NATIONAL ASSOCIATION OF UNCLAIMED PROPERTY ADMINISTRATORS ®

MEMORANDUM

To: **Drafting Committee, Revision of the Uniform Unclaimed Property Act, Uniform Law Commission**

From: **National Association Unclaimed Property Administrators**

Re: **Delegation of Holder Reporting Obligations**

Date: **May 9, 2014**

Introduction

In conjunction with its submission to the Uniform Law Commission of recommended enhancements to the 1995 Uniform Act, the National Association of Unclaimed Property Administrators (NAUPA) has proposed that the Drafting Committee specifically address the matter of a holder's delegation of its reporting obligations. As a related issue, NAUPA also suggests that the Drafting Committee expressly address the disposition of property that has not yet become abandoned that is held by a company that is merged or acquired.
NAUPA has drafted the following new section for the Drafting Committee's consideration:
___ *Assignment and Succession*
(a) A holder may not assign or otherwise transfer its obligation to pay or deliver property or to comply with the duties of this Act, other than to a parent, subsidiary, or affiliate of the holder. The assignor or transferor shall remain the holder for purposes of the application of Section 4 of the Act.

(b) A holder's successor by merger or consolidation or person or entity that acquires all or substantially all of a holder's capital stock or assets shall be responsible for the payment or deliver of property or to comply with the duties of this Act with respect to property held and owing by the predecessor entity.

(c). Nothing in this section shall prohibit a holder from contracting with a third party for the reporting of unclaimed property, provided that a holder shall remain responsible to the administrator for the complete, accurate and timely reporting and delivery of property, and liable to the administrator for any failure on the part of the third party to report and deliver the property.

Secretariat: National Association of State Treasurers, c/o The Council of State Governments
2760 Research Park Drive, P.O. Box 11910, Lexington, KY 40578-1910
Tel: (859) 244-8150 ♦ Fax: (859) 244-8053 ♦ Email: naupa@csg.org ♦ www.unclaimed.org

Necessity for the provision

The proposition that the holder of unclaimed property means the person obligated to hold for the account of, or deliver or pay, to the owner of property is well-established.[1] The view of the States is that the holder is the person *indebted* to another on an obligation.[2] This straightforward "debtor-creditor" analysis is consistent with U.S. Supreme Court decisions concerning unclaimed property.[3]

Not all holders concur with the state view. The result is more than a disagreement. Non-compliance frequently arises when a holder contractually "delegates" its liability to pay an owner to a third party that "assumes" such liability, but the third party then contends that there was no assumption of an obligation to report and remitted unclaimed property. Rather than the original obligor and the third party assuming acting responsibly and resolving the issue amongst themselves, the States are often forced to initiate enforcement actions to collect the property. The Uniform Unclaimed Property Act should be revised to eliminate this purported "ambiguity" and clarify compliance responsibility where a holder has utilized a third party for the administration of funds, record keeping, or claims.

State legal actions

States have in particular encountered non-compliance in "delegation" arrangements within the rebate fulfillment industry. A rebate fulfillment house contracts with a rebate sponsor (retailer or manufacturer) to process and pay the rebate sponsor's consumer rebates. The sponsor fully funds the rebates, and agrees that the fulfillment house may retain all funds from unpresented rebates as consideration for the fulfillment house's services.[4] Typically, the service agreement is

---

[1] See 1995 Uniform Unclaimed Property Act, §1(6).

[2] See 1981 Uniform Unclaimed Property Act, §1(8)(iii). While the definition of a "holder" under the 1981 Uniform Act additionally includes "a person in possession of property belonging to another" and "a trustee," the position of the States is that these alternative definitions are fallbacks for when there is no identifiable person contractually obligated to pay the owner. This position was adopted by the Uniform Law Commission in its enactment of §1(6) of the 1995 Uniform Act.

[3] See *Texas v. New Jersey,*379 U.S. 674, 85 S. Ct 626, 13 L. Ed. 2d 596 (1965) and *Delaware v. New York,* 507 U.S. 490, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1993). Some holder advocates have argued that the *Delaware v. New York* decision supports the proposition that a holder may freely delegate the obligation to pay (and thus its status as the holder of property) to a third party. However, this is a misreading of the case. *Delaware v. New York* involved a novation (discussed *infra)* and not a delegation of liability. "Critical to this decision was the fact that by arrangement with the beneficial owners, the intermediaries held the corporate securities in their own names rather that in the names of the beneficial owners. Thus, as *record owners,* the intermediaries were fully entitled to receive distributions based on those securities. From the perspective of the original debtor—the dividend-paying corporation—the only creditors are registered shareholders, those whose names appear on the issuer's records. Issuers cannot be considered debtors once they pay dividends, interest or other distributions to record owners; payment to a record owner discharges all of an issuer's obligations under the Uniform Commercial Code," *Clymer v. Summit Bancorp,* 726 A. 2d 983, 992 (N.J. Super. 1998).

[4] Rebate fulfillment service contracts may also provide that any unpresented rebate check funds (referred to in the industry as "slippage") are returned to the rebate sponsor. Under this scenario, the rebate fulfillment house is

silent as the reporting of unclaimed property, and whether the sponsor or the fulfillment house has the responsibility for reporting and delivering the uncashed rebate checks.

A decade ago, when States first focused on the non-reporting of uncashed rebate checks, rebate sponsors and rebate fulfillment houses both asserted that the other party was responsible for compliance. Consequently, neither party [5]reported and delivered the property. This resulted in the states collectively bringing litigation against a major fulfillment house, Young America Corporation.[6] Although the states initially named Young America as defendant in the action, the lawsuit was amended to add the fulfillment house's largest rebate sponsor clients. Additionally the States, in the course of discovery (and audit of Young America) concluded that the sponsors of the rebates, and not their fulfillment house, were the holders of the property.[7]

In its briefs before the court, the State of Iowa (the lead plaintiff in the case) argued that the rebate sponsors could not discharge themselves from liability on the rebate obligations simply through delegating payment of the rebates to the fulfillment house. The payment "function" could be outsourced, but the underlying duty to make payment could not be transferred. Such delegation of to perform a contractual obligation is distinguishable from a *novation,* where *all parties* to a contract agree to the replacement of a party, including a debtor, with a new party. In the context of a consumer rebate, the rebate sponsor makes a promise to pay the consumer a rebate for purchasing the sponsor's product. The rebate fulfillment house is not a party to the transaction, and there is no knowledge (let alone consent) on the part of the consumer of the sponsor's delegation of payment to the fulfillment house. Thus, the duty to pay cannot be assigned as a matter of law from the sponsor to the fulfillment house.

Excerpts from Iowa's legal arguments in the *Young America* case are set forth in Exhibit B to this memorandum.[8]

One of the authorities relied upon by Iowa and the other states in the *Young America* litigation was the New Jersey Supreme Court's decision in *Clymer v, Summit Bancorp.*[9] Although this

---

paid a fixed fee for handling rebate transactions, because the fulfillment house is unable to utilize the uncashed check funds as its own revenue.

[5] A small number of rebate sponsors, upon reviewing the contractual arrangement that had entered into with rebate fulfillment houses, concluded that the rebate sponsor was liable for the uncashed rebate checks and did report to the states.

[6] *Fitzgerald v. Young America Corporation,* No. CV6030 (Iowa Dist. Ct. for Polk County, Feb. 8, 2006)(*Petition*).

[7] See "The Rebate Offeror is the 'Holder" of Unclaimed Rebates Because It Is the Debtor with the Obligation to Pay the Consumer," prepared by the state contract auditor Xerox Unclaimed Property Clearinghouse and attached as Exhibit A. This document reflects the legal and policy position of most state unclaimed property programs with respect to the reporting liability for unclaimed consumer rebates, as was articulated by the States in the *Young America* litigation.

[8] The *Young America* case was settled before a final adjudication of the issues. However, in ruling on cross-motions for summary judgment, the Iowa trial court concluded that the rebate sponsors were not "as a matter of law" exempt from potential unclaimed property liability on the rebate checks issued on their behalf by Young America, simply because the sponsors "do not possess the property at issue" (Iowa Dist. Ct. for Polk County, June 5, 2009)*(Ruling on Motions for Summary Judgment, at p. 14).*

case primarily focused on the applicable abandonment period for unclaimed municipal bond interest and principal, resolving the issue required a determination of which entity was the holder of the property. The State of New Jersey had engaged commercial banks to handle the payment of municipal bond interest, as well as the redemption of the bonds. New Jersey asserted that any resulting unclaimed property was subject to the abbreviated one year abandonment period for government obligations; the bank paying agents disagreed. The trial court ultimately determined that

> Although the Bank may have physical possession of the funds that are unclaimed, these funds represent the indebtedness of the governmental entities are payable to bondholders. Accordingly, the governmental
>
> entity is considered the ultimate obligor and thus a "holder" as defined in [the Act].[10]

The Appellate Division of Superior Court of New Jersey reversed the trial court, finding that "[t]hroughout the various versions of the uniform acts and New Jersey's enactments thereof, the use of the term 'holder' has connoted the person or entity whose possession the funds are in at the time of escheat."[11] However, the New Jersey Supreme Court reaffirmed the trial court's ruling, agreeing that the contractual arrangements between the paying agents and the State did not alter the underlying obligation or detract from the State's status as a holder.[12]

Substantially similar issues to those involved *Young America* were presented in the State of Washington's unclaimed rebate litigation with Costco Wholesale Corporation.[13] Costco offered a "One-Stop Rebate Program: to consumers in its warehouses. It used signs in its warehouses to communicate the availability of a rebate on a certain product. It issued the consumer a rebate-receipt submission form, to be used to mail the rebate payment request to the "Costco Rebate Program." The consumer was directed to contact Costco about the rebate and its processing, either online or to its customer service office. Costco used a rebate fulfillment house to process the rebate submission and to issue rebate checks. Throughout, the consumer effectively had no

---

[9] 792 A.2d 396 (2002).

[10] 726 A.2d. 983, 989 (1998)(citations omitted). The Court's analysis placed substantial focus on which party constituted the "ultimate obligor"—that is to say, whether the State of New Jersey or the bank was legally responsible for making payment to bondholders. The Court found, and the bank did not disagree, that the State was liable to the bondholders for payment. Given this fact, the Court easily concluded that the State, being indebted to another on an obligation, was the holder. The fact that the bank "held" the funds did not render the bank the holder. "That the public entity designates the Bank as its fiscal agent to deliver payment does not change[the public entity's] obligation to the bondholders." 726 A.2d at 990.

[11] 758 A.2d 652, 654 (2000).

[12] 792 A.2d at 405, quoting the trial court at 726 A.2d 992.

[13] *Costco Wholesale Corp. v. State,* No. 11-2-08830-8 SEA (Wash. Super. Ct. March 4, 2011)(Petition for Judicial Review).

knowledge about the arrangements between Costco and its suppliers/manufacturers, or the fulfillment house. In its suit challenging the State's determination that Costco possessed the reporting and delivery obligation for its uncashed rebate checks, Costco asserted that it was merely "coordinating" a rebate program[14] on behalf of third-party manufacturers that were sponsoring the rebate program for their products that were for sale in Costco warehouses.[15] Costco argued that it did not undertake any legal obligations to consumers to pay the rebates; rather, the fulfillment house, which was administering the rebate program on behalf of suppliers/manufacturers, was liable for any uncashed rebate checks and thus the holder.[16] Costco maintained that it "discharged any obligation it had on the rebate transactions when it fully paid the rebate amounts" to the fulfillment house for transmittal to consumers.[17]

The State focused on the fact that Costco, not the supplier/manufacturer, entered into a contractual relationship with the consumer to pay the rebate, and that Costco remained indebted to consumers for the unpaid rebates even though Costco had transmitted funds to a third party to fulfill rebate submissions.[18] Adopting the analysis of the States in the *Young America* litigation, Washington argued that

> …Costco's assertions about its role in offering rebates to its customers are not borne out by the rebate offers under examination here. The offers themselves show a contractual relationship only between Costco and its customers. That contractual relationship creates an obligation to pay in Costco and a right to payment in the customer. It is the customer's right to payment that has been abandoned and should have been delivered into the State's protective custody. *Neither its delegation arrangement with CPG nor any collateral funding*

---

[14] Under the arrangement between Costco and its rebate fulfillment provider, the rebate fulfillment provider was entitled to retain all funds representing uncashed rebate checks

[15] It should be noted that the rebates in question were not "manufacturer's rebates," i.e. rebates offered directly by a supplier or manufacturer, submitted to the supplier or manufacturer, and paid by the supplier or manufacturer. Instead, these rebates were offered and administered by Costco.

[16] Prior to the litigation, the rebate fulfillment house, Continental Promotion Group, filed a petition for reorganization under the Bankruptcy Code. The proceeding was subsequently converted to a Chapter7 liquidation. Had the Court agreed with Costco that the fulfillment house was liable to the State for the uncashed rebate checks, the State would have had little or no chance for actual recovery.

[17] *Plaintiff Costco's Motion of Summary Judgment on Counterclaim of Department of Revenue,* at p. 1 (May 18, 2012). In addition, Costco challenged the State's position that "the unclaimed property at issue is not the uncashed checks themselves but rather some ill-defined underlying obligation giving rise to the issuance of checks…[the State] thus appears to seek to go behind the form and substance of the uncashed checks to some preceding obligation." *Id,* at p. 10. Indeed, the State was asserting that Costco's obligation was the company's promise to pay the consumer, and not the printed check on which payment was issued.

[18] *Defendant/Counter-Claimant's Motion for Partial Summary Judgment* (June 29, 2012). There was a third argument that the State additionally addressed, as a result of it being raised by Costco: the naming of Costco as an alternative payee on the rebate checks was of no consequence. Costco had included itself as a payee on the rebate checks to facilitate encashment of the checks at Costco warehouses. Costco felt this prevented the State from claiming the uncashed rebate check funds. Washington (and ultimately the Court) felt otherwise.

> *arrangement for funding by suppliers changes Costco's continuing obligation to pay*. Although Costco gave fund to [its fulfillment house], those funds represent Costco's obligation to the customers and, thus, Costco remains the pertinent "holder" for purposes of the unclaimed property laws.[19]

In granting the State of Washington's motion for partial summary judgment, the trial court concluded that there was "no genuine issue of material fact in dispute that Costco is the 'holder' or unpaid rebate obligations owed to Costco members…[t]he Department of Revenue is entitled to partial summary of judgment as a matter of law on the issue of Costco's liability to report and deliver the unpaid rebate obligation into the State's protective custody in an amount to be determined at trial."[20]

Copies of the Court's partial summary judgment ruling, as well as Costco's and the State of Washington's motions for summary judgment, are attached as Exhibit C to this memorandum.

Compliance and public policy implications

State unclaimed property programs have a legitimate interest in insuring compliance with reporting requirements. Many holders utilize third parties to perform unclaimed property reporting compliance, and the States have no issue with an outsourcing of this function, provided that reports are complete, accurate, and are filed consistent with reporting requirements. [21] However, the holder must remain responsible and accountable for the third party's performance, and the State should be able to look to the holder, and not be relegated to the holder's agent, when a compliance issue arises.

It is the lack of accountability that the States find most problematic in terms of the issue of delegation. Holders often purport to have "assigned" their unclaimed obligations, but in fact mechanisms are not created to insure that counterparty complies with the unclaimed property law. Contracts alleging to delegate unclaimed property reporting obligations frequently lack any specific requirements or penalties for failure to report and deliver unclaimed property. The failure of holders who assert delegation of obligations to monitor compliance, or to take legal steps when an "assignee" fails to report unclaimed property, suggests to the States that instead of representing contractual arrangement under which one party legitimately assumes reporting obligations of another, these types of agreements are in fact designed to facilitate avoidance of unclaimed property law by both parties.

---

[19] *Id,* at p. 22 (emphasis added).

[20] *Order Denying Plaintiff's Motion for Summary Judgment and Granting Partial Summary Judgment to Defendant/Cross-Claimant,* at p. 2 (August 2, 2012). As in *Young America,* the case was settled and there was no final adjudication of all issues by the Court.

[21] The ability of a holder to engage a third party to prepare the holder's unclaimed property reports is expressly acknowledged in NAUPA's draft legislation.

There are a number of public policy reasons against allowing holders to delegate its liability for underling obligations to third parties. The most obvious one, which has already been discussed here, is the legal morass that results when the delegation of the liability is disputed. Additional concerns revolve around the delegation of liability to a third party that is undercapitalized, [22]inadequately managed or staffed, unknowledgeable as to the underlying transactions,[23] or incorporated in a different state (or even country) than the original obligor. This latter concern is particularly troubling. If a holder is free to assign its unclaimed property obligations to a third party, then it could assign such obligations to an entity that is domiciled in a state with a reporting exemption applicable to the property. If owner names or addresses were not maintained with respect to the property (or somehow are not provided to the assignee), the property would effectively become non-reportable. And if the liability could be transferred to a foreign entity, the property would be beyond reach of state unclaimed property laws, even if the names and addresses of owners had been retained and provided to the foreign assignee.

If a holder was allowed to legally transfer the underlying liability for unclaimed property to a third party, a holder could effectively convert its unclaimed property liabilities into assets. Consider an arrangement where an entity, domiciled outside of the United States, agrees to assume full liability for a holder's outstanding checks. Further assume that all such checks have been outstanding for a minimum of 12 months. Realizing that only a small percentage of these checks will be presented for payment more than a year after their issuance, the third party only requires that the holder transfer 50 percent of the outstanding amount to the third party. Because the third party fully indemnifies the holder for all outstanding checks and not merely to the extent that the holder has provided funding, the holder is the able to take the remaining 50 percent of the outstanding check amount to income.

The third party can confidently enter into this arrangement because it knows (a) it will not have to honor for payment more than a small percentage of the checks that it has assumed liability for and (b) it will not be required to transfer any funds to state unclaimed property programs because it is beyond the reach of these laws. Thus, the holder is happy, the third party is happy, and meantime the unclaimed property liability is emasculated. The owners will not receive the benefits and protections of the unclaimed property law. And because proactive reunification efforts are inconsistent with this business model, only those owners who realize on their own accord that they are owed funds will seek and obtain payment.

Is this scenario stranger than fiction? No. On March 24, 2014, the Delaware Superior Court "unsealed" a "whistleblower" suit originally filed on June 28, 2013.[24] The Delaware Department

---

[22] As was the case with Costco's rebate fulfillment house, Continental Promotion Group, discussed in footnote 16, *supra.*

[23] If a liability can be transferred from the original obligor to a third party, this will also frustrate owners in attempting to locate, and receive payment for such obligations.

[24] *State v. Card Compliant, LLC et al.,* Super. Ct. for the State of Delaware, New Castle County (C.A. Mo. N13C-06-289-FSS)

of Justice ("the DOJ") joined the whistleblower in the suit which was filed pursuant to the Delaware False Claims and Reporting Act (DFCRA). The defendants include CardFact, Ltd. and its many subsidiaries; Card Compliance Holding Company, LLC, Card Compliant, LLC and their subsidiaries (collectively, "the Card Services Defendants"); 26 major U.S. retailers, merchants and restaurant groups (collectively "the Delaware Defendants"), who are current or former clients of the Card Services Defendants; and the National Restaurant Association. The complaint asserts that the Card Services Defendants conspired with the Delaware Defendants and the National Restaurant Association to defraud the government and the public out of hundreds of millions of dollars. Allegedly, the Defendants conspired to circumvent the Delaware Abandoned Property Law by establishing sham "paper" entities, creating a string of contracts devoid of any legal substance, providing payments and kick-backs and utilizing an offshore entity in the Cayman Islands to which the Card Services Defendants routinely swept up and transferred their assets. The whistleblower alleges that the Defendants' scheme was so brazen that there was no substance or valid business purpose to any of the "paper" facades and trails created by the parties. The complaint further asserts that the Delaware Defendants, working with the Card Services Defendants and the National Restaurant Association, sought to hide and obscure these funds through a complex series of contracts and shell companies in an effort to keep millions of dollars in as yet unredeemed gift cards and/or stored value cards.

In summary, NAUPA is seeking a prohibition of the delegation or assignment of unclaimed obligations due to the use of such actions being used by holders to circumvent reporting, and thus inconsistent with the purposes of the Uniform Unclaimed Property Act.

Other aspects of the NAUPA draft legislation

There may be legitimate business reasons for a holder to transfer unclaimed property liabilities on an inter-company basis and, as such, the draft legislation permits such transfer. However, such inter-company transfer should not alter the priority of state claims to property (or be used to “shift” an unclaimed property liability to a jurisdiction where the property would not be reportable). Accordingly, the draft legislation provides that for reporting purposes, the original obligor shall be treated as the holder.

States occasionally are involved in disputes with entities that have acquired a company, and then sought to avoid responsibility for the unclaimed property liabilities of the company so acquired. Canons of corporate law notwithstanding, states are presented with arguments that unclaimed property liabilities were not part of a purchase transaction, or because unclaimed property liabilities were not disclosed by a seller they should be forgiven vis-à-vis the acquirer. Inclusion in the Uniform Unclaimed Property Act of a provision that expressly addresses the disposition of unclaimed property liabilities of a company that is acquired, merged, or consolidated would remove any ambiguity as to “successor holders” and the assumption of liability.

The limitations on delegation or assignment have not been proposed by NAUPA to prevent a holder from contracting with a service company to prepare reports of unclaimed property, and the draft legislation expressly recognizes the right of a holder to do so. However, responsibility for the reporting being performed correctly remains the duty of the holder.

Concepts of Delegation and Novation

The Merchants' Delegation of Their Payment Obligation to Consumers to Young America Corp. Does Not Relieve Them of Their Responsibility For Unclaimed Rebates

The foundation of the merchants' motion for summary judgment is that they contracted with Young America Corp. for rebate fulfillment services. In exchange for a reduced payment from the merchants for those fulfillment services, the parties agreed that Young America Corp. could keep the proceeds of any unclaimed rebates as part of its total compensation. Young America Corp. then received from the merchants the funds for all validated rebate claims, deposited those funds into a separate account for the rebate program, and then issued payments to the consumers from that account. The legal consequences of the entire rebate transaction are that in the contract with the consumer, the merchants undertook a duty to perform—to pay the rebate to the consumer, a duty that the merchants subsequently delegated to Young America Corp.

As the Iowa Supreme Court has explained, "'[a]n obligor's empowering of another to perform the obligor's duty is known as a *delegation* of the

The rule that a delegating obligor remains liable to its obligee is designed to protect the expectations of the obligee: a delegating obligor should not be able to foist upon the obligee a performer whose reliability or solvency might differ from that of the obligor.[7] Here, no one asserts that the consumer even knew of the merchants' delegation to Young America Corp. or agreed to it. The consumer dealt with the merchants alone, without any mention of Young America Corp. Hence, as a matter of contract law, the merchant's delegation of its obligation to perform its consumer rebate contract and pay the rebate does not discharge or avoid its payment obligation and its subsequent duty under the Iowa Uniform Act to report and deliver unclaimed rebates to the Iowa Treasurer.

Moreover, Young America Corp.'s issuance of a rebate payment does not affect the merchants' obligation to pay the consumer rebate. Under Iowa's version of § 3-310 of the Uniform Commercial Code, where an uncertified check is taken for an obligation, the underlying contractual obligation for which the check is taken is suspended until the check is paid or dishonored.[8] That provision does not apply to the merchants' unclaimed property obligations for consumer rebate checks for two reasons. First, that provision only applies when the check is "taken" for the underlying obligation, which is usually

---

[7] *First American Commerce Co. v. Washington Mut. Sav. Bank,* 743 P.2d 1193, 1194 (Utah 1987).

[8] Iowa Code § 554.3310(2)(a).

demonstrated by the obligee's depositing or negotiating the check. The mere mailing and/or delivery of a check to the obligee "do[] not trigger the application of this section."[9] And second, Iowa's enactment of the Uniform Commercial Code addresses negotiable instruments generally and nowhere mentions or considers the disposition of property or obligations presumed abandoned. In contrast, the unclaimed property law is a State law that deals specifically with all species of intangible property such as contractual obligations. In such circumstances, the unclaimed property law prevails. As the Iowa Supreme Court has stated, the rule is that "[w]hen one statute deals with a subject in generally comprehensive terms and another statute deals with a part of the same subject in a more minute and definite way, to the extent a conflict exists between the two statutes, the special statute prevails over the general statute absent clear legislative expression to the contrary."[10]

That the merchants remain responsible for the reporting and delivery of their unclaimed consumer rebates to the Treasurer of State is an equitable result. The merchants alone dealt with the consumers. No mention of any involvement of Young America Corp. is made in the rebate offer. The merchants have achieved the benefits of rebates such as increasing in-store traffic, introducing consumers to new brands, generating or reinforcing brand loyalty, meeting sales goals, and gathering potentially valuable information about customers and their buying habits for use in direct marketing and

---

[9] 6B *Anderson on the Uniform Commercial Code*, § 3-310:7 (Rev.) (2008).

[10] *City of Des Moines v. City Dev. Bd.*, 633 N.W.2d 305, 311 (Iowa 2001).

advertising purposes.[11] By outsourcing the fulfillment process for a reduced services fee and also offsetting the rebate program costs using the unclaimed rebates, the merchants have enjoyed the use and benefit of those unclaimed rebates. The merchants are not prejudiced or disadvantaged because any information about unclaimed rebates is in Young America Corp.'s possession. Just as the Treasurer has obtained the information about unpaid rebates through an examination of Young America Corp.'s records, likewise can the merchants do so now.

---

[11] Matthew A. Edwards, *The Law, Marketing and Behavioral Economics of Consumer Rebates*, 12 Stan. J.L.Bus. & Fin. 362, 371 and 372 (2007).

Concept of Novation

The principles of delegation do also allow the party entitled to payment to agree otherwise.[1] In contract law, the replacement of the original party to a contract with a new party, such as a new debtor, gives rise to a novation.[2]

---

[1] The Restatement (Second) of Contracts states the rule to be that *unless the obligee otherwise agrees*, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor." Restatement (Second) of Contracts, § 318(3) (emphasis added).

[2] Bryan A. Garner, *Black's Law Dictionary* 1094 (8th Ed. 2004). "Novation is a contract, consisting of two stipulations, - one to extinguish an existing obligation; the other to substitute a new one in its place. ... Every novation embraces, necessarily, an accord and satisfaction; the principal distinguishing feature between them being that a novation implies the extinguishment of an existing debt by the parties thereto and its transition into a new existence between the same or different parties ... ." *J.A. Wheeler v. Justus S. Wardell*, 173 Va. 168, 176-77 (1939).

FILED
KING COUNTY WASHINGTON
AUG 0 2 2012
SUPERIOR COURT CLERK
BY DAWN TUBBS
DEPUTY

Hon. Barbara Linde

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

COSTCO WHOLESALE CORPORATION, a Washington corporation, Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE and SUZAN DELBENE, in her official capacity as Director of the Washington State Department of Revenue, Defendants.	NO. 11-2-08830-8 SEA **ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PARTIAL SUMMARY JUDGMENT TO DEFENDANT/CROSS-CLAIMANT**

This matter came before the Court on cross-motions for summary judgment. The Court has heard oral argument and reviewed the following materials:

1. Costco's Motion for Summary Judgment on Counterclaim of Department of Revenue, filed May 18, 2012;
2. Declaration of Kathleen O'Sullivan In Support of Plaintiff's Motion for Summary Judgment and Exhibits 1 through 5, filed May 18, 2012;
3. Declaration of Jeff Van Burkleo in Support of Plaintiff's Motion for Summary Judgment and Exhibits 1 through 7, filed May 18, 2012;
4. Declaration of Brian Savo in Support of Plaintiff's Motion for Summary Judgment and Exhibits 1 through 4, filed May 18, 2012;

Attorney General of Washington
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

5. Defendant's Opposition to Plaintiff's Motion for Summary Judgment, filed July 11, 2012;
6. Second Declaration of Rosann Fitzpatrick Regarding Documents and Exhibits A through E, filed July 11, 2012;
7. Praccipe, filed July 12, 2012;
8. Plaintiff Costco's Reply in Support of its Motion for Summary Judgment on Counterclaim of Department of Revenue, filed July 23, 2012;
9. Declaration of Kathleen O'Sullivan in Support of Costco's Reply in Support of its Motion for Summary Judgment and Exhibits 1 and 2, filed July 23, 2012;
10. Defendant/Counter-Claimant's Motion for Partial Summary, filed June 29, 2012;
11. First Declaration of Rosann Fitzpatrick Regarding Documents and Exhibits A through AA, filed June 29, 2012;
12. Plaintiff Costco's Opposition to Defendant/Counter-Claimant's Motion for Partial Summary Judgment, filed July 17, 2012;
13. Declaration of Kathleen O'Sullivan in Support of Costco's Opposition to Defendant's Motion for Partial Summary Judgment and Exhibits A through J, filed July 17, 2012;
14. Declaration of Brian Savo in Support of Costco's Opposition to Defendant's Motion for Partial Summary Judgment and Exhibits A through F, filed July 17, 2012;
15. Defendant's Reply Brief in Support of Motion for Partial Summary Judgment, filed July 17, 2012.

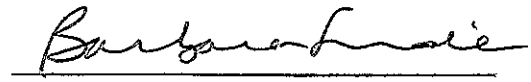
Based on the arguments of counsel and the above-listed filings, the Court finds there is no genuine issue of material fact in dispute that Costco is the "holder" of unpaid rebate obligations owed to Costco members who qualified for a rebate through the Costco One-Stop Rebate Program. The Department of Revenue is entitled to partial summary judgment as a matter of law on the issue of Costco's liability to report and deliver the unpaid rebate obligations into the State's protective custody in an amount to be determined at trial. Therefore, the Court hereby ORDERS:

1. Plaintiff Costco Wholesale Corporation's Motion for Summary Judgment on the Department of Revenue's Counterclaim is DENIED; and,
2. Partial summary judgment is GRANTED to defendant Department of Revenue on its Counterclaim.

Attorney General of Washington
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

3. Trial of this action shall proceed on the issue of the amount of unpaid rebate obligations that must be delivered to the State.

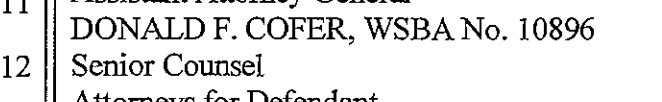
DATED this 2nd day of August, 2012.



JUDGE BARBARA LINDE

PRESENTED BY:

ROBERT M. MCKENNA
Attorney General



ROSANN FITZPATRICK, WSBA No. 37092
Assistant Attorney General
DONALD F. COFER, WSBA No. 10896
Senior Counsel
Attorneys for Defendant

Approved as to Form; Notice of Presentation Waived:

PERKINS COIE LLP

Rosann Fitzpatrick for per email authorization
Kathleen O'Sullivan, dated 8/1/12

KATHLEEN M. O'SULLIVAN, WSBA No. 27850
SHER S. KUNG, WSBA No. 42077
Attorneys for Plaintiff

Attorney General of Washington
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

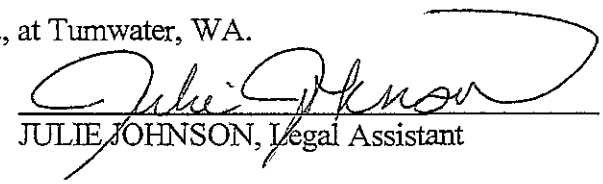
PROOF OF SERVICE

I certify that I served a copy of this document, via electronic mail, on the following:

Kathleen O'Sullivan
KOSullivan@perkinscoie.com
Sher S. Kung
SKung@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue
Seattle, WA 98101-3099

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of August, 2012, at Tumwater, WA.



JULIE JOHNSON, Legal Assistant

Attorney General of Washington
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

THE HONORABLE BARBARA LINDE

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

COSTCO WHOLESALE CORPORATION, a Washington corporation, Petitioner/Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE and SUZAN DELBENE, in her official capacity as Director of the Washington State Department of Revenue, Respondents/Defendants.	No. 11-2-08830-8 SEA **PLAINTIFF COSTCO'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM OF DEPARTMENT OF REVENUE**

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RELIEF REQUESTED 2

III. STATEMENT OF FACTS 2

A. Background Regarding Costco and the Rebates at Issue 2

B. Procedural History 5

IV. STATEMENT OF ISSUES 6

V. EVIDENCE RELIED UPON 7

VI. AUTHORITY AND ARGUMENT 7

A. Costco Is Not the "Holder" of the Property Under the Washington Unclaimed Property Act 8

1. Costco Is Not Obligated on the Rebate Checks 9

2. Even if Costco Once Was Obligated on the "Rebates" Apart from the Checks, It Discharged the Obligation by Transmitting Payment for the Rebates to CPG 12

3. It Would Be an Unconstitutional Taking if the Department Can Seize Sums that Costco Already Transferred to CPG 14

B. Whether or Not Costco Is the "Holder" of the Funds in Question, Costco Is the "Owner" of Those Funds, so the Department's Claim Is Unavailing 16

1. The Checks Are Payable to Costco 16

2. Costco's Ownership Rights Are Superior to Any Claim by the Department 16

VII. CONCLUSION 17

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES

CASES

Azure Ltd. v. I-Flow Corp.,
46 Cal. 4th 1323, 210 P.3d 1110, 96 Cal. Rptr. 3d 501 (2009) 17

Brown v. Legal Found. of Wash.,
538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003) 14

Canel v. Topinka,
212 Ill. 2d 311, 818 N.E.2d 311, 288 Ill. Dec. 623 (2004) 17

Delaware v. New York,
507 U.S. 490, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1993) 13, 16

Dep't of Revenue v. Puget Sound Power & Light Co.,
103 Wn.2d 501, 694 P.2d 7 (1985) 16

Eggleston v. Pierce Cnty.,
148 Wn.2d 760, 64 P.3d 618 (2003) 14

First Nat'l Bank in Alamosa v. Ford Motor Credit Co.,
748 F. Supp. 1464 (D. Col. 1990) 12

Hammack v. Monroe Street Lumber Co.,
54 Wn.2d 224, 339 P.2d 684 (1959) 15

Hodel v. Irving,
481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987) 14

In re Estate of Little,
106 Wn.2d 269, 721 P.2d 950 (1986) 14

Margoles v. Hubbart,
111 Wn.2d 195, 760 P.2d 324 (1988) 7

Metromedia Rest. Servs., Inc. v. Strayhorn,
188 S.W.3d 282 (Tex. App. Austin 2006) 8

Michael v. Mosquera-Lacy,
165 Wn.2d 595, 200 P.3d 695 (2009) 7

Pac. Nw. Bell Tel. Co. v. Dep't of Revenue,
78 Wn.2d 961, 481 P.2d 556 (1971) 16

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES
(continued)

Philippides v. Bernard,
151 Wn.2d 376, 88 P.3d 939 (2004) 15

Potter v. Wash. State Patrol,
165 Wn.2d 67, 196 P.3d 691 (2008) 14

Rust v. Sullivan,
500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) 15

Serv. Merch. Co. v. Adams,
No. 97-2782-III, 2001 WL 34384462 (Tenn. Ch. June 29, 2001) 15

Sheehan v. Cent. Puget Sound Reg'l Transit Auth.,
155 Wn.2d 790, 123 P.3d 88 (2005) 7

Staples, Inc. v. Cook,
35 A.3d 421 (Del. Ch. 2012) 10

State v. Pauling,
149 Wn.2d 381 (2003) 15

W. Union Tel. Co. v. Pennsylvania,
368 U.S. 71, 82 S. Ct. 199, 7 L. Ed. 2d 139 (1961) 15

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) 14

STATUTES

RCW 62A.3-103(a)(3) 11

RCW 62A.3-104(f) 11

RCW 62A.3-105 11

RCW 62A.3-110(d) 16

RCW 62A.3-412 11

RCW 63.29.010 ..... passim

RCW 63.29.170(1) 8

RCW 63.29.190(1) 8

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES
(continued)

CONSTITUTIONAL AUTHORITIES

Wash. Const. art. I, § 16 14

U.S. Const. amend. V 14

OTHER AUTHORITIES

David J. Epstein, Unclaimed Property Law and Reporting Forms (*Matthew Bender, Rev. Ed. 2011*) 8

Uniform Unclaimed Property Act (1995) 13

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

I. INTRODUCTION

This is a case about uncashed rebate checks and unclaimed property law. Costco Wholesale Corporation members received checks for manufacturers' rebates issued by a now-defunct entity named Continental Promotion Group, Inc. (CPG) for certain purchases made at Costco. Costco itself was also a payee on the checks. At the time of issuance, these checks were funded with money from Costco's suppliers who had provided the merchandise sold, and those funds passed through Costco to CPG. Some of the rebate checks remained uncashed, and CPG kept the funds associated with those uncashed checks. The Washington Department of Revenue, standing in the shoes of the people who did not cash their checks, now requests Costco to again come up with the amounts needed to fund those checks. That request has no merit.

Costco is entitled to summary judgment on the Department's Counterclaim for two independent reasons. First, Costco is not the "holder" of the property under the Washington Unclaimed Property Act, which is a required element of the Department's claim. Costco does not possess the money intended to fund the uncashed rebate checks; nor is Costco indebted to its members to pay the uncashed rebate checks as it discharged any obligation it had on the rebate transactions when it fully paid the rebate amounts to CPG for transmittal to the members. Second, as a payee on the checks, Costco is an owner of the "unclaimed" property, and Costco as an owner has claimed it. Because the Department's rights under unclaimed property law are derivative of the owner's rights, the rights of Costco as the property owner are superior to those of the Department.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

II. RELIEF REQUESTED

Pursuant to CR 56, Costco moves for summary judgment in its favor, dismissing with prejudice the Department's Counterclaim to purportedly enforce the Washington Unclaimed Property Act.

III. STATEMENT OF FACTS

A. Background Regarding Costco and the Rebates at Issue

Costco operates membership warehouses around the world, offering low prices to its members by selling a limited selection of brand-name and private-label products in a wide range of merchandise categories with operating efficiencies from volume purchasing, no-frills warehouse facilities open limited hours, and rapid inventory turnover. Declaration of Brian Savo ("Savo Decl.") ¶ 2. A generous customer satisfaction policy, coupled with low prices, is core to Costco's business model. *Id.*

Costco's approach to manufacturer rebates is an example of how Costco has sought to maximize value for and satisfy its members (customers). Historically, mail-in rebates were burdensome to redeem—there was often complicated redemption paperwork, a long lag-time between purchase and receipt of the rebate check, and restrictions on redemption. *Id.* ¶ 4. Too often, rebates did not end up in the pockets of the consumers. *See e.g.*, Declaration of Kathleen O'Sullivan ("O'Sullivan Decl."), Ex. 1 ("FTC Consumer Alert: Taking the 'Bait' Out of Rebates" (2000) (cautioning consumers against being baited by rebate offers that never manifest)).

Costco launched in 2000 the "One-Stop Rebate Program" to facilitate the processing and redemption of manufacturer rebates offered on products sold in Costco warehouses. Savo Decl. ¶ 5; *id.*, Ex. 1 (One-Stop Rebate Program brochure). The new mechanism provided the member a separate receipt at the time of purchase (either a

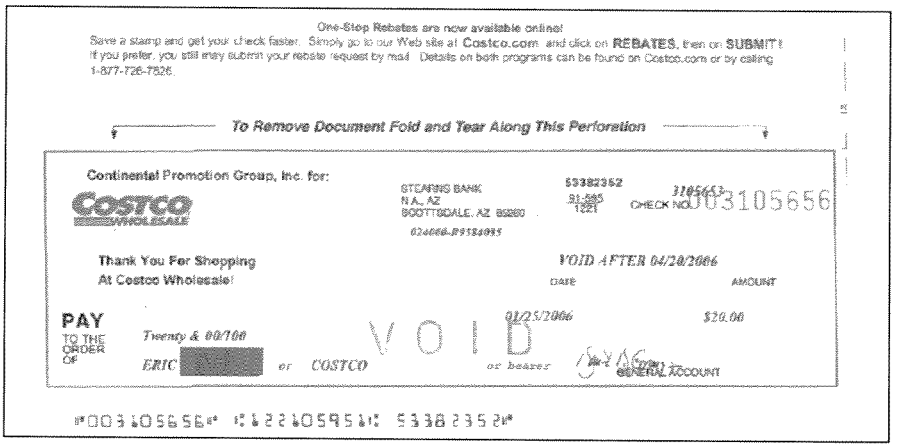
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

register receipt at the point of sale or an on-line rebate receipt form for Internet purchases) that included information necessary to apply for the manufacturer's rebate; the receipt itself was the rebate submission form for all the items purchased. *Id.* ¶ 6; *id.*, Ex. 2 (sample register receipt). To facilitate payment of the rebate from the supplier to the member, Costco contracted with CPG, an independent rebate processor then located in Arizona. Counterclaim ¶ 11; Savo Decl. ¶ 7, Ex. 3. (CPG also processed rebates for many other retailers and manufacturers.) CPG was required to: promptly fulfill and pay for valid rebate requests by issuing and mailing rebate checks to members, *id.*, Ex 3 at COSTCOWA001264 (2006 contract, section I.B.6); to provide customer service through a toll-free telephone hotline and by responding to email inquires, *id.* at COSTCOWA001265 (section I.B.7); to establish and own a dedicated bank account to keep the funds for processing and clearing of rebate checks, *id.* at COSTCOWA001268 (section III.B.); and to comply with unclaimed property laws including any reporting requirements, *id.* at COSTCOWA001265; 1272 (sections I.B.9(a), XII.B.)

Until it filed for bankruptcy in 2008, CPG handled the rebate processing and fulfillment for rebates claimed by Costco members. Counterclaim ¶¶ 11, 40. To claim the rebate, the Costco member simply filled out contact information on the receipt, and then mailed it to CPG, which validated and processed the rebate submission. *Id.* ¶¶ 11-12. CPG provided Costco a weekly invoice for the total rebate amount processed. *Id.* ¶¶ 18-20. Costco then deducted the money from the relevant supplier and transmitted payment to CPG through a wire transfer, in an amount sufficient to cover the rebate amounts and related fees. *Id.* ¶ 19.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Pursuant to its contracts with Costco, CPG owned and maintained bank accounts dedicated to paying the rebate checks. O'Sullivan Decl., Ex. 2 (Response to Costco's Request for Admission No. 13); *see also* Savo Decl. ¶ 7; *id*, Ex. 3 at COSTCOWA001268 (2006 contract, Section III.B). CPG "physically issued all the rebate checks" at issue. O'Sullivan Decl, Ex. 2 (Response to Costco's Request for Admission No. 12); Counterclaim ¶¶ 20, 26. None of these checks was signed or delivered by Costco; rather, the rebate checks were signed by CPG's CEO. Savo Decl. ¶ 10; O'Sullivan Decl, Ex. 3 (Arizona Corporation Commission printout listing CPG CEO). CPG delivered the checks to the Costco members by U.S. mail. Savo Decl., Ex. 3 at COSTCOWA001264 (2006 contract, Section I.B.6). The checks were payable to the member "or COSTCO." *Id.*, Ex. 4 (sample rebate checks).


One-Stop Rebates are now available online!
Save a stamp and get your check faster. Simply go to our Web site at Costco.com and click on REBATES, then on SUBMIT!
If you prefer, you still may submit your rebate request by mail. Details on both programs can be found on Costco.com or by calling 1-877-726-7826.

To Remove Document Fold and Tear Along This Perforation

Continental Promotion Group, Inc. for:
COSTCO WHOLESALE
STERLING BANK N.A., AZ SCOTTSDALE, AZ 85260
53382352
CHECK NO. 003105656
Thank You For Shopping At Costco Wholesale!
VOID AFTER 04/20/2006
DATE
AMOUNT
PAY TO THE ORDER OF
Twenty & 00/100
01/25/2006
$20.00
ERIC [redacted] or COSTCO
VOID
or bearer
GENERAL ACCOUNT
⑈003105656⑈ ⑆122105951⑆ 5338235 2⑈

People who received the checks chose to either cash them or not. When rebate checks remained uncashed, and the funds transmitted to CPG to pay on the checks were not in fact used for this purpose, neither Costco nor its suppliers received a refund or credit from CPG for any amount. CPG simply kept the money. *Id.* ¶ 9, 11.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

B. Procedural History

In 2007, Costco learned that it was under audit by the State of Washington for unclaimed property issues. Declaration of Jeff van Burkleo ¶ 2. On February 4, 2010, individuals from the Department held a meeting with Costco representatives to discuss the uncashed CPG rebate checks. *Id.* ¶ 3. Costco explained that it was simply a conduit for the funds that passed from manufacturer to Costco to CPG to Costco member, and that Costco did not possess the money that remained at CPG when checks remained uncashed. *Id.* Shortly after the meeting, the Department sent Costco a formal request for records in order to perform an "unclaimed property audit of Costco's customer rebate program." *Id.*, Ex. 1. The first item requested was "[a] listing of all uncashed customer rebate checks with name, address, and amount issued between July 1, 1996 and June 30, 2006." Costco produced documents responsive to the Department's requests (including copies of its contracts with CPG) and explained that it did not have a listing of all uncashed rebate checks with names and the amounts of each check. *Id.* ¶ 5. The Department made no substantive response to that letter. *Id.*

Contrary to its own auditing procedures, the Department did not hold an "Exit Conference" or "Closing Conference" to explain its findings to Costco, or give Costco the opportunity to challenge the findings. O'Sullivan Decl., Ex. 4 (Audits: Internal Control and Recording Keeping, available at http://dor.wa.gov/docs/pubs/ucp/RRetaud.pdf); *id.*, Ex. 5 (Response to Interrogatory No. 2). Instead, on February 4, 2011, a year after the parties had met, the Department issued a demand letter to Costco for "unclaimed rebate checks." van Burkleo Decl., Ex. 3. The Department demanded that Costco pay to the State over three million dollars in less than thirty days, or face a "total possible penalty" of

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

millions of additional dollars as well as "criminal sanctions," including imprisonment. *Id.* at 4. The demanded amount was based on a listing of uncashed checks, approximately 236,000 individual entries and associated check amounts, which Costco had never before seen. *Id.* ¶ 6, Ex. 4 (sample excerpt from Schedule 2, redacted).

