

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	CG Docket No. 02-278
Petition of North American)	
Bancard, LLC for Retroactive Waiver)	CG Docket No. 05-338
Of 47 C.F.R. §64.1200(a)(4)(iv))	

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Federal Communication Commission’s (the “Commission”) Rules, 47 C.F.R. § 1.3, and Paragraph 30 of the Commission’s Order, CG Docket Nos. 02-278, 05-338, FCC 14-164, 29 FCC Rcd. 13998 (rel. Oct. 30, 2014), Petitioner North American Bancard, LLC (“Petitioner” or “NAB”), through its attorneys, respectfully requests that the Commission grant it a retroactive waiver of the opt-out notice requirement in Section 64.1200(a)(4)(iv) of its rules with respect to any solicited facsimiles that have been transmitted by or on behalf of NAB prior to April 30, 2015.

I. INTRODUCTION & BACKGROUND

NAB is merchant services company headquartered in Troy, Michigan. NAB provides payment transaction services (i.e. credit card processing) to merchants of many sizes. As part of its offerings, NAB communicates important information about its goods and services via facsimile to individuals and entities which have consented to receive such communications and/or maintain an established business relationship with NAB.

As the Commission is aware, opportunistic plaintiff attorneys are frequently filing putative class action lawsuits seeking windfall recoveries for alleged violations of the Telephone Consumer Protection Act’s (the “TCPA”) prohibition on sending unsolicited facsimile advertisements. These putative class action lawsuits oftentimes expose businesses to millions, if not billions, of dollars in

potential liability for purported violations of the TCPA that, at best, have a minimal effect on the recipient of the facsimile advertisements. The named plaintiffs in such cases often participate in name only, deferring entirely to their respective counsel in the hopes of gaining some monetary award to compensate them for the nuisance of receiving a facsimile. The plaintiff attorneys, however, reap a windfall sum in attorney fees and costs, in part, for the oftentimes inadvertent failure of businesses to provide opt-out notices on facsimiles that their customers have consented to receive.

NAB is currently defending one such TCPA lawsuit.¹ The Litigation NAB is currently defending alleges Plaintiffs received two unsolicited facsimiles from NAB in 2016 that contained inadequate opt out notices. On the basis of Plaintiffs' alleged receipt of the two unsolicited facsimiles from NAB, Plaintiffs seek to represent a nationwide putative class of individuals and entities defined as "all persons with fax numbers...who, on or after a date four years prior to the filing of this action [(i.e. June 3, 2012)],...were sent faxes by or on behalf of defendant North American Bancard, LLC promoting its goods or services for sale...which did not contain an opt out notice as described in 47 U.S.C. §227." Exh. A at ¶30. The Litigation further alleges "[t]he TCPA provides for affirmative defenses of consent or an established business relationship...conditioned on the provision of an opt out notice that complies with the TCPA[.]" *id.* at ¶20, and "[t]he faxes do not contain an 'opt out' notice that complies with 47 U.S.C. §227[.]" *Id.* at ¶18. Of significance, the nationwide putative class of individuals and entities Plaintiffs seek to represent in the TCPA lawsuit includes individuals and entities which were sent facsimile advertisements by or on behalf of NAB pursuant to such individuals and/or entities' prior express permission.

¹ See *West Loop Chiropractic & Sports Injury Center, Ltd., et al. v. North American Bancard, LLC, et al.*, Case No. 1:16-cv-05856, pending in the United States District Court for the Northern District of Illinois, Judge Ronald A. Guzman presiding (the "Litigation"). A true and correct copy is attached hereto as Exhibit A.

This petition does not seek to have the Commission determine the merit, propriety or truthfulness of Plaintiffs' claims and allegations or NAB's defenses, such as whether Plaintiffs or any other of the putative class members invited or consented to receive the purported facsimiles at issue or whether the purported facsimiles at issue are "advertisements" as contemplated by the TCPA. Such determinations are properly left to the consideration of the district court. Rather, NAB seeks only a limited retroactive waiver from 47 C.F.R. § 64.1200(a)(4)(iv) with respect to any solicited facsimiles that have been transmitted by or on behalf of NAB prior to April 30, 2015, consistent with the over 100 retroactive waivers that the Commission has provided to other similarly situated entities.

A. The Telephone Consumer Protection Act and the Commission's Regulations

The Telephone Consumer Protection Act ("TCPA") prohibits the use of any telephone, facsimile machine, computer, or other device to send an "unsolicited advertisement" to a facsimile machine. 47 U.S.C. §227(b)(1)(C). The TCPA was amended in 2005 by the Junk Fax Prevention Act ("JFPA"). *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). Relevant to the issues raised herein, the JFPA codified an exception to the prohibition for companies that send facsimile advertisements to those individuals and entities with whom the companies have an established business relationship. *See* 47 U.S.C. § 227(b)(1)(C)(i).

In response to the changes brought about by the JFPA, the Commission amended its rules concerning fax transmissions. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 & 05-338, FCC 06-42, 21 FCC Rcd. 3787 (rel. April 6, 2006) (the "Junk Fax Order"). The Junk Fax Order adopted a rule stating that a facsimile advertisement "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section." 47 C.F.R. § 64.1200(a)(4)(iv); Junk

Fax Order at App'x A. However, the Junk Fax Order also contained a footnote that further stated “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.” Junk Fax Order at 3810, n. 154. (Emphasis added).

B. The Commission's October 30, 2014, Order

On October 30, 2014, the Commission issued Order FCC 14-164 regarding the requirement that opt-out notices be provided on facsimile advertisements, and confirming the rules adopted by the Junk Fax Order, regardless of whether the recipient had consented to receiving the facsimile. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 & 05-338, FCC 14-164, 29 FCC Rcd. 13998 (rel. Oct. 30, 2014) (the “Oct. 30 Order”). In addition to its findings, and of paramount importance to this petition, the Commission granted retroactive waivers of the opt-out requirement to the petitioners to provide “temporary relief from any past obligation to provide the opt-out notice to such recipients required by [the Commission's] rules.” Oct. 30 Order at ¶ 1.

