

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.

PTL FLEET SALES, INC., by and through)
its Assignee, PENSKE TRUCK LEASING)
CO., L.P. and PENSKE TRUCK LEASING)
CO., L.P. (on its own behalf and as assignee)
of Freightliner LLC),)

Plaintiffs,)

vs.)

UNIVERSITY CREDIT UNION and)
FLEET NATIONAL BANK, N.A.,)

Defendants.)

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MAGISTRATE JUDGE
O'SULLIVAN

APR 11 2009
11:39 AM

COMPLAINT

Plaintiffs, PTL FLEET SALES, INC. ("PTL") by and through its assignee PENSKE TRUCK LEASING CO., L.P., PENSKE TRUCK LEASING CO., L.P. ("Penske Truck") (collectively "Penske"), and PENSKE TRUCK AS ASSIGNEE OF FREIGHTLINER LLC ("Freightliner"), by and through their undersigned counsel, hereby file this Complaint against Defendants, UNIVERSITY CREDIT UNION, ("UCU") and FLEET NATIONAL BANK, N.A. ("Fleet"), and aver in support thereof as follows:

[Handwritten signature]

MARKOWITZ, DAVIS, RINGEL & TRUSTY, P.A.

I. PARTIES

1. Penske Truck is a citizen of the State of Delaware and is a Delaware limited partnership with its principal place of business at Route 10 and Pheasant Road, Reading Pennsylvania 19607.

2. PTL, is a citizen of the Commonwealth of Massachusetts and is a Massachusetts corporation with its principal place of business at Route 10 and Pheasant Road, Reading, Pennsylvania 19607. PTL has assigned its claims against the defendants in the within matter to Penske Truck.

3. Freightliner is a citizen of the State of Delaware and is a Delaware limited liability company with its principal place of business at 4747 N. Channel Ave., Portland, Oregon 97217. Freightliner has assigned its claims in this matter to Penske Truck.

4. UCU is a citizen of the State of Florida and is a credit union chartered by the State of Florida with its principal place of business located at 6250 S.W. 57th Avenue, Miami, FL 33143.

5. Fleet, formed as a national association pursuant to the laws of the United States, is a citizen of the State of Rhode Island with its principal place of business at 111 Westminster Street, Providence, Rhode Island, with a Florida registered agent of C T Corporation System at 1200 South Pine Island Road Plantation, FL 33324.

II. JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to the provisions of 28 U.S.C. §1332(a), the citizenship of the parties being diverse, and the amount in controversy, exclusive of interest and costs, exceeding the sum of \$75,000.00.

7. Venue is properly laid in the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. §1391, in that it is founded on diversity of citizenship, and both Defendants reside in and/or are found in the Southern District of Florida.

III. INTRODUCTION

8. This matter concerns, *inter alia*, the Defendant UCU's liabilities for converting a stolen check originally payable to Freightliner in the amount of One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD) and Fleet's liabilities for then charging Penske's account at Fleet for the full amount of the altered check. The altered check was never properly payable to the party to whom UCU remitted the funds.

IV. OPERATIVE FACTS

A. Background of Parties

9. At all times relevant to this litigation, Penske Truck was and continues to be in the business of renting and leasing commercial trucks and other vehicles throughout the United States, among other things.

10. At all times relevant to this litigation, PTL was and continues to be in the business of purchasing trucks for use by Penske Truck, among other things.

11. On or about, November 16, 2004, PTL executed the Assignment of Claims Agreement (the "PTL Assignment"), assigning all of PTL's claims in this litigation to Penske Truck (a true and correct copy of the "PTL Assignment" is attached hereto as Exhibit "G").

12. At all times relevant to this litigation, Freightliner was and continues to be in the business of manufacturing and selling trucks and vehicles such as those used by Penske.

13. On or about, November 30, 2004, Freightliner executed the Assignment of Claims Agreement (the "Assignment"), assigning all of Freightliner's claims in this litigation to Penske Truck (a true and correct copy of the "Assignment" is attached hereto as Exhibit "A").

14. At all times relevant to this litigation, Fleet was in the business of owning and operating banking and financial institutions throughout the United States, including the State of Florida, among other things.

15. At all times relevant to this litigation, UCU was in the business of owning and operating a credit union, which provides banking and financial services within the State of Florida. UCU is considered a bank under the Uniform Commercial Code (the "Code").

B. Penske's Fleet Account

16. Upon information and belief, on or about July 7, 2000, at Penske's request, General Electric Capital Corporation ("GECC") opened Fleet account number 9427779886 for PTL, also referred to as account number 67680 (the "Fleet Account").

17. Continuously and throughout all times relevant to this action, Penske has maintained the Fleet Account. Penske has made funds available in the Fleet Account to remit payments for the vehicles purchased by PTL for use by Penske Truck, and checks have been issued on the account in the name of PTL.

C. The Freightliner Check

18. On or about December 3, 2003, Penske intended to pay Freightliner One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD) as payment for trucks purchased by Penske from Freightliner.

19. On or about December 3, 2003, as payment to Freightliner for trucks purchased, Penske drafted check number 00015223 on the Fleet Account, in the amount of One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD) (the "Check") (a true and correct copy of the Check as originally drafted is attached hereto as Exhibit "B").

20. Penske caused the Check to be addressed to "Freightliner LLC PO Box 277953, Atlanta Georgia 30384-7953," which was a post office box maintained by Bank of America, Freightliner's Bank (the "BOA Box"), in accordance with Freightliner's instructions and the customary practice of the parties.

21. Bank of America was Freightliner's agent for the purpose of collecting the checks remitted to the BOA Box on Freightliner's behalf.

22. On or about December 3, 2003, Penske addressed the Check to Freightliner's BOA Box and delivered the Check into the United States mail.

D. The Check was Stolen, Altered, and Deposited

23. Upon delivery to the BOA Box, the Check was to be transferred to a Bank of America bank branch in Atlanta, Georgia, in order to be deposited into Freightliner's BOA account.

24. Upon information and belief, Bank of America employed a courier service to pick up all of the checks deposited into the BOA box and deliver them to the Bank of America bank branch in Atlanta, Georgia.

25. Upon information and belief, after the Check was mailed to the BOA Box, and prior to being deposited into Freightliner's account, the Check was stolen.

26. Sometime after the theft of the Check, the name of the payee in the "Pay to order of" section of the Check was altered from "Freightliner LLC PO Box 277953, Atlanta Georgia 30384-7953" to "ENRIQUE FERNANDEZ-BARROS PO Box 248087 CORAL GABELS, FLORIDA 33124" (as misspelled on the altered check)(the "Altered Check") (a true and correct copy of the Altered Check is attached hereto as Exhibit "C").

27. Enrique Fernandez-Barros ("Fernandez"), an adjunct professor of law at the University of Miami, obtained possession of the Altered Check.

28. Upon information and belief, on or about December 22, 2003, Fernandez brought the Altered Check to UCU and attempted to deposit the Altered Check into his UCU account.

29. Upon information and belief, at or after the time of the deposit, Fernandez instructed UCU to wire transfer the funds from the Altered Check to various foreign and domestic accounts.

F. UCU Pays on the Altered Check

30. Upon information and belief, when Fernandez attempted to deposit the Altered Check, UCU suspected that there might have been a problem with the authenticity and/or validity of the Altered Check at the time of the receipt.

31. Upon information and belief, UCU initially held the check for 7 days while seeking confirmation of available funds.

32. Upon information and belief, sometime during this 7-day period, UCU contacted Fleet to inquire into the validity of the Altered Check.

33. Upon information and belief, Fleet represented to UCU that the Altered Check was legitimate.

34. Upon information and belief, UCU then held the Altered Check for an additional four (4) days and again contacted Fleet for confirmation of the check.

35. Upon information and belief, Fleet again represented that the Altered Check was legitimate.

36. At no point did anyone at Fleet or at UCU contact anyone at Penske to inquire if the check was legitimate or if Fernandez was the correct named payee.

37. After Fleet's second assurance that the Altered Check was legitimate, UCU made the entire amount of One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD) in funds from the Altered Check available to Fernandez. UCU then carried out Fernandez' instructions on wiring out and paying out the proceeds of the Altered Check.

F. Fleet Pays UCU on the Altered Check

38. Upon information and belief, UCU then presented the Altered Check to Fleet for reimbursement of the funds paid out to Fernandez.

39. Upon presentment of the Altered Check, Fleet paid UCU the One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD) as stated on the Altered Check.

40. Fleet then deducted the One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD) from the Fleet Account.

G. Penske Discovers The Alterations

41. Penske had no knowledge of the theft or alteration of the Check prior to being contacted by Freightliner on February 2, 2004 regarding non-payment of the invoices that were to be paid by the Check.

42. Upon being contacted by Freightliner on February 2, 2004, Penske promptly performed a reconciliation and review of the Check.

