLY PAYMENTS OVER ONE YEAR). TRUSTEE TO SUPERVISE RECEIVING BANKS AUTHENTICATION & VALIDATION OF BANK ISSUED GUARANTEE TO PAY INSTRUMENTS. WITHIN ONE BANKING DAY OF RECEIPT & ACCEPTANCE OF MONTHLY GUARANTEE TO PAY (BANK CERTIFIED INVOICE FORM). TRUSTOR & TRUSTEE SHALL CAUSE TRUSTOR FUNDS TO BE RELEASED IN EXCHANGE FOR BANK ISSUED GUARANTEE TO PAY WITH ACCEPTANCE OF BANK GUARANTEES (10 MONTHLY FUNDING(S), & ONE YEAR P&I GUANT.) PARTICIPATION IN PROJECT FUNDING PROGRAM IS ACTIVATED. AT ALL TIMES TRUSTOR FUNDS &/OR BANK ISSUED GUANT TO PAY, SHALL BE PROTECTED TO THE BEST OF THE ABILITY OF BOTH TRUST AGREEMENT & TRUSTEE FUNDS SHALL BE PLACED IN PROGRAM FOR SAFETY OF CAPITAL. WITH MAXIMUM FUNDING. NOTE: A SPECIAL DISBURSEMENT ESCROW, TO SECURE & ASSURE TRUSTOR(S) TEN MONTHLY \$1.5MILUSD FUNDING(S), SHALL BE OPENED BY TRUSTEE & ADVISOR IN ESCROW BANK SAID BANK ESCROW SHALL BE FUNDED WITH THE TRUSTOR & TRUSTEE'S DEPOSIT OF BANK ISSUED GUARANTEE TO PAY (TEN MONTHLY PAYMENTS) ISSUED TO THE BENEFIT OF TRUST AGREEMENT #CPFCM/UCG-ROY/500, RECEIVED BY TRUSTEE FOR FURTHER ASSIGNMENT TO ESCROW ACCOUNT AND DISBURSEMENT AS DIRECTED AND

WHEREAS, ADVISOR REPRESENTS, AND TRUSTEE ASSURES TRUSTOR, PROGRAMS ANTICIPATED FINANCIAL TRANSACTIONS SHALL BE CONDUCTED IN COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS OF THE NATIONS WHERE TRANSACTIONS TAKE PLACE, INCLUDING, BUT NOT LIMITED TO, COMPLIANCE WITH THE INTERNATIONAL CHAMBER OF COMMERCE LATEST RULES & REGULATIONS, 400 & ICC500, REFERENCE PRACTICES FOR INTERNATIONAL BANKING CONVEYANCE OF ALL FUNDING SHALL BE DELIVERED INTO ALL ACCOUNT(S) AS BANK CERTIFIED CLEARED FUNDS: AND

WHEREAS, TRUSTEE, IN RELIANCE UPON REPRESENTATIONS OF TRUSTOR, & ADVISOR, IS AGREEABLE TO ACT AS TRUSTEE, TO PLACE & SUPERVISE CAPITAL ASSETS TO BE EXCHANGED FOR ACCEPTABLE BANK ISSUED GUARANTEE TO PAY INSTRUMENT AS PROTECTION OF TRUSTOR'S CAPITAL ASSETS TRUSTEE SHALL ASSIST IN OVERSEEING DISBURSEMENT OF PROJECT FUNDING DOLLARS BEING AS DIRECTED & AGREED. WHEN EXECUTED BY ALL PARTIES THIS TRUST AGREEMENT SHALL CONSTITUTE A READY WILLING AND ABLE TO PERFORM BY ALL PARTIES. FAILURE OF ANY ONE PARTY TO PROPERLY PERFORM HIS/HER TRUST OBLIGATION COULD PUT PROGRAM AT RISK OF FAILURE

CONTINUED ON PAGE 2

PROG# CPFCM/UCG-ROY/500

PAGE 1 OF 5



E000005

[Handwritten signature]
CPFCM
19 JUN 1997

CONT. FROM PAGE 1

AND PARTY(S) AT FAULT AT RISK OF PAYING REASONABLE LIQUIDATED DAMAGES.
IF ASSIGNED BY HEREIN STIPULATED MANDATORY AND BINDING ARBITRATION
NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. UNITED CAPITAL GROUP, LTD...... ACTING BY AND THROUGH TRUSTOR,
ROY P. FISHER_____, HEREBY APPOINTS DR WESLEY F. SINE, JD. AS TRUSTEE,
TO RECEIVE & DIRECT INTO TRUST AGREEMENT DOCUMENTS AND FUNDS AS AND
WHEN DIRECTED, AND SUPERVISE TRANSFER INTO BANK OF AMERICA_____. OF
TRUSTOR(S) \$500,000.00USD FUNDS, CAPITALIZING THE EXCHANGE OF CASH FOR
BANK ISSUED GUARANTEE TO DELIVER TEN MONTHLY FUNDING(S). TRUSTEE SHALL
OVERSEE ALL PHASES OF TRANSACTION ASSISTED BY ADVISOR & TRUSTOR (AS &
WHEN REQUIRED) TO ASSURE & SECURE TRUSTOR ASSETS & FUNDING. SHARING OF
FUNDS AND FINANCIAL REPORTS, FUNDING AS AGREED BY TRUSTOR & ADVISOR, ARE
COVERED UNDER SEPARATE CONFIDENTIAL DISBURSEMENT ORDERS.

2. TRUSTEE SHALL ACT ONLY UPON RECEIPT OF WRITTEN INSTRUCTIONS AS
ISSUED BY PROGRAM ADVISOR AND TRUSTOR REFERENCE THE SUPERVISION OF THIS
TRUST AGREEMENT ALL ORIGINAL INSTRUCTIONS SHALL REMAIN IN FORCE UNTIL
AMENDED IN WRITING BY THE ADVISOR, AND WHEN REQUIRED, AGREED TO BY THE
TRUSTOR.

3. TRUSTOR'S USD FUNDS SHALL CAPITALIZE THE EXCHANGE OF TRUSTOR
CASH FOR BANK ISSUED GUARANTEE TO PAY MONTHLY INSTRUMENTS (TO SECURE
CAPITAL ASSETS) AND ASSURE TRUSTOR TO SHARE A PORTION OF THE HEREIN
DESCRIBED PROJECT FUNDING PROGRAM MONTHLY FUNDING

4. TO THE EXTENT REASONABLY NECESSARY, THE TRUSTEE WILL OBTAIN SUCH
TECHNICAL ASSISTANCE AS MAY BE REQUIRED IN THE MANAGEMENT OF FINANCIAL
TRANSACTIONS OF THIS TRUST, ON SUCH TERMS AS THE TRUSTOR HAS AGREED TO.
ANY FEES AND EXPENSES INCURRED BY THE TRUSTEE, ON BEHALF OF THE TRUST,
SHALL BE REIMBURSED TO TRUSTEE FROM TRUST(S) FINANCIAL GROWTH FUNDS.

