

**Cincinnati Insurance Company v. Wachovia Bank**  
**Wachovia Bank Wins Lawsuit Over Customer That Refused Positive Pay**  
**The Legal Rationale to Implement Positive Pay and High Security Checks**

**Summary**

Schultz Foods Company issued a check for \$153,856 to Amerada Hess Corporation. Thieves stole the check out of the mail, changed the name of the payee and convinced the new payee (an unwitting accomplice) to endorse the check and deposit it into his bank.

His bank presented the check for payment to Schultz Foods' bank, Wachovia Bank, and Wachovia charged \$153,856 against Schultz Foods' account. Before Schultz Foods discovered the fraud, the funds had been wired out, and the money disappeared.

When the fraud was discovered, Schultz Foods reported the altered check to Wachovia and demanded its account be re-credited. Wachovia refused, citing that Schultz Foods had been offered the chance to implement "Positive Pay" after three previous check fraud incidents, but had declined. Instead, Schultz Foods had purchased a check fraud insurance policy from Cincinnati Insurance Co. Positive Pay, however, would have prevented this loss.

Schultz Foods made a \$153,856 claim under its policy with Cincinnati, who paid the claim and filed suit against Wachovia to recover its loss. Cincinnati contended that the altered check was not "properly payable" and Wachovia was liable for the loss.

However, the Wachovia deposit agreement signed by Schultz Foods contained a list of precautions that a customer should take to protect their account. The Agreement included a conditional release of Wachovia's liability:

*"You agree that if you fail to implement ... products or services [that are designed to deter check fraud], ...you will be precluded from asserting any claims against Wachovia for paying any unauthorized, altered, counterfeit or other fraudulent item ...."*

Wachovia had not required Schultz Foods to absorb any losses because of the incidents, even though Schultz Foods never implemented Positive Pay. Cincinnati argued that Schultz Foods "had an expectation that Wachovia would reimburse Schultz Foods' account" for unauthorized charges if Schultz Foods took precautions such as closing its account. However, that expectation was contrary to Wachovia's deposit agreement, which contained an anti-waiver provision, allowing it to waive enforcement of the terms of the Agreement.

Even though Wachovia voluntarily shielded Schultz Foods from past check fraud losses, its deposit agreement protected it from liability created by a precedent.

The Court agreed with Wachovia's argument that the deposit agreement between Wachovia and Schultz Foods required Schultz Foods either to implement Positive Pay or to assume responsibility for any fraud losses caused by its failure to implement Positive Pay.

## **Complete Court Case and Commentary**

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In what may well become a precedent-setting case, Wachovia Bank won a lawsuit against a customer's insurance company after the customer failed to implement Positive Pay and later suffered a \$153,856.46 check fraud loss. The bank had repeatedly recommended that the customer use Positive Pay, an automated check matching service, but the customer declined.

### **Background**

On December 1, 2005, Todd's Snax, Inc., dba Schultz Foods Company ("Schultz Foods"), issued a check in the amount of \$153,856.46 to Amerada Hess Corporation drawn on Wachovia Bank. Thieves stole the check out of the mail, changed the name of the payee to "Kenneth Payton," and induced Payton (an unwitting accomplice) to endorse the check and deposit it into his account at TCF Bank. Payton was a Protestant minister who had been beguiled by the fraudsters into believing he was helping a refugee family in South Africa. Payton wired out \$150,356.46; the benevolent fraudsters allowed him to keep \$3,500.

TCF presented the check for payment to Schultz Foods' bank, Wachovia Bank, and Wachovia charged the amount of the check against Schultz Foods' account. By the time Schultz Foods discovered the fraud, Payton had wired the funds to a bank in Singapore, and the thieves had disappeared with the money.

On or about January 13, 2006, the fraud came to light. Schultz Foods reported the altered check to Wachovia, demanding that Wachovia re-credit its account. Schultz Foods claimed that Wachovia must bear the loss because it processed the altered check in violation of § 4-401(a) of the Uniform Commercial Code. Wachovia disagreed, citing the fact that Schultz Foods had declined to implement "Positive Pay," a check-fraud deterrence program that would have identified the altered payee name and prevented the loss. Wachovia refused to pay.

