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12 **IN THE UNITED STATES DISTRICT COURT**
 13 **FOR THE EASTERN DISTRICT OF WASHINGTON**

15 Federal Trade Commission,
 16 Plaintiff,
 17 vs.
 18 Merchant Services Direct, LLC,
 19 also d/b/a Sphyra, *et al.*,
 20 Defendants.
 21

CASE NO. 13-CV-0279-TOR
**STIPULATION AND ORDER AS
 TO DEFENDANTS BOOST
 COMMERCE, INC., and KYLE
 LAWSON DOVE**

22
 23 Plaintiff Federal Trade Commission (“Commission” or “FTC”) and
 24 Settling Defendants (Boost Commerce, Inc., and Kyle Lawson Dove) agree
 25 to the entry of this Stipulated Order by this Court in order to resolve all
 26 matters in dispute in this action between them.
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THEREFORE, IT IS ORDERED as follows:

FINDINGS

- 1. This Court has jurisdiction over this matter.
- 2. Settling Defendants waive any claim that they might have under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action through the date of this Stipulated Order, and agree to bear their own costs and attorney’s fees.
- 3. Settling Defendants and the Commission waive all rights to appeal or otherwise challenge or contest the validity of this Stipulated Order.
- 4. Entry of this Stipulation and Order hereby resolves all claims alleged in the Complaint.

DEFINITIONS

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

- 1. **“Card Payment Processing Goods or Services”** means goods or services that allow the merchant to process electronic payments by accepting debit and credit card transactions. Card Payment Processing Goods or Services may include, among other things: the performance of any function of collecting, preparing, formatting, charging, or transmitting

1 consumer bank or credit card account data for use in connection with the
2 debiting, charging, or accessing of a consumer's bank or credit card
3 account; monitoring, tracking, and reconciling payments, returns, and
4 chargebacks; providing pre-authorization, post-authorization, and refund
5 services to merchants; and disbursing funds receipts to merchants.
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8 2. **"Clearly and prominently"** means as follows:

9 A. In print communications, the disclosure shall be
10 presented in a manner that stands out from the accompanying text, so that
11 it is sufficiently prominent, because of its type size, contrast, location, or
12 other characteristics, for an ordinary consumer to notice, read and
13 comprehend it; and
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15 B. Regardless of the medium used to disseminate it, the
16 disclosure shall be in understandable language, size, and syntax. Nothing
17 contrary to, inconsistent with, or in mitigation of the disclosure shall be
18 used in any communication.
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21 3. **"Settling Defendants"** means Kyle Lawson Dove and Boost
22 Commerce, Inc., and its successors and assigns, as well as any subsidiaries,
23 and any fictitious business entities or business names created or used by this
24 entity.
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1 4. **“Defendants”** means Settling Defendants and Merchant
2 Services Direct, LLC, dba Sphyra, Inc., and their successors and assigns, as
3 well as any subsidiaries, and any fictitious business entities or business
4 names created or used by these entities, or any of them and Shane Patrick
5 Hurley, by whatever other names he may be known.
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8 5. **“Merchant”** means a person, corporation, or any other entity
9 that acts as a consumer by purchasing or leasing Card Payment Processing
10 Goods or Services.
11

12 6. **“Person”** means a natural person, an organization or other legal
13 entity, including a corporation, partnership, sole proprietorship, limited
14 liability company, association, cooperative, or any other group or
15 combination acting as an entity.
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18 7. **“Sales Office Manager”** means that person contractually
19 appointed to manage a sales office that participates in conduct related to the
20 subject matter of this Stipulated Order.
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22 **STIPULATED ORDER**

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24 **I.**

25 **IT IS THEREFORE ORDERED** that Settling Defendants shall not,
26 whether acting directly or indirectly, in connection with the advertising,
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1 marketing, promotion, offering for sale, sale, or lease of any Card Payment
2 Processing Goods or Services:

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4 A. Misrepresent or assist others in misrepresenting, any material
5 fact, including but not limited to:

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7 1. Settling Defendants' affiliation with the merchants'
8 current payment processors;
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10 2. The savings any merchant will obtain if the merchant
11 purchases Card Payment Processing Goods or Services from
12 Settling Defendants;
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14 3. The fees or rates merchants will be charged for any Card
15 Payment Processing Goods or Services; and
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17 4. That merchants who sign applications or leases with
18 Settling Defendants for Card Payment Processing Goods or
19 Services either are not contractually bound by their
20 signatures or they can cancel at any time without penalty.