5. THE TRUSTEE & ADVISOR SHALL PROTECT AND DIRECT TRUSTOR CAPITAL
ASSETS, \$500,000USD FUNDS TO BE EXCHANGED FOR BANK ISSUED (ONE MASTER
NOTE TO COVER EACH TRUSTOR/PARTICIPATING IN THE PROGRAM) GUARANTEE TO
PAY \$1.5MILUSD MONTHLY FOR TEN MONTHS. EXCHANGE WILL ALLOW TRUST TO
ACTIVATE PARTICIPATION IN PROJECT FUNDING PROGRAM, AND SECURE CAPITAL
ASSETS WHILE SHARING WITH EACH TRUSTOR THEIR DISBURSEMENT AMOUNT OF BANK
GUARANTEED RESULTS. FUNDING OF THE TEN MONTHLY PAYMENTS TO EACH TRUSTOR
SHALL BE VIA WIRE TRANSFER FROM BANK ESCROW ACCOUNT (HOLDING MASTER BANK
GUARANTEE TO PAY) AS TRUSTEE & TRUSTOR DIRECT (WITHIN DETAILED ESCROW
INSTRUCTIONS) AND AS AGREED TOO BY EACH TRUSTOR RECEIVING FUNDING.....

TO : _____
BANK: _____
ACCT: _____ BANK#: _____
ID#: _____

**NOTE: ALL PAYMENTS MADE TO CPA ACCOUNT SHALL BE DISBURSED AS INDICATED
BY PARTICIPANT/TRUSTOR'S DISBURSEMENT ORDERS AS ISSUED BY THE PROGRAM
ADVISOR AND SIGNED BY THE TRUSTOR AND OTHERS, ... UNDER FULLY EXECUTED
SEPARATE AND CONFIDENTIAL DOCUMENTS DELIVERED TO TRUSTEE, CPA, AND ALL
SIGNATURE PARTIES.

PROG# CPFCEM/UCG-ROY/500

PAGE 2 OF 5

E000006

Handwritten signature and date
9/27

6. THE TRUSTEE SHALL RECEIVE A FEE OF .125%(12.5% OF ONE PERCENT) CALCULATED AND FUNDED ON PROGRAM VALUE (\$1,500,000.00) EACH MONTHLY FUNDING (RECURRING) ON BEHALF OF THIS TRUST ACCOUNT AND TRUSTOR. THESE PAYMENTS SHALL BE MADE AFTER ALL COSTS OF BUSINESS AND TRUSTOR HAVE BEEN FUNDED IN FULL. TRUSTEE SHALL BE PAID FROM EACH PROJECT FUNDING PAYMENT, NOT...FROM THE TRUSTOR FUNDS OR ASSETS.

7. THE TRUSTEE & TRUSTOR & ADVISOR AGREE TO, AT ALL TIMES WORK IN GOOD FAITH FOR THE SUCCESS OF THIS PROGRAM, AND TO KEEP CONFIDENTIAL AND NOT DISCLOSE TO ANY THIRD PARTY OR ENTITY THE NAMES, PHONE NUMBER, ADDRESS, TELEX OR TELEFAX NUMBERS, OR ANY OTHER INFORMATION REGARDING ANY PERSON OR ENTITY TO WHICH TRUSTOR OR TRUSTEE IMPARTS OR INTRODUCES ONE TO THE OTHER, SUCH INFORMATION BEING CONSIDERED THE SOLE PROPERTY AND TRADE SECRET OF THE IMPARTING OR INTRODUCING PARTY. BOTH TRUSTEE AND TRUSTOR FURTHER AGREES NOT TO MAKE CONTACT WITH, COMMUNICATE WITH, OR OTHERWISE BE INVOLVED WITH ANY PERSON/ENTITY WHICH HAS BEEN IDENTIFIED AND OR INTRODUCED BY TRUSTOR AND OR TRUSTEE, ONE TO THE OTHER, WITHOUT FIRST OBTAINING WRITTEN AUTHORIZATION FROM THE PROTECTED PARTY(S)

8 THE TRUSTOR SHALL INDEMNIFY AND HOLD THE TRUSTEE HARMLESS FROM ANY AND ALL CLAIMS ARISING BY, THROUGH, OR UNDER HIS ACTIONS OR INACTIONS PURSUANT TO TRUSTOR'S WRITTEN INSTRUCTIONS AND THIS TRUST AGREEMENT, EXCLUDING THOSE CLAIMS PROVING THE TRUSTEE HAS VIOLATED TRUST AGREEMENT AND OTHER WRITTEN INSTRUCTIONS AND HIS FIDUCIARY DUTY TO THE TRUSTOR, OR HAS ACTED NEGLIGENTLY.

9 UNTIL THE TRUSTEE SHALL RECEIVE A PROPERLY WRITTEN, VERIFIABLE NOTICE OF AN EVENT OR CONDITION WHICH CHANGES THE RIGHTS OF ONE OR MORE OF THE PARTIES DESIGNATED TO RECEIVE DISBURSEMENTS FROM THIS TRUST, THE TRUSTEE SHALL INCUR NO LIABILITY TO THOSE PERSONS WHOSE INTERESTS MAY BE EFFECTED BY SAID EVENT. SAID DISBURSEMENTS SHALL CONTINUE TO BE MADE IN GOOD FAITH, IN ACCORDANCE WITH ORIGINAL WRITTEN INSTRUCTIONS AND ASSOCIATED CONFIDENTIAL AGREEMENTS FROM THE TRUSTOR AND/OR ADVISOR.

10 THE TRUSTEE SHALL BE FULLY PROTECTED IN ANY ACTION TAKEN, PERMITTED, OR SUFFERED IN GOOD FAITH, IN ACCORDANCE WITH THE OPINION OF COUNSEL, AND IN CASE OF LEGAL PROCEEDINGS INVOLVING THE TRUSTEE OR THE PARTICIPANT OR INCOME OF THE TRUST ESTATE, THE TRUSTEE MAY DEFEND SUCH PROCEEDINGS, OR MAY, UPON BEING ADVISED BY COUNSEL THAT SUCH ACTION IS NECESSARY OR ADVISABLE FOR THE PROTECTION OF THE INTERESTS OF TRUSTEE, INSTITUTE LEGAL PROCEEDINGS AS PER THE LATEST AMERICAN ARBITRATION ASSOC. RULES & REGULATIONS ANY AND ALL COSTS INCURRED FOR SUCH ACTION SHALL BE PAID PROMPTLY AND IN FULL FROM PROGRAM FUNDED PROCEEDS.

11. THIS TRUST AGREEMENT SHALL REMAIN IN FORCE UNTIL CANCELLED BY EITHER PARTY WITH WRITTEN NOTICE GIVING TEN DAYS NOTICE TO OTHER PARTY, DELIVERED TO THEIR USUAL PLACE OF BUSINESS, BUT SHALL NOT EXCEED ONE YEAR FROM FIRST TRADE. IF/OR WHEN TRUSTEE SHALL RESIGN OR BE REPLACED, SPECIAL REVIEW OF THE FUNDS/ASSETS SHALL BE ACCOMPLISHED, PROBLEMS LOCATED SHALL BE CORRECTED, AND WHEN AGREED TO BY TRUSTOR, SHALL BE DELIVERED TO THE NEW TRUSTEE NOTE: ANY PROBLEM OR EMERGENCY WITH TRUSTEE AUTOMATICALLY AUTHORIZES ADVISER TO ACT AS TEMPORARY TRUSTEE TO THIS AGREEMENT. REPLACEMENT TRUSTEE SUBJECT TO TRUSTOR APPROVAL.

PROG# CPFCM/UCG-ROY/500

E000007

PAGE 3 OF 8

Handwritten signature and initials, possibly "J. E. Sch" and "an".