43. At that time Penske observed that the Check was altered.

44. As a direct result of that discovery, on February 2, 2004, Penske notified Fleet of the alteration by phone and on February 3, 2004 delivered an affidavit of forgery to Fleet.

45. Upon information and belief, on or about February 13, 2004, Fleet notified UCU of the alternation of the Check.

II. Fleet Refuses To Restore The Penske Account

46. Since February of 2004, Penske has requested on numerous occasions that Fleet restore the funds from the Altered Check to Penske's Fleet Account and/or proceed against UCU for the loss of the funds.

47. Fleet has refused to restore the funds into Penske's Fleet Account and has refused to proceed against UCU.

48. Upon information and belief, no party to this litigation has recovered any of the funds paid on the Altered Check from Fernandez or elsewhere.

49. Penske has suffered damage and injury in an amount of One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD).

50. Freightliner has suffered damage and injury in an amount of One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD).

COUNT I

PENSKE TRUCK, AS ASSIGNEE OF FREIGHTLINER, AGAINST UCU CONVERSION UNDER FLA. STAT. § 673.4201

51. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth at length herein.

52. Upon information and belief, Freightliner received delivery of the Check at its BOA Box, through its agent, Bank of America, before the Check was stolen.

53. Fernandez was not entitled to enforce, transfer, or negotiate the Check because he was not the intended payee on the Check and the Check was altered in violation of Fla. Stat. §673.4071.

54. UCU is a “bank” as defined by Fla. Stat. §674.1051 because UCU is a credit union engaged in the business of banking.

55. UCU is the “depository bank” as defined by Fla. Stat. §674.1051 because UCU was the first bank to take the Check.

56. UCU paid the funds on the Check to Fernandez; a person not entitled to enforce the Check or to receive payment on the Check.

57. As the intended payee, Freightliner is entitled to bring an action for conversion against UCU on the Check because Freightliner was the rightful owner of the Check.

58. As a direct and proximate result of the acts and omissions of UCU, Freightliner has not yet received the One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD) payment from Penske.

59. UCU exercised dominion and control over the funds due to Freightliner on the check and has failed and refused to turn those funds over to the rightful owner, Freightliner.

60. As a result of the actions of Defendant, UCU, Freightliner has suffered damages in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD).

WHEREFORE, Plaintiff Penske Truck, as assignee of Freightliner, hereby demands judgment against UCU in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD), for an award of prejudgment interest, costs, an award of attorney's fees if authorized by law and such other and further relief against UCU as the Court may deem just and proper.

COUNT II

PENSKE TRUCK, INDIVIDUALLY AND AS ASSIGNEE AGAINST FLEET FOR CONVERSION UNDER, *INTER ALIA*, FLA. STAT. §673.4201

61. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth at length herein.

62. Fleet is a "bank" as defined by Fla. Stat. §674.105 because Fleet is engaged in the business of banking.

63. Fleet paid One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD) in funds to UCU on the Check.

64. Fernandez was not entitled to enforce, transfer, or negotiate the Check because he was not the intended payee on the Check, and the Check was altered in violation of Fla. Stat. §673.4071.

65. UCU was not a “holder” of the Check because Fernandez was not able to negotiate the Check to UCU; therefore, UCU was not authorized to enforce the Altered Check against Fleet.

66. Upon information and belief, Freightliner received delivery of the Check at its BOA Box through its agent Bank of America.

67. As the intended payee, Freightliner is entitled to bring an action for conversion against Fleet on the Check because Freightliner was the rightful owner of the Check.

68. As the party whose funds were in the account, Penske is entitled to bring an action for conversion against Fleet for the funds removed from the account to pay the Altered Check that was not properly payable.

69. As a direct and proximate result of the acts and omissions of Fleet, Freightliner has not yet received, and Fleet has charged Penske, One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD).

70. Fleet exercised dominion and control over the funds in Penske’s account and has failed and refused to return those funds used by Fleet to pay on the Altered Check, a check that was not properly payable.

71. Fleet exercised dominion and control over the funds due to Freightliner on the check and has failed and refused to turn those funds over to the rightful owner, Freightliner.

72. As a result of the actions of Fleet, Freightliner has suffered damages in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD).

WHEREFORE, Plaintiffs Penske Truck, individually and as assignee of Freightliner, and PTL hereby demand judgment against Fleet in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD), for an award of prejudgment interest, costs, an award of attorney's fees if authorized by law and such other and further relief against Fleet as the Court may deem just and proper.

COUNT III

PENSKE AGAINST FLEET FOR WRONGFULLY CHARGING PENSKE'S FLEET ACCOUNT

73. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth at length herein.

74. Fleet charged Penske's Fleet Account in the amount of One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars and Fifty Cents (\$1,681,582.50) (USD) for funds paid out on the Altered Check, a check that was not properly payable.

75. Penske did not authorize the Altered Check.

76. An employee or agent of Penske did not alter the Check.

77. Neither Penske nor any of its agents or employees was negligent or in any way contributed to the fraudulent alterations on the Altered Check.

78. The Altered Check was not "properly payable" under § 4-401 of the Code, as it was not authorized by Penske and was altered in violation of § 3-407 of the Code; therefore, Fleet was not entitled to charge Penske's Fleet Account.

79. Further, Fleet was not entitled to charge Penske's Fleet Account because UCU was not a "holder" of the Altered Check as the Altered Check could not have been negotiated to UCU by Fernandez, a thief without the authority to endorse the Altered Check.

80. Despite repeated demands by Penske, Fleet has failed to credit Penske's Fleet Account for the amounts deducted by Fleet for payment on the Altered Check.

81. As a direct and proximate result of Fleet's acts and omissions, Penske has suffered damages in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD).

WHEREFORE, Plaintiff Penske hereby demands judgment against Fleet in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD), for an award of prejudgment interest, costs, an award of attorney's fees if authorized by law and such other and further relief against Fleet as the Court may deem just and proper.

COUNT IV

AGAINST FLEET CHARGING PENSKE'S FLEET ACCOUNT IN VIOLATION OF CONN. GEN. STAT. § 42A-4-401

82. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth at length herein.

83. Upon information and belief, GECC and Fleet have a banking relationship purportedly governed by several agreements.

84. Upon information and belief, on or about January 12, 2001, General Electric and GECC entered into: (i) the Check/Draft Account Agreement ("Account Agreement"); (ii) the Positive Pay Reconciliation Services Agreement ("Positive Pay Agreement"); and (iii) Master Agreement for Cash Fleet Management Services ("Master Agreement") (collectively the "Fleet

Agreements”) (true and correct copies of the Positive Pay Agreement, the Account Agreement, and the Master Agreement are attached hereto as Exhibits “D” “E” and “F” respectively.)

85. According to the terms of the Master Agreement, the Fleet Agreements are “governed by and interpreted in accordance with the law of the State of Connecticut.” (See Exhibit “F” § 18).

86. The Fleet Agreements apply to GECC’s subsidiaries, as well as to GE and GECC. To the extent that PTL and/or Penske Truck is considered a GECC subsidiary, or to the extent that the Fleet Account is controlled by or governed by the Fleet Agreements and require the application of the laws of the State of Connecticut to the facts of this case, Fleets actions are in breach of Conn. Gen. Stat. §42a-4-401.

87. The Altered Check was not “properly payable” under Conn. Gen. Stat. § 42a-4-401, as it was not authorized by Penske and was altered in violation of Conn. Gen. Stat. § 42a-3-407; therefore, Fleet was not entitled to charge Penske’s Fleet Account.

88. As a direct and proximate result of Fleets acts and omissions, Penske has suffered damages in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD).

WHEREFORE, Plaintiff Penske hereby demands judgment against Fleet in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD), for an award of prejudgment interest, costs, an award of attorney’s fees if authorized by law or by contract and such other and further relief against Fleet as the Court may deem just and proper.

COUNT V

**PENSKE TRUCK, AS ASSIGNEE OF FREIGHTLINER,
AND ON ITS OWN BEHALF, AND PTL
AGAINST FLEET FOR NEGLIGENCE**

89. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth at length herein.

90. Fleet had a common law duty to all foreseeable parties interested in the Check to use reasonable commercial standards and to make an inquiry into the validity of the Check prior to paying out funds.

91. In light of the amount of the Check and the repeated inquiries by UCU into the validity of the Altered Check, it was unreasonable for Fleet to pay out on the Altered Check without taking steps to confirm the name of the payee.

92. In light of the amount of the Check and the repeated inquiries by UCU into the validity of the Altered Check, Fleet's actions were not consistent with ordinary commercial standards. Under these circumstances a reasonable drawee/payor bank would have made efforts to confirm the payee's name.

93. As a result of the acts and omissions of Fleet, Freightliner and/or Penske has suffered damages in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD).

