



DEALER AGREEMENT

This Dealer Agreement (“Agreement”) is made and entered into on this ___ day of _____, _____ (“Effective Date”), by and between **MistAway® Systems, Inc.** (“MistAway”), a Texas corporation, with its principal place of business at 5508 Clara Road, Houston, Texas 77041, and _____ (“Dealer”), a _____ [state of organization] _____ [corporation, partnership, limited partnership or limited liability company, as applicable], with its principal place of business at _____.

WHEREAS, MistAway is a manufacturer and supplier of outdoor insect control systems and desires to appoint Dealer as one of MistAway’s non-exclusive dealers and grant Dealer certain rights to sell and install MistAway’s systems and products, subject to and in accordance with the terms and conditions of this Agreement; and

WHEREAS, Dealer desires to obtain such rights and be one of MistAway’s non-exclusive dealers and sell MistAway’s systems and products in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants herein contained MistAway and Dealer agree as follows:

1. DEFINITIONS. As used in this Agreement, the following capitalized terms have the following meanings:

“Distribute” means to sell, distribute, market, promote, stimulate interest in, and solicit orders for, and to provide any services that are useful in connection with those activities.

“Intellectual Property Rights” means the Trademarks and any and all patents and rights under applications for patents and trade secrets related to any of the Products or MistAway’s business.

“Order” means a written order sent by Dealer to MistAway on a form acceptable to MistAway requesting the purchase of Products by Dealer from MistAway, or a written confirmation sent by MistAway to Dealer to confirm a telephone order placed by Dealer.

“Product” means any System, product or good purchased by Dealer from MistAway pursuant to this Agreement.

“System” means a MistAway outdoor insect control system including its component motors, pumps, timers, regulators, power systems, hardware, software, control panels and nozzles.

“Trademarks” means any and all logos, trademarks, service marks, trade names, other designations, and copyrights (in each case whether registered or unregistered) which are owned, controlled or used by MistAway and used on or in connection with any of the Products, any packaging for or displays of any of the Products, or any advertisements for any of the Product, or in connection with MistAway or its business.

“MistAway Group” means collectively, MistAway, its subsidiaries and affiliates, and each of its and their respective directors, officers, managers, members, employees, contractors, representatives and agents.

“Dealer Group” means collectively, Dealer, its subsidiaries and affiliates, and each of its and their respective directors, officers, managers, members, employees, contractors, representatives and agents.

2. APPOINTMENT AND RESTRICTIONS.

(a) MistAway grants to Dealer the non-exclusive right to Distribute the Products through Dealer’s distribution network, subject to and in accordance with the terms and conditions of this Agreement. MistAway may appoint additional dealers for its Products as MistAway may determine in its sole discretion. MistAway shall have no obligation to defend or protect Dealer’s Distribution rights or other rights in any respect or manner whatsoever.

(b) Each System and the components thereof have been designed to function as an integrated unit and Dealer shall not install or utilize any third party manufactured or supplied components with any MistAway System. Dealer may purchase outdoor insect control system components from third party manufacturers or suppliers only to the extent necessary for Dealer to service and repair its customers’ third party manufactured systems. In no event shall Dealer ever represent that any third party manufactured or supplied system is a MistAway System.

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(c) Dealer shall sell the Products for its own account and at its own risk. Dealer shall not appoint sub-dealers or sub-distributors or delegate or assign Dealer's rights or obligations under this Agreement or directly or indirectly Distribute any Products outside of the United States of America without the prior written consent of MistAway.

(d) Dealer agrees that during the term of this Agreement it will not directly or indirectly manufacture or advertise for sale any product, system or good that is competitive with the Systems or MistAway's other Products, except to the extent necessary for Dealer to service and repair its customers' third party manufactured outdoor insect control systems.

