

STIPULATION AND SETTLEMENT AGREEMENT

This Stipulation and Settlement Agreement (“Agreement”) is entered into among the State of New York (the “State”), defendants Card Compliant LLC and Phillip Rouse (collectively, “Defendants”), and relator William S. French (the “Relator”), through their authorized representatives. The above-named parties are hereinafter collectively referred to as “the Parties.”

PREAMBLE

WHEREAS, on or about July 12, 2016, Relator filed a *qui tam* action captioned *State of New York ex rel. William S. French v. H&M Hennes Mauritz, L.P., et al.* in the Supreme Court of the State of New York, New York County, Index 101101/2016 (the “Action”), alleging that Defendants knowingly made, used, or caused to be made or used, false records and statements that were material to H&M Hennes Mauritz, L.P.’s obligation to transmit unredeemed gift card balances to the State as required by the N.Y. Abandoned Property Law, in violation of the New York False Claims Act, N.Y. State Finance Law §§ 187 *et seq.* (“NYFCA”); and

WHEREAS, the Office of the Attorney General thereafter commenced an investigation in connection with the allegations of the Relator’s complaint (the “Complaint”); and

WHEREAS, as a result of that investigation, the State contends that it has certain civil claims against Defendants under the NYFCA; and

WHEREAS, Defendants have agreed to this Agreement in settlement of the violations alleged below and to avoid the time, expense, and distraction of litigation, and the Office of the Attorney General has agreed to accept the terms of the Agreement and

discontinue its investigation in connection with the allegations of the Complaint in the Action;

WHEREAS, this Agreement is made in compromise of disputed claims and is neither an admission of liability or wrongdoing by Defendants nor a concession by the State that its claims are not well founded; and

WHEREAS, Relator claims entitlement under State Fin. Law § 190(6) to a share of the proceeds of this Agreement and to Relator's reasonable expenses, attorney's fees and costs;

NOW THEREFORE, in consideration of the mutual promises and obligations of the Agreement, the Parties agree fully and finally to settle this Action pursuant to the Terms and Conditions below:

BACKGROUND

1. CardFact, Ltd. ("CardFact") was an Ohio limited liability company founded in 2003. In 2009, CardFact Ltd.'s assets were acquired by defendant Card Compliant LLC ("Card Compliant"), a Kansas limited liability company with a principal place of business in Leawood, Kansas.

2. From 2009 to the present, defendant Phillip C. Rouse ("Rouse") has served as Chairman of Card Compliant. In the relevant period, Rouse held himself out as Chairman and General Counsel of CardFact, Inc.

3. H&M Hennes & Mauritz, L.P. ("H&M") is a New York limited partnership with a principal place of business in New York, New York. It is wholly owned by H&M Hennes & Mauritz AB, a fashion retailer based in Sweden.

4. As part of its retail business, H&M sells gift cards. H&M gift cards represent a money balance that may be redeemed by a holder of the card for merchandise

at H&M stores in the United States and online, up to the amount represented by the card. When less than the total balance represented by a gift card is redeemed, the unredeemed amount remains held by H&M for the benefit of the cardholder.

5. Under New York's Abandoned Property Law, unredeemed balances on gift cards issued by New York companies such as H&M must be escheated to the State if the owner of the card is unknown and the card has not been used for five years.

6. In 2008, H&M was holding approximately \$4.1 million in unredeemed gift card balances. H&M knew that once the underlying cards became dormant, it would be required to transfer any remaining unredeemed gift card balances to the State pursuant to the New York's Abandoned Property Law.

7. Nonetheless, in order to avoid relinquishing any unredeemed gift card balances to the State, in December 2008 H&M and CardFact entered into an agreement (the "2008 Contract"), which was intended to make it appear that CardFact, and not H&M, issued and administered H&M's gift cards. And because CardFact was not incorporated in New York, it was not required to transfer to the State unredeemed balances on gift cards that it actually issued.

8. While the 2008 Contract provided that CardFact would issue gift cards redeemable at H&M's stores and would assume H&M's liability for outstanding gift card balances on cards issued by H&M, CardFact did not and never intended to sell or administer H&M's gift cards. Indeed, CardFact's marketing materials stated that the 2008 Contract would "not change how you run your business...." According to CardFact, H&M could "sell the same gift cards it has always sold" and "use the same vendors for processing, printing and fulfillment" of its gift card sales, and H&M would

“always manage[] the cash proceeds from gift card sales.” CardFact told H&M that the “only cash passing between [it] and CardFact” was a nominal annual fee paid to CardFact.