94. The acts and omissions of Fleet are the direct and proximate cause of Penske and/or Freightliner's damages.

WHEREFORE, Plaintiffs Penske Truck, individually and as assignee of Freightliner, and PTL hereby demand judgment against Fleet in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD), for an award of prejudgment interest, costs, an award of attorney's fees

if authorized by law and such other and further relief against Fleet as the Court may deem just and proper.

COUNT VI

PENSKE TRUCK, AS ASSIGNEE OF FREIGHTLINER AND ON ITS OWN BEHALF, AND PTL AGAINST UCU NEGLIGENCE

95. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth at length herein.

96. UCU had a common law duty to all foreseeable parties interested in the Check to use reasonable commercial standards and to make an inquiry into the validity of the Check prior to paying out funds.

97. In light of the amount of the Check and UCU's suspicions as to the validity of the Altered Check, it was unreasonable for UCU to pay out on the Altered Check without confirming the name of the payee.

98. In light of the amount of the Check, the instructions to immediately wire transfer the majority of the proceeds of the check out of the country and UCU's suspicions as to the validity of the Altered Check, UCU's actions were not consistent with ordinary commercial standards. Under these circumstances reasonable depository banks would have confirmed the payee's name.

99. As a result of the acts and omissions of UCU, Penske and/or Freightliner has suffered damages in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD).

100. The acts and omissions of UCU are the direct and proximate cause of Penske and/or Freightliner's damages.

WHEREFORE, Plaintiffs Penske Truck, individually and as assignee of Freightliner, and PTL hereby demand judgment against UCU in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD), for an award of prejudgment interest, costs, an award of attorney's fees if authorized by law and such other and further relief against UCU as the Court may deem just and proper.

COUNT VII

PENSKE AGAINST FLEET BREACH OF CONTRACT

101. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth at length herein.

102. To the extent that the Fleet Agreements apply to or have any affect on the relationship between Penske and Fleet, Fleet's actions alleged above are in breach of the Fleet Agreements.

103. To the extent that the Fleet Agreements apply to or have any affect on the relationship between Penske and Fleet, the Master Agreement and Account Agreement expressly place an obligation on Fleet to exercise the same degree of care in processing Penske's items as Fleet uses in processing its own items. (See Exhibit "E" § D and Exhibit "F" § 15).

104. The Master Agreement States:

...the Bank will use the same care to select and use facilities, equipment, personnel and third party providers in connection with the activities to be performed under the respective Service Agreements and this Master Agreement as it exercises in the conduct of its own banking operations. (See Exhibit "F" §15)

105. The Account Agreement States:

The Bank shall exercise the same degree of care in processing items under this agreement that it does in processing its own work... (See Exhibit "E" § D)

106. Fleet personnel received repeated inquiries from UCU as to validity of the Altered Check.

107. To the extent that the Fleet Agreements apply to or have any affect on the relationship between Penske and Fleet, under the language of Master and Account Agreements, UCU's inquiries created a duty on Fleet to attempt to determine the validity of the Altered Check because Fleet would have so attempted if it had been processing its own item. (See Exhibit "E" § D and Exhibit "F" § 15).

108. After receiving UCU's inquiries, Fleet failed to make any attempt to determine the name of the payee on the Altered Check or to contact Penske regarding the appropriate name of the payee on the Check as drafted.

109. As such, to the extent that the Fleet Agreements apply to or have any affect on the relationship between Penske and Fleet, Fleet failed to exercise the degree of care that Fleet exercises in the conduct of its own banking operations, as required under the Master and Account Agreement (See Exhibit "E" § D and Exhibit "F" § 15).

110. To the extent that the Fleet Agreements apply to or have any affect on the relationship between Penske and Fleet, Fleet's failure to pursue its claims against UCU is in breach of the Account Agreement.

111. The Account Agreement expressly states:

This Agreement shall not diminish or affect any claim or cause of action which the Customer would otherwise possess against any third party in connection with any item which is processed in accordance with this Agreement, and upon request, the Bank shall furnish reasonable cooperation and assistance to the Customer in the enforcement of any such claim or cause of action... (See Exhibit "E" § E).

112. The Uniform Commercial Code (the "Code") as adopted by both the State of Florida and the State of Connecticut, imposes liability for payment of the Altered Check on UCU as the depository bank. (See Fla. Stat. §§ 673.4161 and 673.4171; Fla. Stat. Chapters 673 and 674 et al; see also Conn. Gen. Stat. §§ 42a-3-416 and 42a-3-417; Conn. Gen. Stat. Articles 3 and 4 et al.)

113. Yet, despite repeated requests by Penske, Fleet has failed to pursue its warranties and other claims against UCU, or otherwise provide any assistance to Penske's efforts to avoid the damages on the Altered Check. Fleet, instead, simply charged Penske's Fleet Account.

114. As a direct and proximate result of Fleet's breaches of the Fleet Agreements, to the extent that they apply, Penske has suffered damages in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD).

WHEREFORE, Plaintiff Penske hereby demands judgment against Fleet in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD), for an award of prejudgment interest, costs, an award of attorney's fees if authorized by contract or by law and such other and further relief against Fleet as the Court may deem just and proper.

COUNT VIII

**PENSKE AGAINST FLEET BREACH OF THE IMPLIED DUTY OF
GOOD FAITH AND FAIR DEALING AS TO §E OF THE ACCOUNT AGREEMENT**

115. Plaintiffs hereby incorporate all previous paragraphs as if fully set forth at length herein.

116. To the extent that the Fleet Agreements apply to or have any effect on the relationship between Penske and Fleet, the Code, Florida Law, and Connecticut Law each imply a duty of good faith and fair dealing into the Agreements in order to protect the reasonable expectations of the contracting parties.

117. Based on the language of the Account Agreement, to the extent it applies, it is reasonable for Penske to expect that Fleet would pursue its valid and enforceable claims against third parties, rather than force Penske to bare the full loss of the Altered Check. (See Exhibit "E" § E).

118. To the extent that the Fleet Agreements apply to or have any effect on the relationship between Penske and Fleet, Fleet's failure to pursue its claims against UCU are a breach of the implied duty of good faith and fair dealing in the Account Agreement.

119. It is reasonable to expect that, if at any time, Fleet was processing Fleet's own item and received inquiries from a depository bank related to the validity of the item, Fleet would take steps to ascertain whether the item was being paid to the named payee as stated on the item when drafted.

120. Based on the language of § 15 of the Master Agreement and § D of the Account Agreement, to the extent they apply, Fleet had a duty of good faith and fair dealing to attempt to

determine the name of the payee on the Altered Check or contact Penske regarding the appropriate name of the payee on the Check as drafted.

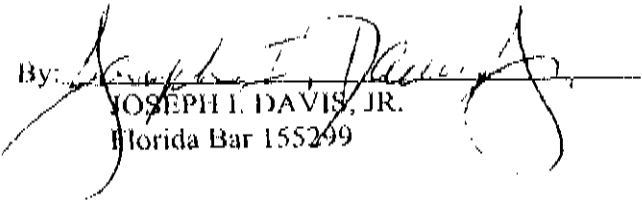
121. Fleet made no attempt to ascertain the name of the payee on the Altered Check and as such, Fleet breached its duty of good faith and fair dealing in the Master and Account Agreements to the extent that they apply.

122. As a direct and proximate result of the acts and omissions of Fleet, Penske has suffered damages in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD).

WHEREFORE, Plaintiff Penske hereby demands judgment against Fleet in an amount in excess of Seventy Five Thousand Dollars (\$75,000) (USD), for an award of prejudgment interest, costs, an award of attorney's fees if authorized by law or by contract and such other and further relief against Fleet as the Court may deem just and proper.

Dated: December 30, 2004.

MARKOWITZ, DAVIS, RINGEL & TRUSTY, P.A.
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By: 
JOSEPH I. DAVIS, JR.
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ASSIGNMENT OF CLAIMS AGREEMENT

THIS ASSIGNMENT OF CLAIMS AGREEMENT (the "Agreement") is dated this 30 day of November, 2004, by and between Freightliner LLC, a limited liability company organized and existing under the laws of the state of Delaware and with its principal business address at 4747 N. Channel Ave., Portland, Oregon 97217 ("Assignor" or "Freightliner") and Penske Truck Leasing Co., L.P., a limited partnership organized and existing under the laws of the state of Delaware with its principal place of business located at Route 10--Green Hills, P.O. Box 563, Reading Pennsylvania 19603-0563 ("Assignee" or "Penske").

