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IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA

Federal Trade Commission,)	CIV'01 0466 PHX ROS
Plaintiff,)	
v.)	STIPULATED FINAL
)	JUDGMENT AND
Bigsmart.com L.L.C.; Mark Tahiliani;)	ORDER FOR A
and Harry Tahiliani,)	PERMANENT
Defendants.)	INJUNCTION

Plaintiff Federal Trade Commission ("Commission") filed a Complaint on MARCH 12 2001. The Complaint charged Defendants Bigsmart.com L.L.C. ("Bigsmart"), Mark Tahiliani, and Harry Tahiliani, collectively "Defendants," with violations of Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. '45. Plaintiff Federal Trade Commission and Defendants, advised by counsel, have agreed to entry of this Stipulated Final Judgment and Order for Permanent Injunction ("Order") by the Court to resolve all matters in dispute in this action without trial.

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and over Defendants.

2. The Complaint states claims upon which relief may be granted against Defendants under Sections 5 and 13(b) of the FTC Act, as amended, 15 U.S.C. §§ 45 and 53(b).

3. Entry of this Order is in the public interest.

4. Defendants enter into this Order freely and without coercion, and acknowledge that they understand the provisions of this Order and are prepared to abide by them.

5. Venue in this district is proper under 28 U.S.C. § 1391 (b) and (c) and 15 U.S.C. § 53(b).

6. The acts and practices of Defendants were or are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFINITIONS

For the purposes of this Order, the following definitions apply:

A. "Bigsmart" means Bigsmart.com L.L.C. and its subsidiaries or affiliates.

B. "Mark Tahiliani" means Mark Tahiliani individually, and d/b/a Bigsmart.

C. "Harry Tahiliani" means Harry Tahiliani individually, and d/b/a Bigsmart.

D. "Defendants" collectively means Mark Tahiliani, Harry Tahiliani, and

Bigsmart.

E. "Consent Decree" means this Order.

F. "Settlement Agreement" means the agreement entered into between Plaintiff, Defendants, and Harris Trust Bank that is incorporated by reference to this agreement and attached hereto as Appendix A.

K. "Business Venture" means any written or oral business arrangement, however denominated, whether or not covered by 16 C.F.R. Part 436, that consists of the payment of any consideration for: (1) the right or means to offer, sell, or distribute goods or services (whether or not identified by a trademark, service mark, trade name, advertising or other commercial symbol); and (2) assistance to any person in connection with or incident to the establishment, maintenance, or operation of a new business, or the entry by an existing business into a new line or type of business.

L. "Related Company" means any multilevel marketing company, in existence on or before February 1, 2000, in which a Defendant is an owner, director or managing agent.

M. "Current Eligible Consumer" means any current Bigsmat.com member who at the time of entry of this Order: (1) owns or used to own one or more Bigsmat.com malls purchased after May 15, 2000,; and/or (2) purchased a Bigsmat.com ASP product to qualify for Phase II commissions; (3) received a voluntary credit issued by Bigsmat after May 15, 2000, as a result of the Maine Settlement, and used the credit to purchase an ASP product; and/or (4) received a voluntary credit issued by Bigsmat after May 15, 2000, as a result of the Maine Settlement, which has either not been redeemed or has expired.

N. "Mall Purchase Price" means the amounts paid for the mall, including any application or set-up fee, less a pro-rata share of any hosting fee that has been used. The pro-rata deduction shall not account for any part of the hosting fee used after January 1,

2001.

O. "Qualification Mall Purchase Price" means any monies paid to Bigsmat.com relating to a Bigsmat.com shopping mall that qualified a Current Eligible Customer for payment of commissions based on activating the mall or malls through the purchase of ASP products for participation in Phase II commissions.

P. "ASP Purchase Price" means any monies paid to Bigsmat.com for a Bigsmat.com Application Service Provider ("ASP") product listed in Appendix B.

Q. "Maine Settlement" means the Consent Decree entered by the Maine Superior Court in case No. CV-00-82 between the State of Maine and Bigsmat.com on May 15, 2000.

R. "Equity Receiver" means the receiver appointed pursuant to the Settlement Agreement.

ORDER

Injunctive Relief

I.

IT IS THEREFORE ORDERED that Defendants, their successors, assigns, officers, servants, agents, employees and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are permanently restrained and enjoined from engaging, participating or assisting in any manner or capacity whatsoever, directly, or in concert with others, or through any business entity or

agents, servants, employees and distributors, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise; in connection with the advertising, promoting, offering for sale, sale, or distribution of any Business Venture are hereby restrained and enjoined from assisting others in the making, expressly or by implication, orally or in writing, any false or misleading representation or omission of material fact.

IV.

IT IS FURTHER ORDERED that Defendants, their successors and assigns, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are restrained and enjoined from engaging, participating or assisting in any manner or capacity whatsoever, directly, or in concert with others, or through any business entity or other device, in any Multi-Level Marketing Program, except any Related Company, until the refunds have been paid fully from the Redress Fund as described in this Order; *provided*, that if the Defendants operate any Related Company, they shall pledge the stock of such company as security to the Commission until the obligations under the Redress Fund are satisfied fully. Any stock pledged pursuant to this provision secures Defendants' obligation to fully fund the \$5.0 million Redress Fund, as described below.

V.

IT IS FURTHER ORDERED that Defendants, in connection with the advertising,

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promoting, offering for sale, sale, or distribution of any Business Venture or Multi-Level Marketing Program are permanently enjoined and restrained from:

A. Failing to take reasonable steps sufficient to monitor and ensure that all Defendants' agents, representatives, employees, or independent contractors comply with Paragraphs I, II, III and IV of this Order. Reasonable steps shall include (a) establishing and disseminating a written compliance program to all members, on a Web site, if there is one, or to each individual representative, (b) spot-checking of representatives and independent contractors to ensure that no misrepresentations have been made, (c) ascertaining the number of and nature of any consumer complaints and investigating, at a minimum, those that recite violations of the written compliance procedures, (d) random monitoring of the Web sites of representatives, and (e) to the extent feasible, blind testing the oral representations made by any representative or independent contractor. Defendants shall, for a period of three (3) years, submit to the Commission, on an annual basis, no later than fifteen (15) days after the anniversary of the date of the entry of this Order, a summary report of compliance with this Paragraph and, for the seven (7) years that follow, maintain records that will demonstrate compliance with this Paragraph in the manner specified in Paragraph IX (Compliance). These annual reports shall be submitted to the Commission's Associate Director for Marketing Practices at the address listed in Paragraph XV.

B. Failing to investigate and address promptly any consumer complaint received by Defendants, their successors, assigns, officers, agents, servants, and employees, and those

persons in active concert or participation with them who receive actual notice of this Order regarding any Multi-Level Marketing Program, or any aspect thereof, and to notify the consumer of the resolution of the complaint and the reason therefore.

VI.

