EXHIBIT A
Wholesaler Agreement, by and between Concord Payment Services, Inc., formerly known as BUYPASS Corporation, and the Debtor.

BUYPASS CORPORATION
WHOLESALER
MARKETING AGREEMENT

12789

THIS AGREEMENT is made and entered into effective as of this 17th day of September 1997 by and between BUYPASS CORPORATION, a Georgia corporation ("BUYPASS"), and FLEMING COMPANIES, INC., a Oklahoma corporation ("WHOLESALER")(each a "Party", together the "Parties").

RECITALS

A. BUYPASS provides electronic funds transfer and related services to merchants and financial institutions to facilitate the operation of electronic terminals at the point of sale and the transmission and completion of transactions initiated at such terminals; and

B. WHOLESALER is a distributor of groceries and related products and services to retail supermarkets and grocery stores owned by WHOLESALER or by independent parties (collectively, "Merchants"); and

C. BUYPASS and WHOLESALER mutually desire to make BUYPASS's services available to Merchants on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, for and in consideration of the mutual agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, BUYPASS and WHOLESALER hereby agree as follows:

ARTICLE 1

DEFINITIONS

1.1 **Definitions**. In addition to the words and terms elsewhere defined in this Agreement, the following capitalized words and terms, as used in this Agreement, shall have the following meanings, and such definitions shall be equally applicable to both the singular and the plural forms of the words and terms herein defined:

"Agreement" shall mean this Agreement, including all Exhibits, Schedules and Addenda hereto, as the same may be amended, modified or supplemented from time to time in accordance with this Agreement.

"Applicable Law" shall mean any federal, state or local law, regulation, rule or ordinance and all other applicable judicial and administrative judgments, orders, stipulations, awards, writs, injunctions and consent decrees, in each case as in effect and applicable to the subject matter referenced.

"Authorized Merchant" shall mean a merchant to which WHOLESALER regularly provides goods or services, and with whom WHOLESALER is either formally associated or is involved in an ongoing wholesale/retail relationship.

"**Business Day**" shall mean any day other than a Saturday, Sunday or federal holiday.

"**BUYPASS Switch**" shall mean BUYPASS's central transaction processing computer.

"**Card**" shall mean a plastic card bearing a magnetic stripe and the logo or service mark of one or more Networks, or other card that BUYPASS agrees in writing to support pursuant to this Agreement, that can be used at a point of sale terminal to access one or more asset or credit accounts or guarantee transactions at the point of sale.

"**Cardholder**" shall mean a person authorized to use a Card to initiate Transactions.

"**EBT**" shall mean the electronic transfers of government benefits.

"**EFT Hardware**" shall mean point of sale terminals, computers and related equipment sold by BUYPASS for use in processing Transactions.

"**EFT Services**" shall mean Transaction processing and related services and products, including EFT Software and EFT Hardware provided by BUYPASS, as specifically set forth in each Merchant Agreement between BUYPASS and a Merchant.

"**EFT Software**" shall mean software provided by BUYPASS for use in connection with the EFT Services, including all machine readable code, whether on tape or diskette, and related user documentation.

"**Financial Institution**" shall mean an "insured depository institution," as that term is defined in Section 3 of the Federal Deposit Insurance Act, or a credit union, the shares of which are federally insured pursuant to Section 201 of the Federal Credit Union Act.

"**Merchant Agreement**" shall mean an EFT Services and License Agreement in the form attached hereto as **Exhibit "A"**, as amended by BUYPASS from time to time in its sole discretion.

"**Network**" shall mean an organization that operates computer hardware and software and telecommunications links to enable the interchange, under a common service mark, of electronic fund transfers (debit and/or credit) among participants in the organization's electronic fund transfer system, including an individual card-issuing organization that has arranged for the acceptance of its Cards at third party locations.

"**Term**" shall mean the Initial Term and any Renewal Terms as each is defined in Section 9.1 hereof.

"**Terminal**" shall mean terminals driven by BUYPASS for the purpose of originating Transactions, including stand alone and integrated controller based systems.

"**Transaction**" shall mean an electronic transfer of funds or transmission of information, including a purchase of goods or services, a cash withdrawal or cash advance, a balance

inquiry, check verification or a denial of any of the foregoing, initiated by the use of a Card at a Terminal supported by BUYPASS and any adjustment, chargeback, representment or other correction thereof.

ARTICLE 2

OBLIGATIONS OF BUYPASS

2.1 **Provision of EFT Services**. BUYPASS shall offer the EFT Services to Authorized Merchants in support of debit card Transactions, credit card Transactions, check verification and guarantee Transactions, EBT Transactions, and any other Transaction types mutually agreed between BUYPASS and WHOLESALER, all in accordance with the Merchant Agreement.