BACKGROUND

- A. On or about December 3, 2003 Penske caused its agent PTL Fleet Sales, Inc. ("PTL") to issue a check drawn on its account at its bank, Fleet/Bank of America ("Fleet") payable to Freightliner and addressed to "Freightliner LLC PO Box 277953, Atlanta Georgia 30384-7953. The check payable to Freightliner, check number 00015223, drawn on the Fleet account was in the amount of One Million Six Hundred and Eighty One Thousand Five Hundred and Eighty Two Dollars (\$1,681,582) (USD) (the "Freightliner Check") and was to pay invoices for goods shipped to and received by Penske for which payment was due and owing. There is no dispute between Penske and Freightliner concerning the amounts owed to Freightliner as reflected in the Freightliner Check.
- B. The PO Box 277953, Atlanta Georgia 30384-7953 is a PO Box lockbox maintained by Bank of America at the Atlanta post office and is used to collect remittances to Freightliner from its customers.
- C. Penske has represented that on or about December 3, 2003 Penske delivered the checks to the USPS for delivery to the payee by first class mail, postage prepaid.
- D. The parties believe that thereafter the Freightliner Check was altered such that the Freightliner Check was made payable to Enrique Fernandez-Barros ("Fernandez"), who is believed to be an adjunct professor of law at the University of Miami.
- E. The parties believe that Fernandez brought the Freightliner Check now made payable to himself to the University Credit Union, Coral Gables, Florida ("Credit Union") and attempted to negotiate the check by depositing it into his account.
- F. The parties believe that thereafter the Credit Union made good funds available to Fernandez on the check, which funds were then distributed and/or dissipated by Fernandez and others. Fernandez and all other persons who received money from the Credit Union had no right to receive such funds. The Freightliner Check was deposited through the payments system and Fleet debited Penske's account for the check. Penske represents to Freightliner that it timely informed Fleet that the

check had been altered no later than February 2nd (orally) and February 3rd (in writing), 2004.

- G. Freightliner has not received any of the proceeds of the Freightliner Check.
- H. Penske intends to pursue Fleet and the Credit Union for recovery of the proceeds lost on the Freightliner Check, and Freightliner intends to pursue the Credit Union, and, perhaps, others for recovery of the proceeds lost on the Freightliner Check. Freightliner and Penske desire to enter into this Agreement for Freightliner to assign to Penske, and for Penske to pursue in a single legal action, Fleet and the Credit Union and such other parties Penske believes in good faith are or may be jointly and/or severally legally liable for the loss of the Freightliner Check and the proceeds lost on the Freightliner Check.
- I. Freightliner is the one hundred percent (100%) owner of certain claims asserted and/or to be asserted by Freightliner against the Credit Union and/or Fleet Bank and/or other parties (other than Penske, PTL, or Penske's affiliates) potentially responsible for the losses (collectively, the "Assigned Claims"). "Assigned Claims" does not include any claim Freightliner has against Penske, PTL, or Penske's affiliates for the amounts owed as reflected in the Freightliner Check.
- J. Penske has agreed to initially fund, and/or to arrange funding, for the prosecution of the claims to be asserted in any forum with jurisdiction over the parties and the Assigned Claims
- K. Assignee and Assignor have agreed to enter into a tolling agreement to toll any and all claims against each other until the final resolution of the Assigned Claims.
- L. Assignor and Assignee desire to set forth certain terms relating to this assignment, the tolling agreement, the responsibility for attorneys' fees, and to allocate the recovery on the Assigned Claims all as set forth below:

diligence. Assignor shall cooperate in good faith in the pursuit of the Assigned Claims in the Litigation including but not limited to testifying as may be reasonably requested by Assignee or as ordered in the Litigation, and producing such documents as may be reasonably requested by Assignee or as ordered produced in the Litigation. Assignor shall keep Assignee informed of all material events in the Litigation, shall forward copies of all pleadings as filed with the court and Assignee may attend any court hearings at its own expense. Assignor and Assignee agree that they have been acting collectively and cooperatively pursuant to a joint litigation agreement in connection with analyzing potential claims by the parties against Fleet, the Credit Union and others and through that agreement intend to preserve their joint attorney client privilege.

3. Funding of Litigation; Assignee's Share. Assignee has the sole responsibility and obligation to fund and/or to arrange for the funding for any and all legal fees, costs, and expenses arising in, to, and under the Litigation of the Assigned Claims and/or the prosecution of the Assigned Claims. In the event that Assignee expends a sum of in excess of two hundred thousand dollars (\$200,000) (USD) for legal fees and costs of the Litigation (the "Excess Fees"), then Assignee and Assignor shall in good faith meet and negotiate to reach an agreement on a percentage split of responsibility for the Excess Fees, and the manner and timing of the payment of any such Excess Fees. If no such agreement is reached then it shall be resolved by expedited binding arbitration as set forth in Section 11 hereof. Other than as set forth herein, Assignor shall have no other financial obligation to fund the Litigation of the Assigned Claims.
4. Re-Assignment. Assignor shall have the right at any time during the Litigation on thirty (30) days written notice to submit a written direction to Assignee to re-assign back to Assignor the Assigned Claims. Assignee shall then execute the re-assignment in the form attached hereto as Exhibit "A". The parties shall cooperate in good faith in the re-assignment process so as not to prejudice the pursuit of the Assigned Claims. Upon re-assignment Assignee shall have no obligation to fund any of the fees, costs and/or expenses thereafter incurred in furtherance of the prosecution of the Assigned Claims, which obligation shall then be borne by Assignor.
5. Assignor's Share. Assignor shall receive the "Net Proceeds" (as defined below) recovered by settlement, execution upon a judgment or otherwise directly or indirectly from the Assigned Claims up to the amount of the Freightliner Check together with accrued interest at the rate of six percent (6%) per annum accruing from December 10, 2003 ("Assignor's Share"). The Net Proceeds, up to the amount of Assignor's Share, shall be paid to Assignor within a commercially reasonable period following the collection of proceeds in good funds.
6. Net Proceeds. As used herein, "Net Proceeds" means gross proceeds of the Litigation of the Assigned Claims and/or the proceeds resulting from the Assigned Claims reduced by any portion of such gross proceeds specifically awarded or designated as reimbursement by the Court for the fees, costs, and expenses of litigation, including but not limited to, attorney's fees, costs, and expenses (the "Costs Award"). Any Costs Award shall be split

between the parties as follows: (a) the first dollars of any Costs Award shall go to Assignee to reimburse it for expenses incurred in funding legal fees, costs, and expenses arising in, to, and under the Litigation of the Assigned Claims and/or the prosecution of the Assigned Claims, up to the amount expended prior to reaching any agreement with Assignor pursuant to Section 3 above; (b) any remaining portion of the Costs Award shall be split by Assignor and Assignee in proportion to the amount of expenses each has incurred in funding legal fees, costs, and expenses arising in, to, and under the Litigation of the Assigned Claims and/or the prosecution of the Assigned Claims following reaching an agreement pursuant to Section 3 above; and (c) any remaining portion of the Costs Award shall be split by agreement between the parties (it being agreed that if no such agreement is reached then such issue shall be resolved by expedited binding arbitration as set forth in Section 11 hereof).

7. Amounts Over Assignor's Share. Any amounts recovered by settlement, execution upon a judgment or otherwise directly or indirectly from the Assigned Claims in excess of Assignor's Share (other than any Costs Award) shall be split by agreement between the parties. If no such agreement is reached then such issue shall be resolved by expedited binding arbitration as set forth in Section 11 hereof.
8. Settlement Authority. Assignee shall not possess any authority to compromise or settle the Assigned Claims without first obtaining written approval of the proposed compromise or settlement. Assignee shall give Assignor reasonable written notice of its desire to accept or propose any compromise or settlement of the Assigned Claims and Assignor shall have seven (7) business days from the date of delivery of the written notice to approve, reject or accept with modifications any such proposal.
9. Tolling Agreement. During the pendency of the Litigation, without reassignment of the Assigned Claims as provided in Section 4, each of the parties hereto agrees not to assert, plead, or raise in any fashion any claims or causes of action against the other arising out of or relating in any way to the Freightliner Check or the underlying invoices that led to the creation of the Freightliner Check, whether by writ, summons, complaint or otherwise (the "Tolled Claims"). The parties agree that the statute of limitations (sometimes denominated as limitations on action) applicable to such claims and causes of action shall be tolled and shall not run until termination of the Litigation or reassignment as provided below. The statute of limitations shall re-commence running ninety days after the earlier to occur of (i) re-assignment of the Assigned Claims back to Assignor, or (ii) the termination of the Litigation by settlement or a non-appealable judgment. No party shall assert any defense or avoidance based on the running of any statute of limitations that may apply during that period or any defense or avoidance based on laches or other principle concerning the timeliness of commencing a civil action based on the failure to file a claim, cause of action or complaint during that period. Nothing herein shall be deemed a waiver or release of any claims against any party hereto. The parties agree that all claims and/or causes of action not asserted within one year of the date that the Statute of Limitations re-commences as provided in this Agreement shall forever be barred and shall not ever be asserted in any forum.