IT IS FURTHER ORDERED that:

A. Subject to the exception set forth below, after the Redress Fund requirements are satisfied, each of the Defendants, their successors and assigns, whether acting directly or indirectly through any persons or entities under such defendant's control, are hereby permanently enjoined and restrained from engaging in or assisting others engaged in any Multi-Level Marketing Program, unless, prior to engaging in or assisting others engaged in such activities, such defendant first obtains a performance bond in the principal sum of five hundred thousand dollars (\$500,000). The terms and conditions of the bond requirement are as follows:

1. The bond shall be conditioned upon compliance with the provisions of this Order and for any violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) related to this Order. The bond shall be deemed continuous and remain in full force and effect as long as such defendant is engaging in or assisting others engaged in any Multi-Level Marketing Program. Such defendant shall maintain the bond for a period of five (5) years after such defendant has both ceased, ^{RCD} and provided notice to the Commission that such defendant has ceased, ^{RCD} engaging in or assisting others engaged in any multi-level marketing.

The bond shall cite this Order as the subject matter of the bond, and shall provide surety thereunder against financial loss resulting from whole or partial failure of performance due, in whole or in part, to any violation of Section 5(a) of the FTC Act related to this Order, or any provision of this Order, or to any other violation of law;

2. The bond required pursuant to this subparagraph shall be an insurance agreement providing surety for financial loss issued by a surety company that is admitted to do business in each state in which such defendant, or any entity directly or indirectly under such defendant's control, is doing business and that holds a Federal Certificate of Authority As Acceptable Surety On Federal Bond and Reinsuring. The bond shall be in favor of both: (1) the Federal Trade Commission for the benefit of any consumer injured as a result of any activities that required obtaining the Bond; and (2) any consumer so injured;

3. The bond required pursuant to this subparagraph is in addition to, and not in lieu of, any other bonds required by federal, state, or local law;

4. At least ten (10) days before commencing in any activity that requires obtaining the bond, such defendant shall provide notice to the Commission describing in reasonable detail said activities, and include in such notice a copy of the bond obtained; and

5. Such defendant shall not disclose the existence of the bond to any consumer without simultaneously and conspicuously making the following disclosure in the same medium: "THE BOND IS REQUIRED BY ORDER OF THE U.S. DISTRICT COURT AS PART OF A FINAL ORDER AGAINST [name of such defendant] in FTC v.

Bigsmart.com, L.L.C., et al., Civ. Action No. ____, U.S. District Court for the District of Arizona.”

B. Notwithstanding the bond requirement set forth above, Defendants may continue to operate any Related Company, but shall, within 6 months after the Redress Fund requirements are satisfied, provide a performance bond of \$250,000. During that 6 month period and until a \$250,000 bond is provided, the Commission will continue to hold the stock of any such Related Company as security under the same terms and conditions set forth in Paragraph VI, subparagraph A(1) - (5), in lieu of the \$250,000 bond required by this subparagraph.

Monetary Relief

VII.

IT IS FURTHER ORDERED that Defendants, their successors and assigns, jointly and severally, shall pay redress to consumers, on the terms specified below, by means of refunds and credits in an amount not to exceed \$5.0 Million (“Redress Fund”). This sum shall be used to (1) provide redress to all Current Eligible Customers who request refunds under the procedures described below, and (2) to pay all attendant expenses of administering the redress program.

A. The Redress Fund shall consist of an escrow account created and administered by the Equity Receiver. The Redress Fund shall initially receive \$3.3 million to be funded as follows. Ten (10) days after entry of this Order: 1) Defendants shall assign to Plaintiff all

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of their rights to the \$3.1 million of Defendants' funds currently held in bank credit reserves for refunds for Bigsmart independent members' purchases; said funds shall be transferred to the Redress Fund in accordance with the Settlement Agreement; and 2) Defendants shall transfer to the Redress Fund an additional \$200,000. Additional payments shall be paid into escrow for the Redress Fund, as necessary to pay refund requests, on the following terms and conditions:

1. Six (6) months after entry of this Order, Defendants shall deposit an additional payment of \$500,000 into the escrow account, if, as determined by the Equity Receiver, such funds are needed to meet requested claims for redress;

2. Twelve (12) months after entry of this Order, Defendants shall deposit an additional payment of \$500,000 into the escrow account, if, as determined by the Equity Receiver, such funds are needed to meet requested claims for redress; and

3. Eighteen (18) months after entry of this Order, Defendants shall deposit an additional payment of \$700,000 into the escrow account, if, as determined by the Equity Receiver, such funds are needed to meet requested claims for redress.

B. The Redress Fund shall be administered by a court-appointed Equity Receiver.

To effectuate the process:

1. At the same time as the filing of this agreement, the parties shall apply to the Court for the appointment of an Equity Receiver with the full power necessary to effectuate this agreement and the Settlement Agreement.

2. Within 10 (ten) business days after the date of issuance of this order, Defendants shall deliver to both the Commission and the Equity Receiver, on magnetic tape or other electronic medium, the following data concerning all Current Eligible Customers: name; last known mailing address; customer number; the amount of any Mall Purchase Price paid, if any; the amount of ASP Purchase Price as defined above, if any; and the amount of any commissions, refunds or other monies paid by Bigsmart.com to the Current Eligible Customer.

3. Defendants shall also provide, as quickly as feasible but no later than ten (10) business days after receiving a written request, any additional information that Equity Receiver reasonably needs to carry out the redress program described herein. Defendants shall deliver all data and information described in this paragraph to the Equity Receiver in a clean format compatible with the Equity Receiver's computers.

4. The Redress Fund shall be used to provide a refund to all Current Eligible Customers who request a refund equal to the Mall Purchase Price and/or Qualification Mall Purchase Price, less any monies paid and credits issued by Bigsmart.com to any Current Eligible Customer, provided the voluntary credit issued by Bigsmart after May 15, 2000, to a Current Eligible Customer shall not be used to reduce the amount of refund owed to the extent the credit was used to purchase an ASP product as reflected in Appendix "B" or has either not been redeemed or expired.

5. Within twenty (20) days of the date of issuance of this Order, the Equity

Receiver shall update the last known addresses of members through the National Change of Address system, and as soon as possible thereafter shall notify Current Eligible Consumers of their right to a refund. Current Eligible Customers must request refunds within forty-five (45) days after the date of the Equity Receiver's notification of the entitlement to a refund and, accordingly, such refund requests must be received no later than fifty-five (55) days after notification.

6. The Equity Receiver, in his or her discretion, shall pay refunds in a manner and schedule designed to provide refunds, either full or partial, to the greatest number of Current Eligible Customers that request refunds within the forty-five (45) day period, *provided* that, should the total amount in the Redress Fund not be adequate to pay all eligible requests under this Order, the Equity Receiver shall use best efforts, in his or her discretion, to achieve the goal of making pro rata refunds to eligible consumers.

7. Administrative expenses and other fees charged by the Equity Receiver will be deducted from the Redress Fund. The Equity Receiver shall pay the agreed-upon attorneys' fees and investigative costs incurred by the State of Texas and State of Wisconsin that they have incurred in this investigation and their assistance of the FTC in its investigation as soon as funds to do so become available in the Redress Fund.

C. If, after eighteen (18) months after entry of this Order, or before if applicable, the Equity Receiver determines that all valid refund requests have been satisfied from available monies in the Redress Fund, the Equity Receiver shall return to Defendants any

of the funds they contributed that are still being held in the escrow account as well as any interest that has accrued on these funds.

VIII.