12. NOTWITHSTANDING ANY OF THE FOREGOING PROVISIONS, THE TRUST AGREEMENT CREATED HEREIN SHALL NOT CONTINUE FOR A PERIOD LONGER THAN TWELVE CALENDAR MONTHS FROM THE DATE AGREEMENT IS ACCEPTED AND SIGNED, (PROG. START DATE _____) (ENDING DATE _____) WITH THE TERMINATION, THE TRUSTEE SHALL DISTRIBUTE AND DELIVER, FREE AND CLEAR OF ANY AND ALL CLAIMS, ANY REMAINING PROGRAM FUNDS DUE AND PAYABLE AS TRUST DIRECTS.

13. IF ANY PROVISIONS OF THIS TRUST AGREEMENT ARE HELD TO BE INVALID OR UNENFORCEABLE, THE REMAINING PROVISIONS HEREIN SHALL CONTINUE IN FULL EFFECT. IN THE EVENT OF DISPUTE CONCERNING ANY ASPECT OF THIS AGREEMENT, THE PARTIES AGREE TO MANDATORY BINDING ARBITRATION, UNDER THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, IN THEIR OFFICES LOCATED IN SALT LAKE CITY, UTAH USA.

14. ALL RIGHTS UNDER THIS TRUST, ITS VALIDITY AND CONSTRUCTION, SHALL BE GOVERNED BY THE LAWS OF THE STATE OF UTAH, USA.

15. NO BOND SHALL BE REQUIRED OF THE TRUSTEE.....
SINCE THE TRUSTEE HAS NO DIRECT OR SINGLE SIGNATURE ACCESS OR CONTROL OF TRUSTOR'S \$500,000.USD CAPITAL ASSETS, AND THE TRUSTOR IS COVERED BY THE \$1.5MILUSD. BANK ISSUED GUARANTEE TO FUND TEN MONTHLY PAYMENTS. TRUSTOR SHALL PRE-APPROVE FORM AND WORDING OF BANK ISSUED GUARANTEE TO PAY PRIOR TO RELEASE OF TRUSTOR ASSETS IN EXCHANGE FOR BANK NOTE, ALLOWING ADVISOR TO PLACE TRUST AGREEMENT INTO SELECT PROJECT FUNDING PROGRAM TRUSTOR SHALL AT ALL TIMES HAVE SIGNATURE CONTROL OF CASH FUNDS & SHARE APPROVAL AND AGREEMENT TO EXCHANGE SAME FOR BANK AUTHENTICATED BANK ISSUED GUARANTEE TO PAY (10 MONTHLY FUNDING(S)) INSTRUMENT.

16. TRUSTOR/PARTICIPANT SHALL HAVE THE RIGHT TO WITHDRAW FROM THE PROGRAM(S) AT ANY TIME. SINCE PARTICIPANTS CAPITAL ASSETS HAVE BEEN COVERED WITH THE BANK GUARANTEE TO PAY TEN MONTHLY FUNDING(S), FINANCIAL RISK HAS BEEN NEUTRALIZED RESULTS OF FUNDS BEING PLACED IN THE PROJECT FUNDING PROGRAM WILL CONTINUE TO BE DELIVERED TO TRUSTOR FOR THE FULL TEN MONTHS, EVEN AFTER WITHDRAWAL FROM TRUST AGREEMENT WITH A 5 DAY WRITTEN NOTICE TO TRUSTEE, TRUSTOR MAY EXIT TRUST AGREEMENT AT ANY TIME.

17. TRUSTOR IS HEREBY OFFERED THE OPPORTUNITY TO PLACE ADDITIONAL BLOCKS OF \$5MIL OR MORE, NET CAPITAL ASSETS UNDER SAME OR SIMILAR TERMS, DURING THE 10 BANKING MONTHS OF THIS PROJECT FUNDING PROGRAM. ADDITIONAL OPPORTUNITY SHALL BE LIMITED BY AVAILABILITY OF PROGRAM OPENINGS, AND ADDITIONAL DICTATES OF THE MARKET. PROGRAMS SHALL ALWAYS BE SELECTED FOR SECURITY AND FURNISHING BANK GUARANTEE TO PAY INSTRUMENTS.

18. ALL PARTIES TO THIS TRUST AGREEMENT MAY ALSO BE PARTY TO THE ADDITIONAL CONFIDENTIAL DOCUMENTS AS REQUIRED. THESE FORMS SHALL COVER SPECIFIC AND DETAILED INSTRUCTIONS SIGNATORY PARTIES SHALL FOLLOW IN BI-WKLY &/OR MTHLY DISBURSEMENT OF ALL FUNDING(S) TO BE REALIZED BY EACH HOLDER OF THE PROGRAM ADVISORS (CPF-CM) IRREVOCABLE DISBURSEMENT ORDERS.

Handwritten signatures and initials:
RDC
CPFCM
G. J. J. J.

FAX TO J. CHRISTENSEN / CHRIS - FAX # 801-534-1948 / one Page

3010101
6-10-1997 7:55PM

FROM UNITED -UPTC 410 544 6258

P.2

18. ALL PARTIES SIGNING THIS TRUST AGREEMENT, AND ADDITIONAL FORMS REQUIRED FOR THE DISBURSEMENT OF ANTICIPATED FINANCIAL FUNDING, HEREBY CONFIRM EACH IS EMPOWERED, LEGALLY QUALIFIED AND DULY AUTHORIZED (UNDER WHATEVER LEGAL STRUCTURE EACH IT IS OPERATING, CORPORATION, TRUST, OBA, ETC) TO EXECUTE THIS AGREEMENT AND BE BOUND BY ITS TERMS AND CONDITIONS. THESE CLAIMS MUST BE VERIFIABLE IN WRITING WHEN REQUIRED BY THE TRUSTEE.

20. ALL PARTIES TO THIS AGREEMENT (PARTICIPATING IN THIS SPECIAL PROJECTS FUNDING PROGRAM) HEREBY GUARANTEE THE FUNDING REALIZED SHALL BE UTILIZED TO THE BENEFIT OF HUMANKIND, AND IN VARIOUS HUMANITARIAN PROJECTS AS AND WHEN REQUIRED THROUGHOUT...MOST...OF THE WORLD. PARTIES FURTHER GUARANTEE THAT NONE OF THE MONIES REALIZED FROM THESE PROGRAMS WILL BE USED TO FOMENT, FUND AND OR SUPPORT IN ANY WAY, WAR/WARLORDS & OR ILLEGAL DRUGS ANYWHERE IN THIS WORLD. (PARTIES TO INITIAL BELOW)

CPF-CM/ADVISER *[Signature]*

R.P.F. *[Signature]*

TRUSTOR *[Signature]*

TRUSTEE *[Signature]*

EXECUTED, BY CPF-CM/ADVISER, IN SAN DIEGO, CALIFORNIA THIS 08TH DAY OF JUNE 1997. THIS PROJECT FUNDING PROGRAM * CPF-CM/UCG ROY/500 THIS CODE SHALL BE USED ON ALL DOCUMENTS ASSIGNED TO THIS PROGRAM.

*TRUSTOR/PARTICIPANT:
UNITED CAPITAL GROUP, LTD.
1280 BAY DALE DR. ARNOLD, MD. 21012.