In a section of the letter (ironically) called "**APPEALS PROCESS**," the Department informed Costco that there was "no formal administrative appeals process," no "secondary review process," and no "appeal process under the APA." *Id.*, Ex. 3. Under protest, Costco promptly paid the amount demanded ($3,261,757.33), and then filed this lawsuit, seeking repayment. *Id.* ¶ 7, Ex. 5.

Costco then filed a claim with the Department, asserting that it was the owner of the "unclaimed" property that it had recently paid. *Id.* ¶ 8, Ex. 6. Shortly after the suit was filed, the Department repaid the amount it had demanded from Costco (plus interest), *id.*, Ex. 7, and filed a Counterclaim seeking repayment.

The Counterclaim alleged that the "uncashed rebate checks issued to Costco's customers are subject to the custody of the Department," Counterclaim ¶ 36; *see id.* ¶ 1 (referencing proceeds of "uncashed rebate checks"), and asked for a judgment based on amounts of "uncashed rebate checks." *Id.* ¶ 53.

IV. STATEMENT OF ISSUES

Whether summary judgment should be granted in favor of Costco on the Department's Counterclaim for either of two reasons:

1. Whether Costco is a "holder" of funds that it does not possess, on which it had no obligation to pay, and on which it has discharged any such arguable "obligation"; or

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

2. Whether the uncashed rebate checks can be claimed by the Department from Costco where one of the payees listed on the checks is Costco, and thus Costco is an owner of the property.

V. EVIDENCE RELIED UPON

In support of its motion, Costco relies upon the Department's Counterclaim, responses and admissions made by the Department in discovery, Declarations of Kathleen O'Sullivan, Brian Savo, and Jeff van Burkleo, and exhibits attached thereto.

VI. AUTHORITY AND ARGUMENT

Summary judgment is appropriate "if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). Once the moving party demonstrates entitlement to summary judgment, the nonmoving party must set forth "specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009) (internal quotation marks and citation omitted). To establish a genuine issue of material fact, "the nonmoving party may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain." *Id.* at 602 (internal quotation marks and citation omitted). If the nonmoving party's evidence is merely colorable or is not significantly probative, summary judgment should be granted. *Margoles v. Hubbart*, 111 Wn.2d 195, 199, 760 P.2d 324 (1988).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

A. Costco Is Not the "Holder" of the Property Under the Washington Unclaimed Property Act

Unclaimed property law (sometimes called "escheatment") permits a state, in certain circumstances, to take custody of lost or abandoned property for the purpose of reuniting it with its owners.[1] The Washington Unclaimed Property Act (the "Washington UPA") requires the "holder" of unclaimed property to report, pay, or deliver to the State property presumed abandoned. RCW 63.29.170(1) ("A person holding property presumed abandoned and subject to custody as unclaimed property under this chapter shall report to the department concerning the property as provided in this section."); RCW 63.29.190(1) (requirement to pay or deliver abandoned property).

The Department asserts that Costco is a holder because Costco is "[i]ndebted to another on an obligation." Counterclaim ¶ 33 (quoting RCW 63.29.010(10)(c)). The burden falls on the Department to sustain that assertion. 1-9 Epstein, Unclaimed Property Law § 9.03[2][a] ("The abandoned property cases have all held, without exception, that the state has the initial burden. Generally, the state is required to prove whatever the missing owner would have been required to establish in the event the owner were suing to recover the property."); *Metromedia Rest. Servs., Inc. v. Strayhorn*, 188 S.W.3d 282, 288 (Tex. App. Austin 2006) ("[T]he Comptroller had the burden of proving that Metromedia is either (1) in possession of the retained funds, or (2) indebted to the employees . . . for the retained funds."). Undisputed facts show that the Department cannot sustain that burden.

---

[1] The State of Washington adopted the Uniform Unclaimed Property Act of 1981, *see, e.g.*, 2B-WA David J. Epstein, Unclaimed Property Law and Reporting Forms (*Matthew Bender, Rev. Ed. 2011*), promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), and codified in RCW 63.29.010-.906.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

As explained below, Costco does not have any obligation to its members in connection with the uncashed rebate checks, and even if it did, it has discharged any such obligation.

1. Costco Is Not Obligated on the Rebate Checks

The unclaimed property at issue here is the rebate checks. The Department's February 4, 2011 demand to Costco asserted unclaimed property reporting liability on "uncashed customer rebate checks." van Burkleo Decl., Ex. 3 at 2. On its face, the demand is clear—the unclaimed property that the Department seeks is simply "**UNPRESENTED CHECKS - REBATE (MS11)**" and "**FUTURE REPORTABLE UNPRESENTED CHECKS**." *Id.* at 2, 3. The entire demand, as reflected in the Department's Schedule 2 spreadsheet, moreover, derives from a compilation of uncashed checks and nothing else. The Department's Counterclaim repeatedly uses the term "uncashed rebate checks" and bases its demand solely on amounts associated with the uncashed checks. As is clear elsewhere in the Counterclaim and the demand letter, the "unclaimed property" here is the checks:

- "A check is deemed intangible property under the Uniform Unclaimed Property Act." Counterclaim ¶ 34 (citing RCW 63.29.010(12)(a)); *see id.* ¶ 35 (noting obligation to remit an "uncashed check");
- "Uncashed rebate checks issued to Costco's customers are subject to the custody of the Department . . . ." *Id.* ¶ 36; *see id.* ¶ 39 (noting that prior audit had reserved issue of "uncashed rebate checks");
- "Costco is the holder of the uncashed rebate checks issued to its customers by CPG . . . ." *Id.* ¶ 52.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

- "The sum of unreported unclaimed rebate checks and interest found to be owing to the State of Washington is **$3,261,757.33**." van Burkleo Decl. Ex. 3 at 1.

The Department may say that the unclaimed property at issue is not the uncashed checks themselves, but rather some ill-defined underlying obligation giving rise to the issuance of the checks. Counterclaim ¶ 52 (while "the checks were issued by CPG," "Costco, not CPG or the manufacturer is the person that contracted with the customer to pay the rebate amount."). The Department thus appears to seek to go behind the form and substance of the uncashed checks to some preceding obligation.

The Delaware Chancery Court, one of the most active courts in the country recently faced with unclaimed property matters, recently rejected a similar contention in deciding motions for judgment on the pleadings. A retailer, Staples, took the position (like the Department here) that the unclaimed property at issue was not checks or credits issued to customers but Staples' "underlying" obligation to provide its customers rebates. *Staples, Inc. v. Cook*, 35 A.3d 421, 426 (Del. Ch. 2012). The court ruled that "[t]he reason why the property was given is irrelevant." *Id.* Because Staples issued its rebates in the form of "'checks' (*i.e.*, bills of exchange) or 'credits,'" *id.* at 422, to its customers, the court rejected Staples' plea to look at the "underlying property," *id.* at 426, instead of what had actually been issued—checks, just like in this case, or credits. Like the State of Delaware in Staples, Costco acknowledges that the property at issue here (the uncashed rebate checks) is within the definition of property under the Washington UPA. RCW 63.29.010(12) (definition of "intangible property" includes checks). As such, the obligation in question is *on* the checks.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Chapter 3 of the Washington Uniform Commercial Code (the "UCC") defines who is indebted on the obligation that is the check. The obligation to pay belongs to the issuer of the check. RCW 62A.3-412 ("The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument. . . ."); RCW 62A.3-104(f) ("'check' means (i) a draft . . . payable on demand and drawn on a bank . . . ."). Under the UCC, "[i]ssue" means "the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person." RCW 62A.3-105. A "[d]rawer" is "a person who signs or is identified in a draft as a person ordering payment." RCW 62A.3-103(a)(3).

Here, CPG alone issued the checks and maintained and owned the bank accounts on which the checks were drawn. In response to receiving a rebate submission request, CPG drew a check on a CPG bank account. Counterclaim ¶¶ 19-20. The checks were signed by the CPG CEO. Savo Decl. ¶ 10, *id.*, Ex. 4 (sample rebate checks). CPG issued the checks to two payees: the member and Costco. *Id.*; Counterclaim ¶ 20. As a result, both the member and Costco were entitled to cash the check for payment from a bank account that CPG owned and funded, and CPG was obligated to make the funds available for payment. RCW 62A.3-412 ("The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued . . . ."). CPG is the party that held the money to pay on the checks in its bank account and CPG is the party who mailed the checks to the members. Savo Decl., Ex. 4 (US Postage paid by CPG); *id.*, Ex. at COSTCOWA001264; 1268 (Sections I.B.6, III.B); Counterclaim ¶¶ 19-20.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Under the UCC, only CPG—not Costco—had an obligation to pay on the rebate checks.[2] The Washington UPA does not purport to create liability for Costco where none exists under the governing state law, the UCC. Costco did not issue the checks, and the checks are not drawn on its bank account. It is not liable on the checks, and as a result it is not "indebted to another on an obligation," RCW 63.29.010(10)(c), with respect to them. Since Costco is not a "holder," summary judgment dismissing the Department's Counterclaim is warranted.

2. Even if Costco Once Was Obligated on the "Rebates" Apart from the Checks, It Discharged the Obligation by Transmitting Payment for the Rebates to CPG

Even if one could conjure some obligation of Costco preceding the issuance of the rebate checks, Costco satisfied that obligation long ago when it transmitted payment to CPG that CPG was contractually obligated to use solely to pay rebate checks. Because it has no continuing obligations concerning the rebates, Costco cannot be the "holder" of the checks or funds representing the checks.

Under the contracts with Costco, CPG received and processed the rebate checks, and billed Costco weekly for the amount. Counterclaim ¶ 18. Costco then transmitted funds to CPG's dedicated bank account so that CPG could issue the rebate checks. *Id.* ¶ 19. Pursuant to contract, CPG was required to use this dedicated bank account solely for the "processing and clearing of rebate checks." Savo Decl., Ex. 3 at COSTCOWA001268

---

[2] Costco's logo on the checks created no obligation to pay them. Savo Decl., Ex. 3 at COSTCOWA001265 (Section I.B.9.(a)) ("CPG will be identified clearly as the issuer of the Rebate Check."); *see First Nat'l Bank in Alamosa v. Ford Motor Credit Co.*, 748 F. Supp. 1464, 1467-70 (D. Col. 1990) (granting summary judgment and dismissing bank's action to force Ford to honor checks under the UCC, in finding that Ford's pre-printed name on the checks had no legal significance and was not a signature).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

(Section III.B). When Costco transmitted payment to CPG, it satisfied any obligation it might have had to its members.

The Uniform Unclaimed Property Act (1995) § 1(6) clarified the definition of "holder" in the 1981 act (the version on which the Washington UPA is modeled): "'Holder' means a person obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this [Act]." The definition was amended to clarify which party is the "holder" where the original "debtor" has satisfied its obligation and thus no longer fits the definition of "holder":

> The definition of "holder" in paragraph 5 [sic] is a clarification. There had been some confusion in the past over the identity of the holder of an obligation that had been transferred by the original obligor, as in the payment of dividends on corporate stock. As held by the Supreme Court in *Delaware v. New York*, the holder is the person indebted under the applicable state law. Thus, *if the original debtor, the dividend-paying corporation, has satisfied its debt under its share contract and under state law by transmitting payment to an intermediary, which has undertaken to make the payment, the intermediary becomes the debtor. The holder thus is "a person obligated," i.e., a person who could be sued successfully by the owner for refusing to make payment.*

Uniform Unclaimed Property Act (1995), NCCUSL cmt. to section 1 (emphasis added); *see Delaware v. New York*, 507 U.S. 490, 505, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1993) (holding that once security distributions were transmitted to intermediary banks, the banks became the holders "because they alone . . . are legally obligated to deliver unclaimed securities distributions to the beneficial owners"). Like the dividend-paying corporation in *Delaware*, after paying CPG, Costco was no longer "indebted to another on an obligation" in connection with the rebates.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

If there is any doubt about applying the escheat statute here to make Costco pay again, the law must be construed in Costco's favor. "A statute in derogation of the common law 'must be strictly construed and no intent to change that law will be found, unless it appears with clarity.'" *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008) (citation omitted). Escheatment is disfavored in law, *In re Estate of Little*, 106 Wn.2d 269, 284, 721 P.2d 950 (1986), so the Department's power to escheat unclaimed property is constrained to those situations to which the unclaimed property statute clearly applies.

3. It Would Be an Unconstitutional Taking if the Department Can Seize Sums that Costco Already Transferred to CPG

Costco cannot be forced to pay to the Department the money that it already transferred to CPG because to do so would effect on Costco an uncompensated and unconstitutional taking of property. U.S. Const. amend. V; Const. art. I, § 16. A state's statutory right to escheatment has constitutional limits. A state may not simply "escheat" private property. *Hodel v. Irving*, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987) (holding that a statute requiring the escheat of privately owned Indian land allotments effected an unconstitutional taking). Unconstitutional takings are not limited to real property; a state may not confiscate intangible property without just compensation either. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980). The State of Washington takings clause offers even "greater protection" than its federal counterpart. *Eggleston v. Pierce Cnty.*, 148 Wn.2d 760, 766, 64 P.3d 618 (2003).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Other states have recognized the principle that the takings clause prevents overly aggressive claims by state revenue officials under unclaimed property law. When a state attempted to escheat unclaimed gift certificates, the court held that to require a party to pay the face amount of unclaimed gift certificates would be an unconstitutional taking of the party's anticipated gross profit on those gift certificates. *Serv. Merch. Co. v. Adams*, No. 97-2782-III, 2001 WL 34384462, at *6 (Tenn. Ch. June 29, 2001) (O'Sullivan Decl., Ex. 7).

The Washington UPA cannot constitutionally be read to require Costco to make payment *again* on funds that it has already transmitted to CPG. It is unconstitutional to force a company to "pay the same single obligation twice." *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80, 82 S. Ct. 199, 7 L. Ed. 2d 139 (1961) (holding that Western Union could not be required to pay one state without assurance that it would not be liable on the same property to another state); *see Hammack v. Monroe Street Lumber Co.*, 54 Wn.2d 224, 232, 339 P.2d 684 (1959) ("[A] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.") (internal quotation marks and citation omitted).

Where there are "two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid," the Court's "duty is to adopt that which will save the Act." *Rust v. Sullivan*, 500 U.S. 173, 192, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (internal quotation marks and citation omitted); *see also State v. Pauling*, 149 Wn.2d 381, 386 (2003) ("A statute will be invalidated *only if* the court is unable to limit sufficiently its standardless sweep by a limiting construction."); *Philippides v. Bernard*,

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

151 Wn.2d 376, 391, 88 P.3d 939 (2004) ("In reviewing a statute, this court will construe a statute as constitutional if at all possible.").

B. Whether or Not Costco Is the "Holder" of the Funds in Question, Costco Is the "Owner" of Those Funds, so the Department's Claim Is Unavailing

The Counterclaim fails for the independent reason that Costco is an owner of the checks and, through the checks, the funds in question.

1. The Checks Are Payable to Costco

The rebate checks were issued by CPG not only to a Costco member, but also to Costco; both the member and Costco are listed as payees on the checks, Costco being a payee as shown by the "or COSTCO" designation. Savo Decl., Ex. 4. Under the UCC, "[i]f an instrument is payable to two or more persons alternatively, *it is payable to any of them*." RCW 62A.3-110(d) (emphasis added).

Since Costco is a payee on the rebate checks, it is an owner of the property under the plain language of the Washington UPA. The law defines an "[o]wner" as including a "payee in the case of other intangible property." RCW 63.29.010(14). Costco, as a payee on the checks, is therefore an owner of the checks and funds at issue.[3]

2. Costco's Ownership Rights Are Superior to Any Claim by the Department

The Department's claim cannot trump Costco's ownership rights because the claim is "purely derivative and therefore no greater than the owner's." *Dep't of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 507, 694 P.2d 7 (1985); *see also Pac. Nw. Bell Tel. Co. v. Dep't of Revenue*, 78 Wn.2d 961, 964, 481 P.2d 556 (1971) ("[T]he rights of the

---

[3] Under unclaimed property law one can be an owner without being a holder, as ownership involves having an interest in property, but not necessarily possession of the property. *See also Delaware*, 507 U.S. at 503 ("we recognized that the relevant 'creditor' might be either a payee [of an unpaid draft] or a sender").

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

state are not independent of the rights of the owner and are therefore no greater than those of the person to whose rights it succeeds.").

This rule is fully in accord with the purpose of unclaimed property statutes, which is not to maximize revenue for a state at the expense of owners but rather to identify owners and then reunite them with their property. *See, e.g.*, *Azure Ltd. v. I-Flow Corp.*, 46 Cal. 4th 1323, 210 P.3d 1110, 1117, 96 Cal. Rptr. 3d 501 (2009) (identifying the purposes of California's unclaimed property law "to protect unknown owners and to give the state the benefit of the use of *unclaimed* property"); *see also id.* ("[E]nsuring that the owners are in fact unknown and the property is in fact unclaimed . . . furthers the purpose of protecting unknown owners."); *Canel v. Topinka*, 212 Ill. 2d 311, 818 N.E.2d 311, 321, 288 Ill. Dec. 623 (2004) ("The purpose of the Act is to give custody of certain enumerated property to the state when the property's owner *does not appear to be aware of its existence and cannot be located.*") (emphasis added) (internal quotations marks and citation omitted).

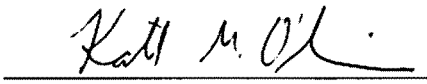
Because the Department has no legitimate interest in seizing property from its owner, where the owner is in fact known and on property the owner has in fact claimed, the Department's Counterclaim should be dismissed. To allow otherwise would be to encourage a futile act—a judgment in favor of the Department on its Counterclaim would be followed by Costco once again paying the money to the Department and following its payment with another claim for return of the money because of Costco's status as the property owner.

VII. CONCLUSION

For either of the two reasons set forth above, Costco respectfully requests that the Court enter summary judgment in its favor and against the Department on the Department's Counterclaim.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

DATED: May 18, 2012



Kathleen M. O'Sullivan, WSBA No. 27850
KOSullivan@perkinscoie.com
Sher S. Kung
SKung@perkinscoie.com, WSBA No. 42077
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Costco Wholesale Corporation

PROOF OF SERVICE

I certify that I served a copy of this document, via electronic mail, per agreement of the parties, on the following:

Rosann Fitzpatrick
Donald Cofer
Julie Johnson
Attorney General's Office, Revenue Division
Counsel for Respondents/Defendants
RosannF@atg.wa.gov, DonaldC@atg.wa.gov, JulieJ@atg.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: May 18, 2012

s/ *Sher S. Kung*
Sher S. Kung, WSBA No. 42077

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

EXHIBIT 1

THE HONORABLE BARBARA LINDE

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

COSTCO WHOLESALE CORPORATION, a Washington corporation, Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE and SUZAN DELBENE, in her official capacity as Director of the Washington State Department of Revenue, Defendants.	No. 11-2-08830-8 SEA **[PROPOSED] ORDER GRANTING PLAINTIFF COSTCO WHOLESALE CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM OF DEPARTMENT OF REVENUE**

The Court, having considered Costco Wholesale Corporation's Motion for Summary Judgment and all the papers filed in support of and in opposition to the motion, and being fully advised in the premises, now GRANTS Plaintiff's Motion for Summary Judgment.

The Court ORDERS:

The Department of Revenue's Counterclaim to enforce the Washington Unclaimed Property Act against Costco be dismissed with prejudice.

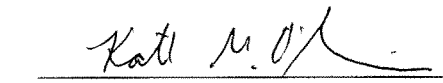
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

DATED this ___ day of _____, 2012.

_____
The Honorable Barbara Linde

Presented by:

DATED: May 18, 2012



Kathleen M. O'Sullivan, WSBA No. 27850
KOSullivan@perkinscoie.com
Sher S. Kung
SKung@perkinscoie.com, WSBA No. 42077
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Costco Wholesale Corporation

THE HONORABLE BARBARA LINDE
Hearing Date: July 27, 2012
Hearing Time: 1:30 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

COSTCO WHOLESALE CORPORATION, a Washington corporation, Petitioner/Plaintiff, v. WASHINGTON STATE DEPARTMENT of REVENUE, and SUZAN DELBENE, in her official capacity as Director of the Washington State Department of Revenue, Respondents/Defendants.	No. 11-2-08830-8 SEA PLAINTIFF COSTCO'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM OF DEPARTMENT OF REVENUE

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

A. The Facts Material to Costco's Motion for Summary Judgment Are Undisputed 1

B. The Department Cannot Meet Its Burden of Proving that Costco is the Holder 2

C. The Department Does Not Contest that Costco Is a Payee on the Checks and thus an Owner Entitled to Claim the Funds 5

III. CONCLUSION 5

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES

CASES

Amer. Exp. Travel Related Servs., Inc. v. Kentucky,
597 F. Supp. 2d 717 (E.D. Ky. 2009) 5

Bates v. Grace United Methodist Church,
12 Wn. App. 111, 529 P.2d 466 (1974) 2

Blue Cross of N. Cal. v. Cory,
120 Cal. App. 3d 723, 174 Cal. Rptr. 901 (1981) 4

City of Seattle v. St. John,
166 Wn.2d 941, 215 P.3d 194 (2009) 4

Delaware v. New York,
507 U.S. 490, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1993) 5

Michael v. Mosquera-Lacy,
165 Wn.2d 595, 200 P.3d 695 (2009) 2

Revenue Cabinet v. Blue Cross & Blue Shield of Ky. Inc.,
702 S.W.2d 433 (Ky. 1986) 4

Staples v. Cook,
35 A.3d 421 (Del. Ch. 2012) 3, 4

Ward v. Fed. Kemper Ins. Co.,
62 Md. App. 351, 489 A.2d 91 (1985) 3

Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima,
122 Wn.2d 371, 858 P.2d 245 (1993) 4

STATUTES

RCW 62A.3-412 3

RCW 63.29.010(12)(a) 3

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES
(continued)

RULES AND REGULATIONS

LCR 7(b)(5)(B) 1

LCR 56(e) 2

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

I. INTRODUCTION

The Court should grant summary judgment for Costco because the undisputed facts support only one interpretation and application of the Washington Unclaimed Property Act. That is: (1) Costco is not the "holder" of the unclaimed property (checks) that it did not issue, and on which it already paid once when it transmitted the rebate dollars to CPG; and (2) Costco is an owner of the unclaimed property as it is a payee on the checks.

II. ARGUMENT

A. The Facts Material to Costco's Motion for Summary Judgment Are Undisputed

These facts involving the flow of rebate funds—and the order in which they occurred (as set forth below)—are undisputed by the Department:

- Costco members could purchase a product subject to a rebate; at the register they received a separate receipt that served as a rebate submission form; the member could fill out her name and address on the form and submit the receipt to "Costco Rebate Program C/O CPG";
- CPG invoiced Costco weekly for the total value of rebates processed and transaction fees; Costco deducted from its suppliers the rebate dollars and fees due CPG;
- Costco wire transferred the money to CPG;
- CPG issued rebate checks to the members from its own bank account, paid postage, and mailed the checks to the members; the checks were payable to the member "or Costco";
- The Costco member could cash the check or not cash it. If uncashed, *CPG kept the money.*[1]

The Department's opposition fails to include a "succinct statement of facts contended to be material" as required by LCR 7(b)(5)(B). Indeed, it contains no statement of facts at all. That is because the Department's central opposition is to the legal conclusion the Court should draw from the undisputed facts. Its meandering argument contains a smattering of "factual"

[1] *See* Savo Decl. in Supp. of Costco's Mot. for Summ. J. ¶¶ 5-11; *id.*, Ex. 4.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

assertions—often supported by no evidence, let alone admissible evidence—that are immaterial to the two questions presented in Costco's motion.

On summary judgment, the question is not whether there are *any* issues of fact, but whether "a genuine issue as to a *material* fact exists." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009) (emphasis added). The nonmoving party "may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain." *Id.* at 602.[2] "[T]he whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence." *Bates v. Grace United Methodist Church,* 12 Wn. App. 111, 115, 529 P.2d 466 (1974). Because its opposition rests on *im*material facts and conclusory assertions, the Department cannot avoid summary judgment.[3]

B. The Department Cannot Meet Its Burden of Proving that Costco is the Holder

The Department admits that it has the burden of proof on the issue of whether Costco is

---

[2] The Department's opposition is replete with conclusory statements unsupported by a citation to any evidence. Some of the more outrageous examples include (false) statements that Costco "us[ed] the unclaimed funds for its own benefit" and that Costco led the Department's auditors on a "wild goose chase" for records. Opp'n at 18.

[3] Under LCR 56(e), Costco objects to the admissibility of certain evidence submitted with the Department's Opposition. In particular, Exhibits D and E to the Second Declaration of Rosann Fitzpatrick are irrelevant to the material facts necessary to decide this Motion. Exhibit D contains a deposition transcript of Costco (and selected exhibits), taken pursuant to CR 30(b)(6), on a list of topics that have no relevance to the narrow issues presented in Costco's motion for summary judgment. *See* Declaration of Kathleen O'Sullivan in Support of Costco's Reply, Ex. 1 (Deposition Notice, listing topics). To the extent this testimony purports to show that Costco paid lower fees to CPG in exchange for CPG having possession of "slippage" (the money when checks went uncashed), it is irrelevant because Costco's suppliers paid whatever fees were charged by CPG; moreover, the fact that CPG kept the "slippage" is entirely consistent with the evidence Costco presented regarding the flow of funds. Exhibit E (excerpts from a Rule 30(b)(6) deposition of the Department) is equally irrelevant, and it does not support the point for which it is cited by the Department (that a "former CPG employee . . . created a complete back-up copy of CPG's computer system shortly before it closed its doors," Opp'n at 19 n.5 (citing dep. at 77, 93)). In fact, the Department's 30(b)(6) designee testified that "it's impossible to confirm that it's a complete copy." Ex. E (Department 30(b)(6) Dep. at 116:8-9) (attached as Ex. 2 to O'Sullivan Decl.).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

the "holder," Opp'n at 4, but fails to satisfy its burden for three reasons: (1) the only "obligations" in this case are on the checks and Costco has no liability on them; (2) even if the unclaimed property is viewed as some "underlying obligation" apart from the checks, the Department's evidence is insufficient to show the basic elements of contract formation; and (3) the UPA cannot be interpreted to require duplicate payment from Costco.

First, the Department offers no explanation for its 11th hour recharacterization of the unclaimed property from checks to another "underlying obligation." The Department's formal records request to Costco sought records of "all uncashed rebate *checks*"; its demand letter informed Costco that it owed a sum for "unreported unclaimed rebate *checks*" based on a total of uncashed checks; and its counterclaim sought a judgment for the total amount of "uncashed rebate *checks*" based on a dormancy period calculated by the date of issuance of the check. *See* van Burkleo Decl., Exs. 1, 3, 4 (emphasis added). The only explanation is this: because the UCC makes CPG obligated on the checks it issued, RCW 62A.3-412, the Department conceived of an alternative theory to hold Costco liable as the "holder."[4] The Department's attempt to evade its earlier position should be rejected not only as internally inconsistent, but because it is inconsistent with the UPA, which explicitly enumerates checks (but not rebates or rebate offers) as a type of intangible property subject to escheat. RCW 63.29.010(12)(a).

The Department offers a weak attempt to distinguish a recent case holding that unclaimed property should be classified by what it in fact is (checks), not by reference to some "underlying" obligation to pay the rebates. Opp'n at 10 (citing *Staples v. Cook*, 35 A.3d 421 (Del. Ch. 2012)). The Department says *Staples* is distinguishable because the court's analysis

[4] The Department suggests that CPG's liability on the checks under the UCC did not arise on checks that were not presented for payment, Opp'n at 5-6, but that simply means that the drawee *bank* is liable on these checks, *see Ward v. Fed. Kemper Ins. Co.*, 62 Md. App. 351, 489 A.2d 91, 95 (1985), not that Costco is liable on checks that it did not issue.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

took place in the context of a statute of limitations issue. But the threshold question before the court answered the statute of limitations issue was whether "unclaimed rebates issued by Staples as 'rebate checks' . . . take the form of any of the 'specifically enumerated'" types of property in the Delaware escheat statute. *Id.* at 422. Staples asked the court to ignore the form of payment, and the Delaware Chancery Court rejected that approach. *Id.* So too here, because "checks" (but not rebates) are among the specifically enumerated types of intangible property subject to escheat under Washington's escheat statute, the only relevant underlying "obligation" is on those checks. As other cases cited by the Department make clear, the party that issued the checks (CPG) has the underlying obligation to pay the rebates. *See Revenue Cabinet v. Blue Cross & Blue Shield of Ky. Inc.*, 702 S.W.2d 433, 433 (Ky. 1986); *Blue Cross of N. Cal. v. Cory*, 120 Cal. App. 3d 723, 174 Cal. Rptr. 901 (1981).

Second, the Department asserts that Costco was the "rebate offeror," but supports this assertion only with evidence of rebate-related *communications*, and does not attempt to prove even one of 236,000 alleged individual contracts between Costco and its members. *Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993) (proof of a contract requires mutual assent: offer and acceptance, and consideration). Evidence that Costco cashed *expired* rebate checks in its warehouses and checks issued by CPG on the eve of its bankruptcy is simply evidence of Costco living up to its "100% satisfaction guarantee" policy, not that it had an "obligation" to pay on those checks.

Third, the Department concedes that Costco already transmitted money to CPG for these checks. The undisputed flow of rebate dollars was from supplier to Costco to CPG to member, and for those members who did not cash their checks, CPG pocketed the money. Finding Costco to be the "holder" on these undisputed facts would result in an absurd (and unconstitutional) duplicate payment. *See City of Seattle v. St. John*, 166 Wn.2d 941, 947, 215

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

P.3d 194 (2009) ("we construe statutes to avoid absurd results"). The Department cannot evade the legal proposition set forth by the U.S. Supreme Court in *Delaware v. New York*—that a debtor satisfies its debt by transmitting payment to an intermediary who has undertaken to make the payment. 507 U.S. 490, 505, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1993).

C. The Department Does Not Contest that Costco Is a Payee on the Checks and thus an Owner Entitled to Claim the Funds

It is undisputed that Costco is a payee on the checks. Costco has already once claimed the rebate funds as the property's owner, and the Department responded by issuing Costco a check for over $3 million. *See* Motion at 6; van Burkleo Decl., Exs. 6 and 7. As Costco explained in its motion, unclaimed property statutes are not intended to maximize revenue for a state at any cost, but their purpose is to identify owners and to reunite them with their property. Where the property owner, the check payee, is known, it would be entirely inconsistent with unclaimed property law to demand the money from that property owner.

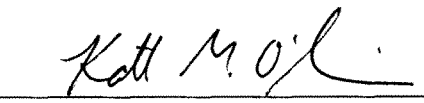
The Department's rhetoric over "private escheat" is inapplicable. Costco does not seek a windfall by "*retain*[ing] the proceeds of the uncashed rebate checks." Opp'n at 20 (emphasis added). CPG retained those funds. Costco seeks only not to have to fund rebates a second time by being forced to come up with this money again. To make Costco do so would not permit a "private escheat," but would effect a taking of Costco's private property. *See, e.g.*, *Amer. Exp. Travel Related Servs., Inc. v. Kentucky*, 597 F. Supp. 2d 717, 728 (E.D. Ky. 2009) (striking down portion of an unclaimed property law as a "forced contribution to governmental revenues"). And it would be futile, as Costco could again claim the property back as its owner.

III. CONCLUSION

The Court should grant summary judgment in favor of Costco and dismiss the Department's Counterclaim in its entirety with prejudice.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

DATED this 23rd day of July, 2012



Kathleen M. O'Sullivan, WSBA No. 27850
Sher S. Kung, WSBA No. 42077
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
Counsel for Petitioner/Plaintiff
Costco Wholesale Corporation

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2012, I caused to be delivered by e-mail a copy of Petitioner's/Plaintiff's Reply in Support of its Motion for Summary Judgment on Counterclaim of Department of Revenue.

Rosann Fitzpatrick
Donald Cofer
Julie Johnson
Attorney General's Office, Revenue Division
Counsel for Respondents/Defendants
RosannF@atg.wa.gov, DonaldC@atg.wa.gov, JulieJ@atg.wa.gov

DATED this 23rd day of July, 2012.

s/ *Sher S. Kung*
Sher S. Kung, WSBA No. 42077

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Hon. Barbara Linde
Hearing Date: July 27, 2012
Oral Argument Requested

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

COSTCO WHOLESALE CORPORATION, a Washington corporation, Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE and SUZAN DELBENE, in her official capacity as Director of the Washington State Department of Revenue, Defendants.	NO. 11-2-08830-8 SEA **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

In its motion for summary judgment, Costco claims the Department cannot meet its burden of proving that Costco is the "holder" of amounts owed to its customers who qualified for a rebate through Costco's One-Stop Rebate Program. Costco is the "holder" of those unpaid rebates because Costco, not the supplier or manufacturer, undertook the obligation to pay the consumers. Costco did not discharge its obligation by transmitting money to CPG, the third-party service provider that Costco hired to process the rebate claims. Costco, not the consumers, assumed the risk that CPG would become insolvent before the rebate checks it issued on Costco's behalf were negotiated and paid. Moreover, CPG's issuance of a rebate

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

check could not have discharged Costco's obligation as to amounts represented by checks that were never presented for payment. Finally, Costco's practice of naming itself an alternate payee on the rebate checks issued by CPG does not absolve it of its duty to report and deliver the unpaid rebates into the State's protective custody. This Court should hold as a matter of law that Costco is the "holder," deny Costco's motion for summary judgment, and grant partial summary judgment in favor of the Department on this issue.

II. ANALYSIS AND AUTHORITY

A. Costco, Not The Manufacturer, Is The Rebate Offeror.

In its statement of facts, Costco characterizes the rebates offered through its One-Stop Rebate Program as "manufacturer's rebates." Plaintiff's Motion for Summary Judgment (Pl.'s MSJ) at 2-3. As discussed in the Department's cross-motion for partial summary judgment, that characterization is inconsistent with the undisputed facts regarding the manner in which the rebates were actually communicated to customers and fulfilled. *See* Defendant's/Cross-Claimant's Motion for Partial Summary Judgment (Def.'s MSJ) at 14-16. Costco offered the rebates to its customers in its own name, on terms and conditions that it set. RF Decl., Ex. F (Cox Dep.) at 54-55, Exs. I through P. Costco selected the rebate processor, defined the parameters for validating rebate submissions, handled member complaints, and owned the rebate submission data. RF Decl., Ex A (FTC presentation by Joe Grachek at 163-69); Ex. C (Grachek Dep.) at 30; Ex. F (Cox Dep.) at 94-95. The manufacturers had no relationship with Costco's customers. RF Decl., Ex. B (Zipp Dep.) at 101; Ex. C (Grachek Dep. at 30); Ex. E (Savo Dep.) at 22; RF Decl., Ex. F (Cox Dep.) at 94. Costco did not permit suppliers or manufacturers to know the identity of the consumers, and the consumers did not know the identity of the suppliers that agreed to sponsor a rebate.

Costco merely recovered its operational costs from the manufacturers. RF Decl., Ex. A at 163-66 (explaining that Costco operates the program "unilaterally," and "charges the

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

suppliers the expense for running that rebate program," which ensures "the suppliers are vested in the program financially."); Ex. X (form contract for suppliers). Costco characterizes the amounts it paid CPG as "pass through" payments from the manufacturers. Pl.'s MSJ at 5 ("Costco explained that it was simply a conduit for the funds that passed from manufacturer to Costco to CPG to Costco member..."); Declaration of Brian Savo (Savo Decl.) at ¶ 8 ("Under the rebate program, Costco served as a pass-through for funds coming from suppliers to fund rebates on products sold at Costco warehouses."). The undisputed evidence, however, establishes that Costco contracted with CPG in its own name, not as an agent for the suppliers, and that it was obligated to pay CPG regardless of whether Costco received payment from the manufacturers. *See* RF Decl., Ex. E (Savo Dep.) at 19-24; Ex. D (Kersten Dep.) at 15, 18 (explaining billing process). Similarly, the suppliers were obligated to pay Costco in accordance with the terms of their separate contractual arrangement with Costco.

Costco clearly distinguished "manufacturer's rebates" from "Costco Rebates" that could be submitted through costco.com or by mail. RF Decl., Exs. L, M. When a manufacturer offered a rebate, Costco identified the rebate to the consumer as a "manufacturer's rebate." Customers were advised, "Manufacturer's rebates must be submitted through the Manufacturer." Costco provided a hyperlink to a pdf file of the manufacturer's rebate, which contrasts markedly with the rebate submission forms for "Costco Rebates." RF Decl., Ex. B (Zipp Dep.) at 44; Second RF Decl., Ex. A.

The Department does not dispute that Costco's One-Stop Rebate Program benefited consumers and was a marked improvement over the "tear pad" and "on pack" manufacturer's rebates that it replaced. However, Costco also benefited from implementing its own customer rebate program. RF Decl., Ex. A (presentation by Joe Gracheck at FTC conference) at 169 ("I guess the biggest thing for us is...if the members have a bad experience with a rebate program that might influence their decision to purchase in the future. And I think we take that really seriously at Costco."). Costco benefited from its ability to measure the promotional value of

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

rebate promotions, increased traffic to its website, and opportunities to cross-sell other products. RF Decl., Ex. F (Cox Dep.) at 52-54, 59-61. Along with the benefits comes the burden of complying with the unclaimed property laws.

The State's burden of proof on the issue of Costco's status as the "holder" is fully satisfied by establishing that Costco was the rebate offeror, that Costco's customers qualified for a rebate (as confirmed by the validation process that culminated in the issuance of a rebate check), and that some of those rebates remain unpaid (a fact which is undisputed). RF Decl., Ex. A at 163 (explaining point-of-sale validation process); Second RF Decl., Ex. B (schematic of validation process for Costco's customer rebate program) (COSTCOWA004348).

B. The Unclaimed Property At Issue Is The Debt Created By The Rebate Offer, Which Gave Rise To The Consumer's Right To Payment And Costco's Obligation To Pay.

Washington's Unclaimed Property Act (UPA) applies to "all intangible property...that is held, issued, or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than three years after it became payable or distributable...." RCW 63.29.020. A "holder" under the UPA includes any person "indebted to another on an obligation." RCW 63.29.010(10)(c). Costco contends the relevant debt obligation for purposes of the UPA is CPG's obligation as the issuer of the rebate checks rather than Costco's obligation as the person that entered into an agreement with the consumer to pay the rebate. Pl.'s MSJ, at 12. This is incorrect.

As discussed in the Department's cross-motion for partial summary judgment on the holder issue, the unclaimed property is the debt arising from the rebate offer, which creates the consumer's right to payment and Costco's obligation to pay. Def.'s MSJ at 16-18. The rebate checks are merely evidence of that outstanding indebtedness. *Cf. Blue Cross of N. Cal. v. Cory*, 120 Cal. App. 3d 723, 736, 174 Cal. Rptr. 901 (1981) (non-negotiability of checks is irrelevant because the unclaimed property is the health insurer's underlying obligation to pay benefits, which is continuing).

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

The Uniform Unclaimed Property Act (1995) § 1(13) clarified the issue by defining "property" as "a fixed and certain interest in intangible property," including "*property that is referred to as or evidenced by*" a check, refund, credit memorandum, etc. Citing the decision in *Blue Cross v. Cory*, the UPA commentators explained that this definition clarifies that "'property' is not the check, note, certificate or other document that evidences the property interest, but the underlying right or obligation." Uniform Unclaimed Property Act (1995), NCCUSL cmt. to. Section 1. As stated by the California court:

> A check written by Blue Cross was evidence of the thing in action, which would have been extinguished if and when the check were negotiated and paid, but it was the thing in action-not the check or its nonexistent "proceeds"- which remained "intangible personal property ... held or owing in the ordinary course of the holder's [Blue Cross'] business ...."

Blue Cross, 174 Cal. Rptr. at 908.

CPG issued rebate checks to Costco's customers by reason of their right to be paid the rebate amounts pursuant to their agreement with Costco. The customer's right to payment is "intangible personal property held or owing in the ordinary course" of Costco's business. RCW 63.29.020. Although CPG issued the rebate check, that check represented Costco's debt obligation to the consumer. *Cf. Revenue Cabinet v. Blue Cross & Blue Shield of Ky., Inc.*, 702 S.W.2d 433, 436 (Ky. 1986) ("The issue is not whether BC/BS is obliged to honor the checks per se after all the intervening years. The issue is whether BC/BS is obliged to honor the debt which the checks represent."). As discussed further below, CPG never became directly liable on checks that were never presented for payment; nor was Costco's obligation to the customer discharged.

C. CPG's Liability On The Checks Did Not Arise As To Checks That Were Never Presented For Payment.

Costco's argument that CPG is the relevant obligor rests on RCW 62A.3-412, a provision of Washington's Uniform Commercial Code (UCC) that states the obligations of a check issuer. Pl.'s MSJ, at 11-12. Costco ignores the UCC provision that specifically

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

addresses the legal effect of a check that is given in payment of an obligation, RCW 62A.3-310 ("Effect of instrument on obligation for which taken").

Under 62A.3-412, the obligation of a drawer is to pay the check according to its terms when issued, but only when the check is dishonored by the drawee bank. A check is a conditional payment. *See Lincoln Cy. v. Gibson*, 143 Wash. 372, 374, 255 P. 119 (1927). The conditions are that the check be presented and honored. Until those conditions are met, no one is directly liable on the check itself. *Ward v. Federal Kemper Ins. Co.*, 62 Md. App. 351, 489 A.2d 91, 95-96 (1985). An ordinary bank check is revocable by the drawer at any time before it is presented for payment. *National Market Co. v. Maryland Cas. Co.*, 100 Wash. 370, 380, 174 P. 479 (1918). Dishonor is a condition to the drawer's liability.

It cannot be asserted that CPG, as the drawer of the rebate checks, now has an enforceable liability on those checks. Because the unpaid rebate checks have never been presented, they have not been dishonored. Thus, any liability of CPG on the checks it drew has not arisen. *Cf. Ward*, 489 A.2d at 95-96 (drawer of check is only secondarily liable on the check when issued).

The UCC provides that when an uncertified check is "taken" for an obligation, the obligation is suspended until the check is dishonored or paid. RCW 62A.3.310(b)(1); *Pardee v. Jolly*, 163 Wn.2d 558, 570, 182 P.3d 967 (2008). The mere delivery of an instrument to the obligee does not suspend the obligation. Anderson on the Uniform Commercial Code § 3-310:7 (rev. 2012). Rather, the obligee must, by its actions, accept the instrument as payment of the obligation. *Id.* Such acceptance ordinarily is shown by the obligee's act of depositing or negotiating the instrument. *Id., citing Kalish & Rice, Inc. v. Regent Air Corp.* 624 F. Supp. 173, 176-77 (S.D.N.Y., 1985) (mere receipt of note did not constitute "acceptance" that would suspend underlying obligation). Because no one knows what has become of the unpaid rebate checks, there is no evidence that the consumer took the check for a rebate obligation. As a matter of law and common sense, Costco's underlying obligation to pay the rebate amount to

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

its customers could not have been discharged by rebate checks that were never presented for payment.

D. Costco Did Not Discharge Its Obligation To The Consumer By Transmitting Funds To CPG.

Costco claims that it satisfied any obligation to its customers by transmitting payment to CPG. Pl.'s MSJ, at 12-13. Costco relies on a comment from the 1995 Model Act concerning the definition of "holder," which was revised in light of a decision by the United States Supreme Court, *Delaware v. New York*, 507 U.S. 490, 505, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1993). Under the 1995 Act, "[h]older" means "a person obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this [Act]." Section 1(6) of the 1995 UPA. The ULA commissioners explained:

> The definition of "holder" in paragraph 5 is a clarification. There had been some confusion in the past over the identity of the holder of an obligation that had been transferred by the original obligor, as in the payment of dividends on corporate stock. As held by the Supreme Court in *Delaware v. New York*, the holder is the person indebted under the applicable state law. Thus, if the original debtor, the dividend-paying corporation, has satisfied its debt under its share contract and under state law by transmitting payment to an intermediary, which has undertaken to make the payment, the intermediary becomes the debtor. The holder thus is "a person obligated," i.e., a person who could be sued successfully by the owner for refusing to make payment."

Uniform Unclaimed Property Act (1995), NCCUSL cmt. to section 1; *see Delaware v. New York*, 507 U.S. at 505.