3. TERM. The term of this Agreement shall be from the Effective Date until the date one calendar year thereafter, unless sooner terminated as provided herein. This Agreement shall be automatically renewed for further successive terms of one (1) calendar year each, unless either party gives to the other party written notice of its intent not to renew this Agreement at least ninety (90) days prior to the expiration of the original term or renewal term then in effect. Each party acknowledges and agrees (i) that the limited term of this Agreement and the foregoing non-renewal privileges are integral parts of this Agreement; (ii) that neither party would have entered into this Agreement without such provisions; and (iii) that neither party hereto shall have any claims against the other party arising from the expiration, termination or non-renewal of this Agreement in accordance with the terms hereof and each party hereby WAIVES and RELEASES any and all such claims.

4. MINIMUM PURCHASE REQUIREMENTS

(a) Within seven (7) days after the Effective Date, Dealer shall make a nonrefundable prepayment to MistAway of at least \$US 10,000.00. If Dealer fails to make prepayment within such time period, then MistAway shall have the right and option to immediately terminate this Agreement by written notice to Dealer and upon any such termination, MistAway shall have no further obligations or liability to Dealer.

5. PRICING, PAYMENT AND RECEIVING TERMS.

(a) The current prices of the Products shall be in effect until changed by MistAway as hereinafter provided. MistAway may change the prices of the Products by sending written notice of such change to Dealer, in which event such price change shall become effective as of the date of such notice. Orders received and accepted by MistAway from Dealer before the effective date of any price increase shall be filled at the price in effect prior to such increase.

(b) Any and all prices of the Products are exclusive of any and all sales, use, property, license, duty, value added, withholding, excise or similar, federal, state or local tax of any jurisdiction (together, the "*Taxes*"), that may be imposed upon or with respect to the Products sold to Dealer or their delivery, use, ownership, possession or Distribution and any inspection fees and similar charges (together, the "*Fees*"), exclusive of taxes based upon MistAway's net income. Dealer shall pay and be responsible for, and indemnify, defend and hold MistAway harmless from and against any liability for, any and all Taxes and Fees that may be imposed or assessed against MistAway in connection with this Agreement or the sale of Products by MistAway to Dealer or Dealer's Distribution of Products.

(c) Unless and until MistAway shall approve other terms, payments for all Orders shall be due prior to shipment.

(d) All amounts not paid within fifteen (15) days after the due date will bear interest at a rate per annum equal to the lesser of eighteen percent (18%) per annum, or the maximum rate of interest permitted by applicable law. If Dealer fails to make any payment within fifteen (15) days of the due date, MistAway shall have the right, in addition to any and all other rights and remedies MistAway may have under this Agreement or applicable law, to unilaterally change the payment terms for any or all future Orders.

(e) Title, risk of loss, and delivery of Products shall be F.O.B. MistAway's facility in Houston, TX.

(f) Dealer shall inspect the Products at Dealer's cost to determine whether the Products meet the standards and requirements of this Agreement. Dealer shall be deemed to have accepted any Products not rejected by notification to MistAway, setting forth in reasonable detail the Products rejected and the reasons therefore, within fifteen (15) days of receipt of such Products. Products that are not so rejected shall be deemed to comply with all standards of quality required by this Agreement. MistAway shall send to Dealer a return authorization when MistAway receives such notification, unless MistAway believes that the reasons for such rejection are not valid. Dealer must pay for all Products for which it does not receive a return authorization.

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6. DISTRIBUTION, PROMOTION AND TECHNICAL ACTIVITIES.

(a) Dealer agrees to use Dealer's best efforts to Distribute and support the Products and further agrees that its marketing efforts will be diligent and of high quality and will preserve the professional image of MistAway and of the Systems and MistAway's other Products.

(b) MistAway shall have the right to timely review and approve all promotional materials relating to the Products prior to the publication or dissemination of such materials. Dealer shall not make any claims or representations concerning the Products that are more detailed, inclusive or broad than the claims made by MistAway in MistAway's promotional materials.

(c) Dealer shall not modify, alter, change, cover, deface, obscure or delete any portion of any promotional materials supplied or approved by MistAway, without the prior written consent of MistAway.

(d) All employees and technical representatives of Dealer involved in any way with the sale, installation or service of the Products shall receive training prior to conducting any sales, installation or service activities.

(e) Dealer shall at all times store and handle the Products in accordance with the requirements of any and all instructions, warnings and other information provided by MistAway from time to time.