Unbeknownst to Wachovia, in March 2005 Shultz Foods bought a commercial insurance policy from Cincinnati Insurance Company to insure against payment of altered and fraudulent checks. Even as Schultz Foods made a claim against Wachovia, it also made a claim under its policy with Cincinnati. Cincinnati paid the claim and filed suit against Wachovia to recover its loss.

In the lawsuit, Cincinnati contended that the altered check was not "properly payable" under § 4-401(a) when Wachovia deducted the amount of the check from Schultz Foods' account, and absent an agreement to the contrary, Wachovia was liable for the loss.

The problem with Cincinnati's argument was that there *was* an agreement to the contrary — the deposit agreement signed by Schultz Foods when it opened its commercial checking account at Wachovia. Section 12 of that agreement described several methods by which a customer could safeguard its account from fraud. These methods fell into two categories:

First, Section 12 contained a bullet-pointed list of "precautions" that customers "can and should take to decrease the risk of unauthorized transactions." They included basic measures such as protecting the secrecy of passwords, promptly reviewing bank statements for unauthorized activity, and immediately reporting suspicious activity to the bank.

Second, Section 12 stated that Wachovia may make available to its customers "certain products and services that are designed to detect and/or deter check fraud." These products and services were developed by Wachovia or purchased from third-party vendors by Wachovia and offered to its customers.

Section 12 of the deposit agreement concluded with a conditional release of Wachovia's liability:

"You agree that if you fail to implement any of these products or services, or you fail to follow these and other precautions reasonable for your particular circumstances, you will be precluded from asserting any claims against [Wachovia] for paying any unauthorized, altered, counterfeit or other fraudulent item that such product, service, or precaution was designed to detect or deter, and we will not be required to re-credit your account or otherwise have any liability for paying such items."

Section 25E of the deposit agreement contained virtually identical language. That section began with the customer's acknowledgment that Wachovia had made available "treasury services designed to reduce the likelihood that a fraudulent, unauthorized or altered check or other item will be paid." That section continued with the customer's acknowledgment that its failure to use such "treasury services" could "substantially increase" the likelihood of fraud. Section 25E ended with another conditional release of Wachovia's liability that was virtually identical to the release found in Section 12.

Wachovia argued that under the terms of the deposit agreement between Schultz Foods and Wachovia, Schultz Foods' failure to implement Positive Pay made Schultz Foods liable for the loss. Positive Pay was a "product or service" for purposes of Section 12 and a "treasury service" for purposes of Section 25E. It was "designed to detect" the type of fraud that caused the \$153,856.46 loss to Schultz Foods. Wachovia repeatedly made Positive Pay available to Schultz Foods, and Schultz Foods unwisely chose not to implement it.

Prior to this loss, Schultz Foods had been a victim of check fraud on three separate occasions. After the first incident in March 2002 when two fraudulent checks cleared its account, Wachovia recommended that Schultz Foods either close its account or implement Positive Pay. Schultz Foods closed its account but did not implement Positive Pay. After the second incident in October 2003 when a check for \$410 was altered to read \$3,942.68, Wachovia again covered the loss. After the third incident in September 2004 when Schultz Foods received notice that a fraudulent check drawn on its account had been deposited at an Oklahoma bank — which did not result in any loss to Schultz Foods — Wachovia told Schultz Foods that if its account

became compromised, Schultz Foods should either close its account or implement Positive Pay. Schultz Foods closed its account but again did not implement Positive Pay. Instead, Schultz Foods purchased a check fraud insurance policy from Cincinnati Insurance Company.

Wachovia did not require Schultz Foods to absorb any fraud-related losses with any of the incidents, even though Schultz Foods never implemented Positive Pay. Based on these experiences, Cincinnati argued that Schultz Foods “had an expectation that Wachovia would reimburse Schultz Foods’ account” for unauthorized charges so long as Schultz Foods took precautions such as closing its account. However, that alleged expectation was contrary to Wachovia’s deposit agreement. Section 43 contained the following anti-waiver provision:

**WAIVER OF RIGHTS BY THE BANK.** We reserve the right to waive the enforcement of any of the terms of this Agreement with respect to any transaction or series of transactions. Any such waiver will not affect our right to enforce any of our rights with respect to other customers or to enforce any of our rights with respect to later transactions with you and is not sufficient to modify the terms and conditions of this Agreement.

