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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

BY: J. McEwen

Federal Trade Commission, Plaintiff, vs. Certified Merchant Services, Ltd., et al., Defendants. Case No. 4:02cv44 Judge Paul Brown STIPULATED FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF AS TO DEFENDANTS CERTIFIED MERCHANT SERVICES, LTD., CERTIFIED MERCHANT GP, INC., CERTIFIED MERCHANT SERVICES, INC., CMS-LP, LLC, JONATHAN FRANKEL AND CRAIG FRANKEL (REDACTED)

This matter comes before the Court on stipulation of Plaintiff Federal Trade Commission ("FTC" or "Commission"), and the Defendants Certified Merchant Services, Ltd., Certified Merchant GP, Inc., CMS-LP, LLC, Certified Merchant Services, Inc., Jonathan Frankel, and Craig Frankel. Defendants Certified Merchant Services, Ltd., Certified Merchant GP, Inc., CMS-LP, LLC and Certified Merchant Services, Inc. are hereinafter collectively referred to as "Certified Merchant Services" or "Corporate Defendants."

On February 11, 2002, the Commission filed a Complaint for Injunctive and Other Equitable Relief, including redress, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and moved for an ex parte Temporary Restraining Order ("TRO") pursuant to Rule 65 of the Federal Rules of Civil Procedure. That same day, this Court, having considered the Complaint, memorandum of law, declarations, and other exhibits filed in support of the Commission's motion, issued a TRO including an asset freeze and appointment of

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a temporary receiver. On March 6, 2002, the FTC, the Corporate Defendants and Jonathan Frankel and Craig Frankel consented to a Preliminary Injunction that provided for a continuation of all of the relief in the TRO, with the Defendants neither admitting nor denying that they engaged in violations of the FTC Act. On June 14, 2002, the Commission filed an Amended Complaint. Now, the Commission, the Corporate Defendants, Jonathan Frankel, and Craig Frankel offer the following Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Defendants Certified Merchant Services, Jonathan Frankel, and Craig Frankel (the "Final Order").

Upon the joint motion of Plaintiff and Defendants Certified Merchant Services, Jonathan Frankel, and Craig Frankel it is hereby **ORDERED, ADJUDGED, and DECREED** as follows:

#### **FINDINGS**

- A. This Court has jurisdiction over the subject matter of this case and the parties hereto.
- B. Venue is proper as to all parties in the Eastern District of Texas under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and (c).
- C. The activities of Defendants Certified Merchant Services, Jonathan Frankel, and Craig Frankel are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
- D. The Amended Complaint alleges claims upon which, if true, relief may be granted against Defendants Certified Merchant Services, Jonathan Frankel, and Craig Frankel under §§ 5(a)(1), and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a)(1), and 53(b).

- E. The Commission and Defendants Certified Merchant Services, Jonathan Frankel, and Craig Frankel stipulate and agree to this Final Order to settle and resolve all matters in dispute arising from the Complaint, the Amended Complaint, and the above-captioned matter to the date of entry of this Final Order.
- F. Defendants Certified Merchant Services, Jonathan Frankel, and Craig Frankel have waived all rights that may arise under the Equal Access to Justice Act, 28 U.S.C. § 2412, *amended by* Pub. L. 104-121, 110 Stat. 847, 863-64 (1996).
- G. Defendants Certified Merchant Services, Jonathan Frankel, and Craig Frankel acknowledge that they have read the provisions of this Final Order and have agreed to abide by them.
- H. Defendants Certified Merchant Services, Jonathan Frankel, and Craig Frankel waive all rights to seek appellate review or otherwise challenge or contest the validity of this Final Order.
- I. Defendants Certified Merchant Services, Jonathan Frankel, and Craig Frankel waive and release any claim they may have against the FTC and its employees, representatives or agents.
- J. No provision of this Final Order shall be construed as an admission or denial that any Defendant has engaged in violations of the FTC Act or the acts or omissions alleged in the Complaint and Amended Complaint.
- K. This Final Order is remedial in nature and shall not be construed as payment of a fine, penalty, punitive assessment or forfeiture.
- L. Entry of this Final Order is in the public interest.

## DEFINITIONS

For the purpose of this Final Order, the following definitions shall apply:

- A. "Acquiring Bank" means any bank that provides Merchant Accounts and has an agreement with Defendants relating to Merchant Accounts.
- B. "Assets" means all real and personal property of Defendants, or held for the benefit of Defendants, including, but not limited to "goods," "instruments," "equipment," "fixtures," "general intangibles," "inventory," "checks," or "notes" (as these terms are defined in the Uniform Commercial Code), all cash, funds, real or personal property, accounts, contracts, shares of stock, lists of Merchant names, or other assets, or any interest therein, wherever located.
- C. "Card processing" means goods and services relating to the acceptance, authorization, settlement, and payments for credit- or debit-card related sales.
- D. "Check conversion processing" means any goods and services that may relate to truncated check debits, as that term is used in the ACH Rules and Operating Guidelines, published by the National Automated Clearing House Association.
- E. "Clearly and conspicuously" means:
1. If presented in writing, the information shall be in a type size and location sufficient for an ordinary consumer to read and comprehend it, and shall be disclosed in a manner that would be easily recognizable and understandable in language and syntax to an ordinary consumer. If the information is contained in a multi-page print document, the disclosure shall appear on the first page.

2. If presented orally, the information shall be disclosed in a volume, cadence and syntax sufficient for an ordinary consumer to hear and comprehend.
3. Nothing contrary to any information disclosed shall be imparted at or near the time of the disclosure. Further, a subsequent disclosure made orally or in writing only limits or qualifies a prior disclosure and cannot cure a false claim.

F. "Corporate Defendants" means Certified Merchant Services, Ltd., Certified Merchant GP, Inc., Certified Merchant Services, Certified Merchant Services, Inc., CMS-LP, LLC, TMS, CMS, Inc., Transaction Merchant Services, Transaction Merchant Services.Com, and Electrocheck, and their subsidiaries, affiliates (including CJF Corporation, Inc.), divisions, successors, and assigns, whether acting directly or through any of their officers, directors, agents, servants, employees, joint ventures, or other devices, unless specified otherwise. *Provided, however,* that an unaffiliated bona fide purchaser of the Corporate Defendants' assets under Subparagraph IX. D. shall not be deemed a successor or assign as those terms are used in this definition.

G. "Defendant" means any of the Individual Defendants and the Corporate Defendants. "Defendants" means all of the Individual Defendants and the Corporate Defendants, individually, collectively, or in any combination.

H. "Document" is equal in scope and synonymous in meaning to the usage of the term in Federal Rule Civil Procedure 34(a), and includes writings, drawings, charts, graphs, photographs, audio and video recordings, computer records, and any other data compilations from which information can be obtained.

I. "General Manager" shall mean the General Manager designated in Paragraph VII of this Final Order. The General Manager is not an employee, representative, or agent of the FTC.

J. "In or affecting commerce" shall mean as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

K. "Individual Defendants" means Jonathan Frankel and Craig Frankel, individually, collectively, or in any combination, and whether acting directly or through any heir, successor, assign, agent, entity, corporation, subsidiary, division, or other device, unless specified otherwise.

L. "Merchant" means a person, corporation or any other entity, who/which sells or leases goods or services, and acts as a consumer by purchasing, leasing or renting goods or services other than primarily for personal, family or household purposes. "Merchants" means any of the Merchants, individually, collectively, or in any combination.

M. "Merchant Account" means a bank account opened at an Acquiring Bank in the name of a Merchant for deposits of the proceeds of the Merchant's credit or debit card-related sales transactions. "Merchant Account" also includes, but is not limited to, goods, leases and services related to that account.

N. "Merchant Account Portfolio" means all Merchant Accounts from which Defendants derive any income.

O. "Receiver," except as used within the term "equity receiver" in Paragraph VII of this Final Order, shall mean Garrett Vogel, in his capacity as Receiver of the Corporate Defendants pursuant to the Complaint and Amended Complaint. The Receiver is not an

employee, representative, or agent of the FTC.

P. "Receivership" shall mean the operation of the Corporate Defendants during the time a Receiver or General Manager has rights, duties and obligations in this case. "Receivership estate" shall mean all assets of the Corporate Defendants.

Q. "Relate to" means refer to, concern, regard, reflect, discuss, constitute, mention, pertain to, allude to or associate with. "Relating to" means referring to, concerning, regarding, reflecting, discussing, constituting, mentioning, pertaining to, alluding to or associated with.

R. "Released Claims" means any and all claims, demands, causes of action, obligations, damages, and liabilities of any kind, arising out of, or relating to any act, omission, cause, matter or allegation that is in whole or in part the subject of or asserted in the Complaint or Amended Complaint and that arose on or before February 11, 2002.

S. "Time Period for Sale" means **REDACTED** [This time period to remain CONFIDENTIAL and Under Seal until the Time Period for Sale passes].

### **PROHIBITED BUSINESS ACTIVITIES**

#### **I.**

**IT IS THEREFORE ORDERED** that in connection with the advertising, promotion, offering or sale of goods or services in commerce, Defendants are hereby permanently restrained and enjoined from falsifying signatures, and from altering or adding to, or assisting others in altering or adding to, without consent of Merchants, signed documents relating to Merchant Accounts, thereby producing changes to material terms, including but not limited to, increased rates and added fees and expenses.

**II.**

**IT IS FURTHER ORDERED** that in connection with the provision of card processing or check conversion processing, Defendants are hereby permanently restrained and enjoined from debiting, billing or receiving money, or assisting others in debiting, billing or receiving money:

- A. From Merchants before Defendants have provided such Merchants with promised card processing services or goods;
- B. From Merchants for check conversion processing before such Merchants have signed up for and activated such services; and
- C. From Merchants for services or goods provided after the Merchants have cancelled in writing.

*Provided, however,* that, with regard to Subparagraphs A and B of this Paragraph II, if a third-party electronic system through which such card processing or check conversion processing is provided does not permit the Defendants to defer automatic debiting until Merchants have the ability to use such processing services, then the Defendants shall, as soon as practicable, reimburse any such debits of which they are aware.

**III.**

**IT IS FURTHER ORDERED** that in connection with the advertising, promotion, offering or sale of goods or services in commerce, Defendants are hereby permanently restrained and enjoined from making or assisting others in making, directly or by implication, orally or in writing, any misrepresentation of material fact, including but not limited to:

- A. If Merchants purchase Defendants' services, such Merchants will save money on their business expenses, including their card processing expenses;



- B. If Merchants are dissatisfied with any services or representations made by Defendants, Merchants can cancel or transfer to another card processor at any time with no further obligation;
- C. There is no monthly minimum fee or expense associated with Merchant Accounts or associated services offered by Defendants;
- D. There are no fees or expenses in addition to the discount rate and per-transaction fee agreed to by Merchants;
- E. If Merchants are charged cancellation fees by prior card processors, Defendants will reimburse the Merchants; and
- F. If Merchants have an existing equipment lease, Defendants will purchase the remainder of the lease.

#### IV.

**IT IS FURTHER ORDERED** that in connection with the advertising, promotion, offering or sale of goods or services in commerce, if Defendants represent directly or by implication that they charge any particular percentage or fee, then Defendants are hereby permanently restrained and enjoined from failing to disclose clearly and conspicuously, orally or in writing, any material fact relating to fees, including but not limited to:

- A. Whether, under what conditions, and in what amounts the Defendants charge or debit any monthly minimum fees;
- B. Whether, under what conditions, and in what amounts the Defendants charge or debit any semi-annual fees; and

- C. Whether, under what conditions, and in what amounts the Defendants charge or debit any cancellation fees.

**V.**

**IT IS FURTHER ORDERED** that in connection with the sale of goods or services in commerce, if Defendants obtain the signature of any Merchant on a contract pertaining to such sale, including but not limited to an application, agreement or lease, then Defendants are hereby restrained and enjoined from failing to furnish that Merchant, at the time such document is executed by the Merchant, with a copy of such executed document in its entirety.

**VI.**

**IT IS FURTHER ORDERED** that, in connection with the advertising, promotion, offering or sale of goods or services in commerce, Defendants are permanently enjoined and restrained from:

- A. Failing to take reasonable steps sufficient to monitor that all Defendants' agents, representatives, employees, or independent contractors comply with Paragraphs I, II, III, IV and V of this Final Order. Reasonable steps shall include, without limitation, establishing and maintaining a compliance program which includes random, blind testing of the oral representations made by any representative or independent contractor; spot checking of Merchants to ensure that no misrepresentations were made; and ascertaining the number and nature of any complaints. Defendants shall, for a period of five (5) years, submit to the Commission, on an annual basis, no later than fifteen (15) days after the anniversary of the date of entry of this Final Order, a summary report indicating their efforts to comply with the requirements of this

Paragraph VI. These annual reports shall be submitted to the Commission's Associate Director for Marketing Practices at the address listed in Subparagraph XVI.D.

- B. Failing to investigate and resolve in a reasonably timely manner any Merchant complaint received by Defendants, their successors, assigns, officers, agents, servants, employees and distributors, and those persons in active concert or participation with them who receive actual notice of this Final Order and to notify the Merchant of the resolution of the complaint and the reason therefor. A resolution of a Merchant complaint includes any action that gives a Merchant actual notice that a complaint has been acknowledged and satisfied or denied.

*Provided, however,* that during the time the General Manager has the rights, duties and obligations in Subparagraphs VII. A. and IX. C. of this Final Order, the General Manager shall be responsible for the Corporate Defendants' compliance with this Paragraph VI.

#### **GENERAL MANAGER/RECEIVERSHIP PROVISIONS**

##### **VII.**

**IT IS FURTHER ORDERED** that Mary Dees, or in the event of her incapacity, or other unwillingness to serve, a substitute agreeable to the FTC and the Defendants, is appointed as General Manager, with the full power of an equity receiver, for the Corporate Defendants, and of all the funds, properties, premises (including 6101 West Plano Parkway, Plano, Texas 75093; P.O. Box 260077, Plano, Texas 75026; and P.O. Box 800697, Dallas, Texas 75380), accounts and other assets directly or indirectly owned, beneficially or otherwise, by the Corporate Defendants.

A. The General Manager is directed to and has authority to accomplish the following:

1. Continue to maintain full control of the Corporate Defendants, except as provided for in Subparagraph B of this Paragraph VII;
2. Continue to collect, marshal, and take custody, control and possession of all the funds, property, premises, accounts, mail and other assets of, or in the possession or under the control of the Corporate Defendants, wherever situated, the income and profits therefrom, and all sums of money now or hereafter due or owing to the Corporate Defendants, with full power to collect, receive and take possession of all goods, chattels, rights, credits, monies, effects, lands, leases, books and records, limited partnership records, work papers, and records of accounts, including computer-maintained information, contracts, financial records, monies on hand in banks and other financial institutions, and other papers and documents of other individuals, partnerships or corporations whose interests are now held by or under the direction, possession, custody or control of the Corporate Defendants;
3. Pay, in due course, all bills for necessary operating expenses of the receivership estate;
4. Perform all acts necessary to conserve, hold, manage, and preserve the value of those assets, in order to prevent any irreparable loss, damage and injury to Merchants; *provided, however*, that the General Manager shall not pay refunds of money (A) for Released Claims, or (B) for claims,

demands, causes of action, damages, or liabilities of any kind arising out of or relating to any act, omission, cause, matter or allegation relating to Merchant Account agreements entered into by the Corporate Defendants after February 11, 2002 (other than when the General Manager makes a good faith determination based on an investigation that a violation of the FTC Act occurred), except (1) to the extent those claims relate to monies (a) held in suspended accounts at an Acquiring Bank, and (b) held in the name of a specific Merchant or (2) unless approved by agreement of the General Manager and the Individual Defendants;

5. Enter into agreements, in connection with the General Manager's duties, to (a) make all employment decisions the General Manager deems reasonably necessary to (i) carry out the duties and responsibilities under Subparagraph IX.C. and (ii) comply with the FTC Act and the provisions of this Final Order during the existence of the receivership; *provided* that the aggregate compensation of employees and independent contractors hired by the General Manager for these purposes, including increases in compensation to current employees and current independent contractors, shall not exceed one hundred thousand dollars (\$100,000.00) annually; (b) retain General Manager's counsel of the General Manager's choice, but no more than two attorneys (one of partner-level and one associate) and their support staff, to assist, advise, and represent the General Manager, *provided* that such counsel shall file with the Court and serve on the

parties periodic requests for the payment of reasonable compensation from the assets of the receivership estate; and *provided further* that the General Manager's counsel shall not increase their fee rate billed to the receivership estate without prior approval of the Court; and (c) move and store any equipment, furniture, documents, records, files or other physical property of the Corporate Defendants;

6. Subject to the terms of this Final Order, institute, prosecute, compromise, adjust, intervene in or become party to such actions or proceedings in state, federal or foreign courts that the General Manager deems necessary and advisable to preserve the value of the properties of the Corporate Defendants, or that the General Manager deems necessary and advisable to carry out the General Manager's mandate under this Final Order, and likewise to defend, compromise, or adjust or otherwise dispose of any or all actions or proceedings instituted against the Corporate Defendants, that the General Manager deems necessary and advisable to preserve the properties of the Corporate Defendants, or that the General Manager deems necessary and advisable to carry out the General Manager's mandate under this Final Order; *provided* that the General Manager shall petition the Court, only if reasonably necessary to carry out the rights duties and obligations in this Subparagraph 6, to retain any counsel in addition to counsel retained pursuant to Subparagraph VII.A.5;

7. Prepare and submit any periodic reports to this Court and to the parties, as directed by the Court;
  8. Receive reasonable compensation from the operations of the receivership estate. Such reasonable compensation shall be a salary of two hundred fifty thousand dollars (\$250,000.00) annually, paid in twice per month installments, from the assets of the Corporate Defendants; and
  9. Intercept, divert and open any mail addressed to any of the Corporate Defendants that comes into the General Manager's possession, custody or control.
- B. To the extent they do not interfere with the General Manager's rights, duties and obligations in Paragraph VI and Subparagraphs VII. A. and IX. C., the Individual Defendants shall have access to the business premises and their offices at 6101 West Plano Parkway and they shall have the rights and duties as set forth in Subparagraphs 1, 2 and 3 below:
1. The Individual Defendants shall have the power to retain or remove, as the Individual Defendants deem necessary or advisable, any officer, director, independent contractor, employee, attorney, accountant, or agent of the Corporate Defendants in order to maximize the sale value of the Corporate Defendants' assets pursuant to Subparagraph IX. D. *Provided, however,* that the Individual Defendants shall consult with the General Manager regarding decisions to retain or remove any officer, director, independent contractor, employee or agent of the Corporate Defendants;

2. The Individual Defendants shall have the power to set employees', independent contractors' and agents' compensation, price products and services, and execute contracts with third parties; *provided, however*, that the Individual Defendants shall consult with the General Manager regarding decisions relating to compensation, the price of products and services, and execution of third-party contracts that might have any effect on the General Manager's duties set forth in Paragraph VI and Subparagraph VII. A.; and
3. The Individual Defendants shall have full control over all reasonable efforts to sell the Corporate Defendants' assets, pursuant to Subparagraph IX. D of this Final Order.

*Provided, however*, that nothing in Subparagraph VII B shall limit the General Manager's authority to retain or remove any officer, director, independent contractor, employee or agent in order to effectuate the General Manager's rights, duties and obligations set forth in Paragraph VI and Subparagraphs VII. A. and IX. C.

C. The Receiver and the Receiver's team of accountants, investigators, consultants and attorneys, other than Mary Dees, are hereby excused from the Receiver's rights, duties and obligations enumerated in the Stipulated Preliminary Injunction. The General Manager may consult with, and seek advice from, the Receiver or any member of the Receiver's team; however, the Receiver and the Receiver's team are not entitled to compensation under this Final Order for such advice and consultation.



*Provided* that the Individual Defendants are not and shall not be liable for (1) any act or omission of the Receiver or General Manager unless the act or omission directly resulted from an act or omission caused by the Individual Defendants, or (2) any act or omission of the Corporate Defendants while the Corporate Defendants were under the control of the Receiver or General Manager unless the act or omission directly resulted from an act or omission of the Corporate Defendants caused by the Individual Defendants. *Provided further*, that the Corporate Defendants are not and shall not be liable for any act or omission of the Receiver or General Manager unless the act or omission either constituted a violation of any specific direction given by the Receiver or General Manager or was intentionally concealed from the Receiver or General Manager.

## COMPLETION OF RECEIVERSHIP

### VIII.

**IT IS FURTHER ORDERED** that:

- A. If the judgment set forth in Subparagraph IX. A. is paid to the FTC in full pursuant to a sale of the Corporate Defendants' assets under Subparagraph IX.D., within the Time Period for Sale, then at such time all rights, authority, duties and responsibilities of the General Manager shall terminate; or
- B. If the judgment set forth in Subparagraph IX. A. is not paid to the FTC in full pursuant to a sale of the Corporate Defendants' assets under Subparagraph IX.D., within the Time Period for Sale, the General Manager shall immediately:
  1. Wind down the affairs and marshal the records and remaining assets of the Corporate Defendants, liquidate any and all Corporate Defendants' assets

remaining in the Receivership estate, and release to the Commission all dominion, title and control of the proceeds of such assets not to exceed payment in full of the judgment to the FTC pursuant to Subparagraph IX. B.; and

2. File with the Court, and serve on the parties, a final report describing the wind-down of the business of the Corporate Defendants and the scope of the General Manager's activities. After filing the final report and receiving any fees due under the Final Order, the rights, duties, authority and responsibilities of the General Manager shall terminate, and the Individual Defendants shall then be entitled to any remaining assets of the Corporate Defendants.