10. Resolution of Tolled Claims. If the Assigned Claims are resolved, whether by settlement or final judgment, in a manner that results in distribution to Freightliner of funds (by payment, execution or otherwise) less than the full amount of Assignor's Share, then Assignor and Assignee shall meet within thirty (30) days of the termination of the Litigation to negotiate a resolution of the Tolled Claims. If an amicable resolution cannot be achieved then the parties shall submit any remaining disputes to expedited binding arbitration as set forth in Section 11 hereof. If Assignor receives a distribution of the Assignor's Share, then the parties will execute a mutual release of the Tolled Claims.
11. Arbitration. Any dispute arising out of or concerning the interpretation, enforcement or application of this Agreement, including but not limited to the funding of the litigation, the split for the responsibility for costs, expenses and fees, reimbursement of costs, expenses and fees, and the split of any recovery over and above Assignor's Share, shall be resolved timely and finally by three (3) Arbitrators in an Arbitration proceeding pursuant to the then-existing commercial rules of the American Arbitration Association. This clause is intended by the parties to be enforceable under the Federal Arbitration Act. Should it be determined by any court of competent jurisdiction that the Act does not apply, then it shall be enforceable under the arbitration statute of the State of Oregon. Arbitration shall be commenced by the claimant serving a concise summary of the claim upon the respondent. Any decision by the Arbitrators shall be final, binding and conclusive on the parties. Arbitration shall take place in the Portland, Oregon or at such other location as the parties may agree upon. Costs of the Arbitration shall initially be borne equally by the disputing parties but may be reapportioned by the Arbitrator in the Arbitrator's discretion. The parties agree that the Arbitrators shall be lawyers with experience in the Uniform Commercial Code or that have other relevant commercial law experience. The arbitration shall be expedited and shall be concluded with a binding decision by the Arbitrators within one hundred twenty (120) days of commencement.
12. Assignment. The rights, duties and obligations arising under the Agreement are not assignable, excepting only that Assignor may assign the claims and causes of action to be asserted in the Litigation to PTI, the entity which issued the Freightliner Check and in whose name the Litigation may be pursued, but only on condition that PTI executes an addendum hereto agreeing to be bound by all of the terms hereof as though it were the original Assignee. Notwithstanding any such assignment, Penske shall at all times remain liable to Assignor under the terms of this Agreement.
13. Severability. The provisions of this Agreement are deemed to be severable, and the invalidity or unenforceability of any provision shall not affect or impair the remaining provisions, which shall continue in full force and effect.
14. Entire and Final Agreement. This Agreement is the entire and final contract between the parties hereto, pertaining to the subject matter hereof, and supersede all prior and contemporaneous agreements, understandings, negotiations, and discussions, whether written or oral, of the parties; and there are no representations, warranties, or other

agreements between the parties in connection with the subject matter hereof, except as specifically set forth herein or therein. This Agreement shall inure to the benefit of and be legally binding upon the parties hereto and their heirs, personal representatives, successors and permitted assigns.

15. Notices. Any notice or other communication to a party pursuant to this Agreement shall be deemed to have been given, served, or delivered when sent by overnight delivery service or deposited in the United States mail, registered or certified, and with proper postage and fees prepaid, or transmitted by telecopy, addressed as follows:

For Assignor: Freightliner LLC
4747 N. Channel Avenue
Portland, OR 97217
ATTN: J. Chris Edwardsen, Esquire
Associate General Counsel
Telecopy No. 503-745-7959

For Assignee: Penske Truck Leasing Co., L.P.
Mailing Address: Route 10 - Green Hills
P. O. Box 563
Reading, PA 19603-0563
Physical Address: Route 10 and Pheasant Road
Reading, PA 19607
ATTN: Michael A. Duff, Esquire
Senior Vice President and General Counsel
Telecopy No. 610-775-6330

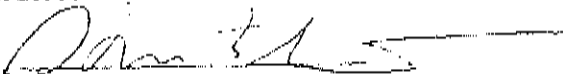
or to such other address as said party may from time to time designate by written notice in the manner hereinabove provided.

16. Governing Law. This Agreement has been made, executed and delivered in the Commonwealth of Pennsylvania and will be construed in accordance with and governed by the laws of such Commonwealth.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first above written.

ASSIGNOR:

FREIGHTLINER LLC

By: 

Name: JUERGEN KRITSCHGAU

Title: SR. VICE PRESIDENT

ASSIGNEE:

PENSKE TRUCK LEASING CO., L.P.

By: Penske Truck Leasing Corporation, General Partner

By: Michael A. Duff

Name: MICHAEL A. DUFF
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL

Title: _____

EXHIBIT A

**REASSIGNMENT
OF CLAIMS**

This REASSIGNMENT OF CLAIMS (this "Reassignment") is made on the ____ day of _____, 200_, by Penske Truck Leasing Co., L.P., a limited partnership organized and existing under the laws of the state of Delaware with its principal place of business located at Route 10--Green Hills, P.O. Box 563, Reading Pennsylvania 19603-0563 ("Reassignor" or "Penske"), in favor of Freightliner LLC, a limited liability company organized and existing under the laws of the state of Delaware and with its principal business address at 4747 N. Channel Ave., Portland, Oregon 97217 ("Reassignee" or "Freightliner").

A. Penske and Freightliner are parties to a certain Assignment of Claims Agreement, dated November __, 2004 (the "Assignment Agreement"), pursuant to which Freightliner assigned to Penske the Assigned Claims, as defined in the Assignment Agreement; and

B. The Assignment Agreement provides that Freightliner may demand, upon 30 days written notice, the Reassignment of the Assigned Claims; and

C. Freightliner provided written notice to Penske on ____ ____, 200_, that it required the reassignment of the Assigned Claims (the "Notice").

NOW, THEREFORE, pursuant to the terms of the Reassignment Agreement and the Notice and for other good and valuable consideration, receipt and sufficiency of which are hereby acknowledged, Reassignor, on behalf of itself and its successors, legal representatives and assigns, hereby:

1. Reassigns its rights in the Assigned Claims, and all other right, title and interest in and to the Assigned Claims conveyed to Reassignor pursuant to the Assignment Agreement or otherwise to Reassignee.

2. Represents and warrants to Reassignee that it has full power to execute and deliver this Reassignment and that it has not sold, transferred, pledged or otherwise encumbered the Assigned Claims in any manner that would limit its ability to reassign the Assigned Claims to Reassignee as provided herein and in the Assignment Agreement.

3. Further agrees to execute and deliver to Reassignee any and all further documents or instruments and do any and all further acts which Reassignee (or its agents, designees or assignees) reasonably request in order to confirm this Reassignment and Reassignee's (or its assignee's) right, title and interest in and to the Assigned Claims

IN WITNESS WHEREOF, Reassignor has caused this Reassignment to be duly executed by its duly authorized officer as of the day and year first above written.

PENSKE TRUCK LEASING CO., L.P.

By: Penske Truck Leasing Corporation, General Partner

By: _____

Name: _____

Title: _____

PURCHASE ORDER	INVOICE NUMBER	INVOICE DATE	GROSS INVOICE AMOUNT	DISCOUNT AMOUNT	NET INVOICE AMOUNT	
134442	A21889	11/21/03	76,751.75		76,751.75	
134735	A22039	11/21/03	25,537.00		25,537.00	
134738	A22040	11/21/03	25,537.00		25,537.00	
134736	A22041	11/21/03	25,537.00		25,537.00	
134736	A22042	11/21/03	25,537.00		25,537.00	
134736	A22043	11/21/03	25,537.00		25,537.00	
134747	A22048	11/21/03	57,432.50		57,432.50	
134766	A22049	11/21/03	33,851.75		33,851.75	
134895	A22058	11/21/03	71,545.00		71,545.00	
134899	A22059	11/21/03	64,027.00		64,027.00	
134899	A22060	11/21/03	64,027.00		64,027.00	
134901	A22061	11/21/03	72,358.00		72,358.00	
134980	A22081	11/21/03	37,077.50		37,077.50	
134990	A22082	11/21/03	37,077.50		37,077.50	
135008	A22083	11/21/03	35,159.00		35,159.00	
135169	A22187	11/21/03	35,037.00		35,037.00	
133129	995504	9/18/03	32,893.00		32,893.00	
133316	997039	9/19/03	36,477.00		36,477.00	
133239	997430	9/22/03	32,711.00		32,711.00	
133280	997438	9/22/03	41,677.00		41,677.00	
133305	997452	9/22/03	33,436.00		33,436.00	
133377	997477	9/22/03	37,275.00		37,275.00	
133431	997503	9/22/03	42,461.00		42,461.00	
133431	997504	9/22/03	42,461.00		42,461.00	
133431	997505	9/22/03	42,461.00		42,461.00	
133244	997848	9/23/03	36,378.75		36,378.75	
133278	997884	9/23/03	32,371.75		32,371.75	
133279	997885	9/23/03	34,771.00		34,771.00	
133434	997967	9/23/03	33,972.00		33,972.00	
133481	997994	9/23/03	33,873.00		33,873.00	
133481	997996	9/23/03	33,673.00		33,673.00	
133489	997997	9/23/03	38,680.00		38,680.00	
133411	998485	9/24/03	34,012.00		34,012.00	
133431	998495	9/24/03	42,461.00		42,461.00	
133431	998497	9/24/03	42,461.00		42,461.00	
133430	998499	9/24/03	33,588.00		33,588.00	
133441	998500	9/24/03	33,762.00		33,762.00	
133477	998516	9/24/03	34,606.00		34,606.00	
133478	998536	9/24/03	32,033.50		32,033.50	
133481	998537	9/24/03	33,873.00		33,873.00	
133504	998538	9/24/03	32,509.75		32,509.75	
133402	998551	9/24/03	32,049.00		32,049.00	
133502	998495	9/24/03	35,236.78		35,236.78	
PTL FLEET SALES, INC. READING, PA 19603-1475			CHECK DATE	12/03/03	1,681,582.50	1,681,582.50