IT IS FURTHER ORDERED that the Court's approval of this Order is expressly premised upon the truthfulness, accuracy, and completeness of complete sworn financial statements that Defendants submit upon execution of this Order to the Associate Director for Marketing Practices at the address listed in Paragraph XV. If, upon motion, this Court finds that in their sworn financial statements, Defendants have made a material misrepresentation or omission understating their net worth, then the Court shall enter a modified judgment holding Defendants jointly and severally liable to the Commission for consumer redress for the difference between the declared and actual net worth.

Compliance

IX.

IT IS FURTHER ORDERED that Defendants, for a period of ten (10) years from the date of entry of this Order, when acting in a commercial capacity as an individual or in connection with any entity in which any defendant has an ownership interest or is a director, officer (or comparable position with a non-corporate entity), or is a person who formulates policies or procedures, are hereby restrained and enjoined from failing to create, maintain and make available to representatives of the Commission, upon reasonable notice:

- A. Books, records and accounts which, in reasonable detail, accurately and fairly

reflect the income, disbursements, transactions and use of monies;

B. Records accurately reflecting the name, address, and phone number of each employee, or independent contractor of any Defendant, that person's job title or position, the date upon which the person commenced work, and the date and reason for his or her termination, if applicable. Defendants shall retain such records for any terminated person for a period of two years following the date of termination;

C. Records containing the names, addresses, and phone numbers of all consumers to whom Defendants have sold, invoiced, or shipped any products or services, whether on their own behalf or that of any third party;

D. Records that, for every consumer complaint or refund request, whether received directly or indirectly or through any third party, reflect:

1. The consumer's name, address, telephone number and the dollar amount paid by the consumer;
2. The written complaint, if any, and the date of the complaint or refund request;
3. The basis of the complaint and the nature and the result of any investigation conducted as to the validity of any complaint;
4. Each response by Defendants, their agents, servants, and employees, and those persons in active concert or participation and the date of the response;
5. Any final resolution and the date of the resolution; and

6. In the event of a denial by Defendants, their agents, servants, and employees, and those persons in active concert or participation of a refund request, the reason for such denial, or if cured, the basis for determining that such complaint has been cured.

E. Records relating to all Business Ventures undertaken by Defendants, their agents, servants, and employees, and those persons in active concert or participation with them, that involve any type of marketing program including, but not limited to, group or individual meetings, telemarketing, Web sites, commercial electronic mail, infomercials or other television or radio advertising, or direct mail, including but not limited to copies of all contracts or agreements between Defendants, their agents, servants, employees and distributors, and those persons in active concert or participation and any sales company, mail house, printer, Internet service provider, information provider, telephone company, television or radio station, or other person through whom Defendants, their agents, servants, employees and distributors, and those persons in active concert or participation advertises or promotes products or services, as well as copies of all advertisements, Web pages, commercial electronic mail, or promotional materials utilized in such ventures; and

F. Copies of all sales scripts, training materials, advertisements or other marketing materials utilized, provided that copies of all sales scripts, training materials, advertisements or other materials shall be retained by Defendants for ten (10) years after the last date of dissemination or use.

X.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date of entry of this Order, for purposes of determining or securing compliance with this Order, Defendants and any Business Venture that they now or come to own, operate or control, shall permit representatives of the Commission upon reasonable written notice:

A. Access during normal office hours to any office or business facility in which documents relating to compliance with the terms of this Order are stored or held, to inspect and copy such documents; and

B. To interview current officers, directors, independent contractors, and employees of any entity directly or indirectly under Defendants' control or under common control with them, relating to compliance with the terms of this Order without restraint or interference from Defendants at a location reasonably convenient to Defendants and the person to be interviewed. 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 Defendants' business premises for the purpose of inspecting and copying all documents relevant to any matter contained in this Order.

Provided further, that plaintiff may otherwise monitor each Defendant's compliance with this Order by all lawful means available, including: (1) the use of investigators or other representatives of the Commission posing as consumers and suppliers of Defendants, their

employees or any entity which any Defendant owns, operates or controls, without the necessity of prior identification or notice; (2) without further leave of Court, to obtain discovery as provided by Rules 26-37 of the Federal Rules of Civil Procedure, including the use of compulsory process pursuant to Federal Rules of Civil Procedure 45; and (3) the use of compulsory process pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49 and 57b-1, to investigate whether either Defendant has violated any provision of this Order or Section 5 of the FTC Act, 15 U.S.C. § 45.

XI.

IT IS FURTHER ORDERED that Defendants, for a period of ten (10) years from entry of this Order, shall give written notice to the Commission of their affiliation or employment with any business entity within twenty-one (21) days of the commencement of such affiliation or employment at the address listed in Paragraph XV. Such notice shall include the new business name and address, a statement of the nature of the business, and a summary of his or her position and responsibilities with the business.

XII.

IT IS FURTHER ORDERED that Defendants, for a period of ten (10) years from the date of entry of this Order, for the purposes of determining or securing compliance with this Order, when acting in a commercial capacity as an individual or in connection with any entity in which any Defendant has an ownership interest or is a director, officer (or

comparable position with a non-corporate entity), or is a person who formulates policies or procedures, shall, within sixty (60) days of a written request from the Commission:

A. File with the Commission a statement containing the names of the media in or on which the defendant, the defendant's agents, representatives, servants, employees, salespersons, or those of any corporations, trusts, or persons or other entities managed or controlled in whole or in part by the defendant, have placed advertisements, the months during which those advertisements were published or broadcast, the caller paid and/or toll-free telephone numbers utilized in furtherance of the sale of products and services, the URL of all Web sites utilized in furtherance of the sale of products and services, and the local carriers and/or telephone service common carriers utilized in furtherance of any telemarketing or teleconferencing activities; and

B. Produce any requested marketing materials used in the advertising, promoting, offering for sale, sale, or distribution of any product or service sold or offered for sale by any Defendant, each of their successors or assigns, agents, representatives, or affiliates.

XIII.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years from the date of this Order, Defendants will provide to all new owners, directors, and managing agents, including the President and corporate officers, of Bigsmart, a copy of this Order and shall obtain a signed acknowledgment of receipt within thirty (30) days of their employment or election, as the

case may be.

B. For a period of five (5) years from the date of this Order, Defendants will provide to all new owners, directors, managing agents and corporate officers (a) of any commercial entity in which any defendant has 25% or greater ownership interest, or (b) of any MLM entity in which any defendant is an officer, director, or is a person who formulates policies, a copy of the key prohibitions and affirmative requirements of this Order, which must include paragraphs I, II, III, IV, V, VI, IX, X, XII and XIII.

1. Within thirty (30) days from the date of this Order, Defendants will provide a copy of the key prohibitions and affirmative requirements of this Order, which must include Paragraphs II, III and XIII, ^{To} ~~each~~ ^{each} Bigsmart mall owner as of the date of the Order. Defendants may, at their option, send this notice to each mall owner's registered e-mail address.

2. For a period of five (5) years from the date of this Order, Defendants will post the Order provisions listed in subsection B(1) of this paragraph, clearly and conspicuously, in the section of its Web site that all new members are required to read and acknowledge.

C. For a period of three (3) years from the date of this Order, Defendants shall send to each representative of a Related Company by e-mail or first class mail, at Defendants' option, the Order provisions listed in subsection B(1) of this paragraph.

D. Defendants may send, post or provide such other provisions of this Order they

deem appropriate in addition to the ones specified in this paragraph.

XIV.