**REDRESS, OTHER EQUITABLE RELIEF, AND SALE  
OF THE CORPORATE DEFENDANTS' ASSETS**

**IX.**

**IT IS FURTHER ORDERED** that

- A. Judgment is entered jointly and severally against Certified Merchant Services, Jonathan Frankel, and Craig Frankel in the amount of

**REDACTED**

[Amount to remain CONFIDENTIAL and Under Seal until the Time Period for Sale passes].

B. Judgment shall be satisfied:

1. By the payment to the Commission of the amount set forth in Subparagraph IX. A. from the following sources in order: first, payment of the net proceeds from a sale or liquidation of the Corporate Defendants' assets, including the Merchant Account Portfolio, as set forth in Subparagraph IX. D.; and second, by the release by Jonathan Frankel and Craig Frankel to the Commission of all dominion, title and control to all assets listed in sections A and B of appendix D to this Final Order; *provided*, that Jonathan Frankel's (i) residence at 2509 Dunwick, Plano, Texas, and personal property therein, and (ii) Mercedes 500SI (year 2000), and Craig Frankel's (i) residence at 5704 Walden Drive, Plano, Texas, and personal property therein, and (ii) Lexus SC 300 (year 1998) shall not be deemed assets for the purposes of this Final Order. The total payment to the FTC shall not exceed the amount of the judgment set forth in Subparagraph IX. A.
2. If, after all funds paid and released pursuant to Subparagraph IX.B.1, the total funds paid and released pursuant to Subparagraph IX.B.1 are

insufficient to satisfy the judgment set forth in Subparagraph IX. A., the judgment shall be deemed satisfied in full subject to the terms set forth in Paragraph X. If the judgment has been satisfied in full pursuant to payments and releases under Subparagraph IX. B. 1., and the General Manager's expenses are paid, then the Individual Defendants shall have the right to dominion, title, and control over any remaining monies and assets.

- C. Not later than January 1, 2003, the General Manager shall, by U.S. Mail, send all Merchants in the Merchant Account Portfolio, who signed a Merchant Account contract on or before February 11, 2002, a copy of the settlement notice letter (in the form of the letter attached hereto as appendix A), a cancellation form (attached hereto as appendix B) and an un-executed Merchant Account contract (attached hereto as appendix C) ("appendix C Merchant Account contract"). Each un-executed appendix C Merchant Account contract shall comply with Paragraphs IV and V of this Final Order. The General Manager shall include with the settlement notice letter, cancellation form, and un-executed appendix C Merchant Account contract, a return envelope, U.S. Mail postage paid by the Corporate Defendants, of sufficient size and sufficient postage to allow Merchants to return any signed appendix C Merchant Account contract to the General Manager. If a Merchant: (1) signs and returns, post-marked within thirty-three (33) days from mailing, the appendix C Merchant Account contract, then upon receipt by the General Manager, it shall replace the existing Merchant Account contract and become the

Merchant's only operative Merchant Account contract ("new Merchant Account contract"); (2) signs and returns, post-marked within thirty-three (33) days from mailing, the appendix B cancellation form, then his existing Merchant Account contract shall be cancelled at the end of the month following the month in which the General Manager receives the signed cancellation form, and such Merchant shall not pay a cancellation fee; or (3) fails to return, within thirty-three (33) days from mailing, either a signed appendix B cancellation form or a signed appendix C Merchant Account contract, then the Merchant will be bound by the existing Merchant Account contract. If any Merchant requests a copy of his existing Merchant Account contract with the Corporate Defendants, the Corporate Defendants shall fax a copy of the existing contract to the Merchant within three (3) business days of the request. (If the Merchant does not have a fax machine, the Corporate Defendants shall mail the existing contract to the Merchant within three (3) business days of the request.) The Corporate Defendants shall create and maintain a list of Merchants who request contracts and whose existing contracts cannot be located and shall, upon written request, provide a copy of the list to the Commission.

- D. The Individual Defendants shall take all reasonable efforts to sell the Corporate Defendants' assets, including the Merchant Account Portfolio, to any interested bona fide third-party buyer for value, who is not a Defendant as defined herein. *Provided, however,* that nothing in this Final Order shall be construed as authority of any Individual Defendant to act as an agent of the FTC in his efforts to sell the

Corporate Defendants' assets. Each Individual Defendant shall make no material misrepresentation in his efforts to sell the Corporate Defendants' assets. Any sale of the Corporate Defendants' assets, including the Merchant Account Portfolio, shall be complete and closed within the Time Period for Sale. All proceeds due under the sale, net of reasonable fees and expenses (including reasonable attorneys fees and expenses) incurred in connection with the sale, not to exceed the judgment set forth in Subparagraph IX. A., shall be deposited directly by the buyer at closing into an account designated by and within the sole control of the FTC or its designated agent. If a sale of the Corporate Defendants' assets is not closed within the Time Period for Sale or if the amount paid to the FTC does not pay in full the judgment set forth in Subparagraph IX. A., then (a) all authority of the Individual Defendants relating to the operations of the Corporate Defendants, as set forth in this Subparagraph IX.D and in Subparagraph VII.B., shall terminate, and (b) the General Manager shall proceed to liquidate any and all Corporate Defendants' assets remaining in the receivership estate, in accordance with Subparagraph VIII. B. *Provided* that, if a sale of the Corporate Defendants' assets is not closed within the Time Period for Sale or if the amount paid to the FTC does not pay in full the judgment set forth in Subparagraph IX. A., then the Commission shall be entitled to inspect all documents that relate to the sale or attempted sale of the Corporate Defendants' assets. *Provided, further*, that the Defendants know of no right, and will create no right, of a Defendant or third-party (apart from anticipated reasonable fees and expenses, including reasonable

attorneys fees and expenses, incurred in connection with the sale) to payment prior in time or prior in right to the Commission's right to receive payment in the event of a sale of the Corporate Defendants' assets.

- E. The net proceeds of a sale or liquidation pursuant to Subparagraph IX. D of this Final Order, not to exceed the judgment set forth in Subparagraph IX. A., shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including, but not limited to redress and any attendant expenses for the administration of any redress fund. Defendants shall cooperate fully to assist the Commission in making the redress fund available to individual Merchants, including providing the Commission with a list of Merchants' last known mailing address, a list of Merchants who received refunds of money for Released Claims after July 19, 2002 and the amounts thereof. In the event that direct redress is wholly or partially impracticable or funds remain after redress is completed, the Commission may pay any remaining funds for such other equitable relief (including consumer education remedies) as it determines to be reasonably related to the Defendants' practices as alleged in the Amended Complaint. Any funds not used for such equitable relief shall be deposited into the United States Treasury. Certified Merchant Services, Jonathan Frankel, and Craig Frankel shall have no right to challenge the Commission's choice of remedies under this Paragraph IX.

**RIGHT TO REOPEN****X.**

**IT IS FURTHER ORDERED** that the Commission's agreement to this Final Order is expressly premised upon the financial condition of Certified Merchant Services, Jonathan Frankel, and Craig Frankel as represented in the sworn financial statements provided to the Commission on February 15, 2002, which provide the basis for the assets listed in appendix D to this Final Order, and which include material information upon which the Commission relied in negotiating and consenting to this Final Order. If, upon motion by the Commission, the Court should find that Certified Merchant Services, Jonathan Frankel, or Craig Frankel failed to disclose any material asset, made a material misrepresentation of the value of any asset, or made any other material misrepresentation in or omission from his financial statement, then this Final Order shall be reopened for the purpose of requiring payment of monetary relief in the amount of the judgment set forth in Subparagraph IX.A., less the sum of any amounts paid to the Commission pursuant to Paragraph IX of this Final Order. *Provided, however,* that in all other respects this Final Order shall remain in full force and effect, unless otherwise ordered by the Court; and *provided further,* that proceedings instituted under this Paragraph X are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings that the Commission may initiate to enforce this Final Order. As of signing this Final Order, the Commission is not aware of any material misrepresentation or omission from any Defendant's financial statement.



**ASSET FREEZE****XI.****IT IS FURTHER ORDERED** that

- A. The Individual Defendants are hereby restrained and enjoined from directly or indirectly transferring, liquidating, converting, encumbering, pledging, loaning, selling, concealing, dissipating, disbursing, assigning, spending, withdrawing, granting a lien or security interest in, or otherwise disposing of any assets listed in sections A and B of appendix D to this Final Order; and
- B. The Corporate Defendants are prohibited from directly or indirectly transferring, pledging, loaning, selling, disbursing, or assigning any assets to the Individual Defendants, except:
1. The General Manager shall continue to pay, pursuant to the Court's previous order, on a once per month basis, one thousand five hundred fifty-two dollars and twenty-five cents (\$1,552.25) to Jonathan Frankel, and two thousand eight hundred thirty-six dollars and twenty-five cents (\$2,836.25) to Craig Frankel, plus, upon presentment of monthly bills, reasonable amounts for property taxes and insurance, household gas, electric, telephone, television, lawn care, water and sewer. Such payments to Jonathan Frankel and Craig Frankel shall terminate upon (a) satisfaction of judgment as provided in Subparagraph IX.B of this Final Order, or (b) at the end of the Time Period for Sale, whichever is earlier;

2. The General Manager shall continue to pay, pursuant to the Court's previous order, on once per month basis, upon presentment of a bill by Bank of Texas or its successor, the monthly mortgage on the residence of Jonathan Frankel at 5608 Champions Drive, Plano, Texas. Such payments shall terminate upon satisfaction of judgment as provided in Subparagraph IX.B of this Final Order; and
3. The General Manager shall pay, within ten (10) days of the entry of this Final Order (or, if insufficient funds exist at that time, then at any time or from time to time in installments as determined by the Individual Defendants in consultation with the General Manager, as soon thereafter as possible), the income taxes, and any penalties and interest, owed for the year 2001 by Jonathan Frankel and Craig Frankel as owners of the Corporate Defendants. The General Manager shall pay, during the operation of the Receivership, all income taxes as they become due and payable, including any estimated quarterly payments, by Jonathan Frankel and Craig Frankel as the owners of the Corporate Defendants.

*Provided, however,* that nothing in this Paragraph XI shall be construed to excuse the Individual Defendants from paying their own individual income taxes resulting from income to them other than as owners of the Corporate Defendants; *provided, further, however,* that nothing in this Paragraph XI shall be construed to limit the General Manager's authority to transfer funds from any account relating to the Corporate Defendants for the purposes of operating the Corporate Defendants' business or any portion thereof.

**RETENTION OF ASSETS BY BANKS AND  
OTHER THIRD PARTIES**

**XII.**

**IT IS FURTHER ORDERED** that any financial or brokerage institution, escrow agent, title company, commodity trading company, business entity, trust, or person that holds, controls or maintains (a) assets listed in appendix D of this Final Order or (b) assets frozen pursuant to Paragraph VII of the Preliminary Injunction entered by this Court on March 6, 2002 shall continue to:

- A. Hold and retain within its control and prohibit the withdrawal, removal, assignment, transfer, pledge, hypothecation, encumbrance, disbursement, dissipation, conversion, sale, gift, or other disposal of any of the assets, except:
1. As directed in writing by the General Manager (regarding (a) assets held in the name or for the benefit of the Corporate Defendants and determined by the General Manager to be necessary to carry out the General Manager's rights and duties pursuant to this Final Order or make payments required under Subparagraph XI. B.; (b) assets to be used to pay costs as provided in Paragraph XXI; and (c) assets to be used to pay redress to the Commission under Paragraph IX);
  2. For specific transfers agreed to in writing by counsel for the Commission; or
  3. Upon written confirmation from counsel for the Commission that the asset freeze has been lifted.

### LIFTING OF ASSET FREEZE

#### XIII.

**IT IS FURTHER ORDERED** that after payment in full to the FTC of the judgment set forth in Subparagraph IX. A., and after the transfer of all funds to the FTC pursuant to Subparagraph IX B of this Final Order, then the asset freeze shall be lifted automatically and immediately, and at such time counsel for the Commission and the Defendants shall file any documents and take all actions necessary to effectuate such lifting of the freeze, including delivery by counsel for the Commission to Defendants a written confirmation that the asset freeze has been lifted.

### CUSTOMER LISTS

#### XIV.

**IT IS FURTHER ORDERED** that Defendants are permanently restrained and enjoined, other than transfers in the ordinary course of business, from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any Merchant who paid money to any of the Defendants in connection with card processing or check conversion processing; *provided* that, pursuant to Subparagraph IX.D of this Final Order, the Individual Defendants or their agents may disclose to any potential buyer of the Corporate Defendants' assets identifying information about any Merchant reasonably anticipated to remain in the Corporate Defendants' Merchant Portfolio as of completion of the process described in Subparagraph IX. D. of this Final Order; *provided further* that, Defendants may disclose such identifying information to a law enforcement agency or as required by any law, regulation, or court order.

**RECORD KEEPING****XV.**

**IT IS FURTHER ORDERED** that, for a period of eight (8) years from the date of entry of this Final Order, in connection with any business which advertises, promotes, offers, or sells Merchant Accounts, where either Individual Defendant is the majority owner of the business or directly or indirectly controls the business, the Individual Defendant and his agents, employees, officers, corporations, successors, and assigns, and those persons in active concert or participation with him who receive actual notice of this Final Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

- A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;
- B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- C. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased;
- D. Complaint and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests; and

- E. Copies of sales and customer service scripts, training materials, advertisements, form letter responses, and other marketing or customer service materials.

### COMPLIANCE REPORTING

#### XVI.

**IT IS FURTHER ORDERED** that, in order that compliance with the provisions of this Final Order may be monitored:

- A. For a period of five (5) years from the date of entry of this Final Order, each Individual Defendant shall notify the Commission of the following:
1. Any changes in his residence, mailing addresses, and telephone numbers, within thirty (30) days of the date of such change;
  2. Any changes in his employment status (including self-employment) within thirty (30) days of such change. Such notice shall include the name and address of each business the Individual Defendant is affiliated with or employed by, a statement of the nature of the business, and a statement of Individual Defendant's duties and responsibilities in connection with the business or employment; and
  3. Any proposed change in the structure of any business entity majority owned or directly or indirectly controlled by Jonathan Frankel or Craig Frankel, such as creation, incorporation, dissolution, assignment, sale, creation or dissolution of subsidiaries, or any other change that may affect compliance obligations arising out of this Final Order, thirty (30) days prior to the effective date of any proposed change.

- B. Fifty (50) days after the Time Period for Sale, each Individual Defendant shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which he has complied and is complying with this Final Order. This report shall include but not be limited to:
1. The Individual Defendant's then current residence addresses and telephone numbers;
  2. The Individual Defendant's then current employment, business addresses and telephone numbers, a description of the business activities of each such employer, and the Individual Defendant's title and responsibilities for each employer;
  3. A copy of each acknowledgment of receipt of this Final Order obtained by the Defendants pursuant to this Final Order; and
  4. A statement describing the manner in which the Individual Defendant has complied and is complying with the injunctive provisions of this Final Order, including, but not limited to, the monitoring, record keeping, and compliance portions of this Final Order.
- C. Upon written request by a representative of the Commission, each Individual Defendant shall submit additional written reports (under oath, if requested) and produce documents on fifteen (15) days' notice with respect to any conduct subject to this Final Order.

- D. For the purposes of this Final Order, the Defendants shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:
- Associate Director for Marketing Practices  
Federal Trade Commission  
600 Pennsylvania Ave, N.W., Room 238  
Washington, DC 20580  
Re: *FTC v. Certified Merchant Services, Ltd., et al.*
- E. For the purposes of this Paragraph, "employment" includes the performance of services as an employee, consultant, or independent contractor; and "employers" includes any individual or entity for whom the Individual Defendant performs services as an employee, consultant, or independent contractor.
- F. For purposes of the compliance reporting required by this Paragraph XVI, the Commission is authorized to communicate directly with the Individual Defendants.
- G. The Commission will treat as confidential, pursuant to 16 C.F.R §§4.10 and 4.11, all information provided to the Commission pursuant to this Paragraph XVI.

### AUTHORITY TO MONITOR COMPLIANCE

#### XVII.

**IT IS FURTHER ORDERED** that the Commission is authorized to monitor each Individual Defendant's compliance with this Final Order by all lawful means, including but not limited to the following:

- A. The Commission is authorized, without further leave of the Court, to obtain discovery from any person in the manner provided by Chapter V of the Federal



Rules of Civil Procedure, Fed. R. Civ. P. 27-34, 36-37, including the use of compulsory process pursuant to Fed. R. Civ. P. 45, for the purpose of monitoring and investigating the Defendants' compliance with any provision of this Final Order.

- B. The Commission is authorized to use representatives posing as Merchants and suppliers to either Individual Defendant or his employees, or any other entity managed or controlled in whole or in part by the Individual Defendant, without the necessity of identification or prior notice.
- C. Nothing in this Final Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to investigate whether any Individual Defendant has violated any provision of this Final Order, or Section 5 of the FTC Act, 15 U.S.C. § 45.
- D. For purposes of the compliance monitoring authorized by this Paragraph XVII, the Commission, and its agents, are authorized to communicate directly with any Individual Defendant and any of their employees, or any other entity directly or indirectly controlled by any Individual Defendant.

#### **ACCESS TO BUSINESS PREMISES**

#### **XVIII.**

**IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of this Final Order, in connection with any business which advertises, promotes, offers, or sells Merchant Accounts, for the purpose of further determining compliance with this Final Order the

Individual Defendants shall permit representatives of the Commission, within three (3) business days of receipt of written notice from the Commission:

- A. Access during normal business hours to any office, or facility storing documents, of any business which advertises, promotes, offers, or sells Merchant Accounts, where either Individual Defendant owns the majority of the business or directly or indirectly controls the business. In providing such access, the Individual Defendant shall permit representatives of the Commission to inspect and copy all documents relevant to any matter contained in this Final Order; and shall permit Commission representatives to remove documents relevant to any matter contained in this Final Order for a period not to exceed five (5) business days so that the documents may be inspected, inventoried, and copied; and
- B. To interview the officers, directors, and employees, including all personnel involved in responding to complaints or inquiries, and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, of any business to which Subparagraph A of this Paragraph XVIII applies, concerning matters relating to compliance with the terms of this Final Order. The person interviewed may have counsel present.

*Provided that*, upon application of the Commission and for good cause shown, the Court may enter an *ex parte* order granting immediate access to any Individual Defendant's business premises for the purposes of inspecting and copying all documents relevant to any matter contained in this Final Order.

**ACKNOWLEDGMENT OF RECEIPT OF FINAL ORDER****XIX.**

**IT IS FURTHER ORDERED** that, within five (5) business days after receipt by a Defendant of this Final Order as entered by the Court, that Defendant shall submit to the Commission at the address provided in Subparagraph D of Paragraph XVI, above, a truthful sworn statement, in the form shown in appendix E, that shall acknowledge receipt of this Final Order.

**DISTRIBUTION OF FINAL ORDER****XX.**

**IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of this Final Order:

- A. In connection with any business which advertises, promotes, offers, or sells Merchant Accounts, each Individual Defendant shall provide a copy of pages 1-10 (through Paragraph V) and page 39 (the Court's signature and date) of this Final Order to, and obtain a signed and dated acknowledgment of receipt of same from, each officer or director, each individual serving in a management capacity, all personnel involved in responding to complaints or inquiries, and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, immediately upon employing or retaining any such persons, for any business in which either Individual Defendant owns the majority of the business or directly or indirectly controls the business. *Provided* that during the Time Period for Sale, the General Manager shall be responsible for providing copies of

those pages of the Final Order to the employees and independent contractors of the Corporate Defendants, obtaining acknowledgments of receipt, and providing copies of the same to the Commission.

- B. The Individual Defendants shall maintain for a period of ten (10) years after creation, and upon reasonable notice, make available to representatives of the Commission, the original signed and dated acknowledgments of the receipt of copies of this Final Order, as required in Subparagraph A of this Paragraph XX. *Provided, however,* that the Individual Defendants are not responsible for maintaining acknowledgments obtained by the General Manager pursuant to Subparagraph XX. A.

## **COSTS**

### **XXI.**

**IT IS FURTHER ORDERED** that each party shall bear its own costs and attorney's fees incurred in connection with this action; *provided however,* that within ten (10) days after entry of this Final Order (a) payment of the balance of the undersigned Individual Defendants' attorneys' fees billed in connection with the above-captioned case through the date of entry of this Final Order shall be paid from the assets identified in sections A and B of appendix D, and (b) the General Manager shall make payment of fifty per-cent (50%) of the undersigned Corporate Defendants' attorneys' fees billed in connection with the above-captioned case through the date of entry of this Final Order from the Receivership Estate. *Provided further however,* that nothing herein shall prohibit the undersigned Defendants' attorneys from petitioning the Court for

payment from any frozen assets additional attorneys' fees and expenses billed through the date of entry of this Final Order, or Plaintiff from opposing such motion.