9. In fact, after H&M and CardFact signed the 2008 Contract, H&M did not alter how its gift cards were sold, tracked, or redeemed, and it continued to hold the cash comprising the unredeemed gift card balances. Nor did H&M transfer any unredeemed gift card balances to the State.

10. In 2011, the State Comptroller, who administers New York’s Abandoned Property Fund, contacted H&M with questions about the 2008 Contract. Both H&M and CardFact wanted to hide the fact that the cash comprising the unredeemed gift card balances remained at H&M. CardFact advised H&M to share only some of the 2008 Contract terms with the State Comptroller, and not to disclose the fee provisions that would have revealed that H&M retained the cash comprising the unredeemed gift card balance (minus its fee to CardFact).

11. In response to the State Comptroller’s questions, CardFact prepared a letter which Rouse, acting in his capacity as Chairman and General Counsel of CardFact, edited and signed. The letter claimed that CardFact issued the H&M gift cards, and that CardFact “paid out tens of millions of dollars” in connection with H&M gift card redemptions. In fact, CardFact had not done so, and lacked the resources to honor H&M’s millions of dollars of outstanding gift cards.

12. On May 18, 2011, CardFact sent the letter to H&M, which forwarded it to the State Comptroller. Neither H&M nor CardFact disclosed to the State Comptroller that H&M, and not CardFact, performed the gift-card issuance and marketing services and

retained the unredeemed gift card balances.

13. In November 2011, the State Comptroller contacted Rouse with further questions. Rouse told the State Comptroller that CardFact had not filed abandoned property reports in New York for the H&M gift cards “because the cards are anonymous cards in that the records of CardFact Ltd do not include personally identifiable information on the cardholders.” This statement implied that CardFact was selling and marketing H&M’s gift cards and was holding the money comprising the unredeemed gift card balances, when in fact H&M was doing those things.

14. As a result of its arrangement with CardFact, H&M did not transfer any unredeemed gift card balances to the State, and the amount of those balances that should have been escheated increased to approximately \$18.3 million by 2020, after which H&M finally transferred the escheatable unredeemed gift card balances to the State.

15. Beginning in 2008, and continuing through the Effective Date (defined below), Defendants thus knowingly concealed or knowingly and improperly avoided or decreased H&M’s obligation under the N.Y. Abandoned Property Law to transfer to the State unredeemed gift card balances and knowingly made or caused to be made false statements material to H&M’s obligation under the N.Y. Abandoned Property Law to transfer to the State unredeemed gift card balances, in violation of the NYFCA.

16. The conduct described in the foregoing Paragraphs 2 through 15 is hereinafter referred to as the “Covered Conduct.”

TERMS AND CONDITIONS

Settlement Amount

17. Defendants are jointly and severally liable for and will pay the sum of four million, three hundred seventy-five thousand dollars (\$4,375,000.00) (the “Settlement

Amount”) to resolve the Action and the Office of the Attorney General’s investigation. This amount represents the damages and penalties being recovered by the State, the Relator’s share, *i.e.*, the share to which the Relator is entitled under New York State Finance Law § 190(6), as well as the State’s attorney’s fees and costs.

18. The Settlement Amount is divided into two portions: a portion paid to the State (“State’s Share”), and a portion paid to the Relator (“Relator’s Share”). The Relator’s Share is the portion to which the Relator is entitled under New York State Finance Law § 190(6).

19. Defendants agree to pay or cause to be paid the State’s Share and the Relator’s Share as follows:

- a. Within fifteen (15) calendar days of the Effective Date (defined below) of this Agreement, Defendants agree to pay or cause to be paid the State’s Share in the sum of three million three hundred sixty-eight thousand seven hundred fifty dollars (\$3,368,750.00). Such payment will be made by wire transfer pursuant to instructions provided by the Office of the Attorney General.
- b. Within fifteen (15) calendar days of the Effective Date of this Agreement, the Defendants agree to pay or cause to be paid the Relator’s Share of the Settlement Amount in the sum of one million six thousand two hundred and fifty dollars (\$1,006,250.00). Such payment shall be made in accordance with written instructions to be provided by Relator’s counsel, Daniel Miller.

20. Defendants agree that they will not claim, assert, or apply for a tax

deduction or tax credit on any New York State tax return for any portion of the amount due under this Agreement.