IT IS FURTHER ORDERED that the expiration of any requirement imposed by this Order shall not affect any other obligation arising under this Order. Each party shall bear its own costs and attorney's fees.

XV.

IT IS FURTHER ORDERED that Defendants shall submit any information, notifications, or reports required by this Order to: Associate Director for Marketing Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, or at such future address as the Commission may designate in writing to Defendants.

XVI.

IT IS FURTHER ORDERED, that no portion of the payment as herein provided shall be deemed a payment of any fine, penalty, forfeiture, or punitive assessment and this Order shall not be construed as an admission or finding of guilt.

XVII.

The parties hereby stipulate and agree, without further notice to any of them, to entry of the foregoing order, which shall constitute a final judgment in this action. Defendants hereby waive any claim they may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, amended by PL 104-121, 110 Stat. 847, 863-64 (1996), concerning the prosecution of this action to the date of this Order.

XVIII.

IT IS FURTHER ORDERED that Defendants shall execute, have notarized and return to the Commission at the address listed in Paragraph XV a signed, dated acknowledgment of receipt of a date-stamped copy of this Order within five (5) days of their receipt of the date-stamped copy of this Order.

XIX.

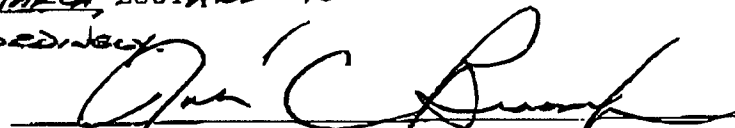
IT IS FURTHER ORDERED that should Defendants fail to comply with any deadline for reporting information to the Commission pursuant to this order, the Commission shall provide written notice of that failure to the Defendants and shall not file any motion for contempt unless Defendants fail to comply within 10 days of mailing such notice to the last address provided to the Commission by Defendants.

XX.

IT IS FURTHER ORDERED, that this Court shall retain jurisdiction of this matter for all purposes.

There being no just cause for delay, this Stipulated Final Judgment and Order for a Permanent Injunction as to Defendants Bigsmat, Mark Tahiliani, and Harry Tahiliani is

APPROVED, SETTLED AND
hereby entered this *21* day of *MARCH*, 2001 *AND THE CLERK IS DIRECTED TO*
ENTER JUDGMENT ACCORDINGLY.



Judge, United States District Court

APPENDIX B

- 1. Asset Watcher - BSB Value 200 Points 100
- 2. Run Point - BSB Value 200 Points 100
- 3. My Tomorrows - BSB Value 200 Points 100
- 4. Right Budget - BSB Value 200 Points 100
- 5. Family Dawn - BSB Value 200 Points 100
- 6. Zoneway - BSB Value 200 Points 100
- 7. Sandy Botkin USA and Canada Tapes - From September 24, 2000 forward, 100 points
- 8. Metabolic Diet 4-Pak - 200 BSB value.
- 9. Violet Mirrored Lens Sunglasses.

APPENDIX A

SETTLEMENT AGREEMENT

This Settlement Agreement is made this 14th day of February, 2001 by and among the FEDERAL TRADE COMMISSION (the "FTC"), BIGSMART.COM L.L.C. ("Bigsmart") and HARRIS TRUST AND SAVINGS BANK ("Harris").

WHEREAS, Bigsmart is engaged in the business of providing goods and/or services over the internet to customers and accepts credit and/or debit cards (the "Cards"), such as Visa and MasterCard (the "Card Associations"), for payment for such goods and/or services (collectively, "Goods/Services").¹

WHEREAS, Harris is engaged in the business of providing for a fee electronic debit and credit card authorization, processing, data capture, deposit, and clearing and settlement services.

WHEREAS, Harris and Bigsmart entered into that certain Merchant Services Agreement (the "Merchant Agreement") as of December 22, 1999, pursuant to which Harris agreed to provide certain merchant banking services as set forth therein to Bigsmart.

WHEREAS, Harris processed the Card charges for certain Goods/Services for the time period December 22, 1999 to late September 2000 (the "Applicable Period") pursuant to the Merchant Agreement in an amount totaling approximately \$23 million.

WHEREAS, a reserve account was established pursuant to paragraph 4 of the Merchant Agreement (the "Reserve Account") into which Bigsmart was obligated to deposit funds to cover refund transactions and chargebacks relating to, *inter alia*, chargebacks for Goods/Services.

WHEREAS, the balance in the Reserve Account is approximately \$2.7 million (the "Reserve Account Balance"), *provided, however*, that the Reserve Account Balance may be subject to possible reductions by Harris as a result of its administration of the Reserve Account

¹ Capitalized terms not defined herein shall have the same meanings as ascribed to such terms in the Consent Decree.

as set forth herein and its recovery of certain reasonable fees and expenses incurred by Harris (the "Harris Expenses"), provided, further, that Harris shall provide written notice of the Harris Expenses to the FTC, Bigsmart, and the Equity Receiver and any objections to payment of the Harris Expenses shall be submitted for review by the District Court within five (5) days after receiving notice of such Harris Expenses; otherwise, payment of the Harris Expenses shall be deemed allowed and shall be made in full on or before ten (10) days after receipt of notice, and provided, further, that solely for purposes of the performance of their obligations to the FTC under the Consent Decree, and without hereby creating any obligation of Harris under this Settlement Agreement, the Consent Decree, or otherwise, Bigsmart and the other Defendants under the Consent Decree shall be deemed to receive credit thereunder for whatever amount is actually held by Harris in the Reserve Account on the date of execution of this Settlement Agreement or \$2.7 million, whichever amount is greater.

WHEREAS, Harris states that it was granted under the Merchant Agreement a valid senior first perfected security interest in all funds in the Reserve Account as collateral for its obligations to fund chargebacks and refunds pursuant to the Merchant Agreement and, as part of the consideration for this Settlement Agreement and compliance and performance hereunder by Harris, the other parties hereto stipulate that they have not asserted any dispute and do not dispute the validity and perfection of such security interest.

WHEREAS, the FTC has filed a Complaint against Bigsmart and others alleging certain conduct relating to Bigsmart's business practices.

WHEREAS, the FTC, Bigsmart and other parties have negotiated a Stipulated Final Judgment and Order for a Permanent Injunction (the "Consent Decree"), pursuant to which a "Redress Fund" will be created to pay refunds of certain amounts, as described in and calculated pursuant to the Consent Decree and this Settlement Agreement.

WHEREAS, the Redress Fund established by the Consent Decree will be administered by an "Equity Receiver" as set forth in the Consent Decree and this Settlement Agreement and is to be partially funded with the funds contained in the Reserve Account (subject to the possible reductions contemplated herein, including payment of the Harris Expenses) when the conditions precedent stated herein have been satisfied or have been determined to be satisfied by the District Court if there is any dispute.

WHEREAS, the parties to this Settlement Agreement, subject to the terms and conditions of this Settlement Agreement and the Consent Decree, want to provide out of the Reserve Account a source of payment for allowed claims of credit card holders which are defined below as the "*Harris Eligible Claims*," including, but not necessarily limited to, such claims of those who are "*Current Eligible Customers*," as such term is defined in the Consent Decree and modified herein as stated in condition C.(i) below, and to protect the interests of Harris from multiple liabilities, as well as to those Customers, Exchanges, and/or Issuing Banks (as these terms are defined below) who may be entitled to receive refunds and/or chargebacks pursuant to paragraph 4 of the Merchant Agreement to the extent that they hold any actual and allowable refund and/or chargeback claims.