X *[Signature]*
TRUSTOR, ROY P. FISHER, PRINCIPAL
ATTY. IN FACT.
FAX: 410-544-6258
PH: 410-544-0848

TRUSTEE:
AUTHORIZED SIGNATORY:

[Signature]
DR. WESLEY F. SINE, JR.
BENEFICIAL TOWERS, 12TH FLOOR
#36 SOUTH STATE,
SALT LAKE CITY, UTAH ZIP 84111
FAX: 801-521-0732
PROGRAM ADVISOR:
AUTHORIZED SIGNATORY:
RAY D. EMERY, PRES.

*CO-TRUSTOR/PARTICIPANT:

? *[Signature]*
TRUSTOR, *[Signature]*
ADVISOR & ATTY. IN FACT.
FAX: 410-544-0848

[Signature]
CPF CAPITAL MANAGEMENT, INC.
120 NEWPORT CENTER DR. #250
NEWPORT BEACH, CALIF.

X 1. *[Signature]* AS AN INDIVIDUAL, AND FOR AND BEHALF OF
UNITED CAPITAL GROUP, HEREBY CERTIFY THAT ROY P. FISHER IS THE
AUTHORIZED SIGNATORY & TRUSTOR AS PER, AND UNDER THE LAWS OF
AND IS THE PERSON WHOSE SIGNATURE APPEARS HEREIN.

X TRUSTOR *[Signature]* DATE 6-10-97
CO-TRUSTOR *[Signature]*

*INDICATES SIGNATURES REQUIRED TO MOVE FUNDS AND FUNDING DOCUMENTS
INTO AND OUT OF THIS TRUST ACCOUNT. TRUSTEE ONLY OVERSEES THE
EXCHANGE TRUSTOR'S FUNDS FOR SPECIFIED DEBENTURES INSTRUMENTS.

PAGE 3 OF 8

E000009

ADVISOR COPY

Tab F

WRS - For your REVIEW + Comment -

Ray -

LAMAR INTERNATIONAL, LIMITED

Arianna House Lane off Dowdwell Streets, P.O. Box N-3822, Nassau Bahamas
Telephone 242 325-1877 or 242 325-5148 • Fax 242 325-3173
Administrative Office: 6745 E Superstition Springs Blvd., Suite 2115, Mesa, AZ 85206
Telephone 602 641-1560 • Fax 602 641-1561 • Pager 888 332-0169

Date: February 4, 1998

TO: Ray Emory

FROM: Giacomo Lucchini

TOTAL NUMBER OF PAGES: 3 Including this cover page.

MESSAGE:

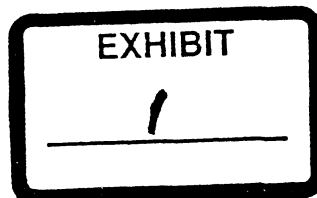
Upon approval, please send us your bank
coordinates with the bank officer's name. Our bank
officer will communicate bank to bank with a copy
of transmission to you.

As soon as you provide the signed agreement
and bank information we are ready to begin.

Thank you,
Giacomo Lucchini

For your information, the bank is:

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



S000001

AGREEMENT

BETWEEN

Lamar International, Limited
LaDonna Rosellini, Director
6745 E Supersution Springs Blvd, Suite 2115
Mesa, AZ 85206
Telephone. 602 641-1560 • Fax. 602 641-1561
Hereinafter, LIL

The Commercial Mortgage Co Of Delaware, Inc
A. M. Nardo, President & CEO
3519 Silverside Road, Suite 201
Ridgely Building, Concord Plaza
Wilmington, DE 19810
Telephone. 302 478-8310 • Fax 302 478-7339
Hereinafter, CMC

And

W.F. Sine Trust
Hereinafter, WFST

WHEREAS, WFST has capital in an amount of Twenty Five Million United States Dollars (\$25,000,000.00) to invest in a program secured by a Bank Guarantee with an anticipated 30 banking day return of One Hundred Twenty Million United States (\$120,000,000.00) Dollars.

WHEREAS, CMC & LIL are prepared to issue to WFST a guarantee from a major bank that provides payment of principal and earnings

As consideration for the above premises, the parties agree to the following

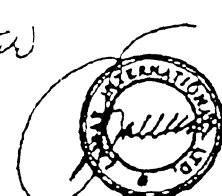
1. CMC & LIL will provide to WFST a guarantee on a bank to bank basis
2. WFST transfers funds upon approval of bank verbiage to the Escrow Account of the major bank
3. The bank pays WFST principal plus profit after 30 banking days
4. End of transaction

Agreement on this day of _____, February, 1998

by _____
W F Sine Trust

by *A. M. Nardo* 2/14/98
The Commercial Mortgage Co Of DE, Inc

by *LaDonna Rosellini*
Lamar International Limited



EXHIBIT

W.F. Sine

S000002

February 4, 1998

Page 2

Bank verbiage:

"On behalf of our Client, DGI, we warrant and certify to transfer to you, directly, on a bank-to-bank basis, to your designated account, the sum of \$120,000,000.00 from ~~Extraw Account number~~ _____, ~~upon transfer of funds, in favor of our client, DGI.~~ Said transfer will be no later than 30 banking days from the date after the deposit of U.S. \$25,000,000.00 to Extraw Account number _____, account holder 49151."

Approved this _____, day of February, 1998

By _____
W.F. Sine Trust

2/4/98 jcd

S000003

Tab G

Crestar Bank N.A.
Washington, DC 20005-2108
(202) 879-6000

CRESTAR

February 6, 1998

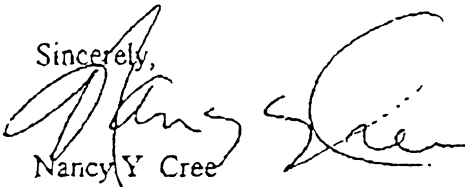
Wesley F Sine, J.D., Esquire
Beneficial Towers, 12th Floor
36 South State Street
Salt Lake City, UT

Ref Account Wesley F Sine, Attorney-at-Law Fiduciary and Trust Account
Account No 12036086, Bank Officer, Dave Tayler

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 \$120,000,000 00 Said transfer will be no later than 30 banking days from the date after the deposit of \$25,000,000 00, to Escrow Account Number 206745745, Account Holder - 49151

Sincerely,



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

3

S000009

Tab H

DR. WESLEY F. SINE, J.D.

Attorney at Law

Beneficial Towers 12th Floor - 36 South State Street, Salt Lake City, Utah 84111

Tel. (801) 364-5125 Fax: (801) 521-0732

March 12, 1998

Josephine Rita Mangiapane
Diana Group, Inc.
FAX: 1-202-965-0961



Reference: Transaction with Diana Group, Inc. / Crestar Bank N.A. / W.F. Sine Trust

Dear Josephine:

This letter is to try and clear certain misunderstandings between you and myself. First of all, I have never in all of our communications told you that Mr. Emery was a partner of the original funds. As of this date, I do not know what his relationship was with the party who was to furnish the funds. Further I do not know how much money he has or has access to. I have met Mr. Emery in person but that did not include a copy of his financial statement.

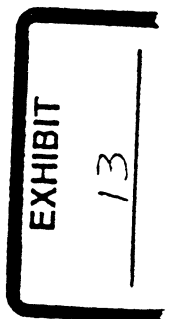
When I was brought into this matter, I was informed that funds were available on Mr. Emery's side and was told who the party was. I was further told that a Bank Guaranty would be forth coming from Crestar Bank which would secure the return of principal for the \$25,000,000.00 which would be proffered as a part of the transaction.