7. COMPLIANCE WITH LAWS, LICENSING REQUIREMENTS AND INDUSTRY BEST PRACTICES

(a) Dealer agrees to comply and to cause the Dealer Group to comply with all applicable laws and regulations applicable to the Products, or the sale, purchase, storage, handling, use or Distribution of the Products, or the activities contemplated by this Agreement, including, but not limited to, any and all applicable licensing and/or permitting laws, regulations and requirements related to pest control or to the sale, application or handling of insecticides and pest control equipment. Upon MistAway's request or at least annually, Dealer agrees to certify in writing that it is in compliance with all applicable licensing and permitting requirements and to provide MistAway with true and correct copies of all required licenses and permits.

(b) Dealer has read and agrees to abide by the Best Management Practices for Outdoor Residential Misting Systems and the Advertising Guidelines which were adopted by the Association of Structural Pest Control Regulatory Officials and the National Pest Management Association in 2007, which are available at:

- <https://www.mistawaypro.com/wp-content/uploads/2018/12/Best-Management-Practices-2007-NPMA.pdf>
- <https://www.mistawaypro.com/wp-content/uploads/2018/12/Advertising-Guidelines-2007-NPMA.pdf>

8. **REPORTS.** Dealer shall maintain detailed records by specific serial numbers of all Systems Distributed by Dealer in order to facilitate a prompt and effective recall if required by MistAway or by any regulatory authority. Dealer shall maintain all of its Distribution records for at least two (2) calendar years after the expiration or termination of this Agreement. Dealer shall maintain and retain such additional records as may be required by applicable law.

9. LIMITED WARRANTY, LIMITATIONS ON LIABILITY, INDEMNIFICATION AND INSURANCE.

(a) **MISTAWAY'S ONLY WARRANTY WITH RESPECT TO THE PRODUCTS IS THE LIMITED WARRANTY FOR THE BENEFIT OF DEALER'S CUSTOMERS THAT IS INCLUDED IN THE OPERATING MANUAL THAT IS PUBLISHED ONLINE AND MAY BE DOWNLOADED AT WWW.MISTAWAY.COM.**

(b) **EXCEPT FOR THE LIMITED WARRANTY REFERENCED IN SECTION 9(a) ABOVE, MISTAWAY HEREBY EXPRESSLY DISCLAIMS ANY WARRANTY, EXPRESS OR IMPLIED, OF MERCHANTABILITY, QUALITY, CONDITION, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE PRODUCTS OR THEIR OPERATION OR PERFORMANCE. MISTAWAY SHALL HAVE NO LIABILITY TO DEALER OR OTHERS FOR INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY DESCRIPTION IN CONNECTION WITH THE PRODUCTS INCLUDING, WITHOUT LIMITATION, LOST OPPORTUNITIES OR LOST PROFITS.** Further, MistAway shall have no liability to Dealer or others for any actual or direct damages in connection with any Products that have been altered, or which have been used, stored or handled in a manner contrary to any use, storage or handling instructions, warnings, or other information provided by MistAway, or contrary to the requirements of this Agreement. Neither party shall be liable to the other for any consequential, exemplary, special, incidental or punitive damages, including, without limitation, lost opportunities or lost profits.

(c) Dealer shall defend, indemnify and hold harmless the MistAway Group from and against any and all actions, claims, costs (including without limitation, costs of investigation, litigation, and court costs), damages, demands, fines, interest, judgments, liabilities, losses, penalties, proceedings, suits (including appeal), and expenses (including, without limitation, reasonable attorneys' fees) (individually and collectively, "Claims") brought by or on behalf of any person or entity and asserted against, resulting to,