2.2 **Sale of EFT Hardware and EFT Software**. BUYPASS may offer EFT Hardware and/or EFT Software in connection with the EFT Services as agreed between BUYPASS and WHOLESALER from time to time pursuant to this Section 2.2.

A. **Purchase by WHOLESALER**. WHOLESALER may, at its option, purchase the EFT Hardware and EFT Software from BUYPASS for resale to Authorized Merchants. WHOLESALER may resell the EFT Software only pursuant to such sublicense agreements with Authorized Merchants as BUYPASS may authorize from time to time.

B. **Direct Purchase by Authorized Merchants**. At WHOLESALER's option, BUYPASS shall offer the EFT Hardware and EFT Software directly to Authorized Merchants at prices mutually agreed between BUYPASS and WHOLESALER.

2.3 **Maintenance of Records**. BUYPASS shall maintain and provide to WHOLESALER, upon request, for the fees set forth in **Exhibit "B"** hereto, the data and records relating to WHOLESALER and its Authorized Merchants, in a form determined by BUYPASS for a period of forty-five (45) days from the date of a Transaction, and on microfilm or any other suitable format for a period of not less than seven (7) years. WHOLESALER represents and warrants that, with respect to any Authorized Merchant whose data or records it requests hereunder, such Authorized Merchant has granted WHOLESALER full right, power and authority to request, receive and review any such data and records.

2.4 **WHOLESALER Service**. BUYPASS shall designate a service representative for corporate level contacts by WHOLESALER.

2.5 **Merchant Service**. BUYPASS shall staff a Authorized Merchant service section (help desk) twenty-four (24) hours per day, seven (7) days per week with toll-free voice communications lines and Merchant service representatives to address Authorized Merchant service requests.

2.6 **License**. BUYPASS hereby grants WHOLESALER a non-exclusive license to sublicense and distribute to Authorized Merchants which have entered into a Merchant

Agreement with BUYPASS BUYPASS's proprietary EFT Software for use at retail locations which such Authorized Merchants own and operate. The scope of said license shall be strictly limited as specified herein, and shall not include any right to use, copy, publish, license, sublicense, sell, market or distribute said EFT Software and documentation, except as expressly authorized herein. WHOLESALER agrees the license is for its own use and the use of its Authorized Merchants and agrees not to use its license for other wholesalers and merchants without the express written agreement of BUYPASS. WHOLESALER and Authorized Merchant shall execute a sublicense agreement as provided by BUYPASS from time to time. WHOLESALER shall not deliver, or cause to be delivered, any EFT Software to any Merchant who has not executed a Merchant Agreement.

2.7 **Optional Services**. If requested by WHOLESALER and a Authorized Merchant, BUYPASS shall provide on-site installation of EFT Hardware and/or EFT Software and related training for the fees set forth in **Exhibit "B"** hereto.

2.8 **Link Responsibility**. BUYPASS shall be responsible for the installation and maintenance of Direct Data Links, if any, that are necessary for direct connections between BUYPASS and Networks to effect the Transactions contemplated in this Agreement.

2.9 **Billing Information**. BUYPASS shall provide WHOLESALER billing information for each Authorized Merchant, including WHOLESALER markups.

ARTICLE 3

OBLIGATIONS OF WHOLESALER

3.1 **Promotion of BUYPASS EFT Services**. WHOLESALER shall advertise, market and promote BUYPASS to its Authorized Merchants as WHOLESALER's preferred provider of services comparable to the EFT Services.

3.2 **Contracts with Merchants**. WHOLESALER shall assist BUYPASS and Authorized Merchants with the contract process, including by delivering the then-current Merchant Agreement and any maintenance agreements to Authorized Merchants and, as necessary, providing assistance to Authorized Merchants in completing and submitting to BUYPASS documentation necessary to enable BUYPASS to provide the EFT Services.

3.3 **Merchant Services**. WHOLESALER shall provide to Authorized Merchants initial support and research services for purposes of gathering information necessary to resolve issues that are not Transaction-specific.

3.4 **Other Merchant Services Provided by WHOLESALER**. If WHOLESALER installs EFT Hardware for a Authorized Merchant, WHOLESALER shall provide such Authorized Merchant with training and related customer support services. WHOLESALER shall also be responsible for providing maintenance for such EFT Hardware. WHOLESALER may request that BUYPASS provide such maintenance services pursuant to a maintenance agreement

between BUYPASS and the Authorized Merchant or WHOLESALER, for fees to be mutually agreed between the parties to such agreement.

