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May 14, 2021

Ron Martin

VisionMenu, Inc.

9921 DuPont Circle Drive West  
Ste 350  
Fort Wayne, IN 46825

Dear Ron:

VisionMenu, Inc. (“VisionMenu”) has developed a proprietary system (the “vSignature System”) designed to allow users to electronically enter into contracts. VisionMenu has asked us to provide this opinion letter documenting our reasoned opinions regarding whether the vSignature System satisfies certain legal requirements described below (the “Opinion”). Although the vSignature System can be configured for use in different types of transactions, the Opinion focuses on the use of the vSignature System by retailers who sell goods (including motor vehicles, powersports vehicles, recreational vehicles, or marine vessels) and related services (“Dealers”). Dealers will enter into transactions with buyers or lessees of such goods and services (“consumers”) involving contracts for the sale, lease, and/or financing of goods and services (“Contracts”).

Capitalized terms that are used in the Opinion and that are not defined in the Opinion have the meanings set forth in the Electronic Contracting Legal Background attached as Exhibit A to the Opinion (the “Electronic Contracting Legal Background”), if they relate to laws or legal requirements, or Exhibit B to the Opinion (the “System Description”), if they relate to system functions of the vSignature System.

## Opinions Requested

Per VisionMenu’s request, the Opinion addresses the following aspects of the vSignature System described in the System Description:

- Whether the vSignature System is capable of creating electronic records and electronic signatures in accordance with the requirements for electronic records and electronic signatures under the Electronic Signatures in Global and National Commerce Act (“ESIGN”)<sup>1</sup>, the Uniform Electronic Transactions Act, as

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Catherine M. Brennan	*◇^<	Erica A.N. Kramer	●●
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W. David Hicks	●	Joel C. Winston	*
Justin B. Hosie	●●	Elizabeth C. Yen	>
Thomas B. Hudson	^*✱		

### Admitted in:

Alabama	◀	Illinois	☐	New Jersey	■	Pennsylvania	^
California	†	Indiana	<	New York	◇	Tennessee	◆
Connecticut	>	Maine	▽	North Carolina	☐	Texas	▶
District of Columbia	^	Maryland	*	Ohio	+	Virginia	✱
Florida	●	Massachusetts	◆	Oklahoma	☐	Washington	✱
Georgia	○	New Hampshire	◇	Oregon	<	Of Counsel	✱
		Michigan	○	South Carolina	×	Partner Emeritus	*

<sup>1</sup> 15 U.S.C. § 7001 *et seq.*

approved and recommended by the Uniform Law Commission (“ULC”) in 1999 (“UETA”<sup>2</sup>), and Article 9 of the Uniform Commercial Code (“UCC Article 9”). E-SIGN and UETA are sometimes collectively referred to in the Opinion as the “Electronic Commerce Laws”.

- Whether the creation of a Contract with the vSignature System could be denied legal effect, validity, or enforceability solely because an electronic record or electronic signature was used in its formation.
- Whether the delivery of the Consumer Retention Copy of an executed Contract as described in the System Description would satisfy any requirement under the Electronic Commerce Laws that the consumer be able to retain a copy of the executed Contract (as discussed in the Electronic Contracting Legal Background).

This Opinion is organized as follows:

- Part I states our reasoned legal opinions on the subjects described above.
- Part II documents our analysis supporting the reasoned legal opinions stated in Part I.
- Part III identifies the assumptions upon which our reasoned legal opinions and analysis are based.
- Part IV identifies the limitations and qualifications related to our review to take in account in considering our reasoned legal opinions and analysis.

The Opinion also incorporates the following Exhibits:

- Exhibit A – Electronic Contracting Legal Background. This Exhibit provides relevant background on the Electronic Commerce Laws and UCC Article 9, as well as the definitions of many of the terms used in this Opinion.
- Exhibit B – System Description. This Exhibit describes the vSignature System and supplies the factual basis for the Opinion, as well as the definitions of many of the terms used in this Opinion.
- Exhibit C – Officer’s Certificate. This Exhibit documents the certifications by an officer of VisionMenu as to the description of the vSignature System set forth in Exhibit B. We have relied on these certifications in preparing the Opinion.

## **Part I - Reasoned Legal Opinions**

Based upon the foregoing discussion, the analysis in Part II below and our consideration of those questions of law we deemed relevant as described in the Electronic Contracting Legal Background, applying a reasoned analysis of the applicable statutory law (there being no judicial precedent directly on point), and subject to the assumptions in Part III below and the limitations and qualifications in Part IV below, it is our reasoned opinion that, as of the date of the Opinion, in a properly presented case, a court of competent jurisdiction (“court”) should hold:

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<sup>2</sup> Final draft made available by ULC at:  
[http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta\\_final\\_99.pdf](http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf).

Except as otherwise noted, all references to UETA in the Opinion are to the official text as approved and recommended by the ULC and should not be understood to refer to modifications adopted by any state in enacting the UETA.

- The vSignature System is capable of creating electronic records and electronic signatures in accordance with the requirements for electronic records and electronic signatures under the Electronic Commerce Laws and UCC Article 9.
- The execution of a Contract with the vSignature System may not be denied legal effect, validity, or enforceability solely because an electronic record or electronic signature was used in its formation.
- The delivery of the Consumer Retention Copy of an executed Contract as described in the System Description satisfies any requirement under the Electronic Commerce Laws that the consumer be able to retain a copy of the executed Contract (as discussed in the Electronic Contracting Legal Background).

## **Part II- Analysis Supporting Reasoned Legal Opinions:**

### *Electronic Records and Signatures under Electronic Commerce Laws*

#### Applicability of Electronic Commerce Laws

As discussed in the Electronic Contracting Legal Background, ESIGN and UETA apply only to electronic signatures and electronic records used in “transactions.” ESIGN defines a “transaction” in relevant part as an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including sale, lease, exchange, licensing, or other disposition of: (i) personal property, including goods and intangibles, or (ii) services. UETA defines “transaction” to mean “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.” ESIGN is further limited to transactions in or affecting interstate commerce.<sup>3</sup>

As described in the System Description, the transactions conducted using the vSignature System involve the sale, lease, and/or financing of goods and services, which suggests that these transactions fall within the definition of “transaction” to which both ESIGN and UETA will apply.

Note: Both ESIGN and UETA state that they do not apply to transactions to the extent they are covered by UCC Article 9. Thus, the UCC Article 9 requirements for the use of electronic records and electronic signatures discussed below remain applicable to any aspects of the Contracts governed by UCC Article 9 despite the applicability of the Electronic Commerce Laws to the other legal aspects of the Contracts.<sup>4</sup>

#### General Consent to Use Electronic Records and Signatures

The Electronic Commerce Laws make it clear that neither a Dealer nor any consumer is required to accept electronic signatures or records. But neither ESIGN nor UETA require parties to *affirmatively* agree to conduct

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<sup>3</sup> See, Electronic Commerce Laws Background, “Applicability of ESIGN and UETA” section

<sup>4</sup> See, Electronic Commerce Laws Background, “Applicability of ESIGN and UETA” section.

transactions electronically. Both statutes permit the agreement to conduct transactions electronically to be inferred from the context and surrounding circumstances, including the parties' conduct.<sup>5</sup>

Nonetheless, the vSignature System does require that the consumer affirmatively agree to a General Consent before the transaction can proceed electronically.<sup>6</sup> The General Consent specifies that the consumer agrees to enter into the transaction electronically using electronic records and signatures.

#### System Capable of Creating Electronic Records

The Electronic Commerce Laws define an electronic record broadly to include information that is stored in an electronic medium that is retrievable in perceivable form. "Electronic" is defined as relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.<sup>7</sup>

As discussed in the System Description, Signature-Ready Contracts are created and stored in a PDF format together with the records logging the actions of a user who adopts and applies an Adopted Signature to a Signature-Ready Contract. This information is stored in a form that should be considered an electronic record as defined under the Electronic Commerce Laws.