21. In consideration of the obligations of Defendants as set forth in this Agreement, Relator and the State, within thirty (30) days after the Effective Date (defined below) of this Agreement, shall file, pursuant to CPLR § 3217(a), a Notice of Discontinuance of the Action, subject to the exceptions set forth in this Agreement. Such dismissal shall, however, expressly preserve the Court's jurisdiction over Defendants' obligation to pay reasonable attorney's fees, expenses and costs to Relator pursuant to New York State Finance Law § 190(6).

Releases

22. Subject to the exceptions in the next Paragraph, in consideration of the obligations of Defendants set forth in this Agreement, conditioned upon the full payment by Defendants of the Settlement Amount and subject to Paragraph 30 herein (concerning bankruptcy proceedings commenced within ninety-one (91) days of the Effective Date of this Agreement or any payment to the State under the Agreement, whichever is later), the State releases Defendants and each of their predecessors, successors, and affiliates from any civil or administrative monetary claim the State has or may have for the Covered Conduct under the New York False Claims Act, N.Y. State Finance Law §§ 187 *et seq.*

23. Notwithstanding any term of this Agreement, the State specifically does not release any person or entity from any of the following liabilities:

- a. Any civil, criminal, or administrative liability arising under state or municipal tax laws;
- b. Any criminal liability;

- c. Any civil liability that Defendants have or may have under any state statute, regulation, or rule not covered by this Agreement;
- d. Any liability to the State (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon such obligations as are created by this Agreement;
- f. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- g. Any liability for personal injury or property damage arising from the Covered Conduct;
- h. Any liability for failure to deliver goods or services due; and
- i. Any civil or administrative liability of individuals, except as provided for herein.

24. In consideration of the obligations of Defendants in this Agreement, conditioned upon the full payment by Defendants of the Settlement Amount, Relator, for himself, and for his heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, releases Defendants and each of their predecessors, successors, affiliates, directors, officers, employees, and agents from any and all claims that Relator has asserted, could have asserted, or may assert in the future on behalf of himself, and from any civil monetary claim that Relator has asserted, could have asserted, or may assert in the future on behalf of the State or any local governments within the State for the Covered Conduct under the New York False Claims Act, N.Y.

State Finance Law §§ 187 *et seq.*; provided, however, that nothing in this Agreement shall preclude Relator from recovering his expenses or attorney's fees and costs from Defendants, pursuant to N.Y. State Finance Law § 190(6).

25. Defendants, for themselves and their respective heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, fully and finally release the State, its agencies, officers, employees, servants, attorneys, and agents from any claims (including claims for attorney's fees, costs, and expenses of every kind and however denominated) that Defendants have asserted, could have asserted, or may assert in the future against the State, its agencies, officers, employees, servants, attorneys, agents and assigns, related to the Covered Conduct and the State's investigation and prosecution thereof.

26. Defendants for themselves and their respective heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns fully and finally release Relator, his heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns from any claims (including claims for attorney's fees, costs, and expenses of every kind and however denominated) that Defendants have asserted, could have asserted, or may assert in the future against the Relator, his heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, related to the Covered Conduct and Relator's and the State's investigations and prosecution concerning the Action.

27. The Relator, for himself individually, and for his heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, fully and finally releases the State, its agencies, officers, employees, servants, attorneys, and agents

from any claims (including claims for attorney's fees, costs, and expenses of every kind and however denominated) that Relator has asserted, could have asserted, or may assert in the future against the State, arising out of the filing of the Action or from any other claim for a share of the settlement proceeds. Relator accepts the payment described in Paragraph 19 in full settlement of any claims Relator may have against the State under this Agreement or as a result of the Action. This Agreement does not resolve or in any manner affect any claims the State has or may have against Relator arising under State tax laws, or any claims arising under this Agreement.

28. Relator, and each of his respective heirs, personal representatives, legal representatives, successors, attorneys, agents and assigns, agrees not to object to this Agreement and agrees and confirms that this Agreement is fair, adequate, and reasonable pursuant to New York State Finance Law § 190(5)(b)(ii).

29. The State has agreed to the terms of this Agreement based on, among other things, the representations made to the Office of the Attorney General by Defendants and their counsel. To the extent that any material representations are later found to be inaccurate or misleading, this Agreement is voidable by the Office of the Attorney General in its sole discretion. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Agreement has been made to or relied upon by Defendants in agreeing to this Agreement. Defendants acknowledge that they have entered this Agreement freely and voluntarily and upon due deliberation with the advice of counsel.