3.5 **Merchant Notice**. WHOLESALER shall use reasonable efforts to ensure that Authorized Merchants give BUYPASS written notice forty-five (45) days prior to the date on which such Authorized Merchants wish to have BUYPASS begin providing EFT Services. If Authorized Merchant has not executed a Merchant Agreement prior to the provision of EFT Services, WHOLESALER shall be liable for the failure of Authorized Merchant to satisfy any duty or obligation that would be imposed on such Authorized Merchant under the Merchant Agreement, including Authorized Merchant's obligation to pay the applicable fees for the EFT Services. WHOLESALER shall use reasonable efforts to give BUYPASS thirty (30) days written notice prior to the cessation of Authorized Merchant's relationship with WHOLESALER, and shall remain liable for payment in respect of all EFT Services rendered to such Authorized Merchant through the expiration of such thirty (30) day period.

3.6 Notwithstanding the other provisions of this Agreement, BUYPASS shall bill WHOLESALER'S Authorized Merchants directly for EFT Services rendered to such Authorized Merchants. BUYPASS will invoice WHOLESALER for such billing services at the applicable rates set forth in **Exhibit "B"** and WHOLESALER shall pay BUYPASS under the terms specified in Article 12 hereof.

3.7 **EBT Services**. WHOLESALER understands that Authorized Merchant may be required to execute and deliver additional addenda to the Merchant Agreement in order to accept EBT Transactions. If WHOLESALER desires to market BUYPASS's EBT Services, WHOLESALER shall execute and deliver an EBT addendum in the form attached hereto as **Exhibit "C"**.

3.8 **WHOLESALER Qualifications**. WHOLESALER shall execute and deliver such applications, certifications, agreements or other documents as shall be required by any Network in order to enable WHOLESALER to perform its obligations hereunder.

ARTICLE 4

MERCHANTS

4.1 **Authorized Merchants**. EFT Services may be provided under this Agreement only to Authorized Merchants.

4.2 **Merchant Agreements**. Each participating Authorized Merchant must execute and deliver to BUYPASS a Merchant Agreement, as it may be amended from time to time, together with any applications, agreements, certifications or other documents required by the Authorized Merchant's Financial Institution sponsor, Networks or other third parties whose consent is necessary for the processing of Transactions.

4.3 **Right to Decline**. BUYPASS reserves the right to decline to provide any or all EFT Services to any Authorized Merchant disapproved by any Financial Institution or Network, or that does not meet such fraud prevention, financial stability and other safety and soundness eligibility criteria as BUYPASS may adopt from time to time in its sole discretion.

4.4 **Relationship with Merchants**. WHOLESALER agrees and acknowledges that BUYPASS shall have the sole and exclusive right to control, administer, modify and operate the EFT System in accordance with this Agreement.

4.5 **Disassociation with Authorized Merchants**. If a Merchant ceases to be an Authorized Merchant, WHOLESALER shall provide, when reasonably possible, thirty (30) days prior written notice of such change in status.

ARTICLE 5

DISCLAIMER OF WARRANTIES

EXCEPT AS EXPRESSLY PROVIDED HEREIN, BUYPASS MAKES NO OTHER WARRANTIES, EITHER EXPRESS OR IMPLIED, OF ANY KIND. BUYPASS EXPRESSLY DISCLAIMS, AND WHOLESALER EXPRESSLY WAIVES, ANY AND ALL WARRANTIES EXPRESS OR IMPLIED INCLUDING WITHOUT LIMITATION THOSE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE (IRRESPECTIVE OF ANY COURSE OF DEALING BETWEEN THE PARTIES). THE EFT SERVICES ARE NOT WARRANTED TO BE FREE FROM ERROR OR INTERRUPTION. NO DESCRIPTIONS OR SPECIFICATIONS, WHETHER OR NOT INCORPORATED INTO THIS AGREEMENT SHALL CONSTITUTE WARRANTIES OF ANY KIND. THE PARTIES FURTHER AGREE THAT ANY DELIVERY OF GOODS HEREUNDER IS PURELY INCIDENTAL TO THE PROVISION OF EFT SERVICES BY BUYPASS AND THAT THIS AGREEMENT IS NOT SUBJECT TO THE UNIFORM COMMERCIAL CODE.

ARTICLE 6

ERROR RESOLUTION

BUYPASS covenants and agrees that it shall cooperate fully and immediately with WHOLESALER and Authorized Merchants in attempting to resolve all alleged errors with respect to any Transaction. In particular, BUYPASS agrees, providing the information is available from the Authorized Merchant and Network, that it shall exercise its best efforts to provide an audit trail of information pertinent to resolution of errors.

ARTICLE 7

REPRESENTATIONS AND WARRANTIES

Each Party hereto represents and warrants to the other the following on an on-going basis for the Term, including any renewal or extension thereof, of this Agreement:

(A) Organization. For BUYPASS, that it is a corporation duly organized, validly existing and in good standing under the laws of the state of Georgia. For WHOLESALER, that it is a corporation duly organized, validly existing and in good standing under the laws of Oklahoma.