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and subject to the stipulations and acknowledgements stated throughout the foregoing recitals (all of which are incorporated herein), the parties hereto agree as follows:

1. **CONDITIONS TO HARRIS'S AGREEMENT TO TRANSFER RESERVE ACCOUNT BALANCE TO REDRESS FUND:**
 - A. (i) Prior to the entry of the Consent Decree by the District Court and the occurrence of the Determination Date (as defined below), the Reserve Account Balance shall remain in the Reserve Account at Harris and subject to the lien and security interest of Harris, and shall be

administered by Harris pursuant to the terms of the Merchant Agreement and subject to the terms of this Settlement Agreement, the Consent Decree, and any Order of the District Court approving this Settlement Agreement.

(ii) On and after the entry of the Consent Decree and any Order of the District Court approving this Settlement Agreement, and pending the occurrence of the Determination Date (defined below), the Reserve Account Balance shall be administered by Harris to the extent legally possible in compliance with the redress formula established by the Consent Decree and this Settlement Agreement and subject to:

(a) the exercise of all credits and offsets permitted by the Consent Decree and this Settlement Agreement; and

(b) the assertion by Harris (solely at the direction of Bigsmart hereby given to Harris and to the extent legally possible) of all defenses stated in writing by Bigsmart regarding a particular claim or category of claims, as permitted by the Consent Decree, including, but not limited to, a defense that: (w) there is a non-refundable portion of fees pursuant to Bigsmart policies; (x) there are commissions received by a Customer of Bigsmart which offset the amount of any refund or chargeback; (y) there is a *pro rata* reduction in the amount of any refund or chargeback attributable to any use or benefit of Goods/Services received from Bigsmart by any of its Customers; and (z) cardholders entering into agreements with Bigsmart during the Applicable Period, and choosing to receive product credits rather than refunds after that date, have waived, have elected not to assert, or are estopped from asserting their disputed refund and/or chargeback claims, or that any enforceable limitation of action under any applicable statute, regulation, agreement, or order has expired (collectively, all of Bigsmart's credits, offsets, and defenses described above and any others that are asserted by Bigsmart as being available

at law or in equity are defined herein as the "Defenses"). Such Defenses shall be asserted and reserved for Bigsmart and the Equity Receiver by all parties hereto, including Harris, after the District Court's approval of the Consent Decree and this Settlement Agreement and pending the occurrence of the Determination Date (defined below). On and after the Determination Date (defined below), the identification, preservation, and assertion of all such Defenses shall become the responsibility of Bigsmart and the Equity Receiver and Harris shall have all benefits of this Settlement Agreement and any necessary or appropriate Orders of the District Court.

B. On and after both the entry of the Consent Decree by the District Court and the occurrence of the Determination Date (defined below), Harris agrees to transfer the Reserve Account Balance to the Redress Fund for administration by the Equity Receiver pursuant to the terms of this Settlement Agreement and the Consent Decree, *provided, however,* that the following conditions precedent set forth in subparagraphs C.(i) through C.(xii) below are fulfilled in their entirety and subject to the complete satisfaction of Harris, which shall not be unreasonably withheld. If Harris asserts that any of the specified conditions precedent has not been fulfilled, Harris shall specify in writing each unsatisfied condition and the other parties hereto (or either of them) shall have fifteen (15) days to request whatever further Order of the District Court may be necessary or appropriate to cure each such unsatisfied condition and thereby provide any necessary or appropriate protection of the interests of Harris, *provided, however,* that the foregoing shall not preclude the other parties hereto (or either of them) from disputing any such assertion by Harris and requesting an Order of the District Court adjudicating that any or all conditions precedent have been satisfied. The "Determination Date" shall mean the date by which all of the following have collectively occurred:

(i) all chargeback and Refund claims of Current Eligible Customers of Bigsmart (as such term is defined in the Consent Decree and modified herein as stated in condition C.(i) below) have been determined by the Equity Receiver to be eligible claims in accordance with the Consent Decree and this Settlement Agreement (such determined eligible claims for Refunds which the Equity Receiver believes allowable and payable from the Redress Fund in accordance with the Consent Decree and this Settlement Agreement to be referred to in this Settlement Agreement as the "*Harris Eligible Claims*") and Harris has received written notice of the amount of the Harris Eligible Claims from the Equity Receiver;

(ii) all Orders of the District Court applicable to this Settlement Agreement, including the Consent Decree, have become final and non-appealable under applicable law; and

(iii) all releases of Harris contemplated herein have become effective pursuant to the terms of this Settlement Agreement.

Nothing herein shall preclude the Equity Receiver from temporarily allowing and then sequestering amounts sufficient to cover disputed claims of Current Eligible Customers, including such claims which are Harris Eligible Claims, *provided, however*, that all Defenses shall be asserted and claimed in the process of ultimately allowing or disallowing such claims. Unless the context otherwise expressly requires, references to the Consent Decree herein shall be deemed to include, without limitation, any other Orders of the District Court applicable to, approving, or implementing this Settlement Agreement. It is the understanding and agreement of the parties that this Settlement Agreement will be presented for approval by Order of the District Court simultaneously with the Consent Decree; and that the procedures and powers then applicable to the Equity Receiver and the Redress Fund will be those (or substantially those) of a

federal equity receiver to the extent of administration of the Redress Fund and all applicable claims notification, allowance, disallowance, bar, discharge, and injunction procedures, provided, however, that the Equity Receiver shall not be appointed, directed, or empowered to operate or manage any continuing or future business of Bigsmart.

C. The following are the conditions precedent to any transfer of the Reserve Account Balance by Harris upon the Determination Date, all of such conditions precedent being hereby expressly incorporated by reference in the Consent Decree:

(i) The term "*Current Eligible Customer*" in the Consent Decree shall be modified, by any Order(s) of the District Court approving and implementing this Settlement Agreement, to include, for the purposes of this Settlement Agreement and the enforcement of the Consent Decree and any other Order(s) of the District Court approving and implementing this Settlement Agreement, and for the protection of the interests of Harris provided herein, all of the following: (a) any customer of Bigsmart or Card holder to whom Harris may be liable under the Merchant Agreement, including, but not limited to, any customer of Bigsmart or Card holder who is or may be entitled to receive any chargeback or other refund pursuant to paragraph 4 of the Merchant Agreement as a result of any credit card purchase made from Bigsmart for any Goods/Services during the Applicable Period or liability under the Processing Agreement as such term is defined herein (herein for the purposes of this Settlement Agreement defined as a "*Refund*") (for the purposes of this Settlement Agreement, such person identified in this subparagraph (a), including any Card holder, shall be referred to as a "*Customer*"); (b) any bank that issued any Card to any Customer that was used for any such purchase and would be entitled to receive the amount of any Refund from Harris pursuant to the Merchant Agreement or to which Harris may be liable under the Merchant

Agreement (an "Issuing Bank"); and (c) any exchanges and Card Associations applicable to any such Customers, namely Visa and MasterCard, or to which Harris may be liable under the Merchant Agreement and, in addition, First Data Merchant Services Corporation ("FDMS") or any successor who provides services similar to FDMS under the Processing Agreement dated as of April 21, 1998 between Harris and FDMS and any amendments or successor agreements thereto (the "Processing Agreement") (hereinafter collectively referred to as the "Exchanges"). Nothing in this provision or elsewhere in this Settlement Agreement shall preclude or limit in any way the right of any of the parties hereto, or the Equity Receiver, to assert any or all Defenses against any Current Eligible Customer, including, but not limited to, and for purposes of this Settlement Agreement, the holder of any Harris Eligible Claim, such that the amount actually allowable as a valid claim of any such individual or entity may be zero (0) dollars.