Bankruptcy and Non-Payment

30. If within ninety-one (91) days of the Effective Date of this Agreement or

of any payment made under this Agreement, any of the Defendants or a third party commence any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking to have any order for relief of its or their debts, or seeking to adjudicate any of the Defendants as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for any of the Defendants or for all or any substantial part of any of the Defendants' assets, Defendants agree as follows:

- a. Defendants' obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547, and Defendants shall not argue or otherwise take the position in any such case, proceeding, or action that: (i) their obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) they were insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment of the Settlement Amount; or (iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Defendants.
- b. If any of the Defendants' obligations under this Agreement are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the State, at its sole option, may rescind the releases in this Agreement insofar as it affects the State and bring any civil and/or administrative claim, action, or proceeding against Defendants for the claims that would otherwise be covered by the releases provided above, and Defendants agree that (i) any

such claims, actions, or proceedings brought by the State are not subject to an “automatic stay” pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceedings described in the first clause of this Paragraph, and Defendants shall not argue or otherwise contend that the State’s claims, actions, or proceedings are subject to an automatic stay; (ii) they shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceedings that are brought by the State within 60 calendar days of written notification to Defendants that the releases have been rescinded pursuant to this Paragraph, except to the extent such defenses were available on the Effective Date of the Agreement; and (iii) the State has a valid claim against Defendants in the amount of treble damages plus penalties under the New York False Claims Act, and may pursue its claim in the case, action, or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

- c. Defendants acknowledge that their agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

31. In the event of the failure by Defendants to make any or all payments of the Settlement Amount, including the State’s Share and the Relator’s Share, when due according to Paragraph 19, the State will provide written notice of the non-payment to the Defendants. Such notice shall be given to the person and address designated in

Paragraph 43 by (i) delivery in person, (ii) a nationally recognized next-day courier service, or (iii) first class, registered or certified mail, postage prepaid. Notice so given shall be effective upon (i) receipt, or (ii) on the fifth (5th) day following mailing, whichever occurs first. Defendants shall have an opportunity to pay the unpaid balance within five (5) calendar days from the effective date of the notice. If Defendants fail to pay the overdue unpaid balance of its payment obligations under this Agreement within five (5) calendar days from the effective date of the notice of non-payment (“Default”), the State, in its sole discretion, may declare or do any or all of the following, or may exercise, without limitation, any remedies available under law, including:

- a. The State may declare the entire Settlement Amount, less any payments already made, immediately due and payable, with unpaid amounts bearing the Default rate of interest at the interest rate set forth in New York Civil Practice Law and Rules § 5004 beginning as of the date of Default until payment of the remaining Settlement Amount is made in full; and/or
- b. Pursue all available remedies to enforce this Agreement and remedy violations of this Agreement. In the event of a Default as described above, Defendants agree not to contest any action to enforce this Agreement or any other collection action undertaken by the State pursuant to this Paragraph or pursuant to law, and Defendants agree to pay the State, without limitation, all reasonable costs of collection and enforcement of this Agreement, including attorney’s fees, expenses and court costs; and/or
- c. Rescind its agreement to this Agreement as to Defendants and reinstitute an action or actions against Defendants in this Court. In the event the

State reinstitutes such action, Defendants: (1) expressly agree not to plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims which (i) are filed by the State after the written notification to Defendants of Default, and (ii) relate to the Covered Conduct, and (2) further waive and will not assert any defenses Defendants may have to any civil or administrative action relating to the Covered Conduct.

32. In the event of the failure by Defendants to make any or all payments of the Relator's Share when due according to Paragraph 19, the Relator will provide written notice of the non-payment to Defendants. Such notice shall be given to the person and address designated in Paragraph 43 by (i) delivery in person, (ii) a nationally recognized next day courier service, or (iii) first class, registered or certified mail, postage prepaid. Notice so given shall be effective upon (i) receipt, or (ii) on the fifth (5th) day following mailing, whichever occurs first. Defendants shall have an opportunity to pay the unpaid balance within five (5) calendar days from the effective date of the notice. If Defendants fail to pay the overdue unpaid balance of its payment obligations for the Relator's Share under this Agreement within five (5) calendar days from the effective date of the notice of non-payment ("Relator's Share Default"), the Relator, in his sole discretion, may declare or do any or all of the following:

- a. The Relator may declare the entire Relator's Share, less any payments already made, immediately due and payable, with unpaid amounts bearing the Default rate of interest at the interest rate set forth in New York Civil

Practice Law and Rules § 5004 beginning as of the date of Relator's Share Default until payment of the remaining Relator's Share is made in full; and/or

- b. Institute an action or actions against Defendants in this Court to collect the unpaid amounts of the Relator's Share plus applicable interest.

