

## TERMS AND CONDITIONS

As provided by the Merchant Application, Merchant, SphereCommerce, LLC (“ISO”) and Merrick Bank Corporation (“Bank”) have agreed to be bound by these terms and conditions. Bank and ISO are collectively referred to herein as the “Provider” and, subject to the requirements of the Network Rules, ISO and Bank allocate the duties and obligations allocated to Provider as they deem appropriate in their sole discretion and may jointly or individually assert or exercise the rights or remedies provided to Provider hereunder.

While all terms in this Merchant Agreement are important, here is a summary of some sections on which we occasionally receive questions. These are common clauses in merchant processing agreements throughout our industry.

- The introductory paragraphs explain that the Merchant Agreement consists of other documents in addition to this Merchant Agreement.
- We can amend your Merchant Agreement by providing you with fifteen business days’ notice or, under certain circumstances, with less than fifteen business days’ notice (see section 5.9).
- Unless confirmed otherwise on your Agreement, the initial term of this Merchant Agreement is three years. If you terminate early without cause, you may be required to pay an early termination fee (see section 4.4).
- The proceeds you receive from transactions are provisional credits. We can charge or debit your Account to recover these provisional credits. We can also debit your Account to recover other amounts that you may owe us (see Section 3.1).
- If you dispute any charge or funding, you must notify us within 30 days of the date of the statement (see section 3.8).
- In some circumstances, we may require the establishment of a reserve account with us so we can mitigate risks. Section 3.6 explains how that reserve account will be funded and how we may use money in that account.
- Our processing fees are set out in detail in the Merchant Application. We may change these fees but must ordinarily notify you before doing so (see Section 5.7).
- This agreement contains an arbitration clause and a class action waiver (see Section 5.16).
- This agreement is a complete and final agreement between us. It supersedes any previous negotiations we may have had on the services and products. (Section 5.17).

Bank, ISO and Merchant agree as follows:

### ARTICLE I – DEFINITIONS

In addition to terms otherwise defined in this Agreement, capitalized terms shall have the meaning ascribed to them in this Article I.

- 1.1** “**Account**” means a commercial checking or demand deposit account maintained by Merchant for the crediting of collected funds and the debiting of fees and charges under this Agreement.
- 1.2** “**ACH**” means the Automated Clearing House paperless entry system controlled by the Federal Reserve Board.
- 1.3** “**Agreement**” means the Merchant Application, the Guaranty and these Terms and Conditions, and any supplementary documents referenced herein, and schedules, exhibits and amendments to the foregoing.
- 1.4** “**American Express**” means the Cards bearing the Marks of, and Card Network operated by, American Express Travel Related Services Company, Inc. or its affiliates.
- 1.5** “**Authorization**” means a computerized function or a direct phone call to a designated number to examine individual Transactions to obtain approval from the Card Issuer to charge the Card for the amount of the sale in accordance with the terms of this Agreement and the Network Rules.
- 1.6** “**Bank**” has the meaning set forth on the Merchant Application.
- 1.7** “**Card**” means (i) a valid credit card or debit card in the form issued under license from a Card Network. (“Bank Card”); or (ii) any other valid credit card or debit card or other payment device approved by Bank and accepted by Merchant.
- 1.8** “**Card Issuer**” means the financial institution or company which has provided a Card to a Cardholder.
- 1.9** “**Card Network**” means Visa U.S.A., Inc., MasterCard International, Inc., American Express Travel Related Services Company, Inc., DFS Services LLC (the owner of Discover) and their affiliates, or any other payment networks approved by Bank that provide Cards accepted by Merchant.
- 1.10** “**Card Not Present**” or “**CNP**” means that an Imprint of the Card is not obtained at the point-of-sale.
- 1.11** “**Cardholder**” (sometimes referred to as “Card Member” in certain Card Network materials) shall mean any person authorized to use the Cards or the accounts established in connection with the Cards.
- 1.12** “**Cardholder Information**” means any non-public, sensitive information about a Cardholder or related to a Card, including, but not limited to, any combination of Cardholder name plus the Cardholder’s social security number, driver’s license or other identification number, or credit or debit card number, or other bank account number.