Even though Wachovia voluntarily shielded Schultz Foods from past check fraud losses, its well written deposit agreement protected it from any liability created by the illusion of a precedent.

In issuing its Order on July 14, 2010, the Court agreed with Wachovia’s argument that the deposit agreement between Wachovia and Schultz Foods required Schultz Foods either to implement Positive Pay or to assume responsibility for any fraud losses caused by its failure to implement Positive Pay. The Order said:

“...the Court finds that, under the deposit agreement between Schultz Foods and Wachovia, Schultz Foods must bear the loss because Schultz Foods failed to implement a fraud-detection program [Positive Pay] offered by Wachovia — a program that would have prevented the loss. The Court thus grants summary judgment to Wachovia.”

#### Points to consider

1. Typically, an altered payee is the liability of the bank of first deposit, in this case, TCF Bank. The attorneys who won this case, William Mohrman and Greg Erickson, Mohrman & Kaardal, in Minneapolis, MN were retained by TCF Bank, not Wachovia Bank. When Wachovia was sued by Cincinnati Insurance, it chose not to hold its customer accountable to the deposit agreement, and expected TCF Bank to pay for the altered check. Under UCC § 3-119, if one party in the legal chain has a good defense, the liable party can assume that party’s good defense to defend itself. TCF Bank did precisely that. It took over Wachovia’s position and defended itself. This case demonstrates that a customer can have a great relationship with its bank and still lose a check fraud lawsuit.
2. Companies/organizations should review their bank deposit agreements to understand their legal rights and responsibilities. As this case illustrates, a company can do the minimum its bank asked it to do (e.g. close the account), and still lose a lawsuit because (a) of a strongly worded deposit agreement, and (b) it didn’t do more.

Based upon this lawsuit, banks will almost certainly be reviewing and re-writing their deposit agreements to include the kinds of provisions Wachovia Bank included in its deposit agreement. Banks that want to strengthen their deposit agreement should consider contacting Bill Mohrman ([mohrman@MKLaw.com](mailto:mohrman@MKLaw.com), 612-341-1074).

3. Companies/organizations should speak with their insurance agent about coverage and loss limits for check fraud and cyber crime losses. Schultz Foods was smart to obtain a high-limit policy that covered its \$153,856.46 loss. Many commercial policies cover up to \$25,000, which is entirely inadequate for most organizations.
4. Check fraud is rampant across the nation. Companies/organizations should implement Positive Pay with Payee Name match on all checking accounts. If their bank does not offer Payee Positive Pay, customers should request the service in writing. The request should be sent by Certified Mail-Return Receipt Requested. One never knows when that document may become useful.
5. All banks charge for Positive Pay. Banks should charge as little as possible to maximize the number of users, and companies/organizations should think of the fees as "insurance." If Positive Pay fees are considered too expensive, compare it to the cost of legal fees as the alternative. It is no longer a matter of "if" a company will be hit, it is a matter of "when."
6. Wachovia Bank won this lawsuit because it offered Payee Positive Pay and had a well crafted deposit agreement. A bank that does not have Payee Positive Pay can add the technology for as little as \$30,000. The technology utilizes X9.37 or TIFF files and works with any bank operating platform. It can interact with existing online banking systems. For more information, contact Greg Litster at [greg@safechecks.com](mailto:greg@safechecks.com) or (800) 949-2265.
7. All parties need to know that Payee Positive Pay is not foolproof. Forgers are beating it by adding a new payee name above the original payee name. A check with an added payee name can pass through Payee Positive Pay undetected.
8. A "secure name font" helps prevent added payee names. The font is available through SAFEChecks. It is illustrated in Frank Abagnale's fraud bulletin, *Check Fraud, Identity Theft, Holder in Due Course and Cyber Crime*, Volume 9, Page 7, *A Primer on Laser Printing*, and also on Page 14, *Secure Software*. To receive a check printed with a secure name font, contact Robin Johnson at (800) 755-2265 x3311 or [robin@safechecks.com](mailto:robin@safechecks.com). Mr. Abagnale's bulletin can be downloaded at [safechecks.com/services/fraudbulletin.html](http://safechecks.com/services/fraudbulletin.html).
9. Technology-challenged companies/organizations that lack the IT capability to format and send its check issue file to the bank can buy software from SAFEChecks to do so. To assist understaffed accounting departments, the software can be programmed to automatically send the check issue file to the bank after every check run. The software includes a secure name font to prevent added payee names, a secure number font, and an encrypted, image-survivable barcode. The barcode contains the maker, payee, dollar amount, check number, account number, issue date, routing/transit number, the X,Y coordinates of each piece of data, the time and date the check was printed, the printer used to print the check, and the operator. The barcode is like Payee Positive Pay on-board the check. If a bank has the technology to decrypt the barcode (starting at