#### System Capable of Creating Electronic Signatures

The Electronic Commerce Laws permit a broad range of technologies, procedures, and processes to qualify as electronic signatures. These laws define an "electronic signature" as an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record. The intent to sign is a critical element for determining whether a particular technology qualifies as an electronic signature.<sup>8</sup>

The vSignature System enables users to signify agreement to Contracts by:

- Creating an electronic symbol in the form of the user's name in a stylized font or a graphical signature created by the user with a mouse, touch-enabled device, or similar process.
- Adopting the electronic symbol by mouse click or touch on the same device.
- Having the signer apply the electronic symbol by mouse click or touch to a signature icon on the record which indicates the effect of the signature with respect to the record.<sup>9</sup>

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<sup>5</sup> See, Electronic Commerce Laws Background, "General Consent to Transact Electronically" section.

<sup>6</sup> See, System Description, "Consent to Use of Electronic Records and Signatures" section.

<sup>7</sup> See, Electronic Commerce Laws Background, "ESIGN and UETA Definition of Electronic Record" section.

<sup>8</sup> See, Electronic Commerce Laws Background, "ESIGN and UETA Definition of an Electronic Signature"

<sup>9</sup> See, System Description, "Consent to Use Electronic Records and Signatures," "Adoption of the Consumer Signature", and "Signature Ceremony" sections.

The vSignature System also logs the actions that indicate agreement to the electronic record and associates them with the electronic record to which they relate.<sup>10</sup>

Assuming that the electronic record to be signed contains appropriate language describing the effect of signing on the particular part of the record to be signed, the method described above should be considered an electronic signature as defined under the Electronic Commerce Laws.

The Electronic Commerce Laws do not absolve the need to be able to attribute a signature to the person against whom the electronic record is to be enforced. UETA provides some guidance on this subject, but ultimately it is a matter of proving, based on all the facts and circumstances, that the person actually signed the electronic record.<sup>11</sup> The vSignature System leaves the core task of identifying a consumer signer to the Dealer, who presumably employs methods similar to those used with traditional wet-ink signatures.

#### *General Rule of Validity for Electronic Records and Signatures*

The General Rule of Validity under Electronic Commerce Laws provides that signatures, contracts and other records relating to a transaction may not be denied legal effect, validity, or enforceability solely because they are in electronic form.<sup>12</sup> To the extent that the Contracts created and signed using the vSignature System are electronic records executed with electronic signatures in accordance with the Electronic Commerce Laws, the application of the General Rule of Validity to those Contracts should cause a court to find that a Contract created and executed with the vSignature System may not be denied legal effect, validity, or enforceability solely because an electronic record or electronic signature was used in its formation.

#### *Delivery of the Consumer Retention Copy*

If other law requires that the consumer be provided a copy of the Contract, there is a risk that the Electronic Commerce Laws would be interpreted as requiring the consumer be provided a copy of the executed Contract in a form capable of being retained as a condition of using electronic records to satisfy writing requirements and electronic signatures to satisfy signature requirements.<sup>13</sup>

The vSignature System provides a consumer with a copy of each Executed Contract by one or more of the following methods:

- printing a paper copy of the Executed Contract, and giving it to the consumer;
- sending an electronic copy of the Executed Contract to the consumer by email.<sup>14</sup>

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<sup>10</sup> See, System Description, “Consent to Use Electronic Records and Signatures,” “Adoption of the Consumer Signature”, and “Signature Ceremony” sections.

<sup>11</sup> See, Electronic Contracting Legal Background, “Attribution– Identifying the Person Legally Bound by the Electronic Contract” section.

<sup>12</sup> See, Electronic Contracting Legal Background, “ESIGN and UETA General Rule of Validity” section.

<sup>13</sup> See, Electronic Contracting Legal Background, “ESIGN and UETA Consumer Retention Copies” section.

<sup>14</sup> See, System Description, “Providing the Consumer Retention Copy” section.

These methods provide the consumer a copy of the Executed Contract in a form the consumer is capable of retaining. Thus, a court should conclude that such methods satisfy any requirement under the Electronic Commerce Laws that the consumer be able to retain a copy of the executed Contract.

### *Electronic Records and Signatures under UCC Article 9*

#### Applicability of UCC Article 9

As discussed above, the Electronic Commerce Laws do not apply to transactions to the extent they are covered by UCC Article 9. Thus, the UCC Article 9 requirements for the use of electronic records and electronic signatures discussed below remain applicable to any aspects of the Contracts governed by UCC Article 9<sup>15</sup> despite the applicability of the Electronic Commerce Laws to the other legal aspects of the Contract.

#### System Capable of Creating Electronic Records

The UCC Article 9 definition of the term “record” is identical to the definition in UETA and ESIGN and, thus, includes electronic records. UCC Article 9 does not define “electronic,” but presumably it embraces the same range of technologies as the UETA, which was also approved and adopted by the ULC.<sup>16</sup>

Thus, a court should find that the vSignature System is capable of creating electronic records as defined by UCC Article 9 for the same reasons discussed above with respect to the creation of electronic records under the Electronic Commerce Laws.

#### System Capable of Creating Electronic Signatures

Under the 2010 Amendments to UCC Article 9, the requirements to authenticate an electronic record are essentially the same as the requirements to electronically sign a record under the Electronic Commerce Laws.<sup>17</sup> Thus, a court should find that the vSignature System is capable of creating electronic signatures that comply with UCC Article 9 for the same reasons discussed above with respect to the creation of electronic signatures under the Electronic Commerce Laws.

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<sup>15</sup> Article 9 would apply only to those Contracts involving a consumer’s grant of a security agreement in property, such as retail installment sale agreement or conditional sale contract.

<sup>16</sup> See, Electronic Contracting Legal Background, “Obtaining an Enforceable Security Interest Using Electronic Records and Signatures” section.

<sup>17</sup> See, Electronic Contracting Legal Background, “Obtaining an Enforceable Security Interest Using Electronic Records and Signatures” section.

In some states, UCC Article 9 imposes a more restrictive standard for electronic signatures. This standard requires the authenticating party to adopt or execute a symbol or encrypt a record with the present intent to identify the authenticating party and adopt or accept a record.<sup>18</sup>

As discussed above, this more restrictive standard should apply only to the consumer's execution of those Contracts involving the grant of a security interest. The vSignature System process for executing the Contracts involve the consumer's use of the consumer's name in a stylized font or a graphical representation of his or her signature, which clearly qualifies as a symbol. Before a consumer can use the vSignature System to sign a Contract, the consumer must take actions which identify the consumer. This occurs in the General Consent process where the consumer's name is identified.<sup>19</sup> From this, one can reasonably infer the consumers' intent to identify themselves. And the intent to adopt or accept the record is apparent for the reasons discussed above with respect to the creation of electronic signatures under the Electronic Commerce Laws. Thus, a court should find that the vSignature System is capable of creating electronic signatures that satisfy UCC Article 9 before the 2010 Amendments to UCC Article 9.

### **Part III – Assumptions for Opinion and Analysis:**

Our reasoned opinions and the analysis that supports them in the Opinion (the "Hudson Cook Opinions and Legal Analysis") are based on the assumptions listed below, each of which are made with your express consent and approval. We make each of these assumptions without verification. Such verification is outside the scope of our work in support of this Opinion. These assumptions are:

- Each Contract used in the vSignature System is a legal, binding, and enforceable obligation of the Dealer and each consumer that is a party to the Contract and that the Contract meets all the requirements of applicable law.
- All transactions made using the vSignature System are considered transactions in or affecting interstate commerce as that term is used in ESIGN.
- The Contract forms used will be suitable for execution using the vSignature System (*e.g.*, they are properly formatted for electronic presentation and execution and can be printed, all in a manner consistent with all applicable legal requirements).
- No Dealer or other user of the vSignature System will customize or configure the vSignature System (including without limitation, the use of additional documents, consents, or disclosures, or the use of forms for a Contract that are not suitable for electronic execution using the vSignature System) in a way that renders the System Description inaccurate or otherwise adversely affects the legal effectiveness of the aspects of the vSignature System that are the bases of the Hudson Cook Opinions and Legal Analysis.
- Nothing in the agreements between the Dealers and VisionMenu renders the System Description inaccurate or otherwise adversely affects the legal effectiveness of the aspects of the System that are the bases of the Hudson Cook Opinions and Legal Analysis.