Specifically, the Commission's determination to grant the retroactive waivers is based in large part on the confusion surrounding two facets of the Junk Fax Order. First, the Commission noted the language in a footnote in the Junk Fax Order which stated that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.” Oct. 30 Order at ¶ 24; Junk Fax Order at 3810, n. 154. Second, the Commission noted the “lack of explicit” notice regarding the new opt-out requirement on facsimile advertisements transmitted with the prior consent of the recipient. Oct. 30 Order at ¶ 25. Because confusion resulted from these two factors, the Commission also found good cause to grant the retroactive waivers of the rule enunciated in the Junk Fax Order, stating:

The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission.

* * *

Further, some commenters question whether the Commission provided adequate notice of its intent to adopt section 64.1200(a)(4)(iv). Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.

* * *

We find that this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.

Oct. 30 Order at ¶¶ 24-26.

Given the lack of explicit notice and the contradictory footnote, the Commission found there was a “confusing situation for businesses” which “left some business potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement.” Oct. 30 Order at ¶ 27. NAB is one such business. Accordingly, the Commission recognized that the “TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests[,]” and determined that granting the requested retroactive waivers would serve the public interest. *Id.*

After granting the retroactive waiver to the petitioning parties, the Commission stated that “[o]ther, similarly situated parties may also seek waivers such as those granted in this Order.” Oct. 30 Order, ¶ 30. The Commission directed that parties making similar waiver requests make every effort to file by April 30, 2015 (i.e. within six months of the release of the Oct. 30 Order). *Id.* However, April 30, 2015, was not a firm deadline, and waivers have been granted on petitions filed after this date. *See, e.g., In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, DA 15-1402, 30 FCC Rcd. 14057 at ¶ 18 (rel. Dec. 9, 2015) (the “Dec. 9 Order”).

Significantly, the Dec. 9 Order rejected the argument that petitions filed after April 30, 2015, should be denied solely on the basis of being untimely stating:

[W]e decline to reject petitions solely on the basis that they were filed after April 30, 2015. We observe that all of the petitions resolved by this Order were filed after the six-month date (April 30, 2015) referenced in the *2014 Anda Commission Order*. We examined these petitions, as we did each petition filed, independently. These petitions sought waiver for faxes sent prior to the April 30, 2015 deadline imposed by the *2014 Anda Commission Order* for compliance by the waiver recipients there. As such, granting waivers to the five parties here does not contradict the purpose or intent of the initial waiver order because the parties are similarly situated to the initial waiver recipients.

Dec. 9 Order at ¶ 18 (emphasis added).²

Since the Oct. 30 Order, the Commission has granted over 100 retroactive waivers of the opt-out notice requirements to similarly situated individuals and entities, the most recent of which occurred on December 9, 2015. *See* Oct. 30 Order; *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, DA 15-976, 30 FCC Rcd. 8598 (rel: Aug. 28, 2015) (the “Aug. 28 Order”); Dec. 9 Order. NAB is similarly situated to other individuals and entities which the Commission has already granted retroactive waiver requests.

II. NAB IS SIMILARLY SITUATED AND RESPECTFULLY REQUESTS A RETROACTIVE WAIVER OF THE OCT. 30 ORDER

A. The Allegations in the TCPA Lawsuit Against NAB

As stated, NAB is a defendant in a putative class action lawsuit alleging violations of the TCPA, which is currently pending in the United States District Court for the Northern District of Illinois, *West Loop Chiropractic & Sports Injury Center, Ltd., et al. v. North American Bancard, LLC, et al.*, Case No. 1:16-cv-05856. *See* Exh. A. The Plaintiffs in the Litigation seek to recover

² The Commission continues to provide the appropriate relief and is currently reviewing, analyzing, and considering Petitions for Retroactive Waiver filed after April 30, 2015, as evidenced by the Commission’s recent Public Notices seeking comments to respective Petitions for Retroactive Waiver filed in December 2015, February 2016, March 2016, April 2016, and May 2016. *See Consumer and Governmental Affairs Bureau Seeks Comment On Petitions Concerning the Commission’s Rule On Opt-Out Notices On Fax Advertisements*, CG Docket Nos. 02-278, 05-538, DA 16-598 (May 31, 2016); *Consumer and Governmental Affairs Bureau Seeks Comment On Petitions Concerning the Commission’s Rule on Opt-Out Notice on Fax Advertisements*, CG Docket Nos. 02-278, 05-538, DA 16-470 (April 29, 2016); *Consumer and Governmental Affairs Bureau Seeks Comment On Petitions Concerning the Commission’s Rule on Opt-Out Notice on Fax Advertisements*, CG Docket Nos. 02-278, 05-538, DA 16-317 (March 25, 2016); *Consumer and Governmental Affairs Bureau Seeks Comment On Petitions Concerning the Commission’s Rule on Opt-Out Notice on Fax Advertisements*, CG Docket Nos. 02-278, 05-538, DA 16-102 (Jan. 29, 2016).

damages on behalf of themselves and others similarly situated based on allegations that NAB allegedly sent two facsimile transmissions in violation of the TCPA. Specifically, Plaintiffs have alleged that the facsimiles do not contain opt-out notices that comply with the TCPA. *See* Exh. A at ¶ 18. Plaintiffs seek to recover on behalf of all persons who received faxes that did not contain the opt-out notice, regardless of whether the recipients had provided prior express permission to receive such facsimile transmissions. *See* Exh. A at ¶ 30. However, NAB has asserted in the Litigation that it is not liable under the TCPA because, among other reasons, the potential members of the putative class consented to receiving the alleged facsimiles.