(ii) Bigsmart, the FTC, and the Equity Receiver shall obtain the District Court's approval of appropriate forms of notice (the "Notice") and proof of claim (the "Proof of Claim"). The Notice and the Proof of Claim and the District Court's Order approving such materials and prescribing notice procedures shall be reasonably acceptable to Harris in form and substance, which acceptance Harris shall not withhold unreasonably, in order to ensure that pursuant to the District Court's Order, the Notice and the Proof of Claim are provided duly and properly to Customers, Exchanges, and Issuing Banks which are or may be entitled thereto, including, but not limited to, any Current Eligible Customers that are or may be entitled to a Refund, *provided, however*, that approval of the Notice, the Proof of Claim, and all applicable notice procedures shall be ultimately the decision of the District Court if the parties to this Settlement Agreement do not agree. The Notice shall:

(a) specifically and expressly state that such Customer's, Exchange's, and/or Issuing Bank's sole and exclusive right to receive any Refund shall be to comply with the procedures set forth in the Consent Decree and this Settlement Agreement to obtain payment from the Redress Fund (subject to paragraph 2 below) and that failure to comply shall: (i) be deemed a waiver of all rights of such Customer, Exchange, and/or Issuing Bank to seek a Refund (including any other kind of claim or chargeback), or to enforce any rights or obligations under the Merchant Agreement, including, but not limited to, paragraph 4 thereof; and (ii) subject such Customer, Exchange, and/or Issuing Bank to the permanent injunction provisions set forth in this Settlement Agreement and the Consent Decree upon the occurrence of the Claims Bar Date as set forth below;

(b) specify that any Customer, Exchange, and/or Issuing Bank that submits a claim for a Refund (including any Harris Eligible Claim) shall be deemed pursuant to the Consent Decree and this Settlement Agreement, by submitting such claim and thereby electing to receive any payment from the Redress Fund on account of such Refund (including any Harris Eligible Claim), to have elected to waive any and all rights, claims, and causes of action against Harris and Bigsmart arising from any and all transactions with Bigsmart which are the subject of this Settlement Agreement, and that such receipt of any payment from the Redress Fund shall constitute a full and complete release by such Customer, Exchange, and/or Issuing Bank of Harris and Bigsmart for any and all claims and causes of action against Harris and Bigsmart arising from any and all transactions with Bigsmart which are the subject of this Settlement Agreement; and

(c) state that all claimants shall be either barred and their claims disallowed (if they fail to make a claim) or bound (if they make a claim) by the foregoing terms.

The Notice and Proof of Claim forms approved by the District Court shall be disseminated by the Equity Receiver, with the assistance of Bigsmart, to every Current Eligible Customer (as that term has been modified by condition C.(i) herein), it being understood that, to the full extent possible and in order to reduce administrative expenses wherever possible, the notice and claims process, and the Equity Receiver's determination(s) of allowable (or temporarily allowable) claims and notification(s) thereof, may be done by computerized electronic transmission(s), such that electronic noticing shall be a preferred and presumptively valid method of noticing under the circumstances presented here and shall be entitled to an equal presumption of valid and proper notice and service with first class United States mail and any approved alternative method of providing notice and service. Notwithstanding the foregoing, nothing herein shall prohibit any other notice procedures, including, without limitation, initial notice by first class United States mail, a request in the Proof of Claim form for a functioning e-mail address, and the future conduct of any or all proceedings and communications electronically if and when such information is provided. The Equity Receiver's compliance with the notice procedures stated herein and in the Consent Decree shall be deemed to constitute proper and effective notice to all Customers, Issuing Banks, and/or Exchanges of their rights and remedies and of the injunctive and bar provisions contained in the Consent Decree and this Settlement Agreement.

(iii) Any Order(s) of the District Court approving and implementing this Settlement Agreement shall specifically provide that after the time period for which any

Customer, Issuing Bank, and/or Exchange may submit a Proof of Claim has expired, the Equity Receiver shall determine the aggregate amount of the Harris Eligible Claims, as well as the amounts thereof which the Equity Receiver believes should be allowed, and the allowed amounts of any other claims of Current Eligible Customers; and the Equity Receiver shall provide written notice of all of the foregoing to all of the parties to this Settlement Agreement within five (5) days after such determination. Any party to this Settlement Agreement shall have seven (7) days after receiving such notice to object to the Equity Receiver's determination in writing, whereupon any such objection, if not resolved by the parties, shall be heard as soon as practicable by the District Court. If there is no objection to the Equity Receiver's determination, or if the parties resolve any such objection or the District Court decides any such objection, the result shall be, and hereby is, stipulated by the parties to be final, binding, and conclusive.

(iv) Any Order(s) of the District Court approving and implementing this Settlement Agreement shall specifically provide that upon the transfer of the Reserve Account Balance to the Redress Fund pursuant to this Settlement Agreement and the Consent Decree on or after the Determination Date: (i) the Reserve Account Balance shall, pursuant to paragraph 2 below, be first used to pay any allowed Harris Expenses and then to pay allowed Harris Eligible Claims; (ii) Harris shall have (on and after the date of execution of this Settlement Agreement) no liability to any Issuing Bank, Exchange, and/or Customer for any Harris Eligible Claim, Refund, or Chargeback, or any deficiency therein, or for enforcement of any rights or obligations under the Merchant Agreement, including, but not limited to, paragraph 4 thereof or the Processing Agreement, and (iii) the rights of any Issuing Bank, Exchange, and/or Customer to receive any Refund (or any other payment of any kind) on account of any Harris Eligible

Claim or any other claim or right to receive a Refund shall be solely governed by the Consent Decree and this Settlement Agreement and any Order(s) of the District Court, and shall be solely payable from the Redress Fund (and subject to paragraph 2 below) pursuant to the refund procedures contained in the Consent Decree and this Settlement Agreement.

(v) The Order(s) of the District Court approving the Notice and the Proof of Claim and establishing the Claims Bar Date shall permanently enjoin and bar any and all claims of any Customer, Exchange, and/or Issuing Bank, including any claim for a Refund (or any other payment of any kind, including pursuant to any Harris Eligible Claim), which are not submitted by the time deadline prescribed by the District Court (i.e., a specific date prescribed by the District Court, which will be approximately forty-five (45) days after the date of the Equity Receiver's transmittal of the Notice and the Proof of Claim, but not affected by the actual date of such transmittal, such submission deadline being referred to herein as the "Claims Bar Date"); and all claims or causes of action by any Customer, Exchange, and/or Issuing Bank, including any claim for a Refund or for enforcement of any rights or obligations under the Merchant Agreement, including, but not limited to, paragraph 4 thereof, which are not timely submitted on or before the Claims Bar Date shall be forever permanently enjoined, barred, extinguished, and disallowed.