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<sup>18</sup> See, Electronic Contracting Legal Background, "Obtaining an Enforceable Security Interest Using Electronic Records and Signatures" section.

<sup>19</sup> See, System Description, "Consent to Use of Electronic Records and Signatures" section.

- Consumers are provided the Consumer Retention Copy immediately after the Contract is fully executed in the form the consumer has agreed to receive such copy.
- As of the date of the Certificate found in Exhibit C to this Opinion, the System Description is: (i) accurate, (ii) does not contain any misrepresentations, (iii) does not omit any material facts that would make any statements, conclusions or other information contained in the Hudson Cook Opinions and Legal Analysis misleading; and (iv) may be relied on by Hudson Cook, LLP in the Hudson Cook Opinions and Legal Analysis.

**Part IV – Limitations on Scope of Hudson Cook Review:**

The Hudson Cook Opinions and Legal Analysis are subject to the assumptions set forth above and the following additional qualifications, exceptions, and limitations:

- We express no opinion with respect to the creation or attachment of a security interest in favor of any Dealer or its assignees, or other vSignature System user in any Contract or with respect to the priority of any such security interest.
- We express no opinion as to the existence or condition of any Contract, or the nature or extent of the rights or title of any Dealer in or to any Contract.
- We express no opinion about the effect or consequence under law other than the Electronic Commerce Laws and UCC Article 9 resulting from all part of a transaction occurring at place other than the Dealer's licensed place of business.
- VisionMenu has not requested, and we do not provide, any opinion about whether the vSignature System satisfies special rules that require a consumer's affirmative consent to the use of electronic records to provide the consumer with information that other law requires to be provided or made available in writing ("Written Disclosure Requirements") under either the Electronic Commerce Laws or the laws imposing the Written Disclosure Requirements. As discussed in the Electronic Contracting Legal Background, ESIGN and several states require a special consent procedure to use electronic records to satisfy Written Disclosure Requirements.<sup>20</sup>
- We express no opinion on the efficacy of any methods employed by a party to attribute a signature to the person against whom any electronic record is to be enforced.
- We have not made any independent investigation, technical or otherwise, regarding, and express no opinion with respect to, the completeness or accuracy of the System Description as provided to us by VisionMenu or the technical or actual performance, internal controls, security controls, functionality, suitability, or integrity of the vSignature System. We note that a failure of the vSignature System to operate as described in the System Description could materially impair the ability of the vSignature System to meet the requirements of the Electronic Commerce Laws or the applicable provisions of UCC Article 9, or other applicable laws. We offer no opinion and provide no guidance on the risks or probability of such failures.
- The vSignature System's ability to create electronic records and electronic records in accordance with the Electronic Commerce Laws and the applicable provisions of the UCC Article 9 depends in part upon the

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<sup>20</sup> See, Electronic Commerce Laws Background, "ESIGN Requirements for Satisfying Written Disclosure Requirements" and "ESIGN Pre-emption, State Law UETA Variations and Non-Uniform Electronic Transaction Laws" sections.



policies, procedures, actions, and intentions of third parties, including but not limited to Dealers and other users of the vSignature System. This ability may be compromised to the extent that any of these policies, procedures, actions, or intentions of third parties are inconsistent with the assumptions or descriptions contained in the Opinion, including the Exhibits.

- The Contract terms are set by the Dealer or other third party and were not examined as part of our work for the Opinion, and the Opinion does not address enforceability of any Contract against the consumer, the Dealer or otherwise.
- The Opinion does not address any requirements for any transaction documents other than those requirements for the Contracts that are specifically discussed in the Opinion.
- The Hudson Cook Opinions and Legal Analysis is based solely upon our plain reading of the applicable published statutes as of April 14, 2021 and is a reasoned analysis of the applicability of those statutes and rules to the vSignature System. The Opinion does not reflect any independent opinion concerning the laws of any individual state.
- The Opinion is limited to the matters expressly set forth herein, and no statements or opinions should be inferred beyond such matters.
- The Opinion is current as of the date hereof; unless separately engaged, we undertake no obligation to update the Opinion to reflect future changes in law, regulation, or facts.
- Members of our firm are members of the bar in the states listed above.

The Opinion is furnished by us as counsel for VisionMenu and is rendered for the sole benefit of VisionMenu. The Opinion may not be used, quoted, relied upon, or otherwise referred to by any other person or for any other purpose without our prior written consent. Receipt or review of this Opinion does not create an attorney-client relationship with Hudson Cook, LLP and such recipient or reviewer with respect to the matters addressed in this Opinion or otherwise.

Very truly yours,

A handwritten signature in blue ink that reads "Hudson Cook, LLP". The signature is written in a cursive, flowing style.

## Electronic Contracting Legal Background

Traditionally, contracts memorializing the sale or lease of goods must be “in writing” and “signed” to be enforceable.<sup>21</sup> However, the following laws have been enacted since 1999 to enable the use of electronic records and electronic signatures to create, sign, store, and maintain contracts:

- The Electronic Signatures in Global and National Commerce Act (“ESIGN”)<sup>22</sup>,
- The Uniform Electronic Transactions Act (“UETA”)<sup>23</sup>, and
- Uniform Commercial Code Article 9 – Secured Transactions (“UCC Article 9”).<sup>24</sup>

### Introduction to ESIGN and UETA

ESIGN and UETA are the principal laws governing the legal enforceability of agreements made using electronic records and electronic signatures. The purpose of ESIGN and UETA is to facilitate the use of electronic records and signatures in the conduct of business, consumer, or commercial affairs between two or more persons. To accomplish this purpose, these laws generally validate the use of electronic records and electronic signatures in transactions where state and federal statutes, regulations, or other rules of law would otherwise require tangible (*i.e.*, non-electronic) writings or signatures.

### Major Provisions of ESIGN and UETA

Both ESIGN and UETA:

- Validate electronic records and electronic signatures as a means of satisfying state and federal laws that require written documents and traditional “wet-ink” signatures, including a general statute of frauds requirement.<sup>25</sup> However, these acts do not change other substantive requirements of these other laws.<sup>26</sup>

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<sup>21</sup> See, e.g., Uniform Commercial Code (“UCC”) § 2-201(1), which states that a contract for the sale of goods for the price of \$500 or more is not enforceable unless there is some “writing” sufficient to indicate that a contract for sale has been made between the parties. See, also, UCC § 2A-201(1), which states that a lease contract for greater than \$1,000 must be evidenced by “a writing,” “signed” by the party against whom enforcement is sought that is sufficient to indicate that a lease contract has been made between. And writing and signature requirements are commonly found in state retail installment sale acts and consumer leasing statutes.

<sup>22</sup> 15 U.S.C. §§ 7001 *et seq.*

<sup>23</sup> Final draft made available by ULC at:  
[http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta\\_final\\_99.pdf](http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf).

Except as otherwise noted, all references to UETA in this Exhibit A are to the official text as approved and recommended by the ULC and should not be understood to refer to modifications adopted by any state in enacting the UETA.

<sup>24</sup> Except as otherwise noted, all references to UCC Article 9 in this Exhibit A are to the official text as jointly approved and recommended by the ULC and the American Law Institute (“ALI”) in 1998 and as amended by the ULC and ALI in 2010 (the “2010 Amendments to UCC Article 9”) and should not be understood to refer to modifications adopted by any state in enacting the UCC Article 9.

<sup>25</sup> See 15 U.S.C. § 7001(a); UETA § 7.

<sup>26</sup> See 15 U.S.C. § 7001(b)(1); UETA § 8.