### **STAY OF OTHER ACTIONS**

#### **XXII.**

**IT IS FURTHER ORDERED** that except by leave of this Court, during the pendency of the receivership ordered herein, the Defendants and all customers, Merchants, principals, investors, creditors, stockholders, lessors, and other persons seeking to establish or enforce any claim, right or interest against or on behalf of the Defendants, and all others acting for or on behalf of such persons, including attorneys, trustees, agents, sheriffs, constables, marshals, and other officers and their deputies, and their respective attorneys, servants, agents and employees be and are hereby stayed from:

- A. Commencing, prosecuting, continuing or enforcing any suit or proceeding against the Defendants, except that such actions may be filed to toll any applicable statute of limitations;
- B. Commencing, prosecuting, continuing or entering any suit or proceeding in the name or on behalf of the Defendants;
- C. Accelerating the due date of any obligation or claimed obligation, enforcing any lien upon, or taking or attempting to take possession of, or retaining possession of, any property of the Defendants, or any property claimed by any of them or attempting to foreclose, forfeit, alter or terminate any of the Defendants' interests in property, including, without limitation, the establishment, granting, or

perfection of any security interest, whether such acts are part of a judicial proceeding or otherwise;

- D. Using self-help or executing or issuing, or causing the execution or issuance of any court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with, or creating or enforcing a lien upon any property, wheresoever located, owned by or in the possession of the Defendants, or the General Manager appointed pursuant to this Final Order or any agent appointed by said General Manager; and
- E. Doing any act or thing whatsoever to interfere with the General Manager taking control, possession or management of the property subject to this Receivership, or to in any way interfere with the General Manager, or to harass or interfere with the duties of the General Manager; or to interfere in any manner with the exclusive jurisdiction of this Court over the property and assets of the Defendants.

*Provided, however,* nothing in this Paragraph XXII shall prohibit any federal or state law enforcement or regulatory authority from commencing or prosecuting an action against the Defendants. *Provided, further,* that this stay shall end following termination of the Receivership pursuant to Paragraph VIII of this Final Order.

**RELEASE**

**XXIII**

**IT IS FURTHER ORDERED** that the Commission, upon execution of this Agreement and the filing of this Final Order, and for good and valuable consideration, the receipt and sufficiency of which is acknowledged by each of the Parties, hereby irrevocably and

unconditionally releases, remises, acquits and forever discharges all Defendants, their heirs, successors, assigns, legal representatives, estates, and successors in interest, from any and all known and unknown causes of action, suits, charges, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, torts, controversies, agreements, promises, variances, trespasses, damages, judgments, extends, executions, claims and demands whatsoever, in law, admiralty or equity which it ever had, now has, or may have, arising out of any occurrence prior to the date hereof, including without limitation, any act or allegation arising from, or which could arise from, the FTC's Complaint, Amended Complaint, or the above-captioned action, and any claims that were or could have been raised by FTC or on its behalf pursuant to any contract, expressed or implied, any obligation arising out of public policy, or the FTC Act or any other law, and all claims that were or could have been raised by FTC or on its behalf for attorneys' fees, disbursements, costs or the like.

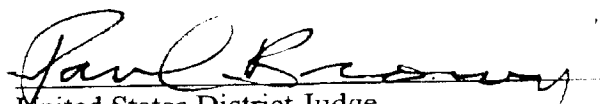
#### RETENTION OF JURISDICTION

#### XXIV.

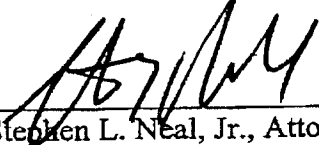
**IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for the purpose of enabling the parties to apply to the Court at any time for such further orders and directives as may be necessary or appropriate for the interpretation or modification of this Final Order, for the enforcement of compliance therewith, or for the punishment of violations thereof.

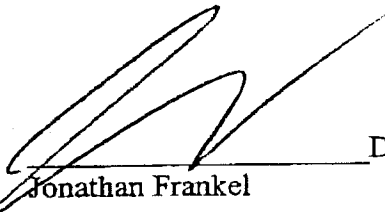
**IT IS SO ORDERED**, this 30<sup>th</sup> day of December, 2002, at

Sherman, Texas.

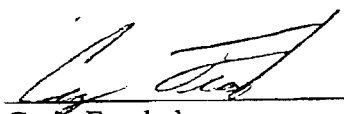
  
United States District Judge  
Eastern District of Texas

CONSENTED TO:

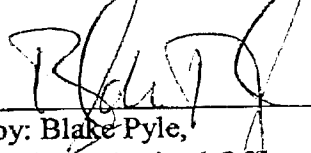
 DATE: 8/29/02  
Stephen L. Neal, Jr., Attorney-in-Charge  
DC Bar No. 441405

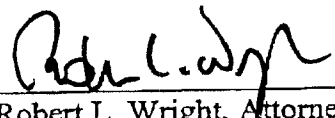
 DATE: 8-29-02  
Jonathan Frankel

Attorneys for Defendants Jonathan Frankel  
and Craig Frankel  
MANATT PHELPS & PHILLIPS, LLP  
1501 M Street, N.W., Suite 700  
Washington, DC 2005  
Tel:(202) 463-4300  
email: sneal@manatt.com  
Fax: (202) 463-4394

 DATE: 8-29-02  
Craig Frankel

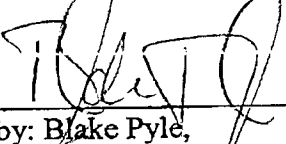
Certified Merchant Services, Ltd.

 DATE: 8/29/02  
by: Blake Pyle,  
Duly Authorized Officer of Certified  
Merchant, GP, Inc., general partner of  
Certified Merchant Services, Ltd.

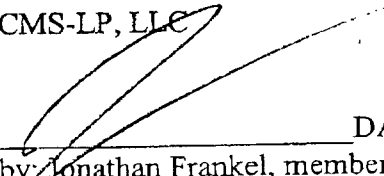
 DATE: 8.29.02  
Robert L. Wright, Attorney-in-Charge  
State Bar No. 22054300

Attorneys for Defendants Certified Merchant  
Services, Ltd., Certified Merchant, GP, Inc.,  
Certified Merchant Services, Inc., and CMS-  
LP, LLC.  
GARDERE WYNNE SEWELL, LLP  
1601 Elm Street, Suite 3000  
Dallas, TX 75201  
Tel: (214) 999-3000  
email: rwright@gardere.com  
Fax: (214) 999-4667

Certified Merchant GP, Inc.

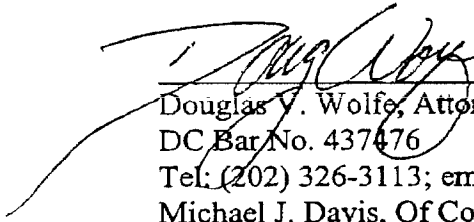
 DATE: 8/29/02  
by: Blake Pyle,  
Duly Authorized Officer

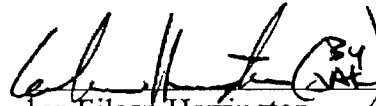
CMS-LP, LLC

 DATE: 8-29-02  
by: Jonathan Frankel, member



Federal Trade Commission

 DATE: 12/13/2002  
 Douglas Y. Wolfe, Attorney-in-Charge  
 DC Bar No. 437476  
 Tel: (202) 326-3113; email: dwolfe@ftc.gov  
 Michael J. Davis, Of Counsel  
 NY Bar No. 3049095  
 Tel: (202) 326-2458; email: mdavis@ftc.gov

 DATE: 12/13/02  
 by: Eileen Harrington  
 Associate Director  
 Division of Marketing Practices  
 Federal Trade Commission

Attorneys for Plaintiff  
 FEDERAL TRADE COMMISSION  
 600 Pennsylvania Ave., N.W.  
 Room H-238  
 Washington, DC 20580  
 Fax: (202) 326-3395

**appendix A**

[Letterhead of CMS, TMS, or NMS, as relevant]

[date]

[Merchant Name]  
[Business Name]  
[Address line 1]  
[Address line 2]  
[City, State ZIP]

**Re: IMPORTANT INFORMATION RE: YOUR CREDIT CARD PROCESSING SERVICES**

Dear Mr./Ms. [Merchant Last Name]:

This letter and the enclosures are important legal documents regarding your credit card processing services. **Please read these documents immediately and take whatever action you desire within 33 days of the date of this letter.**

Due to a settlement reached between the Federal Trade Commission ("FTC") and Certified Merchant Services, Transaction Merchant Services, National Merchant Services, Electrocheck and others ("CMS"), you have three options regarding the continuation of your card processing services. You may either (i) continue your existing contract with CMS; or (ii) sign a new contract with CMS; or (iii) cancel your existing contract with CMS. This letter summarizes your three options.

**Option #1: Continue Processing under Your Existing Contract with CMS**

Your first option ("Option #1") is to take no action. By taking no action, you agree to be bound by the terms of your existing Merchant Processing Agreement with CMS. You and CMS will have all the same rights and obligations that you had before you received this letter. You have a right to receive a copy of your existing Merchant Processing Agreement. If you would like to obtain a copy of that agreement, please call our toll-free Customer Support number 800-737-1099, and we will fax or mail you a copy of the document in its entirety. If you choose Option #1, simply take no action in response to this letter. If we do not receive either a signed new contract (Option #2) or the cancellation form (Option #3) from you within 33 days of the date of this letter, we will consider you to be taking Option #1.

page 2

**Option #2: Sign a New Contract with CMS**

Your second option ("Option #2") is to sign and return the enclosed new Merchant Processing Agreement to us within 33 days of the date of this letter. By returning this signed contract, your prior contract with CMS will be terminated, and you will be bound by the new contract. The new contract may have terms, including rates and fees, number of months, and other contract provisions that are different from your existing contract. Please note that your signature is required in [two] places on the Merchant Processing Agreement, so if you choose this option, be sure to sign in each place required. If you choose Option #2, please sign on each line as required, keep the yellow pages of the contract for yourself, and return the signed contract to us in the enclosed postage pre-paid envelope within 33 days from the date of this letter.

**Option #3: Cancel Your Existing Contract with CMS**

Your third option ("Option #3") is to sign and return the enclosed cancellation form to us within 33 days of the date of this letter. By returning the signed cancellation form, you agree to terminate your existing contract with CMS. As a result, we will terminate your services at the end of the month following the month in which we receive your signed cancellation form. If you wish to continue receiving services like those you received from CMS, you must seek such services from another provider. CMS will not charge you a fee or penalty for this cancellation, and you will not be obligated to pay for any services from CMS beyond the end of the month following the month in which we receive your signed cancellation form. If you choose Option #3, please fill out completely the enclosed cancellation form (including name, address, merchant account number, date and signature), and return the signed cancellation form to us in the enclosed postage pre-paid envelope within 33 days from the date of this letter.

Regardless of what option you choose, you may be able to receive payments from a merchant redress fund established by the settlement. Such payments are not yet available; however, the FTC will contact you with more information about making claims for payment from the merchant redress fund.

If you have questions about this letter, you may contact us at our toll-free Customer Support number \_\_\_\_\_ [Separate Toll-Free Number to be established for this purpose]. Thank you for your attention to this matter.

Sincerely,

Mary Dees  
General Manager

Enclosures

**appendix B**

**CANCELLATION FORM**

To: General Manager of CMS

From: Merchant name: \_\_\_\_\_

Business name: \_\_\_\_\_

Business address: \_\_\_\_\_

Merchant account no.: \_\_\_\_\_

Date: \_\_\_\_\_

Re: Cancellation of Services

I received your letter dated [date of settlement notice letter] regarding the settlement between the Federal Trade Commission and Certified Merchant Services, Transaction Merchant Services, National Merchant Services, Electrocheck, and others ("CMS").

I understand that I have three options, either: (i) continue my existing contract with CMS; or (ii) sign a new contract with CMS; or (iii) cancel my existing contract with CMS.

I understand that by signing this cancellation form, I authorize you to terminate my CMS services at the end of the month following the month in which you receive this signed cancellation form. If I wish to continue processing beyond that point, I understand that it is my responsibility to find another provider. I further understand that I will not be charged any fee or penalty for this cancellation.

\_\_\_\_\_  
Merchant Signature

**appendix C**

# **TMS**

**Transaction Merchant Services**

A Division of  
**Certified Merchant Services, Ltd.**

A Registered ISO/MSP for

National City Bank of Kentucky, Louisville, KY  
Humboldt Bank, Eureka, CA  
Woodforest National Bank, Houston, TX

## **Customer Service**

If you have any questions after installation, please contact  
Merchant Support at: 1-800-737-1099

If not yet installed, please refer to:

Team Leader # \_\_\_\_\_

WHITE COPY - COMPANY

YELLOW COPY - MERCHANT

Transaction Merchant Services.com



P.O. Box 260077
Plano, Texas 75026-0077

A Division of Certified Merchant Services, Ltd.

ISO/MSP for

- National City Bank of Kentucky, Louisville, KY
Humboldt Bank, Eureka, CA
Woodforest National Bank, Houston, TX

New Account

Merchant Category

Additional Location

Conf #

Merchant Processing Application/Agreement

Independent Merchant Consultant

IMC #

Name

Phone #

Office Use Only DOC#

SIC

MID #

Hierarchy #

- 1. Complete Merchant Agreement BEFORE Your Customer Signs
2. NO White Out. NO Crossouts Allowed Unless Lowering Price
3. Use Ink ONLY
4. NO Title Allowed on Personal Guarantor Line
5. If You Make A Mistake, START OVER

Terminal/Software: Printer: Pinpad:

Terminal Program Type: Retail Retail w/Tip Lodging Rest. w/Tip MOTO

EXISTING AMEX# EXISTING DISCOVER# OTHER#

MERCHANT agrees and understands automatic enrollment will occur with Discover if NO Discover account exists or if existing Discover # is NOT entered in the section above. Please write in "DECLINE" in the space following "Existing Discover #" above if Discover enrollment is NOT desired.

Business/Corporate Name Statement Mailing Address (If different from location address)

DBA (Doing Business As) Name City, State, Zip

Location/Site Address Federal Tax ID Number

City, State, Zip Phone Number FAX Number

Sole Proprietorship Partnership Corporation Non-profit

How Long has Present Ownership Been at Location? E-mail Address:

New Existing Mos. Yrs. Number of Locations If you currently accept VISA/Mastercard attach copy of last 3 months merchant statements.

Merchandise Sold Service Sold Monthly Bank Card Volume Average Ticket Amount Highest Ticket Amount

PERCENT OF BUSINESS (MUST = 100%) BUSINESS TYPE (MUST = 100%)
Card Swiped Keyed With Imprint of Card Keyed Without Imprint of Card Store Front Off Premise Mail / Phone Order
Trade Show Internet Other

SUMMARY OF STANDARD FEES

Table with columns: FEE CATEGORY, DISCOUNT RATE, TRANSACTION FEE, EXPLANATION OF FEE CATEGORY. Rows include Qualified Retail, Mid-Qualified Retail, Non-Qualified.

Table with columns: FEE CATEGORY, FEE, EXPLANATION OF FEE CATEGORY. Rows include Account Maintenance Fee, Monthly Minimum Fee, Semi-Annual Fee, Deconversion Fee, Application Fee, Supplieres, OTHER FEES.

MERCHANT understands and agrees that if Woodforest National Bank is the BANK that approves this Application, the discount rate, transaction fees, account maintenance fees and monthly minimum are as follows. All other fees set forth above shall remain applicable.

WOODFOREST BANK PRICING SCHEDULE

Table with columns: Woodforest Bank Pricing Schedule, Woodforest Bank Transaction Fee. Rows include Woodforest Bank Qualified Retail Discount Rate, Woodforest Bank Qualified MoTo/Internet Discount Rate, Woodforest Bank Account Maintenance Fee.







WHITE COPY - COMPANY

YELLOW COPY - MERCHANT

NON-CANCELLABLE LEASE

LEASE FINANCE GROUP, A DIVISION OF CIT FINANCIAL USA, INC. 233 N. Michigan Ave., Suite 1800 Chicago, IL 60601-5519 • (312) 980-5800 • Fax: (312) 980-5788

Form with fields: LEGAL NAME OF LESSEE (LESSEE), BILLING ADDRESS, CITY, STATE, ZIP, LESSEE PHONE NO, COUNTY, SIC CODE, PHONE NO., MERCHANT NUMBER, EQUIPMENT MANUFACTURER/SOFTWARE LICENSOR, MODEL/LICENSE AGREEMENT, SERIAL/REGISTRATION NUMBER. Includes checkboxes for CORPORATION, PROPRIETORSHIP, PARTNERSHIP.

LOCATION OF Equipment/Software Address (no. & street, city, state, zip) if different from above

The equipment ("Equipment") and the software and related license agreement(s) ("License Agreement(s)") and collectively with the software, the "Software") described above shall be referred to collectively as the "Property"

Table with columns: SCHEDULE OF PAYMENTS, PAYABLE AT SIGNING OF THE LEASE. Includes rows for TERM IN MONTHS, BASE MONTHLY PAYMENT OF \$ PER MONTH, COMMENCEMENT DATE, PLUS TAXES AND OTHER FEES AS DESCRIBED IN THE TERMS AND CONDITIONS BELOW, and checkboxes for FIRST AND LAST MONTHLY PAYMENT, FIRST MONTHLY PAYMENT, OTHER.

TERMS AND CONDITIONS (See other side for additional Terms and Conditions)
1. NOTWITHSTANDING ANY AMOUNTS WHICH MAY BE PAID BY LESSOR TO VENDOR OR ANY AGENT OF VENDOR, LESSEE UNDERSTANDS AND AGREES THAT NEITHER VENDOR NOR ANY AGENT OF VENDOR IS AN AGENT OF LESSOR OR IS AUTHORIZED TO WAIVE OR ALTER ANY TERM OR CONDITION OF THIS LEASE.
2. NON-CANCELLABLE LEASE. THIS LEASE CANNOT BE CANCELLED BY LESSEE DURING THE TERM HEREOF.
3. DISCLOSURE OF INFORMATION. Lessee and Guarantor(s) expressly authorize Lessor or its agents or assigns continuing authority to conduct credit checks and background investigations concerning Lessee and Guarantor(s) and has the right to report late payments and defaults to credit agencies as deemed appropriate by Lessor.
4. AUTHORIZATION AGREEMENT FOR AUTOMATIC WITHDRAWAL OF PAYMENTS. I, the undersigned Lessee in the capacity set forth below, hereby authorize CIT Financial USA, Inc. or its designee, successor or assign (hereinafter "Lessor") to automatically withdraw my monthly rental payment and any amounts, including any and all taxes or other charges now due or hereinafter imposed, owed in conjunction with the above referenced Non-Cancellable Lease (hereinafter "Lease") by initiating debit entries to my account at the financial institution (hereinafter "Bank") evidenced on the check copy provided, or such other Bank that may be used by me from time to time.

CERTIFICATE OF ACKNOWLEDGMENT AND ACCEPTANCE OF LEASED PROPERTY
I HAVE READ AND AGREE TO THE TERMS WHICH APPEAR ON BOTH SIDES OF THIS LEASE DOCUMENT. I represent that this Property is being leased for business and/or professional purposes and agree that under no circumstances shall this Lease be construed as a consumer contract. I acknowledge receipt of a copy of this Lease Agreement with all lease terms filled in, and acknowledge and agree that I shall be deemed to have unconditionally accepted the Property you have leased me under our Lease Agreement, particularly of which are given above.

Form with fields: ACCEPTED BY LESSOR (LEASE FINANCE GROUP, A Division of CIT Financial USA, Inc.), ACCEPTED BY LESSEE (LESSEE #1, LESSEE #2), X Signature, Print Name, Title, Date, Witness Signature X.

PERSONAL GUARANTY
To induce Lessor to enter into this Lease, the undersigned unconditionally guarantees to Lessor the prompt payment when due of all of Lessee's obligations to Lessor under the Lease. Lessor shall not be required to proceed against Lessee or the Property or enforce any other remedy before proceeding against the undersigned. The undersigned agrees to pay attorney's fees and other expenses incurred by Lessor by reason of default by the Lessee or the undersigned consents to any extensions or modifications granted to Lessee and the release and/or compromise of any obligation of Lessee or any other obligors and guarantors without in any way releasing the undersigned from its obligations hereunder. This is a continuing Guaranty and shall not be discharged or affected by death of the undersigned, shall bind the heirs, administrators, representatives, successors and assigns, and may be enforced by or for the benefit of any assignee or successor of Lessor. The undersigned agrees and consents the Court of the State of Illinois having jurisdiction in Cook County any Federal District Court having jurisdiction in said county shall have jurisdiction and shall be the proper venue for the determination of all controversies and disputes arising hereunder. The undersigned agrees and consents that the service of process by registered or certified mail will be sufficient to obtain jurisdiction.

Guarantor Signature, Guarantor Signature #2, X (if applicable), No title allowed, X, Witness Signature, Date.

We have written this Lease in plain language because we want you to fully understand its terms. Please read your copy of this Lease carefully and feel free to ask us any questions you may have.