B. Good Cause Exists to Grant NAB a Waiver in these Circumstances

Under section 1.3 of the Commission’s rules, the Commission may suspend, revoke, amend, or waive any of its rules at any time “for good cause shown.” 47 C.F.R. § 1.3; *see also* Oct. 30 Order at ¶ 23; Aug. 28 Order at ¶ 14; Dec. 9 Order at ¶ 13; *Northeast Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990). In addition to “good cause shown,” waiver also requires the Commission find that a waiver is in the public interest. *See id.*; *see also Northeast Cellular Tel. Co.*, 897 F. 2d at 1166 (“The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”). The Commission has already determined that both of these requirements are satisfied in the context of the rule applying the opt-out notice requirement to solicited facsimiles. *See* Oct. 30 Order at ¶¶ 26-27; Aug. 28 Order at ¶¶ 13, 24; Dec. 9 Order at ¶ 22.

C. NAB is Similarly Situated to Parties Granted Waiver By the Oct. 30 Order

NAB is similarly situated to the parties that were granted retroactive waivers by the Oct. 30 Order. In the Litigation, NAB is alleged to have sent facsimile transmissions prior to April 30, 2015, that did not contain proper opt-out notices. NAB contends that such facsimiles were sent with the prior consent of the recipients. NAB did not understand and was reasonably uncertain whether the

opt-out requirement applied to solicited facsimiles. Specifically, NAB was confused as a result of the lack of explicit notice that the “Commission contemplated an opt-out requirements on fax ads sent with the prior express permission of the recipient[.]” Oct. 30 Order at ¶ 25, compounded by the Junk Fax Order’s footnote stating “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements,” Oct. 30 Order at ¶ 24; Junk Fax Order at 3810, n. 154. In short, as with the parties that were granted waivers by the Oct. 30 Order, NAB finds itself potentially subject to significant liability, as well as the costs of litigation, based on the application of a provision of the Junk Fax Order, regarding which the Commission has recognized there was confusion. Accordingly, as the Commission has recognized in similar cases, there is a presumption that good cause exists to grant retroactive waivers to NAB. *See* Aug. 28, 2015 Order at ¶ 19 (“[W]e reject arguments that the Commission made actual, specific claims of confusion a requirement to obtain a waiver. As described above, the Commission found that petitioners who referenced the confusing, contradictory language at issue are entitled to a presumption of confusion. The Commission did not require petitioners to plead specific, detailed grounds for individual confusion and we cannot impose those here.”).

D. A Limited Retroactive Waiver is Appropriate

The Commission may grant a waiver where, as here, the underlying purpose of the rule would not be served or would be frustrated by application in the instant case, and granting the waiver would be in the public interest. 47 C.F.R. §1.925(b)(3)(i). The Commission may also grant a waiver where, under the factual circumstances, application of the rule would be inequitable, unduly burdensome or contrary to the public interest. 47 C.F.R. § 1.925(b)(3)(ii); *see also* 47 C.F.R. § 1.3 (the Commission may waive any provision of its rules for good cause shown, at any time); *Keller Communications, Inc. v. F.C.C.*, 130 F.3d 1073, 1076 (D.C. Cir. 1997) (“The Commission may waive its rules if particular facts would make strict compliance inconsistent with the public

interest.”) (internal quotations omitted).

Here, the underlying purpose of the Rule would not be served by applying the subject opt-out requirement to Petitioner. A purpose of Section 64.1200 is to allow consumers to stop unwanted faxes. *See* 47 CFR 64.1200(a)(4). This purpose would not be furthered by subjecting Petitioner to potentially significant liability for facsimile transmissions that did not contain proper opt-out notices where the recipients had provided NAB with prior express permission to receive such faxes and NAB was understandably confused regarding whether the opt-out requirement applied to such faxes.

Additionally, granting a limited and retroactive waiver to Petitioner would serve the public interest. The factors that weighed in favor of granting a retroactive waiver to the parties addressed by the Oct. 30 Order are similarly applicable here. Specifically, the confusing nature of the contradictory footnote and lack of explicit notice have yielded a situation in which Petitioner may be exposed to significant liability, even though Petitioner believed it was complying with the TCPA. *See* Oct. 30 Order at ¶ 27.

For the same reasons, under these unique factual circumstances, requiring application of 47 C.F.R. §64.1200(a)(4)(iv) to Petitioner would be inequitable.

Petitioner therefore respectfully requests a retroactive waiver of liability under the TCPA and the FCC’s regulations and orders relating to facsimiles transmissions sent prior to April 30, 2015, to recipients who had provided prior express invitation or permission to receive such faxes, but where such faxes did not contain opt-out notices in compliance with Section 64.1200(a)(4)(iii) and (iv).

Date: August 16, 2016

Respectfully submitted,

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4. Plaintiff West Loop Health & Sports Performance Center, LLC is an Illinois limited liability company with offices in the Northern District of Illinois.

5. Plaintiff West Loop Health & Sports Performance Center, LLC maintains telephone facsimile equipment. Plaintiff West Loop Chiropractic & Sports Injury Center, Ltd. pays for the telephone facsimile line that received the unsolicited fax advertisements at issue.

6. Defendant North American Bancard, LLC is a Delaware limited liability company that has offices at 250 Stephenson Highway, Troy, Michigan 48083.

7. Defendants John Does 1-10 are other natural or artificial persons that were involved in the sending of the facsimile advertisements described below. Plaintiffs do not know who they are.

JURISDICTION AND VENUE

8. This Court has jurisdiction under 28 U.S.C. §§1331 and 1367. *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751-53 (2012); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005).

9. Personal jurisdiction exists under 735 ILCS 5/2-209, in that defendants:
- a. Have committed tortious acts in Illinois by causing the transmission of unlawful communications into the state.
 - b. Have transacted business in Illinois.