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imposed upon or incurred by the MistAway Group, or any one of them, arising out of, incident to or related in any way, directly or indirectly, to: (i) any breach of any representation, warranty, covenant or agreement of Dealer contained in or made pursuant to this Agreement; (ii) violation of any governmental laws, regulations, ordinances, permits, licenses, or orders by Dealer Group; (iii) infringement, dilution, misappropriation, or other violation of the Intellectual Property Rights of MistAway by Dealer or Dealer Group; or (iv) any injury to or death of any person, or damage or loss of any property resulting from Dealer's acts or omissions. **EXCEPT FOR CLAIMS ARISING FROM THE SOLE OR GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF MISTAWAY, THE DEFENSE AND INDEMNITY OBLIGATIONS CONTAINED IN THIS PARAGRAPH SHALL APPLY EVEN IF A CLAIM IS CAUSED BY THE JOINT, OR CONCURRENT NEGLIGENCE, STRICT LIABILITY, CONTRACTUAL LIABILITY TO THIRD PARTIES OR OTHER FAULT OF THE MISTAWAY GROUP.**

Dealer shall maintain commercial general liability insurance and such other insurance as is customary and reasonable for Dealer's business and the Distribution of the Products and with reasonable coverage limits.

10. PATENTS AND TRADEMARKS.

(a) The Systems and all references to the Systems in Dealer's promotional materials shall bear MistAway's Trademarks. Dealer acknowledges and agrees that such Trademarks, and all other Intellectual Property Rights of MistAway with respect to the Products are and will remain the sole property of MistAway. Dealer shall in no event register or seek to register any of the Trademarks or other Intellectual Property Rights of MistAway.

(b) MistAway hereby grants to Dealer a non-exclusive license to use MistAway's Trademarks on the Systems, and on advertisements for the Systems, during the term of this Agreement, subject to the terms and conditions of this Agreement. Dealer shall immediately discontinue all use of such Trademarks upon the expiration or termination of this Agreement.

(c) Dealer agrees not to modify, change, add to, delete, cover, obscure or deface any labels on any of the Products or packaging for any of the Products or add any label or other material or graphics of any kind to any of the Products or any such packaging, without the prior written consent of MistAway, not to be unreasonably withheld.

(d) Dealer shall endeavor to promptly notify MistAway upon becoming aware of any infringement or misappropriation of any of MistAway's Intellectual Property Rights. Nothing in this Agreement shall be construed or interpreted to require MistAway to, and Dealer agrees that MistAway shall not be required to, take any action (including the institution, prosecution or defense of any lawsuit, the filing, prosecution or defense of any patent or trademark application, or any other action whatsoever) against any other manufacturer, distributor or other person or entity to prevent such other manufacturer, distributor, person or entity from violating any of MistAway's Intellectual Property Rights, or any of Dealer's distribution or other rights.

11. DEFAULT AND TERMINATION. Each of the following items shall constitute an event of default under this Agreement:

(a) Dealer fails to pay the purchase price for any of the Systems, or interest thereon, or any other sum required to be paid by Dealer under this Agreement when payment thereof becomes due;

(b) Dealer violates any of the requirements set forth in Sections 2, 6, 7, 8, 9, or 10 of this Agreement;

(c) Any representation or warranty by Dealer pursuant to this Agreement shall have been false or misleading in any material respect on and as of the date when made;

(d) Either party fails to comply with any other provision of this Agreement and fails to cure its breach within thirty (30) days after notice from the other party requesting it to cure such breach;

(e) Either party (i) makes a general assignment for the benefit of creditors; (ii) commences a proceeding under any bankruptcy, reorganization or insolvency law; or (iii) seeks or consents to the appointment of a trustee, receiver, or liquidator to take charge of its assets; or.

(f) Any proceeding under any bankruptcy, reorganization or insolvency law is commenced against either party and an order is entered appointing a trustee, receiver or liquidator of all or any substantial part of such party's assets or granting relief in such proceeding or approving the petition in such proceeding, and such order remains in effect for more than thirty (30) days.

Upon the occurrence of an event of default by a party under this Agreement, the other party (the non-defaulting party) may exercise any or all rights and remedies provided under applicable law (but subject to the limitations set forth in this Agreement) and/or this Agreement, including, without limitation, the right to terminate this Agreement by giving notice of such termination to the other party hereto.