- Permit the parties to a transaction to agree to accept electronic records or electronic signatures where the state or federal law would require a writing, but does not require them to accept electronic records and signatures.<sup>27</sup>
- Permit the use of electronic records to provide state and federal consumer disclosures that would otherwise need to be given in writing. (Note, for consumer disclosures subject to ESIGN's requirements, a special procedure is required to obtain the consumer's consent to receive the required disclosures via an electronic record before providing the disclosures in electronic form.<sup>28</sup>)
- Permit the use of electronic records to satisfy legal record retention requirements.<sup>29</sup>
- Establish that parties may form binding contracts using electronic agents. "Electronic agents" are essentially machines or tools programmed to initiate actions (*e.g.*, place a purchase order) or respond to action (*e.g.*, accept a purchase order) with or without human review of a particular transaction.

### **Applicability of ESIGN and UETA**

ESIGN and UETA apply only to electronic signatures and electronic records used in "transactions."<sup>30</sup> ESIGN defines a "transaction," in relevant part, as an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including sale, lease, exchange, licensing, or other disposition of: (i) personal property, including goods and intangibles, or (ii) services.<sup>31</sup> UETA defines "transaction" to mean "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs."<sup>32</sup> The applicable Official Comments to UETA provide that the term "transaction:"

- Is limited to actions between people in business or commercial activities; and
- Does not include unilateral or non-transactional actions, such as the execution of wills and trusts.<sup>33</sup>

UETA's scope extends to electronic records and electronic signatures "relating to a transaction."<sup>34</sup> This is similar to ESIGN's inclusion of "contracts, signatures, and other records related to transactions" within its scope. UETA gives as an example of documents "related to a transaction" internal auditing and accounting records related to a transaction.<sup>35</sup>

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<sup>27</sup> See 15 U.S.C. § 7001(b)(2); UETA §§ 7 and 5.

<sup>28</sup> See 15 U.S.C. § 7001(c); UETA § 8.

<sup>29</sup> See 15 U.S.C. § 7001(d); UETA § 12. There are important exceptions to these provisions which are discussed in the section of this Exhibit A titled "Record Retention Requirements."

<sup>30</sup> 15 U.S.C. § 7001; UETA §3(a).

<sup>31</sup> 15 U.S.C. § 7006(13).

<sup>32</sup> UETA §2(16). The only significant difference is that UETA also refers to "governmental affairs" in its definition. In excluding "governmental affairs" from ESIGN, the drafters intended to narrow the scope of ESIGN so that it would not cover records generated purely for governmental purposes, such as regular monitoring reports on air or water quality that an agency may require pursuant to the Clean Air Act, Clean Water Act, Safe Drinking Act, or similar Federal or State environmental laws.

<sup>33</sup> See Official Comment 12 to UETA §2.

<sup>34</sup> UETA §3(a)

<sup>35</sup> See Official Comment 12 to UETA §2.

ESIGN is further limited to transactions in or affecting interstate commerce.<sup>36</sup>

In addition, both ESIGN and UETA limit their scope by stating that they do not apply to transactions to the extent they are covered by the UCC, other than sections 1-107 and 1-206 and Articles 2 and 2A.<sup>37</sup> The exclusion of most of the Uniform Commercial Code recognizes that most Articles of the UCC had been revised to specifically address electronic transactions.<sup>38</sup> Thus, the UCC Article 9 requirements for the use of electronic records and electronic signatures discussed below remain applicable to those aspects of the contracts governed by UCC Article 9 despite the applicability of the Electronic Commerce Laws to the other legal aspects of the contract.

### **General Consent to Transact Electronically**

Both UETA and ESIGN make clear that parties are not required to accept electronic signatures or records.<sup>39</sup> But neither ESIGN nor UETA require parties to *affirmatively* agree to conduct the transactions electronically. Both statutes permit agreement to conduct transactions electronically to be inferred from the context and surrounding circumstances, including the parties' conduct.<sup>40</sup> ESIGN does require consumers to consent to the use of electronic records to provide information that the law otherwise requires the consumer be provided in writing in connection with the transaction (see the discussion below of rules for delivering consumer disclosures electronically).

### **ESIGN and UETA Definition of Electronic Record**

ESIGN defines "electronic record" as "a contract or other record created, generated, sent, communicated, received, or stored by electronic means."<sup>41</sup> A "record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."<sup>42</sup> This encompasses not only traditional writings, but also anything which is stored on magnetic or optical media (such as a computer hard drive or CD-ROM). Essentially, all that is required is that the information be stored and may be retrieved for review. There is no requirement as to where storage physically occurs. For example, if an individual uses the Internet to review information stored on a server two thousand miles away, that information is still a record. The requirement that the record be "retrievable in perceivable form" is an objective, and not subjective, requirement. ESIGN defines "electronic" as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."<sup>43</sup> UETA definitions of these terms are substantively the same.<sup>44</sup>

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<sup>36</sup> 15 U.S.C. § 7001(a).

<sup>37</sup> 15 U.S.C. § 7003(a)(3); UETA §3(b)(2).

<sup>38</sup> See Official Comment 5 to UETA §3.

<sup>39</sup> See 15 U.S.C. § 7001(b)(2) and UETA §§5(b) and (c).

<sup>40</sup> UETA §5(b).

<sup>41</sup> 15 U.S.C. § 7006(4).

<sup>42</sup> 15 U.S.C. § 7006(9). Note: "electronic records" are the subset of "records" that are stored in "electronic" form.

<sup>43</sup> 15 U.S.C. § 7006(1). ESIGN's definition of "electronic" is identical to that found in UETA § 2(4).

<sup>44</sup> See UETA § 2.

## **ESIGN and UETA Definition of an Electronic Signature**

Both ESIGN and UETA permit a broad range of technologies, procedures, and processes to qualify as electronic signatures. ESIGN defines an “electronic signature” as an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.<sup>45</sup> ESIGN’s definition is identical to that found in UETA.<sup>46</sup>

No specific technology need be used in order to create a valid electronic signature. The intent to sign is the critical element for determining whether a particular technology qualifies as an electronic signature. This means that the person must have performed the action or process that constitutes the electronic signature with the intent to perform a legally significant act. It does not mean that they must have done the action or process with the intent to physically “sign” the record in the traditional sense.

The Official Comments to UETA include the following examples of electronic signatures:

- The person types his/her name as part of an e-mail purchase order.
- Use of numerical codes, personal identification numbers, public and private key combinations, and other security procedures that identify the party to whom an electronic record should be attributed.
- Use of “click-through” procedures if they involve a process where the person takes an action with an intent to “sign,” such as clicking an “I agree” button, and the action results in an electronic signature that becomes associated with the electronic record.<sup>47</sup>

## **ESIGN and UETA General Rule of Validity**

Both ESIGN and UETA provide that signatures, contracts and other records relating to a transaction may not be denied legal effect, validity, or enforceability solely because they are in electronic form.<sup>48</sup> We refer to this as the “General Rule of Validity”. This validates the use of electronic records and electronic signatures in transactions as a means of satisfying state and federal laws that require written documents and traditional “wet-ink” signatures. The General Rule of Validity also establishes that the use of an electronic medium for a record or signature does not affect its legal significance.<sup>49</sup> Thus, a contract

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<sup>45</sup> 15 U.S.C. § 7006(5).

<sup>46</sup> UETA § 2(8).

<sup>47</sup> See Official Comments 1 and 5 to UETA § 9.

<sup>48</sup> 15 U.S.C. § 7001; UETA §7.

<sup>49</sup> 15 U.S.C. §§ 7001(a)(1) and (2) state:

(a) In General.--Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce--

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

entered into using electronic records and signatures effectively complies with state or federal laws that require a signed contract in writing to the same extent as a tangible contracts signed with “wet-ink” signatures.

Implicit in the fact the parties are not required to use electronic signatures and records is that the parties may agree to conditions or limitations on their use. Thus, both E-SIGN and UETA appear to allow parties the flexibility to agree to such things as the designation of an electronic address or addresses for certain notices and a different address for others or the use of a specific authentication method for some electronic records, but not others.<sup>50</sup>

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Similarly, UETA §§ 7(a) and (b), state:

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

Official Comment 1 to § 7 explains:

This section sets forth the fundamental premise of this Act: namely, that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance. Subsections (a) and (b) are designed to eliminate the single element of medium as a reason to deny effect or enforceability to a record, signature, or contract. The fact that the information is set forth in an electronic, as opposed to paper, record is irrelevant.