- 1.13** “**Chargeback**” means the procedure by which a Transaction (or disputed portion thereof) is returned to Provider by a Card Issuer for any reason, including, but not limited to, cases where such item does not comply with the applicable Network Rules.
- 1.14** “**Cash Over**” means a Transaction using a Discover Card whereby the Cardholder elects to receive additional cash in excess of the purchase price, all as provided by Network Rules of Discover.
- 1.15** “**Credit Voucher**” means a document executed by a Merchant evidencing any refund or price adjustment relating to Cards to be credited to a Cardholder account.
- 1.16** “**Discover Card**” means a Card bearing the Discover Marks and accepted as part of the DFS Services Network.
- 1.17** “**Guarantor**” has the meaning set forth on the Merchant Application.
- 1.18** “**Guaranty**” has the meaning set forth in Section 5.26 of this Agreement.
- 1.19** “**Imprint**” means (i) an impression on a Transaction Record manually obtained from a Card through the use of an imprinter, or (ii) the electronic equivalent obtained by swiping a Card through a terminal and electronically capturing Card data and printing a Transaction Record.
- 1.20** “**ISO**” has the meaning set forth on the Merchant Application.
- 1.21** “**Merchant**” has the meaning set forth on the Merchant Application.
- 1.22** “**Merchant Application**” has the meaning set forth on the Merchant Application.
- 1.23** “**Network Rules**” means the rules, regulations, releases, interpretations and other requirements (whether contractual or otherwise) imposed or adopted by any Card Networks and related authorities, including without limitation, those of the PCI Security Standards Council, LLC and the National Automated Clearing House Association (including, with respect to EBT, the Quest Operating Rules and with respect to PIN debit cards, the rules, regulations, policies and procedures of the applicable debit network).
- 1.24** “**Provider**” as provided by the introductory paragraph to these Terms and Conditions, means ISO and Bank together.
- 1.25** “**Transaction**” means any sale of products or services, or credit for such, from a Merchant for which the Cardholder makes payment through the use of any Card and which is presented to Provider for collection.
- 1.26** “**Transaction Record**” means evidence of a purchase, rental or lease of goods or services by a Cardholder from, and other payments to, Merchant using a Card, including preauthorized orders and Recurring Transactions(unless the context requires otherwise), regardless of whether the form of such evidence is in paper or electronic form or otherwise.
- 1.27** “**Voice Authorization**” means a direct phone call to a designated number to obtain credit approval on a Transaction from the Card Issuer, whether by voice or voice-activated systems.