Defendants agree not to contest any action to enforce this Agreement with respect to the Relator's Share or any other collection action undertaken by the Relator pursuant to this Paragraph, and Defendants agree to pay the Relator all reasonable costs of collection and enforcement of this Agreement, including attorney's fees and expenses.

Additional Terms

33. Defendants represent and warrant, through the signatures below, that the terms and conditions of this Agreement are duly approved, and that execution of this Agreement is duly authorized.

34. The undersigned counsel and any other signatories represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

35. Defendants shall not make any statements or publications, oral or written, of a defamatory or disparaging nature concerning the State or this Agreement. Nothing in this Paragraph affects Defendants' testimonial obligations or their right to take legal or factual positions in defense of litigation or other legal proceedings to which the State is not a party, nor shall it affect Defendants' right to comment publicly about this Agreement or the subject thereof to the extent that such comment or statement does not

disparage or defame the State.

36. This Agreement is not intended for use by any third party in any other proceeding.

37. This Agreement and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

38. Except as provided in Paragraphs 31 and 32 above, each Party shall bear its own legal and other costs incurred in connection with this matter.

39. This Agreement constitutes the complete agreement between and among the Parties, and may not be amended except by an instrument in writing signed on behalf of all the Parties to this Agreement.

40. This Agreement shall be binding on and inure to the benefit of the Parties to this Agreement and their respective successors and assigns, provided that no Party, other than the Office of the Attorney General, may assign, delegate, or otherwise transfer any of its rights or obligations under this Agreement without the prior written consent of the Office of the Attorney General.

41. In the event that any one or more of the provisions contained in this Agreement, other than provisions concerning payment and release, shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement.

42. Any failure by the State to insist upon the strict performance by Defendants and/or Relator of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions hereof, and the State, notwithstanding such failure, shall

have the right thereafter to insist upon the strict performance of any and all of the provisions of this Agreement to be performed by the Relator and/or Defendants. Any failure by Relator to insist upon the strict performance by Defendants of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions hereof, and Relator, notwithstanding such failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Agreement to be performed by the Defendants.

43. All communications from any Party concerning the subject matter of this Agreement shall be addressed as follows:

If to the State of New York:

Laura Jereski
Assistant Attorney General
Office of the New York Attorney General
Taxpayer Protection Bureau
28 Liberty Street, 21st Floor
New York, NY 10005
(212) 416-8943

If to Relator:

Daniel Miller
Walden Macht & Haran LLP
2000 Market Street, Suite 1430
Philadelphia, PA 19103
(267) 516-0780

If to Defendants Card Compliant and Rouse:

Sean Cenawood
Dentons US LLP
1221 Avenue of Americas
New York, New York 10020
212-398-4867

44. Except for written notices of Defendants' non-payment issued by the State or Relator, the sending and receipt of which shall be governed by the provisions in Paragraphs 31 and 32 respectively, all communications from any Party to another Party concerning this Agreement shall be sent by United States mail with return receipt

requested or overnight delivery service with signature required to the signatory counsel for each Party, unless such communications are sent by email and a reply is written without objection to the electronic means of communication.

45. In any subsequent investigation, civil action, or proceeding by the State to enforce this Agreement, or for violations of the Agreement, Defendants expressly agree and acknowledge that any statute of limitations or other time-related defenses are tolled from and after the effective date of this Agreement, and that the State may use statements, documents or other materials produced or provided by the Defendants prior to or after the effective date of this Agreement.

46. If a court of competent jurisdiction determines that Defendants have breached this Agreement, other than by failing to pay amounts owed under the Agreement, the remedy for which is described in Paragraphs 31 and 32, Defendants shall pay to the Office of the Attorney General and/or to Relator the cost, if any, of obtaining such determination and of enforcing this Agreement, including, without limitation, legal fees, expenses, and court costs.

47. Any headings, titles and subtitles contained in this Agreement are solely for the purpose of reference, are not part of the agreement of the Parties, and shall not in any way affect the meaning or interpretation of this Agreement.

48. This Agreement shall be governed by the laws of the State of New York without regard to any conflict of laws principles. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement will be the Supreme Court of the State of New York, New York County.

49. This Agreement is effective on the date of signature of the last signatory

of the Agreement (the “Effective Date”). Facsimiles and .pdfs of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

50. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.