5. **NO WARRANTIES.** The Property is subject to any warranties made by the manufacturer of the Equipment or licensor of the Software ("Licensor") and any limitation thereof. The Property is leased "AS IS" and LESSOR IS NOT LIABLE FOR THE PERFORMANCE OF THE EQUIPMENT, THE SOFTWARE, THE LICENSOR OR ANY OTHER PARTY'S FAILURE TO PROVIDE SERVICE. YOU ACKNOWLEDGE THAT WE DID NOT MANUFACTURE OR LICENSE THE PROPERTY NOR DID WE SELECT IT. WE DID NOT REPRESENT THE MANUFACTURER OR THE LICENSOR AND YOU SELECTED THE PROPERTY BASED UPON YOUR OWN JUDGEMENT. WE MAKE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. YOU AGREE THAT, REGARDLESS OF CAUSE, WE ARE NOT RESPONSIBLE FOR, AND YOU WILL NOT MAKE ANY CLAIM AGAINST US FOR, ANY DAMAGES, WHETHER LOST PROFITS, LOST DATA, CONSEQUENTIAL, DIRECT, SPECIAL, PUNITIVE OR INDIRECT, RELATING TO THE PROPERTY. YOU AGREE THAT IN THE EVENT OF A BREACH OR DEFAULT UNDER THE LICENSE AGREEMENT, LESSEE'S SOLE REMEDY SHALL BE AGAINST THE LICENSOR. We hereby notify you that you may have rights under the supply contracts or the License Agreement, and that you may contact the supplier or the Licensor for a description of those rights or any warranties.

6. **TERM AND RENT.** The Lease term shall commence as of the date that the Lease is accepted by us, ("the Commencement Date"), and shall continue until your obligations under the Lease shall have been fully performed. Each installment of rent shall be payable monthly in advance, the first such payment being due on the date you sign this Lease, or at such later time as agreed to by us, and the second payment shall be due the following month on the day of the month we designate in writing (hereinafter "Payment Day"), and subsequent payments will be due on the Payment Day of each successive month until the balance of the rent and any additional rent or fees chargeable to you under this Lease have been paid in full. All payments of rent shall be made to us at the address set forth herein or such other address that we may designate in writing. **YOUR OBLIGATION TO PAY SUCH RENTALS SHALL BE ABSOLUTE AND UNCONDITIONAL AND IS NOT SUBJECT TO ANY ABATEMENT, SET-OFF, DEFENSE OR COUNTERCLAIM FOR ANY REASON WHATSOEVER, INCLUDING ANY ACTION BY LICENSOR OR ANY OTHER THIRD PARTY.** You hereby authorize us to insert the serial numbers and other identification data of the Property when determined by us and dates or other omitted factual matters. If a security deposit is indicated above, the same shall be held by us to secure the faithful performance of the terms of the Lease and returned or applied in accordance with Paragraph 18 hereof.

7. **ASSIGNMENT.** (a) WE MAY ASSIGN OR TRANSFER THIS LEASE OR OUR INTEREST IN THE PROPERTY WITHOUT NOTICE TO YOU. Any assignee of ours shall have all of the rights, but none of the obligations, of ours under this Lease and you agree that you will not assert against any assignee of ours any defense, counterclaim or offset that you may have against us. (b) YOU SHALL NOT ASSIGN OR IN ANY WAY DISPOSE OF ALL OR ANY PART OF YOUR RIGHTS OR OBLIGATIONS UNDER THIS LEASE OR ENTER INTO ANY SUBLEASE OF ALL OR ANY PART OF THE PROPERTY WITHOUT OUR PRIOR WRITTEN CONSENT.

8. **TITLE, QUIET ENJOYMENT.** We shall at all times retain title to the Property. All documents of title and evidence of delivery shall be delivered to us. You hereby authorize us, at your expense, to cause this Lease, or any statement or other instrument in respect to this Lease showing our interest in the Property, including Uniform Commercial Code Financing Statements to be filed or recorded and refiled and rerecorded, and grant us the right to execute your name thereto. You agree to execute and deliver any statement or instrument requested by us for such purpose, and agree to pay or reimburse us for any filing, recording or stamp fees or taxes arising from the filing or recording of any such instrument or statement. So long as you are not in default under any of the terms in this Lease, we agree that we shall not interfere with your quiet use and enjoyment of the Property.

9. **CARE, USE AND LOCATION.** You shall maintain the Equipment in good operating condition, repair and appearance, and protect the same from deterioration other than normal wear and tear, shall use the Property in the regular course of your business; shall not make any modification, alteration or addition to the Property without our written consent, which shall not be unreasonably withheld; shall not so affix the Equipment to realty as to change its nature to real property; and shall not remove the Property from the location shown herein without our written consent, which shall not be unreasonably withheld.

10. **NET LEASE: TAXES.** You intend the rental payments hereunder to be net to us, and you agree to pay all sales, use, excise, personal property, stamp, documentary and ad valorem taxes, license and registration fees, assessments, fines, penalties and similar charges imposed on the ownership, possession or use of the Property during the term of this Lease; shall pay all taxes (except our Federal or State net income taxes) imposed on you or us with respect to the rental payments hereunder or the ownership of the Property; and, shall reimburse us upon demand for any taxes paid by or advanced by us. Unless otherwise agreed to in writing, you shall file personal property tax returns with respect to the Property.

11. **INDEMNITY.** You shall and do hereby agree to indemnify and save us, our agents, servants, successors, and assigns harmless from any and all liability, damage or loss, including reasonable attorney's fees, arising out of the ownership, selection, possession, leasing, operation, control, use, condition (including but not limited to latent and other defects, whether or not discoverable by you), maintenance, delivery and return of the Property. The Indemnity shall continue in full force and effect notwithstanding the termination of the Lease.

12. **INSURANCE.** You shall keep the Equipment insured against all risks of loss or damage from any cause whatsoever for not less than the full replacement value thereof. You shall carry public liability insurance, both personal injury and property damage, covering the Equipment. All such insurance shall be in form and with companies satisfactory to us and shall name us and our Assignee as Loss Payee as our interest may appear with respect to property damage coverage and as additional insured with respect to public liability coverage. You shall pay the premiums for such insurance and upon our request deliver to us satisfactory evidence of insurance coverage required hereunder. The proceeds of such insurance payable as a result of loss or damage to any item of Equipment shall be applied to satisfy your obligation as set forth in Paragraph 13 below. You hereby irrevocably appoint us as your attorney-in-fact to make a claim for, receive payment of and execute and endorse all documents, checks or drafts received in payment for loss or damage under any such insurance policy.

13. **RISK OF LOSS.** You shall bear all risks of loss of and damage to the Property from any cause and the occurrence of such loss or damage shall not relieve you of any obligation hereunder.

14. **INSURANCE NON-COMPLIANCE.** In the event you fail to comply with your obligations under Paragraph 12 of this agreement to deliver to us evidence of insurance naming us as Loss Payee, or upon the cancellation or non-renewal of the required insurance, then you shall be subject to an Insurance Non-Compliance Charge in the amount of \$2.50 per month, per item of Equipment, said amount to be paid with the next monthly rental payment and all subsequent payments due during the remaining term of the Lease, or until

such time as satisfactory evidence of insurance coverage has been provided. The imposition of the Insurance Non-Compliance Charge shall not relieve you of any obligation under Paragraph 13 of this agreement.

15. **EVENT OF DEFAULT.** If any one of the following events (each a "Default") shall occur, then to the extent permitted by applicable law, we shall have the right to exercise any one or more remedies set forth in Paragraph 16 below, (a) you fail to pay any rental or any other payment hereunder when due; or (b) you fail to perform any of the terms, covenants, or conditions of this Lease other than as provided above after ten (10) days' written notice.

16. **REMEDIES.** If a Default occurs, we may do any or all of the following: (a) terminate this Lease; (b) declare all unpaid Lease payments until the end of the term of this Lease and other amounts under this Lease immediately due and payable; (c) repossess or render unusable, any Property wherever located, without demand or notice, without any court order or other process of law and without liability to you for any damages occasioned by such action; (d) require you to deliver the Property to a location designated by us; (e) proceed by court action to enforce performance by you of this Lease and/or recover all damages and expenses incurred by us by reason of any Default; or (f) exercise any other right or remedy available at law or in equity, including those of a secured creditor. You shall pay us all costs and expenses (including attorney's fees and costs) incurred by us in enforcing any of the terms of this Lease or any of our rights against you. Upon repossession or surrender of any Property, we may lease, sell or otherwise dispose of the Property, and apply the net proceeds thereof to the amounts owed to us hereunder, provided, that you shall remain liable to us for any deficiency. You agree that it is commercially reasonable for repossessed Property to be sold at public or private sales (in any state or county selected by us) to dealers or others in lots or pieces (with or without the Property being physically present) at used Property prices. Notwithstanding the foregoing, to the extent the Software is nontransferable or its transfer restricted, Lessee agrees that the Lessor and/or Licensor of the Software shall have no duty to remarket such Software or otherwise mitigate any damages relating to such Software. All rights and remedies are cumulative and may be enforced concurrently. Any delay or failure to enforce our rights hereunder does not prevent us from enforcing any rights at a later time. Notwithstanding the foregoing, any attorneys' fees, costs, or expenses, or costs or expenses of repossession and storage, shall be limited to the highest amount chargeable under applicable law.

17. **CHANGE OF NAME, BILLING ADDRESS, BANK ACCOUNT.** You will inform us, within ten (10) days, of any change in your name, address, billing address, telephone numbers, location of Property, or the bank checking account used by ACH debit. We are authorized to correct any typographic or spelling errors made on the front of this Lease Agreement regarding your address, telephone numbers or the Property leased.

18. **END OF LEASE TERM.** At the expiration or earlier termination of this Lease Term, you have the following options: (1.) You shall disconnect and return the Equipment and/or Software, freight prepaid, to us in good repair, condition and working order, in a manner and to a location we designate and all Lessee's right to use the Software shall terminate. (2.) Lessor extends an option to purchase the equipment at the end of the term for fair market value, which is estimated to be 10% of the Lease term times monthly Lease payment (excluding taxes) and return the Software in accordance with option 1. (3.) You can extend upon all the terms and conditions as stated herein for a period of one month from its expiration date without the necessity of the execution of any further instrument or document. At the end of this additional month, options 1, 2, and 3 are again available to you. Unless you notify us in writing 30 days prior to the expiration of the Lease Term, or monthly renewal period, you shall have been deemed to have chosen option 3 (Automatic Renewal for one month).

19. **LATE PAYMENTS AND COLLECTION COSTS.** If you do not make a payment within 10 days of its due date, you must pay, in addition to the payment, a late charge of \$10.00 for each late payment. Each month the past due payment remains unpaid, an additional late fee of \$10.00 will be assessed. You will pay our collection costs, and reasonable Attorney's fees. Such collection costs include, but are not limited to charges for collection letters and collection calls and to charges of collection agencies, courts, sheriffs, etc. There will be a processing charge of \$10.00 for any returned check or for any rejected credit card charge or for any rejected automatic bank account debit. Payments are applied to late fees and to processing charges first and then to Lease obligations.

20. **MISCELLANEOUS.** In the event you fail to comply with any provision of this Lease, we shall have the right, but not be obligated, to effect such compliance on your behalf. In such event, all monies expended by, and all expenses of ours in effecting such compliance, shall be deemed to be additional rental, and shall be paid by you to us at the time of the next monthly payment of rent. All notices under this Lease shall be sufficient if given personally or mailed to the party intended at the respective address set forth herein, or at such other address as said party may provide in writing from time to time. We intend and you intend this Lease to be a valid and subsisting legal instrument, and agree that any provision of this Lease which may be deemed unenforceable shall be modified to the extent necessary to render it enforceable and shall in no way invalidate any other provision or provisions of this Lease, all of which shall remain in full force and effect. This Lease shall be binding when accepted in writing by us and shall be governed by the laws of the State of Illinois, without regard to the conflict of law, rules or principles thereof. Unless otherwise prohibited by law you agree and consent that the Court of the State of Illinois having jurisdiction in Cook County or any Federal District Court having jurisdiction in Cook County shall have the jurisdiction and shall be the proper venue for the determination of all controversies and disputes arising hereunder. You agree and consent that service of process by registered or certified mail will be sufficient to obtain jurisdiction. Nothing contained herein is intended to preclude us from commencing any action hereunder in any court having jurisdiction thereof. You waive, insofar as permitted by law, trial by jury in any action between the parties.

21. **CHOICE OF LAW; ARBITRATION:** Any claim or controversy, including any contract or tort claim, between or among us, you or any Guarantor related to this Lease, shall be determined by binding arbitration in accordance with Title 9 of the U.S. Code and the Commercial Arbitration Rules of the American Arbitration Association. All statutes otherwise applicable shall apply. Judgment upon the arbitration award may be entered in any court having jurisdiction. In event you or Guarantor Defaults, these provisions regarding arbitration shall not apply to our right to repossess the Equipment. This Lease is made in interstate commerce. Any arbitration shall take place in Chicago, Illinois.

22. **LIMITATION ON ACTION:** You shall commence any action based in contract, tort or otherwise arising from, or related to, this Lease, or the subject matter thereof, within one year of the accrual of that cause of action and no such action may be maintained which is not commenced within that period.

23. **ENTIRE AGREEMENT; CHANGES.** This Lease contains the entire agreement between the parties and may not be altered, amended, modified, terminated or otherwise changed except in writing and signed by one of our executive officers.

WHITE COPY - COMPANY

YELLOW COPY - MERCHANT

### DEBIT NETWORK REGISTRATION

This registration may be used ONLY for debit merchants registering with any or all of the following networks: Accel, Cash Station, Explore, HONO Interlink, MAC, Maestro, Magic Line, NYCE, Pulse, Shazam, Star, and Tyme. THE MERCHANT SPONSORSHIP WITH EACH SUCH NETWORK AS REGISTERED ON THIS DOCUMENT, MUST BE THROUGH THE SAME MEMBER SPONSOR. Additional Terms and Conditions on reverse.

TERMINAL INFORMATION: Terminal ID # \_\_\_\_\_

Number of Terminals \_\_\_\_\_

Terminal Equipment \_\_\_\_\_

Terminal Services Provided: Debit \_\_\_\_\_ Script \_\_\_\_\_

POS Processor \_\_\_\_\_

#### MEMBER SPONSOR INFORMATION

Member \_\_\_\_\_

Sponsor hereby accepts merchant sponsorship liability as contained in the network operating regulations, and further confirms merchant understanding of those operating regulations and accepts liability for merchant's compliance with those operating regulations.

#### REQUIRED SIGNATURES

Merchant  \_\_\_\_\_

Date \_\_\_\_\_

Certified Merchant Services, Ltd. \_\_\_\_\_

Date \_\_\_\_\_

DEBIT TRANSACTION FEE .35 cents + .10 cents Debit Network Fees

MONTHLY DEBIT ACCESS \$7.00

#### Previous Lease Pay-Off Option

By selecting this option your existing Lease may be paid off by TMS upon the execution of a new TMS lease. This may result in your new lease payment being increased to cover the cost of the pay-off.

Previous Lease:

Lease #: \_\_\_\_\_

Pay-off Quote: \$ \_\_\_\_\_ as of Date: \_\_\_\_ / \_\_\_\_ / \_\_\_\_ Monthly Payment: \$ \_\_\_\_\_

Prior Leasing Co: \_\_\_\_\_

Prior Leasing Phone #: \_\_\_\_\_

Upon approval, Prior Leased equipment must be returned to the prior leasing company. The Merchant is solely responsible for returning this equipment to the prior Lease Co. TMS will accept equipment leased previously by LFG or CIT if shipped to TMS corporate address by the merchant. Lease Pay-off terms are subject to change and this is not a binding agreement to pay-off existing Lease.

#### AGREED AND ACCEPTED

\_\_\_\_\_

#1 FROM APPLICATION

Complete this section ONLY if 50% or more of your sales are generated through Mail/Telephone/Internet. If 50% or more, then Mail/Telephone/Internet rates apply.

PERCENT OF ANNUAL MC/VISA SALES GENERATED THROUGH MAIL ORDER % TELEPHONE ORDER \_\_\_\_ % POS \_\_\_\_ % TOTAL = 100%

NUMBER OF DAYS TO PREPARE SHIPMENT FOR DELIVERY TO CUSTOMER FROM DATE OF ORDER \_\_\_\_

PERCENT OF CUSTOMER ORDERS DELIVERED IN 0-7 DAYS % 8-14 DAYS \_\_\_\_ % 15-30 DAYS \_\_\_\_ % MORE THAN 30 DAYS \_\_\_\_ %

100% MC/VISA SALES ARE DEPOSITED (CHECK ONE)  AT DATE OF ORDER  AT DATE OF DELIVERY  OTHER

NAME OF FULFILLMENT HOUSE (IF ANY) \_\_\_\_\_ DELIVERY TIME FRAME \_\_\_\_\_

STREET ADDRESS \_\_\_\_\_ CITY \_\_\_\_\_ STATE \_\_\_\_\_ ZIP \_\_\_\_\_

NAME OF SHIPPING SERVICE USED \_\_\_\_\_ DELIVERY TIME FRAME \_\_\_\_\_

STREET ADDRESS \_\_\_\_\_ CITY \_\_\_\_\_ STATE \_\_\_\_\_ ZIP \_\_\_\_\_

HOW DO YOU ADVERTISE FOR YOUR MAIL/TELEPHONE ORDER SALES? (CHECK AS APPROPRIATE)  CATALOG  DIRECT MAIL-LETTER/BROCHURE  TELEVISION & RADIO

TELEPHONE/TELEMARKETING  INTERNET (IF WEB SITE, LIST ADDRESS) \_\_\_\_\_

NOTE: CURRENT COPIES OF THE ABOVE MATERIALS MUST BE ATTACHED.

IS AN INCENTIVE OFFERED TO PURCHASE THE SERVICE OR PRODUCT?

YES  NO TYPE OF INCENTIVE \_\_\_\_\_

ARE CONSUMERS REQUIRED TO PROVIDE A DEPOSIT?  YES  NO IF YES, PERCENT REQUIRED % \_\_\_\_\_

IF YES, NUMBER OF WEEKS UNTIL COMPLETE DELIVERY OF PRODUCT/SERVICE \_\_\_\_\_

DO YOU HAVE A REFUND POLICY FOR YOUR MASTERCARD/VISA SALES?  YES  NO

CHECK THE APPLICABLE REFUND POLICY  CASH  EXCHANGE  STORE CREDIT  MASTERCARD/VISA CREDIT

IF MC/VISA CREDIT, WITHIN HOW MANY DAYS DO YOU DEPOSIT CREDIT TRANSACTIONS?

0-3 DAYS \_\_\_\_\_ 4-7 DAYS \_\_\_\_\_ 8-14 DAYS \_\_\_\_\_ OVER 14 DAYS \_\_\_\_\_

1. ACQUIRER will release funds to MERCHANT up to five (5) business days after Transaction date.
2. MERCHANT agrees to use and retain proof of a traceable delivery system as means of shipment of product to customer.
3. MERCHANT agrees that transactions will not be processed until products are shipped to cardholder.
4. MERCHANT agrees to charge up to \$.05 per AVS transaction, if applicable.
5. Agreement may be immediately terminated by ACQUIRER if MERCHANT fails to comply with any of the terms of this Agreement.

# Merchant Debit Card Processing Agreement

This Merchant Debit Card Processing Agreement is entered into by and between the company ("Merchant" or "you") indicated on the Debit Network Registration Form ("Registration Form"), the Sponsor Bank indicated on the Registration Form ("Sponsor Bank"), the Settlement Bank indicated on the Registration Form ("Settlement Bank") and Certified Merchant Services, Ltd. d/b/a Transaction Merchant Services ("TMS") on the date that it is accepted by TMS ("Effective Date").