10. Venue in this District is proper for the same reason.

FACTS

11. On April 18, 2016, plaintiffs received the fax advertisement attached as Exhibit A on their facsimile machine.

12. On April 26, 2016, plaintiffs received the fax advertisement attached as Exhibit B on their facsimile machine.

13. Discovery may reveal the transmission of additional faxes as well.

14. Defendant North American Bancard, LLC is responsible for sending or causing

the sending of the faxes.

15. Defendant North American Bancard, LLC as the entity whose products or services

were advertised in the faxes, derived economic benefit from the sending of the faxes.

16. Defendant North American Bancard, LLC either negligently or wilfully violated the rights of plaintiffs and other recipients in sending the faxes.

17. Plaintiffs had no prior relationship with defendants and had not authorized the sending of fax advertisements to plaintiff.

18. The faxes do not contain an “opt out” notice that complies with 47 U.S.C. §227.

19. The TCPA makes unlawful the “use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine ...” 47 U.S.C. §227(b)(1)(C).

20. The TCPA provides for affirmative defenses of consent or an established business relationship. Both defenses are conditioned on the provision of an opt out notice that complies with the TCPA. *Holtzman v. Turza*, 728 F.3d 682 (7th Cir. 2013); *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013).

21. On information and belief, the faxes attached hereto were sent as part of a mass broadcasting of faxes.

22. On information and belief, defendants have transmitted similar fax advertisements to at least 40 other persons in Illinois.

23. There is no reasonable means for plaintiffs or other recipients of defendants’ advertising faxes to avoid receiving illegal faxes. Fax machines must be left on and ready to receive the urgent communications authorized by their owners.

COUNT I – TCPA

24. Plaintiffs incorporate ¶¶ 1-23.

25. The TCPA, 47 U.S.C. §227(b)(3), provides:

Private right of action.

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the Court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the subparagraph (B) of this paragraph.

26. Plaintiffs and each class member suffered damages as a result of receipt of the faxes, in the form of paper and ink or toner consumed as a result. Furthermore, plaintiffs' statutory right of privacy was invaded.

27. Plaintiffs and each class member is entitled to statutory damages.

28. Defendants violated the TCPA even if their actions were only negligent.

29. Defendants should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

30. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiffs bring this claim on behalf of a class, consisting of (a) all persons with fax numbers (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. §1658), (c) were sent faxes by or on behalf of defendant North American Bancard, LLC promoting its goods or services for sale (d) which did not contain an opt out notice as described in 47 U.S.C. §227.

31. The class is so numerous that joinder of all members is impractical. Plaintiffs allege on information and belief that there are more than 40 members of the class.

32. There are questions of law and fact common to the class that predominate over

any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendants engaged in a pattern of sending unsolicited fax advertisements;
- b. The manner in which defendant compiled or obtained their list of fax numbers; and
- c. Whether defendants thereby violated the TCPA.

33. Plaintiffs will fairly and adequately protect the interests of the class. Plaintiffs have retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiffs nor plaintiffs' counsel have any interests which might cause them not to vigorously pursue this action.

34. Plaintiffs' claims are typical of the claims of the class members. All are based on the same factual and legal theories.

35. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendants is small because it is not economically feasible to bring individual actions.

36. Several courts have certified class actions under the TCPA. *Holtzman v. Turza*, 08 C 2014, 2009 WL 3334909, 2009 U.S. Dist. LEXIS 95620 (N.D.Ill., Oct. 14, 2009), *aff'd* in relevant part, 728 F.3d 682 (7th Cir. 2013); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, 2008 U.S. Dist. LEXIS 41766 (N.D.Ill., May 27, 2008); *CE Design Ltd. v Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D.Ill. 2009); *Targin Sign Sys. v Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D.Ill. 2010); *Garrett v. Ragle Dental Lab, Inc.*, 10 C 1315, 2010 U.S. Dist. LEXIS 108339, 2010 WL 4074379 (N.D.Ill., Oct. 12, 2010); *Hinman v. M & M Rental Ctr.*, 545 F.Supp. 2d 802 (N.D.Ill. 2008); *Clearbrook v. Rooflifters, LLC*, 08 C 3276, 2010 U.S. Dist. LEXIS 72902 (N.D. Ill. July 20, 2010) (Cox, M.J.); *G.M. Sign,*

Inc. v. Group C Communs., Inc., 08 C 4521, 2010 WL 744262, 2010 U.S. Dist. LEXIS 17843 (N.D. Ill. Feb. 25, 2010); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D.Wash. 2007); *Display South, Inc. v. Express Computer Supply, Inc.*, 961 So.2d 451, 455 (La. App. 1st Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1st Cir. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok. App. 2006); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. (App.) 94, 50 P.3d 844 (2002); *Core Funding Group, LLC v. Young*, 792 N.E.2d 547 (Ind.App. 2003); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285; 263 P.3d 767 (2011); *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577 (Mo. App. 2010).

37. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiffs request that the Court enter judgment in favor of plaintiffs and the class and against defendants for:

- a. Actual damages;
- b. Statutory damages;
- c. An injunction against the further transmission of unsolicited fax advertising;
- d. Costs of suit;
- e. Such other or further relief as the Court deems just and proper.

s/ Daniel A. Edelman
Daniel A. Edelman

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NOTICE OF LIEN AND ASSIGNMENT

Please be advised that we claim a lien upon any recovery herein for 1/3 or such amount as a court awards. All rights relating to attorney's fees have been assigned to counsel.

s/ Daniel A. Edelman
Daniel A. Edelman

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EXHIBIT A

FAX

North American BANCARD
Merchant Services

Tel: 888-446-6532 Fax: 888-428-4037 & 888-446-6532

TO: Jessica/Sports Inj Ctr W Loop Chiropractic	FROM: Evelyn Thompson, Account Manager
Fax: 3123469358	DATE: 4/18/16
RE: Your Merchant Account	PAGES: 5
<input checked="" type="checkbox"/> URGENT <input checked="" type="checkbox"/> FOR REVIEW <input checked="" type="checkbox"/> PLEASE REPLY	

We called your office earlier and wanted to follow up regarding **LOWERING your merchant rate considerably for Visa/MasterCard/Discover and Amex** (this will also include the **FREE** EMV replacement to avoid any download and terminal memory issues). Please see attached North American BANCARD Merchant Services agreement.