(B) Authority.

(i) That such Party has the power and authority to own its property and to carry on its business as now conducted and as contemplated by this Agreement.

(ii) That such Party is qualified and licensed to do business in every jurisdiction where such qualification or licensing is necessary to carry out its obligations under this Agreement, or promptly will qualify or obtain such licenses prior to performance in such jurisdictions.

(iii) That such Party has the power to execute, deliver and perform its obligations under this Agreement.

(iv) That the execution, delivery and performance of this Agreement by such Party have been duly authorized by all requisite corporate action and will not violate or breach any provision of any organizational document or other agreement or instrument to which such entity is a party or by which it is bound, or constitute a default or result in an acceleration under any of the foregoing or result in a violation of Applicable Law to which such Party is subject.

(v) That this Agreement constitutes a legal, valid and binding obligation of such Party enforceable in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting creditor's rights, and the effect of general principles of equity.

(vi) That no consent, approval, authorization or order of any court or governmental agency or body is required for the execution, delivery and performance of this Agreement by such Party, except to the extent that the addition of new EFT Services requires prior approval of regulatory agencies with authority over BUYPASS.

ARTICLE 8

CONFIDENTIAL INFORMATION

8.1 **Definition**. The term "Confidential Information" means materials and information, of both a technical and business nature, whether tangible or intangible in form, including computer software, data processing information and other information related to either Party's business methods and practices, products, inventions, services, sales volume, inventories, research and development, marketing, operations, Transaction processes, Transaction rates, engineering processes, finances, customers (including customer lists, Cardholder information and customer account data), suppliers, retailers, marketing and future products. Confidential Information specifically includes all confidential Cardholder information, as well as the contents of this Agreement and any Exhibits, Schedules and Addenda hereto.

8.2 **Exceptions from Confidential Information**. Nothing in Section 8.1 above shall restrict either Party with respect to information or data:

(A) that such Party rightfully possessed before it received the information from the other Party, as evidenced by written documentation of such possession;

(B) that subsequently becomes publicly available through no fault of that Party;

(C) that is subsequently furnished rightfully to that Party by a third party (excluding Affiliates of each Party) not known to be under restrictions on use or disclosure;

(D) that is required to be disclosed by Applicable Law, provided that the disclosing Party will exercise reasonable efforts to notify the other Party prior to disclosure; or

(E) that is independently developed by the non-disclosing Party without any confidential information of the other Party.

8.3 **Treatment of Confidential Information**. Each Party agrees that they will safeguard and maintain in strict confidence any Confidential Information of the other Party. Each Party further agrees to use such Confidential Information only for the purposes specified in this Agreement. Neither Party shall obtain any proprietary rights in any such Confidential Information which has been or at any time after the execution of this Agreement is disclosed to the other Party, including any manuals or software provided by BUYPASS in connection with the EFT Services and records of Transactions. Without limiting the generality of the foregoing, the Parties agree (i) not to disclose to any other person, or permit any other person access to, the other Party's Confidential Information, except persons with a need to know such information to facilitate the provision of the EFT Services or the processing of Transactions; (ii) to ensure that such persons with a need to know are advised of the confidential nature of the Confidential Information and are precluded from taking any action prohibited under this Article 8, provided that in any event each Party hereto shall be liable for any breach of this Article 8 by persons with a need to know;

and (iii) not to alter or remove any identification, copyright or proprietary rights notice which indicates the ownership of any part of the other Party's Confidential Information.

8.4 **Injunctive Relief**. The Parties acknowledge and agree that in addition to any other remedies either Party may have at law or in equity, the aggrieved Party will be entitled to a restraining order, injunction or other similar remedy and to enforce specifically the terms and provisions contained in this Article 8. The Parties hereby acknowledge that money damages alone would be an inadequate remedy for the injuries and damages which would be suffered and incurred as a result of any breach of the provisions of this paragraph.

8.5 **Return of Confidential Information**. Each Party agrees that upon termination of this Agreement and receipt of written request therefor from the other Party, it will deliver to the other Party all materials, including materials in an electronic form, and all copies thereof, in its possession which incorporate any Confidential Information belonging to the other Party, or otherwise relates to the other Party's business, or will destroy such materials and will not retain any copies, extracts or other reproductions, in whole or in part, of such materials, regardless of the form thereof. Each Party, upon written request of the other Party, shall execute a certification that it has satisfied its obligations under this Section 8.5.