Costco argues, "[l]ike the dividend-paying corporation in *Delaware*, after paying CPG, Costco was no longer 'indebted to another on an obligation' in connection with the rebates." Pl.'s MSJ at 13. Costco simply begs the question presented. Following *Delaware,* whether payment to a third party discharges the original obligor depends upon the applicable state law and the contractual obligations of the parties. *Cf. Clymer v. Summit Bancorp.*, 171 N.J. 57, 792 A.2d 396, 403 (2002) (finding *Delaware* factually distinguishable where governmental entities did not transfer their obligations to bondholders by transmitting funds to the Bank that served as their paymaster; governmental entities remained the ultimate obligor and thus a "holder");

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

State v. Standard Oil Co., 5 N.J. 281, 74 A.2d 565, 579 (1950) (a corporation was "not absolved of its obligation" to the shareholder by paying funds to a bank for disbursement of declared dividends).

In *Delaware*, the dividend-paying corporation discharged its liability by paying an intermediary that was the record owner of the securities. Under the applicable state law, the securities issuers were obligated only to the record owners, not to the unknown beneficial owners who were customers of the record owners. *Delaware*, 507 U.S. at 504 ("From an issuer's perspective, the only creditors are registered shareholders[.]"), *citing* UCC § 8-207(1) ("the issuer...may treat the registered owner as the person exclusively...to exercise all the rights and powers of an owner"). The intermediary banks were, in turn, obligated to pay their customers, the beneficial owners, pursuant to their contracts with those customers. *Delaware*, 507 U.S. at 505.

Under the law applicable here, Costco did not satisfy its obligation on the outstanding rebates owed to its customers by transmitting funds to a third party. The intermediary in this case, CPG, is merely Costco's subcontractor, a stranger to the agreement between Costco and its customers. As discussed in the Department's cross-motion for partial summary judgment, Costco's delegation of the payment function to CPG did not discharge its liability to its customers. Def.'s MSJ at 20-21. It is a well-established as a matter of contract law that:

> The duties under a contract are not assignable inter vivos in a true sense under any circumstances; that is, one who owes money or is bound to any performance whatever, cannot by any act of his own, or by an act in agreement with any other person, except his creditor, divest himself of the duty and substitute the duty of another.

White Pass Co. v. St. John, 71 Wn.2d 156, 162, 427 P.2d 398 (1967), *quoting* 3 Williston, Contracts 411 (3rd ed. 1960) at pp. 18-20. Absent the creditor's consent, a party to a contract does not discharge its liabilities by assigning them to a third party. *Id.* Mere knowledge that work is being performed by a subcontractor is not sufficient to relieve the general contractor of its contractual obligations. *Id.* "Unless the obligee agrees otherwise, neither delegation of

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor." Restatement (Section) of Contracts § 318(3) (1981). An obligor is discharged by the substitution of a new obligor only if the obligee manifests asset, forming a novation. Otherwise, the obligee retains his original right against the obligor, even though the obligor manifests an intention to substitute another obligor in his place and the other purports to assume the duty. *Cf.* RCW 62A.2-210(1) ("No delegation of performance relieves the party delegating of any duty to perform of any liability for breach."). See also Restatement (Second) of Contracts, § 160 (1932) ("Neither the delegation of performance by an obligor, nor a contract with the obligor by the person to whom the performance is delegated to assume the obligor's duty, extinguishes it or prevents recovery of damages from him if the duty is not performed.")

There is no evidence Costco's customers even knew the identity of CPG, which was identified to them only by its acronym, let alone that they agreed to look solely to CPG for payment. CPG was merely the service provider that Costco hired to administer and fulfill its rebate program. Costco, not the customer, assumed the risk that CPG would become insolvent before the rebate check was negotiated. Costco recognized its continuing obligation to pay the rebate amount represented on the checks issued by CPG by paying whenever the demand for payment is made. RF Decl., Ex. U (instructing warehouses regarding payment of CPG rebate checks); Ex. V (instructing customers they may bring their returned check and notice of bank fees to a Costco warehouse for reimbursement). *Cf. Revenue Cabinet*, 702 S.W.2d at 436; *Riggs Nat'l Bank v. Dist. of Columbia*, 581 A.2d 1229, 1234-35 (D.C. 1990) (bank's practice of routinely honoring demands for payment of stale checks evidenced its continuing obligation). After CPG's bankruptcy, Costco paid all outstanding rebate claims that were submitted to CPG and Costco reimbursed its customers who incurred bank fees for checks that had been dishonored. RF Decl., Exs. U, V.

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

E. *Staples* Recognized That Unpaid Rebates Are Reportable Under The Unclaimed Property Laws Whether They Are In The Form Of A Check Or Otherwise.

Costco relies on a recent trial court decision from Delaware in support of its contention that, as the person that issued the rebate check, CPG, not Costco, is the relevant obligor. Pl.'s Br. at 10, *citing Staples, Inc. v. Cook*, 35 A.3d 421 (Del. Ch. 2012). *Staples* addressed a completely different issue.

That case involved unclaimed volume rebates owed to business customers. Staples did not dispute that it was the holder or that the unpaid rebates were reportable under Delaware's unclaimed property laws. The only dispute was whether Staples could raise a statute of limitations defense, which under Delaware law is not available when abandoned property falls within any of the "specifically enumerated" categories of property.[1] *Staples*, 35 A.3d at 424.

Staples paid the rebates either by check[2] or by crediting the customer's account receivable. *Id.* at 423. The court concluded the rebates "fit comfortably" within at least two of the specifically enumerated categories, including "bills of exchange" and "credits." *Staples*, 35 A.3d at 422. Staples urged the court to disregard the form of payment, invoking the principle that unclaimed property is the underlying debt obligation, not the instrument that evidences it. The Delaware court rejected Staple's argument because the statute itself made the form of payment relevant in addressing the availability of a statute of limitations defense. *Id.* at 426. Thus, the court granted partial summary judgment to the State, holding that the unpaid rebates must be delivered to the State.

---

[1] Delaware's unclaimed property law, like that of Washington and most other states, has an anti-limitations provision that nullifies the effect of any statute of limitations applicable to the owner. *Staples*, A.3d at 424. *See also* RCW 63.29.290 (periods of limitation). Unlike Washington's law, however, Delaware's anti-limitations provision is limited to specific categories of property.

[2] Although it was not disclosed in the opinion, Staples, like Costco, relied on a third party rebate processor to issue the rebate checks, Parago. Plaintiff/Counterclaim-Defendant Staples, Inc.'s Amended Answer to Verified Supplemental Counterclaim, Staples, Inc. v. Cook, No. 5447-CS., 2012 WL 1202785 (Del. Ch. April 4, 2012) at ¶ 73 ("Staples admits only that it identified Parago as its third party administrator for rebates offered by manufacturers and Staples.") ¶ 80.

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Costco relies on *Staples* for the proposition that "the obligation in question is *on* the checks." Pl.'s MSJ, at 10. *Staples* simply does not support that proposition. On the contrary, the Delaware court recognized that the rebates offered by Staples qualified as unclaimed property regardless of the particular form of payment. The form was relevant in addressing the statute of limitations issue, but it had no bearing on determining who was the holder or whether the rebates were unclaimed property. The court observed: "The undisputed reality of record here is that Staples provided to its business customers two forms of property as part of its relationship with those customers." 35 A.3d at 427. Like Staples, Costco offered rebates to its customers in the ordinary course of doing business and it allowed its customers to redeem their rebates in the form of either a credit or a check.

Nothing in the *Staples* decision casts any doubt on the principle that as a result of its contract with consumers, Costco had an obligation to pay and the customers had the right to payment, a debt relationship that is now intangible property subject to the State's protective custody.

F. Requiring Costco To Deliver The Unpaid Rebates Into The State's Protective Custody Does Not Offend The Takings Clause.

Costco claims that requiring it to deliver the funds relating to unclaimed rebates would effect "an uncompensated and unconstitutional taking of property." Pl.'s MSJ at 14. This argument lacks merit.

According to Costco, "[o]ther states have recognized the principle that the takings clause prevents overly aggressive claims by state revenue officials under unclaimed property law." Pl.'s MSJ at 15. In support, it cites to a single unpublished trial court decision from Tennessee, which reasoned that requiring a retailer to deliver the full face value of a gift certificate to the state constitutes an unconstitutional taking of its anticipated gross profits. *Id., citing Serv. Merch. Co., Inc. v. Adams*, No. 97-2782-III, 2001 WL 34384462 (Tenn. Ch. June 29, 2001).

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

A New York appellate court that addressed the same issue deemed the retailer's takings claim "without merit." *See In re Kimberley's A Day Spa, Ltd. v. Hevesi*, 810 N.Y.S.2d 616 (N.Y. App. Div. 2006). The court reasoned the retailer's claimed property interest in the unredeemed gift certificates "is frustrated by a statute in existence at the time of the sale which declares that the value of those certificates escheat to the State. Because the statute deprived petitioner of any property interest in the unredeemed gift certificates, there could not be a taking and no process was due." *Id.* at 619.

A federal district court also rejected the Tennessee court's takings analysis, observing that it relied on inapposite federal case law on real property interests. *American Exp. Travel Related Services Co., Inc. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 611-12 (D.N.J., 2010). The same court acknowledged that a takings claim "conceivably" may arise due to a gift card issuer's loss of anticipated profits.[3] However, no such claim would be available to merchants that issued traveler's checks or prepaid stored value cards because such transactions involve a "cash-for-cash exchange." *Id.* at 611. Like traveler's checks and stored value cards, consumer rebates involve a "cash-for-cash exchange." That is, the rebate offeror agrees to refund a specific portion of the purchase price paid by the consumer. Once the consumer has satisfied the conditions for payment, it has a fixed and certain interest in the rebate amount.

According to Costco, the UPA "cannot constitutionally be read to require Costco to make payment *again* on funds that it has already transmitted to CPG." Pl.'s MSJ at 15. Costco cites *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80, 82 S. Ct. 199, 7 L. Ed. 2d 139 (1961), for the proposition that forcing a company to "pay the same single obligation twice" is unconstitutional. Pl.'s MSJ, at 14. *Western Union* does not support Costco's argument. That case holds that due process requires that a holder be protected from multiple

[3] The 1995 UPA avoids the issue of an unconstitutional taking of a retailer's anticipated gross profits by limiting the escheat value of merchandise-only gift certificates to 60% of their face value. 1995 Unif. Act, note 12, section 2(7).

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

liabilities to more than one State for the unclaimed property it holds. 368 U.S. at 75. It has no application here.

In a decision decided shortly after *Western Union*, the United States Supreme Court adopted rules of priority governing which state may lay a claim to unclaimed intangible property in order to protect holders from multiple liabilities. *See Texas v. New Jersey*, 379 U.S. 674, 85 S. Ct. 626, 13 L. Ed. 2d 596 (1965) (unclaimed property is payable to creditor's state of residence; if unknown, property defaults to the debtor's state of incorporation). The Court enunciated a "clear rule which will govern all types of intangible obligations...to which all States may refer with confidence." 379 U.S. at 679. The 1981 Model Act conforms to the priority rules adopted by the Court. *See* 1 David J. Epstein, *Unclaimed Property Law & Reporting Forms*, § 2.04[1] at 2-19 (2001); RCW 63.29.030 (general rules for taking custody of intangible unclaimed property). In addition, the UPA immunizes a holder from liability relating to property that is delivered into the State's protective custody. *See* RCW 63.29.200(5) (state shall defend holder against competing claims and indemnify holder against any liability).

Costco's argument that requiring it to report and deliver the unclaimed rebates would require it to "pay the same single obligation twice." Pl.'s MSJ at 15 rests on the flawed premise that it discharged its obligation to the consumer by transmitting funds to CPG, its own service provider. Costco's obligation to CPG is distinct from its obligation to its customers. CPG is Costco's agent, not the customers' agent. The customers had no role whatsoever in selecting CPG; nor did they have any knowledge of the terms or conditions of CPG's contractual arrangement with Costco. Costco, not its customers, assumed the risk that CPG would fail to honor the rebate checks. *Cf. White Pass Co. v. St. John*, 71 Wn.2d 156, 161, 427 P.2d 398 (1967) (general contractor remains responsible for his agent's failure to perform).

The State merely seeks to recover the rebate amount that Costco promised to pay its customers. Costco has no constitutionally protected interest in any portion of the unpaid

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

rebates. The full amount of those rebates belongs to the customers who failed to claim them: Costco was not entitled to profit at the expense of its customers by either retaining the proceeds of uncashed checks as its own income or assigning the money to CPG.

Contrary to Costco's suggestion, the Department's claim is not unduly "aggressive." Pl.'s MSJ at 15. Costco does not dispute that the unpaid rebates are property subject to the Washington's unclaimed property laws. The full amount Costco owed to a customer who qualified for a rebate was as "fixed and certain" as the amounts Costco owed as wages to its employees or as payment for the goods provided by its suppliers. Costco received the full purchase price from its customer, and upon confirmation of that customer's eligibility for a rebate, it owed the customer a specific amount in return. It is inconceivable that Costco would disclaim responsibility for unpaid wages and unclaimed payments owed to its suppliers by pointing to a third party it hired to issue checks on its behalf. Costco is the person with the debtor-creditor relationship with its employees and suppliers and cannot avoid liability by delegating the payment function to a third party. Costco's liability with respect to the unpaid rebates owed to its customers is no different. The Department's auditor correctly recognized that the unpaid rebates were reportable to the State during the initial routine audit she conducted in 2007 and early 2008. Second RF Decl., Ex. C.

G. The UPA Should Be Liberally Interpreted In Favor Of The Owner As Against A Defendant Holder That Purports To Contract Away Its Statutory Duties.

Costco asserts that any doubts in the interpretation of the UPA must be interpreted strictly in its favor. Pl.'s MSJ at 14. As discussed in the Department's motion for partial summary judgment, the opposite is true. Def.'s MSJ at 12-13. Costco fails to recognize that the UPA, unlike an escheat statute, does not cause a forfeiture. The objectives of the UPA are to protect owners by locating them and by restoring their property to them, and to give the state rather than holders of unclaimed property the benefit of the use of unclaimed funds or property. *Clymer v. Summit Bancorp*, 320 N.J. Super. 90, 726 A.2d 983, 993 (Ch. Div. 1998), *rev'd on*

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

other grounds, 334 N.J. Super. 252, 758 A.2d 652 (App. Div. 2000), *rev'd*, 171 N.J. 57, 792 A.2d 396 (2002). It has the remedial effect of increasing the period during which owners may assert their claims without being barred by limitations. At the same time, the UPA actually shields the defendant stakeholder or obligor from any later action by the owners or claimants. *State v. Sperry & Hutchinson Co.*, 23 N.J. 38, 127 A.2d 169, 172 (1956); RCW 63.29.200(5). Addressing the District of Columbia's UPA, the D.C. Circuit observed that "courts are obligated to accord a generous construction to legislation of this kind." *Riggs Nat'l Bank v. Dist. of Columbia*, 581 A.2d 1233, 1234 (D.C. 1990) ("Remedial statutes are liberally construed to suppress the evil and advance the remedy.").

The public policies favoring the UPA are so strong that contracts that purport to effect a "private escheat" are void. *Riggs Nat'l Bank,* 581 A.2d 1233-34 (bank's depletion of dormant deposits by imposition of service fees effected an unlawful private escheat); *Blue Cross & Blue Shield.*, 702 S.W.2d at 436 (rejecting health insurer's reliance on UCC statute of limitations for actions on negotiable instruments); *Blue Cross of N. Cal.*, 174 Cal. Rptr. at 911-12 (claims withdrawal provision in health insurance contract deemed an invalid attempt to circumvent the UPA); *Screen Actors Guild, Inc. v. Cory*, 91 Cal. App. 3d 111, 154 Cal. Rptr. 77, 80 (1979) (corporate bylaw providing for forfeiture of unpaid residuals owed to guild members deemed void); *State ex rel. Furman v. Jefferson Lake Sulphur Co.*, 36 N.J. 577, 178 A.2d 329 (1962) (provision of corporate charter providing for forfeiture of unclaimed dividends held invalid).

The case law prohibiting private escheats is based on the principle that a contract contrary to the terms and policy of a statute is illegal and unenforceable. *Vedder v. Spellman*, 78 Wn.2d 834, 837, 480 P.2d 207 (1971). "Where a private agreement between the parties is in fundamental conflict with public policy as established by the legislature, the private agreement must fall." *People ex rel. Callahan v. Marshall Field & Co.*, 83 Ill. App. 3d 811, 404 N.E.2d 368, 373 (1980) (retailer may not rely on expiration date printed on unredeemed gift certificates to avoid delivering the unclaimed property to the state).

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

The Legislature manifested Washington's strong public policy barring private escheats by imposing criminal penalties on persons who attempt to contractually avoid their duties under the APA:

> A person....who enters into a contract to avoid the duties of this chapter is guilty of a gross misdemeanor and upon conviction may be punished by a fine of not more than one thousand dollars or imprisonment for up to three hundred sixty-four days, or both.

RCW 63.29.340(3).

Costco points to language in its contract in which CPG contractually assumed the status of "holder," and asserts CPG agreed "to comply with unclaimed property laws including any reporting requirements." Pl.'s MSJ at 3 (citing to COSTCOWA001265, 1272). To the extent Costco's contractual agreement with CPG purports to absolve Costco of its statutory duties to report and deliver unclaimed rebates to the State, it is void. Just as Costco could not discharge its liability to the consumer by delegating the payment function to CPG, it cannot discharge its statutory duties to the State by contracting them away.

Requiring Costco to deliver the unpaid rebates into the State's protective custody is an equitable result that will thwart Costco's attempt to avoid its duties under the UPA. It is undisputed that Costco made no efforts to monitor CPG's compliance with the unclaimed property laws. Second RF Decl., Ex. D (Costco's CR 30(b)(6) deposition), at 44. On the contrary, the evidence developed through discovery shows that Costco knew CPG never had any intention of reporting or delivering the proceeds of uncashed rebate checks (which the contracts refer to as "slippage") to any of the states. Savo Decl., Ex. 3 at COSTCOWA001188. On the contrary, Costco knew CPG considered the slippage as income CPG was entitled to receive in exchange for Costco's payment of lower service fees. Even worse, when the Department and other states sought Costco's cooperation in recovering the records of the uncashed rebate checks from CPG's bankruptcy estate, Costco invoked a

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

contractual provision that entitled it to demand that CPG destroy its electronic records relating to Costco's customer rebate program.

During its annual contract negotiation process, CPG presented Costco with different pricing options depending on whether Costco or CPG was entitled to retain the slippage. CPG's fees increased if it was required to return the slippage to Costco. Second RF Decl., Ex. D, Costco's CR 30(b)(6) deposition, Ex. 6 (email from CPG to Costco re: "Costco 2004-2005 Fulfillment Quotes," with attachments). CPG offered a lower fee if it was entitled to retain the slippage in its own bank account. *Id.* (quote of $0.51 per transaction if CPG retains slippage, COSTCOWA001944, and $0.65 per transaction if Costco retains slippage, COSTCOWA001996). Costco allowed CPG to retain the slippage in exchange for lower transaction fees, thereby lowering its own costs of doing business. Costco's CR 30(b)(6) deposition, Ex. 5 at COSTCOWA004345 ("Currently our agreement with CPG is they keep all breakage/slippage. This allows Costco to keep their fees at a lower cost.").

Costco and CPG routinely referred to slippage as an element of CPG's compensation for providing rebate fulfillment services well after CPG contractually assumed the responsibility for compliance with the unclaimed property laws. Costco's CR 30(b)(6) deposition, Ex. 9 (emails from Costco employee in Member Rebates stating that certain fees should be paid "from CPG slippage" and not charged to Costco); Ex. 11 (email from CPG's CEO to Costco executives, dated June 22, 2007, characterizing "CPG revenues" as "fees and slippage."). RF Decl., Ex. B (Zipp Dep.), Ex. 20 (letter from CPG to Costco announcing pending insolvency: "As you know, the rebate industry has generally been able to keep processing fees for rebate programs relatively low by enabling processors such as CPG to retain the value of checks sent to Consumers but not ultimately presented for payment.").

Following CPG's bankruptcy, Costco drafted a letter to its suppliers explaining the costs of operating its mail-in rebate program would increase substantially "due, in large part, to "the state['']s more stringent enforcement of their escheat laws, which has eliminated a revenue

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

source to the service provider which is passed on in the form of higher transactional fees." Costco's CR 30(b)(6) deposition, Ex. 10 at COSTCOWA004559.[4]

In substance, Costco's contractual arrangement with CPG effected a private escheat. By using the unclaimed funds for its own benefit, Costco was unjustly enriched by the amounts owed to consumers who never received their rebates.

Costco's contracts with CPG gave Costco ownership of the historical data relating to its rebate fulfillment program as well as the right to obtain reports and to audit CPG's records. Savo Decl., Ex. 4, at COSTCOWA001269, 1271. Costco's CR 30(b)(6) deposition at 46-47 ("Q. [D]id Costco understand that it had the contractual right to obtain from CPG the detail as to the slippage? A. Yes."), 47 ("Q. Was it Costco's understanding that, under this contract, confidential information would include still the historical data on rebate submissions? A. Yes."). Costco's CR 30(b)(6) deposition at 45-46 ("Q. [D]id Costco understand that the detail as to expired checks was confidential information under this contract? A. Yes."). Costco also had the contractual right to demand that CPG destroy any records of its consumer rebate program upon the termination of the contract, including the detail of expired rebate checks, which Costco understood was encompassed within the definition of "Confidential Information" under the contract. Savo Decl., Ex. 4, at COSTCOWA001269; Costco's CR 30(b)(6) deposition at 50.

For years, Costco steered not only the Department's auditors but also the representatives of other states to CPG on what it knew was a wild goose chase for the records of its consumer rebate program. Second RF Decl., Ex. E, Department's CR 30(b)(6) deposition, at 36-38. In June 2008, the Department's auditor informed Costco it would look to Costco as the person ultimately responsible in the event CPG failed to deliver the outstanding rebates owed to Costco's customers. Second RF Decl., Ex. C. CPG filed for bankruptcy in

[4] On advice of legal counsel, the letter that ultimately went out did not mention "escheat." Costco CR 30(b)(6) Deposition at 40-41, Ex. 10 at COSTCOWA004562.

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

November 2008. In November and December 2008, the State of Florida asked for Costco's assistance in accessing CPG's records of its rebate program. Costco's CR 30(b)(6) deposition at 60, Ex. 14. A third party auditor, ACS, acting on behalf of 33 states, also pursued access to Costco's records. Second RF Decl., Ex. E, Department's CR 30(b)(6) deposition, at 36-37.

In February 2009, Costco's counsel wrote to CPG's bankruptcy trustee and demanded that "all computers used by CPG pursuant to the Agreement have been sufficiently scrubbed so that no further Confidential Information exists on the computers." Costco's CR 30(b)(6) Deposition at 57, 59, Ex. 13.

On November 23, 2009, the bankruptcy trustee served Costco with a notice of its opportunity to object to her motion for an order authorizing the CPG bankruptcy estate to abandon non-essential business records, including bank statements from 2006-2007, and "Banking Information 2008 and Older." Costco's CR 30(b)(6) deposition, Ex. 15. Costco knew the bank statements would have included a record of cleared rebate checks. Costco's CR 30(b)(6) deposition at 65. Costco did not file an objection to the abandonment or destruction of CPG's business records. *Id.* The data on CPG's servers was, in fact, rendered inaccessible.[5] Second RF Decl., Ex. E, Department's CR 30(b)(6) deposition at 115, 121-22, 137-39.

The evidence in the record establishes that Costco never had a good faith belief that CPG would, in fact, comply with the UPA by either making its rebate records available or by delivering the unpaid rebates to the states as unclaimed property. Costco's contractual arrangement with CPG was the type of scheme the Legislature sought to deter when it enacted criminal penalties for a person "who enters into a contract to avoid the duties" of the UPA. RCW 63.29.340(3). The evidence shows that it was a patent attempt to effect an unlawful

[5] The records upon which the Department based its demand were provided by a former CPG employee who had created a complete back-up copy of CPG's computer system shortly before it closed its doors. Second RF Decl., Ex. E, Department's CR 30(b)(6) deposition at 77, 93.

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

private escheat of the unclaimed rebates. Thus, this Court should reject any attempt by Costco to rely on the language of the CPG contracts in defense of the Department's counterclaim.

H. Costco's Ownership Interest As An Alternative Payee Does Not Defeat The Customer's Right To Payment Or The State's Interest In Obtaining Custodial Possession Of The Unpaid Rebates.

Costco claims it is entitled to retain the proceeds of the uncashed rebate checks as its own property because it was named an alternate payee on the checks. Pl.'s MSJ at 16-17. As discussed in the Department's motion for partial summary judgment, Costco's argument is based on the false premise that the unclaimed property are the checks rather than the customer's right to payment. The checks were given in payment of Costco's obligation to the consumer. That Costco was named an alternate payee does not extinguish its customer's right to payment, which is the unclaimed property at issue in this case.

Costco instructed CPG to name it as an alternate payee in order to increase the number of customers who would redeem the check at its warehouses for additional purchases. RF Decl., Ex. B (Zipp Dep.) at 33 ("Q. Do you know why Costco decided to make the checks payable to either the customer or to Costco? A. Because we wanted our member to be able to bring that check back in to Costco and use it toward their next purchase..."). Similarly, Costco allowed customers who submitted rebates online to receive payment in the form of a credit to be used for additional purchases. This practice no doubt benefited consumers by making redemption easier, but it also clearly benefited Costco by increasing its sales revenues. That Costco was named an alternate payee does not change its debt obligation to the consumer, which remains "fixed and certain."

If Costco's theory were to succeed, it would effect a private escheat, contrary to the policy of the UPA. *Cf. Marshall Field,* 404 N.E.2d at 374 (retailer could not retain unclaimed gift certificates following their expiration date). "The public policy supporting custodial taking by a State is superior to any claim that a private holder may assert to any unclaimed proceeds." *TXO Production Corp.* v. *Oklahoma Corp. Comm'n*, 829 P.2d 964, 972 (1992).

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

III. CONCLUSION

Costco remains obligated to pay the unpaid rebates now presumed abandoned, an obligation that it undertook when it made the rebate offers to consumers and an obligation that remained with Costco when it delegated its payment obligation to CPG. Thus, this Court should hold that Costco has a duty to deliver the unpaid rebates into the State's protective custody, deny Costco's summary judgment motion, and grant partial summary judgment to the Department.

DATED this 11th day of July, 2012.

ROBERT M. MCKENNA
Attorney General

ROSANN FITZPATRICK, WSBA NO. 37092
Assistant Attorney General
DONALD F. COFER, WSBA NO. 10896
Senior Counsel
Attorneys for Defendants

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

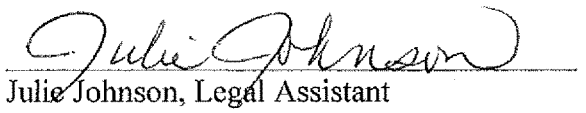
PROOF OF SERVICE

I certify that I served a copy of this document, via Electronic Mail, per agreement of the parties, on the following:

Kathleen O'Sullivan
Sher S. Kung
Perkins Coie LLP
kosullivan@perkinscoie.com
SKung@perkinscoie.com
lnelson@perkinscoie.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of July, 2012, at Tumwater, WA.



Julie Johnson, Legal Assistant

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Hon. Barbara Linde
Hearing Date: July 27, 2011
Oral Argument Requested

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

COSTCO WHOLESALE CORPORATION, a Washington corporation, Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE and SUZAN DELBENE, in her official capacity as Director of the Washington State Department of Revenue, Defendants.	NO. 11-2-08830-8 SEA **DEFENDANT/COUNTER-CLAIMANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION AND RELIEF REQUESTED

The Washington Department of Revenue (Department) moves for partial summary judgment on its action against Costco Wholesale Corporation (Costco) to enforce Washington's Uniform Unclaimed Property Act, chapter 63.29 RCW (UPA). This case is about unpaid rebates that Costco offered to consumers through its One-Stop Rebate Program. Costco denies that it undertook any legal obligation to pay the rebates. The Department asks this Court to hold as a matter of law that Costco is the person legally responsible to report and deliver into the Department's protective custody the proceeds of the consumer rebates that are now presumed abandoned.

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Partial summary judgment on the issue of Costco's liability is appropriate for the following reasons: (1) The undisputed evidence precludes Costco from raising a genuine issue of material fact as to whether Costco, not the manufacturer, entered into a contractual agreement with the consumers to pay the rebates; (2) as a matter of law, the unclaimed property at issue is the outstanding obligation to pay the rebate amount, not the uncashed checks or the funds set aside to satisfy them; (3) as a matter of law, Costco did not discharge its obligation to the consumers by transmitting payment to the third-party subcontractor it hired to fulfill the rebate claims; and (4) as a matter of law, that Costco had itself named as an alternative payee on the uncashed rebate checks does not extinguish the consumers' right to payment, which remains an outstanding debt obligation of Costco.

II. EVIDENCE RELIED UPON

The Department relies upon the following evidence in support of this motion: First Declaration of Rosann Fitzpatrick Regarding Documents (attaching Exhibits A through AA).

III. STATEMENT OF FACTS

A. Costco's Customer Rebate Program.

Costco sells goods to consumers at its membership warehouses nationwide. Declaration of Rosann Fitzpatrick (RF Decl.), Ex. E (Deposition of Brian Savo) at 18. Some of the products offered for sale are subject to rebate offers. A rebate is a return of part of a payment, serving as a discount or reduction of the price.[1] Consumer rebates may be offered by either a product manufacturer or a retailer. A typical rebate offer requires a consumer to (1) make a purchase at a pre-rebate shelf price, (2) submit a request for a refund amount by mail or

[1] *Black's Law Dictionary*, 1295 (8th ed. 2004).

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

online to the rebate offeror or a fulfillment center that processes rebates for the rebate offeror, and (3) wait some period of time after the purchase and rebate submission for the rebate offeror or its agent to send a rebate check or something of value to the consumer. *See generally* Mathew A. Edwards, *The Law, Marketing and Behavioral Economics of Consumer Rebates*, 12 Stan. J.L. Bus. & Fin. 362, 366 (2007) (describing consumer rebates).

In 2000, Costco launched its One-Stop Rebate Program. Declaration of Brian Savo (Savo Decl.), ¶5. Before Costco implemented its customer rebate program, rebates commonly were available at Costco's warehouses in the form of "tear pad" and "on pack" promotions. RF Decl., Ex. A (Deposition of Lori Zipp-Smith) at 11-12; Ex. C (Deposition of Joseph Grachek), at 12; Ex. F (Deposition of Patricia Cox) at 12-13, 49. The product manufacturer or supplier provided a rebate redemption form that was either included in the product packaging or made available on a "rebate board" maintained by Costco. RF Decl., Ex. F (Cox Dep.) at 49. The manufacturer determined the terms and conditions of the rebate offer, chose the method of processing the rebate claims, and owned the rebate redemption data. *Id.* at 49-51; RF Decl., Ex. F (Cox Dep.) at 11-12. The customers would independently redeem a manufacturer's rebate. RF Decl., Ex. C (Gracheck Dep.) at 12. Costco had no connection with the rebate transaction. *Id.*; RF Decl., Ex. A (Zipp Dep.) at 12. Costco had no means to track the rebate redemption rates, measure the promotional value of the rebate offers, or control the terms and conditions of the rebate offers. RF Decl., Ex. F (Cox Dep.) at 52-54; Zipp. Dep. at 12-13.

No portion of the Department's claim in this action pertains to rebates that were identified to the consumers as a "manufacturer's rebate." This action pertains solely to

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

amounts owed to consumers who qualified for a rebate under Costco's One-Stop Rebate Program.

Under Costco's One-Stop Rebate Program, rebates were offered to consumers in Costco's own name, on terms and conditions set by Costco. RF Decl., Ex. F (Cox Dep.) at 54-55. Costco selected the rebate fulfillment provider, created the rebate redemption form, determined the criteria for validating rebate submissions, and owned the consumer information compiled through the rebate fulfillment process. RF Decl., Ex A (FTC presentation by Joe Grachek at 163-69); Ex. C (Grachek Dep.) at 30; Ex. F (Cox Dep.) at 94-95. Costco recovered the costs of its rebate program from its suppliers, who may or may not have been the product manufacturer. RF Decl., Ex. A (Zipp Dep.) at 17-18; Ex. E (Savo Dep.) 20-21, 24. Costco's suppliers had no way of knowing the identity of the consumers. RF Decl., Ex. A (Zipp Dep.) at 101; Ex. C (Grachek Dep. at 30); Ex. E (Savo Dep.) at 22; RF Decl., Ex. F (Cox Dep.) at 94. Conversely, the consumers had no connection with the suppliers who were contractually obligated to reimburse Costco's operating costs. RF Decl., Ex. C (Grachek Dep.) at 43; Ex. F (Cox Dep.) at 84-85, 88.

Costco's One-Stop Rebate Program is described more fully below.

B. The Rebate Offer.

Warehouse sign

Costco communicated the availability of a rebate to its members by means of a warehouse sign. RF Decl., Ex. D (Kersten Dep.) at 35-36; Ex. F (Cox Dep.) at 36, 78. A warehouse sign posted near each product identified the item number, description, and price of each item offered for sale at a Costco warehouse. RF Decl., Ex. F (Cox Dep.) at 23. At the

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

beginning of a rebate promotion, Costco generated a new warehouse sign that stated: "Mail-In Rebate," an expiration date, and the rebate amount. Decl., Ex. A (Zipp Dep.) at 21; Ex. F (Cox Dep.) at 22, 78. RF The supplier was not identified on the warehouse sign unless it happened to be part of the item description. RF Decl., Ex. A (Zipp Dep.) at 36; Ex. F (Cox Dep.) at 79-81; RF Decl., Ex. G (warehouse signs: one offering $150 rebate for "8 piece oval patio set with umbrella; another offering $20 rebate for "Panasonic plain paper fax").

Costco prohibited its suppliers from communicating any additional information about the rebates. RF Decl., Ex. A (Zipp Dep.) at 21; Ex. H ("There should be no rebate details in the box, National stickers on the box, and nothing pre-printed on the packaging."); Costco informed its suppliers that "[a]ll products must have a generic sticker indicating the $ of the rebate, the expiration date, and instruct the consumer to 'See register for details.'" *Id.*

Rebate receipt

Costco issued the customer a "rebate receipt" at the cash register. RF Decl., Ex. A (Zipp Dep.) at 31-32; Ex. F (Cox Dep.) at 25, 81; Ex. I; The rebate receipt served as the rebate submission form. *Id.* "COSTCO WHOLESALE" was identified above the words "Rebate Receipt" and "Submit for Refund." RF Decl., Ex. I. The customer was instructed to mail the rebate request to "Costco Rebate Program C/O CPG, P.O. Box 15999, Scottsdale AZ, 85267." RF Decl., Ex. F (Cox Dep.) at 29. The receipt stated various terms and conditions. *Id.* The rebate receipt directed customers to contact Costco's customer services either at 1-877-726-7826 or online at www.costco.com for additional rebate terms and conditions. *Id.* Like the warehouse signs, the rebate receipt did not identify the supplier unless the description of the item included the manufacturer's name. RF Decl., Ex. F (Cox Dep.) at 81-82.

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Flyers and Advertisements

When Costco implemented its "One-Stop Rebate Program," it disseminated flyers at its warehouses to inform customers about the new program. RF Decl., Ex. F (Cox Dep.) at 82-83. The flyers announced: "Now it's easier and faster than ever to save money through Costco's new One-Stop Rebate Program." RF Decl., Ex. J. The flyers informed customers:

> ***How it works:***
> - When you purchase items covered by a rebate offer, a submission form automatically prints out at the cash register, itemizing all of your purchases that qualify for rebates.
> - Mail in the Rebate Receipt.
> - Within three or four weeks you'll receive one check covering all the eligible rebates.

Id.

Costco also allowed customers to submit rebate requests on-line. A promotional flyer explained:

> ***On-line options:***
> - Check out COSTCO.COM to see what rebates are available on e-commerce.
> - Log on to COSTCO.COM to track your rebate savings online.
> - You may choose to have your rebate payment issued in the form of a credit to your Costco e-commerce account.

Id.

The customer was directed to call Costco's Member Services for more information. *Id.* The flyers made no mention of the suppliers or manufacturers.

"Rebate center" at www.costco.com

Costco maintained a "rebate center" tab at its website www.costco.com. RF Decl., Ex. K. When a customer submitted a rebate claim online, the customer could receive payment in the form of a credit applied to its on-line account for future online purchases. Alternatively,

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

the customer could receive a rebate check that "will be payable to 'Your Name or Costco Wholesale' so you can cash the check at your local financial institution or spend it at Costco Wholesale on your next warehouse visit." RF Decl., Ex. L.

Costco continues to allow some of its suppliers to offer an electronic version of the "tear pad" rebates for online purchases made at costco.com. RF Decl., Ex. A (Zipp Dep.) at 44. Costco facilitates the rebate redemption process for those manufacturers' rebates by providing a hyperlink on its website to a pdf file of the manufacturer's rebate offer. RF Decl., Ex. A (Zipp Dep.) at 44; RF Decl., Ex. Z (manufacturer rebate forms downloaded from www.costco.com). Costco differentiates "manufacturers' rebates" from rebates redeemable through its "Costco Rebate Center." RF Decl., Exs. L, M ("Please note that these are manufacturer's rebates and they should not be submitted through the Costco Rebate Center.").

Rebate check

Customers with approved rebate submissions received a check for the rebate amount on check stock that had Costco's logo in the upper left corner, above the words, "Thank you for shopping at Costco Wholesale!" RF Decl., Ex. A (Zipp Dep.) at 32-33; Ex. N, O (rebate checks). The rebate checks sometimes included advertisements for services or products offered for sale at Costco. RF Decl., Ex. O. The checks did not identify the product manufacturer. RF Decl., Ex. F (Cox Dep.) at 84-85. On checks issued from 2000 through 2004, Costco was the only business entity identified on the check. RF Decl., Ex. N. From mid-2004 forward, the checks included the words "Continental Promotion Group, Inc. for" above Costco's logo. RF Decl., Ex. O.

Costco's payment of expired checks

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

The rebate checks expired after 90 days. RF Decl., Ex. F (Cox Dep.) at Ex. 3 (COSTCOWA001187). However, a customer could either bring an expired check to a warehouse or ask for a new check to be issued. RF Decl., Ex. D (Kersten Dep.) at 58. Costco honored all rebate checks presented for payment at its warehouses regardless of the expiration date. RF Decl., Ex. F (Cox Dep.) at 85; RF Decl., Ex. A (Zipp Dep.) at 52-53; Ex. P ("Regardless of the expiration date listed on the check, warehouses should accept all rebate checks."); RF Decl., Ex. A (FTC presentation) at 166.

C. Costco Contracted With CPG To Administer And Fulfill The Rebate Claims.

Costco contracted with Continental Promotion Group, Inc. (CPG), a rebate fulfillment provider, to process its customers' rebate claims. RF Decl., Ex. F (Cox Dep.) at 15, Exs. 2-4. CPG was responsible for maintaining post office boxes for the receipt of rebate submissions, validating the rebate claims, issuing rebate checks after receipt of payment from Costco, responding to customer inquiries, and providing periodic reports to Costco. RF Decl., Ex. F (Cox Dep.) at Ex. 1 (COSTCOWA001173-74). Costco was responsible for paying CPG "the total of all valid rebates, administrative setup fees, and vendor transaction charges (collectively, the "Fees"). *Id*; RF Decl., Ex. E (Savo Dep.) at 20-21, 24.

CPG validated rebate submissions by transmitting an electronic file to Costco, which was matched to Costco's point-of-sale cash register database. RF Decl., Ex. A at 163; RF Decl., Ex. E (Savo Dep.) at 22. CPG maintained a web portal, accessible to Costco, that detailed each rebate submission. RF Decl., Ex. A (Zipp Dep.) at 57-59, 62-63; Ex. Q (screen shots from IWR portal).

CPG responded to rebate submission inquiries from Costco's customers in three forms:

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

online, through a telephonic "Interactive Voice Response" (IVR), and via "white mail," i.e. paper documents sent through the mail. CPG represented itself as Costco's agent in each medium of communication. *See, e.g.*, RF Decl., Ex. AA (samples of CPG's call center, email, and "white mail" responses to Costco's customers.

Costco authorized the IVR scripts, email communications, and "white mail" that CPG used when communicating with Costco's customers. RF Decl., Ex. A (Zipp Dep.) at 44-50; Ex. F (Cox Dep.) at 89; Ex. ZZ. Costco worked closely with the CPG call center in setting the parameters for dealing with rebate submission inquiries from Costco's customers. RF Decl., Ex. A (Zipp Dep.) at 41, 46-47.

Costco renegotiated the terms of its contract with CPG each year from 2000 through 2008. RF Decl., Ex. A (Zipp Dep.) at 77; Ex. F (Cox Dep.) at 108-110, Exs. 1-5. There is no evidence that either Costco's suppliers or its customers had any involvement in the contract negotiation process. RF Decl., Ex. F (Cox Dep.) at 113. There is no evidence that consumers were informed of any of the terms or conditions of Costco's contract with CPG.

CPG filed for bankruptcy in November 2008. RF Decl., Ex. T. Costco terminated its relationship with CPG and contracted with another rebate fulfillment provider, Arrowhead. RF Decl., Ex. C (Gracheck Dep.) at 33; Ex. U. CPG provided Costco with an electronic file of recent rebate submissions that remained outstanding, which Costco transferred to Arrowhead for fulfillment. RF Decl., Ex. E (Savo Dep.) at 12, 15-17.

Costco informed its customers not to deposit any "Costco Mail-in Rebate checks dated prior to November 13, 2008." RF Decl., Ex. V. Costco instructed customers to redeem the checks at their local Costco warehouse or submit it for a replacement check to "Costco

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Wholesale c/o APF PO Box 1014-A, Grand Rapids, MN 55745." *Id.* Costco reimbursed members for any bank fees incurred as a result of a CPG-issued check being returned as insufficient funds. Costco has filed a breach of contract claim in CPG's bankruptcy proceeding. RF Decl., Ex. W.

For unknown reasons, some of the rebate checks have never been presented for payment. The rebate checks may have been lost, misaddressed, undeliverable, mistaken for junk mail, or the consumer may have moved in the interim.

D. Costco Contracted With Its Product Suppliers To Recover The Costs Of Operating Its Rebate Program.

Costco recovered the costs of its customer rebate program from its suppliers. Suppliers could sponsor a rebate promotion by entering into a form contract with Costco, entitled "US Mail-In Rebate Launch Sheet." RF Decl., Ex. X. The contract included standard terms and conditions for all rebates, with blanks for the rebate amount, promotional period, geographical scope, and other details that were individually negotiated between the supplier and a Costco "Buyer," i.e., the Costco employee responsible for managing the supplier's account. *Id.;* RF Decl., Ex. A (Zipp Dep.) at 17-18. Costco charged the supplier a "setup fee" plus a transaction fee for each rebate redemption. RF Decl., Ex. X. The contract provided that Costco could "deduct earned rebates/allowances immediately from amounts owed from vendor and vendor agrees that if said amounts are insufficient, vendor will promptly reimburse Costco for amounts due." *Id.* The agreement incorporated the "Costco Wholesale Standard Terms," which likewise provided that Costco could offset "any rebates/incentive allowances and any other amounts owed or to be owed by vendor against amounts Costco Wholesale owes the vendor." RF Decl., Ex. Y.

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

CPG maintained a website that suppliers could access to review the rebate redemption data. RF Decl., Ex. E (Savo Dep.) at 20-21. The only information available to the vendors was the total number of redemptions and the warehouses from which the products were purchased. RF Decl., Ex. F (Cox Dep.) at 95; RF Decl., Ex. A (Zipp Dep.) at 101.

Suppliers could inspect records onsite at CPG's facilities, but could not copy any records or bring personal computers. RF Decl., Ex. F (Cox Dep.) at 94-95. The form contract provided that the documents submitted by Costco members "are destroyed 60 days after processing." *Id.* The contract was executed by Costco's buyer, a warehouse manager, and the supplier. RF Decl., Ex. A (Zipp Dep.) at 30.

CPG billed Costco on a weekly basis. RF Decl., Ex. E (Savo Dep.) at 20. Costco, in turn, billed its suppliers for the rebate amounts and transaction fees associated with the rebate redemptions. Grachek Dep. at 19; RF Decl., Ex. D (Kersten Dep.) at 15-16; RF Decl., Ex. E (Savo Dep.) at 20-21. Costco paid CPG regardless of whether there was a negative balance in the supplier's account payable. Grachek Dep. at 21; RF Decl., Ex. D (Kersten Dep.) at 23.

IV. STATEMENT OF THE ISSUES

1. **Is Costco the "holder" of unpaid rebates owed to consumers under Costco's One-Stop Rebate Program because Costco, not the manufacturer, entered into a contractual relationship with the consumer?**

2. **Does Costco remain indebted to the consumers on the unpaid rebates even though it transmitted funds to a third party subcontractor it hired to fulfill the rebate submissions?**

3. **May Costco itself claim ownership of the unpaid rebates because Costco was named as an alternative payee on the rebate checks that were issued to Costco's customers on its behalf?**

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

V. ANALYSIS AND AUTHORITY

A. Unclaimed Property Law Principles.

Washington's Uniform Unclaimed Property Act of 1983, chapter 63.29 RCW (UPA), conforms to the Model Act of 1981 promulgated by the National Conference of Commissioners on Uniform State Laws.[2] The UPA establishes a procedure by which intangible property that is presumed abandoned is transferred to the State as custodian for the absent owner. The Legislature directed that the UPA be interpreted and applied consistently with the purpose to achieve uniformity in the law among the jurisdictions that have enacted the 1981 Model Act. RCW 63.29.902. *Cf. In re Schneider*, 173 Wn.2d 353, 369, 269 P.3d 215 (2011) (Washington courts consider how other states have addressed the issue when interpreting a uniform law).