\$30,000), the customer does not need to send a check issue file. The entire file is in the barcode on the check, and carries through to the image if the check is converted.

10. High security checks are a critical component in check fraud prevention. Organizations cannot fight check fraud and ignore the quality of the check. When Schultz Foods' check was altered, apparently there was no visible trace of the alteration. Using high security checks such as the SuperBusinessCheck ([www.supercheck.net](http://www.supercheck.net)), discussed on Page 11 of Frank Abagnale's fraud bulletin, would likely have left some telltale signs of the alteration. Contact Robin Johnson ([robin@safechecks.com](mailto:robin@safechecks.com)) for a sample.
11. Use a 14 point font for the Payee Name and address. A larger font makes physical alterations more evident. Also, use good quality toner, not cheap toner. Cheap toner can be peeled off with tape without damaging the physical paper check. Finally, make sure the laser printer is hot. The hotter the printer the better the toner bonds to the check. This is discussed in detail in Frank Abagnale's bulletin, Page 7, *A Primer on Laser Printing*.
12. Readers that want to know how challenging it can be when a bank's attorney takes a company to the woodshed over the company's internal failings will want to read selected excerpts from Wachovia Bank's *Memorandum in Support of Defendant Wachovia Bank's Motion for Summary Judgment*. It is Addendum A, below.

The case is:

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
CINCINNATI INSURANCE COMPANY,  
as Subrogee of Todd's Snax, Inc., d/b/a Schultz Foods Company,  
Plaintiff,  
v.  
WACHOVIA BANK, NATIONAL ASSOCIATION,  
Defendant.  
Case No. 08-CV-2734 (PJS/JJG)

This Article and the Court Order can be downloaded at:

[www.safechecks.com/services/fraudprevention.html](http://www.safechecks.com/services/fraudprevention.html)

Addendum A begins on the following page.

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## Addendum A

**NOTE: This Addendum contains selected excerpts taken directly from Wachovia Bank's 28-page, MEMORANDUM IN SUPPORT OF DEFENDANT WACHOVIA BANK'S MOTION FOR SUMMARY JUDGMENT.**

### INTRODUCTION

This action involves a stolen and altered \$153,856.46 check ("Check") drawn on the commercial checking account of the Plaintiff Cincinnati Insurance Co.'s subrogor, Todd's Snax, Inc., d/b/a Shultz Foods, a pretzel manufacturer located in Hanover, Pennsylvania ("Shultz Foods"). Shultz Foods issued the Check from its commercial checking account with Defendant Wachovia Bank on December 1, 2005 payable to Amerada Hess, Inc. Individuals engaged in a fraudulent check scheme stole the Check and altered the name of the payee from "Amerada Hess" to "Kenneth Payton." The thieves convinced Payton to deposit the Check into his TCF Bank account and wire transfer the proceeds to Singapore. By the time Shultz Foods discovered the alteration in January, 2006, the thieves were long gone. Shultz Foods demanded that Wachovia re-credit Shultz Foods' account claiming that the Check was not properly payable under UCC §4-401 because of the altered payee name.