- Next Day Deposit,*
- NO cost to start this new program,
- NO paper statement fee,
- NO downtime as we handle the transfer for you at no cost to you.

Limited time offer!

Takes 5 minutes to complete:

- page 1 of application: **Initial & Complete** where indicated by the arrows
 - **TAX ID &**
 - **OWNERSHIP** section
- SIGN at the bottom of all** pages where indicated by the arrows,
- Include **Voided Check** for your deposits to start SAVING.
- FAX to 888-428-4037** or try **888-446-6532** for a quick approval.

I want to personally thank you for your business. I wish you continued success and look forward to serving you in the years to come!

* Certain conditions may apply.

To be removed from our offer to LOWER your merchant cost, write REMOVE at the top and fax this back to (888) 519-4214

PRICING SCHEDULE		
<input checked="" type="radio"/> Retail <input type="radio"/> Auto/Internet	<input checked="" type="radio"/> Interchange Plus <input type="radio"/> Tiered	
Interchange, dues, & assessments + <u>95</u> bps Transaction Fee: \$ <u>0.10</u>	Qualified discount rate: <u>0.95</u> % Qualified discount rate (check card): <u>0.10</u> %	
For details regarding mid-qualified and non-qualified surcharges, please see page 3 section 1.14 of the terms and conditions. For purposes of this agreement the mid-qualified surcharge* is _____% (\$ _____ per \$100.00) + \$ _____. For purposes of this agreement the non-qualified surcharge is _____% (\$ _____ per \$100.00) + \$ _____. Card association assessments will be passed through.		
*mid-qualified surcharge only applicable to retail tiered merchants		
OTHER FEES		
Dial pay transaction: \$ _____	Free tablet printer (monthly): \$ _____	Monthly minimum discount: \$ <u>25.00</u>
I & I: draft capture transaction: \$ <u>0.25</u>	Free tablet printer/cash drawer (monthly): \$ _____	Monthly basic service: \$ <u>5.00</u>
Address verification: \$ <u>0.10</u>	Wireless transaction: \$ _____	Chargeback: \$ <u>25.00</u>
Batch loader: \$ <u>0.25</u>	Wireless monthly network access: \$ _____	Retrieval: \$ <u>15.00</u>
Interchange fee pass-through:	Wireless activation: \$ _____	Account setup: \$ _____
Credit: \$ <u>1.10</u>	Debit transaction: \$ _____	Annual: \$ _____
Check Card: \$ <u>2.22</u>	Debit monthly gateway: \$ _____	Voice authorization: \$ <u>1.00</u>
Phone Swipe (PS) monthly gateway: \$ _____	EFT transaction: \$ _____	Annual PCI compliance: \$ <u>79.00</u>
Phone Swipe add'l unit monthly gateway: \$ _____	Internet monthly gateway: \$ _____	NSF Fee: \$ <u>25.00</u>
Phone Swipe transaction: \$ _____	Internet transaction: \$ _____	Paper Statement Fee: \$ _____
MasterCard Network Access: \$ <u>0.0208</u>	American Express Network Access: \$ <u>0.15%</u>	
Visa Network Access: \$ <u>0.0218</u>	Discover/PayPal Network Access: \$ <u>0.0185</u>	
I understand and acknowledge that I will be automatically enrolled in a 60-day free trial of the My Biz Perks Program. At the end of the trial, I understand that my account will be charged a monthly membership fee of \$ 11.95, and I may opt out at any time by visiting www.mybizperks.com .		

CERTIFICATION & AGREEMENT

Merchant acknowledges that you have accessed our Merchant Processing Agreement ("Agreement") at www.myresourceportal.com/agreement. By signing below, Merchant agrees to all terms and conditions contained therein. From time to time, the Agreement may be updated. When this occurs, Agent will notify Merchant electronically (or by delivery method selected by Merchant at time of disclosure) when such updates have been made. Merchant acknowledges that continued use of Agent Merchant services after the update signifies Merchant Acceptance of updated Agreement. The undersigned is duly authorized to sign on behalf of the Merchant and to bind the Merchant to the terms and conditions set forth in this Merchant Application ("Application") and previously referenced Agreement, and certifies that all information provided in association with this Application is true, correct and complete. By signing below on behalf of Merchant, you authorize Member/Bank and/or Agent to order a consumer credit report on you and/or Merchant, as well as subsequent consumer credit reports, which may be required or used in conjunction with the maintenance, updating, renewal or extension of the services provided hereunder, or in conjunction with reviewing, taking collection action on, or other legitimate purposes associated with the Merchant account. A Merchant's submission of a transaction to Agent shall be deemed to signify Merchant's acceptance of the Agreement, including the terms and conditions herein.