The UPA is custodial in nature. Unlike an absolute escheat statute, title to the unclaimed property does not vest in the State, but rather remains in the owner, who may claim it at any time. *South Carolina Tax Comm'n v. York Elec. Coop.*, 275 S.C. 326, 270 S.E.2d 626, 628 (1980). This distinction is important because escheat statutes are subject to narrow construction, but the reverse is true of the UPA. As explained by a New Jersey court:

> The question is no longer whether the owner shall forfeit the property to the State as it had been when there was an absolute escheat, but rather whether the State or the holder shall have use of the property until the owner claims it and whether the State or the holder shall enjoy the windfall if the owner never claims it. Because a custodial escheat does not forfeit the owner's claim, there is no need to interpret the Act narrowly as there had been when the escheat was absolute.

State v. Elsinore Shore Assocs., 249 N.J. Super. 403, 592 A.2d 604, 606 (1991).

---

[2] *Uniform Unclaimed Property Act,* 8B *U.L.A.* 567 (1981) (1981 Model Act).

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Unclaimed property laws are "consumer protection and public interest legislation, protecting the interests of the true owner of property against confiscation by the holder while giving the State the benefit of its use until the owner claims it." *Clymer v. Summit Bankcorp*, 320 N.J. Super. 90, 726 A.2d 983, 993 (Ch. Div. 1998), *rev'd on other grounds*, 334 N.J. Super. 252, 758 A.2d 652 (App. Div. 2000), *rev'd*, 171 N.J. 57, 792 A.2d 396 (2002). They serve the public interest because they require that the State "attempt to locate, notice and inform missing owners of their rights of ownership, and… to restore their property to them[.]" *Id.* Accordingly, the UPA should be given a liberal interpretation in favor of the State as against any defendant stakeholder or obligor. *Safane v. Cliffside Park Borough*, 5 N.J. Tax 82, 88 (N.J. Tax Ct. 1982).

Contractual arrangements intended to defeat the UPA are void as contrary to public policy. *Screen Actors Guild, Inc. v. Cory*, 91 Cal. App. 3d 111, 154 Cal. Rptr. 77, 80 (1979) (corporate bylaws providing for forfeiture of unclaimed amounts held in trust for members deemed an unlawful attempt to effect a private escheat); *State ex rel. Furman v. Jefferson Lake Sulphur Co.*, 36 N.J. 577, 178 A.2d 329 (1962) (provision of corporate charter providing for forfeiture of unclaimed dividends held invalid). Moreover, any person "who enters into a contract to avoid the duties" of the UPA is subject to severe penalties and criminal sanctions. RCW 63.29.340.

Under the UPA, "all intangible property…that is held, issued, or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than three years" after it became payable is presumed abandoned. RCW 63.29.020(1). "Intangible property" includes, among other things, including "moneys, checks, drafts, deposits, interest,

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

dividends, and income," and "[c]redit balances, customer overpayments,...refunds, [and] credit memos[.]" RCW 63.29.010(12). "Holder" is defined as a person "[i]n possession of property belonging to another," "[a] trustee," or "[i]ndebted to another on an obligation." RCW 63.29.020(1).

The proper identification of both the unclaimed property and the holder turns on an examination of the legal obligations of the parties. *Delaware v. New York*, 507 U.S. 490, 503, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1992). As summarized by the ULA Commissioners, the holder is "a person who could be sued successfully by the owner for refusing to make payment." *Unif. Unclaimed Property Act* (1995), § 1 cmt., 8C U.L.A. 99 (2001).

The unclaimed property at issue in this case are the unpaid debt obligations owed to consumers who qualified for a rebate through Costco's One-Stop Rebate Program. Costco does not dispute that unpaid rebate obligations constitute unclaimed property subject to the UPA. Rather, Costco contends it is not the "holder" because (a) the manufacturer, not Costco, promised to pay the consumer, (b) Costco discharged any obligation by transmitting funds to a third party rebate processor, and/or (c) Costco is, itself, entitled to the unpaid rebates. The first contention is incontrovertibly false as a factual matter; the latter two rest on erroneous interpretations of the law.

B. The Evidence In The Record Establishes Beyond Any Reasonable Dispute That Costco, Not The Manufacturers, Entered Into A Contractual Agreement With The Customers To Pay The Rebate Amount.

In both its amended complaint and its answer to the Department's counterclaim, Costco disclaims responsibility for the unpaid rebates by characterizing them as "manufacturers' rebates," "third party rebates," "third party manufacturers' post-sale rebate programs," and

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

"amounts owed by the manufacturers." Amended Pet. for Rev., ¶35; Pet's Ans. ¶52. Costco insists that it merely "facilitated" payment of amounts owed by the manufacturer to the consumer. Am. Pet. for Rev. ¶35. The evidence establishes beyond any reasonable dispute, however, that Costco, not the manufacturer, entered into a contractual relationship with the customer to pay the rebates offered through Costco's One-Stop Rebate Program.

The rebate offer was communicated to customers through a warehouse sign, flyers distributed at the cash register, and the rebate receipt, which also served as the rebate submission form. All of these documents identified Costco, not the manufacturer, as the person that offered the rebate to the customer. Costco alone promised that if the customer purchased the designated product and submitted the rebate receipt, it would pay the customer the rebate. That contract gave the customer a right to the payment and imposed on Costco the obligation to perform and pay the rebate. In other words, the rebate transaction resulted in a debtor-creditor relationship: Costco as debtor was indebted to the customer on its obligation to pay the rebate and the customer as creditor had a right to payment or to sue on the debt if payment was not made. The debt is a liability of Costco and an asset of the customer. *Texas v. New Jersey*, 379 U.S. 674, 680, 681, 85 S. Ct. 626, 13 L. Ed. 2d 596 (1965). Where that obligation to pay is not discharged for three years after issuance of the rebate check, the Washington UPA presumes that the customer's right to payment is abandoned and requires that Costco report and deliver the proceeds of that right to payment into Washington's protective custody. RCW 63.29.020(1).

There were only two contexts in which Costco represented to customers that the manufacturer rather than Costco was the sponsor of the rebate offer: (1) when explaining why

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

a customer did not qualify for a rebate payment, and (2) when attempting to recover amounts paid to a customer in excess of what the customer was entitled to receive. RF Decl., Ex. R (Call Center Guidelines; "We need to get away from using Costco in a negative sense. Please inform our members we follow the guidelines of our manufacturers."); RF Decl., Ex. S (release form). In other words, Costco would point to the manufacturer only to deflect customer disappointment. But Costco alone took credit for its members' satisfaction with successfully redeemed rebates.

The only parties to the rebate offer were Costco and the customer. There was no mention of any role that a manufacturer or rebate service provider played in the transaction or its fulfillment. Further, the pricing agreement between Costco and CPG was solely between them and obligated Costco to fund the rebate payments. In contrast, where a manufacturer offered a rebate on its product when purchased at Costco, the manufacturer's name and product were prominently set on the rebate form; the rebate submission was sent to the manufacturer's address, and the submission became the property of the manufacturer.

That Costco had some funding arrangement with product suppliers or manufacturers is of no moment. While it may have arranged to recover its costs of doing business from the suppliers, Costco on the face of these offers remained the sole party with the obligation to pay the customer, with the concomitant liability for unclaimed property reporting and delivery.

C. The "Unclaimed Property" That Is Subject To The UPA Are The Unpaid Rebate Obligations Owed To Costco's Customers, Not The Uncashed Checks Or The Funds Set Aside To Satisfy Them.

The Department seeks custody of the intangible property represented by uncashed checks issued to customers who qualified for a rebate under Costco's One-Stop Rebate

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Program. Costco is the "holder" of that property because it is the person "indebted to another on an obligation." RCW 63.29.010(10) ("holder").

Costco contends it is not the "holder" because it does not possess the money that it transmitted to CPG for payment of its customers' rebate claims: "Costco did not receive the funds associated with those uncashed checks; thus it did not hold and does not hold any unclaimed property associated with those uncashed rebate checks." (Letter dated March 23, 2010, from Costco to the Department.) Costco misapprehends the nature of the unclaimed property at issue.

It is a fundamental principle of unclaimed property law that the unclaimed property subject to the State's custody is the underlying obligation, not the instrument that evidences the obligation or the funds set aside to satisfy it. As stated in the leading treatise on unclaimed property law, "[t]he proper focus is not what the instrument spelling out the evidence of property is called—whether a check, draft, or anything else—but whether there is an underlying obligation, i.e., whether there is unclaimed property." 1A David J. Epstein, *Unclaimed Property Law & Reporting Forms*, § 12.02[2][a][i] (Lexis / Matthew Bender & Co. 2002). "[P]roperty" is not the check, note, certificate or other document that evidences the property interest, but the underlying right or obligation." Unif. Unclaimed Property Act (1995), § 1 cmt., 8C U.L.A. 100 (2001). Checks "are only pieces of paper," but "the obligation to pay that is represented by checks are a liquidated debt, and as such intangible property subject to escheat." *Revenue Cabinet v. Blue Cross & Blue Shield of Ky.*, 702 S.W.2d 433, 434 (Ky. 1986).

By its nature, intangible property refers to the type of property that is evidence of value

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

or of a right or claim against some person or entity but which itself has no intrinsic value. *City of Providence v. Solomon*, 444 A.2d 870, 874 (R.I. 1982). "[I]ntangible property, such as a debt which a person is entitled to collect, is not physical matter which can be located on a map." *Texas v. New Jersey*, 379 U.S. at 677. *See also Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 68 S. Ct. 682, 92 L. Ed. 863 (1948) (reference in New York's Abandoned Property Law to "any moneys held or owing" on an insurance policy does not refer to any specific assets of the holder, but simply to the obligation to pay). "The unclaimed intangible property is not the check, note, certificate or other document that evidences the property interest, or the funds themselves, but the underlying right or obligation." *Clymer*, 726 A.2d at 993. *See also Blue Cross of N. Cal. v. Cory*, 120 Cal. App. 3d 723, 174 Cal. Rptr. 901, 908 (1981). ("right to be paid" is the " "intangible personal property" ... which is recognized in the UPL").

In the unclaimed property context, the State "does not seek to collect the checks [or coupons], but rather to escheat the underlying obligations which the checks [and coupons] represent." *Blue Cross & Blue Shield of Ky.*, 702 S.W.2d at 436 ("The issue is not whether [Blue Cross/Blue Shield] is obliged to honor the checks per se after all the intervening years. The issue is whether [Blue Cross/Blue Shield] is obliged to honor the debt which the checks represent."). Thus, "a proper interpretation of the statute requires delivery to the Department of the obligation underlying the uncashed checks, rather than funds otherwise owned by the holder." *Louisiana Health Serv. & Indem. Co. v. McNamara*, 561 So. 2d 712, 717 (La. 1990).

In the context of consumer rebates, the unclaimed property that is subject to the State's custody is the debt created by the rebate offer, which gives rise to the customer's right to

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

payment and the retailer's obligation to pay. As the person that entered into a contractual agreement with the customer to pay the rebate, Costco is the pertinent "holder" because Costco is the person "indebted to another on an obligation," i.e., the person that undertook the contractual obligation to pay the customer. The uncashed checks issued by CPG are merely evidence of the outstanding rebate obligations.

D. Costco Did Not Discharge Its Obligation To Pay Its Customers By Transmitting Funds To A Third-Party Service Provider.

Costco alleges it cannot be held responsible for the unpaid rebates because it "already made payment to CPG of the amounts sought." Ans. to Counterclaim at 17. Costco is mistaken.

The issue of how to determine the identity of the "holder" when payments to an intermediary are at stake was clarified in *Delaware v. New York*. The United States Supreme Court stated that the first step in determining which party is responsible for reporting and remitting abandoned property is to determine "the precise debtor-creditor relationship as defined by the law that creates the property at issue." *Delaware*, 507 U.S. at 501.

The question presented in *Delaware v. New York* was which party, the issuer of securities or the intermediary bank that held the securities in a "street name" on behalf of its customers, was the relevant "debtor" with respect to abandoned securities owed to unknown owners.[3] The court concluded that the intermediary bank was the debtor because it alone was legally obligated to pay the creditor: the stock issuer had discharged its obligation by transmitting payment to the intermediary. The court noted that under the UCC, payment to an

[3] The court explained that that practice of holding securities in a "street name" is the industry norm and facilitates the movement of securities among traders by avoiding the need to physically transfer share certificates.

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

intermediary that is the record owner of securities extinguishes any liability the issuer might have to the beneficial owner. In contrast, the intermediary banks that held record ownership remained obligated pursuant to their contractual agreement with the beneficial owners. *Id.* at 505. The holder thus is a 'person obligated,' i.e., a person who could be sued successfully by the owner for refusing to make payment.

The reasoning of the United States Supreme Court fully supports the view that Costco remained the "holder" of the unpaid rebate obligations notwithstanding its payments to CPG. Unlike the securities issuers in *Delaware v. New York*, Costco did not discharge its obligation to its customer by transferring funds to a third party. The third party in this case, CPG, was merely Costco's subcontractor. In all phases of the rebate fulfillment process, CPG represented itself to the customers as Costco's agent. Unlike the beneficial owners in *Delaware v. New York*, Costco's customers did not agree to look to the third party alone for payment.

Costco's contract with CPG for fulfillment services does not abrogate its obligations to pay the consumer under the rebate offer. An obligor's empowering of another to perform the obligor's duty is known as a delegation of the performance of that duty. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 833 (Iowa 1998) (quoting E. Allan Farnsworth, *Farnsworth on Contracts,* § 11.1 at 58-59 (1990)). The general rule of delegation is that "one bound to performance of a duty by contract cannot absolve himself from such obligation by devolution of performance thereof upon a stranger to that contract. *Giusti v. C.H. Weston Co.*, 165 Or. 525, 108 P.2d 1010, 1013 (1941). Unless the obligee otherwise agrees, neither delegation of performance nor a contract to assume the duty made with the obligor by the

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

person delegated discharges any duty or liability of the delegating obligor. Restatement (Second) of Contracts, § 318(3).

The underlying rationale is that "a delegant cannot free [it]self from liability by delegating [its] duties of performance to another." *Bashir v. Moayedi,* 627 A.2d 997, 1000 (D.C. 1993). Stated another way, the principle is that "[t]he performance required by a duty can often be delegated; but by such a delegation the duty itself is not escaped." *In re Integrated Res. Life Ins. Co.*, 562 N.W.2d 179, 182 (Iowa 1997). The rule that a delegating obligor remains liable to its obligee is designed to protect the expectations of the obligee: a delegating obligor should not be able to foist upon the obligee a performer whose reliability or solvency might differ from that of the obligor. *First Am. Commerce Co. v. Washington Mut. Sav. Bank,* 743 P.2d 1193, 1195 (Utah 1987). *See* John D. Calamari & Joseph M. Perillo, *The Law of Contracts*, § 18-25 at 698 (4th ed. 1998) (assumption of duties). Absent a novation, the obligee retains his or her original right against the obligor, even though the obligor manifests an intention to substitute another obligor in his place and the other purports to assume the duty.

Here, no one can assert that the customers even knew of Costco's delegation to CPG or agreed to it. The customers dealt with Costco alone, without any mention of CPG. Hence, as a matter of contract law, Costco's delegation of its obligation to perform its rebate contract and pay the rebate does not discharge or avoid its payment obligation and its subsequent duty under the Washington law to report and deliver unclaimed rebates to the State.

Moreover, CPG's issuance of a rebate check does not affect Costco's obligation to pay the rebate. Under Washington's version of the UCC, where an uncertified check is taken for an obligation, the underlying contractual obligation for which the check is taken is suspended

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

until the check is paid or dishonored. RCW 62A.3-310(b)(1). That provision does not apply to Costco's unclaimed property obligations for customer rebate checks for two reasons. First, that provision only applies when the check is "taken" for the underlying obligation, which is usually demonstrated by the obligee's depositing or negotiating the check. The mere mailing and/or delivery of a check to the obligee "does not trigger the application of this section." 6B Anderson on the Uniform Commercial Code § 3-310:7 (rev. 2012). Second, the UCC addresses negotiable instruments generally and does not consider the disposition of property or obligations presumed abandoned. In contrast, the UPA specifically addresses all species of intangible property.

In sum, Costco's assertions about its role in offering rebates to its customers are not borne out by the rebate offers under examination here. The offers themselves show a contractual relationship only between Costco and its customers. That contractual relationship creates an obligation to pay in Costco and a right to payment in the customer. It is the customer's right to payment that has been abandoned and should have been delivered into the State's protective custody. Neither its delegation arrangement with CPG nor any collateral arrangement for funding by suppliers changes Costco's continuing obligation to pay. Although Costco gave funds to CPG, those funds represent Costco's obligation to the customers, and, thus, Costco remains the pertinent "holder" for purposes of the unclaimed property laws.

E. That Costco Was Named As An Alternative Payee On The Rebate Checks Does Not Trump The Customer's Ownership Interest In The Unpaid Rebates.

Costco claims it is the rightful owner of the amount represented by the uncashed rebate checks because Costco is identified on the check as an alternative payee. Ans. to Counterclaim ¶ 42 ("Costco therefore is an owner of the checks and entitled to funds arising out of those

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

checks."). This argument lacks merit.

It seems to be based on the erroneous assumption that the unclaimed property at issue are the rebate checks or the specific funds that CPG was supposed to set aside to pay the checks. But as discussed above, the unclaimed property are the outstanding debt obligations to the customers. Those debt obligations are continuing and remain with Costco. Having itself named as an alternative payee on the rebate checks does not entitle Costco to claim an ownership interest superior to that of the customers, which is the ownership interest at issue in this case.

It would be a patently absurd application of the law to assert that an obligor can discharge its payment obligation by paying itself, which is the result of Costco's supposed "ownership" as alternate payee of the rebate remittance. Additionally, such an absurd application would have the practical—if not the intended—result of a private escheat of the unpaid obligations. A private escheat is contrary to the public policy of unclaimed property law; "a private escheat law cannot circumvent the effect of a public one." *Screen Actors Guild, Inc. v. Cory*, 91 Cal. App. 3d 111, 154 Cal. Rptr. 77, 80 (1979).

Whether, as between CPG and Costco, Costco would have a superior claim to any amount represented by the uncashed rebate checks is not at issue here. That CPG breached its contractual obligation with Costco gives Costco a contract right of action against CPG. However, it does not supersede the customer's right to claim the unpaid rebates from Costco, or the State's ability to do so on behalf of the customers. *Cf. Bank of Am. Nat'l Trust & Sav. Ass'n. v. Cranston*, 60 Cal. Rptr. 336, 337 (1967) (the State administrator of unclaimed property "succeeds...to whatever rights the owner of the abandoned property may have.").

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Costco is the pertinent holder because it had the obligation to pay the rebate to the customers, a debt that is presumed abandoned after three years. As the holder, Costco was responsible for the delivery to the State of the funds to satisfy that payment obligation.

VI. CONCLUSION

The undisputed facts establish that Costco is the person that entered into a contractual agreement with its customers to pay the rebate amount. That contractual relationship creates an obligation to pay in Costco and a right to payment in the customers. It is the customer's right to payment that has been abandoned and should have been delivered into the State's custody. Costco's delegation of the rebate fulfillment function to CPG did not relieve Costco of its obligation to its customers. Costco is the "holder" for purposes of the UPA because Costco, not the supplier or the rebate processor, is the person with outstanding debt obligations to the customers. Thus, this Court should hold that Costco has a statutory duty to report and remit the unpaid rebates to the State in an amount to be determined at trial.

DATED this 29th day of June, 2012.

ROBERT M. MCKENNA
Attorney General

ROSANN FITZPATRICK, WSBA NO. 37092
Assistant Attorney General
DONALD F. COFER, WSBA NO. 10896
Senior Counsel
Attorneys for Defendants

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

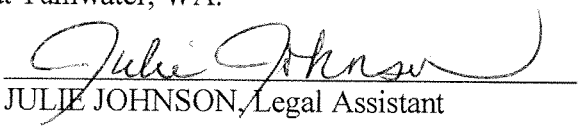
PROOF OF SERVICE

I certify that I served a copy of this document, via Electronic Mail, per agreement of the parties, on the following:

Kathleen O'Sullivan
Sher S. Kung
Perkins Coie LLP
kosullivan@perkinscoie.com
SKung@perkinscoie.com
lnelson@perkinscoie.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of June, 2012, at Tumwater, WA.



JULIE JOHNSON, Legal Assistant

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Hon. Barbara Linde
Hearing Date: July 27, 2012

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

COSTCO WHOLESALE CORPORATION, a Washington corporation, Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE and SUZAN DELBENE, in her official capacity as Director of the Washington State Department of Revenue, Defendants.	NO. 11-2-08830-8 SEA **DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. ARGUMENT

A. The Undisputed Evidence Establishes Beyond Any Reasonable Dispute That Costco Is The Rebate Offeror.

Costco insists the rebates offered through its customer rebate program are, in substance, "manufacturers' rebates" because manufacturers "fund" the rebates by agreeing to reimburse Costco's expenses. Pl.'s Opp. Br. at 2. That manufacturers bear the economic burden of a rebate promotion is legally irrelevant. For purposes of identifying the "holder," the substance turns on which party undertook the legal obligation to the customers to pay them. The undisputed evidence establishes that Costco, not the manufacturers, promised to pay customers who satisfied the conditions of the rebate offers. Def.'s MSJ at 4-7.

Costco tries to minimize the evidence as "merely evidence of communications"

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

between Costco and its customers. Pl.'s Opp. Br. at 16. Yet such evidence establishes the objective manifestations of contractual intent upon which the customers were entitled to rely. *Cf. Barnes v. Treece*, 15 Wn. App. 437, 549 P.2d 1152 (1976) (unilateral contract arising from publicized offer to pay). The rebate transactions were unilateral contracts between Costco and its customers whereby Costco agreed to refund a portion of the purchase price if the customers purchased a product at a pre-rebate shelf price and submitted a completed rebate form. The customers' completion of those acts triggered Costco's obligation to pay.

As Costco acknowledges, a rebate may be offered by either a manufacturer or a retailer. *See* O'Sullivan Decl., Ex. 1 (FTC consumer alert). Costco specifically differentiated "manufacturers rebates" (none of which are included in this action) from "Costco rebates" on its own website. Second RF Decl., Ex. A. Costco owned the rebate submission data and it prohibited the suppliers and manufacturers from knowing the identity of the customers that redeemed rebates. Costco's customers had no way of knowing who entered into an agreement with Costco to sponsor a rebate promotion.[1] The undisputed evidence is inconsistent with any reasonable inference that any of the suppliers entered into a contract with Costco's customers.

B. Resolving The Legal Issue Of Costco's Status As The "Holder" Of The Unpaid Rebates Does Not Require Particularized Evidence Of Unpaid Rebates.

According to Costco, the record is "utterly insufficient" to establish its liability as a holder of unpaid rebates absent particularized proof that it entered into contracts with individual customers. Pl.'s Opp. Br. at 17. That is wrong. A "holder" includes a person who is "[i]ndebted to another on an obligation." RCW 63.29.010(10). Costco's liability as the "holder" of unpaid rebate obligations is established by showing that (a) Costco is the person that promised to pay customers who qualified for a rebate under its customer rebate program, and (b) some customers who qualified for such rebates remain unpaid. The relevant facts

[1] Costco asserts "it's like all shopping, look at the box." Pl.'s Opp. Br. at 3. But many of Costco's suppliers were distributors, not product manufacturers. RF Decl., Ex. D (Kersten Dep.) at 49-50.

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

regarding the mechanics of Costco's customer rebate program are undisputed, as is the fact that at least some of the rebate checks issued by CPG on Costco's behalf remain uncashed. Pet'rs Answer ¶ 22 ("Admitted that certain rebate checks issued from bank accounts owned and maintained by CPG were not cashed."). The real dispute is whether CPG's issuance of rebate checks operated as a novation that discharged Costco's obligations to the customers.

The State is not required to present detailed evidence of individual unpaid rebates to establish Costco's liability as the holder. *See Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 547, 68 S. Ct. 682, 92 L. Ed. 863 (1948) (State need not present insurance policy or comply with other specific conditions the individual owner must meet to escheat unclaimed life insurance benefits). The issue of Costco's "holder" status may be resolved as a matter of law, while the amount of unclaimed property presents an issue of fact for trial. *Cf. Revenue Cabinet*, 702 S.W.2d at 435 ("In the event that the conclusion appropriate from the general nature of the policies in question is not appropriate to any particular check, on remand BC/BS should offer evidence to overcome the prima facie case presented by the record.").

C. The Unclaimed Property Are the Debt Obligations Represented By The Uncashed Rebate Checks, Which Are Costco's Obligations to Pay the Rebate Amounts.

Contrary to Costco's claim that the Department's motion for partial summary judgment is based on a "new-found" legal theory, Pl.'s Opp. Br. at 7, the Department always has deemed Costco's underlying debt obligations represented by uncashed checks as the "unclaimed property." What is novel is Costco's theory that the "holder" issue turns on who owned the bank account from which checks were drawn regardless of the identity of the underlying obligor. In most unclaimed property cases, the check issuer *is* the obligor, which renders the distinction between the payment instrument and the underlying obligation unimportant.[2]

---

[2] *See, e.g., Dep't of Rev. v. Puget Sound Power & Light Co.*, 103 Wn.2d. 501, 503, 694 P.2d 7 (1985) (utility company issued checks to refund customer deposits); *Revenue Cabinet*, 702 S.W.2d 433 (health insurer issued checks to pay health care benefits); *Blue Cross of N. Cal. v. Cory*, 120 Cal. App. 3d 723, 174 Cal. Rptr. 901 (1981) (same); *Div. of Unclaimed Prop. v. McKay Dee Credit Union*, 958 P.2d 234 (Utah 1998) (credit union issued checks to pay vendors).

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Contrary to Costco's theory, the cases it cites do not stand for the proposition that the unclaimed property is "the obligation to pay *on the checks*." Pl's Opp. Br. at 12.

In each case Costco cites, the court looked to the underlying obligation the check was intended to discharge to determine whether there was unclaimed property. Not all uncashed checks are unclaimed property. A check may represent a gift, an offer in settlement, or an amount issued in error. *Cf. Aetna Cas. & Sur. Ins. Co. v. State ex rel. Eagerton*, 414 So.2d 455, 459 (Ala. 1992) (checks offered in settlement of claims). Unless the check represents a liquidated debt, it does not establish an unclaimed property obligation. *Cf. Revenue Cabinet*, 702 S.W.2d at 434 ("If the amounts represented by these checks are liquidated debts," they are subject to escheat). In *Revenue Cabinet*, the insurer had to deliver amounts represented by uncashed checks to the State *not* because it was the check issuer, Pl's Resp. Br. at 12, but because the checks represented "mandatory contractual obligations" to its subscribers.

Here, CPG issued rebate checks to Costco's customers because they qualified for rebates offered by Costco. The rebate checks represent outstanding debt obligations owed by Costco, not CPG. *Cf. Clymer v. Summit Bankcorp*, 320 N.J. Super. 90, 726 A.2d 983, 993 (Ch. Div. 1998) (bond issuer remained "ultimate obligor" of amounts owed to bondholders even though its paying agent had physical possession of the unclaimed funds). Because the checks were never presented and dishonored, CPG's liability "on the checks" never arose, whereas Costco's underlying obligations to its customers continue. *See* Def.'s Opp. Br. at 6.

Costco dismisses as "irrelevant" the Department's reliance on *Texas v. New Jersey*, 379 U.S. 674, 680-81, 85 S. Ct. 626, 13 L. Ed. 2d 596 (1965), for the proposition that the relevant obligations are the debt obligations created by the rebate offer, without regard to which party owned the bank account on which checks were drawn. Pl.'s Opp. Br. at 18. *Texas v. New Jersey* is only one of many cases that explain that intangible property refers to a right or claim, not to any specific assets. The United States Supreme Court, the appellate courts of California, Kentucky, Louisiana, Michigan, New Jersey, the Uniform Law Commissioners, and the

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

foremost treatise writer on the subject, all have explained that the debtor-creditor relationship and the obligation to pay gives rise to unclaimed property, regardless of which entity possesses funds to satisfy the obligation. *See* Def.'s MSJ at 16-19; Def.'s Opp. Br. at 4-5, 7-9.

The UPA should be interpreted consistently with decisions from other jurisdictions to achieve uniformity in the law, RCW 63.29.902, and to fulfill its purpose to ensure that abandoned property "is used for the general good rather than for the chance enrichment of particular individuals and organizations," *Monks Club, Inc.* 64 Wn.2d 845, 848, 394 P.2d 804 (1964) (refusing to narrowly interpret "business association" to exclude non-profit associations from duty to report and deliver abandoned property). To that end, this Court should hold that Costco is the "holder" because it is the person that promised to pay the customers and those debt obligations remain outstanding as to rebate checks that were not presented for payment.

D. The Three-Year Dormancy Period Created By The Unclaimed Property Act Cut Off Any "Suspension" Of Costco's Underlying Obligations.

Costco contends that it cannot be held responsible for the unpaid rebates because its obligations to pay its customers, if any, were suspended when CPG issued rebate checks. Pl.'s Opp. Br. at 19, citing RCW 62A.3-310(b)(1). Washington's Unclaimed Property Act provides that property is payable for purposes of unclaimed property "notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment." RCW 63.29.020(2). This overrides the UCC's indefinite suspension of the obligations underlying uncashed checks.

II. CONCLUSION

For the foregoing reasons, this Court should hold as a matter of law that Costco is the "holder" of unpaid rebate obligations owed to customers under its One-Stop rebate program.

DATED this 23rd day of July, 2012.

ROBERT M. MCKENNA
Attorney General

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

Rosann Fitzpatrick

ROSANN FITZPATRICK, WSBA NO. 37092
Assistant Attorney General
DONALD F. COFER, WSBA NO. 10896
Senior Counsel
Attorneys for Defendants

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

PROOF OF SERVICE

I certify that I served a copy of this document, via Electronic Mail, per agreement of the parties, on the following:

Kathleen O'Sullivan
Sher S. Kung
Perkins Coie LLP
kosullivan@perkinscoie.com
SKung@perkinscoie.com
lnelson@perkinscoie.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this23rd day of July, 2012, at Tumwater, WA.

s/ Julie Johnson
JULIE JOHNSON, Legal Assistant

ATTORNEY GENERAL OF WASHINGTON
Revenue Division
7141 Cleanwater Lane SW
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

THE HONORABLE BARBARA LINDE
Hearing Date: July 27, 2012
Hearing Time: 1:30 p.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

COSTCO WHOLESALE CORPORATION, a Washington corporation, Petitioner/Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE and SUZAN DELBENE, in her official capacity as Director of the Washington State Department of Revenue, Respondents/Defendants.	No. 11-2-08830-8 SEA **PLAINTIFF COSTCO'S OPPOSITION TO DEFENDANT/COUNTER-CLAIMANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF CONTENTS

I. INTRODUCTION AND RELIEF REQUESTED 1

II. STATEMENT OF FACTS 1

A. Costco Developed the One-Stop Rebate Program to Simplify and Expedite the Rebate Redemption Process 1

B. Under the One-Stop Rebate Program, the Rebates Continued to Be Funded by Costco's Suppliers 2

C. CPG's Role in the One-Stop Rebate Program Was to Process and Issue the Rebate Checks 3

D. The Department's Audit of and Demand to Costco Is Based on Rebate Checks 5

III. STATEMENT OF ISSUES 6

IV. EVIDENCE RELIED UPON 6

V. AUTHORITY AND ARGUMENT 6

A. The Washington Unclaimed Property Act Should Be Narrowly Construed 6

B. The Only "Obligations" Are the Checks and Costco Has No Liability on Them 7

1. The Department's Pre-Motion Position Was that the Unclaimed Property Is the Checks 8

2. The Only Evidence on Record that Supports the Department's Demand Is a Purported Total of Uncashed Checks 9

3. The Department's New Theory that Checks Are "Only Pieces of Paper" Is Contrary to the UPA, DOR Practice, and Case Law 10

4. The UCC Governs Checks, and the Department Does Not Contest that the Debt to Pay on the Rebate Checks Belongs to CPG, Not Costco 14

C. Even if the Unclaimed Property Is Viewed Apart from the Checks, the Department's Evidence Is Insufficient for Summary Judgment in Its Favor 15

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF CONTENTS
(continued)

1. The Evidence as to the General Nature of the Rebate Program Is Insufficient to Establish a Contract Entered by Costco 15

2. The Department Presented No Evidence (Admissible or Otherwise) of Any Individual Contract or Transaction 17

3. The Department's Contract Theory Is Unsupported by the Law 18

4. Any Purported Underlying Obligation Was Suspended upon Issuance of the Checks 19

D. The UPA Cannot Be Applied to Require Duplicate Payment 20

1. Nothing in the UPA nor Its Purpose Permits the Department to Require Duplicate Payment of an Obligation 20

2. CPG Was An Intermediary to Whom Costco Discharged Any Obligations It Had to Pay on the Rebates 21

3. The Department's Application of the UPA to Costco Is Unconstitutional 22

E. Costco Is a Payee on the Rebate Checks, Thus Cannot Be Forced to Pay On the Checks Under the UPA 23

VI. CONCLUSION 24

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES

CASES

Blue Cross of N. Cal. v. Cory,
120 Cal. App. 3d 723, 174 Cal. Rptr. 901 (1981) 13

Brown v. Legal Found. of Wash.,
538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003) 23

City of Seattle v. St. John,
166 Wn.2d 941, 215 P.3d 194 (2009) 20

Deep Water Brewing, LLC v. Fairway Res. Ltd.,
152 Wn. App. 229, 215 P.3d 990 (2009) 18

Delaware v. New York,
507 U.S. 499, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1993) 14, 21

Div. of Unclaimed Prop. v. McKay Dee Credit Union,
958 P.2d 234 (Utah 1998) 12

Fid. & Deposit Co. of Md. v. Gladwynne Constr. Co.,
184 Md. App. 229, 964 A.2d 726 (2009) 19

First Nat'l Bank in Alamosa v. Ford Motor Credit Co.,
748 F. Supp. 1464 (D. Colo. 1990) 22

Hansen v. Transworld Wireless TV-Spokane, Inc.,
111 Wn. App. 361, 44 P.3d 929 (2002) 16

Hodel v. Irving,
481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987) 23

In re Estate of Little,
106 Wn.2d 269, 721 P.2d 950 (1986) 6

Lonsdale v. Chesterfield,
99 Wn.2d 353, 662 P.2d 385 (1983) 18

Meisel v. M & N Modern Hydraulic Press Co.,
97 Wn.2d 403, 645 P.2d 689 (1982) 22

Revenue Cabinet v. Blue Cross & Blue Shield of Ky. Inc.,
702 S.W.2d 433 (Ky. 1986) 11, 12

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES
(continued)

Scalise v. Am. Employers Ins. Co.,
67 Conn. App. 753, 789 A.2d 1066 (2002) 19

Serv. Merch. Co. v. Adams,
No. 97-2782-III, 2001 WL 34384462 (Tenn. Ch. June 29, 2001) 23

Staff Builders of Phila., Inc. v. Koschitzki,
989 F.2d 692 (3d Cir. 1993) 19

Staples, Inc. v. Cook,
35 A.3d 421 (Del. Ch. 2012) 13

State, Dep't. of Revenue v. Puget Sound Power & Light Co.,
103 Wn.2d 501, 694 P.2d 7 (1985) 12

State v. Ervin,
169 Wn.2d 815, 239 P.3d 354 (2010) 10

State v. Highland Homes, Ltd.,
No. 08-10-00215-CV, 2012 WL 2127721 (Tex. App.—El Paso, June 13, 2012) 12

Texas v. New Jersey,
379 U.S. 674 (1965) 18

Treasurer of the State of New Jersey v. U.S. Dep't of the Treasury,
No. 10-1963 (3d Cir. June 27, 2012) 7

W. Union Tel. Co. v. Pennsylvania,
368 U.S. 71, 82 S. Ct. 199, 7 L. Ed. 2d 139 (1961) 22

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) 23

Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima,
122 Wn.2d 371, 858 P.2d 245 (1993) 16

STATUTES

RCW 62A.3-103(a)(3) 14

RCW 62A.3-104(f) 14

RCW 62A.3-105 14

RCW 62A.3-310 19

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES
(continued)

RCW 62A.3-412 14
RCW 62A.3-415 14
RCW 63.29.010 ..... 6, 10, 20, 24
RCW 63.29.020 ..... 9, 11
RCW 63.29.030 9
RCW 63.29.040 10
RCW 63.29.050 10
Uniform Unclaimed Property Act (1995) 21

OTHER AUTHORITIES

John V. Orth, *Escheat: Is the State the Last Heir?*, 13 Green Bag 2d 73 (2009) 7

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 23
Wash. Const. art. I, § 16 23

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

I. INTRODUCTION AND RELIEF REQUESTED

This is a case about uncashed rebate checks funded by Costco's suppliers and issued by a third party, for which the Department of Revenue seeks to escheat from Costco. Under both Washington's Unclaimed Property Act (UPA) (which includes checks as a type of unclaimed property) and Washington's Uniform Commercial Code (UCC) (which places liability on the check issuer), Costco is not liable on the Department's counterclaim on these checks as a matter of law. Any construction of the UPA that would place liability on Costco—in effect requiring Costco to pay again on these instruments—would result in an unconstitutional taking of Costco's property. The Department's motion should be denied.

II. STATEMENT OF FACTS

A. Costco Developed the One-Stop Rebate Program to Simplify and Expedite the Rebate Redemption Process

Costco is a retailer. Declaration of Brian Savo in Support of Opposition ("Savo Decl.") ¶ 2. It sells products that it acquires from its suppliers, which Costco sometimes refers to as "vendors" or "manufacturers." *Id.* Costco aims to offer low prices on all the merchandise in its warehouses, but in some instances, the supplier insists on selling its product with a rebate (ultimately claimed by only a fraction of consumers) instead of offering a discounted price to all customers. *Id.* In that case, Costco permits the supplier to do so in order for its members to have access to that further discount. *Id.*

Costco launched the One-Stop Rebate Program to streamline what had been a burdensome and consumer-unfriendly rebate redemption process at many retailers. *See id.* ¶ 3; Cox Dep.[1] 68:15-18. In line with its company philosophy of member service, Costco set up the

[1] Excerpts from deposition transcripts are attached to the Declaration of Kathleen O'Sullivan ("O'Sullivan Decl.").

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

One-Stop Rebate Program to make it easier for members to submit rebates, and to shorten the time it took for members to receive their rebate checks. Grachek Dep. 24:8-25:1 ("Costco's evolution in this area was to not redefine what the suppliers were offering to their customers as a manufacturer's value. We were just trying to develop delivery systems that made sure that our members earned those values as easily and as often as possible."); *see also* Cox Dep. 13:14-14:19; Zipp-Smith Dep. 11:3-20. Ultimately, Costco's goal was to "get out of the rebate business, and have the vendor drop the price of the product, and eliminate all that extra work on everybody's part so that the vendor—rather than the vendor paying for a mail-in rebate program, they would just drop the cost of the product." Cox Dep. 70:4-22; *see also id.* at 14:6-11.

B. Under the One-Stop Rebate Program, the Rebates Continued to Be Funded by Costco's Suppliers

Whether termed "tear-pad," "on pack," "manufacturer," or "mail-in," rebates were funded by Costco's suppliers in amounts that they set. Savo Decl. ¶ 2. Costco's communications to its members made clear that the "One-Stop" program was a change in the process, not the source, of rebates: "Now it's easi*er* and fast*er* than ever to save money through Costco's new One-Stop Rebate Program." First Declaration of Rosann Fitzpatrick ("RF Decl."), Ex. J (emphasis added).

The terms of the rebate offers were negotiated between suppliers and Costco, and approved by suppliers in a "Mail-In Rebate Launch Sheet." Savo Decl. ¶ 6; Zipp-Smith Dep. 19:2-12; *see also* Grachek Dep. 16:24-17:11. As reflected on the launch sheets, the supplier approved of the key terms of any rebate offer: (1) the product subject to the rebate, (2) the rebate amount, (3) any limit, and (4) the duration of the rebate offer. Savo Decl., Ex. B ("Offer Specifications"). The suppliers provided the funds to Costco to pay consumers. Cox Dep.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

31:2-4, 6-9. The funding process had several steps: CPG invoiced Costco for the aggregate amount of numerous rebates plus transaction fees, Costco deducted from its suppliers the amount due for those rebates and fees, Costco then paid the invoice from CPG, and CPG then issued each individual rebate check to the customer. Savo Decl. ¶ 5; *see also* Grachek Dep. 16:24-17:11.

These rebates ranged in price from lower-dollar rebates to high-dollar rebates such as $150.00 off an 8-piece patio set selling for $999.99 (pre-rebate). Savo Decl., Ex. C. The rebate sign, posted in front of the product in the warehouse, indicated which product and thus which "manufacturer" or supplier was offering the rebate. Cox Dep. 83:12-15 (Q: Can you tell me how a customer would know who the manufacturer was for a product that was subject to a rebate? A: Just like any shopping. Look at the box.).

As Costco's members know from the low prices they see everyday in the warehouses, Costco's business model is based on operating no-frills warehouses with a limited selection of inventory, coupled with the efficiencies of volume purchasing power. Savo Decl. ¶ 7. Costco operates on very low margins to keep prices so low. *Id.* Because its profit margins are low, if Costco funded rebates (as opposed to the suppliers) it would have taken a loss on sales for which rebates were redeemed. *Id.*

C. CPG's Role in the One-Stop Rebate Program Was to Process and Issue the Rebate Checks

Under the "old" rebate system, a customer who bought three different items, each offering a rebate, may have had to mail three different claim forms to three different addresses and wait, often for months, for three different processors to process the claims. *Id.* ¶ 3. If no check arrived, the customer would have needed to contact three different entities. *Id.* Costco

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

simplified that. *Id.* It contracted with Continental Promotion Group (CPG) to process the rebates and to issue the rebate checks to provide "one stop shopping." *Id.* ¶ 4.

Costco's role was to facilitate the transfer of rebate funds from supplier to CPG so that the money could end up in the consumer's pocket more efficiently. *Id.* Rebate checks that went uncashed were not reflected on Costco's books as profit. *Id.* ¶ 8. *None of the transfer of rebate dollars was reflected on Costco's books as a profit or loss*:

> Q: How does Costco account for member rebates that are processed through Costco's member-rebate program?
>
> *A: Well, again, it's not a profit-and-loss accounting. It's simply a pass through from our suppliers to the processing house or the clearinghouse, if you will.*

Grachek Dep. 16:12-16; *see also id.* at 16:19-17:11.

> Q: What do you mean when you say Costco would pass-through the money?
>
> *A: I'm saying it never shows up on our income statement. It never resides in Costco – as a Costco asset ... So instead of just CPG getting the money from the manufacturer, they're notified by Costco that, you know, this money needs to go to CPG because a member has redeemed a mail – a mail-in rebate.*

Kersten Dep. 14:25-15:10.

CPG's role in the Costco One-Stop Rebate Program was to promptly fulfill and pay for valid rebate requests by issuing and mailing rebate checks to members, Savo Decl., Ex. A at 2 (2006 contract, section I.B.6); to provide customer service through a toll-free telephone hotline and by responding to email inquires, *id.* at 3 (section I.B.7); to establish and own a dedicated bank account to keep the funds for processing and clearing of rebate checks, *id.* at 6 (section III.B.); and to comply with unclaimed property laws including any reporting requirements, *id.* at 3; 10 (sections I.B.9(a), XII.B.). The contracts between Costco and CPG expressly stated the parties' mutual independence: "Neither party shall, for any purpose, be deemed to be an agent

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

of the other party. . . Neither party shall have any right or authority to assume or create any obligations or to make any representations or warranties on behalf of any other party, whether express of implied, or to bind the other party in any respect whatsoever." *See, e.g.*, *id.* at 11-12.

D. The Department's Audit of and Demand to Costco Is Based on Rebate Checks

Years before this lawsuit, the Department termed its audit of Costco an audit of "uncashed rebate checks." O'Sullivan Decl., Ex. F ("Costco Uncashed Rebates and UCP"). The Department sent Costco a formal request for records, seeking "[a] listing of all uncashed customer rebate checks with name, address, and amount issued between July 1, 1996 and June 30, 2006," and copies of Costco's contracts with any third-party rebate processor. Savo Decl., Ex. D. The request did not seek information beyond check records and transactions between Costco and CPG.

The Department ultimately tendered a demand based entirely on and for the amounts represented by checks. The Department's February 4, 2011 demand to Costco sought delivery of $3,261,757.33 for "unclaimed rebate checks" owing to the State under the UPA. *Id.*, Ex. E. On its face, the demand letter states that the unclaimed property the Department seeks is: "**UNPRESENTED CHECKS - REBATE (MS11)**" and "**FUTURE REPORTABLE UNPRESENTED CHECKS**." *Id.* at 2, 3. Attached to the demand letter were almost 4,000 pages of spreadsheets, itemizing hundreds of thousands of individual checks issued by CPG. In sum, the entire demand derives from a compilation of uncashed checks and nothing else.