I then received a copy of the projected language for the bank guaranty and made several slight corrections to tighten it up to where I felt the parties who would transfer the \$25,000,000.00 would be protected. Your Bank then sent a faxed copy of the Bank Commitment to me. So far as I was concerned the language was sufficient to obligate the Bank to pay \$120,000,000 30 Banking Days after receipt of \$25,000,000.00. I communicated to Mr. Emery who so far as I was concerned represented the funds, that I had received the Letter from the Bank and had confirmed with the Bank Officer that the Bank was obligating itself to pay 30 Banking Days after receipt of the \$25,000,000.00 \$120,000,000.00 to my designated account.

I then waited for the funds to be transferred to my account first at Bank of Utah and later to Bank of America. The funds were never transferred to either of my accounts. This was not my fault and maybe was not the fault of Mr. Emery but for some reason the funds were never sent.

Mr. Emery then tried to obtain funds from other sources which were unsuccessful. During his efforts to find additional funds, I made sure that no one received from me a copy of the Bank Letter unless it was thoroughly sanitized including name of the Bank, Clients, Bank Officer, Address etc.

As you are aware, this went on for numerous weeks with not success, although at times I thought knowing some of the parties that the transaction could be completed



S000012

Finally several days ago you asked
you. This is not something which I normally do but as a favor to you I have contacted two
attorneys and a third party with direct access to parties with funds

The one attorney who controls his own funds has an interest but will not be able to
move before ten days.

The second attorney has an attorney with \$35 Million in his account and is willing
to immediately move on the \$25 Million but desires several changes to the Bank Letter - I
have included it as Exhibit "A".

The third party is not an attorney but is a client who handles funds for various
investors. He will not have a final answer until Monday.

Please look at Exhibit "A" and see if that is do able. If not, I will inform them that it
cannot be done that way.

One more thing, the documentation which I have from LaDonna Roselini states that
the Bank is furnishing a Bank Guarantee with an anticipated 30 Banking Day pay off. The
Letter from the Bank commits the Bank to Guarantee to pay \$120,000,000 in 30 Banking
Days after receipt of the \$25,000,000.00.

I await your word as to how I can be of additional service to you.

Yours truly,

Wesley F. Sine

WFS/sw

S000013

EXHIBIT A

ON CRESTAR BANK LETTERHEAD

Addressed to client's bank, or client's council for
verification through normal bank procedures

REFERENCE: (Transaction Code)

On behalf of our client _____, we irrevocably and unconditionally warrant,
certify and promise to pay to your order, directly, on a bank to bank basis, to your designated
account, the sum of Fifty Million United States Dollars (\$ 50,000,000.00). *we do not warrant that* Said transfer will be
without protest, set off or delay and no later than 60 days from the date of the deposit of U.S.
\$25,000,000.00 to Account number _____, account holder

Sincerely,

Bank Officer

Authorized verbiage:

By: _____

Tab I

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

CRESTAR

March 24, 1998

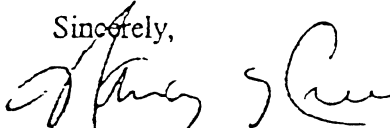
Dr. Wesley F. Sine, J.D.
Beneficial Towers, 12th, Floor
36 South State Street
Salt Lake City, UT

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,



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

P-6

S000019

Tab J

DR. WESLEY F. SINE, J.D.

Attorney at Law

Beneficial Towers 12th Floor - 36 South State Street, Salt Lake City, Utah 84111

Tel: (801) 364-5125 Fax: (801) 521-0732

FACSIMILE COMMUNICATION

DATE 26 MAR.1998

TO: BANK OF UTAH
ATTN: MR DAVE TAYLER, MGR.
FAX: 801-363-9781

REF: ATTY-AT-LAW FIDUCIARY AND TRUST ACCT.*12036086, AND THE PROPOSED CRESTAR BANK WARRANTY TO PAY TRANSACTION. (UPDATED, 24 MAR 98 LETTER, \$500,000.00USD, FROM BRANCH MANAGER N.Y.CREE, VP)

SIR:

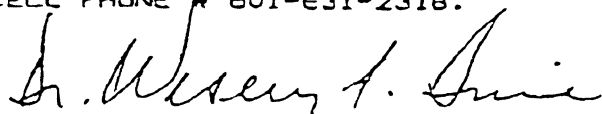
WE SUBMIT FOR YOUR CONSIDERATION, THE FOLLOWING PROPOSED WORDING OF WIRE TRANSFER OF FUNDS, REQUIRED TO ACTIVATE WIRE TRANSFER OF FUNDS (WITHIN THIRTY BANKING DAYS) INTO THE HEREIN REFERENCED SINE ATTY. TRUST ACCOUNT.

SWIFT WIRE WORDING:

ADDRESSED TO: CRESTAR BANK,
GEORGETOWN BRANCH MGR.
NANCY Y.CREE, A.VP

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. IF I MAY BE OF ANY FURTHER ASSISTANCE ON COMPLETING THIS MATTER PLEASE CONTACT ME ON MY CELL PHONE * 801-631-2318.



DR WESLEY F.SINE, ATTY/TRUSTEE



Tab K

PRINTOUT OF ELECTRONIC DATA – PRINTED AFTER MAY 29, 1998

NEW 2.0 BROWSE - WTR-INTHIST -- REC 0000000 PG 0000001.001 LOCK 00 COL 001 080
COMMAND ==>
***** TOP OF DATA *****
***** SCROLL ==> PAGE *****

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

*A/124300107

RECON:

I:
JTAH OGDEN
EN, UT

RTC:

CDT:*D/206849540

ADV LTR

GL RECON:

DEPT: RTC:
DIANA GROUP INC 10321

0 /

ADVICE INSTRUCTIONS

REF NUM

BNF BANK /

MMAND ==>

SCROLL ==> PAGE.

BNK: /

REF NUM:

:/

: ATTORNEY TRUST

ADVICE INSTRUCTIONS

BNF /

CH: BK?

REF NUM:

-TO-BANK INFO:

0,000 USD VIA BK TO BK WIRE W/O
ROTEST SET OFF OR DELAY W/IN 31
AYS 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
,000.00 WIRE SERVES TO RECONF BR MG

CRESTAR000151

0327L4QFAB1D00001203271521FT01

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

ADVICE INSTRUCTIONS

MEMO:

INT BNK: /

Y PERSON:

FY PERSON:

IR PERSON:

PT PERSON:

980327 15:24:08.37

980327 15:24:04.95

980327 15:24:08.37

ADVICE INSTRUCTIONS

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

Tab L

Diana Group, Inc.

1111 30th., Street, N.W.
Ste. 318
Washington, D.C. 20007
Phone & Fax (202) 965-0961

March 28, 1998

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

Ref Bank Letter from Crestar Bank N.A., dated March, 24th., 1998, and
underlying transaction;

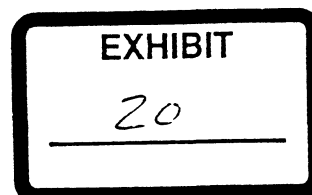
Dear Dr. Sine.

Please be advised that the underlying transaction, involving the investment of \$500,000.00 is **terminated and hereby wholly cancelled**. Your transfer of said funds will be sent to **Bank of Utah, Account Holder/Wesley F. Sine/Account Number 12036086/Bank Officer, Mr. Dave Taylor**, on Monday, March 30th., and be confirmed directly by Mrs. Nancy Y., Cree to you and to your banker by fax.