(vi) The Order(s) of the District Court approving this Settlement Agreement and establishing the Claims Bar Date shall permanently enjoin and bar all Customers, Exchanges, and/or Issuing Banks from seeking redress against Harris for any Harris Eligible Claim, Refund, Chargeback, or any deficiency therein, or for enforcement of any rights or obligations under the Merchant Agreement, including, but not limited to,

paragraph 4 thereof or the Processing Agreement, and shall further provide that the sole remedy of such Customers, Exchanges, and/or Issuing Banks to obtain payment of any Harris Eligible Claim or Refund shall be those set forth in the Consent Decree and this Settlement Agreement and any Order(s) of the District Court approving and implementing this Settlement Agreement.

(vii) The Order(s) of the District Court approving this Settlement Agreement and establishing the Claims Bar Date shall specifically provide that Customers, Issuing Banks, and/or Exchanges are expressly enjoined and precluded from initiating chargeback procedures or taking any action directly or indirectly causing Card chargebacks to be processed against the Card accounts with respect to charges for the purchase of any Goods/Services from Bigsmart, which purchases were made before entry of the Consent Decree and related to the Merchant Agreement or the Processing Agreement (the "Chargebacks").

(viii) The Order(s) of the District Court approving this Settlement Agreement and establishing the Claims Bar Date shall specifically provide that all Issuing Banks, Exchanges, and Harris shall not accept any Chargebacks, shall not credit the Card accounts of Customers who submit Refund requests pursuant to the Consent Decree, and shall not cause Chargebacks to be processed through the credit card system.

(ix) The Order(s) of the District Court approving this Settlement Agreement and establishing the Claims Bar Date shall specifically provide that, from and after the Claims Bar Date, all Customers, Issuing Banks, and/or Exchanges shall be permanently enjoined from making any Chargebacks or seeking a Refund or seeking to enforce any obligation of Harris pursuant to the Merchant Agreement, including, but not limited to, paragraph 4 thereof or the Processing Agreement.

(x) The Order(s) of the District Court approving this Settlement Agreement and establishing the Claims Bar Date shall specifically provide that any Harris Eligible Claim payable to any Customer, Issuing Bank, and/or Exchange shall be further reduced by, and may be extinguished and disallowed by, all Defenses as herein defined.

(xi) The Consent Decree and all Order(s) of the District Court approving and implementing this Settlement Agreement shall be expressly entered as final orders by the District Court.

(xii) To the extent applicable, all conditions set forth in this paragraph C. may be included and satisfied in the Consent Decree, or may be included and satisfied in any other Order(s) to be entered by the District Court not later than the date of entry of the Consent Decree by the District Court, or may be included and satisfied by incorporation by reference of provisions of the Consent Decree and any such other Order(s) in each other, all in accordance with the understanding and agreement of the parties as described herein. The form and substance of the Consent Decree, the Order(s) of the District Court approving this Settlement Agreement, and any other Order(s) of the District Court identified in the foregoing conditions must be reasonably acceptable to Harris, which acceptance shall not be unreasonably withheld and which condition shall be satisfied when counsel for Harris receives a copy of such Consent Decree or other Order(s) and Harris either approves it as to form and content or, in all events, Harris does not object in writing to its entry after such receipt and after having had an opportunity to review a copy of such Consent Decree or other Order(s). Notwithstanding references in the foregoing conditions to particular Orders as well as the Consent Decree, the parties recognize that this Settlement Agreement is an Appendix to the Consent Decree, and incorporated by

reference therein, and that, therefore, entry of the Consent Decree also will give effect to this Settlement Agreement as an Order of the District Court.

2. *Priority of Certain Payments from Redress Fund:* Upon the transfer of the Reserve Account Balance to the Redress Fund pursuant to the procedures set forth in this Settlement Agreement, Bigsmart and the FTC shall instruct the Equity Receiver who, in turn, shall be bound to: (i) deposit the Reserve Account Balance into a separate account to be established at Harris that will hold only such funds; and (ii) disburse funds from that account that are solely attributable to the payment of *first*, any allowed Harris Expenses and *second*, any allowed Harris Eligible Claim. Subject to any reimbursement claim of Harris provided for herein, within thirty (30) days after the Determination Date and after all allowed Harris Expenses and allowed Harris Eligible Claims have been paid, and not later than June 1, 2001, any balance remaining in that account shall be available, without restriction, to the Equity Receiver to administer and use as part of the Redress Fund pursuant to the terms of the Consent Decree; and at the option of the Equity Receiver, such funds may be transferred into the account in which the remaining Redress Fund is deposited for further administration, *provided, however*, that if there remains any unresolved dispute of any Harris Expenses or any Harris Eligible Claim, or any unresolved indemnity claim under Section 3 hereof, the Equity Receiver shall sequester separately from the rest of the Redress Fund whatever amount is necessary to pay the disputed amount in full until the dispute is finally resolved. To the extent a deficiency exists between the amount of any Harris Eligible Claims and the Reserve Account Balance available to pay Harris Eligible Claims, the Equity Receiver shall make a *pro-rata* distribution to such Customer, Issuing Bank, and/or Exchange in accordance with the procedures contained in the Consent Decree and this Settlement Agreement. Harris shall have no liability to any Customer, Issuing Bank, Exchange, and/or Bigsmart for any such deficiency.

3. *Indemnity and Bigsmart to be Conditionally Liable for Any Deficiencies:* Subject to the terms of this Settlement Agreement and the Consent Decree, Bigsmart shall indemnify Harris and hold Harris harmless from any and all claims, losses, expenses, costs, and liabilities (including, but not limited to, reasonable attorneys' fees and expenses) that may be brought against or incurred by Harris and which arise out of, are related to, or are in any way connected with any assertion of any Defendants (as that term is defined in the Consent Decree) against Harris or by any Issuing Bank, Exchange, Card holder, and/or Customer to receive any payment of any claim for a Refund, Chargeback, or Harris Eligible Claim, including any deficiency in any such claim, or for enforcement of any rights or obligations under the Merchant Agreement, including, but not limited to, paragraph 4 thereof, or the Processing Agreement. Bigsmart further agrees that Harris, to the extent necessary to cover any remaining liability or obligation of Harris to any claimant that is not permanently enjoined, satisfied, or barred, shall have an unsecured claim against Bigsmart in an amount equal to any deficiency in the Reserve Account, or in any deficiency in the amount of any Refund or Harris Eligible Claim that is not paid in full to any Customer, Issuing Bank, Card holder, and/or Exchange, *provided, however,* that Harris shall not have any such claim *unless and until* a claimant asserts, notwithstanding the District Court's Orders, that Harris has unsatisfied liability for any claim. Further, any rights that Bigsmart and/or the other Defendants (as defined in the Consent Decree) shall or may have to receive any undistributed portion of the Reserve Account Balance from the Redress Fund shall be subject to the continuing first, prior and secured claim of Harris to secure payment of any indemnity claim that Bigsmart is obliged to pay under Section 3 hereof before any such portion of the Reserve Account Balance is turned over to Bigsmart or any other Defendant.