Even after this lawsuit had begun, the Department continued to assert that its demand of unclaimed property was for uncashed rebate checks. The Department's Counterclaim alleged that the "uncashed rebate checks issued to Costco's customers are subject to the custody of the Department," Counterclaim ¶ 36; *see id.* ¶ 1, and asked for a judgment based on amounts of "uncashed rebate checks," *id.* ¶ 53. The Counterclaim repeatedly uses the term "uncashed

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

rebate checks" and states that the UPA applies because "[a] check is deemed intangible property under the Uniform Unclaimed Property Act." *Id.* ¶ 34 (citing RCW 63.29.010(12)(a)); *see id.* ¶ 35 (noting obligation to remit an "uncashed check").

III. STATEMENT OF ISSUES

1. Whether Costco is the "holder" where the relevant obligation under the UPA is the rebate checks, on which Costco is not indebted;

2. Whether there is sufficient evidence of any "contract" between Costco and any one of its members, let alone as to the hundreds of thousands of transactions at issue on the Department's Counterclaim;

3. Whether the UPA can be applied to require duplicate payment of an "obligation"; and

4. Whether the Department can claim that it has a right superior to Costco on checks on which Costco is a named payee.

IV. EVIDENCE RELIED UPON

In support of its opposition, Costco relies upon the Department's Counterclaim, and the Declarations of Kathleen O'Sullivan and Brian Savo and exhibits attached thereto.

V. AUTHORITY AND ARGUMENT

The Department's theory that Costco is the holder—thus liable to pay on checks it did not issue, but for which it has already transmitted funds—is flawed as a matter of law. Even if it were not, the Department's evidence is insufficient to support the legal conclusions it attempts to draw (let alone sufficient for summary judgment).

A. The Washington Unclaimed Property Act Should Be Narrowly Construed

The Department's argument begins with an incomplete primer on "Unclaimed Property Law Principles." Citing no Washington case law, the Department contends that the UPA should be given a "liberal interpretation." Motion at 13. The opposite is true. In Washington,

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

escheat statutes are subject to narrow construction because escheat is "disfavored in the law." *In re Estate of Little*, 106 Wn.2d 269, 284, 721 P.2d 950 (1986).

The Department concedes that "absolute escheat" statutes are subject to narrow construction, Motion at 12, but contends that the UPA should be treated differently because it is "custodial in nature," *id.* But that is a distinction without a difference when it comes to unclaimed property equivalent to cash that the Department can simply deposit in the State's general fund. *See* John v. Orth, *Escheat: Is the State the Last Heir?*, 13 Green Bag 2d 73, 79 n.23 (lists state laws), 82-83 (2009) ("Custody . . . seems an awkward description of the state's right to unclaimed personal property. . . . A custodian has physical control and some duty to protect and preserve the property for the owner, but state officers with custody of unclaimed personal property are regularly empowered to commingle the property with other state property and use it for state purposes . . . ."). Professor Orth's article was recently relied upon by the Third Circuit in dismissing various states' claim to unredeemed U.S. Treasury bonds under unclaimed property laws. *Treasurer of New Jersey v. U.S. Dep't of Treasury*, No. 10-1963, slip op. at 11-12 (3d Cir. June 27, 2012) (O'Sullivan Decl., Ex. E). The Third Circuit also rejected the states' contention that their "intent in bringing" suit under unclaimed property laws was "benevolent"—"the objective reality obviously is otherwise." *Id.* at 13. Like the states' effort to recover vast sums of unredeemed savings bonds from the U.S., the economic reality of the Department's effort to recover millions of dollars from Costco is similarly "obvious."

B. The Only "Obligations" Are the Checks and Costco Has No Liability on Them

The lynchpin of the Department's Motion is its new-found insistence that the unclaimed property at issue is an "underlying obligation," not the uncashed rebate checks themselves. This argument fails for four reasons. First, the Department took a contrary position from audit to demand to counterclaim. Second, the only evidence that supports the demand is a purported

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

total of uncashed checks. Third, the position that checks are "only pieces of paper" is contrary to the plain language of the UPA and to DOR's practices, and is unsupported by any case law directly on point. Fourth, under the UCC, Costco has no obligation on the checks as it did not issue them and is, in fact, a payee on such checks.

1. The Department's Pre-Motion Position Was that the Unclaimed Property Is the Checks[2]

The Department audited Costco on "uncashed rebate *checks*," believing that "Costco is the holder of the uncashed rebates for reporting compliance purposes unless their contract with the agent transfers complete ownership liability for the uncashed rebates due Washington residents." O'Sullivan Decl., Ex. F. In its effort to obtain evidence supporting its demand, the Department sought only records of checks and information related to Costco's contracts with CPG. *See* Savo Decl., Ex. D. There was no effort to obtain evidence of any "underlying obligation."[3]

The demand that arose from the audit was based on checks. The letter informed Costco that the "sum of unreported unclaimed rebate *checks* and interest found to be owing to the State of Washington is **$3,261,757.33.**" *Id.*, Ex. E. The attachment to this letter, entitled "Auditor's Detail of Differences and Instructions to Holder," further explained that "The examination covered uncashed customer rebate *checks*, property category code MS11, reportable as of November 1, 2010"; the Department also described Costco's unclaimed property liability as on the "unpresented *checks*." *Id.* Nothing in the Department's demand letter premised liability on any "underlying obligation." And the thousands of pages of spreadsheets provided by the Department to support the demand is a listing of uncashed checks, and nothing else.

---

[2] Emphasis is added in italics for the Department's use of the word "checks" in the quotations in this section.

[3] The Department maintained its position that Costco is the holder even after it obtained the contracts with CPG showing that CPG, not Costco, had the unclaimed property liability on the uncashed checks.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

The universe of rebate checks allegedly due for reporting was based on a dormancy period of three years for "[u]ncashed *checks* dated prior to July 1, 2007." *Id.* (citing RCW 63.29.020 (governing presumption of abandonment)). Referencing RCW 63.29.030, the Department describes the intangible property as "Washington uncashed customer rebate *checks* due for unclaimed property report years 2004 through 2010." *Id.*

The Counterclaim similarly refers to uncashed checks as the basis for the Department's demand:

- "A *check* is deemed intangible property under the Uniform [UPA]." Counterclaim ¶ 34; *id.* ¶ 35 (obligation to remit an "uncashed check");
- "Uncashed rebate *checks* issued to Costco's customers are subject to the custody of the Department . . . ." *Id.* ¶ 36;
- "Costco is the holder of the uncashed rebate *checks* issued to its customers by CPG . . . ." *Id.* ¶ 52.

2. The Only Evidence on Record that Supports the Department's Demand Is a Purported Total of Uncashed Checks

In its moving papers, the Department produces no evidence supporting the amount of its demand to Costco. Instead, the Department is requesting approval of its legal theory of liability divorced from the evidentiary basis for that theory, suggesting that the amount should be "determined at trial." Motion at 24. The Department cannot now ignore the basis for its demand. The schedules attached to the Department's demand letter show that it is derived from a compilation of uncashed CPG checks and nothing else. Savo Decl., Ex. F. Schedules 2 and 3 consist of about 4,000 pages of CPG check records, amounting to approximately 236,000 individual records of checks, each containing the fields "Check/Cert Date" and "Cash Amt."

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

3. The Department's New Theory that Checks Are "Only Pieces of Paper" Is Contrary to the UPA, DOR Practice, and Case Law

a. The UPA Defines "Intangible Property" as Including Checks

Washington's UPA explicitly enumerates checks as a type of "intangible property" subject to escheat. RCW 63.29.010(12)(a). The "intangible property" definition does not include "obligations" to pay on checks. The UPA simply does not say that inchoate obligations to pay on checks issued by another—separate from the obligation of the check issuer under the UCC—are subject to unclaimed property law. *Cf.* RCW 63.29.010(10)(c) (only place in UPA where "obligation" appears).

Though the Department posits its "underlying obligation" theory as a "fundamental principle" of unclaimed property law, it cannot be found in the UPA of Washington. Washington adopted the 1981 Uniform UPA, not the 1995 Act (from which the Department cites a comment for its "underlying obligation" theory). The UPA in effect in Washington explicitly defines intangible property as including "checks" and does not define either "intangible property" or "checks" by reference to any underlying "obligation." *See* RCW 63.29.010(12). Under the Department's theory, the check is never itself an "obligation," merely evidence of an obligation. That would, however, improperly render the explicit references to "checks" in the law as mere surplusage. *See id.*; *see also* RCW 63.29.040 (travelers checks); RCW 63.29.050 (certified checks); *State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010) ("One such canon of construction is that 'we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.'") (citation omitted).

When it comes to checks, any assertion that what is relevant for unclaimed property is not the instrument itself is simply a recognition that states do not seek to escheat the "pieces of paper" on which checks are written, but the amount of payment represented by the checks.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Revenue Cabinet v. Blue Cross & Blue Shield of Ky. Inc., 702 S.W.2d 433, 434, 436 (Ky. 1986). Undoubtedly, a holder cannot report and remit a check if the check is not in the holder's possession because it has been delivered to an owner who has failed to deposit it.

The unclaimed property under the UPA must be checks in order for the Department to apply the presumption of abandonment which it has done. Under RCW 63.29.020, the presumption of abandonment arises when the property remains "unclaimed by the owner for more than three years after it became payable or distributable." The Department itself based its demand of checks on a three-year period of presumption measured from the date of issuance of the *check*. *See* Savo Decl., Ex. E (demand letter); Motion at 15.

b. The Department's Own Practices Show that the Unclaimed Property Is the Checks

The Department's communications to the public are silent about any requirement of an "underlying obligation" of which a check is merely evidence. In explaining how to report unclaimed property, the Department says "Washington State law requires businesses and other organizations (commonly referred to as 'HOLDERS') to review their records each year to determine whether they hold any funds, securities or other property that has been unclaimed for the required abandonment period." O'Sullivan Decl., Ex. G (Reporting Booklet). Similarly, the Department's website explains that "[t]ypical unclaimed property includes: Bank accounts, Insurance proceeds[,] . . . [u]ncashed checks," *id.*, Ex. H (screen shot of website), and provides a link to the National Association of Unclaimed Property Administrators' (NAUPA) website, which also defines unclaimed property to include checks. *Id.*, Ex. I. Neither the Department's website nor the NAUPA's has any mention of an "underlying obligation," much less suggesting that checks are merely pieces of paper divorced from the escheat regime.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Consistent with its public statements, the Department has pursued holders for report and delivery of unclaimed property in the form of checks. In *State, Dep't. of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 503, 694 P.2d 7 (1985), the Department sought recovery of uncashed checks Puget had issued. *See also State v. Highland Homes, Ltd.*, No. 08-10-00215-CV, 2012 WL 2127721, at *5 (Tex. App.—El Paso, June 13, 2012) ("[T]he class members here were issued checks. Each class member was identified by name and last known address and mailed a check. Therefore, the holder of the funds had a fixed, certain obligation to each class member."); *Div. of Unclaimed Prop. v. McKay Dee Credit Union*, 958 P.2d 234, 237 (Utah 1998) (holding that checks were escheatable unclaimed property to be reported by check issuer).

c. The Department's "Underlying Obligation"-Not-the-Checks Theory Is Unsupported by Any Relevant Case Law

None of the cases relied upon by the Department hold that unclaimed property subject to escheat includes an underlying obligation to pay on checks that is *separate* from the obligation that attaches to a person's issuance of a check, or that such obligation may be borne by a party distinct from the check issuer. Instead, those cases buttress Costco's argument that the party that issued the checks (CPG) has the underlying obligation to pay on those checks.

For example, in *Revenue Cabinet* v. *Blue Cross & Blue Shield of Kentucky, Inc.*, 702 S.W.2d 433, 433 (Ky. 1986), Blue Cross issued certain checks from its bank account to pay subscriber benefits and premium refunds that went uncashed. There was no dispute as to which party was the holder of unclaimed property represented by those checks. The court held that the unclaimed property was the obligation to pay *on the checks*—an obligation that Blue Cross possessed as the issuer of the checks. *Id.* at 436.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

The Department cites other authority that shows that the party that issued the checks, and pocketed the proceeds of checks that went uncashed, is the "holder" of those funds. *Blue Cross of N. Cal. v. Cory*, 120 Cal. App. 3d 723, 174 Cal. Rptr. 901 (1981). Even though the California unclaimed property law (unlike Washington's) did not define "intangible personal property" to specifically include "checks," the court concluded that the payees' right to be paid on those checks was intangible property subject to escheat. 120 Cal. App. 3d. at 735. Again, the underlying obligation in that case derived from the obligation to pay because Blue Cross issued the checks. Under that logic, Costco is not the "holder." CPG is.

The Department's Motion ignores a recent opinion from the preeminent forum for adjudication of corporate matters that rejected an attempt to re-characterize uncashed rebate checks as an underlying obligation. In *Staples, Inc. v. Cook*, 35 A.3d 421, 423 (Del. Ch. 2012), the Delaware Chancery Court held that rebate checks were just that—checks, subject to escheat laws. There, Staples entered into supply contracts with its business customer, agreeing to give customers a reduction in price (in the form of a rebate) if the customer purchased a minimum volume of inventory from Staples. Staples took the position (like the Department here) that the unclaimed property at issue was not checks or credits issued to customers but Staples' "underlying" obligation to provide its customers rebates. *Id.* at 426. The court ruled that "[t]he reason why the property was given is irrelevant"—the question was whether the property was specifically enumerated in the escheat statute. *Id.* Because Staples issued its rebates in the form of checks or credits, *id.* at 422, the court rejected Staples' plea to look at the "underlying property," *id.* at 426, instead of what had actually been issued.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

4. The UCC Governs Checks, and the Department Does Not Contest that the Debt to Pay on the Rebate Checks Belongs to CPG, Not Costco

Though the Department devotes only one paragraph of its brief to the UCC (Motion at 21-22), the "law that creates the property at issue"—checks—is the UCC. *Delaware v. New York*, 507 U.S. 499, 501, 113 S. Ct. 1550, 123 L. Ed. 2d 211 (1993). As such, the "precise debtor-creditor relationship" is defined by the UCC. 507 U.S. at 499. Here, that debtor is CPG. The Department does not contest that if the unclaimed property is deemed to be the rebate checks, Costco has no obligation on the checks under the UCC.

Chapter 3 of the UCC clearly defines the obligation on checks and says that the person obligated to pay is the *issuer of the check*. RCW 62A.3-412 ("The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder . . . . The obligation is owed to a person entitled to enforce the instrument or to an indorser who paid the instrument under RCW 62A.3-415."); RCW 62A.3-104(f) ("'Check' means (i) a draft . . . payable on demand and drawn on a bank . . . ."). Under the UCC, "[i]ssue" means "the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person." RCW 62A.3-105. A "[d]rawer" is "a person who signs or is identified in a draft as a person ordering payment." RCW 62A.3-103(a)(3).

As the person who signed the checks drawn on its own bank account, CPG was the issuer of rebate checks, thus the person indebted on the checks. Ignoring the UCC, the Department summarily states that CPG was Costco's subcontractor, but does not produce evidence showing that the parties had any such agreement. The contracts between Costco and CPG provided that neither party shall be deemed an agent of the other. Savo Decl. ¶ 4, Ex. A.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Under the UCC, Costco cannot be deemed to have any obligation to pay on the rebate checks; such an outcome would be antithetical to the UCC.

The Department's attempt to evade the applicability of the UCC is unavailing. It is not true that the UCC addresses negotiable instruments only "generally," whereas the UPA "specifically" addresses "all species of intangible property." Motion at 22. The UCC quite specifically addresses checks and, as explained above, provides that the issuer of the check has the obligation on that instrument. RCW62A.3-412.

C. Even if the Unclaimed Property Is Viewed Apart from the Checks, the Department's Evidence Is Insufficient for Summary Judgment in Its Favor

The Department contends that Costco entered into a "contractual agreement with the customers" to pay the rebate amount. Motion at 14. But because the Department's counterclaim is for judgment on hundreds of thousands of individual rebate checks, the Department is actually asserting that Costco entered into hundreds of thousands of contracts with its members to pay these rebates. The Department has utterly failed to put forth the evidence required to establish the mutual assent for even one contract (offer, acceptance, consideration), let alone hundreds of thousands of such contracts. And again, the Department's argument is unsupported by case law on point, or the UPA or UCC.

1. The Evidence as to the General Nature of the Rebate Program Is Insufficient to Establish a Contract Entered by Costco

The Department cites evidence of the general nature of Costco's One-Stop Rebate Program to attempt to show a contract between Costco and its members. The evidence cited by the Department is three types: warehouse signs, flyers distributed at the cash register, and the rebate receipt. Motion at 15. The signs simply said "Mail-in Rebate" or "Rebate," and listed the designated product, and the rebate amount. Savo Decl., Ex. C. Though the signs did not have the magic words "Manufacturer's Rebate" that the Department suggests is required, the

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

signs did not promise that Costco was the entity responsible for paying the rebate. *Id.* Similarly, the flyers distributed at the inception of the "One-Stop" program did not say that Costco was now offering to fund and pay rebates. Rather, it explained that Costco had instituted a new program to simplify the process by which such rebates were paid. "Now it's easi*er* and fast*er* than ever to save money through Costco's new One-Stop Rebate Program." RF Decl., Ex J. Finally, the rebate receipt contained no promise that Costco would pay the rebate. RF Decl., Ex I. The rebate receipt simply contained the information about the product subject to the rebate (rebate quantity, limit, dollar amount, and expiration date) and provided instructions on how to submit the receipt for payment: "Mail submission requests to: Costco Rebate Program C/O CPG. P.O. Box 15999 Scottsdale AZ 85267." *Id.*

In sum, what the Department has presented as evidence of a "contract" is merely evidence of *communications* from Costco to its members regarding the availability of and process for obtaining rebates—that always had been, and continued to be, offered by Costco's suppliers. Proof of a contract requires much more. It is black letter law that "[m]utual assent is required for the formation of a valid contract." *Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). This generally takes the form of offer and acceptance, *Hansen v. Transworld Wireless TV-Spokane, Inc.*, 111 Wn. App. 361, 370, 44 P.3d 929 (2002), supported by consideration and a meeting of the minds on essential terms.

The essential terms of the rebate are listed on the rebate receipt, and all of those were negotiated and approved by the suppliers in the Mail-In Rebate Launch Sheet: (a) product subject to rebate; (b) limit; (c) rebate amount; and (d) expiration date. The Department ignores that evidence, though it concedes there is other evidence that "Costco represented to customers that the manufacturer rather than Costco was the sponsor of the rebate offer." Motion at 15.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Costco explained to its members that the "manufacturer" or "vendor" was the party offering the rebate. RF Decl., Ex. R (call center guideline to explain that rebate submission cannot be honored because it was "postmarked beyond the date allowable per our agreement with the manufacturer"); RF Decl., Ex. L (explaining to member the method to "reimburse the vendor" when members returned products after they had submitted and received rebate checks). The Department tries to minimize the import of this evidence by contending that these were the "only two contexts" in which Costco represented to its members that the "manufacturer" was the sponsor of the rebate offer. Motion at 15. But these were the only circumstances in which it was necessary to explain that.

2. The Department Presented No Evidence (Admissible or Otherwise) of Any Individual Contract or Transaction

The Department's Counterclaim relates to approximately 236,000 transactions. In its Motion, however, the Department made no attempt to prove a contract for even a single one of these transactions. Because the Department has the burden of establishing its claim under the UPA and as the moving party on summary judgment, the record is utterly insufficient for summary judgment against Costco on this "contracts" theory.[4]

The Department's Counterclaim rests entirely on a collection (not obtained from Costco and unreliable in numerous ways as will be explained at trial, should there be one) of CPG records of checks purportedly issued and not cashed. These CPG records (which the Department did not even bother to submit in its motion) are not proof of the alleged underlying obligation, much less admissible proof. Rather, the CPG schedules attached to the Department's demand letter are simply a listing of approximately 236,000 CPG check records, consisting of limited fields: name, address, check date, and cash amount. Savo Decl., Ex. F.

[4] The Department's characterization of the property as an "obligation" independent from the issuance of the checks begs the question: when does the contractual obligation become distributable?

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

3. The Department's Contract Theory Is Unsupported by the Law

In addition to its evidentiary failings, the Department's argument that Costco entered into a "contract" with its members to pay the rebates falls well short in terms of legal authority. The argument is supported by citation to a single, irrelevant case. Motion at 15 (citing *Texas v. New Jersey*, 379 U.S. 674, 85 S. Ct. 626, 13 L. 3d. 2d 596 (1965)), for proposition that payment of rebates was a "debt" and "liability of Costco and an asset of the customer"). *Texas v. New Jersey* addressed the unrelated issue of jurisdictional priority in escheat (which state had the power to claim the funds), not who was the underlying debtor. 379 U.S. at 675. The identity of the debtor was undisputed, as the "evidence[] on the books of Sun's two Texas offices" showed that Sun Oil Company was indebted to over a thousand small creditors. *Id.*

In contrast, the Department *cites no such evidence on the books of Costco*. That is because Costco's role in the rebate process was simply to facilitate the flow of funds from its suppliers to CPG so that Costco's members could receive payment on their rebate checks. In terms of the accounting, the funds that Costco received from the suppliers to pay the rebate checks were not booked as assets, thus never showed up on Costco's income statements. Kersten Dep. 14:25-15:10. Costco's balance sheet did not reflect any profit or loss with respect to the rebate dollars, Grachek Dep. 16:12-18, and likewise did not contain any record of individual rebate transactions. Savo Decl. ¶ 8.[5]

---

[5] If anything, *CPG*—as contractually obliged to issue checks to members—assumed a direct obligation to the third parties who were eligible for rebates. *See Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983) ("If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person . . . ."); *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 255, 215 P.3d 990 (2009). As is evident from the CPG-Costco contracts, the rebate checks contemplated necessarily provided a direct benefit to the third party members.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

4. Any Purported Underlying Obligation Was Suspended upon Issuance of the Checks

RCW 62.A.3-310(b) provides that "if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken." When CPG issued and delivered the rebate checks, they were taken, thus suspending any "underlying obligation" that Costco might have.

The Department opaquely suggests that the rebate checks were not "taken" for the underlying obligation within the meaning of RCW 62A.3-310(b) because these checks were not deposited or negotiated. Motion at 22. The comments to RCW 62A.3-310 explain, however, that "taken" does not mean deposited or cashed; it simply means "given in payment of the obligation." RCW 62A.3-310(b) cmt. 3. *See Staff Builders of Phila., Inc. v. Koschitzki*, 989 F.2d 692 (3d Cir. 1993); *Scalise v. Am. Employers Ins. Co.*, 67 Conn. App. 753, 760-61, 789 A.2d 1066 (2002) ("if a party's act of delivering a check as payment for an obligation is not the sending of money in discharge of the debt it is hard to figure out what a payment can be") (internal citation and quotation marks omitted). When a check is given to pay a debt, the debt is suspended and cannot be enforced until the drawee bank has paid or declined to pay it. RCW 62A.3-310(b); *see also Fid. & Deposit Co. of Md. v. Gladwynne Constr. Co.*, 184 Md. App. 229, 237, 964 A.2d 726 (2009). Also, in the case of lost checks, the "creditor may assert only rights *on the check*. The creditor can proceed under Section 3-309 to enforce the obligation of the debtor, as drawer, to pay the check." RCW 62A.3-310 cmt. 4 (emphasis added).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

D. The UPA Cannot Be Applied to Require Duplicate Payment

The Department's final argument that Costco cannot discharge its payment obligations ignores the fact that Costco has already transmitted payment to the party obligated to fulfill the rebate checks—CPG.

1. Nothing in the UPA nor Its Purpose Permits the Department to Require Duplicate Payment of an Obligation

A person is deemed a "holder" of unclaimed property where he is either in possession of property belonging to another, a trustee, or indebted to another on an obligation. RCW 63.29.010(10). The Department acknowledges that the basis on which it asserts Costco is a "holder" is its theory that Costco is "indebted" on an obligation to pay the rebate checks. That is because Costco is not in possession of the money. The Department has not identified a single case in which a party that does not possess alleged unclaimed property has nonetheless been ordered to deliver that property to the State.

Finding Costco the "holder" would require Costco to make a duplicate payment on the same transactions. Costco already transmitted funds to CPG (money that Costco had deducted from its suppliers) to fulfill the rebates. Costco's books do not reflect a profit or loss on the rebates because the money only passed through Costco. Grachek Dep. 16:12-17:11; Kersten Dep. 14:25-15:10. There is no $3 million (or any other amount) in rebate dollars sitting on Costco's books that it is refusing to deliver to the Department. Savo Decl. ¶ 11. And Costco cannot recover this money from the suppliers who also transmitted payment once already. Any interpretation of the UPA that requires a duplicate payment by Costco would yield a highly inequitable, absurd result. *See City of Seattle v. St. John*, 166 Wn.2d 941, 947, 215 P.3d 194 (2009) ("we construe statutes to avoid absurd results").

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

2. CPG Was An Intermediary to Whom Costco Discharged Any Obligations It Had to Pay on the Rebates

Even if Costco were once obligated to fund the rebate checks, it discharged such obligation long ago by passing money from the suppliers to CPG, the issuer of the rebate check, creating a statutorily prescribed obligation to pay under the UCC. Costco has no continuing obligations concerning the rebates, thus it cannot be the "holder" of the funds representing the checks or obligations to pay rebates.

Admitting there is *a* precise holder here, the Department cites *Delaware v. New York* as authoritative on how to determine which party is responsible for reporting and remitting unclaimed property. Motion at 19. *Delaware* does not support the position that Costco remained the holder of unpaid rebate checks, but rather that Costco discharged any obligation to pay by transmitting funds to CPG. In *Delaware*, the Supreme Court held that once security distributions were transmitted to intermediary banks, the banks became the holders "because they alone . . . are legally obligated to deliver unclaimed securities distributions to the beneficial owners."). 507 U.S. at 505. After paying CPG, and once CPG issued rebate checks, Costco was no longer (if it ever was) "legally obligated" to pay on the rebates. *See also* Uniform Unclaimed Property Act (1995), NCCUSL cmt. to section 1 (clarifying the definition of "holder" in the 1981 Act, the version on which the Washington UPA is modeled, stating that an "original debtor" satisfies its obligation to pay under the applicable state law by "transmitting payment to an intermediary, which has undertaken to make the payment").

Even had Costco entered into a contractual agreement to pay on the rebates, it discharged this obligation by delegating the duty to issue and pay on checks to CPG—who then became the precise debtor. The Department's assertion that Costco could not have delegated its duty because customers only dealt with Costco (without any mention of CPG) is wrong.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Motion at 21. The rebate receipt required the member to mail the submission "c/o CPG," and on Costco's website, the link for online submissions clearly directed users to CPG's third party site. Most significant is the actual rebate check, signed by CPG's CEO and postage paid by CPG—which members received in the mail. When members received the rebate check, they were dealing only with CPG, not Costco.[6] This evidence shows "the obligee otherwise agree[d]," Motion at 20-21, to Costco's delegation to CPG of the duty to fulfill rebates: to process submissions, issue the checks, and pay on the rebates.[7]

3. The Department's Application of the UPA to Costco Is Unconstitutional

The UPA cannot constitutionally be read to require Costco to make payment *again* on funds that it has already transmitted to CPG. It is unconstitutional to force someone to "pay the same single obligation twice." *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80, 82 S. Ct. 199, 7 L. Ed. 2d 139 (1961) (holding that Western Union was denied due process by the Pennsylvania judgment to pay because the Pennsylvania courts did not have power to protect Western Union from *any other claims*, including the claim of the State of New York). Just as the Constitution protected Western Union from being subjected to duplicate claims for the same funds by two states, it protects Costco from "any other claims" that would cause it to pay the same rebates that it already funded once.

---

[6] The Department is wrong in contending that between 2000 through 2004, Costco was the only business entity identified on the check. Motion at 7. The checks contain the signature of CPG's CEO and was drawn from CPG's bank account. Savo Decl. ¶ 5. Costco's logo on the checks created no obligation to pay them. *See, e.g.*, *First Nat'l Bank in Alamosa v. Ford Motor Credit Co.*, 748 F. Supp. 1464, 1467-70 (D. Colo. 1990) (granting summary judgment and dismissing bank's action to force Ford to honor checks under the UCC, because Ford's pre-printed name on the checks had no legal significance and was not a signature).

[7] Nor has the Department provided any evidence to "pierce" through CPG's relationship with Costco to require Costco to pay on CPG's debt. *See Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 411, 645 P.2d 689 (1982) ("Separate corporate entities should not be disregarded solely because one cannot meet its obligations.").

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

To require Costco to pay the Department the money that it already transferred to CPG would not only offend due process, but it would constitute a taking of Costco's private property. U.S. Const. amend. V; Wash. Const. art. I, § 16. A state may not simply "escheat" private property, including intangible property, without just compensation. *Hodel v. Irving*, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987) (holding that a statute requiring the escheat of privately owned Indian land allotments effected an unconstitutional taking); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980). As applied to the unclaimed property context, courts have held that the takings clause prevents overly aggressive claims by state revenue officials. *See, e.g.*, *Serv. Merch. Co. v. Adams*, No. 97-2782-III, 2001 WL 34384462, at *6 (Tenn. Ch. June 29, 2001) (holding that the state cannot escheat the face amount of unclaimed gift certificates, because to do so would be an unconstitutional taking of the party's anticipated gross profit on those gift certificates) (O'Sullivan Decl., Ex. J).

E. Costco Is a Payee on the Rebate Checks, Thus Cannot Be Forced to Pay On the Checks Under the UPA

The Department argues that Costco has no right to the checks as a payee, but this argument depends on the Court finding that the unclaimed property is not the checks. Under the correct characterization of the unclaimed property—checks—Costco is entitled to claim the property because it is a payee. *See* RF Decl., Exs. N, O.

The Department's argument that Costco's naming itself as a payee results in "private escheat of the unpaid obligations" has no merit. Motion at 23. First, Costco does not seek to discharge an obligation by paying itself; it seeks to avoid having to pay *again* on checks it has

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

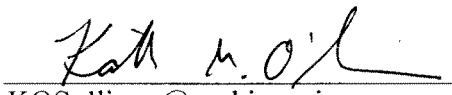
already funded once. Second, Costco discharged its obligation to pay long ago, prior to this lawsuit, by transmitting funds to CPG.

Even were the Court to accept the Department's position that the unclaimed property is the member's right to be paid under a contract with Costco, then the Department's argument becomes a breach of contract contention. Essentially, the Department argues that by naming itself as a payee, Costco intercepted a member's right to payment, and is in breach of the contract. Apart from the lack of evidence showing any such contract, there is no evidence that any member ever contended that Costco as a payee breached the contract. At most this shows an unliquidated obligation, not subject to escheat. *See* RCW 63.29.010(12) (confirming that Washington's escheatment statute "does not include contract claims which are unliquidated").

VI. CONCLUSION

For the reasons set forth above, Costco respectfully requests that the Court deny the Department's motion for partial summary judgment.

DATED: July 17, 2012



KOSullivan@perkinscoie.com
Sher S. Kung, WSBA No. 42077
SKung@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Plaintiff
Costco Wholesale Corporation

PROOF OF SERVICE

I certify that I served a copy of this document, via electronic mail, per agreement of the parties, on the following:

Rosann Fitzpatrick
Donald Cofer
Julie Johnson
Attorney General's Office, Revenue Division
Counsel for Respondents/Defendants
RosannF@atg.wa.gov, DonaldC@atg.wa.gov, JulieJ@atg.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: July 17, 2012

/s/ Sher S. Kung
Sher S. Kung

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

EFiled: Mar 26 2014 09:43AM EDT
Transaction ID 55204006
Case No. N13C-06-289 FSS

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

The State of DELAWARE, Plaintiff, *Ex rel.* [UNDER SEAL], Plaintiff-Relator, v. [UNDER SEAL], Defendants.	Case No. N13C-06-289 FSS TRIAL BY JURY OF TWELVE (12) DEMANDED pursuant to Superior Court Civil Rule 38(b)-(bb)&(d) COMPLAINT

YOU ARE IN POSSESSION OF A DOCUMENT FILED IN THE SUPERIOR COURT OF DELAWARE THAT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL.

If you are not authorized by Court order to view or retrieve this document, read no further than this page. You should contact the following:

Stuart M. Grant
Grant & Eisenhofer P.A.
123 Justison Street
Wilmington, DE 19801
302-622-7000

FILED
PROTHONOTARY
CIVIL [illegible] COURTER
2013 JUN 28 PM 2:43

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

The State of DELAWARE, Plaintiff, *Ex rel.* WILLIAM SEAN FRENCH, Plaintiff-Relator, v. CARD COMPLIANT, LLC, APPLE AMERICAN GROUP, LLC, HOMEAWAY.COM, INC., BENIHANA, INC., CALIFORNIA PIZZA KITCHEN, INC., CBC RESTAURANT CORP., EINSTEIN NOAH RESTAURANT GROUP, INC., HANNA ANDERSSON, LLC, HOULIHAN'S RESTAURANTS, INC., IL FORNAIO (AMERICA) CORPORATION, NASH-FINCH COMPANY, NETFLIX, INC., NOODLES & COMPANY, OVERSTOCK.COM, INC., PAMIDA STORES OPERATING CO., LLC, POLO RALPH LAUREN CORPORATION, RUTH'S CHRIS HOSPITALITY GROUP, SHELL OIL COMPANY, SHOPKO STORES OPERATING CO., LLC, SHUTTERFLY, INC., SKECHERS USA, INC., SKIP BARBER RACING SCHOOL, LLC, SONY ELECTRONICS, INC., TESORO REFINING AND MARKETING COMPANY, LLC, THE PANTRY, INC., ULTA SALON, COSMETICS & FRAGRANCE, INC., WOLVERINE WORLD WIDE, INC., THE NATIONAL RESTAURANT ASSOCIATION, CARDFACT I, INC., CARDFACT II, INC., CARDFACT III, INC., CARDFACT IV, INC., CARDFACT V, INC., CARDFACT VI, INC., CARDFACT VII, INC., CARDFACT VIII, INC., CARDFACT IX, INC., CARDFACT X, INC., CARDFACT XI, INC., CARDFACT XII, INC., CARDFACT XIII, INC., CARDFACT XIV, INC.,	Filed Under Seal Pursuant To Delaware False Claims and Reporting Act, 6 Del. C. § 1203(b)(2) and Superior Court Civil Rules 4 & 5 TRIAL BY JURY OF TWELVE (12) DEMANDED pursuant to Superior Court Civil Rule 38(b)-(bb)&(d)

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

CARDFACT XV, INC., CARDFACT XVI, INC., CARDFACT XVII, INC., CARDFACT XVIII, INC., CARDFACT XIX, INC., CARDFACT XX, INC., CARDFACT XXI, INC., CARDFACT XXII, INC., AND CARDFACT XXVI, INC., CARDFACT XXVII, INC., CARDFACT XXIX, INC., CARDFACT XXX, INC., CARDFACT XXXI, INC., CARDFACT XXXII, INC., CARDFACT XXXIII, INC., CARDFACT XXXIV, INC., CARDFACT XXXV, INC., CARDFACT XXXVI, INC., CARDFACT XXXVII, INC., CARDCO HOLDING, INC., CARDCO CI, INC., CARDCO CV, INC., CARDCO CVIII, INC., CARDCO CXI, INC., CARDCO CXII, INC., CARDCO CXV, INC., CARDCO CXVI, INC., CARDCO CXVII, INC., CARDCO CXIX, INC., CARDCO CXX, INC., CARDCO CXXI, INC., CARDCO CXXII, INC., CARDCO CXXIV, INC., CARDCO CXXV, INC., CARDCO CXXVI, INC., CARDCO CXXVII, INC., CARDCO CXXVIII, INC., CARDCO CXXXII, INC., CARDCO CXXXIII, INC., CARDCO CXXXIV, INC., CARDCO CCCIII, INC., CARDCO CCCIV, INC., AND CARDCO CCCVI, INC., VACATION PROPERTIES UNITED, LTD., LIABILITY FACTORING, LLC., FACTORING COMPANY, CARDCO CX, INC., CARDCO DC, INC., CARDCO DI, INC.,	:
Defendants.	:

COMPLAINT

KOREIN TILLERY, LLC
Douglas R. Sprong
Christopher A. Hoffman
505 North 7th Street, Suite 3600
St. Louis, MO 63103
Telephone: (314) 241-4844
Facsimile: (314) 241-3525

GRANT & EISENHOFER P.A.
Stuart M. Grant (Del. I.D. No. 2526)
Mary S. Thomas (Del. I.D. No. 5072)
Jacob R. Kirkham (Del. I.D. No. 5768)
123 Justison Street
Wilmington, DE 19801
Telephone: (302) 622-7000
Facsimile: (302) 622-7100

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Reuben A. Guttman
Grant & Eisenhofer P.A.
1920 L Street, N.W., Suite 400
Washington, DC 20036
Telephone: (202) 386-9500
Facsimile: (202) 386-9505

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

I. SUMMARY OF THE ACTION

1. This is a qui tam civil action against multiple defendants pursuant to the Delaware False Claims and Reporting Act, 6 Del. C. § 1201 et seq., for violations of Delaware's Abandoned or Unclaimed Property Law, 12 Del. C. §§ 1101-1224 ("the Abandoned Property Law"). Defendants have schemed to deprive the State of Delaware of hundreds of millions of dollars due to the State under the Abandoned Property Law (defined below).

2. The Delaware Defendants (identified below) collectively have sold billions of dollars in gift cards. The beneficiaries of the gift cards are entitled to use the gift cards to purchase products and services from the Delaware Defendants. Often, the beneficiaries of the gift cards do not use the full value of the cards, leaving unused money on the cards.

3. The Delaware Defendants kept no records of who purchased the gift cards or to whom they were given as gifts. As numerous gift cards are lost, unredeemed, or redeemed for only a fraction of their value, five years after the issuance or last use of the gift cards, the State of Delaware, through the Abandoned Property Law, is entitled to the difference between the purchase price of the gift cards and the amount redeemed. Unfortunately, defendants have schemed to deprive the State of Delaware of this revenue.[1]

---

[1] *E.g.*, http://www.nytimes.com/2007/01/07/magazine/07wwln_freak.t.html ("The financial-services research firm TowerGroup estimates that of the $80 billion spent on gift cards in 2006, roughly $8 billion will never be redeemed – 'a bigger impact on consumers,' Tower notes, 'than the combined total of both debit- and credit-card fraud.' A survey by Marketing Workshop Inc. found that only 30 percent of recipients use a gift card within a month of

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

4. Under the Abandoned Property Law, a Delaware corporation that "holds" the unredeemed value from gift cards that have not been used for five years is required to report and transfer the value of those gift cards to the State Escheator. See 12 Del. C. §§ 1198, 1199, 1212. In violation Delaware law, the Delaware Defendants (all Delaware corporations) have intentionally failed to report and transfer the value of unclaimed gift cards to the State.

5. The Card Services Defendants (defined below) conspired with the Delaware Defendants to hide this revenue from the State by creating sham contracts portraying themselves as the "holders" of unredeemed gift cards in exchange for an annual fee from the Delaware Defendants. These contracts are without substance as the value of all unredeemed gift cards remains within the possession, custody and control of the Delaware Defendants.

6. To facilitate this scheme, the Card Services Defendants set up shell corporations in Ohio and Florida to allegedly "hold" the value of unredeemed gift cards because those states do not define abandoned property to include the unredeemed value of gift cards. See, *e.g.*, Ohio Rev. Code § 169.01(B)(2)(d); Fla. Stat. § 717.1045. The Card Services Defendants created phony relationships with the Delaware Defendants whereby gift cards redeemable for products and services sold by the Delaware Defendants were "issued" by Ohio and Florida corporations. The Card Services Defendants enticed the Delaware Defendants into their scheme by promising them that (a) they would not have to change anything about the way

---

receiving it, while Consumer Reports estimates that 19 percent of the people who received a gift card in 2005 never used it.").

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

they were running their gift card programs, and (b) they could keep the unredeemed value of gift cards at all times. The Delaware Defendants paid CardFact (defined below) a small annual fee, determined by a formula based on the amount of gift cards the Delaware Defendants sold and redeemed. In exchange, the Card Services Defendants' shell corporations purported to "hold" the gift card obligations. In reality, the Delaware Defendants were always the "holders" of the unused value of the cards and the only purpose of the agreements with the Card Services Defendants was to illegally evade the Abandoned Property Law.

7. The contracts between the Card Services Defendants and the Delaware Defendants have two main components: a Card Services Agreement and a Trademark Licensing Agreement. The Card Services Agreement, a document designed to conceal Defendants' conduct from Delaware oversight, falsely states that the Card Services Defendants are responsible for manufacturing, marketing and selling the gift cards, and that the Card Services Defendants receive and hold money from gift cards sold but not yet redeemed each year. In addition, the contracts state that the Card Services Defendants "issue" the cards and "hold" their value until redeemed. In truth, the proceeds from all gift card sales, and thus the value of any unredeemed cards, are always in the possession, custody and control of the Delaware Defendants. The contracts similarly state that the Card Services Defendants pay the Delaware Defendants large sums in "trademark licensing" and "handling" fees. In truth, these "trademark licensing" and "handling fees" are no more than an accounting artifice designed to return to the Delaware Defendants'

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

books the value of the unredeemed gift cards, minus the Card Services Defendants' nominal fee for running the scheme.

8. The Card Services Defendants are mere shell corporations, whose assets are regularly swept up and transferred to a Cayman Island entity. The Card Services Defendants never had or could have had the assets to reimburse the Delaware Defendants when their gift cards were redeemed.

II. JURISDICTION

9. The Court has subject matter jurisdiction pursuant to 6 Del. C. § 1201(c), which specifically confers jurisdiction on this Court for actions brought pursuant to the Delaware False Claims and Reporting Act.

10. This suit is not based upon the prior public disclosure of the allegations or actions in a criminal, civil, or administrative hearing, or from the news media. This suit is also not substantially based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the Government of the State of Delaware is already a party.

11. To the extent that there has been a public disclosure unknown to Relator French, he is an original source of the information under 6 Del. C. § 1206(c). Relator French has direct and independent knowledge of the information on which the allegations are based and, pursuant to 6 Del. C. § 1206(c), voluntarily provided the information to the Attorney General of the State of Delaware before filing this *qui tam* action.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

III. PARTIES

A. Relator William French

12. William French is a resident of Columbus, Ohio. From 2007 to 2009, he acted as controller and then vice president of client relations for CardFact, Ltd. During those years, CardFact's physical address was his residence and the business was operated out of his basement. From 2010 to 2011, he was a sales and support representative for Card Compliant, Inc. He is an original source as that term is defined by the Delaware Code 6 Del. C. § 1206(c) and has personal knowledge of non-public facts central to this case. He maintained the CardFact entities' books and records and has copies of the Card Services Defendants' marketing materials, contracts and correspondence with the Delaware Defendants, including reports showing the amounts of unredeemed gift card value these companies failed to report or remit to the State Escheator.

B. The CardFact Defendants

13. CardFact, Ltd. is an Ohio corporation created in 2003. Its principal place of business is located at 992 Jaeger Street, Columbus, Ohio 43206. On or about September 1, 2009, CardFact Ltd. changed its name to Vacation Properties United, Ltd., to be used in future business endeavors by CardFact's original owners. Vacation Properties United, Ltd. continues to exist today, but will be referred to as "CardFact" throughout this complaint. CardFact is subject to jurisdiction in Delaware Superior Court through the Delaware long arm statute, 10 Del. C. §§ 3104(a)-(c).

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

14. CardFact is in the business of providing "card services" to companies incorporated in Delaware and other states that require the unredeemed value of gift cards to escheat to the state. CardFact enters into contracts whereby its affiliated Ohio corporations purportedly "hold" the unredeemed value of gift cards issued by its clients and then "return" all but a small percent of that money in the form of "handling" and "trademark licensing" fees to its clients. In sum, CardFact's principal business is entering into conspiracies to break the law of Delaware and other states. A competitor, Card Compliant, purchased CardFact in 2009, and then continued to operate the CardFact brand name to carry on the unlawful scheme to evade Delaware's escheat laws. As of September 2009, when Card Compliant purchased it, CardFact advertised that it had 30 clients who issued over $600 million in gift cards annually.

15. In addition to CardFact, Ltd., CardFact also operated numerous Ohio shell corporations set up by CardFact's owners for the purpose of running its scheme. There are 24 CardFact entities whose names are CardFact followed by a roman numeral (CardFact I, Ltd. through CardFact XXIV, Ltd.). These entities are now defunct, but are frequently mentioned throughout as a part of CardFact's operations. CardFact also operated a shell company called Liability Factoring, LLC. These shell corporations were incorporated and managed by CardFact, Ltd. management, had the same employees as CardFact, Ltd., and had the same physical address as CardFact, Ltd. CardFact, Ltd. and its numbered shell entities were the same operation in all but name only.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

16. Also included among the CardFact entities is a Cayman Island corporation, the Factoring Company, set up by CardFact's owner, Ted Ziegler. This company entered into assignments with the various CardFact shell companies whereby the Factoring Company would receive the assets of those companies in exchange for being responsible for those companies' obligations to the Delaware Defendants. The Factoring Company is subject to jurisdiction in Delaware Superior Court through the Delaware long arm statute, 10 Del. C. §§ 3104(a)-(c).