Wachovia denied Shultz Foods' claim because Wachovia's Depository Agreement specifically provided if Shultz Foods failed to implement a commonly used check fraud deterrence program known as "Positive Pay," Shultz Foods was "precluded from asserting any claims against Wachovia" for altered checks.

### STATEMENT OF THE FACTS

#### **A. Bank "Positive Pay" Programs.**

This lawsuit involves an anti-check fraud program banks have developed for commercial customers over the course of the last ten years commonly known in the banking industry as "Positive Pay." Banks developed "Positive Pay" programs with the advent of computer accounting programs and internet technology to combat the increasing incidence of check fraud.

#### **B. Shultz Foods' Previous Instances of Check Fraud.**

Shultz Foods was the business name of a closely held Pennsylvania corporation, Todd Snax, Inc., engaged in manufacturing snack foods in Hanover, Pennsylvania.

In 2004, Shultz Foods had revenues of \$(deleted for privacy reasons) and a gross profit of \$(deleted for privacy reasons) and for the six months ended June 30, 2005 had revenues of \$(deleted for privacy reasons) and a gross profit of \$(deleted for privacy reasons).

In March, 2002, a fraudulent check cleared Shultz Foods' account with First Union Bank. First Union's customer service representative for Shultz Foods contacted Shultz Foods' account

manager regarding the fraud. Emails exchanged confirm that First Union offered a “Positive Pay” program to detect check fraud and sent documents regarding “Positive Pay.”

Shultz Foods admitted it fully understood how “Positive Pay” worked in 2002 and that “Positive Pay” prevented payment of fraudulent checks. Nonetheless, Shultz Foods refused to implement “Positive Pay” because of costs, even though the “Positive Pay” program cost only \$25 per month. Rather, Shultz Foods’ closed and re-opened its account with a new account number.

After March, 2002, First Union merged with Wachovia. In October, 2003, Shultz Foods had yet another fraudulent check clear its Wachovia account. Again, Shultz Foods refused to implement “Positive Pay.”

In September, 2004, Shultz Foods had yet another fraudulent check clear its account. Wachovia’s representative in charge of “Positive Pay” for Shultz Foods’ account sent an email on September 21, 2004 recommending that Shultz Foods implement “Positive Pay” and attaching Wachovia documentation regarding “Payee Match Positive Pay” which would have prevented the payment of the Check at issue in this action. [Wachovia’s employee] later followed up with [Schultz Foods’ employee] specifically explaining Wachovia’s “Payee Match Positive Pay” program.

Despite [Wachovia’s employee] again explaining “Positive Pay,” Shultz Foods refused to implement “Positive Pay” but rather chose to close and re-open its checking account as a result of the fraud. [Schultz Foods’ employee] testified Shultz Foods refused to implement “Positive Pay” in 2004 because (i) Wachovia’s service fees for “Positive Pay” and (ii) the cost of implementing “Positive Pay” on Shultz Foods’ computers.

However, [Schultz Foods’ employee] *post hoc* speculative explanations are contradicted by undisputed documentary evidence demonstrating that Shultz Foods would have paid no service fees and little or nothing in implementation of “Positive Pay.” In addition, Wachovia’ account specialist assigned to the Shultz Foods account contacted [Schultz Foods’ employee] regarding “Positive Pay” and specifically recommended that Shultz Foods’ implement “Positive Pay.”

### **C. Shultz Foods Would Not Have Paid Any Additional Fees to Enroll In Wachovia’s “Payee Match Positive Pay.”**

[Wachovia’s employee] specifically testified she told [Schultz Foods’ employee] in September, 2004 that if Shultz Foods implemented Wachovia’s “Payee Match Positive Pay” program Wachovia would not have charged Shultz Foods any service fees because Shultz Foods received “fee credits” based on the high daily balances maintained on its accounts. [Wachovia’s employee] explained that Pennsylvania law does not allow Pennsylvania banks to pay interest on checking accounts. As a result, in order to compensate customers not receiving interest on deposits, Wachovia provides “fee credits” based on the customer’s average daily balance.