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12. EFFECT OF TERMINATION OR EXPIRATION. When this Agreement expires or is terminated by either party hereto pursuant to the terms of this Agreement:

- (a) MistAway may at its option cancel any or all unfilled Orders given to it hereunder;
- (b) Dealer shall immediately cease to use any Intellectual Property Rights of MistAway;
- (c) Dealer shall immediately destroy all promotional materials in its possession or under its control containing, bearing or covered by any Trademarks of MistAway together with all photos, films, videotapes and reproductions of any of such materials;
- (d) Dealer shall immediately take all appropriate steps to remove and cancel its listings in telephone books, directories, public records or elsewhere, which state or indicate that Dealer is a distributor of MistAway, and to cancel all advertising contracts or arrangements pertaining to any of the Products;
- (e) Dealer shall continue to be obligated to pay for Orders for Products from MistAway (except to the extent such Orders are cancelled by MistAway as hereinabove provided), whether filled prior to or after such expiration or termination and to pay and perform all other accrued obligations of Dealer to MistAway as of the date of such expiration or termination and such accrued obligations, and all obligations which this Agreement clearly contemplates to be performed after the expiration or termination of this Agreement (including, without limitation, Dealer's covenants, indemnities, and other obligations under Sections 5, 6, 7, 8 and 9(c) and this Section 12), shall survive the expiration or termination of this Agreement; and

(f) MistAway shall not be liable to Dealer because of the expiration or termination of, or refusal of MistAway to extend, this Agreement for compensation, reimbursement, or damages on account of the loss of prospective profits or loss of goodwill or on account of loss or liability of Dealer in respect of expenditures, investments, leases or any type of commitments (including bids and tenders for government or other contracts) made in connection with the business of Dealer, or any other damages, losses or liabilities of any kind. WITHOUT LIMITING THE FOREGOING, DEALER IS HEREBY WARNED THAT ANY TENDER, BID OR COMMITMENT BY DEALER TO, OR ANY CONTRACT BY DEALER WITH, PURCHASERS OF PRODUCTS, OR OTHERS, IS MADE BY DEALER AT ITS OWN RISK AND THAT UPON THE TERMINATION OR EXPIRATION OF THIS AGREEMENT, MISTAWAY MAY NOT CONTINUE TO ACCEPT DEALER'S ORDERS FOR PRODUCTS, AND DEALER MAY THEREFORE BE UNABLE TO FULFILL SUCH TENDERS, BIDS, COMMITMENTS OR CONTRACTS.

13. FORCE MAJEURE. Except as to the timely payment by Dealer of the purchase price of Products purchased by it under this Agreement, and the timely payment of all other sums required to be paid by Dealer under this Agreement, neither party shall be responsible for failure or delay of fulfillment of its contractual obligations under this Agreement, when such failure or delay is due to (a) Acts of God or public enemies; (b) acts of local, state, or national government or public agencies; (c) wars, civil commotions, riots, acts of terrorism, or labor disturbance; (d) epidemic; (e) destruction of facilities or materials by fire, earthquake or storm or other casualty; or (f) shortage of power or raw material. However, the parties will use commercially reasonable efforts to avoid, and the party temporarily excused from performance will use commercially reasonable efforts to remove or cure, all such conditions. Any party temporarily excused from performance by such conditions will resume performance promptly when such conditions are removed. Any party claiming any such condition as an excuse for delay in performance will give prompt notice of such condition to the other party. If any failure to perform pursuant to this Section 12 continues for a period of more than three (3) months, any party hereto will have the right to terminate this Agreement or any individual Order hereunder by notice to the other party.

14. APPLICABLE LAW. This Agreement, and all the rights and duties of the parties arising out of, in connection with, or relating in any way to the subject matter of this Agreement or the transactions contemplated by it, shall be governed by, construed, and enforced in accordance with the laws of the State of Texas (excluding its conflict of laws rules which would refer to and apply the substantive laws of another jurisdiction). Any suit or proceeding hereunder shall be brought exclusively in state or federal courts located in Harris County, Texas. Each party consents to the personal jurisdiction of the state and federal courts of said county and waives any objection that such courts are in an inconvenient forum.