17. CardFact, its numbered shell entities, Liability Factoring, LLC, and the Factoring Company are referred to collectively as "CardFact," unless otherwise stated.

C. **The Card Compliant Defendants**

18. Card Compliance Holding Company, LLC and Card Compliance, LLC are Kansas corporations created in January 2008. Card Compliance, LLC's name was changed to Card Compliant, LLC later that year. Its principal place of business is at 460 Nichols Road, Suite 300, Kansas City, Missouri 64112. Card Compliant, LLC and Card Compliance Holding Company, LLC are subject to jurisdiction in Delaware Superior Court through the Delaware long arm statute, 10 Del. C. §§ 3104(a)-(c).

19. On September 1, 2009, Card Compliant entered into an Asset Purchase Agreement, Security Agreement, and Account and Contract Assignment with CardFact, Ltd. under which CardFact's business was acquired by CardFact Acquisition Co., LLC, and CardFact 25, Inc. Thereafter, Card Compliant assumed the accounts and carried on CardFact's business. Card Compliant also established

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

numerous Florida shell corporations to allegedly hold unredeemed gift card value. These shell corporations were incorporated by David Hill, Phillip Rouse, and Wayne Chatham Jr. David Hill is a founding partner and President and Chief Strategic Officer at Card Compliant. Phillip Rouse is the Chairman and Chief Architect at Card Complaint. Wayne Chatham Jr. is the Chief Executive Officer at Card Compliant. As of January 2011, Card Compliant had over 70 clients and was purportedly "responsible for the regulatory compliance management of over $3.0B[illion] of annual Gift Card activations."

20. The Card Compliant Defendants also include the following Florida corporations set up by David Hill, Phillip Rouse, and Wayne Chatham Jr. on behalf of Card Compliant, LLC for the purpose to running its scheme: CardFact I, Inc., CardFact II, Inc., CardFact III, Inc., CardFact IV, Inc., CardFact V, Inc., CardFact VI, Inc., CardFact VII, Inc., CardFact VIII, Inc., CardFact IX, Inc., CardFact X, Inc., CardFact XI, Inc., CardFact XII, Inc., CardFact XIII, Inc., CardFact XIV, Inc., CardFact XV, Inc., CardFact XVI, Inc., CardFact XVII, Inc., CardFact XVIII, Inc., CardFact XIX, Inc., CardFact XX, Inc., CardFact XXI, Inc., CardFact XXII, Inc., and CardFact XXVI, Inc., CardFact XXVII, Inc., CardFact XXIX, Inc., CardFact XXX, Inc., CardFact XXXI, Inc., CardFact XXXII, Inc., CardFact XXXIII, Inc., CardFact XXXIV, Inc., CardFact XXXV, Inc., CardFact XXXVI, Inc., CardFact XXXVII, Inc., CardCo Holding, Inc., CardCo CI, Inc., CardCo CV, Inc., CardCo CVIII, Inc., CardCo CXI, Inc., CardCo CXII, Inc., CardCo CXV, Inc., CardCo CXVI, Inc., CardCo CXVII, Inc., CardCo CXIX, Inc., CardCo CXX, Inc., CardCo CXXI, Inc.,

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

CardCo CXXII, Inc., CardCo CXXIV, Inc., CardCo CXXV, Inc., CardCo CXXVI, Inc., CardCo CXXVII, Inc., CardCo CXXVIII, Inc., CardCo CXXXII, Inc., CardCo CXXXIII, Inc., CardCo CXXXIV, Inc., CardCo CCCIII, Inc., CardCo CCCIV, Inc., and CardCo CCCVI, Inc. These defendants have no employees, operating capital or legitimate places of business. They are shell entities, sharing the same principal address, officers, directors, and employees as Card Compliant, LLC. These Defendants are subject to jurisdiction in Delaware Superior Court through the Delaware long arm statute, 10 Del. C. §§ 3104(a)-(c).

21. The Card Compliant Defendants also include the following Virginia corporations: CardCo CX, Inc., CardCo DC, Inc., and CardCo DI, Inc. These defendants have no employees, operating capital or legitimate places of business. They are shell entities, sharing the same principal address, officers, directors, and employees as Card Compliant, LLC. These companies are subject to jurisdiction in Delaware Superior Court through the Delaware long arm statute, 10 Del. C. §§ 3104(a)-(c).

22. Card Compliant, LLC and its numbered shell entities are the same operation in all but name only. Hereinafter, Card Compliant, LLC and its numbered shell entities are referred to collectively as "Card Compliant" unless otherwise stated.

D. **The Delaware Defendants**

23. The following Delaware companies are current and former clients of CardFact that knowingly participated in CardFact's scheme to avoid the Delaware

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Abandoned Property Law in violation of the Delaware False Claims and Reporting Act.

24. Apple American Group, LLC ("Applebee's") is a limited liability company formed in 2001 under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Applebee's principal place of business is located at 6200 Oak Tree Boulevard, Suite 250, Independence, Ohio 44131. Applebee's owns and operates approximately 438 Applebee's Neighborhood Grill and Bar restaurants nation-wide. It is the largest Applebee's franchise in the country with $1.1 billion in sales.

25. Homeaway.com, Inc. ("Homeaway"), d/b/a BedandBreakfast.com, is incorporated under the laws of the State of Delaware. In 2010, it purchased its competitor, BedandBreakfast.com, which it continues to operate today. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Homeaway's principal place of business is 1011 West Fifth Street, Suite 300, Austin, Texas 78703. Homeaway is a publicly held company that operates an online marketplace for vacation rentals in 171 countries. It reported revenues of over $280 million in 2012.

26. Benihana, Inc. ("Benihana") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Benihana's principal place of business is 8750 Northwest 36th Street, Doral, Florida 33178. Benihana is

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

a privately held company that owns, operates, and franchises 94 Benihana, Haru, and RA Sushi brand restaurants nation-wide. Benihana was a publicly traded company until 2012, when it was acquired by Angelo, Gordon & Co., an investment advisory firm with approximately $25 billion under management.

27. California Pizza Kitchen, Inc., d/b/a CPK Management Company ("CPK"), is incorporated under the laws of the State of Delaware. Its registered agent in the state is National Corporate Research, Ltd., 615 South DuPont Highway, Dover, Delaware 19901. CPK's principal place of business is located at 12181 Bluff Creek Drive, 5th Floor, Playa Vista, California 90094. CPK is a privately held company that owns and operates or franchises approximately 250 California Pizza Kitchen restaurants nation-wide, as well as sells a line of frozen pizza products through grocery stores, sports stadiums, and airports. CPK is owned by Golden Gate Capital, a private equity firm managing $12 billion in capital.

28. CBC Restaurant Corp. ("CBC") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. CBC's principal place of business is 12700 Park Central Drive, Suite 1300, Dallas, Texas 75251. CBC operates and franchises more than 115 Corner Bakery Café restaurants nation-wide. CBC is owned by Il Fornaio (America) Corp. and operates as a subsidiary; Il Fornaio is owned by Roark Capital Group, an Atlanta-based private equity firm with more than $3 billion in equity capital under management.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

29. Einstein Noah Restaurant Group, Inc. ("Einstein") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Einstein's principal place of business is 555 Zang Street, Suite 300, Lakewood, Colorado 80228. Einstein is a publicly traded company that owns, operates, and franchises Einstein Bros. Bagels, Noah's New York Bagels, and Manhattan Bagels brand restaurants. It reported revenues of over $413 million in 2012.

30. Hanna Andersson, LLC ("Hanna") is a limited liability company formed under the laws of the State of Delaware. Its registered agent in the state is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. Hanna's principal place of business is located at 1010 NW Flanders, Portland, Oregon 97209. Hanna is a privately held company that manufactures children's clothing sold through catalogs, on-line, and a base of retail stores nation-wide. Hanna is owned by Sun Capital Partners, Inc., a private equity firm invested in more than 315 companies with combined sales of over $45 billion.

31. Houlihan's Restaurants, Inc. ("Houlihan's") is incorporated under the laws of the State of Delaware. Its registered agent in the state is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. Houlihan's principal place of business is located at 8700 State Line Road, Leawood, Kansas 66206. Houlihan's is a privately held company that owns, operates, and franchises more than 100 Houlihan's Restaurant and Bar restaurants across the mid-west and

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

east coast. Houlihan's is owned by Goldner Hawn Johnson and Morrison, a private equity firm with over $600 million in capital under management.

32. Il Fornaio (America) Corporation ("Il Fornaio") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Il Fornaio's principal place of business is 770 Tamalpais Drive, Suite 400, Corte Madera, California 94925. Il Fornaio owns and operates 21 full service Il Fornaio restaurants nation-wide. It is owned by Roark Capital Group, a private equity firm with more than $3 billion in equity capital under management.

33. Nash-Finch Company ("Nash") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Nash's principal place of business is 7600 France Avenue South, Edina, Minnesota 55435. Nash is a publicly traded company that operates as a wholesale food distributor through brands such as Pick'n Save, Family Fresh Market, and Bag'n Save grocery stores. It has annual sales of approximately $5.0 billion.

34. Netflix, Inc. ("Netflix") is incorporated under the laws of the State of Delaware. Its registered agent in the state is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. Netflix's principal place of business is 100 Winchester Circle, Los Gatos, California 95032. Netflix is a publicly traded company that provides on-demand entertainment streaming services and DVD

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

rentals by mail. Netflix is a world-wide provider of internet television, with 33 million members in 40 countries, generating over $3.6 billion in revenues in 2012.

35. Noodles & Company ("Noodles") is incorporated under the laws of the State of Delaware. Its registered agent in the state is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. Noodles' principal place of business is 520 Zang Street, Suite D, Broomfield, Colorado 80021. Noodles operates and franchises over 300 Noodles & Company restaurants nation-wide. It is owned by Catterton Partners, a private equity firm with more than $2.5 billion in equity capital under management.

36. Overstock.com, Inc. ("Overstock") is incorporated under the laws of the State of Delaware. Its registered agent in the state is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. Overstock's principal place of business is 6350 South 3000 East, Salt Lake City, Utah 84121. Overstock is a publicly traded company that operates as an online discount retailer for a diverse range of products. It reported net revenues of over $1 billion in 2012.

37. Pamida Stores Operating Co., LLC ("Pamida") is a limited liability company formed under the laws of the State of Delaware. Its registered agent in the state is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. Pamida's principal place of business is located at 700 Pilgrim Way, Green Bay, Wisconsin 54304. Pamida is a subsidiary of Shopko Stores, Inc., which is a privately held company that operates 136 discount retail stores nation-wide with annual sales exceeding $2.2 billion. Shopko is owned by Sun Capital Partners,

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Inc., a private equity firm invested in more than 315 companies with combined sales of over $45 billion.

38. Polo Ralph Lauren Corporation ("Polo") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Polo's principal place of business is 625 Madison Avenue, New York, New York 10022. Polo is a publicly traded company that designs, markets, and distributes premium apparel, home, accessories, and fragrance product lines. It reported net revenues of over $6 billion in 2012.

39. Ruth's Chris Hospitality Group, d/b/a Ruth's Chris Steak House, Inc., ("Ruth's Chris") is incorporated under the laws of the State of Delaware. Its registered agent in the state is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. Ruth's Chris principal place of business is 1030 West Canton Avenue, Suite 100, Winter Park, Florida 32789. Ruth's Chris is a publicly traded company that owns, operates, and franchises Ruth's Chris Steak House restaurants nation-wide. It reported total revenues of over $369 million in 2011.

40. Shell Oil Company, d/b/a Shell Oil Products U.S., ("Shell") is incorporated under the laws of the State of Delaware. Its registered agent in the state is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware, 19801. Shell's principal place of business is One Shell Plaza, 910 Louisiana Street, Houston, Texas 77002. Shell is a part of the Royal Dutch Shell

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

conglomeration and is a publicly traded company that, inter alia, owns and operates approximately 6000 Shell branded gasoline stations nation-wide and 8000 Shell branded gasoline stations through a 50/50 joint venture with Motiva Enterprises, LLC. Shell reported total revenues of over $470 billion in 2011.

41. Shopko Stores Operating Co., LLC ("Shopko") is a limited liability company formed under the laws of the State of Delaware. Its registered agent in the state is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. Shopko's principal place of business is located at 700 Pilgrim Way, Green Bay, Wisconsin 54304. Shopko is a privately held company that operates 136 discount retail stores nation-wide with annual sales exceeding $2.2 billion. Shopko is owned by Sun Capital Partners, Inc., a private equity firm invested in more than 315 companies with combined sales of over $45 billion.

42. Shutterfly, Inc. ("Shutterfly") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Shutterfly's principal place of business is 2800 Bridge Parkway, Redwood City, California 94065. Shutterfly is a publicly traded company that operates as a manufacturer of personalized photo and other products. Shutterfly reported total revenues of over $640 million in 2012.

43. Skechers USA, Inc. ("Skechers") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Skechers' principal

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

place of business is 228 Manhattan Beach Boulevard, Manhattan Beach, California 90266. Skechers is a publicly traded company that manufactures and distributes footwear nation-wide. Skechers reported net sales of over $1.5 billion in 2012.

44. Skip Barber Racing School, LLC, d/b/a Skip Barber Services, LLC, ("Skip Barber") is a limited liability company formed under the laws of the State of Delaware. Its registered agent in the state is National Corporate Research, Ltd., 615 South DuPont Highway, Dover, Delaware 19901. Skip Barber's principal place of business is located at 5290 Winder Highway, Braselton, Georgia 30517. Skip Barber is a privately held company that operates racing and driving schools nation-wide.

45. Sony Electronics, Inc. ("Sony") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Sony's principal place of business is 16530 Via Esprillo, San Diego, California 92127. Sony Electronics is the U.S. sales and marketing arm of Sony Corporation's global electronics business, which manufactures and distributes a comprehensive range of consumer electronics. Sony Corporation of America is a publicly traded company that reported total revenue of over $78 billion in 2012.

46. Tesoro Refining and Marketing Company, LLC ("Tesoro") is a limited liability company formed under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Tesoro's principal place of business is 19100

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Ridgewood Parkway, San Antonio, Texas 78259. Tesoro Refining and Marketing Company is a subsidiary of Tesoro Corporation which, inter alia, operates over 1,375 branded retail gas stations. Tesoro Corporation is a publicly traded company that reported total revenue of over $32 billion in 2012.

47. The Pantry, Inc. ("Pantry") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Pantry's principal place of business is 305 Gregson Drive, Cary, North Carolina 27511. Pantry owns and operates over 1500 Kangaroo Express convenience stores across the southeastern United States. It is a publicly traded company that reported over $8.2 billion in revenues in 2012.

48. Ulta Salon, Cosmetics & Fragrance, Inc. ("Ulta") is incorporated under the laws of the State of Delaware. Its registered agent in the state is The Prentice-Hall Corporation System, Inc., 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. Ulta's principal place of business is 1000 Remington Boulevard, Suite 120, Bolingbrook, Illinois 60440. Ulta is a beauty products retailer and salon that owns 550 stores and salons nation-wide. It is a publicly traded company that reported net sales of over $1.7 billion in 2012.

49. Wolverine World Wide, Inc. ("Wolverine") is incorporated under the laws of the State of Delaware. Its registered agent in the state is Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808.Wolverine's principal place of business is 9341 Courtland Drive Northeast,

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Rockford, Michigan 49351. Wolverine manufactures and distributes footwear nation-wide under several brand names, inter alia, Hush Puppies. It is a publicly traded company that reported over $1.6 billion in revenues in 2012.

50. Collectively, these defendants are referred to hereinafter as "Delaware Defendants." The evidence showing these defendants violated the Delaware Abandoned Property Law and the Delaware False Claims and Reporting Act is described below in sections for each Delaware Defendant.

E. The National Restaurant Association

51. The National Restaurant Association ("NRA") "is the largest foodservice trade association in the world – supporting nearly 500,000 restaurant businesses.... [The NRA] represent[s] and advocate[s] for foodservice industry interests with state, local and national policymakers."[2] It is headquartered at 2055 L Street Northwest, Suite 700, Washington, District of Columbia 20036. The NRA is subject to jurisdiction in Delaware Superior Court through the Delaware long arm statute, 10 Del. C. §§ 3104(a)-(c).

52. On October 25, 2007, the NRA entered into a "Royalty Services Agreement" with CardFact, Ltd. Under the agreement, the NRA agreed to assist in CardFact's marketing in exchange for a percentage of the business CardFact received from NRA members and for an "intellectual property rights" fee enabling CardFact to use NRA's name and logo in its marketing efforts. On April 30, 2010, following Card Complaint's purchase of CardFact, the NRA, through its wholly-

[2] http://www.restaurant.org/About-Us.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

owned subsidiary, the National Restaurant Association Solutions, LLC, entered into a similar agreement with CardFact Holding, Inc.

53. As part of their arrangement, the NRA ran articles promoting and vouching for the Card Services Defendants. The NRA endorsed the Card Services scheme to its clients and thus recommended participation. The Card Services Defendants, in turn, used its "partnership" with the NRA defendants as a means of identifying potential new clients, informing potential clients that the NRA had "performed thorough due diligence of CardFact."

IV. STATUTORY PROVISIONS APPLICABLE TO DEFENDANTS' DELAWARE FALSE CLAIMS AND REPORTING ACT VIOLATIONS

A. The Delaware Abandoned Property Law

54. Delaware has codified the right of the State to exercise its sovereign power to take possession and control of unclaimed or abandoned property by way of the doctrine of "escheat." Abandoned Property Law, 12 Del. C. §§ 1197, *et. seq.*

55. Pursuant to the Delaware Abandoned Property Law and the United States Supreme Court created "priority rules" among all states' escheat laws, Delaware is entitled to take possession and ownership of the type of property at issue, in this case if it has been abandoned, unclaimed, unprotected, or lost for a period of five years. Delaware is entitled to escheat such dormant property if: (1) it is located in the State of Delaware; or (2) it was owned by a person with a last known address in Delaware; or (3) its owner's identity and/or last known address is unknown and the property is being held by a business incorporated under the laws of the State of Delaware. *See* Delaware Abandoned Property Law, *id.*, at §§ 1197,

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

1198, and 1201; *see also, Delaware v. New York*, 507 U.S. 490, 498 (1993); *Texas v. New Jersey*, 379 U.S. 674, 680-682 (1965), aff'd, *Pennsylvania v. New York*, 407 U.S. 206 (1972).

56. The unclaimed property at issue – namely unused gift card funds – falls into the third category described above because it cannot be traced back to an identifiable owner and is being held by the Delaware Defendants.

57. Holders of abandoned or unclaimed property are required to file a report identifying such property with the State Escheator by March 1 of the year following the year in which such property became abandoned or unclaimed. 12 Del. C. § 1199(a). Holders are further required to deliver to the State Escheator all abandoned or unclaimed property identified in a report on or before the date such report is due. 12 Del. C. § 1201(a). If a Delaware corporation fails to file an accurate report without reasonable cause, "there shall be added to the amount of abandoned or unclaimed property required to be shown on the report 5% of the amount thereof if the failure is not for more than one month, with an additional 5% for each additional month or fraction thereof during which such failure continues, not to exceed 50% in the aggregate." 12 Del. C. § 1159(a). Beginning the date the payments were due, persons who violate the Abandoned Property Law are required to pay interest on the outstanding amounts, including penalties, at 0.5% per month. *See* 12 Del. C. § 1159(d).

58. The Abandoned Property Law defines "holder" to be any person having "possession, custody or control of the property of another person and includes a post

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

office, a depository, a bailee, a trustee, a receiver or other liquidating officer, a fiduciary, a governmental department, institution or agency, a municipal corporation and the fiscal officers thereof, a public utility, service corporation and every other legal entity incorporated or created under the laws of this State or doing business in this State." 12 Del. C. § 1198(7).

59. Under Delaware law, the use of reasonable methods of estimation is permitted in determining the liability of a holder of unclaimed property to the State. Particularly, where the records of a holder of abandoned or unclaimed property are "insufficient to permit the preparation of a report" to the State Escheator, the holder may be required to pay the amount of property that "should have been but was not reported that the State Escheator reasonably estimates to be due and owing" based on available records and any other "reasonable method of estimation." 12 Del. C. § 1155.

60. The Delaware Defendants, working with the Card Services Defendants and the National Restaurant Association, have sought to escape their obligations under the Abandoned Property Law by entering into sham contracts with the Card Services Defendants whereby the latter allegedly "hold" the unredeemed value of gift cards going back several years. As described above, generally, and as shall be explained more particularly in the sections that follow, the sham contracts fail to transform the Card Services Defendants into "holders" of the unclaimed gift card property. The Card Services Defendants never possessed, had custody of, or controlled the unclaimed property at issue. The Delaware Defendants were at all

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

times in possession, custody and control of that money. Consequently, the Delaware Defendants have always been the "holders" of the unclaimed gift card property. The Delaware Defendants have, furthermore, failed to properly report and pay any of the amounts owed to the State of Delaware in abandoned gift card property for many years.

B. The Delaware False Claims and Reporting Act

61. Under the Delaware False Claims and Reporting Act ("DFCRA"), it is unlawful to knowingly make or cause to be made false claims to the government regarding abandoned property, conspire to defraud the government, willfully conceal property that is required to be delivered to the government, or to knowingly make, use, or cause to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government. *See* 6 Del. C. § 1201.

62. Anyone found liable for violations of the DFCRA is liable for a civil penalty of not less than $5,500 and not more than $11,000 for each violation, plus three (3) times the amount of damages which the Government sustains because of such actions. *See* 6 Del. C. § 1201.

63. The Delaware Defendants have knowingly and willfully violated the DFCRA and the requirements of the Abandoned Property Law by failing to make required reports and/or making false reports to the State of Delaware to conceal, avoid, or decrease their obligation to transmit property to the State of Delaware. The Card Services Defendants and the National Restaurant Association Defendants have conspired with the Delaware Defendants in this illegal enterprise. All the

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

defendants are, therefore, in violation of the Delaware False Claims and Reporting Act.

V. SPECIFIC ALLEGATIONS OF DEFENDANTS' FALSE CLAIMS

A. CardFact's Marketing Scheme

64. CardFact identified potential clients by finding companies that sold gift cards and were incorporated in a state, such as Delaware, that defined abandoned property to include the value of unredeemed gift cards. Once CardFact identified contacts inside the companies, it would provide them with a "Business Summary," Answers to "Frequently Asked Questions," a slide show, and what CardFact called a "White Paper" entitled "Strategic Planning for Unredeemed Gift Card Legal Compliance."

65. The key selling point CardFact stressed in marketing its Card Services Agreement ("CSA") was that it would allow the Delaware Defendants to retain possession, custody, and control over the very funds CardFact was claiming to hold. CardFact told clients:

> "CardFact will not change how you run your business. Your Company can use the same vendors for processing, printing and fulfillment. Your Company *always manages the cash proceeds from gift card sales.*" (emphasis added)."
>
> "Retailer manages cash from gift card sales at all times. No change is required in gift card processor or operation of program."
>
> "Proceeds from the sale of gift cards *stay in retailer bank accounts.* The retailer also keeps the float." (emphasis supplied).
>
> "No change [is] required to [your] operations."

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

66. Thus, under CardFact's scheme, the Delaware Defendants could continue to sell gift cards and keep the money from each sale. They could issue the cards, hold the money from gift card sales, and recognize any unredeemed gift card monies as revenue. Under the scheme, despite the fact that the Delaware Defendants possessed and controlled the money they received from gift card sales, they could allegedly avoid their escheat obligations to the State of Delaware by entering into a contract that said CardFact is the "holder" of the gift card liabilities.

67. CardFact told potential clients: "One of the biggest challenges facing companies that sell gift cards is what to do with the unused value ('breakage') left on cards. These amounts are considered unclaimed property and are governed by state abandoned and unclaimed property laws."

68. The "White Paper" tells customers "there is only one sure way to comply with the unclaimed property laws of every state: make sure that neither the parent company nor any related entity is the holder with respect to unredeemed gift cards."

1. CardFact's Scheme Is Based On Accounting Gimmicks That Lack Economic Substance

69. CardFact explained its "turnkey" solution as resting on the legal concept of a "holder." CardFact told the Delaware Defendants that "State laws apply only to Holders;" that a "retailer that subscribes to CardFact is not the Holder and therefore has no state reporting requirements." One section of the marketing presentation called "What CardFact Does" states: "CardFact issues gift cards," "assumes the legal liability for unredeemed cards," and is "the holder with respect

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

to all unredeemed gift cards." The White Paper says: "Because CardFact has issued the cards and is liable to the owners for all redemptions, CardFact is the holder with respect to the unredeemed gift cards, and the retailer is not."

70. In support of its claim that clients who enter into a CSA are no longer "holders" of the unredeemed value of gift cards, CardFact quotes the 1995 Uniform Unclaimed Property Act's definition of "holder" to be "a person obligated to hold for the account of, or deliver, or pay to, the owner . . . ." CardFact claims that because it is obligated by the CSA to hold the unredeemed gift card value "none of these [abandoned property] laws would apply to the retailer, because CardFact would be the holder of the unclaimed property." Thus, by signing a CardFact contract the "retailer is in full compliance with the gift card related unclaimed property laws of every state."

71. CardFact showed Delaware Defendants how they would keep the proceeds from gift card sales by providing them with sample accounting journal entries designed to disguise the origin of the money and increase revenues. CardFact's own scheme, however, is belied by the very journal entries it proposes its clients make. The sample entries show the value of gift cards being owed to CardFact as accounts payable, with the bulk returned through trademark and handling fees. At the end of the transaction, a small fraction of the gift card sales is credited to "cash" which CardFact explains "indicates cash owed to CardFact." The sample entries then instruct Delaware Defendants to record a credit to "Contingent Gift Card Liability" and a debit to "Other Income – Gift Card Breakage" that

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

"[r]ecords contingent liability for unredeemed gift cards [which is the] [v]alue of unredeemed cards sold during the accounting period that Company expects will someday be redeemed."

72. In other words, CardFact instructed its clients and prospective clients to increase their liabilities by setting up a reserve for unredeemed gift card funds they expect will be redeemed in the future, even though these are the very liabilities CardFact is supposedly assuming through the CSA. Clients and prospective clients are then instructed to set up another reserve with a credit to "Contingent Gift Card Liability" and a debit to "Other Income – Gift Card Breakage" that "[s]ets up a reserve based on a 24-month wait before presumption of abandonment." This reserve is unredeemed gift card funds the clients will recognize as income after 24 months. After 24 months, converse accounting entries are made that record the reserve fund as "Other Income – Gift Card Breakage," which allows the Delaware Defendants to recognize unredeemed gift card funds as revenue after only two years.

73. The reserve funds for unredeemed gift cards created and retained by the Delaware Defendants are the very funds CardFact is supposedly assuming under the CSA. CardFact's own hypothetical sample journal entries show that, in reality, the payment made to CardFact for running the scheme is only a small fraction of yearly unredeemed gift card funds. In the sample entries only $50,517 is actually paid to CardFact as a "fee," while the bulk is retained by Delaware

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Defendants in reserve funds for future redemptions or future recognition as income – in the sample entries $2,369,000 and $1,184,500 respectively.

74. CardFact's sample journal entries confirm that it and its clients are engaging in accounting artifices that disguise the true nature of its scheme: to cheat the State of Delaware. CardFact and the Delaware Defendants attempt to mask their deceit by including in the CSA a provision stating that "all calculations of amounts owed by CardFact and [Delaware Defendants] . . . will be made in accordance with generally accepted accounting principles as applied in [Delaware Defendant's] financial statements." As required by GAAP, accounting entries must faithfully reflect the facts or conditions they purport to represent.[3] Accounting entries that do not faithfully reflect the facts they purport to represent are unreliable and violate GAAP principles.[4]

75. The CSAs' declaration that CardFact "holds" the Delaware Defendants' unclaimed gift card property is not binding on the State. Courts look to the substance of transactions when determining liabilities to the State. *See Commissioner v. Court Holding Co.*, 324 U.S. 331, 334 (1945) ("The incidence of

---

[3] In the underlying principles of GAAP, this is referred to as the principles of "reliability" and "representational faithfulness." *See* Financial Accounting Standards Board, Statement of Financial Accounting Concepts No. 2, As Amended, ¶¶ 58-63 (1980). ("The reliability of a measure rests on the faithfulness with which it represents what it purports to represent, coupled with an assurance for the user, which comes through verification, that it has that representational quality.... Representational faithfulness is correspondence or agreement between a measure or description and the phenomenon it purports to represent.")

[4] *Id.*; The American Institute of Certified Public Accountants Code of Professional Conduct prohibits members from expressing an opinion or stating affirmatively that financial statements or other financial data "present fairly ... in conformity with generally accepted accounting principles" if that information contains any departures from accounting principles promulgated by, *inter alia*, the Financial Accounting Standards Board. *See* American Institute of Certified Public Accountants, Code of Professional Conduct, Rule 203.01 (1988).

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

taxation depends upon the substance of a transaction. ... To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress."); *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280, n.31 (Del. 2007) ("In the area of tax law, courts have enunciated various doctrines such as step transaction, business purpose, and substance over form, all of which allow the substantive realities of a transaction to determine the tax consequences."); *Ford Motor Co. v. Dir. of Revenue*, 963 A.2d 115, 123 (Del. 2008); *Coughlan v. NXP b.v.*, 2011 Del. Ch. LEXIS 166, 25-27 (Del. Ch. Nov. 4, 2011) ("transactional formalities will not blind the court to what truly occurred. Indeed, it is the very nature of equity to look beyond form to the substance of an arrangement.") (internal quotation omitted); *Carpenter v. State Tax Comm'r*, 58 Del. 425, 428 (Del. 1965).

76. The parties' chosen form does not bind the State. The law looks to the economic substance of the transaction. Here, the purpose and substance of the CSAs was for the Delaware Defendants to keep possession, custody and control of the money from the sales of gift cards. CardFact never paid the Delaware Defendants when gift cards were redeemed. CardFact received only a nominal fee for allegedly assuming the obligation to "hold" millions in so-called "historical liability." And when the CSAs are terminated, these millions are transferred back to the Delaware Defendants without any consideration.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

2. CardFact Distributes A Legal Opinion To Promote The Legality Of Its Scheme

77. In an effort to provide potential clients with comfort – or perhaps just a plausible rationale for the scheme – CardFact claimed that some of the best lawyers in the country had looked into their arrangement and found it to be a legal and effective way of avoiding abandoned property laws. The Frequently Asked Questions slide from CardFact's marketing presentation says: "We can share the opinion letter of CardFact's outside counsel, Baker & Hostetler, one of the top 75 law firms in the country, which attests to the legality and efficacy of [CardFact's] service. Additionally, CardFact clients have engaged some of the other top law firms in the country and all of them have reached the same favorable conclusion."

78. Yet, the Baker Hostetler letter does not support the actual scheme carried out by the Defendants herein. Curiously, although the opinion letter assumes that CardFact's clients are domiciled in Delaware, Baker Hostetler acknowledges that it conducted no research of and did not consider Delaware law in forming its opinion. In describing the scope of its work in arriving at its legal opinion, Baker Hostetler says:

> [W]e have made such investigations of such matters of law as we deemed appropriate as a basis for the opinions expressed below including applicable United States Supreme Court decisions. In this regard, there are no Ohio court cases, administrative opinions or administrative rules that address or implicate the application of unclaimed property law to a fact pattern similar to that of the Program or Alternative Program. Further, we have not researched, nor have we been asked to research, whether other states' court cases, statutes, administrative opinions or rules may apply to the Program or Alternative Program.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

B. The CardFact Contracts

79. Although they were revised slightly over the years, and sometimes modified to accommodate individual clients, the Card Services Agreements ("CSAs") entered into by the Delaware Defendants are similar. The preamble to the CSAs creates the false appearance that CardFact was in the business of manufacturing, marketing and selling gift cards. It states that CardFact is "engaged in the business of issuing and marketing stored value devices and providing certain services related to the tracking, design, manufacture and use of such Cards . . . ." The CSAs describe CardFact's clients as though they were new to the gift card business. It states: "[Client], in order to obtain the additional sales of merchandise and/or services, which a card program may provide, desires to provide for its customers the opportunity to purchase Cards issued and sold by CardFact . . . ."

80. The CSAs make it appear that CardFact has a duty to "manufacture and deliver" the Cards to its clients and third-parties who sell the cards. The CSAs state: "CardFact shall manufacture and deliver, or shall instruct, or may authorize [Client] to directly instruct applicable third-party manufacturers of the Cards to manufacture and deliver, the Cards pursuant to the Orders." The CSAs also make it appear that CardFact markets the gift cards: "[Client] agrees to permit CardFact to market the cards in [Client's] stores and otherwise related venues with the consent of the [Client] (including discount-priced 'block sales' and discount-priced or free promotional issuances approved by [Client]) and CardFact agrees to . . . so market, the Cards . . . ."

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

81. As the marketing materials make clear, however, CardFact's clients were identified precisely because they were already in the business of ordering, marketing, and selling gift cards. CardFact persuaded them to enter into the CSAs on the promise that they would not have to change anything about the way they ran their gift card programs. To the extent CardFact had any involvement in the manufacture of gift cards, its involvement was confined to ensuring that its name was mentioned on the card, or assisting the client in ordering the cards from third-parties. CardFact was never involved in marketing or selling gift cards. While some CSAs provide that the client would pay CardFact a yearly "marketing fee," this fee was merely a guise used to compensate CardFact for operating its illegal scheme.

1. The CSAs Purport To Make CardFact The Holder Of All Liabilities And Issuer Of All Cards

82. The CSAs say that CardFact is the "issuer" of the cards and the "holder" of the value of any unredeemed cards. The CSAs state: "All Cards shall clearly state that CardFact is the issuer of the Card . . . ." The CSAs state: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards, and obligated to satisfy the debts represented by said Cards. It is the intention of the Parties that CardFact is the holder of any unclaimed property with respect to Cards issued during the Term of this Agreement and any now existing Cards issued prior to the date of this Agreement with respect to which no statutory dormancy period has run." These representations are false.

83. The reason the CSAs required that the cards state that they were "issued by CardFact" was to make it appear there was an agreement between the

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

card purchaser and CardFact that CardFact, not the Delaware Defendants, was obliged to redeem the value of the card. Despite this provision in the CSAs, the unredeemed cards for which CardFact was allegedly assuming the liability, more often than not, made no mention of CardFact.

84. As part of its services, CardFact would purportedly assume the obligation to hold the value of unredeemed gift cards previously issued by the Delaware Defendants. The CSAs generally defined the "Cards" for which CardFact would assume the obligation to "hold" the unredeemed value to be gift cards sold about five years before the effective date of the contract. CardFact assumed this so-called "historical liability" without inquiring as to its extent and at no cost to the Delaware Defendants.

85. The CSAs also contained indemnification provisions regarding the parties' duties in the event that a state made a claim for the unredeemed value of gift cards pursuant to abandoned property laws. The typical agreement informed clients that if a state pursued them under an abandoned property law, they were on their own. Occasionally, however, CardFact would agree to modify these terms to satisfy an important customer. For instance, in the case of Tesoro Marketing and Refining, CardFact agreed that if there were a judgment against Tesoro under any unclaimed property laws, CardFact would return any fees Tesoro had paid to CardFact, pay the penalty assessed against Tesoro, and pay one-half of Tesoro's legal costs. CardFact's variously numbered entities agreed to these indemnity

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

provisions even though they were uninsured for such claims and never possessed even a fraction of the assets necessary to make good on such promises.

86. Although CardFact was purportedly holding several million dollars in unclaimed gift cards, at the termination of the contract, all CardFact's liabilities would transfer to the Delaware Defendants without the exchange of any money. Every contract provides: "Upon Termination of this Agreement by either party, Company [i.e., the Delaware Defendants] shall assume the liability to the Cardholders for all unredeemed Cards and, except for Company assuming the liability for all unredeemed Cards, neither party shall have any further obligations . . . ." CardFact would, however, retain the unclaimed value "in perpetuity" for an additional fee.

87. None of the previously issued cards stated that CardFact issued them. Even on a going-forward basis, some clients balked at putting CardFact's name on the back of the cards, and others did not put CardFact's name on their cards until several years after they entered into the CSAs. Moreover, CardFact (and later Card Compliant) assigned its obligations under the CSAs to other CardFact (or Card Compliant) entities, and so even when the cards mention CardFact, they often did not indicate the proper CardFact entity.

88. When the Delaware Defendants agreed to the CSAs, they were occasionally charged a one-time set-up fee of up to $10,000. The only money that thereafter would change hands between CardFact and the Delaware Defendants was CardFact's annual fee, usually paid in monthly installments. That fee was

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

designed to be about one percent of the companies' annual gift card sales, determined by a formula based on the amount of gift cards sold and redeemed in a given year.

89. The formula CardFact initially used to calculate its fee assumed that there would always be more card purchases than cards redeemed. This assumption turned out to be mistaken in a couple of cases. As a result, under the formulas in the CSAs, CardFact would end up owing the Delaware Defendants money at the end of the year. When that happened, however, the parties would simply ignore the formula or CardFact would issue a "credit memo" that could be used to offset its fees the following year. CardFact then revised the contracts to address this issue of "excess redemptions" so that CardFact would always be entitled to a fee.

90. Rather than receiving money when gift cards are purchased and remitting money when the cards are redeemed, as one might expect if CardFact were actually issuing the cards and holding the money from those sales, the Card Services and Delaware Defendants would engage in what the parties ironically referred to as yearly "true-ups." Such "true-ups" consisted of the Delaware corporations reporting their total sales and redemptions of gift cards for the year, as well as their costs in producing the plastic cards. CardFact did no due diligence to confirm the accuracy of the Delaware Defendants reports. In some cases, the amounts of gift card sales the Delaware Defendants reported to CardFact were significantly different than the amounts they reported in filings with the SEC. Some clients even inflated their "reimbursable card costs" to reduce the amount

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

they would have to pay CardFact, prompting CardFact to require more paperwork to support such claims.

91. After receiving the Delaware Defendants' reports on the cards sold and redeemed, CardFact prepared invoices showing the value of all the gift cards sold, the amounts redeemed, and the value of any unredeemed cards as "handling" and "trademark licensing" fees owed to the Delaware Defendants. Thus the total bill owed by, and actually paid by, the Delaware Defendants is CardFact's nominal fee. In some cases clients issued CardFact 1099-MISC forms indicating that their payments under the contract were for "non-employee compensation" or "rents."

92. In contrast, had CardFact operated its scheme as if it truly were the "holder" of the unredeemed gift cards, CardFact would have received and held all the money from yearly gift card sales from its client. CardFact then would use that money to reimburse the client for any gift card redemptions honored by the client each year. Any unused gift card funds would be held by CardFact in its own accounts for the entirety of the dormancy period required by state law until it is considered abandoned. This is not what the Card Services Defendants and the Delaware Defendants are doing.

93. Despite the CSAs statements that CardFact is the holder of the unredeemed value of gift cards, CardFact never has possession, custody, or control over that money. As CardFact's bank records show, despite allegedly holding millions in unredeemed gift cards from 2007 through 2009, both CardFact and Card Compliant possessed little or no assets. Moreover, unbeknownst to the Delaware

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Defendants, CardFact assigned its obligation to hold the value of unredeemed cards under the CSAs to a Cayman Island company – the Factoring Company –owned by CardFact's owner. Any assets on CardFact's books that were not required for the daily operations were regularly transferred to the Factoring Company under assignment agreements.

94. The CSAs, credit memos, invoices and yearly "true ups," and related documents created and used by CardFact, Card Compliant, and each of the Delaware Defendants constitute a false record made or used by the Defendants to avoid or conceal their escheat obligations to the State of Delaware. Each such document was designed to disguise the actual nature of the Defendants' scheme and conceal the actual holders of unclaimed gift card funds.

C. Card Compliant Purchases CardFact

95. On September 1, 2009, CardFact assigned its title and interest to all its assets and liabilities to CardFact 25, Inc., a Florida corporation. Thereafter, CardFact 25 assumed the rights and responsibilities of CardFact under the CSAs with the Delaware Defendants. CardFact 25 then assigned its rights and obligations under the CSAs to several Florida shell corporations, obtaining the consent of the Delaware Defendants for this assignment sometime thereafter.

96. After the assignment of rights to CardFact 25, CardFact Ltd. changed its name to Vacation Properties United, Ltd., to be used in future business endeavors by CardFact's original owners. Vacation Properties United, Ltd. continues to exist today.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

97. Card Compliant, in addition to assuming the rights and duties of CardFact with respect to CardFact's then-existing customers, adapted the CardFact model to attract additional clients. In some of these agreements, Card Compliant assumed the so-called "historical portfolio" of unredeemed cards dating back several years and that are presently subject to escheat.

D. Defendants Complicit In CardFact's Scheme

1. Ruth's Chris Hospitality Group

98. Ruth's Chris Hospitality Group, d/b/a Ruth's Chris Steak House, Inc., ("Ruth's Chris") is a publicly traded company that owns, operates, and franchises Ruth's Chris Steak House restaurants nation-wide.

99. Ruth's Chris began selling gift cards in 1996 or 1997. On information and belief, Ruth's Chris never accurately reported the value of unclaimed property it held in the form of unredeemed gift cards to the State of Delaware.

100. Ruth's Chris reported in its 2004 10-K, that it sold $26.3 million in gift cards in 2004, and $22.21 million in 2003. In that same 10-K, Ruth's Chris reported $1,187,000 in deferred revenue for 2002, $936,000 for 2003, and $2,696,000 in 2004, and stated that "[d]eferred revenue primarily represents the Company's liability for gift cards that have been sold but not redeemed . . . ."

101. On December 26, 2005, Ruth's Chris, on behalf of all its wholly-owned subsidiaries, entered into a Card Services Agreement ("CSA") with CardFact, Ltd. Thomas J. Pennison, Jr., Ruth's Chris CFO and Senior VP signed the contract.

102. Under the contract, CardFact, Ltd. purported to assume liability for the value of all unredeemed Ruth's Chris "gift certificates or cards, merchandise

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

return cards and similar cards, coupons or items" sold between January 1, 2001 and December 25, 2005 ("historical liability"), and to become the "issuer" of Ruth's Chris gift cards going forward. The contract stated: "CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the holder of any unclaimed property with respect to any now existing Cards or Cards issued during the term of this Agreement."

103. CardFact did not inquire about the amount of historical liability, and Ruth's Chris paid CardFact nothing for allegedly assuming such liability. Ruth's Chris merely paid CardFact its customary $10,000 set-up fee.

104. On January 1, 2008, CFO Robert M. Vincent agreed to amend the CSA to change the definition of "aggregate card redemptions" and add an "excess card redemptions" clause so that CardFact would never be required to pay Ruth's Chris if there was ever a year where more cards were redeemed than purchased.

105. On October 22, 2008, CardFact, Ltd. assigned its liabilities for Ruth's Chris gift cards to its subsidiary CardFact VII, Ltd. On December 23, 2008, Ruth's Chris later consented to that assignment. On September 1, 2009, CardFact VII, Ltd. assigned all its accounts to CardFact 25, Inc., which is a holding company set up by Card Compliant to assist in the sale of CardFact to Card Compliant. Card Compliant later assigned its liabilities for Ruth's Chris gift cards from CardFact 25, Inc. to CardFact VII, Inc.

106. Customers who purchased Ruth's Chris gift cards between 2001 and 2005 would not know that CardFact was supposedly holding the unredeemed value

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

of Ruth's Chris gift cards because none of those cards mentioned CardFact. The same is true for Ruth's Chris gift cards sold in 2006, 2007 and much of 2008; Ruth's Chris gift cards did not begin to mention CardFact as the "issuer" of cards until sometime in mid-2008. The backs of the gift cards sold by Ruth's Chris after mid-2008 state "[t]his card is issued by and represents an obligation of CardFact, Ltd."

107. CardFact was never in a position to satisfy any of the obligations for the Ruth's Chris gift cards it "issued." Ruth's Chris's 10-K filings show that CardFact never "held" any unredeemed gift card funds, and that Ruth's Chris swept unredeemed gift cards into its income. In its 2008 Form 10-K, Ruth's Chris expressly states that it recognizes unredeemed gift card balances as "other operating income" after only 18 months:

> *Other Operating Income.* Other operating income includes banquet related guarantee and services revenue and other incidental guest fees as well as other licensing fees and income and discounts associated with the sale of gift cards. While we always honor gift cards ... our historical experience has shown that very few cards are redeemed after 18 months following the issue date. As such, we record in other operating income the full remaining value (original issue less any partial redemptions) of any gift cards unredeemed after 18 months from the date of last activity....

In its description of its revenue recognition policies, Ruth's Chris nowhere states that it remits funds from gift card sales to CardFact or any other third party, which, in fact, it did not. Rather, Ruth's Chris states that it recognizes the sale of gift cards as a liability in deferred revenue, and after 18 months recognizes unredeemed funds as "other operating income."

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

> Deferred revenue primarily represents the Company's liability for gift cards that have been sold but not yet redeemed, and is recorded at the expected redemption value.... The expected redemption value of the gift cards represents the full value of all gift cards issued less the amount the Company has recognized as other operating income for gift cards that are not expected to be redeemed. The Company recognizes as other operating income the remaining value of gift cards that have not been redeemed 18 months following the last date of card activity....