Evidently, you and your Client, Mr. Ray Emory, have selectively attempted to create an intent other than what was always represented by the Diana Group, Inc., and that is that the underlying transaction is not between Diana Group, Inc., and either you as Trustee for your Client Mr. Ray Emory or you on behalf of the Trust, but between you and Crestar Bank N.A., That in fact would have been the basis for your attempting to secure funds from the Pinnacle Credit and Commerce International Ltd., earlier this month. You still seem to have an agenda which selectively denies the intent of the undertaking as presented to you by Diana Group, Inc. 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., letter referencing the Escrow Account and the transfer of repayment on a bank-to-bank basis, on our behalf.

For and on behalf of the
Diana Group, Inc.


Josephine Rita Mangiapane
cc: Mr. Ray Emory



A handwritten number "9" inside a hand-drawn rectangular box.

S000026

Tab M

DR. WESLEY F. SINE, JD

Attorney at Law

Beneficial Towers 12th Floor - 36 South State Street, Salt Lake City, Utah 84111

Tel. (801) 364-5125 Fax: (801) 521-0732

FACSIMILE COMMUNICATION

DATE: March 29, 1998

EXHIBIT

21

Josephine Rita Mangiapane
Diana Group, Inc.
111 30th, Street, N.W.
Washington D.C. 20007
Fax: 202 965 0961

Reference: Bank Letter from Crestar Bank N.A., dated March, 24th, 1998 /
transaction with Diana

Dear Ms Magiapane:

I am in receipt of your letter of March 28, 1998. It is obvious from your letter that there is a serious misunderstanding existing between you, Mr. Ray Emery and myself.

This transaction was originally brought to us by LaDonna Rosellini. She was our first contact and basically set the foundation for the transaction. She told us that the requested \$25,000,000 was needed to cover certain margin costs on a purchase of U.S. Treasuries which Diana and you were involved in.

Later when you and I started to discuss the matter, you told me that you had syndicated certain banks who were furnishing funds to you but the closing costs of the transaction had to be furnished by yourself and could not be taken from the funds furnished. That was what the \$25,000,000, which you needed, was to be used for.

Recently, when it became evident that you were not able to adjust the bank letter sufficiently to satisfy the attorneys' I was dealing with, you informed both myself and Mr. Emery that you would be willing to deal with a sum as little as \$500,000.00. Therefore based upon what you had told us before, we agreed-based upon receipt of a Letter from Crestar Bank warranting and certifying to transfer \$2,500,000.00 within 30 Banking Days to my account after our transferring \$500,000.00 to your account, to

10

D000066

transfer \$500,000.00 to your account. That transfer took place on Friday, with great effort, to meet your deadline.

After the transfer of the funds to Crestar, I then arranged to have DHL pick up the original Bank Letter from you. You declined stating that you didn't want to give personal identification to the DHL Agent and would send the original of the Bank Letter by Federal Express to me for arrival on Saturday.

Imagine my surprise when on Saturday you contacted me and wanted me to sign a document which, up to that time, had not been discussed as a part of the transaction. Then the document turns out to be a Private Placement Agreement.

It was my understanding from both you and Rosellini that this transaction was not a joint venture. That this transaction was being warranted and certified for payment by Crestar Bank. In fact I contacted Mrs. Cree at the Bank as to the intent of the Bank Letter and was informed that the \$2,500,000.00 would be paid by the Bank on the 31'st Bank Day after the Bank's receipt of our funds. I did not know what your arrangement with the Bank was composed of, but assumed that you had sufficient funds or assets with the Bank which allowed them to issue such a letter.

When your Private Placement Agreement arrived, it was certainly not a contemplated document. It even had a "Best Efforts" statement in it. We were not sending funds to you as a part of a trading or placement program. It was a transaction with you warranted and certified to be paid by the bank independent of whether there were funds in your account (guaranteed by the Bank).

We have fulfilled that which we were to do and now it seems you are trying to get out of the agreement.

Your comments about Pinnacle are moot in this matter. That might have gone on before, but Mr. Emery's contact with Pinnacle was supposed to be an investment not a loan. They were to associate with him in the transaction, not loan him the money. He was to put up certain monies to guaranty that their time and efforts would not be in vain. It certainly has nothing to do with \$500,000.00 which we have transferred to your account. I am sure that Mr. Emery did not state to Pinnacle that either he or I were negotiating with the Bank. At that time Rosellini was still representing you and your company, and we were led to believe that certain changes might be acceptable if funds were provable. Further Rosellini had furnished to us certain changes which supposedly were acceptable to both you and the Bank.

I think in all honesty, there have been too many cooks in the kitchen.

I do not know why a totally different agreement has to be signed by myself relative to this transaction. You were anxious to have the funds transferred and based upon the Bank Letter from Crestar which in our minds and in the mind of the bank officer guaranteed that within 30 Banking Days after receipt of the \$500,000.00, \$2,500,000.00 would be returned to my coordinates.

D000067

If you wish to discuss this matter further, please contact me at 801 328 3307
after 2 p.m. today or on Monday after 7:30 am.

Yours truly,

/s/ Dr. Wesley F. Sine, JD
Dr. Wesley F. Sine, JD

WFS/sw

D000068

Tab N

Private Placement Agreement

THIS AGREEMENT, is entered into as of the 30th day of March 1998, by and between Diana Group, Inc. ; and Dr Wesley F. Sine J.D., Trustee;

WHEREAS, Sine represents and warrants that he has unencumbered funds which were transferred on March 27, 1998, to the account of Diana where he has placed said funds on a short term basis in exchange and pursuant to a Letter from Crestar Bank dated March 24, 1998, and,

WHEREAS, Diana represents, warrants, and certifies to provide a high yield return on a short term basis;

NOW THEREFORE, in consideration these and other good and valuable contributions, the receipt and sufficiency of which is hereby acknowledged, the Parties have hereto enter into this Agreement under the following terms and conditions.

- 1 The placement of the funds involves the transfer of \$500,000 00 which have been received in Diana's designated Escrow Account and the return of \$2,500 000 00, on behalf of Diana to Sine at the end of a specified term, on a bank to bank basis
2. The amount transferred is \$500,000.00 US Dollars.
- 3 The account into which the funds were transferred per instructions of Diana is on Exhibit 1
4. Diana warrants to return Five times the principal value ~~in addition to the principal sum~~ which Crestar Bank has warranted and certified to transfer after 30 Banking Days (See Exhibit 2 which is Crestar's Letter)
5. The term of the return is 30 Banking Day after receipt of funds in Diana's Account .
6. The Parties hereto represent, certify, and warrant to the other that Sine is duly authorized to enter into the transaction set forth, and to perform the obligations hereunder, and has taken all necessary action to authorize such execution, deliver, and performance thereof. The Parties hereto executing the delivery and performance of this Agreement and the transaction hereunder will not violate any law, ordinance, charter, by law or rule applicable to it or any other Agreement by which it is bound or by which any of the assets hereunder are affected
7. This agreement shall be governed, construed and enforced in accordance with the laws of the District of Columbia and the State of Utah, the legal Venues thereof.
8. No expressed or implied waivers of any event of default by either party shall constitute a waiver of any other event of default, and no exercise of any remedy thereunder by any Party shall constitute a waiver of its right to exercise any other remedy hereunder.