In November, 2005, the average daily ledger balance in Shultz Foods’ accounts was \$(deleted for privacy reasons). As a result, Wachovia provided a credit of \$(deleted for privacy reasons) for fees on Shultz Foods’ accounts. Wachovia’s monthly fees for implementing Wachovia’s “Payee Match Positive Pay” would have consisted of three fee charges in December, 2005: (i) \$XX per month to have “Positive Pay,” (ii) \$0.0X per check presented to use “Basic Positive Pay” and (iii)



\$0.0Y per check presented to use “Payee Match Positive Pay.” Because Shultz Foods had NNN checks presented for payment in December, 2005, Wachovia would have charged Shultz Foods \$91.89 for Shultz Foods using “Payee Match Positive Pay.” However, as Johnston testified and as reflected on Wachovia’s bank statement to Shultz Foods, the \$(deleted for privacy reasons) credit for service fees would have been more than enough to cover the \$91.89 in Wachovia’s fees for providing “Payee Match Positive Pay” to Shultz Foods in December, 2005. In other words, because Shultz Foods maintained an average daily ledger balance of \$(deleted for privacy reasons) in its Wachovia accounts, Shultz Foods would have paid absolutely no service fees to Wachovia for using “Payee Match Positive Pay.”

#### **D. From September, 2004 Through December, 2005, Shultz Foods’ SAP ERP Accounting System Could Have Generated The “Issue File” For Purposes of Wachovia’s “Payee Match Positive Pay” Program.**

Plaintiff will presumably assert either that Shultz Foods’ computer accounting program could not generate the “issue file” for each check necessary to implement Wachovia’s “Payee Match Positive Pay” program or that the cost of formatting the “issue file” from its computers would be too expensive. However, the undisputed facts demonstrate that Shultz Foods that these uncorroborated excuses are not only untrue, but absurd given that Shultz Foods was running average daily balances in its accounts of \$(deleted for privacy reasons). First, [Schultz Foods’ employee] admitted that Shultz Foods’ computers used an SAP “ERP” program to run Shultz Foods business as early as 2002, including its accounting program to issue checks, and that the SAP program was “robust.” While [Schultz Foods’ employee] initially testified in his deposition that he was uncertain whether Shultz Foods’ SAP accounting program could generate a digital “issue file,” [Schultz Foods’ employee] later admitted that Shultz Foods’ computers could generate the “issue file” for the “Payee Match Positive Pay” program.

Second, Wachovia’s representatives have testified that Wachovia’s technical representatives who assist with implementation of “Payee Match Positive Pay” could assist Shultz Foods in generating “issue files” for “Payee Match Positive Pay” from an SAP accounting software. Moreover, Wachovia has customers who create issue files for “Positive Pay” from an SAP accounting program.

Third, [Schultz Foods’ employee] admitted he knew by 2002 that third party software could be installed on Shultz Foods’ computers to generate the “issue file” needed to implement “Payee Match Positive Pay.”

In 1998, [Third Party software] was designed to create “issue files” for use in “Positive Pay” programs. [Third Party software] could generate “issue files” from SAP accounting programs as early as 2000. In addition, [Third Party software] was offered to Wachovia customers for \$495.00 including installation and ensuring implementation to create “issue files” compatible with Wachovia.

Finally, [Schultz Foods’ employee] admitted that \$500 was not an unreasonable cost to implement the “Positive Pay” program. Thus, Shultz Foods could have had [Third Party software] installed and properly working on its computers in 2004 at a total cost of \$495.00. Thus, the undisputed facts demonstrate that Shultz Foods’ computer from at least 2004 through

December, 2005 could have generated check “issue files” to be used with Wachovia’s “Payee Match Positive Pay” program.

**E. From September, 2004 Through December, 2005, Shultz Foods’ Accounting Program and Printers Could Print The Payee Name On Its Checks In a Font Style and Size Which Could Be Recognized By Wachovia’s “Payee Match Positive Pay” Program.**

Wachovia’s “Payee Match Positive Pay” program required Shultz Foods to print the payee name on its checks in a certain font style and font size to enable Wachovia’s OCR software to recognize the payee name and input the digital payee name into Wachovia’s computers. The undisputed facts demonstrate that Shultz Foods’ computers had this capability in December, 2005.