ARTICLE 9

TERM AND TERMINATION

9.1 **Term**. This Agreement shall commence upon the date first written above and shall remain in full force and effect for an initial term of three (3) years thereafter (the "Initial Term"). Unless sooner terminated as provided herein, this Agreement will continue in effect for successive terms of one (1) year each thereafter (each a "Renewal Term") until terminated by either Party upon written notice to the other Party not less than ninety (90) days in advance of the expiration of the then-current term.

9.2 **Default**. The following shall constitute a "Default" by each Party under this Agreement:

(A) Such Party materially breaches this Agreement and does not (i) cure such breach within sixty (60) days of receipt of written notice of such breach, or, (ii) if such breach is not reasonably susceptible to cure within such sixty (60) day period, commence and diligently pursue in good faith efforts to cure such breach as soon as reasonably practicable;

(B) Such Party becomes insolvent, is the subject of a voluntary or involuntary petition in bankruptcy or a receiver, conservator, liquidator or other such officer is appointed for such Party;

(C) Such Party is closed for business by any state or federal regulatory authority or by corporate action;

(D) Any substantial part of such Party's property becomes subject to any levy, seizure, assignment, application or sale for or by any creditor or governmental agency; or

(E) Such Party engages in fraud or criminal misconduct relative to its obligations under this Agreement or relative to the operation of its business.

9.3 **Termination for Default**. Either Party may, as a result of any Default (set forth in Section 9.2 hereto) by the other Party, upon giving written notice describing such Default to the other Party, immediately terminate this Agreement. A default by any Authorized Merchant of any of its obligations with respect to its receipt of EFT Services from BUYPASS, including but not limited to any obligations of Authorized Merchants set forth herein or in any Merchant Agreement or maintenance agreement executed by BUYPASS and any Authorized Merchant, shall not be deemed a default by WHOLESALER hereunder.

9.4 **Payment of Fees upon Termination**. If either WHOLESALER or BUYPASS terminates this Agreement, all monies due to either BUYPASS or WHOLESALER under the terms of this Agreement will be paid according to the terms contained in Article 12 hereof, including reimbursement for any expenses actually incurred by BUYPASS in connection with development specifically pre-authorized by WHOLESALER.

ARTICLE 10

INDEMNIFICATION

10.1 **Indemnification of WHOLESALER**. Subject to Article 11, BUYPASS agrees to indemnify and hold harmless WHOLESALER and its officers, directors and employees, from any and all losses, damages, claims, liabilities and expenses (including reasonable attorneys' fees) suffered or incurred by WHOLESALER as a result of or arising out of:

(A) Any gross negligence or willful misconduct of BUYPASS; or

(B) Any material breach of this Agreement by BUYPASS.

10.2 **Indemnification of BUYPASS**. Subject to Article 11, WHOLESALER agrees to indemnify and hold harmless BUYPASS and its officers, directors and employees from any and all losses, damages, claims, liabilities and expenses (including reasonable attorneys' fees) suffered or incurred by BUYPASS as a result of or arising out of:

(A) Any gross negligence or willful misconduct of WHOLESALER; or

(B) Any material breach of this Agreement by WHOLESALER.

10.3 **Assumption of Defense**. Promptly following receipt of any claim, action or demand by any third party for which either Party seeks indemnification under this Article 10, the Party

seeking indemnification (the "Indemnified Party") shall provide written notice thereof to the other Party (the "Indemnifying Party"). The Indemnifying Party shall have the right, with counsel reasonably satisfactory to the Indemnified Party, to assume the defense of such claim, action or demand at its own expense; provided however, that the Indemnified Party shall have the right to participate in such defense and shall have final approval authority with respect to the nonmonetary terms of any settlement or compromise thereof, provided that such approval shall not be unreasonably withheld or delayed.

ARTICLE 11

LIMITATION OF LIABILITY

11.1 **General Limitation**. WHOLESALER acknowledges and agrees that BUYPASS has no responsibility or liability for the correctness of the data input by Authorized Merchants or by WHOLESALER.

11.2 **Limitation of Liability**.

(A) NEITHER PARTY SHALL BE LIABLE FOR (i) ANY LOSS OF USE, REVENUE, PROFIT OR BUSINESS OPPORTUNITIES OR INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, SPECIAL OR EXEMPLARY DAMAGES, EVEN IF SUCH PARTY IS INFORMED OR IS OTHERWISE AWARE OR SHOULD BE AWARE, OF THE POSSIBILITY OR LIKELIHOOD OF SUCH DAMAGES AND REGARDLESS OF WHETHER ANY LIMITED REMEDY PROVIDED HEREUNDER IS DETERMINED TO FAIL IN ITS ESSENTIAL PURPOSE OR (ii) LOSSES ATTRIBUTABLE TO OR ARISING FROM OVERHEAD ALLOCATIONS OR GENERAL AND ADMINISTRATIVE COSTS AND EXPENSES OF THE OTHER PARTY. \

(B) NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR CLAIMS MADE MORE THAN ONE HUNDRED EIGHTY (180) DAYS FROM THE TIME OF THE EVENT WHICH GIVES RISE TO SUCH CLAIMS OR, IN THE CASE OF A CLAIM WHICH CANNOT BE REASONABLY DISCOVERED WITHIN ONE HUNDRED EIGHTY (180) DAYS OF THE EVENT THROUGH THE EXERCISE OF DUE DILIGENCE, MORE THAN THIRTY (30) DAYS FOLLOWING THE ACTUAL DISCOVERY OF SUCH CLAIM.