WFS



S000030

No modification of waiver of any provision of this agreement and no consent by any Party to a departure here from shall be effective unless and until such shall be in writing, and duly executed by both parties hereto.

- 9 The rights and obligations of the Parties under this Agreement and under any transaction shall not be assigned by either Party without, the prior written consent of the other Party. Subject to the foregoing, this Agreement and any transaction shall be binding upon and shall inure to the benefit of the other Party and their respective successors, heirs executors, personal representatives, administrators, and or assigns. This Agreement may not be cancelled by either party, except that the parties hereto mutually agree to such cancellation.
- 10 This agreement constitutes the total Agreement between Parties and remains in full force an effect until termination or until otherwise mutually agreed to in writing between Parties hereto
- 11 This Agreement contains several exhibits which are fully incorporated by reference and made a part of this Agreement thereby:
 - a. Wiring instructions
 - b Copy of March 24, 1998 Crestar Bank Letter.
- 12 The parties hereto acknowledge that this transaction constitutes a Private Placement between the Parties hereto, this is not a public offering, nor a solicitation
13. Notices and Other Communication:

For: Diana Group, Inc., 111 30th , Street, N.W., Ste 318, Washington, D C
20007, Phone & Fax 202-965-0961;

For: Dr. Wesley F. Sine, Trustee, Beneficial Towers 12th Floor, 36 South State
Street, Salt Lake City, Utah, Phone 801-364-5125, Fax 801- 521-0732
- 14 This document may be executed by facsimile and have the same binding effect as if it were executed in the original.

IN WITNESS WHEREOF, the undersigned attest and agree to this agreement.

Diana Group, Inc.

Dr. Wesley F. Sine Trustee

By *Josephine Rita Magiapane*
Josephine Rita Magiapane

By *Dr. Wesley F. Sine J.D.*
Dr. Wesley F. Sine, J.D.

Date March 30, 1998

Date March 30, 1998

S000031

Tab O

Diana Group, Inc.

1111 30th., Street, N.W

Suite 318

Washington, D.C. 20007

May 8, 1998

Dr. Wesley F. Sine, J.D.
Beneficial towers 12th., Floor
36 South state Street
Salt Lake City, Utah 84111

Ref: Private Placement Agreement/Transfer of Funds;

Dear Dr. Sine:

Reference is made to our conversations concerning the *term* of Private Placement and subsequent date identified therein under par. 4., as well as on the date specified on the letter issued March 24th., 1998, on behalf of Diana Group, Inc., by Ms. Nancy Y. Cree, branch manager, reflecting the date on which the transfer of funds would be effective.

On May 6th., and 7th., we discussed the possibility of a continuance, due to the fact that several days were non-banking days, because of holidays internationally. I am thus proposing that the *return* of \$2,500,000.00, agreed to under the terms and conditions of the Private Placement be sent on May 15th., 1998, in lieu of May 8th., 1998.

Please confirm your acceptance in writing concerning this issue.

Thank you for your cooperation in the foregoing,
Kind Regards,

Josephine Rita Mangiapane
Josephine Rita Mangiapane
President

EXHIBIT
28

113

0000030

Tab P

May 8, 1998

Josephine Rita Mangiapane President
Diana Group, Inc
1111 30th. Street, N W
Washington, D C 20007
Facsimile 202-965-0961 / Original to follow by FED EXP

Reference Letter from Crestar Bank to warrant and certify transfer of \$2,500,000 00

Dear Josephine Rita Mangiapane

Pursuant to your request, concerning the actual 30 Banking Days. I am hereby agreeing that the payment date referred to in Crestar Bank's Letter of March 24, 1998 is May 13, 1998 and this letter will supercedes my letter of May 7, 1998 to the Bank

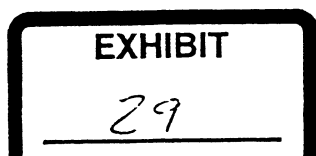
This is being done in good faith in anticipation of future such transactions with your company

I am enclosing a copy of my Letter to the Bank for your letter.

A facsimile of this document may be acted upon as an original and have the same binding effect

Sincerely,
Wesley F. Sine, Jr.
Dr Wesley F Sine, J D

WFS/sw
cc: Josephine Rita Magiapane



S000040



From please print and press hard)

Date 5/8/98

Sender's Name Wesley F. Sine

Company SINE ENTERPRISES

Address 36 S STATE ST FL 12

City SALT LAKE CITY

State UT ZIP 84111

Dept./Floor/Suite/Room

Phone (801) 364-5125

FedEx Tracking Number 802858653127

Station's Trifx Account Number 1475--3173-7

Sender's Trifx (Next business afternoon)

FedEx 2Day (Third business day)

FedEx Standard Overnight (Next business afternoon)

FedEx Priority Overnight (Next business afternoon)

FedEx Express Saver Freight (Next business day)

FedEx Freight Service (Next business day)

FedEx 2Day Freight (Next business day)

FedEx Standard Overnight Freight (Next business day)

FedEx Priority Overnight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

FedEx Freight Service Freight (Next business day)

FedEx 2Day Freight Freight (Next business day)

FedEx Standard Overnight Freight Freight (Next business day)

FedEx Priority Overnight Freight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

FedEx Freight Service Freight Freight (Next business day)

FedEx 2Day Freight Freight (Next business day)

FedEx Standard Overnight Freight Freight (Next business day)

FedEx Priority Overnight Freight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

FedEx Freight Service Freight Freight (Next business day)

FedEx 2Day Freight Freight (Next business day)

FedEx Standard Overnight Freight Freight (Next business day)

FedEx Priority Overnight Freight Freight (Next business day)

SP112 Sender's Copy

0200

Form 101 No

Express Package Service Packages under 150 lbs

FedEx Priority Overnight (Next business afternoon)

FedEx 2Day (Third business day)

FedEx Standard Overnight (Next business afternoon)

FedEx Express Saver Freight (Next business day)

FedEx Freight Service (Next business day)

FedEx 2Day Freight (Next business day)

FedEx Standard Overnight Freight (Next business day)

FedEx Priority Overnight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

FedEx Freight Service Freight (Next business day)

FedEx 2Day Freight Freight (Next business day)

FedEx Standard Overnight Freight Freight (Next business day)

FedEx Priority Overnight Freight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

FedEx Freight Service Freight Freight (Next business day)

FedEx 2Day Freight Freight (Next business day)

FedEx Standard Overnight Freight Freight (Next business day)

FedEx Priority Overnight Freight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

FedEx Freight Service Freight Freight (Next business day)

FedEx 2Day Freight Freight (Next business day)

FedEx Standard Overnight Freight Freight (Next business day)

FedEx Priority Overnight Freight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

FedEx Freight Service Freight Freight (Next business day)

FedEx 2Day Freight Freight (Next business day)

FedEx Standard Overnight Freight Freight (Next business day)

FedEx Priority Overnight Freight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

FedEx Freight Service Freight Freight (Next business day)

FedEx 2Day Freight Freight (Next business day)

FedEx Standard Overnight Freight Freight (Next business day)

FedEx Priority Overnight Freight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

FedEx Freight Service Freight Freight (Next business day)

FedEx 2Day Freight Freight (Next business day)

FedEx Standard Overnight Freight Freight (Next business day)

RETAIN THIS COPY FOR YOUR RECORDS

2 Your Internal Billing Reference Information

3 To please print and press hard)

Recipient's Name Josephine Rita MANAPANG

Company Diana Group Inc.