15. NOTICES. All notices, requests, consents, approvals, agreements and other communications of any kind ("Notices") required or permitted under this Agreement shall be deemed to have been given if sent by mail, expedited delivery service (such as but not limited to Federal Express), confirmed fax communication, courier or personal delivery to the address of such party set forth on the signature page hereto (or to such other address as either party may theretofore specify by Notice given to the other party). Such Notices shall be deemed to have been given upon receipt, except that (1) in the case of Notices sent by fax communication, such Notices shall be deemed to have been given upon receipt and electronic confirmation of the same, and (2) in the case of Notices sent by certified mail, return receipt requested, postage prepaid, such Notices shall be deemed delivered four (4) days from the date on which same are deposited in the custody of the United States Postal Service. All Notices must be in writing to be effective.

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16. RELATIONSHIP OF THE PARTIES. Dealer is an independent contractor under the terms of this Agreement and is not a partner, co-venturer, agent, employee or legal representative of MistAway. Dealer shall not, and shall have no authority to, negotiate, give or make any agreement, promise, guarantee, warranty, representation or affirmation of fact, whether in relation to any of the Products or otherwise, on behalf of or in the name of MistAway with or to any purchaser, transferee, governmental authority, or other person or entity whatsoever.

17. AMENDMENTS. Except where otherwise expressly so provided in this Agreement, all amendments, revisions or modifications to this Agreement must be in writing and must be signed by the party against whom enforcement of the amendment, revision or modification is sought in order to be effective.

18. ASSIGNMENT. This Agreement shall be enforceable by and binding upon MistAway and Dealer and their respective successors and assigns, except that Dealer may not sell, transfer, assign, subcontract or delegate all or any portion of its rights or obligations under this Agreement without the prior written consent of MistAway. MistAway's consent shall not be unreasonably withheld.

19. WAIVER. The failure of either party to enforce the provisions of this Agreement shall not be deemed a waiver of such provisions or of the right of such party thereafter to enforce such provisions.

20. SEVERABILITY. In the event that any provision of this Agreement shall be unenforceable or invalid under applicable law, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole, and, in such event, such provision shall be changed and interpreted so as to accomplish the objectives of such unenforceable or invalid provision to the fullest extent, if any, permitted by applicable law.

21. RIGHTS AND REMEDIES CUMULATIVE. Except as otherwise expressly provided or limited herein, the rights and remedies provided to the parties in this Agreement shall be cumulative and not exclusive of any other rights and remedies provided by law or otherwise.

22. REPRESENTATIONS AND WARRANTIES. Each party represents and warrants to the other that: (a) it has the right, power and authority to enter into and perform this Agreement, (ii) the execution and performance of this Agreement by such party has been duly authorized by all necessary corporate and other action, (iii) its entering into and performance of this Agreement in accordance with its terms does not violate any existing contract or agreement to which it is a party or by which it is bound, and (iv) this Agreement constitutes the legal, valid and binding agreement of such party and is enforceable against such party in accordance with its terms. Dealer represents and warrants to MistAway that: Dealer has the financial capability to perform its obligations under this Agreement; Dealer is subject to no court order, decree or writ, or any other governmental requirement, which would preclude Dealer from effectively performing its obligations pursuant to this Agreement; and Dealer is not the subject of any pending or threatened bankruptcy or insolvency proceeding.

23. ENTIRE AGREEMENT AND INTERPRETATION. This Agreement constitutes the entire agreement between the parties hereto regarding the subject matter hereof and replaces and supersedes all prior, oral and written commitments or agreements, if any, in respect thereof. The headings set forth in this Agreement are for convenience only, and shall be afforded no meaning whatsoever in the construction or interpretation of this Agreement. Except as otherwise expressly provided herein, all consents, approvals and agreements by MistAway contemplated by this Agreement may be granted, denied or conditioned by MistAway, as MistAway may elect in its sole and absolute discretion.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective duly authorized representatives.

Dealership Name:

Signed: _____

Name: _____

Title: _____

Address for Notices:

Attention: _____

Telephone: (____) _____

Fax: (____) _____

MistAway:

MistAway Systems, Inc.

Signed: _____

Name: _____

Title: _____

Address for Notices:

MistAway Systems, Inc.

5508 Clara Road

Houston, Texas 77041

Attention: _____

Telephone: (713) 468-6464

Dealer's Initials _____