First, [Schultz Foods’ employee] ultimately admitted in his deposition that Shultz Foods’ computers and printers could have printed its checks, including the payee name, in an Arial font pursuant to Wachovia’s requirements because, among other reasons, Shultz Foods was in fact printing the payee name in an Arial font in 2005. [Schultz Foods’ employee] also initially asserted that Shultz Foods did not have an Internet connection in 2005. However, after it was later pointed out to [Schultz Foods’ employee] in his deposition that Shultz Foods was using Wachovia’s Internet banking service, called “Wachovia Connection” as early as 2002, [Schultz Foods’ employee] corrected his testimony and admitted that Shultz Foods could transmit issue files to Wachovia in 2005.

Second, during this litigation, Wachovia’s “Positive Pay” technical employees randomly selected 14 images of Schultz Foods’ checks presented for payment in December, 2005 and ran those checks through Wachovia’s “Payee Match Positive Pay” OCR software. Wachovia’s “Payee Match Positive Pay” OCR software accurately read the payee name of 13 of the 14 checks resulting in a pass rate of 92.85% which was above Wachovia’s 88% pass rate required to qualify for Wachovia’s “Payee Match Positive Pay.” One of the reasons for the high pass rate is because Shultz Foods printed the payee name in an Arial font as required by Wachovia. Thus, Shultz Foods’ could have used Wachovia’s “Payee Match Positive Pay” program in December, 2005 without making any changes to how Shultz Foods printed its checks.

Third, SAP’s default font style is a Helvetica font. Shultz Foods’ SAP consultant in 2005 testified that the SAP Helvetica font is identical – not similar but identical – to the Arial font. [Schultz Foods’ SAP consultant] further testified that Shultz Foods’ SAP software could print in an Arial font between 10-16 points as required under Wachovia’s “Payee Match Positive Pay” program in December, 2005. Thus, the undisputed facts demonstrate that Shultz Foods’ computer programs and printers could have generated the “issue file” and properly printed the payee name on its checks in order to use Wachovia’s “Payee Match Positive Pay” program in December, 2005 because Shultz Foods’ accounting system was run on a “robust” SAP program and used an HP LaserJet 6P printer to print checks.

**F. Under Shultz Foods’ “Deposit Agreement and Disclosures for Commercial Accounts” With Wachovia, Shultz Foods Agreed It Could Not Assert A Claim For An Altered Check If Shultz Foods Failed to Implement Wachovia’s “Positive Pay” Program.**

As set forth above, as a result of the fraud in Shultz Foods' account in September, 2004, Shultz Foods decided to open a new account rather than implement Wachovia's "Positive Pay" program. In order to open the new account, Wachovia's representative for Shultz Foods account sent [Schultz Foods' employee] a September 24, 2004 email attaching three documents including Wachovia Bank's "Deposit Account Application." On the third line of the "Deposit Account Application," Shultz Foods specifically agreed it had received Wachovia's "Deposit Agreement and Disclosures for Commercial Accounts."

Wachovia's "Deposit Agreement" governs Wachovia's depository relationship with its commercial customers. Most importantly, Wachovia's Deposit Agreement specifically precludes commercial customers from holding Wachovia liable for altered checks if the customer fails to implement "Positive Pay." Both paragraph 12, entitled "Fraud Detection/Deterrence and Safeguarding Your Account," and paragraph 25E., entitled "Treasury Services," provided that Shultz Foods agreed Wachovia had made available to Shultz Foods certain programs which are designed to deter or detect fraudulent checks including "Positive Pay."

The purpose of paragraphs 12 and 25E., as specifically set forth in those paragraphs, is to preclude Shultz Foods from asserting liability against Wachovia in the event an altered check clears Shultz Foods' account which Wachovia's "Positive Pay" program was designed to detect or deter.

**END OF SELECTED EXCERPTS**

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