Merchant: By _____ (Merchant Principal or Corporate Officer Signature)		Merchant: By _____ (Merchant Principal or Corporate Officer Signature)
_____		_____
(Print Name)		(Print Name)
Date: <u>04/18/16</u>		Date: _____

PERSONAL GUARANTEE

In consideration of Agents and Bank's acceptance of this Agreement, the undersigned Guarantor (jointly and severally if more than one) unconditionally guarantees the performance of all obligations of Merchant to Agent and Bank under the Agreement, and payment of all sums due hereunder, and in the event of default, hereby waives notice of default and agrees to indemnify Agent and Bank for all funds due from Merchant pursuant to the terms of the Agreement. Guarantor waives any and all rights of subrogation, reimbursement or indemnity derived from Merchant, and further waives any and all rights or defenses arising by reason of any modification or change in the terms of the Agreement whatsoever, including, without limitation, the renewal, extension, acceleration, or other change in the time any payment or other performance hereunder is due, and/or any change in any interest or discount rate or fee hereunder. Guarantor confirms that Guarantor, collectively or individually, is a party to the Agreement and, unconditionally and specifically authorizes Agent and Bank, or its authorized agent, to debit any overdue fees, costs, chargebacks, fines, fees, penalties, expenses or obligations under the Agreement and/or any contractual relationship with Agent and Bank from any personal checking or other account owned or controlled by Guarantor, and further to report any default hereunder on Guarantor's personal Credit Bureau Report. Guarantor agrees to pay all costs and expenses of whatever nature, including attorney's fees and other legal expenses, incurred by or on behalf of Bank in connection with the enforcement of this Guaranty.

Merchant: By _____ (Guarantor Signature)		Merchant: By _____ (Guarantor Signature)
_____		_____
(Print Name)		(Print Name)
Date: <u>04/18/16</u>		Date: _____

BANK DISCLOSURE

Member Bank Information
The Bancorp Bank ("Bank")
409 Silverside Road, Ste. 105
Wilmington, DE 19809

Agent Information
North American Bancard, LLC
250 Stephenson HWY
Troy, MI 48083
T. 888-446-6532

Important Bank Responsibilities

1. Bank is the only entity approved to extend acceptance of VISA products directly to a Merchant.
2. Bank must be a principal to the Merchant Agreement.
3. Bank is responsible for educating Merchants on pertinent VISA Operating Regulations or such pertinent rules and regulation of MasterCard International with which merchants must comply. Merchant acknowledges it has read and understood, or seek clarification from Agent or the Bank, all such rules and regulations before submitting a transaction for processing by Agent and Bank.
4. Bank is responsible for and must provide settlement funds to the Merchant.
5. Bank is responsible for all funds held in reserve that are derived from settlement.

Merchant Information

Merchant Name: _____

Merchant Address: _____

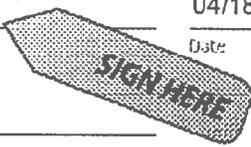
Merchant Phone: _____

Important Merchant Responsibilities

1. Ensure compliance with cardholder data security and storage requirements.
2. Maintain fraud and chargebacks below thresholds.
3. Review and understand the terms of the Merchant Agreement.
4. Comply with VISA, MasterCard, And American Express and Discover Operating Regulations.
5. You may download Visa Regulations from Visa's website at:
<https://usa.visa.com/support/small-business/regulations-fee.html>
6. You may download MasterCard Regulations from MasterCard's website at:
<http://www.us.mcc.com/us/merchants/support/rules.html>
7. You may download the American Express Merchant Operating Guide from American Express' website at:
<http://www.americanexpress.com/merchant/operguide>
8. You may download additional merchant information from Discover Network's website at:
<http://www.discovernetwork.com/merchants/rules.html>

The responsibilities listed above do not supersede terms of the Merchant Agreement and are provided to ensure the Merchant understands some important obligations of each party and that the VISA Member– Bank –is the ultimate authority should the Merchant have any problems.

Merchant's Signature Date: 04/18/16



Merchant's Printed Name & Title

FREE TERMINAL PLACEMENT AGREEMENT



FREE Verifone Vx520 Terminal or Vx520 w/ CR1000i Check Imager



- EMV-ready, PCI PED approved, advanced security including SSL
- Integrated NFC capabilities and expandable memory exceeding 500MB
- Superior performance for faster transaction processing
- Ethernet connection for lightning-fast transactions
- Multiple payment and value-added applications
- Lower cost, higher performance
- Small size keeps countertops clutter free

FREE Verifone Vx520 Terminal or Vx520 w/ CR1000i Check Imager

This Agreement is a contract between the Merchant named below and North American Bancard, Inc. (NAB). NOW THEREFORE, North American Bancard (NAB) and the Party (Merchant) agree as follows:

- I. Merchant agrees that the Equipment is the property of NAB, is being licensed to Merchant, and must be returned in good and working condition within ten (10) days of the termination or expiration of the Merchant Account with NAB. If the Equipment is not returned within ten (10) days, Merchant agrees to pay the equipment value (Vx520 = \$895, Vx520 Combo with check imager = \$1345, Pinpad \$100). Merchant authorizes NAB to ACH my account for said fees according to program. In addition, Merchant agrees to be responsible for any damage to the Equipment as a result of misuse or negligence. NAB reserves the right to replace the above models with comparable models and to add or discontinue models.
- II. Merchant agrees to indemnify and hold NAB harmless from and against any and all liabilities, losses, claims, damages, disputes, offsets, claims or counterclaims of any kind in any way related to the use (or misuse) of the Equipment. Merchant understands that NAB agrees to free overnight delivery of replacement equipment, fully programmed and ready to use, up to but not exceeding twice the first year, and that each additional incident will incur a fee of \$99.

Merchant has accepted the following equipment (the "Equipment") by checking one box below:

- Verifone Vx 520 Terminal (equipment value of \$895)
- Verifone Vx 520 Terminal, CR 1000i Check Imager, Stacker, and all necessary cables (equipment value of \$1345)
- Verifone Pinpad 1000SE and necessary cables (equipment value of \$100) – requires monthly \$5 debit gateway fee

Select Connection Type:

Dial Up Connection

IP Connection (Cable/DSL)

ISP Provider

ISP Phone Number

Except as herein otherwise expressly provided, the Merchant Agreement, as heretofore amended, shall remain in full force and effect.