## ARTICLE II - CARD ACCEPTANCE

- 2.1** **Honoring Cards.** Merchant will accept all valid Cards when properly presented by Cardholders in payment for goods or services, subject to applicable Network Rules requiring Merchant to elect whether it will accept credit only, debit only or both debit and credit cards. Merchant’s election is set forth in the Merchant Application. Except to the extent explicitly provided by the Network Rules, Merchant may not establish minimum or maximum amounts for Card sales as a condition for accepting any Card. Merchant may, subject to applicable Law and the Network Rules, (i) impose a surcharge, under certain conditions and with proper disclosure to a Cardholder who elects to use a Card in lieu of payment by cash, check or other method of payment, or (ii) offer cash discounts to Cardholders making payment by cash or check. Merchant shall not engage in any acceptance practice that discriminates against or discourages the use of a Card Network’s Cards in favor of any other Card Network’s Cards, or favor any particular Card Issuer over any other Card Issuers. Note, many states prohibit or limit cases where Merchant may surcharge a Cardholder or offer cash discounts and the Card Networks impose restrictions on surcharging and cash discounting. Merchant must comply with all applicable Law and the Network Rules before Merchant begins to surcharge Cardholders or offer any cash discount. Provider shall not be liable for any acts or omissions of Merchant in violation of applicable Laws or Network Rules. Merchant may not engage in a Transaction (other than a mail, internet, telephone order, or preauthorized sale to the extent permitted under this Agreement) if (i) the person seeking to charge the purchase to his or her Card account does not present the Card to permit Merchant to compare the signature on the Card to the signature on the Transaction Record; or (ii) the Merchant does not obtain an Imprint or otherwise use the physical Card to complete the Transaction.
- 2.2** **Merchant’s General Duties.** Merchant will comply with Agreement for submitting and processing Transactions. Merchant, and not Bank, is responsible for any advice from, acts of, as well as omissions, acts of fraud or acts of misconduct by, Merchant’s employees, processors, consultants, advisors, contractors, merchant servicers, agents, officers and directors. Merchant, and not Bank, is responsible for the use, unauthorized use or misuse of Merchant’s equipment, point of sale equipment, or software. Merchant agrees that if Merchant does not use point of sale equipment that has been certified EMV (Europay/MasterCard/Visa) chip card compliant and enabled or when a lost or stolen chip and PIN card is used at an EMV enabled terminal capable of processing chip and signature only, Merchant may be liable for payment of any transactions submitted for chargeback by the applicable EMV chip card issuer(s) due to lost, stolen and never-received-issue fraud claims.
- 2.3** **Advertising.** Subject to the Network Rules, Merchant will prominently display the promotional materials provided by Provider in its place(s) of business. Merchant’s use of promotional materials and use of any trade name, trademark, service mark or logo type (collectively, the “Marks”) associated with a Card is limited to informing the public that the Card will be accepted at Merchant’s place(s)

of business. During the term of this Agreement, Merchant may use promotional materials and Marks pursuant to and in strict compliance with the terms of this Agreement and the Network Rules. Upon notification by any Card Network or Provider, or upon termination of this Agreement, Merchant shall discontinue the use of such Card Network's Marks and return any inventory or promotional materials to Provider. Merchant may not use any promotional materials or Marks associated with the Card Network in any way which suggests or implies that a Card Network endorses any goods or services other than Card payment services. Merchant's website, if any, must prominently display the name of the Merchant and the name that will appear on the Cardholder statement.

**2.4 Card Acceptance.** Merchant has the option of accepting MasterCard credit cards, Visa credit cards, credit cards issued by Discover, American Express payment cards, MasterCard signature debit cards (MasterMoney Cards) or Visa signature debit cards (check cards), or debit cards issued by Discover. Merchant may elect to accept any or all of these card types for payment. If Merchant do not specifically indicate otherwise on the Merchant Application the application will be processed to accept ALL MasterCard, Discover, Visa and American Express card types. When accepting a Card, Merchant will follow the steps and guidelines set forth in the Network Rules or otherwise provided by Provider from time to time for accepting Cards and in particular, will: (a) determine in good faith and to the best of its ability that the Card is valid on its face; (b) obtain Authorization from the Card Issuer to charge the Cardholder's account; (c) comply with the additional terms set forth in in this Agreement with respect to Telephone Orders, Mail Orders, Internet, Preauthorized Orders and Installment Orders and with respect to any Card Not Present Transactions; (d) document the approved Transaction in accordance with this Agreement and the Network Rules; and (e) deliver a true and completed copy of the Transaction Record to the Cardholder at the time the goods are delivered or services performed or, if the Transaction Record is prepared by a point-of-sale terminal, at the time of the sale. Except to the extent otherwise provided for in this Agreement, each Transaction Record must contain the following information: (i) Merchant's legal name and/or registered trade name, Merchant's location, and the Merchant's merchant identification number designated by the Provider; (ii) the truncated version of the Card number as provided in the Network Rules; (iii) a brief description of the goods or services involved in the Transaction; (iv) the selling price, together with applicable taxes, other charges or gratuities, and the total amount of the Transaction; (v) signature of the Cardholder or authorized user as described in this Agreement, date of the Transaction and the Transaction approval number; (vi) any additional requirements of the Card Networks that may be applicable to specific merchant or transaction types, as amended from time to time; and (vii) such additional information which may from time to time be required by Provider, the Card Networks, or Card Issuers. Merchant will not transmit a Transaction Record to Provider until such time as: (i) the Transaction is completed; (ii) the goods or services have been shipped or provided, except as set forth in this Agreement and the Network Rules; or (iii) a Cardholder consent is obtained for a Recurring Transaction in accordance with terms of this Agreement and the Network Rules.