You desire to honor plastic cards ("Debit Card") issued by the electronic fund transfer networks listed on the Registration Form ("Network") for payment of goods or services. TMS has made arrangements with Sponsor Bank to sponsor you into debit card networks. Therefore, the parties agree as follows:

- General; Merchant Account.** You agree to honor all valid Debit Cards issued by a Network and properly presented by a person presenting a Debit Card for payment ("Cardholder") to pay for goods or services. Cardholders will be entitled to the same services and return privileges you extend to cash customers, and you will not impose any special conditions (unless permitted by the applicable Network) in connection with the acceptance of Debit Cards. You authorize Sponsor Bank and Settlement Bank or its designees to credit and debit via ACH the deposit account designated by you ("Merchant Account") to facilitate payment of amounts due under this Agreement.
- Compliance; Authorization; Other Requirements.** You will comply (and assume all liability for failure to comply) with the operating rules and regulations of the Networks as amended from time to time ("Rules"). You will obtain authorization for every purchase by a Cardholder of goods or services from you by use of a Debit Card ("Transaction") prior to acceptance of a Transaction. When authorization is obtained, you will electronically print the authorization number on the electronic or paper form evidencing a Transaction ("Sales Transmittal").
- Compliance.** You will comply with all Rules and relevant state and federal statutes and regulations ("Laws"). Without limiting the generality of the foregoing, you agree that: (i) for each Debit Card sale, the Cardholder must enter his Personal Identification Number ("PIN") through a PIN pad located at the point of sale; (ii) each PIN pad will be situated to permit Cardholders to input their PINs without revealing them to other persons, including your personnel; (iii) you will instruct personnel (A) that they may not ask any Cardholder to disclose the PIN and (B) in the event that any of your personnel nevertheless becomes aware of any Cardholder's PIN, such personnel will not use such PIN or create or maintain any record of such PIN, and will not disclose such PIN to any other person; (iv) the PIN message must be encrypted from the PIN pad to the POS terminal and from the POS terminal to the Network and back so that the PIN message will not be in the clear at any point in the transaction; (v) you will comply with any other requirements relating to PIN security as required by Sponsor Bank or by any Network; (vi) for each Debit Card sale a transaction receipt in conformity with Regulation E will be made available to the Cardholder; (vii) you may not establish a minimum or maximum transaction amount as a condition for use of a Debit Card; (viii) you may not charge any Cardholder for the use of any Debit Card unless the Rules so permit; (ix) you may not collect tax as a separate cash transaction; and (x) POS terminals, including hardware and software, must be certified for use by Sponsor Bank and by all of the Networks. POS terminals must include encrypted PIN pads which allow entry of up to sixteen character PINs, printers and a keyboard lock function. You are responsible for compliance with all Rules regarding the use of POS terminals, regardless of whether such POS terminals are obtained through TMS or through a third party.
- Credit Refunds.** You will promptly initiate a refund to the customer (which may be made in cash, by an adjustment draft or with a check or cashier's check, as permitted by the Rules) whenever you determine that a Transaction should be canceled or reversed.
- Error Resolution.** You will cooperate with TMS, with Sponsor Bank, with Settlement Bank, and with each applicable Network and its other members to resolve any alleged errors relating to Transactions. You will maintain adequate records to assist in error resolution; records will be maintained for 2 years or the period of time required by the Rules, whichever is greater. You will permit and will pay all expenses of periodic examination and audit of functions related to each Network, at such frequency as the applicable Network deems appropriate. Audits will meet Network standards, and the results will be made available to the Network.
- Certain Prohibited Transactions.** You will not accept cash, checks or other negotiable items from any Cardholder and forward a credit through any Network (i.e., as a purported payment or deposit to an account maintained by the Cardholder). You will not forward through any Network any Transaction or initiate any reversal of a transaction that did not originate between you and the Cardholder.
- Prevention of Fraud.** You will not complete any Transaction that you know or should have known to be fraudulent or not authorized by the Cardholder. You will fully cooperate with TMS, Sponsor Bank, Settlement Bank, and each Network in the event that TMS, Sponsor Bank or any Network determines that there is a substantial risk of fraud arising from your access to the Network. You will take whatever actions TMS, Sponsor Bank, Settlement Bank, or any Network reasonably deems necessary in order to protect such Network, its members, and its Cardholders. Neither TMS, the Network, Sponsor Bank, Settlement Bank, nor any of their respective personnel will have any liability to you for any action taken in good faith.
- Display of Network Trademark(s); Protection of Trade Secrets.** You will prominently display the trademark of each Network at each location and will display signage of each Network at the entrance, near all POS terminals and on the window of such location. All uses by you of any Network trademark will comply with the Rules. You acknowledge and agree that in displaying any such trademark, you will be acting under Sponsor Bank's control and subject to approval by the applicable Network. You will under no circumstances be deemed to be a licensee or sublicensee of any trademark of any Network, nor will you otherwise be deemed to have or to acquire any right, title or interest in such trademarks.
- Returns and Adjustments.**
  - Cardholder Disputes.** You will attempt to settle in good faith any dispute between you and a Cardholder involving a Transaction. You will establish a fair, consistent policy for the exchange and return of merchandise and for the adjustment of amounts due on Debit Card sales.
  - Adjustments.** Except as the Networks may permit, you will not make any cash refunds or payments for returns or adjustments on Transactions but will instead complete a form provided or approved by Sponsor Bank ("Adjustment Draft"). The Sales Transmittal for any Debit Card sale for which no refund or return will be accepted by you must be clearly and conspicuously marked (including on the Cardholder's copy) as "final sale" or "no return" and must comply with the Rules.
- Presentation of Sales Transmittals and Adjustment Drafts.**
  - Transmission.** You will electronically transmit to Sponsor Bank all Sales Transmittals or Adjustment Drafts in a manner acceptable to Sponsor Bank. You will make a good faith effort to electronically transmit data within one banking business day after the transaction date. You will not extend the time of payment for or extend credit for any part of a Transaction. You represent and warrant that the electronic transmission of each Sales Transmittal and Adjustment Draft will evidence a true record of the Transaction reflected on the document.
  - Settlement.** Settlement Bank will process Sales Transmittals transmitted by you, and Settlement Bank will promptly credit, debit or charge, as applicable, the appropriate amount to the Merchant Account. Within a reasonable time after the end of each calendar month Settlement Bank or TMS will calculate the applicable amount of fees and other charges owed by you, and Settlement Bank or TMS will debit the Merchant Account in the amount of such fees and other charges. The amount of such fees to be paid by you are set forth on the Registration Form. Such fees may be changed at any time by Sponsor Bank or TMS, effective upon 30 days written notice to you.
  - Non-acceptance.** Settlement Bank may refuse to accept or may revoke its acceptance of any Sales Transmittal or Adjustment Draft, and Settlement Bank may debit, charge or credit the Merchant Account in the corresponding amount, if: (i) the Transaction was completed without prior authorization; (ii) the Sales Transmittal or Adjustment Draft involved circumstances constituting a breach of this Agreement; (iii) the Transaction was in violation of the Laws or Rules; (iv) the Cardholder is Merchant, any partner of or shareholder in Merchant, or any affiliate, spouse or immediate family member of any of them; (v) the Debit Card sale was not made in connection with the sale of goods or services by you; (vi) you default in paying when due any obligation to Sponsor Bank or TMS; (vii) any material adverse change in your financial condition occurs; (viii) any deposit account at Sponsor Bank or Settlement Bank or any of your property in the possession of Sponsor Bank or Settlement Bank is garnished or attached; (ix) you assign your assets generally for the benefit of creditors; (x) a proceeding is commenced by or against you under any bankruptcy, insolvency or similar law seeking an order to adjudicate you bankrupt or insolvent or other relief, or seeking appointment of a receiver or similar official for you or for any substantial part of your assets. You will notify Sponsor Bank, Settlement Bank, and TMS in writing immediately upon becoming aware that any such event has occurred or is likely to occur.

(d) **Adjustments.** Settlement Bank will notify you promptly of all adjustments. Additionally, Settlement Bank will advise you of each debit, charge and credit processed to the Merchant Account.

(e) **Set-off.** You authorize Sponsor Bank and Settlement Bank to offset debits arising from this Agreement against any credit due you, whether or not such charges create overdrafts or a debit balance in the Merchant Account. You agree to pay Sponsor Bank and Settlement Bank the full amount of any such overdraft or debit balance or to replenish the Merchant Account in an amount sufficient to permit the amount of the charge to be made promptly upon request.

(f) **Suspensions.** You further authorize Settlement Bank, Sponsor Bank or TMS to suspend in a segregated account amounts which otherwise would be credited to the Merchant Account if Sponsor Bank, Settlement Bank or TMS reasonably believes that the Sales Transmittals submitted by you are fraudulent. Sponsor Bank, Settlement Bank or TMS will notify you of the suspension of such amounts within a reasonable time; provided, however, that such notice will not be required if the appropriate law enforcement agency has been notified of the suspected fraud.

**5. Limitation; Claims and Collections.**

(a) **Prohibited Transactions.** You will not accept any Debit Card in payment for any legal services or for expenses related to the defense of any crime (other than a traffic violation), any domestic relations matter where services or expenses are furnished a person whose name is not embossed on the Debit Card or any bankruptcy, insolvency, or other proceeding affecting the creditors of any Cardholder. You will not present to Settlement Bank for processing a Transaction that does not represent a sale of goods or service directly between Cardholder and you.

(b) **Notification.** You will notify Sponsor Bank, Settlement Bank and TMS promptly of all claims and defenses asserted or alleged by any Cardholder with respect to any Transaction.

**6. Indemnity and Limitation of Liability.**

You will indemnify TMS, Sponsor Bank, Settlement Bank, each Network, each Network member and their respective processors ("Indemnified Parties"), from and against any and all liabilities, losses, costs, claims, demands, actions and causes of action of any kind (including without limitation, reasonable attorneys' fees) that may be suffered or incurred by any Indemnified Party caused by, resulting from, or in connection with any of the following: (i) any dispute between you and a Cardholder with respect to the alleged or actual failure by Merchant to process a Transaction as requested by such Cardholder or to provide physical security at or near any terminals or other premises of Merchant; (ii) the transmission or disclosure of any information by or through such Network for you; (iii) the transmission of any incorrect or incomplete information to a customer of any Network member through the Network regarding account maintained by such customer, or the disclosure through such Network to any party of information relating to any such account; and (iv) your failure to comply with the provisions of this Agreement and the Laws and Rules. You further agree to indemnify and hold TMS, Settlement Bank, and Sponsor Bank harmless from all claims, liability and expenses arising or resulting from any dispute or claim made against TMS, Settlement Bank, or Sponsor Bank by any third party. In no event shall any party be liable for any special, incidental, consequential or punitive damages for any reason even if notified of the possibility of such damage. The total cumulative liability of TMS, Settlement Bank, and Sponsor Bank in the aggregate for damages arising from any breach of this Agreement or for any other claims under this Agreement shall not exceed an amount equal to fees paid to TMS, Settlement Bank and Sponsor Bank under this Agreement during the most recent 4 months measured from the date the liability accrues.

**7. Records; Confidentiality.**

(a) **Review.** Sponsor Bank, Settlement Bank or TMS may examine at any reasonable time and upon reasonable notice all of your records pertaining to Transactions.

(b) **Copies.** You will preserve copies of all Sales Transmittals and Adjustment Drafts for the longer of (i) 2 years from the transaction dates of such items, or (ii) that period of time required by the applicable Network. You are liable for failure to so preserve Sales Transmittals and Adjustment Drafts. Upon the request of TMS, Sponsor Bank or Settlement Bank, you will deliver to Settlement Bank or Sponsor Bank, not later than ten business days after a request is made, a copy of any Sales Transmittal or Adjustment Draft. If you do not provide a copy within ten days, Sponsor Bank or Settlement Bank is authorized to debit the Merchant Account for the amount of the Sales Transmittal or Adjustment Draft.

(c) **Debit Card Information.** You will not sell, purchase, provide or exchange Debit Card account name or number information in any form to any third party except to TMS, Sponsor Bank, Settlement Bank, to your agents for business purposes, to the Networks (with respect to Transactions pursuant to the applicable Network's Debit Cards), or pursuant to government request.

**8. Representations and Warranties.** Each transmittal of any Sales Transmittal constitutes your representation and warranty that: (i) the Cardholder indebtedness arises from a bona fide Debit Card sale in the total amount stated; (ii) you have performed all of your obligations to Cardholder; (iii) you have complied with all Rules; (iv) the Transaction does not involve the use of a Debit Card for any purpose other than the purchase of goods or services from you and does not involve the Cardholder's obtaining cash from you unless allowed by the applicable Network and agreed in writing with TMS or Sponsor Bank; and (v) each Transaction, and each Sales Transmittal, comply with the terms of this Agreement.

**9. Term and Termination.** This Agreement will become effective on the Effective Date, will remain in effect for a period of 3 years ("Initial Term"), and will automatically renew for additional successive 1 year periods ("Renewal Term") unless terminated earlier in accordance with the provisions of this Agreement. This Agreement may be terminated by Sponsor Bank, Settlement Bank or TMS at any time upon written or oral notice. In addition, processing under a particular Network may be suspended or terminated (without terminating this entire Agreement) if: (i) the Network determines to suspend or terminate processing; or (ii) automatically, upon termination or expiration of Sponsor Bank's or your access to such Network whether caused by termination or expiration of Sponsor Bank's agreement with such Network or otherwise. In addition, in the event that Sponsor Bank's or TMS' participation in such Network is suspended for any reason, processing through such Network by you will be suspended for the period of time of such suspension and Sponsor Bank or TMS will immediately notify you of that event. Neither TMS, Settlement Bank, Sponsor Bank or any Network will have any liability to you as a result of any such suspension or termination.

**10. Miscellaneous.** This Agreement may not be assigned by you to any other entity, and any such assignment will be null and void. Except as otherwise provided above, this Agreement may only be amended by a written instrument signed by all parties.

### TMS

(Signature) \_\_\_\_\_

(Name) \_\_\_\_\_

(Title) \_\_\_\_\_

(Date) \_\_\_\_\_

### Sponsor Bank

(Signature) \_\_\_\_\_

(Name) \_\_\_\_\_

(Title) \_\_\_\_\_

(Date) \_\_\_\_\_

### Settlement Bank

(Signature) \_\_\_\_\_

(Name) \_\_\_\_\_

(Title) \_\_\_\_\_

(Date) \_\_\_\_\_

# AGREEMENT FOR CHECK CONVERSION/GUARANTEE

### CHECK CONVERSION

This Check Conversion Agreement (the "Agreement") is made and entered into by and between Transaction Merchant Services, Ltd. d/b/a ElectroCheck, (hereinafter referred to as "ElectroCheck") and the Merchant identified in the application section of the Agreement attached hereto and incorporated herein by reference (hereinafter referred to as "Merchant"), subject to the approval of ElectroCheck.

### REGITALS

NOW, THEREFORE, consideration of the mutual obligations and agreements hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed, the parties agree to the following:

**TERMS AND CONDITIONS.** ElectroCheck is engaged in the business of processing and transmitting electronic data of a financial, banking or economic nature, including but not limited to checking account debits and credits without tender of a check. In this Agreement, the words "you" and "your" mean the Merchant and the words "we", "our" and "us", unless the context clearly states otherwise, refer to ElectroCheck. We and you agree that we will be the sole providers of all services necessary to authorize, process and settle all of your electronic check transactions.

**1. Acceptance of Specimen Checks.** You agree to permit consumers producing a specimen check source document from their personal banking account (Electronic Conversion Customer) without discrimination electronically to access funds residing in the applicable banking accounts for the purchase of goods and services from you (collectively, Electronic Check Transactions). In this agreement, "Electronic Conversion Customer" means the person producing the check. You must submit any Electronic Check Transaction EFT authorization for drafts to us specified in the accompanying instructions, when requested by ElectroCheck. All such EFT authorizations must be signed.

For all Electronic Check Transaction submitted to Us:

- (a) The transaction must represent obligations of the Electronic Conversion Customer for the amounts in the transaction (including tax, but without any surcharge) and only for merchandise actually sold or services actually rendered by you must not invoke any element of credit for any other purpose;
- (b) You shall not impose any surcharge on sales. Any tax required to be collected by you must be included in the total transaction amount;
- (c) The transaction must represent a bona fide sale or services not previously submitted and may not represent a refinancing of any prior obligation;
- (d) The price charged for the transaction must not be subject to any dispute, setoff or counter claim;
- (e) You must have no knowledge or notice of any facts, circumstances or defenses which would indicate that the transaction was fraudulent or not authorized by the Electronic Conversion Customer or which would otherwise impair the collectibility of the Electronic Conversion Customer's obligation or relieve the Electronic Conversion Customer for the transaction and;
- (f) You and the Electronic Conversion Customer have each retained a written authorization signed by the Electronic Conversion Customer for the transaction.

(g) Merchant is required by law to conspicuously display notification of intent to convert checks into electronic funds transfer at the point of purchase.  
(h) Merchant is required to void check and return to customer at point of purchase.  
YOU UNDERSTAND THAT IT IS A FEDERAL VIOLATION TO PROCESS DEBIT REQUESTS AGAINST A CONSUMER BANK ACCOUNT WITHOUT THE ELECTRONIC CONVERSION CUSTOMER'S EXPRESSED AUTHORITY. YOU HEREBY ACKNOWLEDGE RECEIPT OF PROPER NOTICE THAT THE USE OF ANY COUNTERFEIT, FICTITIOUS, LOST, STOLEN, OR FRAUDULENTLY OBTAINED DEBIT INSTRUMENT OR DEVICE TO UNLAWFULLY INITIATE A DEBIT TRANSACTION IS PUNISHABLE BY A MAXIMUM OF \$10000 IMPRISONMENT FOR A TERM OF TEN YEARS, OR BOTH. IT IS SPECIFICALLY UNDERSTOOD BY YOU THAT ANY TRANSACTION EVENT INITIATED AS AN UNAUTHORIZED MANUAL ENTRY OR BY ISSUE OF A DEPOSIT SLIP SHALL BE INTERPRETED AS AN UNLAWFULLY INITIATED DEBIT TRANSACTION PURSUANT TO THIS NOTICE.

- 2. Fees. The cost of services under Agreement shall be as follows:
  - (i) Monthly Fees: You also agree to pay the following monthly:
    - (A) Transaction Fee as stated on the front of this Agreement per each electronic authorization attempted;
    - (B) A Minimum Per Check Fee as stated herein. In the event the sum of the fees of (i) through (B) is less than the Minimum Per Check Fee, then the Minimum Per Check Fee applies instead of (i) through (B).
    - (C) Monthly Minimum Fee as stated herein. In the event the sum of the fees of (i) through (B) or the Minimum Per Check Fee, as applicable, do not exceed the Monthly Minimum Fee, then the Monthly Minimum Fee shall apply instead of (i) through (B).
    - (D) Account Maintenance Fee as stated herein.
  - 3. Compensation of ElectroCheck. Each month we may provide you with an itemized statement containing accumulated charges based on your inquiries and the amount of such statement shall be paid by you to us via ACH. In the event the ACH for collection of fees owed to us is rejected by your bank, you agree to pay us a reject fee of no less than \$25.00 and no more than \$50.00. These fees shall be paid by you to us via ACH.
  - 4. Chargeback Rights. We may charge back to you any transaction amount (commonly referred to as a "chargeback") for the reasons stated and within the time frames permitted by NACHA Rules in effect from time to time or in accordance with applicable law. In addition, you must reimburse us for any chargebacks or other losses resulting from your failure to produce a transaction record requested by us within the time limits established by NACHA Rules. We may, but will not be obligated to, provide you with copies or summaries or Rules relating to chargebacks from time to time.

**5. Terms Default:**  
(a) This Agreement is binding upon its execution by us and will continue in force for the Initial Term of three (3) years and shall continue in force for one (1) year contract terms thereafter until terminated by you or this giving one (1) year contract terms thereafter until terminated by you or this giving written notice to the other party or parties not less than 30 days prior to the designated termination date. Notwithstanding the foregoing, we may terminate this Agreement at any time upon 30 days written notice to you. We may terminate in less than 30 days as provided below.  
(b) if any of the following events (each a "Default") occurs, we may terminate this Agreement immediately without notice and exercise all our other rights and remedies under this Agreement and applicable law: (i) a material adverse change in your business, financial condition, business procedures, products or services, a sale of all or a substantial portion of your assets, or a change in control of your business (directly or indirectly); (ii) irregular Electronic Check Transactions, excessive chargebacks or other circumstances which in our discretion, may increase our potential exposure for your chargebacks or check services or otherwise present a financial or security risk to us; or (iii) a default by you in any material respect in the performance or observance of any term, covenant, condition or agreement in this Agreement, or in any other agreement with us or any of our affiliates (including but not limited to any credit or debit card processing agreements); or (iv) you file a voluntary petition or complaint seeking relief under any federal or state bankruptcy or other debt relief statute, an involuntary petition under any federal or state bankruptcy or other debt relief statute is filed against you, you generally become unable to pay your debts or trade obligations as they become due, or you make general assignment for the benefit of creditors.  
(c) Subject to Section 13 below, Merchant must give ElectroCheck thirty (30) day's notice of intent to terminate due to any alleged default of ElectroCheck. Merchant shall have no right to terminate this Agreement unless ElectroCheck fails to cure a proven default within such thirty-day period.

**6. Security, Interest and Setoff Rights.** You irrevocably grant to us a lien against and security interest in any funds pertaining to the transaction contemplated by this Agreement now in our possession or that may come into our possession whether due or become due to you together with the proceeds thereof. Any such funds may be commingled with other funds and need not be maintained in a separate account. In addition to any rights granted under applicable law and not by way of limitation of such rights, you authorize us at any time and from time to time without notice or demand any such notice and demand being expressly waived) to set off to appropriate and to apply any and all such funds against and on account of your obligations under this Agreement and any other agreement with us or any of our affiliates for any related services whether such obligations are liquidated, unliquidated, fixed, contingent, matured or unmatured. You agree to execute and deliver to us such instruments and documents we may reasonably request to perfect and confirm the lien, security interest and right of setoff set forth in this Agreement. In the event Agreement is terminated early for any reason other than as set forth in Section 11, you agree to pay ElectroCheck a liquidated damage sum ("Liquidated Damages") to be determined by computing the number of months remaining from the effective date of termination to the end of the current term and multiplying that number by thirty five dollars (\$35) You and we agree that damages suffered by us as a result of such early termination would be extremely difficult to calculate with precision. For that reason, you and we agree that the Liquidated Damages should be computed as set forth above.  
**7. Governing Law; Severability.** This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Texas. This Agreement is entered into and enforceable in Collin County, Texas. Venue for any dispute under this Agreement shall be in Collin County, Texas. Should any provision of this Agreement be held unenforceable or invalid under the laws of the United States of America or the State of Texas, or under any other applicable laws of any other jurisdiction, then the parties hereto agree that such provision shall be deemed modified for purposes of performance of this Agreement in such jurisdiction to the extent necessary to render it lawful and enforceable, or if such a modification is not possible without materially altering the intention of the parties hereto, then such provision shall be severed herefrom for purposes of performance of this Agreement in such jurisdiction. The validity of the remaining provisions of this Agreement shall not be affected by any such modification or severance, except that if any severance materially alters the intentions of the parties hereto as expressed herein (a modification being permitted only if there is no material alteration), then the parties hereto shall use their best reasonable efforts to agree to appropriate equitable amendments to this Agreement in light of such severance.