Ruth's Chris mentions no policies for unclaimed property, nor that it has any responsibility to the state of Delaware for escheating the balance of unredeemed gift cards.[5]

108. Beginning in 2006, Ruth's Chris sent reports to CardFact detailing the dollar value of the gift cards it sold and redeemed.

109. CardFact's 2006 invoice shows Ruth's Chris had aggregate card issues of $24,151,145 and redemptions of $17,598,370, leaving $6,552,775 unredeemed. For the year 2006, Ruth's Chris paid CardFact only $68,976.[6]

110. CardFact's 2007 invoice shows Ruth's Chris had aggregate card issues of $26,677,134 and redemptions of $21,669,527, leaving $5,007,607 unredeemed. For the year 2007, Ruth's Chris paid CardFact only $71,927.[7]

---

[5] There appears to be an inconsistency between Ruth's Chris' accounting as reported in the 10-Ks and the Card Services Agreement ("CSA"). Under the CSA, Ruth's Chris should have no unredeemed value to report as "other income" as the contract provides that this money is returned to Ruth's Chris in the form of Trademark Licensing and Handling fees.

[6] Ruth's Chris may have under-reported its gift card sales to CardFact. In its 2006 10-K filed with the SEC, Ruth's Hospitality Group reported that it sold $36.2 million in gift cards during 2006 – almost 50% more than it had reported to CardFact.

[7] Ruth's Chris' 2007 10-K states that it sold $36.4 million in gift cards during 2007 – almost $10 million more than it had reported to CardFact.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

111. CardFact's 2008 invoice shows Ruth's Chris had $31,707,900 in gift card sales and $25,466,155 in card redemptions, leaving $6,241,745 unredeemed. For the year 2008, Ruth's Chris paid CardFact only $76,958.

112. Ruth's Chris informed Card Compliant that its total unredeemed card balance as of 2008 was $36,088,111.89. Given that Ruth's Chris reported to CardFact that it had $6,241,745 in unredeemed cards for the year 2008, it is estimated that Ruth's Chris holds approximately $29,846,366.89 in abandoned gift cards issued from the inception of its gift card program through the year 2007. Under the Abandoned Property Law, this amount of unredeemed abandoned gift cards is presently owed to the State of Delaware. Some cards may have been redeemed after Ruth's Chris 2008 report to CardFact. But Ruth's Chris itself acknowledged that gift cards are rarely redeemed after 18 months. So, the unredeemed amount reported to CardFact in 2008 should not have changed appreciably by 2013. Ruth's Chris continues to amass unclaimed property that it will be required to report in future years. Ruth's Chris reported to Card Compliant that it had a total of $42,920,836 in unredeemed gift cards at the end of 2010.

113. In its 2008 Form 10-K, Ruth's Chris stated it had approximately $38.8 million in total gift card sales for the year; in its 2010 Form 10-K, Ruth's Chris stated it recognized $3.7 million as other operating income for the year (18 months after the sale of the gift cards in 2008). At no point between the years 2008 to 2010 did Ruth's Chris remit $38.8 million to CardFact, nor even the $3.7 million that was still unredeemed after 18 months. In its 2008 invoice to Ruth's Chris, CardFact

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

requested $76,958 as its fee. This itemized invoice expressly states that CardFact's fee is calculated as aggregate card issues less aggregate card redemptions, reimbursable card costs, trademark license fee, and a handling fee.[8] Ultimately, Ruth's Chris paid CardFact only $76,958 to "hold" several million dollars in gift cards.

114. CardFact's banking records confirm that Ruth's Chris never remitted funds from gift card sales to CardFact. CardFact's bank statements from January 2008 to December 2009 show the highest balance to be about $250,000. Further, after CardFact, Ltd. assigned its liabilities for Ruth's Chris gift cards to CardFact VII, Ltd., the bank account for CardFact VII never held a balance higher than $6,642. These amounts were supposed to satisfy CardFact's multi-million dollar obligations to Ruth's Chris's and numerous other clients' customers.

115. Relator estimates that Ruth's Chris presently holds almost $50 million in unredeemed gift cards. Approximately $30 million of that amount is "abandoned or unclaimed property" that Ruth's Chris should have already reported and transferred to Delaware. See 12 Del. C. §§ 1198(7)-(9). Because Ruth's Chris has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for more than a decade, it is also required to pay interest on the property from the year it became due and a penalty of up to 50% of the value of the abandoned property. See 12 Del. C. §§ 1159(a), (d). Moreover, because Ruth's Chris has for years knowingly failed to file accurate reports regarding its abandoned

[8] Ruth's Chris appears to have misreported its gift card sales and redemptions to CardFact as Ruth's Chris reported that its 2008 aggregate card issues were $31,707,900, and the aggregate card redemptions were $25,466,155.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

property, it is in violation of and subject to penalties under the False Claims and Reporting Act.

2. Polo Ralph Lauren Corporation

116. Polo Ralph Lauren Corporation ("Polo") is a publicly traded company that designs, markets, and distributes premium apparel, home, accessories, and fragrance product lines.

117. Polo entered into a CSA with CardFact, Ltd. on December 31, 2006. Robert Madore, Senior Vice President and CFO of Polo Retail Group signed the contract.

118. Under the contract, CardFact, Ltd. agreed to assume liability for the value of all unredeemed "gift certificates or cards, merchandise return cards and similar cards, coupons or items" Polo sold after January 1, 2001 and to be the "issuer" of Polo gift cards going forward. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards, and obligated to satisfy the debts represented by said Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to Cards issued during the Term of this Agreement and any now existing cards issued prior to the date of this Agreement . . . ."

119. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Polo paid CardFact nothing for allegedly assuming this liability. Polo paid no set-up fee and agreed to make estimated payments of $4,500 per month.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

120. After the sale of CardFact to Card Compliant, CardFact, Ltd. assigned its liabilities for Polo gift cards to CardFact 25, Inc.

121. Customers who purchased Polo gift cards would not know that CardFact was the issuer of the card and supposedly holding the liability for those cards. Gift cards issued in 2011 by Polo still listed Polo as the issuer of the card and made no mention of CardFact or any of its numbered subsidiaries or entities.

122. CardFact's internal accounting records show that in 2006, Polo reported gift card sales of $20,309,314 and redemptions of $17,084,942, leaving $3,224,372 unclaimed. For the year 2006, Polo paid CardFact only $63,213.

123. In 2007, Polo reported gift card sales of $30,042,875 and redemptions of $20,920,992, leaving $9,121,883 unclaimed. For the year 2007, Polo paid CardFact only $77,293.

124. In 2008, Polo reported gift card sales of $29,080,835 and redemptions of $21,475,045, leaving $7,605,790 unclaimed. For the year 2008, Polo paid CardFact only $74,331.

125. Polo's annual 10-K statements state that it retains the money from gift card sales. Polo's 2008 form 10-K states that it recognizes revenue from unredeemed gift cards "when the likelihood of a gift card being redeemed by a customer is remote."

126. Lee Jurgens, Polo's Director of Sales and Cash Audit reported that as of January 2011, it held a total of $15.6 million in unredeemed gift cards.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

127. Based on Relator's experience in the gift card industry and his knowledge of Polo's gift card operations, Relator estimates that, in fact, Polo presently holds $20 million to $30 million in unredeemed gift cards that are "abandoned or unclaimed property" that Polo should have already reported and transferred to Delaware. Because Polo has failed to file an accurate report to the Delaware Escheator, without reasonable cause, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Polo's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

3. Shell Oil Company

128. Shell Oil Company, d/b/a Shell Oil Products U.S., ("Shell") is a part of the Royal Dutch Shell conglomeration and is a publicly traded company that, *inter alia*, owns and operates approximately 6000 Shell branded gasoline stations nation-wide and 8000 Shell branded gasoline stations through a 50/50 joint venture with Motiva Enterprises, LLC.

129. Shell started its gift card program in 1994 or 1995. Shell initially charged fees if the gift cards were not used within a certain time but later changed that practice.

130. On January 1, 2007, Shell Oil Products US "on behalf of itself and Motiva Enterprises LLC" (referred to collectively as "Shell") entered into a standard CSA with CardFact. Tim Finnerty, Shell's North America Payment & Loyalty

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Purchasing Manager and Kevin Ilges, Shell's Director of U.S. Social Responsibility & Business Support, signed the contract.

131. According to the CSA, CardFact, Ltd. agreed to assume liability for the value of all unredeemed "gift certificates, gift cards, merchandise return cards, and similar cards or items" Shell sold on or after January 1, 2002, and going forward. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all Unredeemed Value on Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing cards transferred to CardFact or Cards issued during the Term of this Agreement."

132. As part of its fee, CardFact agreed to manufacture and deliver the cards, though it also permitted Shell to do this on its own.

133. At some point after Shell entered into the 2007 CSA, it began issuing gift cards stating they are "issued by CardFact, Ltd."

134. CardFact did not inquire about the extent of the historical liability it was purportedly assuming when it entered into the CSA, and Shell paid CardFact nothing for allegedly assuming that liability. Shell paid a $10,000 set-up fee and agreed to make estimated payments of $156,000 annually, in quarterly installments.

135. In the summer of 2011, Shell reported to Card Compliant that it had more than $10 million in unredeemed gift cards from the period between 2002 and 2006.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

136. In 2007, Shell reported to CardFact that it sold $198,012,503 in gift cards and redeemed $192,027,415, leaving almost $6 million unclaimed. For the year 2007, Shell paid CardFact only $155,260.

137. In 2008, Shell sold $308,059,789 in gift cards, and redeemed $280,979,847, leaving more than $27 million unclaimed. For the year 2008, Shell paid CardFact only $237,795.

138. On May 1, 2008, Tim Finnerty, on behalf of Shell, agreed to modifications of certain definitions in the CSA.

139. Following Card Compliant's purchase of CardFact in September 2009, Shell agreed to an assignment of the obligations under the CSA from CardFact, Ltd. to CardFact 25, Inc. On January 1, 2010, Shell entered into Amendment No. 2 to the CSA, which acknowledged that the alleged holder of Shell's unclaimed gift card value was changed from CardFact, Ltd. to CardFact 25, Inc. and the governing law changed from Ohio to Florida. Despite the fact that CardFact, Ltd. was no longer responsible for the unredeemed value of Shell gift cards, Shell's gift cards continue to state that they are issued by CardFact, Ltd.

140. On July 26, 2011, Mark Theobald, through information provided by Richard Golightly, wrote that Shell had over $24.5 million in unredeemed gift cards between 2004 and 2008, as follows: 2004: $3,056,602.92; 2005: $2,296,934.17; 2006: $4,739,513.67; 2007: $4,808,969.72; 2008: $9,725,201.25.

141. Based on Relator's experience in the gift card industry and his knowledge of Shell's gift card operations, Relator estimates that, in fact, Shell

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

presently holds about $15 million in unredeemed gift cards that are "abandoned or unclaimed property" that Shell should have already reported and transferred to Delaware. Because Shell has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for more than a decade it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Shell's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

4. **Homeaway.com, Inc.**

142. Homeaway.com, Inc. ("Homeaway") purchased its competitor, BedandBreakfast.com, in 2010 and continues to operate it today. Homeaway is a publicly held company that operates an online marketplace for vacation rentals in 171 countries.

143. BedandBreakfast.com entered into a CSA with CardFact, Ltd. on January 1, 2005. John Banczak, Vice President of Corporate Development, signed the contract.

144. Under the contract, CardFact, Ltd. agreed to assume liability for the value of all unredeemed BedandBreakfast.com gift cards or similar items sold after January 1, 2000, and to be the "issuer" of BedandBreakfast.com gift cards going forward. CardFact did not inquire as to the amount of the "historical liability" it was assuming, and received nothing from BedandBreakfast.com in exchange for taking on such liabilities. CardFact received only a $7,500 set-up fee.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

145. The contract stated: "CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now-existing Cards or Cards issued during the Term of this Agreement."

146. BedandBreakfast.com later consented to CardFact, Ltd. assigning its liabilities to CardFact XII, Ltd. After the sale of CardFact to Card Compliant, CardFact XII, Ltd. assigned its liabilities to CardFact 25, Inc. CardFact 25, Inc. later assigned its liabilities to CardFact XII, Inc.

147. Homeaway's public filings show that it recognizes the balances of unredeemed gift cards as revenue. In its 2011 10-K, Homeaway states that:

> There is a portion of the gift card obligation that, based on historical redemption patterns, will never be used or required to be remitted to relevant jurisdictions, or breakage. At the point of sale, we recognize breakage as deferred income and amortize that over 48 months based on historical redemption patterns.

148. CardFact's internal accounting records show that in 2005, BedandBreakfast.com reported to CardFact gift card sales of $1,430,275 and redemptions of $704,043, leaving a difference of $726,232. But BedandBreakfast.com paid CardFact only $20,900.

149. In 2006, BedandBreakfast.com had gift card sales of $4,330,680 and redemptions of $1,108,254, leaving a difference of $3,222,426, but paid CardFact only $20,900.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

150. In 2007, BedandBreakfast.com had gift card sales of $7,667,134 and redemptions of $2,254,714, leaving a difference of $5,412,420, but paid CardFact only $29,320.

151. In 2008, BedandBreakfast.com had gift card sales of $4,618,314 and redemptions of $3,839,232, leaving a difference of $779,082, but paid CardFact only $37,642. None of the balances for unredeemed gift cards were ever given to CardFact or Card Compliant.

152. BedandBreakfast.com has been issuing gift cards since at least 2005, but has never accurately reported or paid to the Delaware Escheator the value of abandoned gift cards.

153. Based on Relator's records, Homeaway has approximately $7 million to $10 million in abandoned gift cards it is presently obligated to report and transfer to Delaware. Because Homeaway has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for at least two years, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d).Moreover, because Homeaway has knowingly failed to file accurate reports regarding its abandoned property for at least two years, it is in violation of and subject to penalties under the False Claims and Reporting Act.

5. Apple American Group, LLC

154. Apple American Group, LLC. ("Applebee's") owns and operates more than 400 Applebee's Neighborhood Grill and Bars. It is America's largest Applebee's Neighborhood Grill and Bar franchisee.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

155. Applebee's entered into a CSA with CardFact, Ltd. on June 1, 2006. Applebee's Executive Vice President, Lorin Cortina, signed the CSA. Under the contract, CardFact, Ltd. agreed to assume liability for all unredeemed Applebee's "gift certificates or cards, merchandise return cards and similar cards, coupons or items" sold after January 1, 2002 and become the "issuer" of Applebee's gift cards going forward.

156. The contract stated: "CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the holder of any unclaimed property with respect to any now existing Cards or Cards issued during the Term of this Agreement."

157. Customers who purchased Applebee's gift cards between 2001 and 2011 would not know that CardFact was supposedly holding the unredeemed value of Applebee's gift cards because none of those cards mentioned CardFact.

158. CardFact did not inquire about the amount of unredeemed cards for which it was becoming liable, and Applebee's paid CardFact nothing for allegedly assuming such liability. CardFact even waived its customary $10,000 set-up fee.

159. On April 24, 2008, CardFact amended the CSA with Applebee's to change the definition of "aggregate card redemptions" and add an "excess card redemptions" clause so that CardFact would never be required to pay Applebee's if there was ever a year where more cards were redeemed than purchased.

160. On October 28, 2008, CardFact, Ltd. assigned its liabilities for Applebee's gift cards to its subsidiary CardFact XIV, Ltd. After the sale of CardFact

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

to Card Compliant, CardFact XIV, Ltd. assigned its liabilities to CardFact 25, Inc. Card Compliant later assigned its liabilities for Applebee's gift cards from CardFact 25, Inc. to CardFact XIV, Inc.

161. In a July 25, 2011 email chain between Relator French and Kelly Wyatt, the accounting operations supervisor at Applebee's, Applebee's reported to CardFact that it had approximately $13 million in unredeemed gift cards after 2002. When asked by Relator French what Applebee's policy is on escheating unredeemed gift card balances, Ms. Kelly responded: "Prior to CardFacts [sic], we did not do anything with escheat for gift cards."

162. CardFact's internal accounting records show that in 2006 Applebee's began paying CardFact a monthly fee of $3,580. Similar payments of $3,217 and $3,305 were made each month in 2007 and 2008 respectively.

163. In 2006, Applebee's reported to CardFact gift card sales of $9,067,180 and redemptions of $6,046,577, leaving $3,020,603 unclaimed. Rather than remitting to CardFact the proceeds relating to unredeemed gift cards, Applebee's retained those funds for itself by "charging" CardFact a series of phony fees purportedly related to CardFact's services. Specifically, in 2006, Applebee's charged CardFact a $122,677 "Card Manufacturing Fee," a $2,613,251 "Trademark Fee," a $239,256 "Handling Fee," a $6,812 "2006 15% Discount," and a $17,127 "2006 One-Time Discount." Ultimately, Applebee's paid CardFact a mere $21,480 for the year 2006, keeping for itself the more than $3 million in proceeds relating to unredeemed gift cards.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

164. In 2007, Applebee's reported to CardFact gift card sales of $9,560,686 and redemptions of $9,350,370, leaving $210,316 unclaimed. For the year 2007, Applebee's paid CardFact only $35,750.

165. In 2008, Applebee's reported to CardFact gift card sales of $9,219,018 and redemptions of $8,147,409, leaving $1,071,609 unclaimed. For the year 2008, Applebee's paid CardFact only $36,179.

166. CardFact's internal accounting records further show that after the assignment of Applebee's liabilities from CardFact, Ltd. to CardFact XIV, Ltd., the bank account for CardFact XIV never held a balance higher than $7,168 in 2009.

167. Based on Relator's experience in the gift card industry and his knowledge of Applebee's gift card operations, Relator estimates that, in fact, Applebee's presently holds almost $10 million in unredeemed gift cards. Approximately $5 to 7 million of that amount is "abandoned or unclaimed property" that Applebee's should have already reported and transferred to Delaware. *See* 12 Del. C. §§ 1198(7)-(9). Because Applebee's has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for more many years, it is also required to pay interest on the property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Moreover, because Applebee's has for years knowingly failed to file accurate reports regarding its abandoned property, it is in violation of and subject to penalties under the False Claims and Reporting Act.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

6. California Pizza Kitchen, Inc.

168. California Pizza Kitchen, Inc., d/b/a CPK Management Company, ("CPK") is a privately held company that owns and operates or franchises approximately 250 California Pizza Kitchen restaurants nation-wide, and sells a line of frozen pizza products through grocery stores, sports stadiums, and airports. CPK is owned by Golden Gate Capital, a private equity firm managing $12 billion in capital. Prior to its ownership by Golden Gate Capital in 2011, CPK was a publicly traded company.

169. CPK has been issuing gift cards for many years. On information and belief, it has never filed an accurate report of the extent of its unclaimed property in the form of gift cards with the State of Delaware.

170. CPK Management Company, Inc., on behalf of its affiliates, including CPK, entered into a CSA with CardFact, Ltd. on July 1, 2008. Todd Slayton, Assistant Secretary and Director signed the contract. Under the CSA, CardFact agreed to assume liability for the value of all unredeemed "gift certificates, gift cards, and similar cards or items" sold at any time prior to the effective date of the contract and to become the "issuer" of CPK gift cards going forward.

171. Because CPK was an NRA member, CardFact waived its customary $10,000 set-up fee. CPK agreed to pay CardFact $2,100 in monthly estimated payments, reflecting CPK's 10% discount for being an NRA member.

172. The contract stated: "CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now-existing Cards or Cards

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

issued during the Term of this Agreement." Although CardFact assumed the obligation to pay CPK the value of any gift cards or certificates CPK had ever issued in the past, CardFact did not inquire about the amount of this obligation and CPK paid CardFact nothing to assume this obligation.

173. The contract provided that if in any given year there were more card redemptions than sales, CardFact would not be required to pay CPK anything.

174. CardFact agreed that it would "submit, in accordance with each state's requirements, annual reports to the appropriate state authorities regarding Cards that qualify as unclaimed and abandoned property under that state's applicable laws" and to provide CPK with copies of such reports. CardFact did not, however, assume the obligation to file reports on behalf of CPK. Because the assumption was that CardFact held all the unredeemed gift cards CPK had ever issued, and CardFact was an Ohio corporation, where unredeemed gift cards are not deemed abandoned property, the CSA's requirement that CardFact file unclaimed property reports imposed no real duty on CardFact.

175. In an undated assignment agreement labeled "November __, 2008," CardFact, Ltd. assigned its liabilities for CPK gift cards to its subsidiary CardFact XVI, Ltd. After the sale of CardFact to Card Compliant, CardFact XVI, Ltd. assigned its liabilities to CardFact 25, Inc. Card Compliant later assigned its liabilities for CPK gift cards from CardFact 25, Inc. to CardFact XVI, Inc.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

176. Despite the CSA's requirement that "[a]ll Cards shall clearly state that CardFact is the issuer of the Card," it does not appear that CPK gift cards ever reflected that they were "issued" by CardFact.

177. In 2008, CPK reported to CardFact gift card sales of $13,533,347 and redemptions of $12,159,697, leaving $1,373,650 unclaimed. For the year 2008, CPK paid CardFact only $26,746. CardFact's internal accounting records show that after the assignment of CPK's liabilities from CardFact, Ltd. to CardFact XVI, Ltd., the bank account for CardFact XVI never held a balance higher than $29,145 in 2009.

178. Prior to its sale to Golden Gate Capital in 2011, CPK stated in its 10-K statements that it retains the money from gift card sales. In its 2010 form 10-K, CPK noted that it was recognizing revenue from unredeemed gift cards over a 24 month period, beginning when a card is sold:

> Gift Card Revenue Recognition
>
> The Company's branded gift cards (the "Cards") are sold primarily at the Company's restaurants and other retailers and are redeemable at Company-owned locations. Cards are issued by a third-party vendor ("Issuer") pursuant to a service agreement and the Issuer is the obligor for Cards. The Cards carry no dormancy, inactivity or service fees and have no expiration date. When Cards are sold, a gift card liability is recorded. Restaurant sales are recognized when Cards are redeemed. Discounts on Cards sold for less than face value are generally recorded as reductions to restaurant sales when the related Cards are redeemed.
>
> In 2010, the Company determined that it had specific, historical data over a sufficient timeframe and determined the period after which the likelihood of a Card being redeemed was deemed to be remote was 24 months after it is sold. An analysis of the data also determined the percentage of Card balances unlikely to ever be

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

> redeemed which is commonly referred to as the breakage rate. As a result of the Issuer agreement, the Company is able to recognize supplemental gift card revenue based on Cards unlikely to ever be redeemed.
>
> Beginning in 2010, the Company began recognizing supplemental gift card revenue over 24 months, utilizing the redemption method, beginning when a Card is sold. The amount recognized is based on the estimated breakage rate and in the same proportion that the data shows Cards are redeemed by guests. This was accounted for as a change in accounting estimate. During 2010, $5.6 million of supplemental gift card revenue was recorded, or $0.23 per share, on loss before income tax benefit, of which $3.3 million related to a cumulative catch up for Cards issued prior to 2010.

179. In its 2010 form 10-K, CPK noted that it was recognizing $3.3 million in revenue from unredeemed gift cards issued prior to 2010, which it described as "cumulative catch up" in gift card revenue.

180. Based on Relator's experience in the gift card industry and his knowledge of CPK's gift card operations, Relator estimates that, in fact, CPK presently holds $4 million to $6 million in unredeemed gift cards that are "abandoned or unclaimed property" that CPK should have already reported and transferred to Delaware. Because CPK has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for many years, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Moreover, because CPK has for years knowingly failed to file accurate reports regarding its abandoned property, it is in violation of and subject to penalties under the False Claims and Reporting Act.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

7. Overstock.com, Inc.

181. Overstock.com, Inc. ("Overstock") is a publicly traded company that operates as an online discount retailer for a diverse range of products. Overstock entered into a contract with CardFact, Ltd. On January 1, 2006. Overstock's Senior Vice President of Corporate Affairs, Jonathan E. Johnson, III, signed the contract.

182. Under the contract, CardFact, Ltd. agreed to assume liability for the value of all unredeemed gift certificates or cards, merchandise return cards and similar cards, coupons or items Overstock sold after January 1, 2001 and to become the issuer of Overstock gift cards going forward. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing cards or Cards issued during the Term of this Agreement."

183. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Overstock paid CardFact nothing for allegedly assuming that liability. Overstock paid a $5,000 set-up fee and agreed to make estimated payments of $2,000 per month

184. On May 1, 2008, CardFact and Overstock amended the CSA to add an option for CardFact to retain liability for all unredeemed Overstock cards in perpetuity for an additional fee.

185. In an undated assignment agreement labeled "October __, 2008," CardFact, Ltd. assigned its liabilities for Overstock gift cards to its subsidiary CardFact V, Ltd. After the sale of CardFact to Card Compliant, CardFact V, Ltd.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

assigned its liabilities to CardFact 25, Inc. Card Compliant later assigned its liabilities for Overstock gift cards from CardFact 25, Inc. to CardFact V, Inc.

186. In 2006, Overstock reported to CardFact gift card sales of $3,806,040 and redemptions of $2,740,850, leaving $1,065,190 unclaimed. For the year 2006, Overstock paid CardFact only $22,000.

187. In 2007, Overstock reported to CardFact gift card sales of $5,007,856 and redemptions of $3,401,763, leaving $1,606,093 unclaimed. For the year 2007, Overstock paid CardFact only $35,269.

188. In 2008, Overstock reported to CardFact gift card sales of $5,871,064 and redemptions of $4,628,241, leaving $1,242,823 unclaimed. For the year 2008, Overstock paid CardFact only $43,428.

189. CardFact's internal accounting records show that after the assignment of Overstock's liabilities from CardFact, Ltd. to CardFact V, Ltd., the bank account for CardFact V never held a balance higher than $8,559 in 2009.

190. Overstock's annual 10-K statements state that it retains the money from gift card sales. In its 2008 form 10-K, Overstock states that it recognizes revenue from unredeemed gift cards "when the likelihood of its redemption becomes remote."

191. In January 2011 Rory Peterson, Senior Accountant at Overstock, reported to CardFact that Overstock held $202,087 in unredeemed gift cards from 2004, $1,067,724 from 2005, $354,155 from 2006, $1,329,859 from 2007, $1,242,323 from 2008, $871,265 from 2009, and $814,271 from 2010.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

192. Customers who purchased Overstock gift cards prior to 2006 would not know that CardFact was supposedly holding the unredeemed value of Overstock gift cards because none of those cards mentioned CardFact. Overstock's electronic gift cards made no mention of CardFact in any of the terms or conditions so that a purchaser would know that CardFact was allegedly the issuer of the card.

193. Based on Relator's experience in the gift card industry and his knowledge of Overstock's gift card operations, Relator estimates that, in fact, Overstock presently holds $4 million to $7 million in unredeemed gift cards that are "abandoned or unclaimed property" that Overstock should have already reported and transferred to Delaware. Because Overstock has failed to file an accurate report to the Delaware Escheator for at least four years, without reasonable cause, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Overstock's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

8. Ulta Salon, Cosmetics & Fragrance, Inc.

194. Ulta Salon, Cosmetics & Fragrance, Inc. ("Ulta") is a publicly traded company that operates as a beauty products retailer and salon that owns 550 stores and salons nation-wide.

195. Effective December 1, 2010, Ulta Salon, Cosmetics & Fragrance, Inc. ("Ulta"), entered into a Third Party Prepaid Card Issuance and Services Agreement with Card Compliant's Florida subsidiary, Cardco CXVI, Inc. The numbered

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

"Cardcos" are mere shell entities that Card Compliant began using after its purchase of CardFact. Greg Bodnar, Ulta's CFO, signed the contract. Under the agreement, Ulta sought to "transfer its current and historical gift card program to Cardco in exchange for the right to receive licensing fees, commissions and payments from Cardco." Card Compliant "unconditionally guarantee[d] to ULTA full and prompt payment and performance of all of the Obligations" that Cardco had to ULTA under the agreement.

196. The contract defines the cards governed by the agreement to be "the cards in the Current Portfolio and the cards with unredeemed balances in the Historical Portfolio." Cardco is designated as the "issuer" of the cards in both the Current Portfolio and Historical Portfolio. Under the contract, Cardco would "issue" the cards and Ulta would distribute and market them. The contract provides that the back of cards will state: "This card is issued by CARDCO XVI, Inc., the sole obligor to the card owner . . . ."

197. In a section of the contract titled "Unclaimed Property," it states: "CARDCO shall be responsible for managing the compliance with unclaimed property laws governing the Cards in the Current Portfolio and the Historical Portfolio. It is the intention of the parties that CARDCO shall be the legal holder of any unclaimed property regarding the Cards . . . and shall bear all legal liability for escheat with respect to unredeemed cards . . . ."

198. The contract says: "The parties intend that neither ULTA nor any of ULTA's Affiliates shall be obligated or liable to a Cardholder with respect to any of

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

the Cards issued by CARDCO pursuant to this Agreement." It later says: "With respect to the Cards, the parties intend that CARDCO shall hold the obligations to the Cardholders and that ULTA shall not hold the obligations of Cardholders."

199. In addition to an initial $10,000 set-up fee, Ulta agreed to pay Cardco for the assumption of Ulta's historical liability. The contract provides: "As a part of and a condition to the assumption by CARDCO of the Cards in the Historical Portfolio, ULTA shall remit funds to CARDCO in the discounted amount of $4,056,620 ('the Historical Card Funds Payment')." The contract required CARDCO to pay part of this money back immediately in the form of prepayments, and other fees: "CARDCO shall pay $3,329,683 to ULTA as a Historical Prepaid Redemption Payment to ULTA with respect to all Assumed Cards in the Historical Portfolio." "With respect to Assumed Cards in the Historical Portfolio, CARDCO shall pay $65,109 to ULTA as a Trademark License Fee . . . . In addition, CARDCO shall pay $195,328 to ULTA as a Handling Fee . . . ." "The Net Amount owed by ULTA to CARDCO under Sections 3.01, 4.01 and 5.01 of the Assumption Agreement in this Schedule shall be $466,500."

200. On a going-forward basis, the contract provides that "ULTA shall have an obligation to remit funds to CARDCO in the amount of the Initial Embedded Value Balance of each Card sold or distributed by ULTA . . . [and] CARDCO shall have an obligation to remit funds to ULTA in the Card Redemption Amounts when Cards . . . are honored by ULTA." "The parties agree to reconcile and pay these

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

mutual obligations using a prepaid redemption payment method in the manner specified on Payment and Compensation Schedule N . . . ."

201. The Estimated Payment Amount Ulta agreed to pay for the first year of the contract was $17,013. That amount would be adjusted annually in what the parties called a "True-Up."

202. Ulta reported on its 10-K that in fiscal 2010, "there was a change in facts and circumstances which resulted in the Company recognizing approximately $2.0 million of gift card breakage income which related primarily to gift cards sold in prior years."

203. Based on Relator's records, Ulta holds more than $4 million in unclaimed gift cards it is presently required to escheat. Because Ulta has failed to file an accurate report to the Delaware Escheator, without reasonable cause, it is required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Ulta's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

9. Einstein Noah Restaurant Group, Inc.

204. Einstein Noah Restaurant Group, Inc. ("Einstein") is a publicly traded company that owns, operates, and franchises Einstein Bros. Bagels, Noah's New York Bagels, and Manhattan Bagels brand restaurants.

205. Einstein entered into a CSA with CardFact, Ltd. on December 19, 2007. Einstein's CFO, Richard P. Dutkiewicz, signed the contract. Under the contract, Einstein assigned "all of [its] right, title, benefit, privileges and interest in

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

and to, and all of [its] duties, obligations, terms, provisions, burdens and covenants in connection with, all Cards" Einstein had ever issued. "Cards" were defined to include "gift certificates, gift cards, merchandise return cards or credits, and similar cards or items" sold both prior to the effective date of the contract, and going forward.

206. In exchange for taking on the responsibility for all Einstein's previously issued gift cards, Einstein agreed to pay CardFact 0.001% of the aggregate face value of those cards. This payment, however, was mere window dressing as Einstein never made the payment to CardFact and CardFact never required or even requested it from Einstein.

207. In light of Einstein's membership in the NRA, CardFact waived its customary $10,000 set-up fee and gave Einstein a 10% discount. Thus, Einstein paid only an $1800 monthly estimated fee.

208. The CSA purports to assigns all Einstein's duties to cardholders to CardFact, and make any card-related duties Einstein owes duties to CardFact, not Einstein's customers: "CardFact shall be (i) liable to the Cardholders for all unredeemed Cards, (ii) a debtor to each Cardholder with respect to the Embedded Value of the Cards, and (iii) the holder of the Cards for purposes of Title 12 of the Delaware Code, if applicable. [Einstein] shall owe a duty to CardFact, and not to any Cardholder, for the redemption of the Cards."

209. On May 1, 2008, CardFact amended the CSA with Einstein to change the definition of "aggregate card redemptions" and add an "excess card

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

redemptions" clause so that CardFact would never be required to pay Einstein if there was ever a year where more cards were redeemed than purchased.

210. In an undated assignment agreement labeled "November __, 2008," CardFact, Ltd. assigned its liabilities for Einstein gift cards to its subsidiary CardFact XVII, Ltd. After the sale of CardFact to Card Compliant, CardFact XVII, Ltd. assigned its liabilities to CardFact 25, Inc., which later assigned its liabilities to CardFact XVII, Inc.

211. In 2008, Einstein reported to CardFact gift card sales of $2,912,979 and redemptions of $2,655,954, leaving $257,025 unclaimed. For the year 2008, Einstein paid CardFact $19,800 in 2008.

212. CardFact's internal accounting records show that after the assignment of Einstein's liabilities from CardFact, Ltd. to CardFact XVII, Ltd., the bank account for CardFact XVII never held a balance higher than $7,150 in 2009.

213. Einstein's 10-Ks state that it retains the money from gift card sales. In the notes to its 2009 form 10-K, Einstein stated that it recognized revenue from unredeemed gift cards based on a breakage rate determined by "company-specific historical information." Einstein also noted that in 2008 it recognized an unredeemed gift card balance of $1.3 million – representing previously unescheated balances from 2003-2006 – because of its contract with CardFact:

> Gift Cards
>
> While we will continue to honor all gift cards presented for payment, we may determine the likelihood to be remote for certain gift card balances due to the age of the unredeemed balance. In these circumstances, to the extent we determine there is no requirement for remitting

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

> balances to government agencies under unclaimed property laws, gift card balances may be recognized as gift card breakage in revenue. Gift card breakage is included in revenue within company-owned restaurant sales in our consolidated statements of operations.
>
> For the fiscal years ended December 30, 2008 and December 29, 2009, income from gift card breakage was $0.3 and $0.2 million, respectively. For the fiscal year ended January 1, 2008, income recognized from gift card breakage was $1.3 million, which relates to unredeemed balances from 2003 through 2006 and resulted from the Company entering into an agreement in December 2007, with an unrelated third party that assumed the unredeemed liability for gift cards that had not yet reached the statutory term for unclaimed property. As a result of the agreement, certain third-party claims on unredeemed gift cards for certain jurisdictions had been removed. Our estimate of gift card breakage is based upon reasonable and reliable company-specific historical information that the Company believes is predictive of the future and relates to a large pool of homogenous gift card transactions over a sufficient time frame.

214. In a March 8, 2011 email from Ladonna Johnson, Assistant Controller, Einstein stated that at year end, 2010, it held, or had recognized as revenue, $3,119,293 in unredeemed cards from 2003-2010. None of these unredeemed card balances were given to CardFact or any of its numbered entities or subsidiaries.

215. Customers who had purchased Einstein gift cards prior to 2008 would not know that CardFact was supposedly holding the unredeemed value of Einstein gift cards because none of those cards mentioned CardFact.

216. Based on Relator's experience in the gift card industry and his knowledge of Einstein's gift card operations, Relator estimates that, in fact, Einstein presently holds $1 million to $2 million in unredeemed gift cards that are "abandoned or unclaimed property" that Einstein should have already reported and

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

transferred to Delaware. Because Einstein has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for several years, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Moreover, because Einstein has for years knowingly failed to file accurate reports regarding its abandoned property, it is in violation of and subject to penalties under the False Claims and Reporting Act.

10. The Pantry, Inc.

217. The Pantry, Inc. ("Pantry") is a publicly traded company that owns and operates over 1500 Kangaroo Express convenience stores across the southeastern United States.

218. The Pantry entered into a contract with CardFact, Ltd. on September 28, 2006. The CSA was signed by Mark Tate, VP of Merchandise.

219. Under the CSA, CardFact assumed the obligation for all unredeemed "gift certificates or cards, coupons or items" the Pantry had issued since January 1, 2000 and going forward.

220. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing Cards or Cards issued during the Term of this Agreement."

221. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and the Pantry paid CardFact nothing for allegedly

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

assuming this liability. CardFact waived its customary set-up fee. And the Pantry agreed to pay CardFact $1,771 per month as an Estimated Payment Amount.

222. For 2006, the Pantry reported to CardFact $955,824 in gift card sales and $746,145 in redemptions, leaving $209,679 unclaimed. For the year 2006, Pantry paid CardFact only $10,000 in fees.

223. For 2007, the Pantry reported to CardFact $1,658,617 in gift card sales and $1,549,735 in redemptions, leaving $108,882 unclaimed. For the year 2007, Pantry paid CardFact only $18,700 in fees.

224. For 2008, the Pantry reported to CardFact $3,199,033 in gift card sales and $2,692,849 in redemptions, leaving $506,184 unclaimed. For the year 2008, Pantry paid CardFact only $20,900 in fees. The Pantry issued CardFact a 1099-MISC income form for 2008 showing that it paid CardFact $30,797.

225. Effective September 15, 2009, CardFact and the Pantry entered into "Amendment 1," which addressed the excess redemptions issue. Amendment 1 also incorporated a provision whereby the client has the option, when the contract is terminated, to transfer liability for unredeemed cards to CardFact "in perpetuity."

226. On October 6, 2010, Kevin Taylor reported to CardFact that it had a "total unredeemed card balance" of $786,058.23 from the inception of its gift card program through 2010.

227. After Card Compliant purchased CardFact, Card Compliant sought to get the Pantry to enter into a new contract. The "Restated Third Party Prepaid

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Card Issuance and Service Agreement" provided that the obligation for the Pantry's unredeemed gift cards was held by CardFact 25, Inc.

228. At some point after contracting with CardFact, the Pantry was audited by Kelmar on behalf of Delaware's Escheator. In an effort to deceive Kelmar, the Pantry provided auditors with a copy of its agreement with CardFact. Using the deceptions promulgated by the CSA – namely that CardFact was the "holder" of Pantry's cards – Pantry was able to survive its audit. As discussed above, however, Pantry has maintained continuous possession and control over all unredeemed gift card funds, deceiving the State of Delaware and its auditors in the process. After the audit, Robin Vaughn wrote to Relator French on May 10, 2011 that the Pantry "reserve[s] a liability account for all issued cards so we are interested in learning our options to recognize any of the unredeemed amounts."

229. Based on Relator's experience in the gift card industry and his knowledge of Pantry's gift card operations, Relator estimates that, in fact, Pantry presently holds $1 million to $2 million in unredeemed gift cards that are "abandoned or unclaimed property" that Pantry should have already reported and transferred to Delaware. Because the Pantry has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for many years, it is required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). The Pantry's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

11. Shopko Stores Operating Co., LLC

230. Shopko Stores Operating Co., LLC ("Shopko") is a privately held company that operates 136 discount retail stores nation-wide. Shopko is owned by private equity firm Sun Capital Partners, Inc.

231. Shopko entered into a CSA with CardFact, Ltd. on May 5, 2006. Peter Vandenhouten, ShopKo's VP and Secretary, signed the contract.

232. Under the CSA, CardFact agreed to hold the unredeemed value of all "gift certificates or cards, merchandise return cards and similar cards, coupons or items" ShopKo had issued since January 1, 2001 and all ShopKo Cards going forward. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing Cards or Cards issued during the Term of this Agreement."

233. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and ShopKo paid CardFact nothing for allegedly assuming this liability. ShopKo paid only a $10,000 set-up fee. CardFact waived the customary estimated payments for the first year of the contract.

234. Effective February 1, 2007, ShopKo agreed to amend certain definitions in the original CSA to accommodate situations when there were more redemptions than sales of gift cards in a year.

235. In October 2008, CardFact, Ltd. assigned all its rights and obligations under the CSA with ShopKo to CardFact II, Ltd. Sometime thereafter ShopKo agreed to the assignment. After the sale of CardFact to Card Compliant, CardFact

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

II, Ltd. assigned its liabilities to CardFact 25, Inc., which later assigned its liabilities for Shopko gift cards to CardFact II, Inc.

236. In 2006, Shopko reported to CardFact that it sold $19,777,991 in gift cards and redeemed $19,475,750, leaving over $300,000 unclaimed.

237. In 2007, ShopKo reported to CardFact that it sold $21,699,008 in gift cards and redeemed $21,310,284, leaving over $388,000 unclaimed. For the year 2007, ShopKo paid CardFact only $52,123.

238. In 2008, Shopko reported to CardFact that it sold $19,214,872 and redeemed $18,926,649 in gift cards, leaving approximately $288,000 unclaimed. For the year 2008, Shopko paid CardFact only $13,918.

239. CardFact's internal accounting records show that after the assignment of Shopko's liabilities from CardFact, Ltd. to CardFact II, Ltd., the bank account for CardFact II never held a balance higher than $8,428 in 2009.

240. In September 2009, ShopKo appears to have entered into an agreement whereby CardFact II would allegedly retain the liability for all unredeemed ShopKo gift cards in perpetuity.

241. Despite the fact that CardFact, Ltd. had assigned all its rights and duties under the contract to CardFact II, Ltd., which had further assigned its rights to CardFact II, Inc. the Shopko gift cards continue to state that they are "issued by CardFact, Ltd." *See* http://www.shopko.com/gift-cards.

242. Based on Relator's experience in the gift card industry and his knowledge of Shopko's gift card operations, Relator estimates that, in fact, Shopko

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

presently holds $1 million to $2 million in unredeemed gift cards that are "abandoned or unclaimed property" that Shopko should have already reported and transferred to Delaware. Because ShopKo has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for several years it is required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d).ShopKo's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

12. Noodles & Company

243. Noodles & Company ("Noodles") operates and franchises over 300 Noodles & Company restaurants nation-wide. It is owned by private equity firm Catterton Partners.

244. Noodles began selling gift cards in 2003. But in the first three years of the program it charged a dormancy fee when the cards were not used, wiping out small balances that may have existed.

245. Noodles entered into a contract with CardFact XI, Ltd. on January 2, 2008. The contract was signed by Noodles' Executive Vice President, Paul A. Straser.

246. Under the contract, CardFact XI, Ltd. agreed to assume liability for the value of all unredeemed "gift certificates, gift cards, merchandise return cards or credits, and similar cards or items" Noodles had previously sold and to become the issuer of Noodles gift cards going forward. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing cards or Cards issued during the Term of this Agreement."

247. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Noodles paid CardFact nothing for allegedly assuming this liability. CardFact gave Noodles the NRA 10% discount and waived the customary $10,000 set-up fee. Noodles agreed to make estimated payments of $1,725 per month.

248. The contract provided that if in any given year there were more card redemptions than sales, CardFact would not be required to pay Noodles anything.

249. CardFact's internal accounting records show that in 2008, Noodles reported to CardFact gift card sales of $1,820,721 and redemptions of $1,107,952, leaving $712,769 unclaimed. For the year 2008, Noodles paid CardFact only $21,710.

250. CardFact's internal accounting records show that the bank account for CardFact XI never held a balance higher than $25,185 in 2009.

251. After the sale of CardFact to Card Compliant, CardFact XI, Ltd. assigned its liabilities to CardFact 25, Inc., which later assigned its liabilities for Noodles gift cards to CardFact XI, Inc.

252. In July 2011 Noodles reported to CardFact that it held a total of $1.7 million in unredeemed gift cards from the inception of its gift card program through July 2011. Noodles was unable to break this number down year-by-year. But when

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

asked by Relator French inquired how Noodles handled its escheat obligations, Carrie Hart, Director of Operational Accounting and Tax at Noodles, stated: "I think our only vulnerable year is 2007."

253. Based on Relator's experience in the gift card industry and his knowledge of Noodle's gift card operations, Relator estimates that, in fact, Noodles presently holds $1 million to $2 million in unredeemed gift cards that are "abandoned or unclaimed property" that Noodles should have already reported and transferred to Delaware. Because Noodles has failed to file an accurate report to the Delaware Escheator, without reasonable cause, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Noodles' failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

13. Skip Barber Racing School, LLC

254. Skip Barber Racing School, LLC, d/b/a Skip Barber Services, LLC, ("Skip Barber") is a privately held company that operates racing and driving schools nation-wide.

255. J. Lawrence Blades, general counsel, entered into a Card Services Agreement on behalf of Skip Barber, LLC effective January 1, 2005. Under the CSA, CardFact, Ltd. assumed the liability for unredeemed "gift certificates or cards, merchandise return cards and similar cards, coupons or items issued by CardFact or by [Skip Barber] after January 1, 2000 . . . ."

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

256. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing Cards or Cards issued during the Term of this Agreement."

257. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Skip Barber paid CardFact nothing for allegedly assuming that liability. CardFact did not charge Skip Barber a set-up fee. Skip Barber agreed to estimated payments of $1,500 per month.