It is unfortunate that E-SIGN contains no counterparts to UETA §§ 7(c) and (d), which state:

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

These provisions provide a useful clarifying statement. However, the Official Comments to UETA § 7 suggest that the clarifying statements found in §§ (c) and (d) are not necessary so long as a counterpart to UETA § 7(a) exists, such as that found in 15 U.S.C. §§ 7001(a)(1). Official Comment 3 to UETA § 7 states that §§ (c) and (d) are “particularized applications of subsection (a)” whose “purpose is to validate and effectuate electronic records and signatures as the equivalent of writings, subject to all of the rules applicable to the efficacy of a writing . . .”

<sup>50</sup> See “Electronic Records and Signatures under the Federal E-SIGN Legislation and the UETA,” Wittie and Winn, *The Business Lawyer*, Vol. 56 No. 1, at 300, which states:

By specifying that the use and acceptance of electronic records and signatures is voluntary, E-SIGN effectively preserves the autonomy of private parties to agree to limitations on, or specific criteria for, their use. While the Act limits the government's ability to require or give preferential treatment to specific technologies, such as digital signatures, public key infrastructures, or other commercial applications of cryptography, it does not limit the ability of individual parties to require their use in their own transactions. In this manner, E-SIGN incorporates by implication the essence of autonomy provisions that had been contained in the House and Senate bills that were refashioned by a joint conference report to become the Act, without affecting any other rules of law, such as those governing unconscionable contracts, that might limit the enforceability of parties' agreements. [Footnotes omitted]

The same analysis would apply to UETA. UETA only applies to transactions between parties each of which has agreed to conduct transactions by electronic means. And a party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. See UETA § 5(b) and (c).

In addition, neither ESIGN nor UETA prohibit one party from requiring the use of electronic records or signatures by the other party for all or part of a transaction as a condition for entering into or continuing a transaction. ESIGN appears to acknowledge that this is permissible in the special consumer consent rules discussed below, which provide that termination of the transaction is a permissible consequence of a consumer's withdrawal of consent to receive disclosures electronically.<sup>51</sup>

### **ESIGN and UETA Consumer Retention Copies**

If other law requires that the consumer be provided a copy of the contract (a "retention requirement"), there is a risk that both the ESIGN and UETA General Rule of Validity (discussed above) would be interpreted as requiring the consumer be provided a copy of the executed contract as a condition of using electronic records to satisfy writing requirements and electronic signatures to satisfy signature requirements.

ESIGN provides that if a contract or other record is required by law to be "in writing," the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained; and capable of being accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.<sup>52</sup>

Similar to ESIGN, UETA states that if parties to a transaction have "agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt."<sup>53</sup>

These sections are reasonably understood as simply reinforcing that a party subject to a retention requirement may only use electronic records to satisfy that requirement if the electronic records are provided in a form that can be retained. But there is a risk that a court would interpret the ESIGN and UETA provisions as invalidating the use of electronic records and signatures entirely as a means of satisfying writing and signature requirements applicable to the contract (including the statute of frauds).

We note that other laws governing the sale, financing, or leasing of motor vehicles and other goods, such as state retail installment sale and consumer leasing laws, generally require the retailer to provide the consumer with a copy of the executed contract. To be conservative, we assume that such contracts are subject to retention requirements, and that both ESIGN and UETA require that these retention requirements be satisfied for electronic records and signatures to be used to satisfy writing and signature requirements under the General Rule of Validity (discussed above).

### **ESIGN and UETA Record Retention Provisions**

Both UETA and ESIGN authorize a records holder to comply with state and federal record retention laws by electronically retaining copies of those records.<sup>54</sup> Each provides that an accurate electronic copy satisfies any requirements that the "original" record be retained, provided the electronic disclosure or

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<sup>51</sup> 15 U.S.C. § 7001(c)(1)(B)(i). *See also*, UETA §5(b) and (c).

<sup>52</sup> 15 U.S.C. § 7001(e).

<sup>53</sup> UETA § 8.

<sup>54</sup> *See* 15 U.S.C. § 7001(d); UETA § 12.

other record is accessible for later reference. ESIGN goes somewhat further than UETA, by requiring that such records be accessible “to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.”<sup>55</sup>

Thus, a retailer should be able to satisfy a record retention requirement by either printing or e-mailing a copy of records requested by a regulator, or giving a regulator access to the retailer’s computer system for purposes of printing or downloading the records.

### **ESIGN Requirements for Satisfying Written Disclosure Requirements Electronically**

#### *ESIGN Consumer Consent Requirement*

As discussed above, ESIGN and UETA generally establish that electronic records can be used to satisfy statutory provisions that require a “writing;” that electronic signatures can be used to satisfy statutory provisions that require a “signature;” and that parties are generally free to enter into contracts using electronic records.

However, ESIGN creates special rules that require a consumer’s affirmative consent to the use of electronic records to provide the consumer with information that other law requires be provided or made available to the consumer in writing (“Written Disclosure Requirements”).<sup>56</sup> If consent is obtained in the manner required by ESIGN, electronic records may be used to satisfy Written Disclosure Requirements.

#### *ESIGN Consumer Consent Disclosures*

Under ESIGN, the consent to receive required consumer disclosures in electronic form must be preceded by a “clear and conspicuous” statement disclosing:

- Any right or option that the consumer has to receive the record in non-electronic form;
- The consumer’s right to withdraw the consent and any conditions, consequences (which may include termination of the parties’ relationship), or fees that would result from such a withdrawal;
- The categories of electronic records that may be provided or made available pursuant to the consent during the course of the parties’ relationship, or if the consent covers only the particular transaction giving rise to the obligation to provide the record, a statement to that effect.
- The procedures the consumer must use to withdraw consent and to update the consumer’s electronic address;
- How, after consenting, the consumer may obtain a paper copy of any electronic record and whether a fee will be charged for providing it; and
- The hardware and software requirements of access to and retention of the electronic records.<sup>57</sup>

(Collectively, the “ESIGN Pre-Consumer Consent Disclosures.”)

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<sup>55</sup> See 15 U.S.C. § 7001(d); UETA § 12.

<sup>56</sup> 15 U.S.C. § 7001(c).

<sup>57</sup> 15 U.S.C. § 7001(c).



### *Reasonable Demonstration Requirement*

After these E-SIGN Pre-Consumer Consent Disclosures are provided to the consumer, the consumer must consent electronically, or confirm his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access the information in the electronic form that will be used to provide the required consumer disclosures that are the subject of the consent (the “reasonable demonstration requirement”).<sup>58</sup>

### **Continued Applicability of Other Substantive Legal Requirements**

Both E-SIGN and UETA include provisions clarifying that neither act affects the substantive requirements of other laws except for requirements that records be written, signed, or retained in non-electronic form. E-SIGN emphasizes this by stating that “nothing in this title affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.”<sup>59</sup> UETA provides a similar provision.<sup>60</sup>

Both E-SIGN and UETA preserve general contract law, including law of fraud and mistake.<sup>61</sup> UETA provides similar assurances that, except for state laws that would limit the use of electronic records or signatures, nothing in UETA serves to undermine other requirements of state laws.

As a result, neither E-SIGN nor UETA alter substantive legal requirements that would apply to a contract other than requirements to use writings or wet-ink signatures. This would include federal laws, like the Truth in Lending Act and Consumer Leasing Act, as well as state credit codes, motor vehicle retail installment sale acts, and state motor vehicle leasing laws.

### **Attribution – Identifying the Person Legally Bound by the Electronic Contract**

Establishing that a particular person is legally bound by an electronic record or electronic signature is known as “attribution.” E-SIGN contains no guidance on what is necessary to attribute an electronic record or electronic signature to a person, but UETA does. UETA states that:

- An electronic record or electronic signature is attributable to a person if it was the act of that person.
- An act of a person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

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<sup>58</sup> *Id.* Note that the reasonable demonstration requirement only requires a reasonable demonstration that the consumer can access the information. See 15 U.S.C. § 7001(c)(1)(C)(ii). However, some consumer disclosure requirements involved with contracts require that the consumer be given the disclosures in a form the consumer may keep. For example, Truth in Lending Regulation Z requires that the disclosures be provided to the consumer in a form that the customer may keep. 12 CFR § 1026.17(a)(1). Thus, there is a risk that a court or regulator might conclude that the creditor must make a reasonable effort to confirm the consumer’s ability to retain the required consumer disclosures as part of the consent process if other law requires that the disclosures be given in a form the consumer can retain.