**2.5 Authorization.** Merchant will obtain an Authorization for all Transactions using a means approved by Provider. If Merchant cannot, for any reason, obtain an electronic Authorization through the use of a terminal, Merchant will request a Voice Authorization from Provider's designated authorization center and will legibly print the authorization number on the Transaction Record. Provider will charge Merchant a Voice Authorization Fee for each Voice Authorization that is initiated. The Voice Authorization Fee is only charged when a Transaction is called into an 800 number of the Card Issuer for authorization. Merchant will not obtain or attempt to obtain Authorization from Provider's authorization center unless Merchant intends to submit to Provider a Transaction for the authorized amount if Authorization for the Transaction is given. Merchant may not divide a single Transaction between two or more Transaction Records on a single Card to avoid Authorization limits that may be set by the Card Issuer. Merchant acknowledges that an Authorization provides only that the Cardholder account has sufficient credit available to cover the amount of the current sale and that an Authorization is not a guarantee that the Transaction will not be subject to dispute or Chargeback and does not warranty the Cardholder's identity. Merchant may not attempt to obtain an authorization by successively decreasing the sale amount. Provider may refuse to process any Transaction Record presented by Merchant: (a) unless a proper authorization number or approval code has been recorded on the Transaction Record; (b) if Provider determines that the Transaction Record is or is likely to become uncollectible from the Cardholder to which the Transaction would otherwise be charged; or (c) if Provider has reason to believe that the Transaction Record was prepared in violation of any provision of this Agreement or the Network Rules. Merchant will use, and may not circumvent, fraud identification tools requested by Provider, including address verification system processing and CVV2 processing, and acknowledges that the use of these tools may prevent Merchant from accepting certain Cards as payment. Merchant acknowledges that its use of fraud identification tools may not prevent fraudulent Card usage, and agrees that any fraudulent Transaction may ultimately result in a Chargeback, for which Merchant retains full liability under this Agreement.

**2.6 Retention and Retrieval of Cards.** Merchant will use its best efforts, by reasonable and peaceful means, to retain or recover a Card when receiving such instructions when making a request for Authorization or if Merchant has reasonable grounds to believe the Card is counterfeit, fraudulent or stolen. Merchant's obligations under this section do not authorize a breach of the peace or any injury to persons or property, and Merchant will hold Provider harmless from any claim arising from any injury to person or property or other breach of the peace in connection with the retention or recovery of a Card.

**2.7 Multiple Transaction Records; Partial Consideration.** Merchant may not prepare more than one Transaction Record for a single sale or for a single item, but will include all goods and services purchased in a single Transaction in the total amount on a single Transaction Record except under the following circumstances: (a) for purchases in separate departments of a multiple department store; (b) for partial payment, installment payment, delayed delivery or an advance deposit; or (c) for delayed or amended charges governed by

Network Rules for travel and entertainment merchants and related Transactions.