258. Effective January 1, 2007, Jeffrey D'Onofrio, Sr. VP and CFO, signed an amendment on behalf of Skip Barber whereby the definition of "Cards" was amended to include all "gift certificates or cards, merchandise return cards and similar cards, stored value cards or certificates and coupons issued by CardFact or by [Skip Barber] after January 1, 2000, and credits to retail customers resulting from advanced payments issued by CardFact or [Skip Barber] after January 1, 2001 . . . ." The Amendment also inserted an "Estimated Payment Amount" clause defining how much Skip Barber would make in estimated payments.

259. In October 2008, CardFact, Ltd. assigned its rights and obligations under the Skip Barber CSA to CardFact IX, Ltd. Skip Barber consented to the assignment.

260. CardFact's internal accounting records show that after the assignment of Skip Barber's liabilities from CardFact, Ltd. to CardFact IX, Ltd., the bank account for CardFact IX never held a balance higher than $6,216 in 2009.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

261. Effective September 1, 2009, Skip Barber agreed to the excess redemption amendment, whereby CardFact would not be required to pay Skip Barber if card redemptions were very high; CardFact also gave Skip Barber the option to transfer the unredeemed value of gift cards in perpetuity at the Termination of the CSA. The amendment is on behalf of CardFact, Ltd., despite the fact that it had assigned its rights and obligations to CardFact IX, Ltd.

262. After the sale of CardFact to Card Compliant, CardFact IX, Ltd. assigned its liabilities to CardFact 25, Inc., which later assigned its liabilities to CardFact IX, Inc.

263. In 2005, Skip Barber reported to CardFact $1,526,737 in gift card sales and $1,052,369 in redemptions, leaving $474,368 unclaimed. For the year 2005, Skip Barber paid $1500 per month in estimated payments to CardFact.

264. In 2006, Skip Barber reported to CardFact $1,512,813 in gift card sales and $972,990 in redemptions, leaving $539,823 unclaimed. For the year 2006, Skip Barber paid $2,065 per month in estimated payments to CardFact. The final bill for CardFact's service for 2006 was $24,685.

265. In 2007, Skip Barber reported to CardFact $2,109,531 in gift card sales and $1,014,709 in redemptions, leaving $1,094,822 unclaimed. For the year 2007, Skip Barber paid $1,250 per month in estimated payments to CardFact. The final bill for 2007 was $18,643.65.

266. In 2008, Skip Barber reported to CardFact $3,172,902 in gift card sales and $1,275,621 in redemptions, leaving $1,897,281 unclaimed. For the year 2008,

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Skip Barber paid $1,250 per month in estimated payments to CardFact. Skip Barber paid CardFact a little over $23,000 for 2008.

267. Based on Relator's records, Skip Barber is presently required to escheat at least $2 million in unredeemed gift cards. This does not include any amounts for abandoned gift cards issued before 2005. Skip Barber also continues to accumulate hundreds of thousands in unclaimed property every year. Because Skip Barber has failed to file an accurate report to the Delaware Escheator, without reasonable cause, it is required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Skip Barber's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

14. Sony Electronics, Inc.

268. Sony Electronics, Inc. ("Sony") is the U.S. sales and marketing arm of Sony Corporation of America's global electronics business, which manufactures and distributes a comprehensive range of consumer electronics. Sony Corporation of America is a publicly traded company.

269. Sony entered into a CSA with CardFact, Ltd. effective December 19, 2008. Hiroshi Kawano, senior vice president of Sony, signed the contract. CardFact, Ltd. would later assign its rights and duties under the CSA to CardFact 25, Inc., with Sony's consent.

270. Under the Sony CSA, CardFact assumed the liability for all unredeemed "gift certificates, gift cards, merchandise return cards or credits, and

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

similar cards, coupons or items Sony had ever issued and going forward. The CSA states: "For the consideration provided herein, CardFact agrees to provide the services set forth below with respect to the Cards and assume all liability for the cards issued prior to and after the effective date of this agreement."

271. The contract purports to make CardFact the "legal holder" of all the cards Sony ever sold: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing cards or Cards issued during the Term of this Agreement."

272. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Sony paid CardFact nothing for allegedly assuming this liability. Sony paid a $10,000 initial set-up fee and a total estimated payment amount of $37,500 for the first year of the contract.

273. Sony had the option to pay CardFact a special assessment to "assume all obligations with respect to redemption for all unredeemed Cards in perpetuity."

274. CardFact agreed to manufacture Sony's gift cards. The amounts Sony was obligated to pay CardFact under the CSA did not include the cost of designing and manufacturing gift cards; Sony was billed separately for the cost of making the cards.

275. Unlike other CSA's, the Sony CSA made no pretense that CardFact marketed or sold cards; it provided that Sony was solely responsible for marketing and selling the cards. The CSA states: Sony "agrees to market the Cards in [Sony's]

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

sole discretion through it retail stores, Company's website, through third party retail arrangements, and otherwise." It further states that that Sony "shall in its sole discretion sell the Cards . . . ."

276. CardFact agreed to be solely responsible for administering legal compliance with unclaimed property laws. The CSA states: "In connection with the Card, CardFact will at its sole cost and expense undertake all general responsibilities necessary to manage and administer the Card in compliance with all applicable laws." CardFact agreed to perform "additional services" at no cost, including notifying Sony of "changes in federal and state legislation affecting gift cards," "generally accepted accounting principles, including pronouncements from the SEC and IRS," and being "available to consult on all aspect of gift card management." The CSA, however, does not absolve Sony of its escheat obligations to the State of Delaware and compliance with Delaware yearly reporting requirements to the State Escheator. Sony maintained that responsibility throughout its relationship with CardFact.

277. For the year 2008, Sony reported to CardFact $6,987,987 in gift card sales and $6,350,048 in redemptions, leaving $637,939 unclaimed. For the year 2008, Sony paid CardFact a total of $40,220.

278. Sony reported to Card Compliant in 2010 that it had an "estimated outstanding liability" of $4,402,566 from the inception of its gift card program through the year 2010. Given that its total reported unclaimed amount for the years

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

2008-2010 was $1,861,657, Sony appears to have had a historical liability of $2,540,909 when it entered into the CSA.

279. Although CardFact agreed to manufacture Sony cards under the CSA, no Sony card backs would mention CardFact until sometime in 2011.

280. Sony's legal department was involved in approving the contract and card back language.

281. Based on Relator's experience in the gift card industry and his knowledge of Sony's gift card operations, Relator estimates that, in fact, Sony presently holds over $2.5 million in unredeemed gift cards that are "abandoned or unclaimed property" that Sony should have already reported and transferred to Delaware. Because Sony has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for many years, it is required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Sony's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

15. CBC Restaurant Corp.

282. CBC Restaurant Corp. ("CBC") operates and franchises more than 115 Corner Bakery Café restaurants nation-wide. CBC is owned by Il Fornaio (America) Corp. and operates as a subsidiary. Il Fornaio is owned by private equity firm Roark Capital Group.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

283. CBC has been issuing gift cards for many years. On information and belief, it has never filed an accurate report of the extent of its unclaimed property in the form of gift cards with the State of Delaware.

284. CBC entered into a CSA with CardFact, Ltd. on January 1, 2008. The contract was signed by CBC's Vice President, Blake Bernet. Under the contract, CardFact assumed the liability for the value of all unredeemed CBC "gift certificates, gift cards, merchandise return cards or credits, and similar cards or items" sold both prior to the contract and going forward.

285. CardFact did not inquire with CBC regarding the extent of the historical liability it was allegedly assuming, and CBC made no payment to CardFact to reflect the alleged transfer of its liabilities.

286. Because CBC was an NRA member, CardFact waived its customary $10,000 set-up fee. CardFact also gave CBC a "NRA discount" of 10% on its fees, and a 35% "multi-company discount" because its parent company, Il Fornaio, is also a CardFact client. CBC agreed to pay CardFact $1,100 monthly in estimated payments.

287. The contract stated: "CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now-existing Cards or Cards issued during the Term of this Agreement."

288. The contract provided that if in any given year there were more card redemptions than sales, CardFact would not be required to pay CBC anything.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

289. In an assignment agreement labeled "November __, 2008," CardFact, Ltd. assigned its liabilities for CBC gift cards to its subsidiary CardFact XVIII, Ltd. After the sale of CardFact to Card Compliant, CardFact XVIII, Ltd. assigned its liabilities to CardFact 25, Inc., which later assigned its liabilities to CardFact XVIII, Inc.

290. In 2008, CBC reported to CardFact gift card sales of $1,729,661 and redemptions of $1,374,799, leaving $354,862 unclaimed. For the year 2008, CBC paid CardFact only $12,100.

291. On December 26, 2010, CBC reported to Card Compliant that it held $122,163 in unredeemed cards from 2006, $187,630 from 2007, $222,943 from 2008, and $302,890 from 2009. None of these balances were ever given to CardFact or any of its numbered entities or subsidiaries. CardFact's internal accounting records show that after the assignment of CBC's liabilities from CardFact, Ltd. to CardFact XVIII, Ltd., the bank account for CardFact XVIII never held a balance higher than $5,409 in 2009.

292. Customers who had purchased CBC gift cards prior to 2008 would not know that CardFact was supposedly holding the unredeemed value of CBC gift cards because none of those cards mentioned CardFact.

293. Based on Relator's experience in the gift card industry and his knowledge of CBC's gift card operations, Relator estimates that, in fact, CBC presently holds $1 million to $3 million in unredeemed gift cards that are "abandoned or unclaimed property" that CBC should have already reported and

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

transferred to Delaware. Because CBC has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for several years, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Moreover, because CBC has for years knowingly failed to file accurate reports regarding its abandoned property, it is in violation of and subject to penalties under the False Claims and Reporting Act.

16. Il Fornaio (America) Corp.

294. Il Fornaio (America) Corporation ("Il Fornaio") owns and operates 21 full service Il Fornaio restaurants nation-wide. It is owned by private equity firm Roark Capital Group.

295. Il Fornaio entered into a CSA with CardFact, Ltd. on January 1, 2008. Sean Maloney, CFO, signed the contract.

296. Under the contract, CardFact, Ltd. agreed to assume liability for the value of all unredeemed Il Fornaio "gift certificates, gift cards, merchandise return cards or credits, and similar cards or items" it had previously sold and to become the "issuer" of Il Fornaio gift cards going forward. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing cards or Cards issued during the Term of this Agreement."

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

297. CardFact did not inquire the extent of Il Fornaio's historical liability, and Il Fornaio paid CardFact nothing for allegedly assuming this liability. CardFact even waived its customary set-up fee.

298. CardFact also paid Il Fornaio kickbacks for referring its subsidiary, CBC Restaurant Corp., to CardFact. CardFact gave Il Fornaio a $2,000 "referral fee" at the time CBC signed its CSA with CardFact, as well as a 35% "multi-company discount" on its fees each year CBC remained a CardFact client. CardFact also waived its customary $10,000 set up fee.

299. The contract provided that if in any given year there were more card redemptions than sales, CardFact would not be required to pay Il Fornaio any money.

300. In an assignment agreement labeled "November __, 2008," CardFact, Ltd. assigned its liabilities for Il Fornaio gift cards to its subsidiary CardFact XV, Ltd. After the sale of CardFact to Card Compliant, CardFact XV, Ltd. assigned its liabilities to CardFact 25, Inc., which later assigned its liabilities for Il Fornaio gift cards to CardFact XV, Inc.

301. CardFact's internal accounting records show that in 2008, Il Fornaio began paying CardFact a $1,200 monthly deposit towards CardFact's yearly fee. In 2008, Il Fornaio reported to CardFact gift card sales of $1,355,013 and redemptions of $1,290,639, leaving $64,374 unredeemed. For the year 2008, Il Fornaio paid CardFact only $11,200.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

302. CardFact's internal accounting records further show that after the assignment of Il Fornaio's liabilities from CardFact, Ltd. to CardFact XV, Ltd., the bank account for CardFact XV never held a balance higher than $7,174 in 2009.

303. On July 25, 2011, Il Fornaio provided a report stating that at the end of 2010, it still held $102,749 in unredeemed cards from 2003, $197,303 from 2004, $187,243 from 2005, $220,942 from 2006, $259,330 from 2007, $206,704 from 2008, and $264,897 from 2009. None of these balances were ever given to CardFact or any of its numbered entities or subsidiaries.

304. Furthermore, none of the aforementioned balances were escheated to the State of Delaware when they became dormant. In a July 25, 2011 email chain between Relator French and Demetri Gill, Vice President of Finance and Controller of Il Fornaio, when asked if Il Fornaio had escheated any dormant gift cards in the past, Mr. Gill responded: "Prior to you guys we never dealt with escheatment per se. We have been rolling the dice but have been conservative in recording the deferred revenue and not booking anything to income."

305. Customers who had purchased Il Fornaio gift cards prior to 2008 would not know that CardFact was supposedly holding the unredeemed value of Il Fornaio gift cards because none of those cards mentioned CardFact. Customers who purchased Il Fornaio gift cards after the 2008 CSA, similarly, would not know that CardFact was the issuer of the cards and supposedly holding the unredeemed value of Il Fornaio gift cards because none of those cards mentioned CardFact.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

306. Based on Relator's experience in the gift card industry and his knowledge of Il Fornaio's gift card operations, Relator estimates that, in fact, Il Fornaio presently holds almost $1 million in unredeemed gift cards that are "abandoned or unclaimed property" that Il Fornaio should have already reported and transferred to Delaware. Because Il Fornaio has failed to file an accurate report to the Delaware Escheator, without reasonable cause for several years, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Moreover, because Il Fornaio has knowingly failed to file accurate reports regarding its abandoned property for at least five years, it is in violation of and subject to penalties under the False Claims and Reporting Act.

17. Tesoro Refining and Marketing Company

307. Tesoro Refining and Marketing Company, LLC ("Tesoro") is a subsidiary of Tesoro Corporation which, *inter alia*, operates over 1,375 branded retail gas stations. Tesoro Corporation is a publicly traded company.

308. Tesoro entered into a CSA with CardFact, Ltd. effective December 31, 2008. Chad Falgout, Vice President, signed the contract. In addition to Chad Falgout, the principal contacts at Tesoro were Robert Bezner and Lorei Hawthorne.

309. Under the CSA, CardFact assumed the liability for all unredeemed gift cards Tesoro had ever issued and going forward. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

holder of any unclaimed property with respect to any now existing Cards or Cards issued during the Term of this Agreement."

310. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Tesoro paid CardFact nothing for allegedly assuming this liability. Tesoro paid only a $10,000 set-up fee. Tesoro agreed to pay an estimated payment amount of $15,000 for the first year of the contract.

311. Tesoro agreed that CardFact would never be required to pay if there was ever a year where more cards were redeemed than purchased.

312. CardFact agreed to limit the total amounts it would be paid by Tesoro based not on the amounts of unclaimed gift card value, but on the amount of gift cards value issued. Under that agreement, there was a sliding scale of maximum payments. If Tesoro issued $500,000 in cards, it would pay CardFact no more than $12,500 (regardless of the amount of unclaimed gift cards). If Tesoro issued $10 million in gift cards, it would pay CardFact no more than $47,750.

313. CardFact, Ltd. assigned its duties and rights under the Tesoro CSA to CardFact 25, Inc., effective September 1, 2009, and later obtained Tesoro's consent to that assignment. At some point after 2010, Tesoro gift cards stated on their back that "CardFact 25, Inc. is card issuer and sole obligor to card owner."

314. In 2008, Tesoro reported to CardFact $4,707,530 in gift card sales and $4,613,379 in redemptions, leaving $94,151 unclaimed. For the year 2008, Tesoro paid CardFact $15,000.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

315. Robert Bezner of Tesoro reported to CardFact in its 2010 "True-up" that its total unredeemed card balances were $2,131,799 in 2008, $2,023,024 in 2009, and $2,042,152 in 2010.

316. According to Relator's records, Tesoro presently holds in excess of $1.5 million in unredeemed gift cards it is presently required to escheat. Because Tesoro has failed to file an accurate report to the Delaware Escheator, without reasonable cause, it is required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Tesoro's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

18. Hanna Andersson, LLC

317. Hanna Andersson, LLC ("Hanna") is a privately held company that manufactures children's clothing sold through catalogs, on-line, and a base of retail stores nation-wide. Hanna is owned by private equity firm Sun Capital Partners, Inc.

318. Hanna has been issuing gift cards since at least 2006 but has never accurately reported or paid to the Delaware Escheator the value of abandoned gift cards.

319. Hanna entered into a CSA with CardFact, Ltd. on January 1, 2007. Laura McLue, CFO, signed the contract. Hanna later consented to CardFact, Ltd. assigning its liabilities for Hanna gift cards to CardFact 25, Inc.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

320. Under the contract, CardFact, Ltd. agreed to assume liability for the value of all unredeemed Hanna gift cards had previously sold and to be the "issuer" of Hanna gift cards going forward. CardFact did not inquire as to the amount of the "historical liability" it was assuming from Hanna, and received nothing from Hanna in exchange for taking on such liabilities. CardFact received only its customary $10,000 set-up fee.

321. The contract stated: "CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now-existing Cards or Cards issued during the Term of this Agreement."

322. CardFact's internal accounting records show that in 2007, Hanna reported to CardFact gift card sales of $1,245,268 and redemptions of $1,123,751, leaving $121,517 unclaimed. It paid CardFact only $19,800 in fees.

323. In 2008, Hanna had gift card sales of $1,183,695 and redemptions of $1,089,124, leaving $94,571 unclaimed. For the year 2008, Hanna paid CardFact only $19,950.

324. Hanna later reported to Card Compliant that it had unredeemed gift cards of $72,475 from 2006, $137,824 from 2007, $158,123 from 2008, $188,362 from 2009 and $76,574 from 2010. None of these balances were ever given to CardFact or Card Compliant.

325. Customers who purchased Hanna gift cards are unlikely to know CardFact or CardFact 25 is allegedly holding the unredeemed value of Hanna gift

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

cards because the cards issued before the CSA do not mention CardFact and although the cards now say they are issued by CardFact, Ltd.,[9] CardFact, Ltd. assigned its obligations to CardFact 25 more than three years ago.

326. Based on Relator's records, Hanna has approximately $200,000 to $400,000 in abandoned gift cards it is presently obligated to report and transfer to Delaware. Because Hanna has failed to file an accurate report to the Delaware Escheator, without reasonable cause, for at least two years, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Moreover, because Hanna has knowingly failed to file accurate reports regarding its abandoned property for at least two years, it is in violation of and subject to penalties under the False Claims and Reporting Act.

19. Benihana, Inc.

327. Benihana, Inc. ("Benihana") is a privately held company that owns, operates, and franchises 94 Benihana, Haru, and RA Sushi brand restaurants nation-wide. Benihana was a publicly traded company until 2012, when it was acquired by investment advisory firm Angelo, Gordon & Co.

328. Benihana entered into a "Card Program Issuance and Services Agreement" with CardFact XXX, Inc. sometime after Card Compliant purchased CardFact, but effective January 1, 2009. The contract was signed by Jose Ortega, VP of Finance.

---

[9] *See* http://www.hannaandersson.com/giftCard.asp?cchkrd=y.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

329. Under the contract, CardFact XXX assumed the liability for unredeemed "gift certificates, gift cards, merchandise return cards or credits, and similar cards or items" ever issued by Benihana in the past and going forward, provided the statutory dormancy period had not already expired.

330. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing Cards or Cards issued during the Term of this Agreement."

331. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Benihana paid CardFact nothing for allegedly assuming this liability. Because Benihana was an NRA member, CardFact waived the $10,000 set-up fee and Benihana agreed to estimated payments of $2,340 per month.

332. Relator has no records showing the amounts of unredeemed gift cards Benihana has sold; but on information and belief, Benihana is presently required to escheat hundreds of thousands in unclaimed gift cards. Because Benihana has failed to file an accurate report to the Delaware Escheator, without reasonable cause, it is required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Benihana's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

20. Pamida Stores Operating Co., LLC

333. Pamida Stores Operating Co., LLC ("Pamida") is a subsidiary of Shopko Stores, Inc., which is a privately held company owned by private equity firm Sun Capital Partners, Inc.

334. Pamida entered into a contract with CardFact, Ltd. on February 4, 2007. Bradley D. Larson, VP and Treasurer, signed the contract on behalf of Pamida.

335. Under the contract, CardFact, Ltd. agreed to assume liability for the value of all unredeemed "gift certificates, gift cards, merchandise return cards or credits, and similar cards or items" that Pamida had previously sold and to become the issuer of Pamida gift cards going forward. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing cards or Cards issued during the Term of this Agreement."

336. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Pamida paid CardFact nothing for allegedly assuming this liability. Pamida paid a $10,000 set-up fee and agreed to make estimated payments of $2,300 per month.

337. CardFact and Pamida amended the CSA to change the definition of "aggregate card redemptions" and "excess card redemptions" so CardFact would not be required to pay Pamida in the event that redemptions exceeded 98.5% of card sales for a given reporting period.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

338. In an undated assignment agreement labeled "October __, 2008," CardFact, Ltd. assigned its liabilities for Pamida gift cards to its subsidiary CardFact III, Ltd. After the sale of CardFact to Card Compliant, CardFact III, Ltd. assigned its liabilities to CardFact 25, Inc., which later assigned its liabilities to CardFact III, Inc.

339. In 2007, Pamida reported to CardFact gift card sales of $3,098,273 and redemptions of $2,877,514, leaving $220,759 unclaimed. For the year 2007, Pamida paid CardFact only $28,593.

340. In 2008, Pamida reported to CardFact gift card sales of $3,340,224 and redemptions of $3,273,420, leaving $66,804 unclaimed. For the year 2008, Pamida paid CardFact only $24,683.

341. CardFact's internal accounting records show that after the assignment of Pamida's liabilities from CardFact, Ltd. to CardFact III, Ltd., the bank account for CardFact III never held a balance higher than $4,156 in 2009.

342. According to a report by Jennifer Tenski, a Pamida employee handling gift card accounting with CardFact, Pamida held $677,447 in unredeemed gift cards as of February 2011. Ms. Tenski further admitted that Pamida has never filed a report or transferred the value of gift cards to Delaware: "[Pamida] ha[s] not had to handle escheatment."

343. Until sometime after August, 2010 customers who purchased Pamida gift cards would not know that CardFact was the issuer of the cards and supposedly holding the liability for those cards.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

344. Relator's records do not specify the precise amount of unclaimed gift cards Pamida held at the end of 2007. But based on the fact that Pamida held over $675,000 in unredeemed cards at the close of 2010, and had about $287,000 in unredeemed cards between 2007 and 2008, it is reasonable to believe that Pamida held over $100,000 in unredeemed cards at the close of 2007, and continues to amass about $140,000 per year in unredeemed gift cards. Because Pamida has failed to file an accurate report to the Delaware Escheator, without reasonable cause, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Pamida's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

21. Shutterfly, Inc.

345. Shutterfly, Inc. ("Shutterfly") is a publicly traded company that operates as a manufacturer of personalized photo and other products.

346. Shutterfly entered into a contract with CardFact, Ltd. on July 15, 2005. Shutterfly's Chief Financial Officer, Stephen E. Recht, signed the CSA.

347. Under the CSA, CardFact, Ltd. assumed the liability and held the unredeemed value of all "gift certificates or cards, merchandise return cards and similar cards, coupons or items" Shutterfly sold from July 15, 2000 and going forward. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Parties that CardFact is the holder of any unclaimed property with respect to any now existing Cards or Cards issued during the Term of this Agreement."

348. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Shutterfly paid CardFact nothing for allegedly assuming this liability. Shutterfly paid no set-up fee and CardFact waived the customary estimated payments for the first year of the contract.

349. Shutterfly agreed to pay an annual "marketing fee" of $17,500 to CardFact, which would be subtracted from any other fees Shutterfly was obligated to pay under the contract. But CardFact engaged in no marketing on behalf of Shutterfly.

350. In 2006, Shutterfly sold $183,140 in gift cards and redeemed $109,831, leaving $73,309 unclaimed.

351. In 2007, Shutterfly sold $826,700 in gift cards and redeemed $397,603, leaving $429,007 unclaimed. For the year 2007, Shutterfly paid CardFact $18,217.

352. In 2008, Shutterfly sold $1,173,921 in gift cards and $579,876 was redeemed, leaving $594,045 unclaimed. For the year 2008, Shutterfly paid CardFact only $21,858.

353. Shutterfly cards at some point were modified to say that they are issued by CardFact, Ltd.

354. On October 22, 2008, CardFact, Ltd. assigned all its rights and obligations under the CSA to CardFact VIII, Ltd. On November 11, 2008 Shutterfly consented to the assignment to CardFact VIII, Ltd. After the sale of CardFact to

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Card Compliant, CardFact VIII, Ltd. assigned its liabilities to CardFact 25, Inc., which later assigned its liabilities to CardFact VIII, Inc. As late as January 2011, however, Shutterfly gift cards said that the cards were issued by CardFact, Ltd.

355. CardFact's internal accounting records show that after the assignment of Shutterfly's liabilities from CardFact, Ltd. to CardFact VIII, Ltd., the bank account for CardFact VIII never held a balance higher than $10,423 in 2009.

356. In 2011, Shutterfly indicated that it would like to terminate its contract with CardFact. A January 2011 internal email reveals that, as far as Shutterfly was concerned, Card Compliant was simply "the vendor that we use for the verbiages that we use in back of our card." Shutterfly informed Card Compliant that they were going to terminate on March 23, 2011.

357. When Card Compliant realized it might lose Shutterfly as a client, it prepared a presentation in an effort to keep it from terminating. According to the presentation, Shutterfly had unredeemed gift cards valuing $1,009,653 between the years 2006-2010, with $807,722 "slated for escheat" to Delaware for the years 2008-2010. Card Compliant claimed that Shutterfly would receive $807,722 in income if it stayed with CardFact. The slide show further says that if Shutterfly stays with CardFact, it has no "escheat exposure" and that it will have "earnings with CardFact" of $1,690,653, which would otherwise be required to escheat to Delaware. Shutterfly nevertheless gave its 90-day notice of termination on May 20, 2011.

358. The parties then did a final "true-up" in which Shutterfly reported to CardFact $339,788 in gift card sales and $282,609 in redemptions, leaving $57,179

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

unredeemed. A final estimated bill was issued on June 22, 2011, showing that Shutterfly owed CardFact VIII, Inc. $11,254 for the first six months of 2011.

359. Based on Relator's records, Shutterfly is presently required to escheat approximately $500,000 and continues to accumulate unclaimed property. Because Shutterfly has failed to file an accurate report to the Delaware Escheator, without reasonable cause, it is required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Shutterfly's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

22. Skechers USA, Inc.

360. Skechers USA, Inc. ("Skechers") is a publicly traded company that manufactures and distributes footwear nation-wide.

361. Skechers entered into a Card Services Agreement with CardFact, Ltd. effective January 1, 2008. Frederick H. Schneider, Jr., CFO, signed the contract on behalf of Skechers. The Trademark Licensing Agreement was signed by David Weinberg, COO of Skechers U.S.A., Inc. II. Under the agreement, CardFact agreed to assume the liability for all Skechers' "gift certificates, gift cards, merchandise return cards or credits and similar cards or items issued by CardFact during the Term of [their] Agreement or by [Skechers] prior to the effective date of [the] Agreement . . . ."

362. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing Cards or Cards issued during the Term of this Agreement."

363. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Skechers paid CardFact nothing for allegedly assuming this liability. Skechers paid a one-time initial set-up fee of $10,000 and agreed to estimated payments of $1,667 per month.

364. For the year 2008, Skechers reported to CardFact that they sold $1,101,347 in gift cards and redeemed $1,014,681, leaving $86,666 unclaimed. For the year 2008, Skechers paid CardFact $21,605.

365. CardFact assigned its rights and duties under the agreement to CardFact 25, Inc. Until 2011, however, the cards indicated that they were issued by CardFact, Ltd.

366. On March 15, 2011, Skechers reported to CardFact the following in unredeemed gift cards: 2005: $46,056.35; 2006: $98,731.54; 2007: $136,824.74; 2008: $141,438.81; 2009: $204,568.89; 2010: $925,412.51 – with a total unredeemed value of $1,553,032.84.

367. Based on Relator's records, Skechers is presently required to escheat approximately $300,000 to $500,000 in unredeemed gift cards, and continues to accumulate hundreds of thousands in unclaimed property every year. Because Skechers has failed to file an accurate report to the Delaware Escheator, without reasonable cause, it is required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See*

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

12 Del. C. §§ 1159(a), (d). Sketchers' failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

23. Houlihan's Restaurants, Inc.

368. Houlihan's Restaurants, Inc. ("Houlihan's") is a privately held company that owns, operates, and franchises more than 100 Houlihan's Restaurant and Bar restaurants across the mid-west and east coast. Houlihan's is owned by private equity firm Goldner Hawn Johnson and Morrison.

369. Houlihan's entered into a CSA with CardFact IV, Ltd. on January 1, 2008. Cynthia D. Parrel, Vice President, signed the agreement.

370. Under the contract, CardFact IV, Ltd. agreed to assume liability for the value of all unredeemed Houlihan's gift cards sold prior to the effective date of the contract and to become the "issuer" of Houlihan's gift cards going forward. CardFact did not inquire about the amount of this "historical liability," and received nothing from Houlihan's in exchange for taking on those liabilities.

371. Houlihan's agreed to pay the customary $10,000 set-up fee and a monthly estimated payment of $2,100. This fee reflected the 10% NRA discount.

372. The contract stated: "CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now-existing Cards or Cards issued during the Term of this Agreement."

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

373. The contract provided that if in any given year there were more card redemptions than sales, CardFact would not be required to pay Houlihan's anything.

374. CardFact's internal accounting records show that in 2008, Houlihan's reported to CardFact gift card sales of $2,039,954 and redemptions of $1,999,155, leaving $40,799 unredeemed. For the year 2008, Houlihan's paid CardFact $23,100. CardFact's internal accounting records further show that the bank account for CardFact IV never held a balance higher than $23,100 in 2008-2009.

375. After the sale of CardFact to Card Compliant, Card Compliant assigned its liabilities for Houlihan's gift cards from to CardFact IV, Inc.

376. Based on Relator's experience in the gift card industry and his knowledge of Houlihan's gift card operations, Relator estimates that, in fact, Houlihan's presently holds $350,000 in unredeemed gift cards that are "abandoned or unclaimed property" that Houlihan's should have already reported and transferred to Delaware. Because Houlihan's has failed to file an accurate report to the Delaware Escheator, without reasonable cause for several years, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d).Moreover, because Houlihan's has knowingly failed to file accurate reports regarding its abandoned property for at least two years, it is in violation of and subject to penalties under the False Claims and Reporting Act.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

24. Nash-Finch Company

377. Nash-Finch Company ("Nash") is a publicly traded company that operates as a wholesale food distributor through brands such as Pick'n Save, Family Fresh Market, and Bag'n Save grocery stores.

378. Prior to the 2008 CSA, Nash operated a paper gift certificate program dating back to 2005.

379. Nash entered into a CSA with CardFact, Ltd. on January 1, 2008. Robert Dimond, VP and CFO, signed the contract.

380. Under the contract, CardFact, Ltd. agreed to assume liability for unredeemed "gift certificates, gift cards, merchandise return cards or credits, and similar cards or items" Nash had previously sold and to become the issuer of Nash gift cards going forward from the date of the contract. The contract stated: "During the Term of this Agreement, CardFact shall be liable to the Cardholders for all unredeemed Cards. It is the intention of the Parties that CardFact is the legal holder of any unclaimed property with respect to any now existing cards or Cards issued during the Term of this Agreement."

381. CardFact did not inquire about the extent of the historical liability it was purportedly assuming, and Nash paid CardFact nothing for allegedly assuming this liability. Nash paid the $10,000 set-up fee and agreed to make estimated payments of $1,770 per month.

382. The contract provided that if in any given year there were more card redemptions than sales, CardFact would not be required to pay Nash anything.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

383. Nash later consented to CardFact, Ltd. assigning its liabilities for Nash gift cards to CardFact 25, Inc.

384. CardFact's internal accounting records show that in 2008, Nash reported to CardFact gift card sales of $327,006 and redemptions of $159,199, leaving $167,807 unredeemed. For the year 2008, Nash paid CardFact $19,470.

385. In a September, 2010, email chain between Relator and Bonnie Larson, Accounting Manager at Nash, Nash requested that it "transfer" all of its gift certificate liabilities to CardFact – despite the contract language in the CSA already assuming all "gift certificates" issued by Nash prior to the CSA. Nash made this request because it was being audited by Kelmar and it wanted to avoid escheating money from the gift certificate program to Delaware. CardFact agreed and assumed all gift certificate liabilities of Nash from 2005-2008. Nash later reported to CardFact that in May, 2011, Nash still held $157,857 in unredeemed gift certificates.

386. Customers who had purchased Nash gift certificates prior to 2008 would not know that CardFact was supposedly holding any unredeemed value because none of those certificates mentioned CardFact.

387. Although Relator's records do not make clear the amounts Nash held in unredeemed gift cards or certificates at the end of 2007, based on Relator's experience in the gift card industry and his knowledge of Nash's gift card operations, Relator estimates Nash's unredeemed gift card liability to be in excess of $150,000. Nash, moreover, continues to amass unredeemed gift cards at about

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

$150,000 per year. Because Nash has failed to file an accurate report to the Delaware Escheator, without reasonable cause for at least three years, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d).Nash's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

25. Netflix, Inc.

388. Netflix, Inc. ("Netflix") is a world-wide provider of on-demand entertainment streaming services and DVD rentals by mail.

389. On July 17, 2007, Netflix entered into a contract with CardFact, Ltd. regarding the escheatment of its unredeemed (i.e., unclaimed) gift cards. Roxanna Young, Director of Marketing at Netflix, signed the contract.

390. Under the contract, CardFact purported to assume liability as the holder of all unredeemed Netflix gift cards that had not yet reached statutory dormancy ("historical liability") and all cards going forward.

391. CardFact did not inquire about the amount of historical liability it was assuming and Netflix never transferred its historical liability to CardFact.

392. While CardFact purported to assume responsibility for issuing Netflix gift cards and escheating Netflix unclaimed gift cards, CardFact never performed either of those functions. Netflix continued to issue its own gift cards and hold all the proceeds from the sale of gift cards.

393. In 2007, CardFact's internal accounting records report Netflix annual gift card sales of $50,000 and redemptions of $35,000, leaving a difference of

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

$15,000. Rather than remitting to CardFact the proceeds from the yearly unredeemed gift cards, Netflix retained those funds for itself by "charging" CardFact a series of phony fees purportedly related to CardFact's services. Ultimately, for the year 2007, Netflix paid CardFact a mere $1,150.

394. In 2008, Netflix reported to CardFact gift card sales of $294,302 and redemptions of $181,402, leaving a difference of $112,900. For the year 2008, Netflix paid CardFact only $10,000. In 2008, CardFact issued Netflix a "credit memo" for $3,231, so as to avoid paying money back to Netflix from CardFact's yearly fee.

395. Although Relator's records do not make clear the amounts Netflix held in unredeemed gift cards or certificates at the end of 2007, based on Relator's experience in the gift card industry and his knowledge of Netflix's gift card operations, Relator estimates Netflix's gift card liability to be in excess of $50,000.Netflix, moreover, continues to amass unredeemed gift cards at about $150,000 per year. Because Netflix has failed to file an accurate report to the Delaware Escheator, without reasonable cause for at least three years, it is also required to pay interest on that property from the year it became due and a penalty of up to 50% of the value of the abandoned property. *See* 12 Del. C. §§ 1159(a), (d). Netflix's failure to file accurate reports regarding its abandoned property is also a violation of and subject to penalties under the False Claims and Reporting Act.

26. Wolverine World Wide, Inc.

396. Wolverine World Wide, Inc. ("Wolverine") is a publicly traded company that manufactures and distributes footwear nation-wide under several brand names, *inter alia,* Hush Puppies.

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

397. Brett Parent, e-commerce manager, signed a CSA on behalf of Hush Puppies Retail, Inc. ("Hush Puppies") effective December 31, 2006.

398. Under the agreement, CardFact, Ltd. agreed to "hold" the unredeemed value of "gift certificates or cards, merchandise return cards and similar cards, coupons or items" issued after December 31, 2006. Hush Puppies paid a $3000 set-up fee.

399. Based on the documents provided to CardFact, Hush Puppies sold $83,701 in gift cards in 2007 and redeemed $72,977, leaving $10,724 unredeemed. Hush Puppies sold $24,983 in gift cards in 2008 and redeemed $14,846, leaving $10,137 unredeemed. Wolverine World Wide, Inc. sent a 2008 1099-MISC form indicating a $3,493 payment to CardFact, Ltd. for 2008.

400. On January 7, 2011, Bev Bobko submitted a true-up sheet stating that Hush Puppies' "total unredeemed card balance" stood as follows: $2,039.82 in 2008, $8,652.17 in 2009, and $38,228.99 in 2010.

401. In March 2011, Hush Puppies had still not indicated on its cards that they were allegedly issued by CardFact. Hush Puppies consented to the assignment from CardFact, Ltd. to CardFact 25, Inc.

VI. KICKBACKS PAID TO THE NATIONAL RESTAURANT ASSOCIATION

402. In an effort to increase its marketing campaign and perpetuate its scheme with new clients, CardFact began paying kickbacks to the National Restaurant Association in exchange for inducing its members to use CardFact's gift card services. On October 25, 2007, the NRA entered into a "Royalty Services

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Agreement" ("RSA") with CardFact, Ltd. Under the agreement, the NRA agreed to assist in CardFact's marketing in exchange for a percentage of the business CardFact received from NRA members and for an intellectual property rights fee enabling CardFact to use NRA's name and logo in its marketing efforts.

403. On April 30, 2010, following Card Compliant's purchase of CardFact, the NRA, through its wholly-owned subsidiary, the National Restaurant Association Solutions, LLC, entered into a similar agreement with CardFact Holding, Inc. As part of their arrangement, the NRA ran articles advertising and vouching for the Card Services Defendants. The Card Services Defendants, in turn, used its "partnership" with the NRA defendants to make its business appear legal, informing potential clients that the NRA had "performed thorough due diligence of CardFact."

404. As a part of the RSA, CardFact offered all NRA members a 10% discount on CardFact's fees, as well as a "best pricing" agreement that provides NRA members with pricing "more favorable than the pricing offered to a substantially non-member organization." CardFact also agreed to waive its initial $10,000 set-up fee for all NRA members.

405. Per the RSA's terms, CardFact was to pay the NRA a percentage of annual revenues from NRA members on a lock-step basis. CardFact paid the NRA 10% of aggregate yearly revenues exceeding $40,000 from NRA members; 20% of aggregate yearly revenues exceeding $80,000 from NRA members; and 30% of aggregate yearly revenues exceeding $120,000 from NRA members. CardFact paid

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

the NRA a $25,000 "implementation fee" to begin using the NRA intellectual property rights.

406. In exchange for these kickback payments, the NRA agreed to market CardFact's program to NRA members, sponsor "in-house public relations and promotion of" CardFact's program, and promote CardFact's program to the NRA's Finance Executive Study Group by inviting CardFact to speak at the group's meetings on gift card compliance. The NRA further provided information on CardFact's program on its website, and provided links to CardFact's website for members to access information on CardFact's program for NRA members.

407. On April 23, 2009, Ted Ziegler, then CEO of CardFact Ltd., presented to the NRA Finance and Tax Executives Conference about CardFact's program for NRA members and the state of unclaimed property laws throughout the United States. CardFact then began sending targeted letters to NRA members about the ills of using an LLC to manage gift cards, and why CardFact's services are promoted by the NRA as a better gift card solution. Card Compliant continued to utilize the NRA marketing opportunities by providing a free webinar to NRA members discussing unclaimed property rules in the United States and CardFact's scheme for avoiding them. Based on these and other marketing opportunities, CardFact received significant business from NRA members to further its scheme to avoid the unclaimed property laws of the State of Delaware.

408. CardFact used NRA membership lists to send target potential customers with letters and marketing materials. In one such letter to Starbucks,

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

CardFact promises that it "can protect all of Starbucks gift cards from escheatment . . . CardFact can even protect those gift cards that have already been issued to consumers – Starbucks historic gift card liability." This letter also promotes CardFact's "partnership" with the NRA – including a link to an NRA press release about CardFact – and states "there are even discounts available" for NRA members.

409. CardFact's internal accounting records show that it paid the NRA its $25,000 implementation fee at the end of 2007. In 2008, CardFact paid the NRA kickbacks of $12,990 as royalties from revenues from NRA members. In 2009, CardFact paid the NRA kickbacks of $22,716 as royalties from revenues from NRA members. On February 19, 2011, CardFact paid $8,326 in kickbacks to the NRA for November, 2010, through January, 2011. Further kickbacks were paid to the NRA throughout 2010, 2011, and 2012.

410. Because the NRA has knowingly caused false reports to be filed to the Delaware Escheator, without reasonable cause, for several years, it is in violation of and subject to penalties under the False Claims and Reporting Act.

VII. COUNTS

COUNT ONE
Delaware False Claims and Reporting Act
6 Del. C. § 1201 (a)(7)
Against All Defendants

411. Relator re-alleges and incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

412. This is a claim for treble damages, forfeitures, and civil penalties under the Delaware False Claims and Reporting Act. 6 Del. C. § 1201 *et seq.*

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

413. Through the acts described in this Complaint, Defendants knowingly refused to fulfill their obligations to the State of Delaware under the Abandoned Property Law, 12 Del. C. §§ 1197, *et seq.* by failing to report and deliver unclaimed gift card and gift certificate funds to the State of Delaware.

414. Through the acts described in this Complaint, Defendants knowingly made, used, or caused to be made or used, false statements and records to conceal, avoid, or decrease an obligation to pay or transmit money to the Government of the State of Delaware in violation of the Delaware False Claims and Reporting Act 6 Del. C. § 1201(a)(7).

415. The State of Delaware, unaware that Defendants were wrongfully withholding unclaimed property to which it is entitled, has suffered significant monetary damages as a result of the Defendants' misconduct and presently continues to be damaged.

COUNT TWO
Delaware False Claims and Reporting Act
6 Del. C. § 1201 (a)(4)
Against All Defendants

416. Relator re-alleges and incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

417. This is a claim for treble damages, forfeitures, and civil penalties under the Delaware False Claims and Reporting Act. 6 Del. C. § 1201 *et seq.*

418. Through the acts described in this Complaint, Defendants knowingly refused to fulfill their obligations to the State of Delaware under the Abandoned

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

Property Law, 12 Del. C. §§ 1197, *et seq.* by failing to report and deliver unclaimed gift card and gift certificate funds to the State of Delaware.

419. Through the acts described in this Complaint, Defendants have possession, custody, or control of property or money used or to be used by the Government, and intending to deceive the Government or willfully conceal the property, delivered or caused to be delivered less property than the amount for which they have a receipt, thereby deceiving the Government of the State of Delaware in violation of the Delaware False Claims and Reporting Act 6 Del. C. § 1201(a)(4).

420. The State of Delaware, unaware that Defendants were wrongfully withholding unclaimed property to which it is entitled, has suffered significant monetary damages as a result of the Defendants' misconduct and presently continues to be damaged.

VIII. PRAYER FOR RELIEF

a. **WHEREFORE,** Relator requests that judgment be entered against the Defendants, ordering that: Defendants cease and desist from violating 6 Del. C. § 1201, *et seq.*;

b. Defendants pay not less than $5,500 and not more than $11,000 for each violation of 6 Del. C. § 1201, *et seq.*, plus three (3) times the amount of damages the State of Delaware has sustained as a result of Defendants' actions;

c. Defendants pay all costs of this action, including attorneys' fees and costs pursuant to 6 Del. C. § 1201, *et seq.*;

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.

d. The Relator be awarded the maximum "relator's share" allowed pursuant to 6 Del. C. § 1205; and

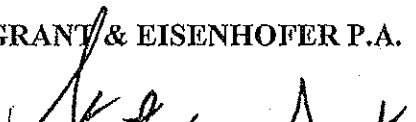
e. The State of Delaware and Relator French receive such other relief as the Court deems just and proper.

IX. JURY TRIAL DEMANDED

Relator demands trial by a jury of twelve (12).

Dated: June 28, 2013

GRANT & EISENHOFER P.A.



Stuart M. Grant (Del. I.D. No. 2526)
Mary S. Thomas (Del. I.D. No. 5072)
Jacob R. Kirkham (Del. I.D. No. 5768)
123 Justison Street
Wilmington, DE 19801
Telephone: (302) 622-7000
Facsimile: (302) 622-7100

Reuben A. Guttman
Grant & Eisenhofer P.A.
1920 L Street, N.W., Suite 400
Washington, DC 20036
Telephone: (202) 386-9500
Facsimile: (202) 386-9505

Douglas R. Sprong
Christopher A. Hoffman
Korein Tillery, LLC
505 North 7th Street, Suite 3600
St. Louis, MO 63103
Telephone: (314) 241-4844
Facsimile: (314) 241-3525

Attorneys For Relator

THIS DOCUMENT IS CONFIDENTIAL AND FILED IN CAMERA AND UNDER SEAL. REVIEW AND ACCESS TO THIS DOCUMENT IS PROHIBITED EXCEPT BY PRIOR COURT ORDER.