4. *Reservation of Rights; Release of Bigsmart and Related Persons:* Harris reserves all of whatever rights, claims, and causes of action it has or may have against Bigsmart, and its

officers, directors, employees, successors, and assigns, and any other applicable parties, including all Customers, Issuing Banks, Exchanges, and all other Defendants (as that term is defined in the Consent Decree), and any person who received any benefit from any proceeds from a Card transaction with Bigsmart, including, but not limited to, all rights, claims, and causes of action which arise out of, are related to, or are in any way connected with the Merchant Agreement or any assertion of any Issuing Bank, Exchange and/or Customer to receive any Chargeback, Harris Eligible Claim, or other Refund, or any deficiency therein. The security interest and lien of Harris on the Reserve Account, which is undisputed as stipulated herein, shall be preserved and shall be deemed to be valid and fully perfected against and shall continue to attach to the funds attributable to the Reserve Account Balance as they are maintained by the Equity Receiver pursuant to paragraph 2 above, *provided, however*, that such lien and security interest shall be deemed to be terminated and extinguished upon the satisfaction of all Harris Eligible Claims as set forth in paragraph 2 above. Subject to the above reservation of rights, and effective on the Determination Date and subject to the Consent Decree and the Order(s) approving the Settlement Agreement being effective so that: (i) there exists no claim asserted or which could be asserted against Harris for any Harris Eligible Claim, Refund, Chargeback, or other related liability; and (ii) all liabilities, damages, losses, expenses, attorneys' fees, and other professional fees and expenses have been satisfied and paid in full at no cost to Harris, Harris shall forever release and discharge Bigsmart, its officers, directors, employees, representatives, servants, advisors, parents, subsidiaries, agents, shareholders, attorneys, successors and assigns (the "Bigsmart Parties") from any and all allegations, actions, causes of action, suits, claims, debts, demands, dues, accounts, bonds, covenants, contents, promises, damages, contracts, agreements, judgments, and liabilities which it ever had or may have had, now has, or hereafter can, shall, or may have against Bigsmart and all other Defendants, whether in law or in equity.

and whether known or unknown, upon or by reason of any act, omission, or other matter, cause, or thing whatsoever related to the Merchant Agreement. Bigsmart and all other Defendants (as that term is defined in the Consent Decree) acknowledge and confirm that this release does not release any rights, claims, or obligations existing or arising under the Settlement Agreement, the Consent Decree, or any Order of the District Court approving the Settlement Agreement, including, but not limited to, any deficiency liability or indemnification obligations of Bigsmart that may arise, if at all, as provided in this Settlement Agreement and, in particular, under Section 3 hereof.

5. *Release of Harris:* Bigsmart and the FTC have entered into this Settlement Agreement in order to resolve any and all claims that any of them may have regarding Bigsmart's operations and to address the assertions of Harris regarding the Consent Decree against the Defendants. Therefore, effective on the Determination Date, Bigsmart and all other Defendants (as that term is defined in the Consent Decree) do hereby forever release and discharge Harris, its officers, directors, employees, representatives, servants, advisors, parents, subsidiaries, agents, shareholders, attorneys, successors, and assigns from any and all allegations, actions, causes of action, suits, claims, debts, demands, dues, accounts, bonds, covenants, contents, promises, damages, contracts, agreements, judgments and liabilities which each of them ever had or may have had, now have, or hereafter can, shall, or may have against Harris, whether in law or in equity, and whether known or unknown, upon or by reason of any act, omission, or other matter, cause, or thing whatsoever related to the Merchant Agreement. Harris acknowledges and confirms that this release does not release any rights, claims, or obligations existing or arising under this Settlement Agreement, the Consent Decree, or any Order(s) of the District Court approving this Settlement Agreement. Such an Order approving this Settlement Agreement shall be submitted to the District Court as heretofore provided, and such Order shall

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expressly provide that Harris has no liability to any Defendant, Customer, Issuing Bank, and/or Exchange under any applicable law or regulation, including, but not limited to, any FTC rule or regulation, any credit card rule, or the Truth in Lending Act and Fair Debt Collection Practices Act, arising from any transaction with Bigsmart which is the subject of this Settlement Agreement.

6. *FTC Consent:* The FTC acknowledges and agrees that: (A) nothing contained in the Consent Decree, this Settlement Agreement, or any Order(s) of the District Court approving this Settlement Agreement relates to, contemplates, or in any way suggests that there is any basis for any known or unknown claim against Harris for violation of any applicable law or regulation, including, but not limited to, any FTC rule or regulation, any credit card rule, or the Truth in Lending Act and Fair Debt Collection Practices Act arising from any transaction with Bigsmart which is the subject of this Settlement Agreement; and (B) all claims and allegations contained in the Complaint relate solely to alleged conduct of the Defendants (as defined in the Consent Decree) and not in any way to Harris and its parents, subsidiaries, directors, officers, employees, agents, and attorneys. The FTC further acknowledges that it is entering into this Settlement Agreement for the purpose of, *inter alia*, providing a mechanism for certain funds to be obtained and distributed pursuant to the Consent Decree, which funds are subject to the security interest and lien asserted by Harris and undisputed as provided herein. The FTC approves of and fully consents to the structure of this Settlement Agreement and finds that the procedures contemplated herein benefit and facilitate those certain procedures contained in the Consent Decree and the cooperation of Harris in connection therewith.

7. *Limitation of Liability of Harris:* Notwithstanding anything contained herein to the contrary, Harris shall not have any liability for the representations, warranties, covenants, agreements, or other obligations hereunder or in any of the certificates, notices, or agreements

delivered by or between Bigsmart and any Customer, Issuing Bank, Exchange, and/or any Defendant (as that term is defined in the Consent Decree), as to all of which recourse shall be had solely to the remedies set forth in the Consent Decree and this Settlement Agreement with respect to the Redress Fund. Nothing stated herein shall relieve Harris or any other party to this Settlement Agreement from the continuing obligation to comply fully with the terms of this Settlement Agreement.

8. *Amendments/Modification:* The parties hereto agree that this Settlement Agreement may not be modified except by an instrument in writing, signed by the duly authorized representatives of each of the parties hereto, and no waiver of compliance of any provision or condition hereof and no consent provided for herein shall be effective unless evidenced by an instrument in writing duly executed by the party hereto which is to be charged with such waiver or consent.

9. *Further Assurances:* Upon entry of the Consent Decree by the District Court, the parties hereto are hereby authorized to take such actions as may be reasonably necessary to effect the provisions of this Settlement Agreement and implement the transactions contemplated thereby.

10. *Governing Law:* This Settlement Agreement shall be governed, interpreted, construed, and enforced in accordance with the laws of the United States and the State of Illinois.

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QUARLES & BRADY STREET

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FEB. 13. 2001 4:29PM

CHAIRMAN AND GUILER

NO. 3077

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11. *Counterparts*: This Settlement Agreement may be executed in counterparts, including facsimile counterparts.

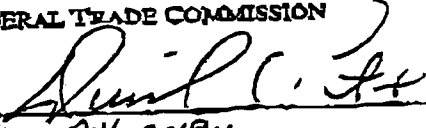
HARRIS TRUST AND SAVINGS BANK

By _____
Its _____

BIGSMART.COM LLC

By  _____
Its MARK TANCIANI

FEDERAL TRADE COMMISSION

By  _____
Its ATTORNEY