<sup>59</sup> 15 U.S.C. § 7001(c)(2)(A).

<sup>60</sup> See, e.g., Official Comment 5 to UETA § 5.

<sup>61</sup> 15 U.S.C. § 7001(b)(1). Official Comment 4 to UETA §1.

- The effect of an electronic record or electronic signature attributed to a person is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.<sup>62</sup>

The Official Comments to UETA provide the following helpful examples where electronic records and electronic signatures would be attributable to a person:

- The person types his/her name as part of an e-mail purchase order.<sup>63</sup>
- The person's employee, pursuant to authority, types the person's name as part of an e-mail purchase order.<sup>64</sup>
- The person's computer, programmed to order goods upon receipt of inventory information within particular parameters, issues a purchase order that includes the person's name, or other identifying information, as part of the order.<sup>65</sup>
- A person signs on a touch screen that captures the signature electronically and associates it with an electronic record.<sup>66</sup>

The Official Comments also offer examples of how electronic records and electronic signatures might be attributed to a person without the use of anything like a traditional signature and they emphasize that, with or without a signature, information within the electronic record may be sufficient to give attribution of an electronic record to a particular party.<sup>67</sup> Examples given include:

- Information printed across the top of facsimile that indicates the machine from which was a document was sent or the letterhead contained in the document transmitted to that person.<sup>68</sup>
- An established course of dealing between parties.<sup>69</sup>

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<sup>62</sup> UETA § 9.

<sup>63</sup> Official Comment 1 to UETA § 9.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Official Comment 2 to UETA § 9 makes clear that capturing a traditional signature electronically is an acceptable method of attributing a record to a person absent a showing of fraud, forgery, or other invalidating cause. It states:

Nothing in this section affects the use of a signature as a device for attributing a record to a person. Indeed, a signature is often the primary method for attributing a record to a person. In the foregoing examples, once the electronic signature is attributed to the person, the electronic record would also be attributed to the person, unless the person established fraud, forgery, or other invalidating cause.

<sup>67</sup> Official Comment 3 to UETA § 9 states: "[t]he critical point is that with or without a signature, information within the electronic record may well suffice to provide the facts resulting in attribution of an electronic record to a particular party."

<sup>68</sup> Official Comment 3 to UETA § 9. This comment states:

The use of facsimile transmissions provides a number of examples of attribution using information other than a signature. A facsimile may be attributed to a person because of the information printed across the top of the page that indicates the machine from which it was sent. Similarly, the transmission may contain a letterhead which identifies the sender. Some cases have held that the letterhead actually constituted a signature because it was a symbol adopted by the sender with intent to authenticate the facsimile. However, the signature determination resulted from the necessary finding of intention in that case. Other cases have found facsimile letterheads NOT to be signatures because the requisite intention was not present.

<sup>69</sup> *Id.*

- Numerical codes, personal identification numbers, public and private key combinations, and other security procedures that identify the party to whom an electronic record should be attributed.<sup>70</sup>
- “Click-through” procedures if they involve a process where the person takes an action with an intent to “sign,” and the action results in an electronic signature that becomes associated with the electronic record.<sup>71</sup>

Official Comment 1 to UETA § 9 recognizes that UETA merely restates existing law regarding attribution. It says:

This section does not alter existing rules of law regarding attribution. The section assures that such rules will be applied in the electronic environment. A person’s actions include actions taken by human agents of the person, as well as actions taken by an electronic agent, i.e., the tool, of the person. Although the rule may appear to state the obvious, it assures that the record or signature is not ascribed to a machine, as opposed to the person operating or programming the machine.

### **Electronic Records and Signatures as Evidence of the Contract**

UETA and E-SIGN both provide that an electronic record will be treated as an original for evidentiary purposes, so long as the record complies with the applicable statute’s standards for record retention.<sup>72</sup> This rule applies whether the record was created in, or converted to, electronic form.<sup>73</sup> The Official Comments to UETA explain that so long as there exist reliable assurances that the electronic record accurately reproduces information, then UETA establishes the functional equivalence of electronic and paper-based records. Information stored electronically will remain effective for all audit, evidentiary, archival and similar purposes.<sup>74</sup>

While UETA and E-SIGN both provide for electronic records to be treated as originals, they do not otherwise alter the rules of evidence. The necessary foundation still has to be established in order to have the electronic record admitted into evidence.<sup>75</sup>

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<sup>70</sup> Official Comment 4 to UETA § 9. This comment states:

Certain information may be present in an electronic environment that does not appear to attribute but which clearly links a person to a particular record. Numerical codes, personal identification numbers, public and private key combinations all serve to establish the party to whom an electronic record should be attributed. Of course security procedures will be another piece of evidence available to establish attribution.

<sup>71</sup> Official Comment 5 to UETA §9. This comment states:

This section does apply in determining the effect of a “click-through” transaction. A “click-through” transaction involves a process which, if executed with an intent to “sign,” will be an electronic signature. See definition of Electronic Signature. In the context of an anonymous “click-through,” issues of proof will be paramount. This section will be relevant to establish that the resulting electronic record is attributable to a particular person upon the requisite proof, including security procedures which may track the source of the click-through.

<sup>72</sup> 15 U.S.C. § 7001(d)(3); UETA § 12(d).

<sup>73</sup> UETA § 12(a).

<sup>74</sup> Official Comment 1 to UETA § 12.

<sup>75</sup> Official Comment to UETA § 13.

The Federal Rules of Evidence (“F.R.E.”) and the Uniform Rules of Evidence, which are based on the F.R.E., make accommodation for electronic records. F.R.E. 1001 (known as the best evidence rule) permits the introduction of printouts and other computer output as an “original” of an electronic record.<sup>76</sup> Most business records are offered into evidence under the hearsay exception for business records. The exception covers any:

[M]emorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.<sup>77</sup>

Data integrity is the key to admitting electronic records, or printouts of the records. To date, the few court decisions focusing on the introduction of electronic records have emphasized the systemic protections -- division of labor, complexity of backup systems, activity logs, and security of copies stored offsite to verify content -- which make it difficult to counterfeit a record without leaving a discoverable trail.<sup>78</sup>

### **Paper Copies as Evidence of the Contracts**

As discussed above, the best evidence rule provides that a printed copy of electronic chattel paper should be sufficient to establish evidence of the holder’s rights in any enforcement action against an obligor. And the ability of the holder of such a contract to demonstrate the reliability of the systems used to store, manage, and reproduce electronic records is paramount. Also important is the ability to demonstrate that the reliability of the process by which the obligor has signed the electronic contract.

State and federal agencies may establish performance standards to insure that records retained electronically are accurate, maintain record integrity and are adequately accessible.<sup>79</sup> State and federal agencies may not, however, require that any particular hardware or software be used by creditors or other regulated businesses.<sup>80</sup> In addition, state or federal agencies may require records to be maintained in paper form if (i) there is a compelling governmental interest relating to law enforcement or national security and (ii) imposing such a requirement is essential to attaining that interest.<sup>81</sup> Therefore, it would be prudent to consult with the relevant regulators before assuming that electronic records will satisfy a particular record retention requirement.

### **ESIGN Pre-emption, State Law UETA Variations and Non-Uniform Electronic Transaction Laws**

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<sup>76</sup> Fed. R. Evid. 1001.

<sup>77</sup> Fed. R. Evid. 803(6).

<sup>78</sup> See *United States v. Greenlee*, 380 F. Supp. 652 (E.D. Pa. 1974), *aff'd* 517 F.2d 899 (3d Cir. 1975), *cert. denied*, 423 U.S. 985 (1975); *Transport Indemnity Co. v. Seib*, 132 N.W.2d 871 (1965).