PTL FLEET SALES, INC.
ROUTE 10, PHEASANT ROAD
P.O. BOX 1475 02339
READING, PA 19603-1475

FLEET BANK
Hartford, CT

31-44 Check No.
119 00015223

MO.	DAY	YR
12	03	03

AMOUNT
\$1,681,582.50

PAY **1,681,582 DOLLARS AND 50 CENTS

PAY TO THE ORDER OF
FREIGHTLINER LLC
PO BOX 277953
ATLANTA, GA 30384-7953

Wayne S. Byelback

⑈00015223⑈ ⑈011900445⑈

67680⑈

EXHIBIT "B"

00F-9



ROUTE 10 PHEASANT HILL
 P.O. BOX 1475 02339
 READING MA 01860-1475

UNION BANK
 HARTFORD CT

86015223

NOV 21 1983

AMOUNT \$1,582.50

PAY TO THE ORDER OF \$1,582.50 DOLLARS AND 50 CENTS

ENRIQUE FERNANDEZ-BARROS
 P.O. BOX 24808
 CORAL GABLES FLORIDA 33124

Enrique Fernandez-Barros

⑆00015223⑆ ⑆011900445⑆

67680⑆

⑆0168158250⑆

EXHIBIT "C"

Prof. Dr. Enrique Hernandez - X

52293-9

DO NOT WRITE IN STAMP OR BELOW THIS LINE

020009891

ORIGINAL DOCUMENT

FLEET

728 114 12 26 1200000
020009891
12-23-03
01 11-0646-1

ENT=1880 TRC=1806 PK=04

066000409
020009891
020009891 12-23-03

U.S. AIR FORCE
110. C. U. 385-284-1832 - 2267878584-12 22 83 88188 MAIL

POSITIVE PAY RECONCILIATION SERVICES AGREEMENT

THIS AGREEMENT entered into this 12th day of January, 2004, by and between Fleet National Bank ("Bank") and Col. BPCS and Subsidiary ("Customer").

1. Customer has requested and Bank hereby agrees to provide automatic reconciliation services (the "Services") for Fleet checking account(s) ("Account") opened by Customer and utilized for disbursement and deposit of funds. The Account and the Services shall also be subject to the terms and conditions of the Fleet Business Deposit Account Agreement, the Fleet Master Agreement for Cash Management Services and the Account Reconciliation Programs Services Guide (the "Guide"), copies of which have been received by Customer, and in the event of any conflict between the terms of any of these agreements and this Agreement, the terms and conditions of this Agreement shall prevail.

2. All checks to be used by Customer to make withdrawals from the Account ("Items") will conform to check specifications set forth on the specification sheet contained in the Guide. Customer specifically acknowledges that it will have each Item MICR-encoded with the Account number and Bank's transit number, and with a MICR serial number that corresponds to the Item's printed serial number. Customer agrees that issuance of any nonconforming Item that has not received Bank's prior approval in accordance with the Guide may result in delays in processing, charges for extra processing, or termination of the Services by Bank.

3. Customer shall provide at least 25 voided Items for testing at least two (2) weeks prior to the date on which the Services are expected to commence. Bank will test the Items to ensure that they meet Bank's specifications and that the magnetic encoding is satisfactory. Test documents will not be returned. Customer will provide Bank with a representative sample of fifty (50) voided Items for testing purposes each time new checks are ordered. Customer will be responsible for insuring that duplicate check numbers are not ordered.

4. a. Customer agrees that it will provide a file containing the serial number and amount of each Item issued by Customer ("Issue Information") no later than 5 p.m. (EST) two business days prior to the date on which such Item is actually disbursed by Customer to the payee. For example, if Customer disburses an Item on Wednesday, the Issue Information for such Item must be received by Bank by 5 p.m. on Monday. Bank shall maintain Issue Information until the sooner of the date on which the Item is presented or the receipt of instructions from Customer to delete or alter the Issue Information with respect to that Item but in no event more than three years from the date of receipt by the Bank of the Issue Information. Customer may provide Bank with deletions or alterations to the Issue Information at any time prior to the day on which the Item is presented. Customer authorizes Bank to pay all Items for which Issue Information is provided by Customer, unless Customer has placed a stop payment order on an Item, as provided below.

b. Items presented at the Fleet teller for which Issue Information has not been provided by the Customer will be accepted for deposit only and will not be accepted for encashment. The payee of an Item for which the Bank does not have Issue Information will be instructed to refer to maker.

c. Bank shall provide a daily report to Customer on each business day of Items deposited on the previous business day for which the Bank has no Issue Information ("Without Issue Items").

d. Customer authorizes Bank not to pay unless otherwise instructed, all Without Issue Items except for those Without Issue Items as to which, prior to 2:30 p.m. (EST) on the business day after presentation, Bank receives from Customer instructions to pay such Items unless otherwise instructed.

EXHIBIT "D"

5. a. Customer authorizes Bank to pay all deposited Items for which Issue Information has been received by the Bank, except for those Items as to which, prior to 2:30 p.m. (EST) on the business day after presentation, Bank receives from Customer instructions to return such Items.

b. Failure of the Customer to respond by 2:30 p.m. (EST) will result in the Bank deferring to the default decision of either "pay" or "return" designated by the Customer in the Account Reconciliation Programs Service Agreement.

6. Monthly Semi-monthly Weekly _____ Bank shall make available to Customer an account reconciliation report and a statement of account, and will will not separately deliver the paid Items detailed in such report. If the paid Items are not delivered to Customer, they will be retained by Bank for a period of ninety (90) days unless instructed otherwise, after the date of the report showing the payment of such Items before being destroyed. Such Items may be obtained by Customer upon request before the expiration of such 90-day period provided that the Customer provides the appropriate Check Processing Control System ("CPCS") number and CPCS output batch and sequence numbers. Copies of all Items will be maintained on microfilm for seven years, or such lesser period as may be permitted by applicable law. Customer may obtain copies of microfilmed Items upon request, which request shall include the date the item was processed and the CPCS number.

7. a. Customer may use Treasury Express or call Account Reconciliation Operations to place stop payment orders on an Item. Customer agrees that it will not place a stop payment order if the Item has already been paid and that information is available to Customer through Treasury Express or the Account Reconciliation Operations.

b. Bank shall maintain a master file of stop payment orders received from Customer and shall maintain each stop payment order on file for one year from date of receipt or such longer period as may be agreed to by Bank, at which time such order shall be automatically deleted from the file unless new written stop payment order is placed by Customer.

c. Bank shall use its best efforts to effectuate a stop payment order on the business day on which such order is received by Bank provided that the order is received by Bank prior to 5:00 p.m. (EST) on such business day; any stop payment order received after 5:00 p.m. of any business day will be implemented as of 9:00 a.m. the following business day. Bank cannot stop payment on Items not encoded according to Bank specifications, nor can Bank stop payment on Items with duplicate or unmatched serial numbers.

8. Compliance by Bank with the terms of this Agreement shall constitute the exercise of ordinary care with regard to the payment of any Item.

IN WITNESS WHEREOF, the parties hereto have, by their duly authorized officer, executed this Agreement as of the date first set forth above.

Customer
By: [Signature]
Title: Sean P. O'Connell
Director - Treasury Consulting

Fleet
By: [Signature]
Title: RAVI KACKER
DIRECTOR

By: [Signature]
Title: Vice President

[Signature]
Dennis R. Sweeney
Vice President & Assistant Treasurer
General Electric Capital Corporation

CHECK/DRAFT ACCOUNT AGREEMENT
FLEET NATIONAL BANK
 (the Bank)

AND

COMPANY
 (the Customer)

The Bank will process on a daily basis, in accordance with its normal procedure, all checks and/or drafts (the "items") presented to the Bank bearing account numbers listed on Schedule A hereto (the "Accounts") maintained and updated by the Bank, as Customer opens and/or closes accounts on behalf of customer and its subsidiaries, which are drawn by the Customer and payable at or through the Bank.