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22 B. Conceal or fail to disclose, or assisting others in concealing or
23 failing to disclose, clearly and prominently, to any merchant any
24 material fact, including, but not limited to, the following:

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26 1. Costs, rates, charges, or fees any merchant will be
27 required to pay; and
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2. That merchants who sign applications, agreements, or leases are signing binding and non-cancellable contracts;

C. Alter, add, or delete any term relating to costs, rates, charges, or fees of any binding document, or assisting others in altering, adding, or deleting such terms of any binding document previously signed by merchants, without obtaining a new signature from the merchant;

D. Fail to furnish merchants, before submitting any application for processing, with a complete copy of each contract or other document requiring the merchants' signatures; and

E. Make any representation or assist others in making any representation, about the fees, rates, costs, terms, savings, or benefits of any Card Payment Processing Good or Service, unless, at the time such representation is made, Settling Defendants possess and rely upon a reasonable basis to substantiate that the representation is true.

II.

IT IS FURTHER ORDERED that Settling Defendants, whether acting directly or indirectly, in connection with any business where: (1) a Settling Defendant is the majority owner of the business or directly or indirectly

1 manages or controls the business; and (2) the business is engaged, directly
2 or indirectly, in the advertising, marketing, promotion, offering for sale,
3 sale, or lease of any Card Payment Processing Goods or Services, are
4 prohibited from:
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7 A. Failing to take reasonable steps sufficient to monitor and ensure
8 that all employees and sales agents comply with this Stipulated Order.

9 Such steps shall include the following:
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- 11 1. Establishing and maintaining a procedure for receiving and
12 responding to merchant complaints;
- 13 2. Ascertaining the number and nature of merchant complaints
14 regarding transactions in which each employee or sales agent
15 is involved;
- 16 3. Promptly investigating fully any merchant complaint
17 received by any business to which this Section applies; and
18 4. Taking corrective action with respect to any sales agent or
19 employee whom Settling Defendants determine is not
20 complying with this Stipulated Order.
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25 B. Before any merchant signs any contract with Settling
26 Defendants, Settling Defendants' sales agents shall provide the merchant
27 with a separate document setting forth all fees, charges, and rates to be
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1 assessed or debited in connection with any contracts for Settling
2 Defendants' Card Payment Processing Goods or Services unless prohibited
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4 by the sponsoring bank or participating independent sales organization
5 ("ISO").
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7 **III.**

8 **IT IS FURTHER ORDERED** that Defendant Kyle Lawson Dove
9 hereby assigns to the Commission all of his right, title and interest in that
10 certain Promissory Note, dated July 8, 2013 from defendant Merchant
11 Services Direct, LLC, on which Merchant Services Direct, LLC, owes the
12 principal amount of six hundred ninety-five thousand six hundred twelve
13 dollars and forty-three cents (\$695,612.43) plus interest, less any principal
14 and interest already paid.
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18 **IV.**

19 **IT IS FURTHER ORDERED** that Settling Defendants obtain
20 acknowledgments of receipt of this Stipulated Order:
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22 A. Each Settling Defendant, within seven (7) days of entry of this
23 Stipulated Order, must submit to the Commission an acknowledgment of
24 receipt of this Stipulated Order sworn under penalty of perjury.
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26 B. For five (5) years after entry of this Order, defendant Kyle
27 Lawson Dove, for any Card Payment Processing business that he
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1 individually or collectively with any other Defendant is the majority owner
2 or controls directly or indirectly, and Boost Commerce, Inc., must deliver a
3 copy of this Stipulated Order to: (1) all principals, officers, directors, and
4 LLC managers and members; (2) all Sales Office Managers who participate
5 in conduct related to the subject matter of this Stipulated Order; and (3) any
6 business entity resulting from any change in structure as set forth in Section
7 VII of this Stipulated Order. Delivery must occur within seven (7) days of
8 entry of this Stipulated Order for current personnel. For all others, delivery
9 must occur before they assume their responsibilities.
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14 C. From each individual or entity to which a Settling Defendant
15 delivered a copy of this Stipulated Order, that Settling Defendant must
16 obtain, within thirty (30) days, a signed and dated acknowledgment of
17 receipt of this Stipulated Order.
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20 V.

21 **IT IS FURTHER ORDERED** that Settling Defendants make timely
22 submissions to the Commission:
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24 A. One (1) year after entry of this Stipulated Order, each Settling
25 Defendant must submit a compliance report, sworn under penalty of
26 perjury.
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1. Each Settling Defendant must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Settling Defendant; (b) identify all of Settling Defendant's Card Payment Processing businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each such business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Defendant (which Kyle Lawson Dove must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Settling Defendant is in compliance with each Section of this Stipulated Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Stipulated Order, unless previously submitted to the Commission.