(C) BUYPASS SHALL HAVE NO LIABILITY TO WHOLESALER WITH RESPECT TO ITS PERFORMANCE OF THE EFT SERVICES EXCEPT FOR THOSE PROVIDED UNDER SECTION 2.2(A) HEREOF.

(D) NOTWITHSTANDING ANY PROVISION CONTAINED IN THIS AGREEMENT TO THE CONTRARY, THE AGGREGATE LIABILITY OF BUYPASS DURING EACH CONSECUTIVE TWELVE (12) MONTH PERIOD BEGINNING ON THE EFFECTIVE DATE FOR ANY AND ALL CLAIMS,

DEMANDS, COSTS, LOSSES, DAMAGES OR OTHER POTENTIAL OR ACTUAL EXPENSES WHICH ARE IN ANY WAY RELATED, DIRECTLY OR INDIRECTLY, TO THE EXECUTION, PERFORMANCE OR SUBJECT MATTER OF THIS AGREEMENT SHALL NOT EXCEED THE AVERAGE MONTHLY AMOUNT OF FEES PAID BY ALL MERCHANTS (OR BY WHOLESALER ON BEHALF OF ALL MERCHANTS) TO BUYPASS DURING SUCH PERIOD, REGARDLESS OF THE FORM OF ACTION EMPLOYED, WHETHER IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE. THE PARTIES AGREE THAT THE LIMITATION OF LIABILITY SET FORTH IN THIS SUBSECTION 11.2(D) IS A REASONABLE ALLOCATION OF RISK AND THAT SUCH LIMITATION SHALL APPLY TO ANY REMEDY ORDERED BY A COURT, REGARDLESS OF WHETHER SUCH COURT DETERMINES THAT ANY REMEDY PROVIDED FOR HEREUNDER FAILS IN ITS ESSENTIAL PURPOSE.

(E) Each Party shall use commercially reasonable efforts to mitigate damages for which the other Party may become responsible.

ARTICLE 12

FEES AND PAYMENT TERMS

12.1 **WHOLESALER Payments**. WHOLESALER agrees to pay BUYPASS for any services purchased by WHOLESALER based on the schedule of fees and charges set forth in **Exhibit "B"**.

12.2 **WHOLESALER Markups**. WHOLESALER markups for services and products provided by BUYPASS to Authorized Merchants shall be as follows:

Debit $ .02 Credit $ .0225 EBT $ .0025

The detailed report of WHOLESALER markups for all Authorized Merchant Transactions as of the last day of the month shall be provided to WHOLESALER by the twenty-fourth (24th) day of the following month.

12.3 **Pass Through Fees**. BUYPASS's charges are exclusive of fees and charges of a sponsoring Financial Institution and Networks, as well as charges for telephone service (except for toll charges relating to dial up Transactions), which are the sole responsibility of WHOLESALER and its Authorized Merchants. WHOLESALER and Authorized Merchants shall be responsible for any pass through fees, including any and all Network fees and charges associated with the EFT Services, as such fees and charges may be modified from time to time. Network fees and charges associated with the EFT Services may include, without limitation, any fees, charges or fines, such as transaction fees, card fees, license fees, membership fees, logo fees, certification fees, switch fees and Network-imposed adjustment fees that are incident to a

Authorized Merchant's membership, participation or acquisition of Transactions in any Network that a Authorized Merchant accesses through the EFT Services.

12.4 **Fee Adjustments**. BUYPASS's Transaction fees set forth in Part I of **Exhibit "B"** may be changed, during the Term of this Agreement in the event that any Financial Institution, telephone company, or other third party service provider changes its fees to BUYPASS. BUYPASS may also change its Transaction fees from time to time in its discretion. However, in the event that discretionary changes result in increases in Transaction fees of more than five percent (5%) in any calendar year, WHOLESALER shall have the right to terminate this Agreement on thirty (30) days written notice to BUYPASS. BUYPASS shall give WHOLESALER sixty (60) days written notice prior to any change in Transaction fees.