<sup>79</sup> ESIGN § 101(d); UETA § 12.

<sup>80</sup> ESIGN § 104(b)(3)(A).

<sup>81</sup> ESIGN § 104(b)(3)(B).

To help ensure uniformity in the acceptance of electronic signatures and records across state lines, E-SIGN provides for broad preemption of inconsistent state requirements. E-SIGN draws its basic approach and much of its language from UETA. The legislative history of E-SIGN shows that Congress looked with favor on the policy and provisions found in UETA. This explains in part why E-SIGN exempts a state enactment of UETA in its model form from its preemption provision.<sup>82</sup> The legislative history of E-SIGN also recognizes that the Official Comments to those UETA provisions comparable to E-SIGN's provisions are a useful reference source for understanding the meaning and purpose of the E-SIGN's provisions. For these reasons, courts interpreting E-SIGN should be guided by the Official Comments to UETA for comparable provisions of E-SIGN.

E-SIGN describes whether it or UETA governs a particular transaction. The following generally describes the relationship/applicability of E-SIGN and UETA:

- If a state has enacted UETA without modification, then UETA applies to state writing and signature requirements (including its general statute of frauds).
- If a state has not adopted UETA, or has adopted UETA with modifications, then E-SIGN applies to the state writing or signature requirements (including its general statute of frauds), at least to the extent of any non-uniformity, and perhaps always.
- E-SIGN applies to all writing and signature requirements imposed by federal law.

Forty-eight states, the District of Columbia, and the U.S. Virgin Islands have enacted UETA.<sup>83</sup>

Illinois and New York have not enacted UETA and currently have non-uniform state laws that purport to govern the general use of electronic records and electronic signatures to some extent. Illinois adopted the Electronic Commerce Security Act.<sup>84</sup> New York enacted the Electronic Signatures and Records Act.<sup>85</sup> And some states have adopted electronic signature provisions in addition to the UETA. For example, Florida adopted the Electronic Signature Act of 1996,<sup>86</sup> which states that, unless otherwise provided by law, an electronic signature may be used to sign a writing and has the same force and effect as a written signature.<sup>87</sup>

Of the states that have enacted a version of UETA, many were enacted with only minor variations from the uniform version of the UETA.<sup>88</sup> Some have adopted versions of UETA that vary more substantially

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<sup>82</sup> See 15 U.S.C. § 7002(a)(1).

<sup>83</sup> See <https://www.uniformlaws.org/committees/community-home?communitykey=2c04b76c-2b7d-4399-977e-d5876ba7e034&tab=groupdetails>.

<sup>84</sup> 5 Ill. Comp. Stat. §§ 175/1-101 *et seq.*

<sup>85</sup> N.Y. Technology Law §§ 540.1 *et seq.*

<sup>86</sup> Fla. Stat. Ann. §§ 668.001 *et seq.*

<sup>87</sup> Fla. Stat. Ann. § 668.004.

<sup>88</sup> A notable exception is California, which adopted its version of the UETA with numerous and significant changes to NCCUSL's version of the UETA. California's enactment of the UETA predated E-SIGN. The number and significance of California's variations from the uniform version of the UETA is widely considered to be a significant factor in prompting Congress to take up and enact E-SIGN to prevent states from enacting a morass of different electronic contracting laws that would stifle Internet

from the uniform version. None of them have made modifications that materially alter the definitions of “electronic record” or “electronic signature”. And none of them materially changes the General Rule of Validity.

Against this backdrop, determining whether UETA or ESIGN applies to a particular state writing or signature requirement can be very complex. Thus, for most purposes, a conservative approach is to assume that ESIGN governs in both states with no UETA and those states that have enacted a UETA with modifications.

### **Obtaining an Enforceable Security Interest Using Electronic Records and Signatures**

Certain contracts for the sale of goods involve a buyer granting the seller a security interest in the goods being purchased. This portion of the contract is a security agreement subject to UCC Article 9.

This security agreement becomes enforceable by the seller (and subsequent assignees) against the buyer when it “attaches.”<sup>89</sup> For our purposes here, attachment occurs when:

- The buyer has authenticated the contract containing a security agreement that grants the seller a security interest in the purchased goods;
- The seller gives value to the buyer by transferring ownership of the goods to the buyer in exchange for the consumer’s promise to pay for the goods; and
- The buyer obtains ownership of the goods.<sup>90</sup>

UCC Article 9 permits the electronic creation of a security interest via an authenticated electronic security agreement. The 2010 Amendments to UCC Article 9 substantially conformed the requirements to “authenticate” a record to the ESIGN and UETA requirements to electronically sign a record.<sup>91</sup> However, a significant number of states did not adopt this new definition. Thus, we assume for the purposes of this Exhibit A that a secured party must continue to comply with the prior definition. Under this definition, “authenticate” includes executing or adopting a symbol, or encrypting a record in whole or in part, with present intent to:

- Identify the authenticating party; and
- Adopt or accept a record or term.<sup>92</sup>

The definition of the term “record” is identical to the definition in UETA and ESIGN and thus, includes electronic records.<sup>93</sup> UCC Article 9 does not define “electronic,” but presumably it embraces the same range of technologies as the UETA, which was also approved and adopted by the ULC.

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commerce. ESIGN is generally regarded as having been successful in this regard, given the lack of significant deviations from the uniform version of the UETA in the state enactments of it that followed the passage of ESIGN.

<sup>89</sup> UCC § 9-203(a).

<sup>90</sup> UCC § 9-203(b).

<sup>91</sup> UCC Rev. § 9-102(a)(7).

<sup>92</sup> Pre-2010 Amendments Version of UCC Rev. § 9-102(a)(7).

<sup>93</sup> UCC § 9-102(a)(70).



## Exhibit B

### VisionMenu

#### vSignature System Description

##### Introduction

VisionMenu, Inc. (“VisionMenu”) offers a service to allow users to electronically enter into contracts (the “vSignature System”). Although the vSignature System can be configured for use in different types of transactions, this System Description focuses on the use of the vSignature System by retailers of goods and services, including motor vehicles, powersports vehicles, recreational vehicles, or marine vessels (“Dealers”) for transactions with buyers or lessees of such goods and services (“consumers”) involving contracts for the sale, lease, and/or financing of goods and services (“Contracts”).

Each Dealer independently manages electronic presentation and signing of Contracts within the vSignature System. However, the underlying process for each Dealer is similar and is designed to ensure compliance with legal requirements that govern the use of electronic methods to enter into Contracts.

This System Description describes the flow of events in the vSignature System for all Dealers and other persons involved in the process of executing Contracts.

##### Contract Service Process Flow

Contract terms and conditions will be negotiated by the Dealer and the consumer without regard to whether they will be signed using the vSignature System. After a consumer and a Dealer agree on terms and conditions of the related transaction, the Dealer will prepare a definitive Contract in preparation for signing. A Dealer will choose the Contracts it wishes to have signed using the vSignature System by saving each definitive Contract in the Adobe Portable Document Format (“PDF”) (if not already in that format) and uploading it to the vSignature System. We refer to each such a Contract as a “Signature-Ready Contract”. The vSignature System allows the Dealer to designate places on a Signature-Ready Contract where a Dealer or a consumer can place an electronic signature (“signature icons”). The placement of these signature icons will correspond to the sections of the Contract that have been designated for a conventional graphical signature using ink (*i.e.*, a “wet signature”).

Signature-Ready Contracts are stored in the vSignature System and presented to signers in a visual user interface (or “device”). The vSignature System allows the Dealer to place signature icons on a Signature-Ready Contract prior to presenting the Contract to the consumer for review and signature. Alternatively, a Dealer representative may place signature icons on the Contract while the consumer is viewing the Contract on a device. The Dealer representative then directs the consumer to sign where each signature icon is placed.

The vSignature System can be used to electronically sign Contracts with different devices and with or without real-time assistance by a Dealer representative (“User Modes”). Current User Modes are as follows:

- *Live Mode:* In this User Mode, the Dealer presents a Signature-Ready Contract to the consumer on a device supplied by the Dealer or the consumer. The Dealer representative controls when each Signature-Ready Contract can be viewed by the consumer and places signature icons on a Signature-Ready Contract during the Signature Ceremony (as defined below) and guides a consumer to each place on a Contract where the consumer must sign or initial.