A. In performance of this Agreement, the Bank shall:

- (1) Make provisional settlement of all items payable at or presented through it at the close of the same business day they are received by the Bank in accordance with applicable Clearing House rules and Regulation J of the Federal Reserve Board. Such items shall be debited to the designated account of Customer with the Bank. Sufficient collected funds must be maintained in such account by the Customer to cover the amount of items presented, except when customer has requisite credit facilities or when operating Controlled Disbursement accounts.

- (2) On a daily basis print reports of and balance the amounts of items presented and produce an output magnetic tape and/or printed reports of such items which tape and/or reports shall be made available for:

Pick up by the company
 Delivery to the company
 Transmission to the company

Daily Weekly Monthly _____

- (3) Maintain a master stop payment list based upon specific instructions by the Customer, not to pay particular items presented by other banks, which instructions shall be deemed in full force and effect for one year from date of receipt, at which time they shall be automatically deleted from the file unless specific instructions to the contrary are received by the Bank.

It is agreed that if stop payment instructions are received in writing or by phone, those particular items shall be implemented by the Bank as of 9:00 a.m., on the business day next following the business day on which such stop payment is received; provided, however, that if a stop payment is received on or after 3:00 p.m. on a business day, it shall be implemented by the Bank as of 9:00 a.m., on the second following business day. Stop payments shall be considered as having been received by the Bank upon communication to Commercial Customer Services Department of information sufficiently descriptive and precise to enable the Bank to effect a stop payment in accordance with the normal procedures.

If a stop payment is input on-line via a terminal, that stop payment becomes effective immediately if input is completed prior to 5:00 p.m., otherwise the stop payment will be implemented next day.

- B. If the customer returns to the Bank items on which it does not wish payment to be made no later than 2:00 p.m. on the business day following the business day on which such item is received by the Bank, the Bank shall credit the amount of such items to the designated account of Customer, and return such item through the banking system. Bank is hereby authorized to accept and rely upon the written or on-line terminal initiated instructions given by any authorized representative of Customer and Bank is hereby authorized to accept and rely upon and shall incur no liability for paying or refusing to pay items pursuant to any verbal instructions of one representing himself to be an authorized representative of Customer which the individual receiving such instructions on behalf of Bank believes in good faith to have been given by an authorized representative of Customer. The authorized representatives of Customer shall be only such persons as are authorized in writing to Bank by Customer.

EXHIBIT " E "

- C. Regardless of whether any item is a check or a draft (as those terms are defined in the Uniform Commercial Code as adopted in Connecticut), the Bank shall have no responsibility or liability for the authenticity of any item, for any forged or unauthorized signature of the maker on any item, or for alteration of any item without authorization whether presented by other banks or payees, or for any forged, unauthorized or missing endorsement on items presented by other Banks unless due to the Bank's negligence, willful misconduct and/or employee fraud.
- D. The Bank shall exercise the same degree of care in processing items under this agreement as it does in processing its own work, but in no event shall the Bank be liable for any loss or damage or destruction of items unless clearly attributable to negligence or willful misconduct on the part of the Bank.
- E. This Agreement shall not diminish or affect any claim or cause of action which the Customer would otherwise possess against any third party in connection with any item which is processed in accordance with this Agreement, and, upon request, the Bank shall furnish reasonable cooperation and assistance to the Customer in the enforcement of any such claim or cause of action, but in that connection shall not be required to make any expenditures or outlays without reimbursement by Customer.
- No third party shall have any rights or claims against the Bank under this Agreement, and the Customer hereby agrees to indemnify and hold harmless the Bank from and against any and all such rights and claims.
- F. Compensation of the Bank's services pursuant to this Agreement shall be as agreed to in writing from time to time.
- G. This Agreement shall be in effect for a minimum period of 90 days from commencement of the service and shall continue in effect indefinitely thereafter until and unless terminated by either party. Either party may so terminate (a) at any time after the minimum period upon not less than 120 days' written notice to the other, or (b) at any time upon written notice to the other of default under this agreement; provided however that in either event the Customer shall be deemed to have requested a stop payment on all outstanding items upon the effective date of such written notice. Any notices required under this paragraph shall be delivered to Bank at 777 Main Street, Hartford, Connecticut 06115-2001, marked for the attention of the Cash Management Department, and to Customer at the address set forth below.
- H. All items must be encoded according to mutually acceptable MICR specifications. The customer will submit to the Bank, in time to allow for testing prior to issuance of items, a representative sample of not less than 25 to 50 items from the initial order of stock, as well as from subsequent orders.
- If the rate rejecting on a daily basis exceeds 2%, regardless of previous testing, all rejected items will be charged on an exception basis.
- I. **Optional Provisions:**
- () The Customer shall provide courier service for pick up and delivery of magnetic tape and/or associated reports. The Bank shall not be liable for any loss of any data, report, document, or any other output product while in transit to or from Bank premises. Nor shall the bank be responsible for any delay or failure to perform the agreements on its part to be performed pursuant to this agreement resulting from labor disputes, disaster, acts of God, or other causes of any kind beyond its control.
- () The Bank shall provide courier service for pick up and delivery of Bank processed items, magnetic tapes, and associated reports; provided that such courier service shall not accept deposits for delivery to the Bank. The Bank shall not be liable or responsible for any loss of data, report, document, or any other output product while in transit to or from Bank premises; for any delay or failure to perform the agreements on its part to be performed pursuant to this agreement resulting from labor disputes other than bank's employees, disaster, acts of God, or other causes of any kind beyond its control.
- () Customer requests the Bank to make settlement on all items received on a collection basis, without referring such items to the Customer (except photocopies), in accordance with the Bank's operating procedures applicable to such items. Accordingly, the Customer absolves the Bank of any liability to the Customer by reason of the automatic payment of collection items herein provided for.

This agreement constitutes the entire agreement and understanding between the Customer and the Bank with respect to the transactions contemplated hereunder.

In witness whereof, the parties have caused this agreement to be duly executed this 12th day of January

2004

FLEET NATIONAL BANK

FLEET NATIONAL BANK

Havi Kacker

[Signature]

Name: **HAVI KACKER**
Title: **DIRECTOR**

Name: *[Signature]*
Title: *[Signature]*

COMPANY

[Signature]

Name:
Title: **Sean P. O'Connell**
Director - Treasury Consulting

[Signature]

Dennis R. Sweeney
Vice President & Assistant Treasurer
General Electric Capital Corporation

MASTER AGREEMENT FOR CASH MANAGEMENT SERVICES

The Fleet bank that maintains the deposit account(s) with respect to which a cash management service is to be performed (the "Bank") agrees to perform, and the customer named below (the "Customer") agrees to purchase, Service(s) described in separate Service Agreements in effect from time to time (the "Service(s)") in accordance with this Master Agreement for Cash Management Services (the "Master Agreement") and the respective Service Agreements. If the terms of the Service Agreement(s) conflict with the Master Agreement, the terms of the Service Agreement(s) shall apply. Customer acknowledges that the Services may be performed by Bank or any of its Affiliates.

1. Definitions.

(a) "Affiliate" shall mean any one or more direct or indirect subsidiaries (other than Bank) of Fleet Financial Group, Inc. and its successors.

(b) "Banking day" shall mean any day other than a Saturday, Sunday, or a day on which Bank is closed for substantially all of its banking business.

2. **Account Documentation.** Prior to the implementation of the Service(s), Customer will execute and deliver to Bank such account documentation as Bank deems necessary, including, but not limited to, this Master Agreement and appropriate Service Agreements, signature cards, corporate resolutions and evidence of corporate authority. Bank will, in its sole discretion, determine the adequacy of such documentation, and may refuse to provide the Service(s) until such documentation is received by Bank. Customer agrees promptly to notify Bank of any material changes to any information presented in the account documentation, and further agrees promptly to execute any new or additional account documentation as Bank deems necessary. Customer agrees that Bank may rely on the current documentation it has on file to determine the individuals authorized to initiate requests for services under the Service Agreements, and may refuse to comply with such a request from any other individual until such documentation as Bank deems necessary is delivered to Bank.

3. **Customer's Records and Media.** Prior to the implementation of the Service(s), Customer agrees to provide to Bank all records and data processing media necessary to perform the Service(s). The records will be legible, correct, complete and in the format specified in the Service Agreements, Service Guide(s) and related schedules. The records will contain totals and proof information satisfactory to the Bank. Checks will be MICR encoded according to the Bank's specifications. Bank will, in its sole discretion, determine the adequacy of the information and the format in which it is submitted, and may refuse to provide the Service(s) until such information and/or format is deemed satisfactory.