ARTICLE 13

DISPUTE RESOLUTION

13.1 **Notice**. Any dispute, controversy or claim arising out of or relating to this Agreement, including any claim based on or arising from an alleged tort, shall at the request of either Party be submitted for resolution in accordance with this Article 13. Either Party may initiate the dispute resolution procedures set forth in this Article 13 by providing prior written notice to the other (stating with particularity the nature of the dispute and providing any documentation on which such claim is based). Except for the purpose of enforcing this Article 13, no suit shall be initiated with respect to any dispute or claim arising under this Agreement.

13.2 **Mediation**.

(A) Upon delivery and receipt of notice pursuant to Section 13.1, each Party shall designate two (2) of its executives, who will, in turn, use best efforts to select and agree upon a neutral mediator. If a mediator cannot be agreed upon, one will be selected by the Center for Public Resources Institute.

(B) The executives and the neutral mediator shall participate in a meeting in which the Parties shall work in good faith to resolve the dispute in question. The meeting shall be held within sixty (60) days after selection of the neutral mediator and agreement among the Parties and the neutral mediator on a time and place for such meeting, which agreement shall not be unreasonably withheld by either Party. The mediator may set the time and place of the meeting if the Parties are unable to agree.

(C) The executives and the neutral mediator shall agree on the procedures for an exchange of documents prior to the meeting and for the presentation of documents and oral and written arguments as part of the mediation. After listening to such presentations and examining such documents and other exhibits, the four executives designated by the respective Parties, with the assistance of a neutral mediator, shall work together in good faith to resolve the dispute in question. The

meeting shall be of such duration as the Parties in good faith deem necessary, but in no event shall it extend beyond three (3) Business Days. Each Party shall absorb all of its own expenses in connection with such meeting and shall pay one-half of any costs or fees related to the services of the neutral mediator. In the event the dispute is not resolved after such a meeting is concluded, the provisions of Section 13.3 shall apply.

13.3 **Arbitration**.

(A) Any dispute, controversy or claim arising out of or relating to this Agreement, including any claim based on or arising from an alleged tort, shall at the request of any Party be determined by arbitration if not resolved by mediation pursuant to Section 13.2. The arbitration shall be conducted in accordance with Commercial Arbitration Rules of the American Arbitration Association ("AAA") then in effect, except where modified by this Agreement. Notwithstanding any choice of law provision in this Agreement, the United States Arbitration Act (Title 9, U. S. Code) shall govern the interpretation and enforcement of this arbitration provision.

(B) The arbitration shall be conducted by a single arbitrator. The choice of the arbitrator shall be governed by the following procedure. Each Party shall submit to the other Party within thirty (30) days of the submission of a request for arbitration a list of five (5) persons with knowledge in the area of the subject matter of the dispute and who are not in any way associated with either Party. If there are one or more common persons on such lists, the Parties shall choose one such common person to be the arbitrator. If there are no common persons on such lists, each Party shall be entitled to strike four of the other Party's choices, and the Parties' remaining two candidates shall together mutually select and agree upon an impartial arbitrator to conduct such arbitration proceedings. If such candidates are unable to agree, the arbitrator shall be selected by the AAA. The Parties agree that arbitration proceedings will take place in Atlanta, Georgia or such other location agreed between the Parties.

(C) Each Party may serve a single request for production of documents. If disputes arise concerning these requests, the arbitrator shall have sole and complete discretion to determine the disputes. The arbitrator shall give effect to Applicable Law, including statutes of limitation, in determining any claim, and any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator.

(D) The arbitrator is empowered to award all damages otherwise available under the terms of this Agreement, except punitive damages, and each Party hereby waives any right to punitive damages. The arbitrator shall deliver a written opinion setting forth the proposed award and supporting findings of fact, conclusions of law, and the rationale for the decision. The award shall become final thirty (30) days after service of the opinion on the Parties if no motion for reconsideration is

filed as provided below. The arbitrator shall reconsider the decision once upon the motion and at the expense of the moving Party. Any such motion shall be filed within twenty (20) days of service of the opinion on the Parties, and a response may be filed by the other Party within twenty (20) days of service of the motion. The arbitrator shall render a decision on the motion for reconsideration within sixty (60) days of service of the motion. Any alteration in the proposed award shall be accompanied by a revised opinion setting forth the findings of fact, conclusions of law and rationale supporting the revised award. The award shall be final when the decision on the motion for reconsideration, including any revised opinion, is served on the Parties. Article 8 hereof, Confidential Information, shall apply to the arbitration proceeding, all evidence taken and the opinion. Judgment upon the decision rendered by the arbitrator may be entered in any court having jurisdiction as provided in the United States Arbitration Act. The institution and maintenance of an action for judicial relief or pursuit of a provisional or ancillary remedy shall not constitute a waiver of the right of any Party, including the plaintiff, to submit the controversy or claim to arbitration if another Party contests such action for judicial relief.