**8. Amendment.** This Agreement or any provision hereof may be modified by ElectroCheck with no notice to Merchant.

**9. Waiver; Assignment.** Any of the terms, provisions, representations, warranties, covenants, or conditions hereof may be waived, only by a written instrument executed by all parties hereto, or in the case of a waiver, by party waiving compliance. The failure of any party at any time to require performance of any provision hereof shall not constitute a waiver of such provision. The rights and obligations of Merchant hereto may not be assigned

**10. Indemnification.** Merchant does hereby indemnify and hold harmless ElectroCheck from and against claims, damages, actions, costs or expenses, including reasonable attorney's fees and costs for any breach of this Agreement, or for failure to submit, and for third party claims resulting from or out of, ElectroCheck exercising any rights under this Agreement, or in connection with, the indemnification, failure to comply with the terms of this Agreement. Merchant agrees to hold harmless and indemnify ElectroCheck for any inability to perform according to this Agreement because of equipment failure, fire, flood, hurricane, or any other act of God. Further, Merchant agrees to indemnify ElectroCheck for any and all wrongful and/or negligent acts or omissions committed by merchant.

**11. Notice.** Except as otherwise provided herein, all notices, requests, demands and other communications required or permitted to be given hereunder shall be in writing and shall be deemed to have been duly given, if delivered personally, given by telecopy, facsimile, prepaid telex or telegram or mailed first class, postage pre paid, certified United States mail, return receipt requested, to the party to receive such notice, request, demand or communication at such party's address set forth herein; provided that, any party may change its address for notice by giving personally, when delivered, (i) if sent by telecopy, facsimile, telex or telegram, upon sending, and (ii) if mailed, hours after mailing.

**12. Entire Agreement.** This Agreement, when executed by both ElectroCheck and Merchant, shall constitute the entire agreement between the parties, and shall supersede and cancel all prior offers and negotiations whether in writing or otherwise.

**13. ElectroCheck Bank Verification Statement.** Upon initial installation of new equipment or reprogram of existing equipment, Merchant agrees to the following: (i) shall run a test transaction to ensure equipment functionality; verify the accuracy of receipt information and (ii) Merchant shall verify proper deposits into Merchant's Check Account to verify proper routing procedure no less than four (4) banking days and no more than six (6) bank days from the time of the first valid customer transaction. Merchant shall immediately notify ElectroCheck in writing of any failure of the above within ten (10) banking days. Failure of Merchant to notify ElectroCheck within said time frame shall result in ElectroCheck being relieved of liability and responsibility for any equipment failure or mis-routings.

**14. ElectroCheck Merchant Funding Policy.** ElectroCheck releases funded transactions to the merchant check bank on the third banking day, exclusive of the day the transaction was processed. The transaction day for sales conducted on weekends or holidays will be the following first banking day. ElectroCheck has no control when the receiving bank posts the transaction. A receiving bank that uses third party processing to post transactions experiences delays in posting to the merchant account.

### CHECK GUARANTEE & CONVERSION TRANSACTION GUARANTEE

**TERMS AND CONDITIONS.** YOUR LOCATION(S) compliance with the terms and conditions of the Agreement, to include the Agreement in its entirety is an express condition to ElectroCheck's obligation to pay YOUR LOCATION(S) when its information proves inaccurate and ElectroCheck reserves for itself sole discretion to determine if YOUR LOCATION(S) has complied with the terms and conditions of this Agreement, to include the Agreement in its entirety, may be changed by ElectroCheck at any time upon ten (10) calendar days written notice. Such changes shall supersede any previous terms and conditions. Within ten (10) days notice of a rate increase, YOUR LOCATION may cancel this Agreement by giving written notice to ElectroCheck. The term of this agreement shall be for a twelve month period from the date of acceptance by an officer of ElectroCheck. This agreement may be canceled hereafter by either party with thirty (30) days written notice. This agreement will automatically renew successively thirty (30) day periods unless terminated by written notice to the other at least (30) days prior thereto. This Agreement includes your Confirmation letter, which collectively forms the entire Agreement between YOUR LOCATION(S) and ElectroCheck with respect subject matter hereof, and supersedes any prior Agreement or any written between YOUR LOCATION(S) and ElectroCheck and/or its representative(s). YOUR LOCATION(S) agree that the failure by ElectroCheck to enforce any terms or conditions of this Agreement is not a waiver of any term or conditions herein contained. DEFINITION OF A TRANSACTION: A transaction is defined as a one time purchase with one check being used. If two or more checks, written on the same account, on the same day, are used, all checks and the corresponding face amounts will not be guaranteed.

**DEFAULT:** Should YOUR LOCATION(S) become delinquent, or fail to comply with the terms and conditions of Agreement, then ElectroCheck may at its option; add to the normal payment cycle of any dishonored checks or would otherwise be paid by ElectroCheck under this Agreement the number of days that YOUR LOCATION(S) checks not be delinquent in paying any fee when due; void all approvals given to YOUR LOCATION(S) for checks not previously paid; demand immediate payments for all amounts owed under this Agreement; immediately terminate Agreement; or any of the above. Should any employee to YOUR LOCATION(S) engage or participate, directly or indirectly, as principal or accessory, in any activity for the purpose of improperly obtaining any approval number then this Agreement shall be immediately terminated, all approval numbers voided, and the total amount due to YOUR LOCATION(S) covered by this Agreement shall become due and payable immediately. ElectroCheck shall have, and YOUR LOCATION(S) acknowledges that ElectroCheck has, the right to bill YOUR LOCATION(S) a 1. interest fee per month on any amount owed by YOUR LOCATION(S) to ElectroCheck that becomes delinquent. YOUR LOCATION(S) acknowledges that the assessment of any late fee and/or the acceptance of payment by YOUR LOCATION(S) does not waive any rights that ElectroCheck may have under this Agreement. If legal action is taken by ElectroCheck to enforce this Agreement, then ElectroCheck shall have the right to court costs and reasonable attorney's fees as determined by the court. YOUR LOCATION(S) and ElectroCheck acknowledge and agree to notwithstanding anything to the contrary, neither party shall be liable to the other for any indirect, consequential, punitive damages arising out of, or relating to Agreement.

**YOUR LOCATION(S) WARRANTIES:** As a condition to ElectroCheck warranty to the accuracy of its information, YOUR LOCATION(S) represents and warrants to ElectroCheck that each and every check assigned to ElectroCheck YOUR LOCATION(S) is properly payable, and that with respect to such checks, the customer, YOUR LOCATION(S) has no valid defense to payment as determined in the sole discretion of ElectroCheck. YOUR LOCATION(S) shall have previously been paid, if upon further review by ElectroCheck, such checks fail to meet any conditions or provisions set forth in the Agreement, as determined solely by ElectroCheck. In the event that any customer of YOUR LOCATION(S) asserts a valid defense against payment of any dishonored check, despite payment or asserts a claim against YOUR LOCATION(S), or YOUR LOCATION(S) accepts any payment on any dishonored check, or check is charged back, YOUR LOCATION(S) agrees to reimburse ElectroCheck harmless from any and all costs made by such customer. Such amounts shall be due within ten (10) calendar days notice to YOUR LOCATION(S) shall take any and all measures necessary to assist ElectroCheck in locating, recover damages from, and prosecuting any party who has incurred a dishonored check to YOUR LOCATION(S) including the submission to ElectroCheck of work orders, credit applications and any additional paperwork. YOUR LOCATION(S) agrees to post any and all notices required by law to consumers regarding check services, charges or consumer fees charged for dishonored checks. YOUR LOCATION(S) agrees not to use any competitor check approval service during the term of this Agreement. YOUR LOCATION(S) agrees that ElectroCheck may use YOUR LOCATION(S)'s name in its promotional and advertising material.

**VENUE:** This Agreement shall be governed by and constituted in accordance with the laws of the State of Texas. The parties agree that any action for the enforcement of the terms and conditions of this Agreement shall be brought in the Courts of Collin County, Texas. YOUR LOCATION(S) agrees that this Agreement was formed at Collin County, Texas upon acceptance by ElectroCheck.

The Warranty by ElectroCheck does not apply to:

1. Any check not properly made and completed in full at the time of its acceptance to include:
  - a. The ElectroCheck approved Motor Vehicle Driver's License number and state of issuance.
  - b. The current U.S. residence address and telephone number of the account holder. If Post Office box used, or telephone number is not printed. The correct residence address and telephone number must be written on the check.
  - c. YOUR LOCATION(S) as the payee.
2. Any two party checks, travelers checks, checks written by employees of YOUR LOCATION, payroll checks, credit card checks, or checks for cash only. The check must be drawn on a demand deposit account (DDA).
3. Any postdated, predated, undated, or redeposited check. The date of the check must accurately coincide with the date of the approval number and sale.
4. Any counter any temporary check, unpersonalized check or photocopy of a check.
5. Any company check or business check.
6. Any stolen check where YOUR LOCATION(S) failed to compare the signature on the check against the signature on the current valid identification as displayed by the person presenting the check at the time of the transaction.
7. Any check accepted as a replacement of any previously dishonored payment, payment for accounts receivable or on credit or account.
8. Any check upon which YOUR LOCATION(S) has accepted partial payment for any one particular sale or transaction, return of merchandise or entered into an agreement for payment.
9. Any check for which the check writer is not the purchaser of the goods or services at the time of approval.
10. Any check for which a refund is negotiated at any given time.
11. Any check with uninitiated changes to the originally insured information on the check.
12. Any check against which a stop payment order has been issued.
13. Any check for which an approval number has previously been sought from ElectroCheck or any competitive Check or Inquiry service.
14. Any returned check for which original has not been received by ElectroCheck within 30 days from the



WHITE COPY - COMPANY

YELLOW COPY - MERCHANT

APPLICATION / SERVICE AGREEMENT



YOUR LOCATION(S) COVERED: YOUR LOCATION(S) shall include all Agents, Representatives, and/or Employees. YOUR LOCATION(S) covered by this Agreement shall have a unique ElectroCheck location number and shall be billed individually.

CHECK ACCEPTANCE: Only YOUR LOCATION(S), covered by this Agreement, shall contact ElectroCheck by use of electronic terminal to request approval numbers for all U.S. checks presented to YOUR LOCATION(S) for goods or services purchased at the time of approval by the check writer. Based on ElectroCheck's experience, the information in ElectroCheck's computer files, and the information provided by YOUR LOCATION(S), ElectroCheck shall inform YOUR LOCATION(S) whether ElectroCheck will issue an approval number on each such check. YOUR LOCATION(S)' decision to accept or reject any check shall be made solely at YOUR LOCATION(S)' own discretion. Upon YOUR LOCATION(S)' acceptance of an approved check(s), YOUR LOCATION(S) hereby assigns all right, title and interest in and to such check(s) to ElectroCheck.

CHECK CONVERSION: YOUR LOCATION(S), covered by this agreement, shall contact ElectroCheck, by use of electronic terminal, to request Check Conversion to an Electronic Funds Transfer, and associated approval number, for all U.S. checks purchased originated at YOUR LOCATION(S) for goods or services purchased at the time of approval by ElectroCheck, and authorization by the Electronic Conversion Customer. Based upon ElectroCheck's experience, the information in ElectroCheck's computer files, and the information provided by YOUR LOCATION(S), ElectroCheck shall inform YOUR LOCATION(S) whether ElectroCheck will issue an approval number on the Check Conversion EFT transaction. YOUR LOCATION(S) decision to accept or reject the Check Conversion EFT transaction, shall be made solely at YOUR LOCATION(S) own discretion. Upon YOUR LOCATION(S) acceptance of the Check Conversion EFT, YOUR LOCATION(S) must have the transaction authorized by obtaining the Electronic Conversion Customer's signature on the furnished EFT Conversion Acknowledgment Receipt at the time of purchase. Upon YOUR LOCATION(S) acceptance of an approved Check Conversion EFT, YOUR LOCATION(S) hereby assigns all right, title and interest in and to such Check Conversion EFT(s) to ElectroCheck.

WARRANTY: ElectroCheck warrants the accuracy of its information. ElectroCheck will pay YOUR LOCATION(S), up to the approval limit, the approved amount of any check covered by this Agreement, which amount shall not exceed the face amount of the check, when the information received from ElectroCheck proves inaccurate and provided YOUR LOCATION(S) strictly complies with all the requirements of this Agreement. YOUR LOCATION(S) shall treat all information received from ElectroCheck as strictly confidential and shall hold ElectroCheck harmless from any loss, damage, costs, or reasonable attorney's fees incurred as a result of communication in any manner of such information by YOUR LOCATION(S).

SERVICE RATES: YOUR LOCATION(S) shall pay monthly to ElectroCheck the fees indicated below, which will never be less than thirty-five cents per transaction, nor less than twenty-five dollars per month (verification only) plus up to a nine dollar and fifty cent account maintenance fee, plus up to fifty cents (conversion) or up to nine cents (guarantee) or twenty-five cents (verification only) per transaction. The service rate, plus the total per transaction charge, will be applied to the check amount of all checks called into ElectroCheck. ElectroCheck shall have, and YOUR LOCATION(S) acknowledges that ElectroCheck shall have, the right to set off against any amount payable by ElectroCheck to YOUR LOCATION(S) under any provision of this Agreement, any amounts owed ElectroCheck by YOUR LOCATION(S), or any damages sustained by ElectroCheck as a result of YOUR LOCATION(S)' violation, breach or non-performance of its obligations under this Agreement.

PAYMENTS: YOUR LOCATION(S) agree to permit ElectroCheck to debit Merchant's account for check conversion or guarantee service according to the terms of the agreement between YOUR LOCATION(S) and ElectroCheck's ACH agent. YOUR LOCATION(S)' payment will be delinquent if not received within two weeks of the statement date. It is understood that all payments due under this Agreement will be debited from YOUR LOCATION(S)' bank account. By signing this Agreement, I hereby authorize ElectroCheck to automatically debit the bank account listed below for all payments due under this Agreement. (Must also attach copy of voided check). If I change bank accounts I will provide ElectroCheck with the new bank account information and authority to debit such new account prior to implementing any such bank change. Merchant authorizes ElectroCheck to initiate credit and debit entries adjustments to the Account and authorize ElectroCheck as a signatory to draft the Account for any amounts due under this agreement, including electronically reproducing Merchant's signature.

CONVERSION GUARANTEE ADDENDUM: ElectroCheck will guarantee dishonored conversion transactions processed through the ElectroCheck system if the following conditions are met:

1. The check must have been issued a valid authorization number on the conversion receipt printed at the time of the transaction.
2. The conversion transaction must have been a first presentation of a new check (no replacements or manager overrides).
3. The original conversion receipt must be sent to ElectroCheck and contain the following information: Signed by the customer, at the time of the transaction, with the customer's name printed under the signature. A valid driver's license number belonging to the customer written on the receipt. A home telephone number belonging to the customer written on the receipt. ElectroCheck will pay the amount of the dishonored conversion transaction captured on the original valid receipt within thirty (30) days of customer receiving said qualifying receipt. ElectroCheck, upon receiving the original qualifying transaction receipt, assumes all rights and ownership to the transaction, and reserves the right to pursue all legal remedies to recover funds stated in the transaction receipt. ElectroCheck must be in possession of the original qualifying receipt within fifteen (15) days of notification by ElectroCheck that the conversion transaction was dishonored. Conversion transactions dishonored because the customer withdrew authorization for payment (similar to a STOP PAYMENT on a check) are not guaranteed. This situation reflects a dispute between the customer and merchant over goods or services, and is a customer service issue. ElectroCheck authorization software captures representation and manager override transaction codes during the conversion process, and these codes will be used as partial criteria for determining the eligibility of a transaction to be guaranteed. Checks not eligible for conversion: Payroll Checks, Company or Business Checks, Counter or Temporary Checks, Checks for "Cash Only" Transactions. Any Check already presented for Payment. DEFINITION OF A TRANSACTION: A transaction is defined as a one time purchase with one check being used. If two or more checks, written on the same account, on the same day, are used, all the checks and the corresponding face amounts will not be guaranteed.

PAYROLL CHECKS/ BUSINESS CHECKS & THIRD PARTY CHECKS WILL NOT BE CONVERTED EVEN IF AUTHORIZATION RECEIPT PRINTS

MAXIMUM APPROVAL LIMITS: PERSONAL CHECKS - \$999.99 BUSINESS CHECKS - \$500.00

Grid for SITE #, LOCATION NUMBER, RULE SET, AGENT #

BUSINESS NAME: \_\_\_\_\_ AND/OR \_\_\_\_\_ PHONE # \_\_\_\_\_ STREET ADDRESS \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP: \_\_\_\_\_ CITY: \_\_\_\_\_

OWNERS/OFFICERS INFORMATION (MUST REFLECT 50% OR MORE OWNERSHIP) Name (print) Title Residence Address City, State, Zip Social Security # Phone # % Equity Ownership Driver's License #

MONTHLY CHECK VOLUME \$ \_\_\_\_\_ AVERAGE CHECK TRANSACTION \$ \_\_\_\_\_ MAXIMUM CHECK TRANSACTION \$ \_\_\_\_\_

Table with columns: CHECK TYPE, MONTHLY MINIMUM, SERVICE RATE, ACCOUNT MAINTENANCE FEE, TRANSACTION FEE. Includes rows for Check Guarantee, Check Verification, Check Conversion, and Business Check Guarantee.

EQUIPMENT/AGENT INFORMATION INDEPENDENT AGENT: \_\_\_\_\_ CHECK READER: \_\_\_\_\_ QUANTITY: \_\_\_\_\_ MODEL: \_\_\_\_\_ EXISTING TERMINAL AND/OR PRINTER TYPE: \_\_\_\_\_ PRINTER TYPE: \_\_\_\_\_ QUANTITY: \_\_\_\_\_ MODEL: \_\_\_\_\_

DEBIT/CREDIT AUTHORIZATION MERCHANT hereby authorizes ElectroCheck in accordance with this Application/Service Processing Agreement to initiate debit/credit entries to MERCHANT'S checking account, as indicated per the information from the attached copy of a voided check from same. The authority is to remain in full force and effect until ElectroCheck has received a written notification from MERCHANT of its termination in such a manner as to afford ElectroCheck reasonable opportunity to act on it; and (b) all obligations of MERCHANT to ElectroCheck that have arisen under this Agreement have been paid in full. MERCHANT acknowledges and understands that Independent Merchant Consultant IS NOT an employee of CMS. If equipment is leased, MERCHANT acknowledges and understands that any agreement between Lease Finance Group and MERCHANT is separate from Visa/MasterCard processing services contracted for with CMS, and that CMS is in no way affiliated with Lease Finance Group. Therefore, MERCHANT agrees that CMS is not liable for any disputes MERCHANT has with Lease Finance Group.

MERCHANT AGREEMENT YOUR LOCATION(S)' SIGNATURE VERIFIES ALL INFORMATION ON THIS APPLICATION, INCLUDING ALL TERMS AND CONDITIONS ON REVERSE SIDE, AND CONFIRMS YOUR OFFER TO ENTER INTO AN AGREEMENT. By [Signature] Date \_\_\_\_\_ Print Name \_\_\_\_\_

OFFICE USE ONLY ELECTROCHECK'S ACCEPTANCE OF YOUR APPLICATION, TO INCLUDE ANY PREMIUMS ACCEPTED BY ELECTROCHECK IN YOUR CONFIRMATION LETTER, FORMS THE ENTIRE AGREEMENT. (MAIN OFFICE USE ONLY) By \_\_\_\_\_ Date \_\_\_\_\_ Title \_\_\_\_\_

## Glossary of Fees Transaction Merchant Services Merchant Processing Application / Agreement Introduction

This *Glossary of Fees* is designed to assure that you have a full understanding of TMS Merchant Fees.

The *Glossary of Fees* is sorted alphabetically by fee name and will reference the TMS Merchant Agreement by section and subsection numbers. This is to help you with quickly locating the fee inside the Merchant Agreement.

### ACCOUNT MAINTENANCE FEE

**Definition:** This fee covers monthly administrative costs incurred by TMS for maintaining and servicing the merchant's account. This fee may be up to \$15 as per the Pricing Schedule part of the Merchant Agreement. \$9.50 is the maximum allowed for TMS accounts. Note: The maintenance fee will be debited from the merchant's account daily or monthly, through ACH, as set forth in the Pricing Schedule part of the Merchant Agreement.

### ACH

**Definition:** (Automated Clearing House) The network used for the electronic movement of money.

### ACH RETURNED DEBIT FEE

**Definition:** This \$25 fee is assessed for returned ACH debit items, such as, but not limited to, when an account has insufficient funds or the account is closed.

**Note:** The ACH returned debit fee is charged only when a debit item is returned back from a merchant.

### APPLICATION FEE

**Definition:** This one time, non-refundable \$95 fee defrays the cost of the application and underwriting process.

### AVS FEE

**Definition:** (Address Verification System) This is a fraud prevention service designed to protect the merchant. The merchant may elect to have his/her terminal, if compatible, programmed with the AVS service. The AVS service will then prompt the merchant to enter the cardholder's ZIP code on his/her terminal for keyed retail or MOTO/Internet transactions. This service costs 5¢ per transaction.