Merchant's Authorized Signer:

North American Bancard:

Owner's or Officer's Signature _____ Date _____



Account Executive Signature _____ Date _____

INDIVIDUAL GUARANTY (NO TITLES) I/Wc hereby guarantee to NAB, their successors and assigns, the full, prompt and complete performance of Merchant and all of Merchant's obligations under this Agreement, including, but not limited to, all monetary obligations arising out of Merchant's performance or nonperformance under this Agreement, whether arising before or after termination of this Agreement. The undersigned, by signing below, agrees to be bound by the Agreement and this Guaranty.

Personal Guarantor Printed Name _____ Date _____



EXHIBIT B

FAX

North American BANCARD
Merchant Services

Tel: 888-446-6532 Fax: 888-428-4037 & 888-446-6532

TO: Jessica/Sports Inj Ctr W Loop Chiropractic	FROM: Evelyn Thompson, Account Manager
Fax: 3123469358	DATE: 4/26/16
RE: Your Merchant Account	PAGES: 5
<input checked="" type="checkbox"/> URGENT <input checked="" type="checkbox"/> FOR REVIEW <input checked="" type="checkbox"/> PLEASE REPLY	

We called your office earlier and wanted to follow up regarding **LOWERING your merchant rate considerably for Visa/MasterCard/Discover and Amex** (this will also include the **FREE** EMV replacement to avoid any download and terminal memory issues). Please see attached North American BANCARD Merchant Services agreement.

- Next Day Deposit,*
- NO cost to start this new program,
- NO paper statement fee,
- NO downtime as we handle the transfer for you at no cost to you.

Limited time offer!

Takes 5 minutes to complete:

- page 1 of application: **Initial & Complete** where indicated by the arrows
 - **TAX ID &**
 - **OWNERSHIP** section
- SIGN** at the bottom of all pages where indicated by the arrows,
- Include **Voided Check** for your deposits to start SAVING.
- FAX** to **888-428-4037** or try **888-446-6532** for a quick approval.

I want to personally thank you for your business. I wish you continued success and look forward to serving you in the years to come!

* Certain conditions may apply.

To be removed from our offer to LOWER your merchant cost, write REMOVE at the top and fax this back to (888) 519-4214

MERCHANT SERVICES			
<input checked="" type="radio"/> Retail <input type="radio"/> Moto/Internet		<input checked="" type="radio"/> Interchange Plus <input type="radio"/> Tiered	
Interchange, dues, & assessments + <u>95</u> bps		Qualified discount rate: <u>0.95</u> %	
Transaction Fee: \$ <u>0.10</u>		Qualified discount rate (check card): <u>0.10</u> %	
For details regarding mid-qualified and non-qualified surcharges, please see page 3 section 1.14 of the terms and conditions. For purposes of this agreement the mid-qualified surcharge is _____% (\$ _____ per \$100.00) + \$ _____. For purposes of this agreement the non-qualified surcharge is _____% (\$ _____ per \$100.00) + \$ _____. Card association assessments will be passed through.			
*mid-qualified surcharge only applicable to retail tiered merchants			
OTHER FEES			
Dial pay transaction:	\$ _____	Free tablet printer (monthly):	\$ _____
I & I: draft capture transaction:	\$ <u>0.25</u>	Free tablet printer/cash drawer (monthly):	\$ _____
Address verification:	\$ <u>0.10</u>	Wireless transaction:	\$ _____
Batch loader:	\$ <u>0.26</u>	Wireless monthly network access:	\$ _____
Interchange fee pass-through:		Wireless activation:	\$ _____
Credit:	\$ <u>10</u>	Debit transaction:	\$ _____
Check Card:	\$ <u>22</u>	Debit monthly gateway:	\$ _____
Phone Swipe (PS) monthly gateway:	\$ _____	EBT transaction:	\$ _____
Phone Swipe add'l unit monthly gateway:	\$ _____	Internet monthly gateway:	\$ _____
Phone Swipe transaction:	\$ _____	Internet transaction:	\$ _____
MasterCard Network Access:	\$ <u>0.0208</u>	American Express Network Access:	\$ <u>0.15%</u>
Visa Network Access:	\$ <u>0.0218</u>	Discover/PayPal Network Access:	\$ <u>0.0125</u>
Monthly minimum discount: \$ <u>25.00</u> Monthly basic service: \$ <u>5.00</u> Chargeback: \$ <u>25.00</u> Retrieval: \$ <u>15.00</u> Account setup: \$ _____ Annual: \$ _____ Voice authorization: \$ <u>1.00</u> Annual PCI compliance: \$ <u>79.00</u> NSF Fee: \$ <u>25.00</u> Paper Statement Fee: \$ _____			
I understand and acknowledge that I will be automatically enrolled in a 60-day free trial of the My Biz Perks Program. At the end of the trial, I understand that my account will be charged a monthly membership fee of \$11.95, and I may opt out at any time by visiting www.mybizperks.com .			

CERTIFICATION & AGREEMENT

Merchant acknowledges that you have accessed our Merchant Processing Agreement ("Agreement") at www.mysourceportal.com/agreement. By signing below, Merchant agrees to all terms and conditions contained therein. From time to time, the Agreement may be updated. When this occurs, Agent will notify Merchant electronically (or by delivery method selected by Merchant at time of disclosure) when such updates have been made. Merchant acknowledges that continued use of Agent Merchant services after the update signifies Merchant Acceptance of updated Agreement. The undersigned is duly authorized to sign on behalf of the Merchant and to bind the Merchant to the terms and conditions set forth in this Merchant Application ("Application") and previously referenced Agreement, and certifies that all information provided in association with this Application is true, correct and complete. By signing below on behalf of Merchant, you authorize Member/Bank and/or Agent to order a consumer credit report on you and/or Merchant, as well as subsequent consumer credit reports, which may be required or used in conjunction with the maintenance, updating, renewal or extension of the services provided hereunder, or in conjunction with reviewing, taking collection action on, or other legitimate purposes associated with the Merchant account. A Merchant's submission of a transaction to Agent shall be deemed to signify Merchant's acceptance of the Agreement, including the terms and conditions herein.