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- *Guided Mode:* This User Mode is similar to the Live Mode in that the Dealer presents a Signature-Ready Contract to the consumer on a device supplied by the Dealer or the consumer. However, in this User Mode, the signature icons have been placed on each Signature-Ready Contract prior to the Signature Ceremony. A Dealer representative guides a consumer to each place on the Contract where the consumer must sign or initial.
- *Unattended Mode:* In this User Mode, signature icons have been placed on each Signature-Ready Contract prior to the Signature Ceremony. However, a consumer is not guided by a Dealer representative. Instead, the Dealer representative sends the consumer an email or text message that provides a link to a website at which the consumer, using his or her own device, may review and sign the Signature-Ready Contract placed there. The vSignature System provides prompts alerting the consumer to each place on the Contract where the consumer must sign or initial and requires an action to sign or initial on each signature icon before the Signature Ceremony can be completed.

### **Consent to Use of Electronic Records and Signatures:**

After preparing the Signature-Ready Contracts, the Dealer invites a consumer to review and sign them. In each User Mode, before a consumer can commence review and apply signatures, the consumer is presented with a screen that presents the consumer with: (1) the vSignature Terms of Service, (2) an Electronic Records and Signature Disclosure, and (3) a general consent to use electronic records and signatures for the purpose of review and executing Contracts (the “General Consent”).

The General Consent includes the consumer’s agreement to enter into Contracts electronically, *i.e.*, the consumer’s agreement to use: (a) electronic records to document Contracts, and (b) electronic signatures to sign Contracts.

Before the transaction can proceed electronically, the vSignature System requires all consumers to clearly signify agreement to the terms of the General Consent. The vSignature System presents the consumer with a screen that includes the language of the General Consent and identifies the consumer by name. The screen includes a checkbox with the following language followed by a “button” labeled “Start”:

By checking this box below and clicking “Start” you are agreeing: (a) to review contracts and other documents presented to you electronically, (b) sign contracts using an electronic signature, and (c) receive copies of these contracts and other documents in electronic form.

To proceed to the review and signing of Contracts, each consumer to be obligated on a Contract must mark the checkbox and click the Start button. Both of these actions can be accomplished with a mouse click, or by touch if the device is enabled with a touch screen. The vSignature System will not allow the user to advance to the next screen until these actions are completed.

When a consumer takes the actions described above to signify acceptance of the General Consent, this action is logged by the vSignature System by noting the date of acceptance and the IP Address of the device with which the consent actions were performed.

### **Adoption of the Consumer Signature**

After completing the General Consent, the vSignature System prompts the user to adopt a signature and initials. This can be accomplished by one of the following methods:

- The user types his or her name and initials into a signature adoption form that is presented on the device. The name and initials are reproduced in a stylized font that represent symbols of the

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user's signature and initials. The signature adoption form prompts the user to adopt these symbols as an electronic signature and electronic initials by touching or clicking a "button" labeled "Adopt". The signature adoption form explains to the user that by taking this action the user agrees that the signature and initials represented in the form will represent the user's electronic signature and initials to be applied to documents, including legally binding contracts, presented in electronic form.

- The signature adoption form also provides the user with the option to "draw" a signature. This method of signature adoption involves the user creating a graphical representation of his or her signature using a touch screen device that captures the motion of the users finger or stylus and converting it into a graphical symbol of a signature. The same process is used to draw initials. These symbols may then be adopted by the user as described above for signatures and initials that are in the form of a stylized font.

Once a consumer has adopted the signature and initials created using one of the methods described above (we hereafter refer to both the adopted signature and/or initials as the "Adopted Signature") the vSignature System creates a record for the Adopted Signature, which includes the following information: (1) a unique alphanumeric identifier, (2) the transaction for which the Adopted Signature was created, (3) the date the Adopted Signature was created, (4) the Dealer representative who initiated the signature adoption process, (5) the Internet IP address of the device used to adopt the Adopted Signature, and (6) a unique alphanumeric identifier for the device used to create the Adopted Signature. An Adopted Signature can be applied only to documents signed on the device on which the Adopted Signature was adopted and only for a period of two hours after being adopted.

After the Dealer obtains the consumer's agreement to the General Consent, the vSignature System presents Signature-Ready Contracts in one of the User Modes described above.

### Signature Ceremony

The "Signature Ceremony" is a process which collects all required signatures on a Signature-Ready Contract. The vSignature System presents the Signature-Ready Contracts to the consumer with a clear indication of where signatures are required.

A consumer signifies his or her intent to be bound by the terms of a Signature-Ready Contract by applying the Adopted Signature to the electronic signature blocks added to the Signature-Ready Contract by the Dealer. The Adopted Signature is applied when the consumer uses a finger, or a mouse or similar device to tap or "click" on the signature icon displayed on the Signature-Ready Contract. Each signature icon indicates the action (e.g., "Buyer Tap to Sign" or "Buyer Tap to Initial") that is necessary to apply the Adopted Signature to the Signature-Ready Contract. The vSignature System creates a record for each application of an Adopted Signature which includes the following information: (1) a unique alphanumeric identifier, (2) a unique identifier for the device used to apply the Adopted Signature, (3) the page number,

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and x and y coordinates on the applicable page of the Signature-Ready Contract, (4) the width and height of the Adopted Signature applied, and (5) the date and time of the application of the Adopted Signature.

The signing procedure described above must be repeated for each Adopted Signature applied by the consumer to every signature icon in each Signature-Ready Contract.

After the first Adopted Signature is applied to a Signature-Ready Contract and captured by the vSignature System, the Dealer is unable to modify the Contract. If a modification is needed, a new definitive Contract must be prepared and uploaded to the vSignature System to create a new Signature-Ready Contract.

After the consumer has signed each Signature-Ready Contract related to the transaction, any such Contract requiring a Dealer signature can be signed using a similar process. A Dealer representative will create an Adopted Signature and apply the Adopted Signature to each signature icon placed on the Signature-Ready Contract in the place designated on the Contract for a Dealer signature.

Once all signatures are completed for a Signature-Ready Contract, the signatures are applied to each Signature-Ready Contract by creating a new PDF file of the Signature-Ready Contract with an image of the Adopted Signatures in place of the signature icons. This new, signed PDF file is then encrypted using AES 256 bit encryption so that the resulting file (an "Executed Contract") cannot be modified by the consumer or the Dealer.

### **Providing the Consumer Retention Copy**

The Dealer will provide the consumer with a copy of each Executed Contract by one or more of the following methods: (1) printing a paper copy of the Executed Contract, and giving it to the consumer (if the consumer is at the Dealer's premises); or (2) sending an electronic copy of the Executed Contract to the consumer via encrypted email. The consumer is invited to select the method by which copies are provided at the end of the signature ceremony.

**Exhibit C**

**VisionMenu, Inc.**

**Officer's Certificate**

I, Ron Martin, President of VisionMenu, Inc. ("VisionMenu"), give this Officer's Certificate to Hudson Cook, LLP, with respect to its Opinion Letter of even date herewith addressed to VisionMenu (the "Opinion"). Capitalized terms used herein but not defined shall have the meaning given to them in the Opinion.

I have examined Exhibit B to the Opinion. I am the President of VisionMenu and, as such officer, part of my duties is the supervision of the vSignature System.

I certify to Hudson Cook, LLP that the description of the vSignature System set forth in Exhibit B of the Opinion:

1. Accurately describes the vSignature System.
2. Does not contain any misrepresentations.
3. Does not omit any material facts which would make the statements or other information contained in the Opinion false or misleading.
4. May be relied on by Hudson Cook, LLP to render the Opinion.

Nothing in this Officer's Certificate shall be construed as express or implied consent for this Certificate to be used for any purpose other than for the issuance of the Opinion to VisionMenu.

Executed May 14, 2021



Ron Martin, President  
VisionMenu, Inc.