**Note:** For a merchant to receive the best rates possible he/she must use the AVS service when keying a retail transaction into his/her terminal or when entering MOTO/Internet transactions. Without employing the AVS service the merchant is putting himself/herself at higher risk for fraudulent transactions and will be charged a non-qualified discount rate. The AVS fee will be debited from the merchant's account daily or monthly, through ACH, only for transactions using the AVS service as set forth in the Pricing Schedule part of the Merchant Agreement.

### CHARGEBACK FEE

**Definition:** This \$15 non-refundable fee defrays administrative and reporting costs accrued during the chargeback process.

**Note:** This fee occurs at the end of the chargeback process only if the cardholder's dispute becomes a chargeback. This fee would be in addition to the retrieval request fee.

### COPY FEE

**Definition:** This fee offsets the administrative cost of duplicating archived agreements or statements for the merchant. The merchant is charged \$2.00 per page of the duplicated record. This charge covers administrative and delivery costs.

**Note:** This fee is charged only on an as needed basis. Merchants who maintain accurate and complete records rarely need this service.

### DECONVERSION FEE

**Definition:** If a Merchant terminates this Agreement without cause within 6 months of the date last Merchant submits its first transaction to TMS, Merchant will be assessed the deconversion fee indicated in the summary of fees section of the Merchant Processing Application. No such deconversion fee will be assessed if Merchant terminates this agreement with or without cause after such 6 months period expires.

**Note:** The Merchant Agreement is in full force for 36 months from the date of acceptance. The Merchant Agreement will automatically renew for additional 24-month periods unless terminated by the merchant with 90 days written notice. Request for terminations must be in writing and sent via certified mail and will be effective 30 days after the receipt of the request.

### DISCOUNT RATE

**Definition:** This is a fee charged for services rendered in connection with processing financial institution card sales transactions. The discount fee is a percentage of the gross dollar amount submitted. Example: If the transaction amount was \$10.00 and the discount rate was 1% then the discount rate fee charged for that particular transaction would be 10¢. ( $\$10.00 \times 1\% = \$0.10$ )

**Note:** The discount fee will be debited from the merchant's account daily or monthly, through ACH, as set forth in the Pricing Schedule part of the Merchant Agreement. The discount fee is calculated against the gross dollars deposited by the merchant on a daily basis.

### MID-QUALIFIED RETAIL OR QUALIFIED MOTO/INTERNET RATE

**Definition:** Manually keyed bankcard transactions that are closed in a daily batch within 24 hours of the card's authorization, and receive an "exact match" to the AVS prompt. This % and transaction fee is added to the qualified retail discount rate and transaction fee.

**Note:** Requirements:

- Transaction is manually keyed.
- Transaction is closed in a batch within 24 hours of authorization.
- Transaction receives an "exact match" from the AVS system.
  - If the merchant doesn't use the AVS system, the transaction is automatically non-qualified
  - Remember, using the AVS system costs an additional 5¢ per transaction.
- MOTO/Internet transactions have an order number.

### MONTHLY MINIMUM FEE

**Definition:** The \$25 monthly minimum fee defrays costs generally associated with particular industry types and is only applicable to certain industry types or accounts submitted based on the underwriting review. The monthly minimum fee is not charged if the merchant exceeds \$25 in discount fees.

**Notes:** Applicable industry types: Antique stores, Automotive Industry, Child Care/Day Care, Electronic Sales, Fitness Clubs, Flower Shops/Furniture/Home Based Businesses, Jewelry, Limo, Shuttle Services, Mailing Centers, Mail Order/Telephone Order, Internet, Massage Parlor, Mini Storage, Pagers & Cell Phones, Printing Shops, Sports Cards/Coin Dealers, Tanning Salons, Temporary Locations (Kiosks in Malls & Flea Markets), Tow Trucks, Vitamins & Cosmetics

**Example One:** If a merchant has a discount rate of 1.79% and processes \$1,500.00 per month his/her discount fees would be \$26.85. The monthly minimum would not be applicable because the merchant exceeded \$25 in discount fees. ( $1.79\% \times \$1,500 = \$26.85$ )

**Example Two:** If a merchant has a discount rate of 1.79% and processes \$1,000.00 per month his/her discount fees would be \$17.90. The merchant would be charged the \$7.10 difference between his monthly discount fees and the monthly minimum fee.

(Monthly minimum: \$25.00)

(Monthly discount fees:  $1.79\% \times \$1,000 = \$17.90$ )

(Monthly minimum charged: \$7.10)

### NON-QUALIFIED RETAIL OR NON-QUALIFIED MOTO/INTERNET DISCOUNT RATE

**Definition:** All bankcard transactions that do not meet the requirements of either the qualified retail discount rate or mid-qualified retail or qualified MOTO/Internet discount rate categories. This may include, but is not limited to, Visa / MasterCard business cards, foreign card transactions and any transaction not batched-out within 24 hours. This fee is added to the qualified MOTO/Internet discount rate and qualified MOTO/Internet transaction fee.

**Note:** A non-qualified transaction may add up to 1.5% to the qualified discount rate and up to 10¢ to the qualified transaction fee.

### QUALIFIED RETAIL DISCOUNT RATE

**Definition:** Applies to bankcard transactions that are swiped, electronically authorized, and closed in a daily batch within 24 hours of the card's authorization.

**Note:** Requirements:

- Transaction is swiped.
- Transaction is electronically authorized.
- Transaction is batched-out within 24 hours (daily batch).

The qualified discount rate will be debited from the merchant's account daily or monthly, through ACH, as set forth in the Pricing Schedule part of the Merchant Agreement. The qualified discount rate is calculated against

### RETRIEVAL REQUEST FEE

**Definition:** This \$15 non-refundable fee occurs as part of the chargeback process. After a cardholder initiates a chargeback TMS will request from the merchant a transaction receipt proving that the charge is valid. The receipt may be provided as the original, a paper copy, a facsimile, or an electronic version. The merchant responsible to maintain all receipt copies at their location for 2 years. The retrieval request fee defrays the associated with processing of the issuers request, the mailed notification to the merchant, receiving the receipt from the merchant and forwarding it on to the issuing bank.

**Note:** This fee is charged only when a retrieval request is received. If the cardholder's dispute becomes a chargeback then this fee would be in addition to the chargeback fee.

### SEMI-ANNUAL FEE

**Definition:** This \$49 fee offsets the cost of supplies, terminal maintenance, any needed terminal replacement (excluding the restocking fee), and other value-added services provided by TMS. The semi-annual fee will be debited from the merchant's account semi-annually, through ACH, as set forth in the Pricing Schedule part of the Merchant Agreement.

### Reference: 11.1 Merchant Fees; SOSP

### TERMINAL REPLACEMENT/RESTOCK FEE

**Definition:** In the event a replacement terminal is shipped to the merchant, this \$50 fee helps to offset associated with stocking and repairs.

### TRANSACTION FEE

**Definition:** This is a fee charged for services rendered in connection with processing financial institution card sales transactions. This is a flat fee charged anytime the Merchant's terminal communicates with the host. A transaction is classified as any communication with host including: declined authorizations, successful authorizations, batch communication, and is consistent with all card types including Discover, American Express and Diners Club.

**Example:** If the transaction amount was 25¢ per transaction, the merchant ran 10 transactions during the course of the day and batched out his/her 10 transactions at the end of the day then he/she would be charged \$2.75 that day's transactions.

(Transactions:  $25¢ \times 10 = \$2.50$ ) + (Batch:  $25¢ \times 1 = \$0.25$ ) = (\$2.75)

**Note:** The transaction fee will be debited from the merchant's account daily or monthly, through ACH, as set forth in the Pricing Schedule part of the Merchant Agreement.

### VOICE AUTHORIZATION FEE

**Definition:** If a transaction cannot be authorized electronically through the terminal the merchant may call voice authorization for a charge of 95¢ per call.

### VOICE AUTHORIZATION / OPERATOR ASSISTED FEE

**Definition:** If a transaction cannot be authorized electronically through the terminal the merchant may call operator-assisted voice authorization for a charge of \$2.95 per call.

### Debit Card Service Fees

#### DEBIT NETWORK FEE

**Definition:** This is a fee charged for to defray cost of communicating with the debit network. This is a flat fee charged anytime the Merchant's terminal communicates with the host. This fee is 10¢ per transaction.

**Note:** The transaction fee will be debited from the merchant's account daily or monthly, through ACH.

#### DEBIT TRANSACTION FEE

**Definition:** This is a fee charged for services rendered in connection with processing financial institution debit sales transactions. This is a flat fee charged anytime the Merchant's terminal communicates with the host. A transaction is classified as any communication with host including: declined authorizations, successful authorizations, batch communication, and is consistent with all debit card types. This fee is 35¢ per transaction.

**Note:** The transaction fee will be debited from the merchant's account daily or monthly, through ACH.

#### DEBIT MONTHLY ACCESS FEE

**Definition:** This fee covers monthly administrative costs incurred by TMS for accessing the debit network on the merchant's behalf. This fee is \$7.00 per month.

**Note:** The monthly access fee will be debited from the merchant's account daily or monthly, through ACH.

#### ElectroCheck™ Service Fees

##### ELECTROCHECK™ ACCOUNT MAINTENANCE FEE

**Definition:** The \$9.50 monthly maintenance fee covers monthly administrative costs incurred by TMS for maintaining and servicing the merchant's account.

##### ELECTROCHECK™ MONTHLY MINIMUM

**Definition:** The \$25 monthly minimum fee defrays costs generally associated with running transactions on ACH. The monthly minimum fee is not charged if the merchant exceeds \$25 in transaction fees.

##### ELECTROCHECK™ SERVICE RATE

**Definition:** This is a fee charged for services rendered in connection with processing check transactions. The service rate is a percentage of the transaction amount and based upon services rendered.

**Note:** For Check Guarantee service without Check Conversion the service rate is 0.99% of the transaction amount. For Check Conversion with Check Guarantee the service rate is 1.98% of the transaction amount. The service rate is charged for Check Verification service without Check Guarantee. The service rate will be debited from the merchant's account daily or monthly, through ACH, as set forth in the Pricing Schedule part of the Merchant Agreement.

**Example:** If the transaction amount was \$10.00 and the merchant employed both Check Guarantee and Check Conversion then the service rate would be 19.8¢. ( $\$10.00 \times 1.98\% = \$0.198$ )

If the transaction amount was \$10.00 and the merchant employed only Check Guarantee without Check Conversion then the service rate would be 9.9¢. ( $\$10.00 \times 99\% = \$0.99$ )

##### ELECTROCHECK™ TRANSACTION FEE

**Definition:** This is a fee charged for services rendered in connection with processing check transactions. This is a flat fee charged anytime the Merchant's terminal communicates with the host. A transaction is classified as any communication with host including: declined authorizations, successful authorizations, batch communication, and is consistent with all transaction types. This fee is based upon services rendered.

**Note:** For Check Guarantee service without Check Conversion the transaction fee is 9¢ per transaction. For Check Verification service without Check Guarantee the transaction fee is 25¢ per transaction. For Check Conversion with Check Guarantee the transaction fee is 30¢ per transaction. The transaction fee will be debited from the merchant's account daily or monthly, through ACH, as set forth in the Pricing Schedule part of the Merchant Agreement.

##### ElectroCheck™ Reject Fee

**Definition:** This fee defrays the cost incurred by TMS if the ACH for the collection of merchant fees from the merchant is rejected by the merchant's bank.

**Note:** This fee may be no less than \$25.00 and no greater than \$50.00. This fee is charged only if ElectroCheck fee is returned by the merchant's bank and is via ACH to TMS from the merchant.

##### ElectroGiftCARD™ Service Fees

###### ELECTROGIFTCARD™ ACCOUNT MAINTENANCE FEE

**Definition:** The \$5.00 monthly maintenance fee covers monthly administrative costs incurred by TMS for maintaining and servicing the merchant's account.

###### ELECTROGIFTCARD™ TRANSACTION FEE

**Definition:** This 25¢ per transaction fee is charged for services rendered in connection with processing financial institution gift card sales transactions. This is a flat fee charged anytime the Merchant's terminal communicates with the host to process a gift card transaction.

###### ELECTROGIFTCARD™ BASIC SET-UP AND CARD CREATION FEE

**Definition:** This one-time \$395 set up fee covers the cost of creating the merchant's account with TMS, designing the merchant's customized giftcard (without artwork or logo), and creating 100 customized giftcards. Additional basic giftcards may be provided at a cost to the merchant of 50¢ per card.

**Note:** If the merchant does not pay the set up fee upfront via check to TMS, the amount will be deducted from the merchant consultant's commission.

###### ELECTROGIFTCARD™ DELUXE SET-UP AND CARD CREATION FEE

**Definition:** This one-time \$795 set up fee covers the cost of creating the merchant's account with TMS, designing the merchant's customized giftcard (with artwork and/or logo), and creating 100 customized giftcards. Additional deluxe giftcards may be provided at a cost to the merchant of 95¢ per card.

**Note:** If the merchant does not pay the set up fee upfront via check to TMS, the amount will be deducted from the merchant consultant's commission.





date when obtaining authorization of the Card transaction. For mail/telexphone order transactions, Merchant will type or print legibly on the signature line of the Sales Draft the following applicable words or less: telephone order or "TO"; or mail order or "MO".

2.1.3 Future Delivery

Merchant will not present any Sales Draft to Bank or TMS for processing (whether by electronic means or otherwise) which relates to the sale of goods or services for future delivery without TMS' prior written authorization. If Bank or TMS have previously given such consent, Merchant represents and warrants to Bank and TMS that Merchant will not rely on any proceeds of credit resulting from such transactions to purchase or furnish goods or services. Merchant will maintain sufficient working capital to provide for the delivery of goods or services at the agreed upon future date, independent of any credit or proceeds resulting from Sales Drafts or other transactions taken in connection with future delivery transactions.

2.1.4 Laws

Merchant will comply with all federal, state, and local laws, rules and regulations, as amended from time to time. 2.1.5 Rights, Duties, and Responsibilities of Bank and TMS

2.1.5.1 Deposits

(a) Merchant agrees that this Agreement is a contract of financial accommodation within the meaning of the Bankruptcy Code, 11 U.S.C. § 365, as amended from time to time. Subject to this Section, Bank will deposit to the Merchant Account all net funds evidenced by Sales Drafts (whether evidenced in writing or by electronic means) complying with the terms of this Agreement and the Rules and will provide Merchant provisional credit for such funds (less recoupment of any credits), adjustments, fines, chargebacks or fees. If Bank or TMS reasonably believes that a chargeback or credit is likely with respect to any transaction or Sales Draft Bank and TMS have accepted, Bank and TMS may withhold payment due Merchant under this Agreement until such time that (i) Bank is charged back by the issuing bank (in such event, Bank shall retain the funds); (ii) the period of time by which the Cardholder may dispute the Sales Draft and the issuing bank may exercise its chargeback rights has expired; and/or (iii) Bank and/or TMS determines that a chargeback on the Sales Draft will not occur. Merchant acknowledges that its obligation to Bank and TMS for all amounts owed under this Agreement arises out of the same transaction as Bank's obligation to deposit funds to the Merchant Account.

(b) Notwithstanding subsection (a) of this Section, under no circumstances will Bank or TMS be responsible for processing credits or adjustments related to Sales Drafts not originally processed by Bank and TMS. All Sales Drafts and deposits are subject to audit and final checking by Bank and TMS, and may be adjusted for inaccuracies. Merchant acknowledges that all credits provided to Merchant are provisional and subject to chargebacks and adjustments in accordance with the Rules and this Agreement, whether or not a transaction is charged back by the Card issuer. Final credits for those occasional funds will be granted within TMS' and Bank's sole discretion.

(c) TMS or Bank may impose a cap on the volume and ticket amount of Sales Drafts that it will process for Merchant, as established by TMS or Bank. This limit may be changed by TMS or Bank from time to time. If Merchant exceeds the established limit, TMS or Bank may terminate this Agreement or suspend processing Sales Drafts, and either return all Sales Drafts evidencing funds over the cap to Merchant or hold those deposits in a separate Reserve Account. Merchant acknowledges that any monthly volume exceeding the established limit may cause the Merchant account to be reviewed and may result in the possible interruption of service and/or the delay of transmission of funds and/or the diversion of funds into a Reserve Account. Merchant hereby indemnifies and holds TMS and Bank harmless for any loss or consequential damages suffered by Merchant as a result of delayed funds.

2.1.5.2 Payments

Bank and TMS will accept for purchase all Sales Drafts deposited by Merchant that comply with the terms of this Agreement. Bank will pay to Merchant within 3 business days after the date the Bank receives each transaction, unless Merchant is otherwise informed by Bank or TMS that the merchant account is under review. Bank will not process any Sales Drafts determined daily or monthly. All payments, credits and charges are subject to audit and final checking by Bank and TMS, and prompt adjustments may be made for inaccuracies discovered.

2.1.5.3 Acceptance

Notwithstanding any other provision of this Agreement, Bank and TMS may refuse to accept any Sales Draft, or revoke its prior acceptance, in any of the following circumstances: (a) the sale gives rise to such Sales Draft was not made in compliance with all the terms and conditions of this Agreement including Card Associations' regulations, and applicable laws and regulations of any government authority; or (b) The Cardholder disputes his/her liability. In the event of a revocation of a prior acceptance of a Sales Draft, Bank may withdraw from the Merchant Account or Reserve Account any amount previously paid to Merchant for such Sales Draft.

2.1.5.4 Customer Service

Bank and TMS will provide electronic draft capture and monthly activity statements, and will assign customer service phone numbers which will accept all customer service calls and other communications from Merchant relating to the services provided under this Agreement including, but not limited to, disbursement of funds, account charges, monthly statements and chargebacks. Bank and TMS will provide, at Merchant's option, a 24 hour toll-free help line for servicing of peripheral equipment which shall include repair and re-programming of equipment leased, rented or purchased from other vendors.

2.1.5.5 Equipment Services

TMS will provide Equipment Replacement Services to Merchant if Merchant has paid (a) the most-recently assessed semi-annual fee set forth on the summary of fees section of the Merchant Processing Application ("Semi-Annual Fee"), and (b) all other amounts due to TMS under this Agreement. "Equipment Replacement Services" consist of the following: (i) replacement of receipt printer paper, (ii) replacement of receipt printer ribbons, and (iii) replacement or repair, at TMS' option, of Merchant's point-of-sale terminal. In no event shall TMS be responsible for the cost of any equipment or equipment repairs. TMS may, at its sole discretion, refuse to provide such services if Merchant has not paid the Semi-Annual Fee, or if Merchant's equipment is not a TMS-approved model. Merchant will not be eligible for Equipment Replacement Services if the Semi-Annual Fee has been waived at any time during the term of this Agreement.

2.1.5.6 Account Monitoring

Merchant acknowledges that Bank and TMS will monitor Merchant's daily deposit activity. Merchant agrees that Bank and TMS may, upon reasonable grounds, divert the disbursement of Merchant's funds for a period of time deemed necessary to investigate suspicious or unusual deposit activity. Bank and TMS will make good faith efforts to notify Merchant of any such diversion. Bank and TMS shall have no liability for any losses, either direct or indirect, which Merchant may attribute to any diversion of funds disbursement. Any funds diverted shall be deposited immediately into a non-interest bearing account at Bank, and not be released until such time that questionable/suspicious/ fraudulent transactions have been resolved to the Bank's and TMS' satisfaction.

2.1.5.7 Warranties

Merchant represents and warrants to Bank and TMS all of the following: (a) That all representations and statements made by Merchant or on Merchant's behalf in the Merchant Processing Application, or in any other documents relating to this Agreement, are true, accurate and complete in all material respects. Merchant hereby authorizes Bank and TMS to investigate and confirm any information related hereto which is provided at any time by Merchant. (b) That Merchant will provide Merchant with a copy of the results of such investigation. (c) That Merchant is engaged in the lawful business shown on the Merchant Processing Application and is duly licensed to conduct such business under the laws of the state, county and city in which Merchant is located. (d) That Merchant has not been terminated from settlement of Card transactions by any financial institution or determined to be in violation of any of the Rules of Visa or MasterCard except as specifically disclosed in the Merchant Processing Application. (e) That Merchant has the authority to enter into this Agreement and that the person(s) signing for or on behalf of Merchant is/are specifically authorized and directed to do so by Merchant. (f) That all of Merchant's sales locations engage in the same or substantially similar business activity as that listed on the Merchant Processing Application. (g) That each Sales Draft submitted hereunder represents the indebtedness of a Cardholder for whom Merchant has provided goods or services; shall not involve any advance of credit for any other purpose; represents a transaction which was placed by the Cardholder or other authorized user of the Card and was not previously charged back or declined; and is not subject to any defense, dispute, offset or counterclaim which may be raised by a Cardholder. Further, Merchant warrants that any credit voucher which it issues represents a bona fide refund or adjustment on a Card sale by Merchant.

2.1.5.8 Limitation of Liability; Indemnification

6.1 Equipment Bank and TMS shall have no liability for any negligent design or manufacture of any point-of-sale terminal, printer, or other equipment used by Merchant for the acceptance of credit card transactions. NEITHER TMS NOR BANK MAKE ANY WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, CONCERNING ANY EQUIPMENT, OR OTHER SERVICE PROVIDED BY OTHERS AND IN PARTICULAR MAKES NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE.