- 2.8 Telephone Orders, Mail Orders, Internet, Preauthorized Orders and Installment Orders.** Unless Merchant has been approved by Provider to accept mail, internet or telephone orders, Merchant warrants that it is a walk-in trade business, located in a retail business place where the public moves in and out freely in order to purchase merchandise or obtain services. If Merchant is not approved by Provider for Card Not Present Transactions and Provider determines Merchant has accepted unapproved Card Transactions which are placed by telephone, generated through telephone solicitation, mail order, internet sales or other means that does not create a Transaction Record that bears the Card Imprint and Cardholder's signature, this Agreement may be immediately terminated by Provider and the value of all Transaction Records collected from the first day of processing may be charged back to Merchant and all funds therefrom held as provided in Article IV of this Agreement. Unless approved by Provider, this Agreement does not contemplate regular acceptance of Cards for sales accepted by mail, internet or telephone nor through preauthorized orders. Regardless of whether Merchant has been approved by Provider for Card Not Present Transactions, Merchant assumes all responsibility for identification of the Cardholder and the validity of the Card information for Card Not Present Transactions. Merchant agrees to identify separately any high-risk transactions Merchant submits. The high-risk transactions include, but are not limited to, any under Merchant Category Code 5967 – Direct Marketing – Inbound Telemarketing Merchants.
- 2.9 Lodging and Vehicle Rental Transactions.** For lodging and vehicle rental Transactions, Merchant must estimate and obtain Authorization for the amount of the Transaction based upon the Cardholder's intended length of stay or rental. Additional Authorization must be obtained and recorded for charges actually incurred in excess of the estimated amount. Regardless of the terms and conditions of any written preauthorization form, the Transaction Record amount for any lodging or vehicle rental Transaction must include only that portion of the sale, including any applicable taxes, evidencing a bona fide rental of real or personal property by Merchant to the Cardholder and may not include any consequential charges. Nothing contained herein is intended to restrict Merchant from enforcing the terms and conditions of its preauthorization form through means other than a Transaction.
- 2.10 Returns and Adjustments; Credit Vouchers.** Merchant's policy for the exchange or return of goods sold and the adjustment for services rendered will be established and posted in accordance with the Network Rules of the applicable Card Networks. Merchant will disclose, if applicable, to a Cardholder before a Transaction is made, that if merchandise is returned: (a) no refund, or less than a full refund, will be given; (b) returned merchandise will only be exchanged for similar merchandise of comparable value; (c) only a credit toward purchases will be given; or (d) special conditions or circumstances apply to the sale (e.g., late delivery, delivery charges, or other non-credit terms). If Merchant does not make these disclosures, a full refund in the form of a credit to the Cardholder's Card account must be given. Disclosures must be made on all copies of Transaction Records or invoices in letters approximately 1/4" high in close proximity to the space provided for the Cardholder's signature or on an invoice issued at the time of the sale or on an invoice being presented for the Cardholder's signature. Any change in Merchant's return or cancellation policy must be submitted in writing to Provider not less than fourteen (14) days prior to the change. Provider may refuse to process any Transaction Record made subject to a revised return or cancellation policy of which Provider has not been notified as required herein.
- 2.11 Cash Payments.** Merchant may not receive any payments from a Cardholder for charges included in any Transaction resulting from the use of any Card nor receive any payment from a Cardholder to prepare and present a Transaction for the purpose of effecting a deposit to the Cardholder's account.
- 2.12 Cash Advances; Scrip Purchases.** Unless otherwise approved in advance by Provider, Merchant may not deposit any Transaction for the purpose of obtaining or providing a cash advance either on Merchant's Card or the Card of any other party and may not accept any Card at a scrip terminal, and either action will be grounds for Provider's immediate termination of this Agreement.
- 2.13 Duplicate Transactions.** Merchant may not deposit duplicate Transactions. Provider may debit Merchant for any adjustments for duplicate Transactions and Merchant is liable for any Chargebacks resulting therefrom.
- 2.14 Deposit of Fraudulent Transactions.** Merchant may not accept or deposit any fraudulent or unauthorized Transactions and may not under any circumstances present for processing or credit, directly or indirectly, a Transaction which originated with any other merchant or any other source other than Transactions arising from bona fide purchases from Merchant for the goods and services for which Merchant has been approved under this Agreement. If Merchant deposits any such fraudulent or unauthorized Transaction, Provider may: (a) immediately terminate this Agreement; (b) withhold funds and demand an escrow as provided in this Agreement; or (c) report Merchant to the applicable Card Network. Merchant's employees' and agents' actions are chargeable to Merchant under this Agreement.
- 2.15 Collection of Pre-Existing Debt.** Merchant may not prepare and present to Provider any Transaction representing the refinancing of an existing Cardholder obligation, including, but not limited to, obligations: (a) previously owed to Merchant; (b) arising from the dishonor of a Cardholder's personal check or relating to a Chargeback; or (c) representing the collection of any other pre-existing indebtedness, including collection of delinquent accounts on behalf of third parties.
- 2.16 Data Security/Personal Cardholder Information.** Except as otherwise provided by the Network Rules, Merchant may not, as a condition of sale, impose a requirement on Cardholders to provide any personal information as a condition for honoring Cards unless such information is required to provide delivery of goods or services or Merchant has reason to believe the identity of the person presenting the Card may be different than that of the Cardholder. Merchant will not, under any circumstances, release, sell or otherwise