2. Additionally, Kyle Lawson Dove must: (a) identify all of his telephone numbers and all of his physical, postal, email and Internet addresses, including all residences; (b) identify all of his Card Payment Processing business activities, including any

1 business for which he performs services whether as an employee
2 or otherwise, and any Card Payment Processing entity in which
3 he has any ownership interest; and (c) describe in detail his
4 involvement in each such business, including title, role,
5 responsibilities, participation, authority, control, and any
6 ownership.
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9 B. For five (5) years after entry of this Stipulated Order, each
10 Settling Defendant must submit a compliance notice, sworn under penalty
11 of perjury, within fourteen (14) days of any change in the following:
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- 14 1. Each Settling Defendant must report any change in: (a)
15 any designated point of contact; or (b) the structure of defendant
16 Boost Commerce , Inc., or any Card Payment Processing entity
17 that the Settling Defendant has any ownership interest in or
18 controls directly or indirectly controls that may affect
19 compliance obligations arising under this Stipulated Order,
20 including: creation, merger, sale, or dissolution of the entity that
21 engages in any acts or practices subject to this Stipulated Order;
 - 22 2. Additionally, Kyle Lawson Dove must report any change
23 in: (a) name, including aliases or fictitious name, or residence
24 address; or (b) title or role in any Card Payment Processing
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1 business activity, including any Card Payment Processing
2 business for which he performs services, whether as an
3 employee or otherwise, and any Card Payment Processing entity
4 in which he has any ownership interest, and identify the name,
5 physical address, and any Internet address of the business or
6 entity.
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9 C. Each Settling Defendant must submit to the Commission notice
10 of the filing of any bankruptcy petition, insolvency proceeding, or similar
11 proceeding by or against such Settling Defendant within fourteen (14) days
12 of its filing.
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15 D. Any submission to the Commission required by this Order to be
16 sworn under penalty of perjury must be true and accurate and comply with
17 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of
18 perjury under the laws of the United States of America that the foregoing is
19 true and correct. Executed on: _____" and supplying the date, signatory's
20 full name, title (if applicable), and signature.
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23 E. Unless otherwise directed by a Commission representative in
24 writing, all submissions to the Commission pursuant to this Stipulated
25 Order must be emailed to DEbrief@ftc.gov or sent by overnight courier
26 (not the U.S. Postal Service) to: **Associate Director for Enforcement,**
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1 **Bureau of Consumer Protection, Federal Trade Commission, 600**
2 **Pennsylvania Avenue NW, Washington, DC 20580.** The subject line
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4 must begin: *FTC v. Merchant Services Direct, LLC, et al.*, (FTC Matter
5 No. X130053).

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7 **VI.**

8 **IT IS FURTHER ORDERED** that Settling Defendants must create
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10 certain records for five (5) years after entry of the Stipulated Order, and
11 retain each such record for five (5) years. Specifically, Boost Commerce,
12 Inc., and Kyle Lawson Dove, for any Card Payment Processing business
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14 that such Settling Defendant, individually or collectively with any other
15 Defendants, is a majority owner or controls directly or indirectly, must
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17 create and retain the following records:

18 A. Accounting records showing the revenues from all Card
19 Payment Processing Goods or Services sold;

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21 B. Personnel records showing, for each person providing services,
22 whether as an employee or otherwise, that person's: name, addresses, and
23 telephone numbers; job title or position; dates of service; and, if applicable,
24 the reason for disciplinary action or termination;
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1 C. Records of all merchant or consumer complaints and refund and
2 cancellation requests, whether received directly or indirectly, such as
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4 through a third party, and any response;

5 D. All records necessary to demonstrate full compliance with each
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7 provision of this Stipulated Order, including all submissions to the
8 Commission; and

9 E. A copy of each unique contract, addendum to such contract,
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11 advertisement, training material, or other marketing material.

12 **VII.**

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14 **IT IS FURTHER ORDERED** that, for the purpose of monitoring
15 Settling Defendants' compliance with this Stipulated Order, including the
16 financial representations upon which the Commission relied in negotiating
17 this Stipulated Order:
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19 A. Within thirty (30) days of receipt of a written request from a
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21 representative of the Commission, each Settling Defendant must: submit
22 additional compliance reports or other requested information, which must
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24 be sworn under penalty of perjury; appear for depositions; and produce
25 documents for inspection and copying. The Commission is also authorized
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27 to obtain discovery, without further leave of court, using any of the
28 procedures prescribed by Federal Rules of Civil Procedure 29, 30

1 (including telephonic depositions), 31, 33, 34, 36, 45, and 69; *provided that*,
2 Settling Defendants, after attempting to resolve a dispute without court
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4 action and for good cause shown, may file a motion with this Court seeking
5 an order for one or more of the protections set forth in Rule 26 (c).
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7 B. For matters concerning this Stipulated Order, the Commission is
8 authorized to communicate directly with each Settling Defendant. Settling
9 Defendants must permit representatives of the Commission to interview any
10 employee or other person affiliated with any Settling Defendant who has
11 agreed to such an interview. The person interviewed may have counsel
12 present; and
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15 C. The Commission may use all other lawful means, including
16 posing, through its representatives as prospective customers, suppliers, or
17 other individuals or entities, to Settling Defendants or any individual or
18 entity affiliated with Settling Defendants, without the necessity of
19 identification or prior notice. Nothing in this Stipulated Order limits the
20 Commission's lawful use of compulsory process, pursuant to Sections 9 and
21 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.
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