6.2 Indemnification

Merchant hereby indemnifies and holds Bank and TMS and each of them, their parent companies, affiliates and/or subsidiaries and all of its or their officers, agents and/or employees, harmless from and against any and all claims, losses, demands, actions, responses, damages, liability, and/or causes of action, including (without limitation) attorneys' fees, costs of defense and/or collection fees, which in any way result directly or indirectly from: (a) Any breach of this Agreement or of any warranty or representation made to Bank or TMS by Merchant; (b) Any damage or loss caused by negligence, fraud, dishonesty or willful behavior by Merchant or any of Merchant's employees, agents or other representatives; or (c) Any contention, whether well-founded, baseless or otherwise, that Merchant violated the law or any MasterCard and/or Visa Rule.

6.3 Limitation of Liability

Bank and TMS will use due care in providing services covered by this Agreement and the performance of all services called for in this Agreement shall be consistent with industry standards. The collective liability, if any, of Bank and TMS under this Agreement for any claims, costs, damages, losses and expenses for which it or they may be legally liable, whether arising in negligence or other tort, contract, or otherwise, will not exceed aggregate the amounts of fees paid by Merchant, less interchange and assessments, over the previous 12 month period, calculated from the date the liability occurred, in no event will Bank or TMS or their agents, officers, directors or employees be liable for indirect, special, or consequential damages.

7.0 Display of Merchant Trademarks

Merchant will prominently display the promotional materials provided by TMS in its place of business, provided that such displays are not required by Merchant from doing so by government regulation or to the extent expressly exempted by MasterCard or Visa, as applicable. All promotional materials supplied to Merchant by TMS are the property of TMS and, upon termination of this Agreement, Merchant will return them to TMS. Merchant shall have the right to use and display the proprietary or MasterCard or Visa logos, wherever it is earlier, and then only in conjunction with applicable Visa and MasterCard Rules concerning such usage. Merchant shall have no right to use the proprietary name and/or symbol of Bank using the materials containing such as provided to Merchant, and/or approved in advance, by Bank, Merchant's use of Visa, MasterCard or other cards' promotional materials will not indicate, directly or indirectly, that Visa or MasterCard endorse any goods or services other than their own and Merchant may not refer to Visa or MasterCard in stating eligibility for its products or services. Nothing herein is intended to restrict Merchant from honoring other credit cards or from entering into any other transaction with a purchaser. Merchant may use and advertise any other credit card or credit plan, provided, however, that visual parity shall be maintained between the MasterCard and Visa symbols and any local/regional acceptance mark also displayed. In no event will Merchant advertise or display any promotional material containing the name or symbol of Bank, Visa or MasterCard which states or implies that only Cards issued by Bank will be honored by Merchant.

8.0 Terms Termination

8.1 Term This Agreement shall become effective upon acceptance by Bank and TMS and shall continue in full force and effect for a term of 36 months. Thereafter, this Agreement will automatically renew for additional 24-month periods unless terminated by any party upon not less than 30 days written notice.

8.2 Termination

TMS or Bank may terminate this Agreement immediately at any time with or without cause upon providing Merchant with written notice of such termination. Merchant may terminate this Agreement upon 30 days prior written notice to TMS and Bank.

8.3 Action Upon Termination

Merchant shall be responsible for the return of all equipment, materials, and/or other items provided to it by Bank and TMS and for the

disbursement of all funds evidenced by Sales Drafts and other payment transactions in process. Collected funds may be placed in the Reserve Account (defined below) until Merchant pays any outstanding charges or losses.

(a) Merchant hereby authorizes Bank, upon termination of this Agreement or at any time upon Bank's and TMS' request and with Bank and TMS' sole discretion, to establish and maintain a deposit account ("Reserve Account") at Bank in an amount reasonably determined by Bank and TMS to be appropriate to protect Bank's and TMS' interests under this Agreement.

(b) Bank is authorized to debit the Merchant Account from time to time to make or maintain funds in the Reserve Account with or without prior notice to Merchant. Bank may deposit into the Reserve Account funds it would otherwise be obligated to pay Merchant. For the purpose of establishing or maintaining the Reserve Account in accordance with this section, if it determines such action is appropriate to protect its interests, Bank's and TMS' right to suspend them by Merchant pursuant to this Agreement shall in no way limit or restrict the use of the Reserve Account. Bank's and TMS' rights with respect to this Reserve Account, including their security interest therein, shall survive the termination of this Agreement. Bank may charge Merchant monthly fee for maintenance of said Reserve Account, if established.

(c) Bank may, without notice or demand to Merchant, apply deposits in the Reserve Account against any outstanding amount Merchant owes under this Agreement or any other Agreement between Merchant and Bank/TMS. Also, Bank and TMS may exercise their rights under this Agreement to collect any amounts due to Bank and TMS including, without limitation, rights of set-off and recoupment.

(d) In no event will Merchant be entitled to a release of Reserve Account funds before 270 days following the effective date of termination of this Agreement, provided however, that the release of such funds to Merchant shall not relieve Merchant of its liability to Bank or TMS or discharge either before or after such release. Bank will have sole control of the Reserve Account. Merchant further acknowledges and agrees that TMS has the right to hold funds of Merchant in order to cover all liabilities of Merchant to TMS.

(e) If Merchant terminates this Agreement without cause within 90 days of the date that Merchant submits its final transaction to TMS, Merchant will be assessed the deconversion fee indicated in the summary of fees section of the Merchant Processing Application. No such deconversion fee will be assessed if Merchant terminates this Agreement with or without cause after such 90-day period expires.

8.4 Rights

The rights conferred upon Bank and TMS in this Agreement are not intended to be exclusive of each other or of any other rights and remedies of Bank and TMS under this Agreement, at law or in equity. Rather, each and every right of Bank and TMS at law or in equity will be cumulative and concurrent and in addition to every other right.

8.5 Terminated Merchant File

If this Agreement is terminated for cause, Merchant acknowledges that Bank and TMS may be required to report Merchant's business name and the names and other identification of its principals to the combined Terminated Merchant File (TMS) maintained by Visa and MasterCard. Merchant shall hold harmless Bank and TMS for claims which Merchant may raise as a result of such reporting.

8.6 Sales Adjustment

Notwithstanding any termination of this Agreement, this Agreement shall remain in full force and effect with respect to any Sales Draft which is actually delivered to Bank or TMS by Merchant and not returned to Merchant prior to Bank's extending credit therefor.

9.0 Notices

All notices under this Agreement shall be deemed delivered when mailed, postage prepaid, addressed as follows: **TERMINATED MERCHANT SERVICES**, HUMBOLDT BANK, P.O. Box 160077, El Paso, TX 75026-0077, NATIONAL CITY BANK OF KENTUCKY, 621 Downey Lane Louisville, KY 40211-2008

(b) If to Merchant, to any owner or officer stated on the Merchant Processing Application at the Merchant's place of business also stated on the Merchant Processing Application. Notice may be sent by facsimile or other electronic means of communication but, if such transmitted notice is by Merchant to the Bank and/or TMS, the original of any such communication shall also be mailed to the intended recipient on the date of the electronic transmission and it shall not be deemed served on the receiving party until the mailed copy is received and confirmed by that party. If Bank or TMS gives notice by facsimile or other electronic communication to Merchant, service is deemed to have been given on the day of such transmission (with confirmed receipt).

10.0 Additional Terms

10.1 Audits Representative of Bank and TMS may, during the normal business hours, inspect, audit and make records of Merchant's books, accounts, records and files pertaining to any Card transactions. Merchant will preserve its records of all Card sales and any return or adjustment therefor for at least 7 years from the date of such sale, credit, refund or adjustment.

10.2 Confidentiality

Merchant will not use for its own purposes, will not disclose to any third party, and will retain in strictest confidence all information and data belonging to or relating to the business of Bank and TMS (including without limitation the terms of this Agreement), and will safeguard such information and data by using at least the same degree of care that Merchant uses to protect its own confidential information.

10.3 Force Majeure

Bank and TMS shall not be liable for any damages resulting from any performance or non-performance caused by circumstances beyond Bank's and/or TMS' control including, but not limited to, Acts of God, fire, flood, war, government action, labor trouble or shortage, or other events of similar effect in connection with Bank's and TMS' obligations herein.

10.4 Amendments

Bank and TMS may propose amendments or additions to this Agreement. Bank and TMS may inform Merchant of a proposed change in a periodic statement or other written notice. Merchant will be deemed to have agreed to the change if it continues to present transactions to Bank and TMS after 14 days from the date notice of the proposed change was sent. If Merchant does not agree with a proposed change, it may terminate this Agreement by notifying TMS in writing within 14 days of the mailing of the notice of proposed amended terms. Notwithstanding the previous sentence, TMS is entitled to increase any fee due to an increase imposed by Visa or MasterCard, or to amend communication vendors without giving Merchant the right to terminate this Agreement.

10.5 Construction

All section headings are for descriptive purposes only, and the language of such section shall control.

10.6 Assignment

This Agreement may not be assigned by Merchant, directly or by operation of law, without the prior written consent of Bank and TMS. Bank and/or TMS may assign this Agreement at any time upon written notice to Merchant.

10.7 Merchant's Fees

Merchant shall be liable for and shall indemnify Bank and TMS for any and all attorney's fees and other costs (including collection costs) and expenses paid or incurred by the Bank and/or TMS or resulting from any breach by Merchant of this Agreement.

10.8 Governing Law, Venue

Any action or proceeding arising out of this Agreement by or against Bank or TMS shall be initiated and maintained under the laws of the state of Texas and shall take place in the county of Collin County. This Agreement shall be construed and governed by the laws of the state of Texas. If any provision of this Agreement shall be held to be invalid, illegal or unenforceable, the remaining provisions shall remain in effect.

10.9 Dispute Resolution

Any dispute arising under this Agreement, shall be promptly submitted to binding arbitration in accordance with the rules of the American Arbitration Association in Collin County, Texas and in accordance with any corresponding laws concerning arbitration in that jurisdiction. The arbitrator shall have the right to render equitable, as well as court awards and relief. Without limiting its foregoing, any party submitting such dispute shall request the American Arbitration Association as: (a) appoint a single arbitrator who is experienced and knowledgeable in the field of industry relating to the subject matter of this Agreement; (b) require a testimony to be transcribed; and (c) require any award or decision to be accompanied by findings of fact and a statement of reasons for said award or decision.

10.10 Waiver

Neither the failure nor a delay on the part of Bank or TMS to exercise any right, remedy, power or privilege hereunder shall operate as a waiver or give rise to an estoppel nor be construed as an agreement to modify the terms of this Agreement, nor shall any single or partial exercise of any right, remedy, power or privilege hereunder with respect to any occurrence be construed as a waiver of any such right, remedy, power or privilege with respect to any other occurrence. No waiver by a party hereunder shall be effective unless it is in writing and signed by the party making such waiver, and then such waiver shall apply only to the exact specifications stated in such writing.

10.11 Survival

Each and every indemnity provided for in this Agreement shall survive the termination of this Agreement. Further, Sections 2.7, 2.8, 8.3, and all provisions of Section 5.0 and 6.0 shall survive the termination of this Agreement.

10.12 Cooperation

Merchant agrees to execute, file and record such statements, notices and certificates as Bank or TMS may reasonably request to preserve and protect Bank's and/or TMS' interests.

10.13 Entire Agreement

This Agreement and all other documents created or submitted by Merchant in connection herewith, or incorporated herein by reference, constitute the entire agreement between Merchant, on the one hand, and TMS and Bank on the other.

11.0 Fees

11.1 Merchant Fees Merchant will pay Bank and TMS fees for services, forms and equipment as accordance with the fees set forth on the Merchant Processing Application. Such fees will be calculated and debited from the Merchant Account once each business day, and shall be determined by TMS for the previous business day or month's activity, or will be netted out from the funds due Merchant under this Agreement. TMS may adjust the fees set forth in Section 10.4. Merchant agrees that all fees and charges are considered accurate and final unless Merchant disputes them in accordance with the provisions of Section 2.7(c). Furthermore, Merchant understands that every credit voucher issued will be subject to a transaction fee and discount fee and there will be no refund of any fees or charges associated with the original transaction.

11.2 Other Amounts Owed

Merchant will immediately pay TMS or Bank any amount incurred by TMS or Bank attributable to this Agreement and ACH debit to Merchant's account, including but not limited to, fees incurred by Visa or MasterCard, non-sufficient funds fees, and ACH debit to the Merchant Account, Reserve Account, or any other account Merchant maintains at Bank or in any other financial institution for any amount Merchant owes TMS or Bank under this Agreement or under any other contract, note, guaranty, instrument or dealing of any kind now existing or later created between Merchant and TMS or Bank, whether the obligation is direct, indirect, primary, secondary, fixed, contingent, joint or several. In the event any such amount does not fully reimburse TMS or Bank for the amount owed, Merchant will immediately pay TMS or Bank such amount.

Merchant authorizes Bank and TMS to debit from the Merchant Account any amounts paid by Bank or TMS to a leasing company on Merchant's behalf, including but not limited to monthly lease payments or other amounts owed by Merchant to the leasing company.

11.4 Taxes

Merchant shall timely pay all taxes and other charges imposed by any governmental authority on the services provided under this Agreement.

11.5 Prior Processor Termination Fee Refund

If Merchant incurs a fee for cancelling Merchant's immediately preceding credit card processing agreement in order to sign this Agreement, TMS will reimburse Merchant in an amount not to exceed \$250. TMS will reimburse such amount to Merchant within 30 days of TMS' receipt of a bill or bank statement evidencing the cancellation fee. If (i) TMS reimburses Merchant within 30 days of TMS' receipt of a bill or bank statement evidencing the cancellation fee, (ii) Merchant terminates this Agreement to Merchant within 30 days of the date of this Agreement, and (iii) Merchant terminates this Agreement without cause within the initial 36 month term of this Agreement, then (c) the reimbursement fee set forth in the summary of fees section of the Merchant Processing Application will apply, and (d) Section 8.3(e) of this Agreement shall have no force or effect.

WHITE COPY - COMPANY

YELLOW COPY - MERCHANT

OWNERS/OFFICERS INFORMATION (MUST REFLECT 51% OR MORE OWNERSHIP)

Form with fields for Name (print), Title, Residence Address, City, State, Zip, Social Security #, Phone #, % Equity Ownership, Driver's License # for two individuals.

TRADE REFERENCES

Form with three columns for Name, City, State, Contact, and Phone for trade references.

I understand any equipment lease (if applicable) is separate from any and all other business or personal leases I may have at this time. I understand that this lease payment will be separate from and in addition to any and all other business or personal leases I may have at this time. (N/A if a signed lpo is included with application.)

Merchant Acceptance

Box containing a checked 'X' for merchant acceptance.

By checking the box, MERCHANT agrees to abide by the terms and conditions of Diners Club. I understand that the Diners Club Agreement will be sent to the business entity indicated on this application. By accepting the Diners Club Card for purchases of goods and/or services, I agree to be bound by the terms and conditions of the Agreement.

Small empty box for agreement confirmation.

MERCHANT SITE SURVEY (to be completed by Independent Merchant Consultant. Independent Merchant Consultant IS NOT an employee of TMS)

Form with fields for Merchant Location, Landlord Name, Landlord Telephone#, and checkboxes for business premises and staff/stock status.

Comments:

I hereby verify that I have physically inspected the business premises of the merchant at this address and the information stated above is correct to the best of my knowledge and belief.

Checked 'X' for verification.

Fields for INDEPENDENT MERCHANT CONSULTANT NAME, INDEPENDENT MERCHANT CONSULTANT SIGNATURE, and DATE.

DEBIT/CREDIT AUTHORIZATION

MERCHANT hereby authorizes ACQUIRER and TMS in accordance with this Merchant Processing Agreement to initiate debit/credit entries to MERCHANT'S checking account, as indicated per the attached copy of a voided check from same.

MERCHANT ACCEPTANCE

All owners, principals, and officers of MERCHANT must read and sign below and agree to the terms and conditions stated in all of this merchant processing agreement and certifies that all information provided in this application is true, correct, and complete.

AGREED AND ACCEPTED

Form with three checked 'X' boxes for agreement and acceptance.

PRINT BUSINESS NAME:

Fields for DATE for each of the three agreement boxes.

PERSONAL GUARANTY

FOR VALUE RECEIVED, and in consideration of the mutual undertaking contained in this MERCHANT PROCESSING APPLICATION AGREEMENT (the "Agreement") by and between the MERCHANT and Certified Merchant Services, Ltd. d/b/a Transaction Merchant Services.com ("TMS") and ACQUIRER, the undersigned jointly and severally if more than one, unconditionally guarantee to TMS and ACQUIRER and its successors and assigns the full and prompt payment when due of all of the obligations of every kind of MERCHANT arising directly or indirectly out of the Agreement or any document or agreement executed and delivered by MERCHANT in accordance with the terms of the Agreement.

Form with three checked 'X' boxes and labels #1 from application, #2 from application, #3 from application.

FOR TMS USE ONLY

Fields for Application Approved By, SIGNATURE, TITLE, and DATE for TMS use.

FOR ACQUIRER USE ONLY

Fields for Application Approved By, SIGNATURE, TITLE, and DATE for Acquirer use.

Account Name (DBA): \_\_\_\_\_

IMC Name: \_\_\_\_\_

Accounting System

Application Type:

- Retail
- Retail w/Tip
- Lodging
- Rest. w/Tip
- MOTO

System Type

- Nurit:
- 3000+ SC
  - 3000+
  - 3000
  - 2080
  - 3010

- Check Scanner:
- IVI 2500
  - Other
  - N/A

- Nurit Pinpad:
- Internal
  - External
  - N/A

- Accessories:
- VRP Printer
  - IVI 3000
  - IVI 2500
  - Pinpad

Thales:

- ARTEMA
- Portable

Reprogram

Terminal 1

Application Type:

- Retail
- Retail w/Tip
- Lodging
- Rest. w/Tip
- MOTO

Terminal Type: \_\_\_\_\_

External Printer: \_\_\_\_\_

External Pinpad: \_\_\_\_\_

External Check Reader: \_\_\_\_\_

Reprogram

Terminal 2

Application Type:

- Retail
- Retail w/Tip
- Lodging
- Rest. w/Tip
- MOTO

Terminal Type: \_\_\_\_\_

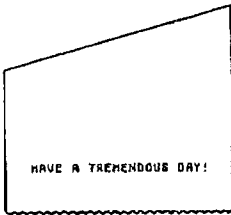
External Printer: \_\_\_\_\_

External Pinpad: \_\_\_\_\_

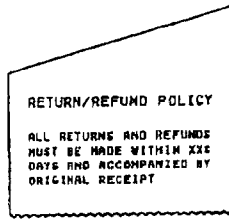
External Check Reader: \_\_\_\_\_

Customized Receipt Layout and Available Security Features

(Only available with Nurit Systems)

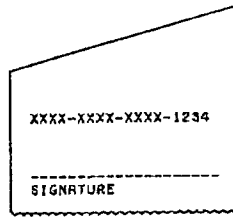


Standard Footer



Refund Footer\*

\* Number of days: \_\_\_\_\_



Receipt Truncation

Replaces 12 numbers of a customer's card number with "X"s, leaving either the last four numbers as a reference. Protects your customers from having their card numbers fall into the wrong hands.

Password Protect

Provides additional protection by adding a secure code that is required when a VOID, CREDIT, or Batch Transaction is completed.

Fraud Control

Reduces the risk of accepting fraudulent cards through a special verification method that compares the last four numbers stamped on the credit card with the last four numbers the magnetic strip provides.

AVS

Address Verification Service. Mail order merchants verify the customer's zip code, thus reducing fraudulent activity.

Will the merchant accept Debit/ATM cards?  Yes\*\*  No

What type of check acceptance protection did the merchant select?  Guarantee\*\*  Conversion\*\*

Is it necessary to dial a number to access an outside line?  Yes  No

If Yes what is the number: \_\_\_\_\_

Is their call waiting enabled?  Yes  No

If Yes, what is the code to disable? \_\_\_\_\_

Will the merchant be using a dedicated phone line for processing?  Yes  No

If No what else is connected? \_\_\_\_\_

\*\* Additional Paperwork Required for Debit or Check acceptance

**appendix D [to be filed under seal]**

**APPENDIX E**

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

Federal Trade Commission,	)	
	)	Case No. 4:02cv44
Plaintiff,	)	Judge Paul Brown
	)	
vs.	)	AFFIDAVIT OF [NAME OF
	)	DEFENDANT]
Certified Merchant Services, Ltd., et al.,	)	
	)	
Defendants.	)	
	)	
	)	

[Name of defendant], being duly sworn, hereby states and affirms as follows:

1. My name is \_\_\_\_\_ . My current residence address is \_\_\_\_\_ . I am a citizen of the United States and am over the age of eighteen. I have personal knowledge of the facts set forth in this Affidavit.
2. I am a defendant in FTC v. Certified Merchant Services, et al. (United States District Court for the Eastern District of Texas).
3. On [date], I received a copy of the [state full name of the Final Order as it appears on the Order itself], which was signed by the Honorable Paul Brown and entered by the

Court on [*date of entry of Order*]. A true and correct copy of the Order I received is appended to this Affidavit.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on [*date*], at [*city and state*].

\_\_\_\_\_  
[*Full name of defendant*]

State of \_\_\_\_\_, City of \_\_\_\_\_

Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 199\_\_\_\_.

\_\_\_\_\_  
Notary Public  
My Commission Expires:  
\_\_\_\_\_