disclose any Cardholder Information to any person other than Provider or the applicable Card Network, except as expressly authorized in writing by the Cardholder, or as required by Law or the Network Rules.

(a) Safeguards. Merchant will maintain appropriate administrative, technical and physical safeguards for all Cardholder Information. These safeguards will (i) ensure the confidentiality of Cardholder Information; (ii) protect against any anticipated threats or hazards to the security or integrity of Cardholder Information; (iii) protect against unauthorized access to or use of Cardholder Information that could result in substantial harm or inconvenience to any Cardholder; and (iv) properly dispose of all Cardholder Information to ensure no unauthorized access to Cardholder Information. Merchant will maintain all such safeguards applicable to Merchant in accordance with applicable Law and the Network Rules.

(b) Compliance with Card Network Rules. Merchant represents, warrants and covenants that it is and will remain throughout the Term of this Agreement in compliance with (i) Network Rules related to data security, data integrity and the safeguarding of Cardholder Information, including the Payment Card Industry Data Security Standard ("PCI"), Discover Information Security Compliance ("DISC"), MasterCard's Site Data Protection Program ("SDP"), the American Express Data Security Requirements ("DSR"), and Visa's Customer Information Security Program ("CISP"), in effect and as may be amended, supplemented or replaced from time to time, and (ii) any data security guidelines or operating guide that Provider may provide to Merchant, as the same may be amended, supplemented or replaced from time to time. Merchant will cause all of its service providers, subcontractors and agents to comply with PCI, SDP, DISC, DSR and CISP requirements and any data security guidelines or operating guide provided by Provider at all times. Merchant will report any non-compliance immediately to Provider. To accomplish the foregoing, Merchant will encrypt all debit, credit or stored value card numbers whether in storage, transport or backup and will not store data security codes on its systems, network or software.

(c) Annual Certification. Merchant will provide an annual certification to Provider if requested by Provider (in a form acceptable to Provider) certifying compliance with the data security provisions of this Agreement, including compliance with applicable Card Network requirements such as PCI, SDP, DSR and CISP. Merchant will provide annual certifications for Merchant's service providers, subcontractors and agents.

(d) Information Use Limitations. Merchant may not sell, disclose, or otherwise make Cardholder Information available, in whole or in part, in a manner not provided for in this Agreement, without Provider's prior written consent. Merchant may, however, disclose Cardholder Information to its service providers, subcontractors and agents who have a need to know such information to provide the services described in this Agreement, provided that those individuals or entities have assumed confidentiality obligations in accordance with this Agreement, or when such disclosure is required by legal process or applicable Law, and Merchant and its relevant service provider, subcontractor, or agent have entered into a written agreement containing Merchant's and such individual's or entity's agreement to the foregoing data security provisions, including compliance with the Network Rules.

(e) Response to Unauthorized Access. Merchant will notify Provider within twenty four (24) hours after it becomes aware of any actual or potential breach in security resulting in an unauthorized access to Cardholder Information. Merchant will provide any assistance that Provider, Card Issuer, regulators, governmental authority or any Card Network deems necessary to contain and control the incident to prevent further unauthorized access to or use of Cardholder Information. Such assistance may include, but not be limited to, preserving records and other evidence and compiling information to enable Provider and the issuing bank(s) or the Card Network to investigate the incident and provide assistance and cooperation to: (a) file suspicious activity reports (as applicable); (b) notify their regulators (as applicable); and (c) notify the affected Cardholder (as required). Unless the unauthorized access was due to Provider's acts or omissions, Merchant will bear the cost of notifying affected Cardholder.