Merchant: By _____
 (Merchant Principal or Corporate Officer Signature)

 (Print Name)
 Date: 04/26/16



~~Merchant: By _____
 (Merchant Principal or Corporate Officer Signature)

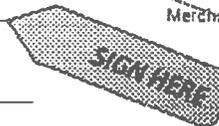
 (Print Name)
 Date: _____~~

PERSONAL GUARANTEE

In consideration of Agents and Bank's acceptance of this Agreement, the undersigned Guarantor (jointly and severally if more than one) unconditionally guarantees the performance of all obligations of Merchant to Agent and Bank under the Agreement, and payment of all sums due hereunder, and in the event of default, hereby waives notice of default and agrees to indemnify Agent and Bank for all funds due from Merchant pursuant to the terms of the Agreement. Guarantor waives any and all rights of subrogation, reimbursement or indemnity derived from Merchant, and further waives any and all rights or defenses arising by reason of any modification or change in the terms of the Agreement whatsoever, including, without limitation, the renewal, extension, acceleration, or other change in the time any payment or other performance hereunder is due, and/or any change in any interest or discount rate or fee hereunder. Guarantor confirms that Guarantor, collectively or individually, is a party to the Agreement and, unconditionally and periodically authorizes Agent and Bank, or its authorized agent, to debit any overdue fees, cards, chargebacks, fines, fees, penalties, expenses or obligations under the Agreement and/or any contractual relationship with Agent and Bank from any personal checking or other account owned or controlled by Guarantor, and further to report any default hereunder on Guarantor's personal Credit Bureau Report. Guarantor agrees to pay all costs and expenses of whatever nature, including attorney's fees and other legal expenses, incurred by or on behalf of Bank in connection with the enforcement of this Guaranty.

Merchant: By _____
 (Guarantor Signature)

 (Print Name)
 Date: 04/26/16



~~Merchant: By _____
 (Guarantor Signature)

 (Print Name)
 Date: _____~~

BANK DISCLOSURE

Member Bank Information
The Bancorp Bank ("Bank")
409 Silverside Road, Ste. 105
Wilmington, DE 19809

Agent Information
North American Bancard, LLC
250 Stephenson HWY
Troy, MI 48083
T. 888-446-6532

Important Bank Responsibilities

1. Bank is the only entity approved to extend acceptance of VISA products directly to a Merchant.
2. Bank must be a principal to the Merchant Agreement.
3. Bank is responsible for educating Merchants on pertinent VISA Operating Regulations or such pertinent rules and regulation of MasterCard International with which merchants must comply. Merchant acknowledges it has read and understood, or seek clarification from Agent or the Bank, all such rules and regulations before submitting a transaction for processing by Agent and Bank.
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5. Bank is responsible for all funds held in reserve that are derived from settlement.

Merchant Information

Merchant Name: _____

Merchant Address: _____

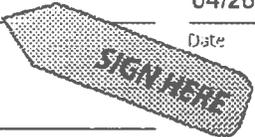
Merchant Phone: _____

Important Merchant Responsibilities

1. Ensure compliance with cardholder data security and storage requirements.
2. Maintain fraud and chargebacks below thresholds.
3. Review and understand the terms of the Merchant Agreement.
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<https://usa.visa.com/support/small-business/regulations-fee.html>
6. You may download MasterCard Regulations from MasterCard's website at:
<http://www.mastercard.com/us/merchants/support/rules.html>
7. You may download the American Express Merchant Operating Guide from American Express' website at:
<http://www.americanexpress.com/merchant/oguide>
8. You may download additional merchant information from Discover Network's website at:
<http://www.discovernetwork.com/merchant/merchant.html>

The responsibilities listed above do not supersede terms of the Merchant Agreement and are provided to ensure the Merchant understands some important obligations of each party and that the VISA Member – Bank – is the ultimate authority should the Merchant have any problems.

Merchant's Signature Date 04/26/16



Merchant's Printed Name & Title

FREE TERMINAL PLACEMENT AGREEMENT



FREE Verifone Vx520 Terminal or Vx520 w/ CR1000i Check Imager



- EMV-ready, PCI PED approved, advanced security including SSL
- Integrated NFC capabilities and expandable memory exceeding 500MB
- Superior performance for faster transaction processing
- Ethernet connection for lightning-fast transactions
- Multiple payment and value-added applications
- Lower cost, higher performance
- Small size keeps countertops clutter free

FREE Verifone Vx520 Terminal or Vx520 w/ CR1000i Check Imager

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- Verifone Vx 520 Terminal, CR 1000i Check Imager, Stacker, and all necessary cables (equipment value of \$1345)
- Verifone Pinpad 1000SE and necessary cables (equipment value of \$100) – requires monthly \$5 debit gateway fee

Select Connection Type:

Dial Up Connection

IP Connection (Cable/DSL)

ISP Provider

ISP Phone Number

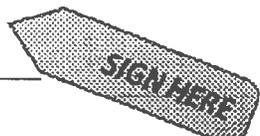
Except as herein otherwise expressly provided, the Merchant Agreement, as heretofore amended, shall remain in full force and effect.

Merchant's Authorized Signer:

North American Bancard:

Owner's or Officer's Signature _____ Date _____

Account Executive Signature _____ Date _____



INDIVIDUAL GUARANTY (NO TITLES) I/We hereby guarantee to NAB, their successors and assigns, the full, prompt and complete performance of Merchant and all of Merchant's obligations under this Agreement, including, but not limited to, all monetary obligations arising out of Merchant's performance or nonperformance under this Agreement, whether arising before or after termination of this Agreement. The undersigned, by signing below, agrees to be bound by the Agreement and this Guaranty.

Personal Guarantor Printed Name _____ Date _____