Customer agrees to maintain adequate back-up of all such data for a period of not less than five banking days after delivery to Bank. Customer agrees to provide Bank with an additional copy or transmission thereof, as applicable, if requested. Customer's failure to provide back-up upon request shall release Bank from any liability for its inability to provide the Service(s) if back-up is required to be maintained pursuant to this Master Agreement and Customer fails to so do.

EXHIBIT "E"

When any Service Agreement is terminated, Customer will notify the Bank in writing within 60 calendar days whether the Bank should return or destroy any data processing media furnished by Customer and any records produced as a result of the terminated Service(s). If Customer does not notify the Bank within 60 calendar days, the Bank may destroy, retain or return any such material, and shall have no liability to Customer or any third party if such material is destroyed.

4. **Software Provided in Connection with Performance of Service(s).** Bank may supply Customer with certain software owned by or licensed to the Bank to be used by Customer in connection with the performance of the Service(s). Customer agrees that, with respect to any software provided under this Master Agreement, Customer shall not reverse compile, transfer, copy, modify or alter the software, nor shall Customer use its copy of the software on more than one central processing unit or transfer or distribute any portion of the software to any other person, without the express written consent of Bank. Neither the Bank nor any of its Affiliates shall be liable for any damage or loss resulting from the transfer of data to Customer's computer system utilizing software provided by the Bank or any Affiliate. Customer agrees not to remove, and shall include on any copy made, any copyright notice or other notice of proprietary rights placed on or within the software owned by or licensed to the Bank. Customer agrees to execute any licensing or sublicensing agreement reasonably deemed necessary by the Bank in connection with the performance of the Service(s). In the event of any conflict between the provisions of this Section 4 and any such license agreement, the terms of the license agreement shall control.

Notwithstanding any other provisions of this Master Agreement and only to the extent the software is used in a manner consistent with the Service Agreement(s), Bank shall defend with counsel of its own choice and at its own expense any claim brought against Customer that any software owned by Bank infringes upon any United States copyright or patent, and Bank shall pay any costs, damages, and reasonable attorney's fees finally awarded against Customer on any such action, provided that (a) Customer promptly notifies Bank of any claim and reasonably cooperates with Bank in the handling of such claim, and (b) Bank exercises sole control of the defense or settlement of such claim.

All software, specifications, tapes or other media, programs and procedures owned or licensed by the Bank and used in connection with the performance of the Service(s) will be and remain the sole property of the Bank. Customer agrees not to contest or challenge the ownership of such software, specifications, tapes or other media, programs and procedures owned by or licensed to the Bank. Customer shall return such materials to the Bank promptly upon request or at termination of applicable Service Agreement or Master Agreement, and shall be responsible for any damages to any such materials incurred in shipping and usage other than normal wear and tear.

5. **Customer Failure to Furnish Satisfactory Records and Media.** The Bank's performance under this Agreement is subject to the Bank's receiving timely, accurate and complete data for each Service, in form and on media specified by the Bank. If any of these requirements are not met by Customer, the Bank shall no longer be bound to the delivery schedule set forth in the Service Agreement(s) and shall be authorized to deliver as complete and finished whatever portion of the Service can be performed with the data available. Customer shall compensate the Bank for converting nonstandard data into standard form or completing missing data at the Bank's then current rates for time and materials. The Bank shall not be liable for converting or completing missing data, or for failing to do so, upon Customer's failure to properly supply data in a standard and complete format.

6. **Customer's Duty to Inspect.** Customer is responsible for inspecting all Service(s) performed when received and to notify the Bank immediately of any errors. Customer must notify the Bank within thirty (30) calendar days after receipt of the material containing the error or of a report or statement reflecting the error. Except to the extent required by law, failure to notify the Bank of errors within this time will relieve the Bank of any and all liability.

7. **Limitation of Liability; Disclaimer of Warranties.** Except to the extent required by law, the liability of Bank and any Affiliate will be limited as set forth herein. The liability of Bank or that of any Affiliate under this Master Agreement or any Service Agreement for failing to comply with the terms of either agreement shall be limited to actual damages sustained by Customer and only to the extent such damages are a direct result of Bank's or any Affiliate's gross negligence. Neither Bank nor any Affiliate shall be liable for damages caused by any act or omission of any third party, not under the direction and control of Bank or any Affiliate, whether or not such party was chosen by Bank or an Affiliate, or for any charges imposed by any third party. Each Service Agreement is only between Bank and Customer, and Bank shall have no liability thereunder to any third party. **IN NO EVENT SHALL BANK BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL OR INDIRECT LOSS OR DAMAGE WHICH CUSTOMER MAY INCUR OR SUFFER IN CONNECTION WITH THIS AGREEMENT OR THE SERVICE, INCLUDING WITHOUT LIMITATION LOSS OR DAMAGE FROM SUBSEQUENT WRONGFUL DISHONOR RESULTING FROM THE BANK'S ACTS PURSUANT TO THIS AGREEMENT OR ANY SERVICE AGREEMENT REGARDLESS OF WHETHER THE LIKELIHOOD OF SUCH LOSS OR DAMAGE WAS KNOWN BY THE BANK AND REGARDLESS OF THE BASIS, THEORY OR NATURE OF THE ACTION ON WHICH A CLAIM IS ASSERTED.**

The Bank will compensate Customer to the extent required by applicable law for Customer's loss of interest on funds as a direct result of the Bank's failure to comply with such law in executing a wire transfer or ACH entry to the extent such failure was within the Bank's control. The Bank shall not be liable for Customer's attorneys' fees in connection with any claim except pursuant to Section 4 of this Agreement. The Bank's aggregate liability to Customer for all losses, damages, and expenses incurred in connection with any single claim under any Service Agreement shall not exceed an amount equal to one month's average billing to Customer under such Service Agreement taken over the six months preceding the date on which the damage or injury giving rise to such claim is alleged to have occurred, but if the Service Agreement has not been in effect for six months preceding such date, then over such fewer number of preceding months as such Service Agreement has been in effect. The Bank shall have no liability for any currency, checks, magnetic tape or other item delivered by Customer to a third party carrier that is not received by the Bank or its agent.

BANK HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE PROVISION OF SERVICE UNDER ANY SERVICE AGREEMENT INCLUDING, BUT NOT LIMITED TO, SOFTWARE, ETC.

8. **Fees.** Customer shall compensate the Bank for its Service(s) in accordance with the fee schedule in effect from time to time. The Bank may amend its fee schedule upon consent at any time

check had been altered no later than February 2nd (orally) and February 3rd (in writing), 2004.

- G. Freightliner has not received any of the proceeds of the Freightliner Check.
- H. Penske intends to pursue Fleet and the Credit Union for recovery of the proceeds lost on the Freightliner Check, and Freightliner intends to pursue the Credit Union, and, perhaps, others for recovery of the proceeds lost on the Freightliner Check. Freightliner and Penske desire to enter into this Agreement for Freightliner to assign to Penske, and for Penske to pursue in a single legal action, Fleet and the Credit Union and such other parties Penske believes in good faith are or may be jointly and/or severally legally liable for the loss of the Freightliner Check and the proceeds lost on the Freightliner Check.
- I. Freightliner is the one hundred percent (100%) owner of certain claims asserted and/or to be asserted by Freightliner against the Credit Union and/or Fleet Bank and/or other parties (other than Penske, PTL, or Penske's affiliates) potentially responsible for the losses (collectively, the "Assigned Claims"). "Assigned Claims" does not include any claim Freightliner has against Penske, PTL, or Penske's affiliates for the amounts owed as reflected in the Freightliner Check.
- J. Penske has agreed to initially fund, and/or to arrange funding, for the prosecution of the claims to be asserted in any forum with jurisdiction over the parties and the Assigned Claims.
- K. Assignee and Assignor have agreed to enter into a tolling agreement to toll any and all claims against each other until the final resolution of the Assigned Claims.
- L. Assignor and Assignee desire to set forth certain terms relating to this assignment, the tolling agreement, the responsibility for attorneys' fees, and to allocate the recovery on the Assigned Claims all as set forth below:

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the parties hereto hereby agree as follows:

1. Assignment and Assumption of Claims. Effective as of the date hereof, Assignor hereby assigns to Assignee all of Assignor's right, title and interest in, to and under the Assigned Claims and Assignee hereby accepts the assignment of the Assigned Claims, and undertakes and assumes the performance and duties and obligations of Assignor hereunder. Assignee from this day forth is the sole owner of the Assigned Claims subject to the terms hereof.
2. Litigation. Assignee shall pursue the Assigned Claims in litigation to be filed in a court of proper jurisdiction (the "Litigation"), in good faith, competently and with due