Address 111 30th Street NW

City Washington

State D.C. ZIP 20007

Dept./Floor/Suite/Room

Phone (202) 965-0961

FedEx Tracking Number 802858653127

Station's Trifx Account Number 1475--3173-7

Sender's Trifx (Next business afternoon)

FedEx 2Day (Third business day)

FedEx Standard Overnight (Next business afternoon)

FedEx Priority Overnight (Next business afternoon)

FedEx Express Saver Freight (Next business day)

FedEx Freight Service (Next business day)

FedEx 2Day Freight (Next business day)

FedEx Standard Overnight Freight (Next business day)

FedEx Priority Overnight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

FedEx Freight Service Freight (Next business day)

FedEx 2Day Freight Freight (Next business day)

FedEx Standard Overnight Freight Freight (Next business day)

FedEx Priority Overnight Freight Freight (Next business day)

FedEx Express Saver Freight Freight (Next business day)

Questions? Call 1-800-Go-FedEx (800)463 3339

S000041

WCS 109
Per Order 109
© 1994
FBI

288

004155719 6

Tab Q

Tab R

April 29, 1998

LaDonna Rosellini, Managing Director
LAMAR INTERNATIONAL, LIMITED
6745 E Superstition Springs Blvd , Suite 2115
Mesa, AZ 85206

Reference Your Letter pertaining Bank Guarantee Program

Dear Ms Rosellini

I do not understand your letter of April 28, 1998 In the first place there has never been a Bank Guarantee Program. The Letter which I received on February 4, 1998 was not a Bank Guarantee but was a certification and warranty of payment That particular transaction was never completed

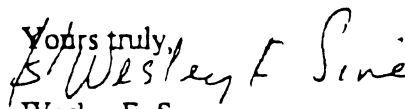
It was my responsibility under the transaction to verify that the Letter from the Bank of Warranty and Certification was authentic and meant what it said My Bank Officer verified the source of the Letter and the authority of the officer signing the letter I spoke personally with the Bank Officer to verify its authenticity At that point funds in the amount of \$25,000,000 00 were to be sent to my trust account to finish the transaction As you are well aware, those funds were never forth coming and I never signed any agreements with Lamar International or yourself on behalf of the Trust That proposed transaction died of its own inactivity

I, as Trustee, was never under any obligation to pay any fees to yourself, or your company as you presented yourselves to me in your correspondence as the principal in this matter, claiming it was "your" bank etc Furthermore, in this particular transaction, I did not participate in the negotiating of the transaction or the preliminary negotiations of the proposed transaction

By your letter of April 28th, you have slandered and injured my reputation and have tried to damage a business transaction Realize that by those actions you may be liable for damages for what you have said and what you have published by sending your letter to others

I believe in doing what I have said I would do and in telling the truth At no time have I obligated myself to pay you anything

You should send a retraction as references myself to mitigate whatever damages may be forth coming

Yours truly,

Wesley F Sine

cc Ray Emery, Josephine Mangiapane



D000050

Diana Group, Inc.
1111 30th., Street, N.W.
Ste. 318
Washington, D.C. 20007
Telephone & Fax (202) 965-0961

June 5, 1998

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

Ref: Bank Letter from Crestar Bank N.A., dated March 24th., 1998; and
Private Placement Agreement dated March 30th., 1998;

Dear Dr. Sine:

Pursuant to our discussion on the 4th., I am confirming that payment against the
referenced letter and Private Placement Agreement, in the following amount,

a. Principal amount of	\$2,500,000.00
b. Penalty at a rate of	
\$25,000.00 x 20 days of	<u>500,000.00</u>
 GROSS REPAYMENT	 \$3,000,000.00

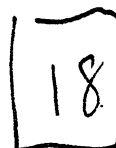
10th June
will be transferred by bank wire, June 20th., 1998.

If you care to extend the payment for an additional nine (9) days, I am prepared
to remit a gross value of \$3,300,000.00.

Please advise accordingly, the proposal is initiated because of your remark
regarding considering the initial investment as a re-invested value.

Kind Regards,

Josephine Rita Mangiapane
Josephine Rita Mangiapane



S000060

Tab S

Diana Group, Inc.
1111 30th. Street, N.W.
Ste. 318
Washington, D.C. 20007

May 13, 1998

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


Ref: March 30th., 1998/Private Placement Agreement; &
Compensation/Pro-Rata @ 5% of \$500,000.00;

Dear Dr. Sine:

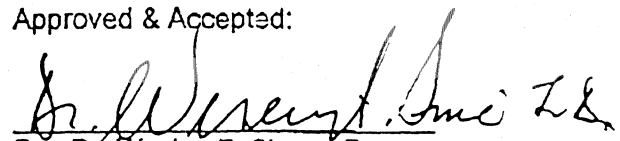
The following value represents compensation to you, on behalf of the Diana Group, Inc., with respect to your forbearance for payment against the Private Placement Agreement dated March 30th., 1998.

Diana Group, Inc., agrees to pay an additional \$25,000.00, (twenty-five thousand, U.S. Dollars) daily, commencing May 13th., per banking day, excluding Saturday and Sunday, for the outstanding days pursuant to clearance and transfer of funds as per the Private Placement, and the letter dated May 13th., 1998, sent this date.

For and on behalf of the Diana Group, Inc.


By: Josephine Rita Mangiapane

Approved & Accepted:


By: Dr. Wesley F. Sine, J.D.

cc: Mrs. Nancy Y. Cree, Crestar Bank
cc: Mr. Dick Cunningham, Esquire, Steptoe & Johnson

S000045

DEFENDANT'S
EXHIBIT

Tab T

Diana Group, Inc.

1111 30th., Street, N.W.
Ste. 318
Washington, D.C. 20007

May 13, 1998

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

Ref: March 30th., 1998/Private Placement Agreement; &
Subsequent Continuance for Payment dated May 13th., 1998;

Dear Dr. Sine:

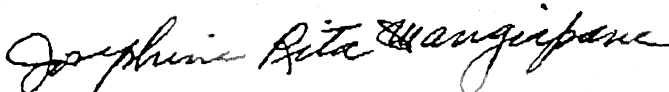
Reference is made to both the Private Placement Agreement and the subsequent continuance relative to payment of \$2,500,000.00. I was advised early this morning that the funds covering the payment referenced herein will most likely not be available for transfer today, May 13th. The transfer is being sent against a bank cashier's check, which has not yet cleared.

Since our running history pre-dates this transaction, going back to February 6th., 1998, I made many allowances for your omissions and failures to meet deadlines which greatly jeopardized my undertakings. However, despite this factor, we seem to have been able to go forward and consummate a transaction. This matter is literally beyond my control. The bank's cashier check was deposited on Friday, but I have subsequently learned it takes 5 days to clear a multi-million dollar bank cashier checks. Had I known it would have taken several days, I would have traveled by plane to secure it and/or made other arrangements.

This situation is truly beyond my control. However, I am willing to compensate you, for your forbearance by paying you an additional pro-rata value for these several outstanding days. The clearance should be by Friday and the transfer initiated on Friday, the 15th., or Monday, the 18th., of May.

Please call concerning the foregoing.

Kind Regards,



Josephine Rita Mangiapane

cc: Mrs. Nancy Y. Cree, Crestar Bank
cc: Mr. Dick Cunningham, Esquire, Steptoe & Johnson