(E) No provision of this Section 13.3 shall limit the right of a Party to this Agreement to obtain provisional or ancillary remedies from a court of competent jurisdiction before, after, or during the pendency of any arbitration. The exercise of a remedy does not waive the right of any Party to resort to arbitration. The Parties acknowledge that for the purposes of this Agreement (i) preliminary injunctions, appointments of receivers, attachments, temporary protective orders, and writs of possession constitute "provisional remedies," and (ii) judicial actions to enforce a decision reached pursuant to this Section constitute "ancillary remedies."

ARTICLE 14

MISCELLANEOUS

14.1 **Notices**. Any notices or other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given as follows: (i) upon receipt if personally delivered; (ii) by telecopy with written acknowledgment of receipt or (iii) upon deposit in the mail, if sent by first class, certified or registered mail, postage prepaid, or by an overnight delivery service, addressed as follows:

If to WHOLESALER:Fleming Companies, Inc.
6301 Waterford Boulevard
P.O. Box 26647
Oklahoma City, Oklahoma 73126
Attn: Richard Palmer

If to BUYPASS: BUYPASS Corporation
360 Interstate North Parkway, Suite 400
Atlanta, GA 30339
Attn: Scott Plumblee, Sr. Vice President

14.2 **Use of Trade Names**. Neither Party shall use the other Party's name, trademarks, logos, service marks or other trade names in connection with any representation, solicitation, advertising or promotion, or sales or marketing publication or advertisement or for any purpose whatsoever without prior full disclosure to and written permission from the other.

14.3 **Relationship of Parties**. The Parties hereto are and shall remain independent contractors, and neither they, nor their respective individual employees shall have, or hold themselves out as having, any power to bind the other to any third party. Nothing contained in this Agreement shall give rise to or establish, or be deemed to give rise to or establish, any principal-agent, employer-employee, joint venture, or partnership relationship.

14.4 **Compliance with Laws**. The Parties agree to comply, and further agree to instruct all who perform services for them hereunder to comply, with all Applicable Law.

14.5 **Governing Law**. This Agreement shall be governed by, construed and interpreted in accordance with the laws of the State of Georgia.

14.6 **Assignment**. Neither Party may assign this Agreement or any of its rights or obligations hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld. Consent for assignment to parent corporations or wholly-owned subsidiaries shall not be required, providing that the assigning entity remains secondarily liable for performance of the terms and conditions hereof. Subject to the foregoing, this Agreement shall be binding upon and the rights and benefits set forth herein shall inure to the benefit of the Parties hereto and their respective successors and permitted assigns.

14.7 **Severability**. If a court of competent jurisdiction should determine that any portion of this Agreement is illegal, invalid or unenforceable, then such provision shall be deemed to have been stricken from this Agreement, but the remaining portions of this Agreement shall not be affected by the ruling of such court and such remaining provisions shall continue to be binding upon the Parties hereto.

14.8 **Entire Agreement**. This Agreement, with any exhibits, schedules or addenda attached hereto, constitutes the entire agreement of the Parties with respect to the subject matter hereof. Except as expressly provided herein, this Agreement may be waived, modified or amended only by a writing signed by all of the Parties hereto. Each Merchant Agreement entered into by BUYPASS and any Authorized Merchant pursuant hereto shall constitute a separate agreement enforceable in accordance with its terms.

14.9 **Headings**. Headings in this Agreement are solely for convenience of reference and are not to be construed as limiting or affecting the meaning or interpretation of this Agreement or any provision hereof.

14.10 **Force Majeure**. In the event either Party hereto shall be delayed or hindered in or prevented from the performance of any act required under this Agreement by reason of strikes, lockouts, labor troubles, inability to procure materials, failure of power, restrictive governmental law or regulations, riots, insurrection, war or other reason of a like nature not the fault of the Party delayed in performing work or doing acts required under the terms of this Agreement, then performance of such act shall be excused for the period of the delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

14.11 **Survival of Obligations**. No termination or expiration of this Agreement shall release any Party hereto from any liability or obligation which may have accrued prior to, or which may be accruing at the time of, termination. The obligations of the Parties pursuant to Articles 8, 9, 10, 11 and 13 and Section 14.2 shall survive the termination or expiration of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed by their authorized officers, all effective as of the day and year first written above.

FLEMING COMPANIES, INC.
an Oklahoma corporation

By: _____

Printed Name: Richard Palmer

Title: Manager, Electronic Payments

Executed on: Sept 17, 1997

BUYPASS CORPORATION
a Georgia corporation

By: _____

Printed Name: Scott Plumblee

Title: Sr. VP, Supermarket / Major Retail

Executed on: Sept. 17, 1997