(f) Miscellaneous. Merchant may not make a claim against Provider or hold Provider liable for the acts or omissions of other merchants, service providers, Card Issuers, Card Network, financial institutions or others that do not have a written contractual relationship with Provider or over which Provider has no control. These provisions supplement, augment and are in addition to obligations of indemnification, audit, confidentiality and other similar provisions contained in this Agreement. This Section and each of its subsections will survive this Agreement's termination. Merchant may not store in any system or in any manner discretionary Card read data including without limitation CVV2 data, PIN data, address verification data or any other information prohibited by Network Rules. Merchant agrees that Provider may disclose to any Card Network information regarding Merchant and Merchant's Transactions to any Card Network, and that such Card Network may use such information to perform its responsibilities in connection with its duties as a Card Network, promote the Card Network, perform analytics and create reports, and for any other lawful business purposes, including commercial marketing communications purposes within the parameters of Card Network Card acceptance, and transactional or relationship communications from a Card Network. A Card Network may use the information about Merchant obtained in this Agreement at the time of setup to screen and/or monitor Merchant in connection with the Card Network marketing and administrative purposes. Merchant agrees it may receive messages from a Card Network, including important information about Card Network products, services, and resources available to its business. These messages may be sent to the mailing address, phone numbers, email addresses or fax numbers of Merchant. Merchant may be contacted at its wireless telephone number and the communications sent may include autodialed short message service (SMS or "text") messages or automated or prerecorded calls. Merchant agrees that it may be sent fax communications.

(g) ISO acknowledges that it will maintain compliance with all applicable PCI DSS requirements.

- 2.17 Compliance with Laws and Network Rules.** Merchant will comply with and conduct its Card activities in accordance with all applicable local, state, and federal statutes, regulations, ordinances, rules and other binding law, as the same may be enacted or amended from time to time (collectively, "Laws") as well as all Network Rules. Merchant may not: (a) accept Cardholder payments for previous Card charges incurred at the Merchant location; (b) require a Cardholder to complete a postcard or similar device that includes the Cardholder's account number, card expiration date, signature, or any other card account data in plain view when mailed; (c) add any tax to transactions, unless applicable Law expressly requires that Merchant be permitted to impose a tax (any tax amount, if allowed, must be included in the transaction amount and not collected separately); (d) enter into interchange any Transaction Record for a Transaction that was previously the subject of a Chargeback to Provider and subsequently returned to Merchant, irrespective of Cardholder approval (Merchant may pursue payment from the Cardholder outside the Card Network system); (e) request or use an account number for any purpose other than as payment for its goods or services; (f) disburse funds in the form of travelers cheques, if the sole purpose is to allow the Cardholder to make a cash purchase of goods or services from Merchant; (g) disburse funds in the form of cash, unless: (i) Merchant is a lodging or cruise line merchant disbursing cash to a Cardholder, (ii) Merchant is dispensing funds in the form of travelers cheques, Cards, or foreign currency, or (iii) Merchant is participating in the Card Network cash back or Cash Over service; (h) accept a Card for manual cash disbursement; (i) accept a Card to collect or refinance existing debt that has been deemed uncollectible by Merchant providing the associated goods or services; (j) enter into a Transaction that represents collection of a dishonored check; or (k) accept a Card for an unlawful Internet gambling transaction. Merchant will pay all Card Network fines, fees, penalties and all other assessments or indebtedness levied by Card Network to Provider which are attributable, at Provider's discretion, to Merchant's Transaction processing or business. The Card Network may require that Bank limits Merchant's participation in the applicable Card Network and/or terminate this Agreement.
- 2.18 Merchant's Business.** Merchant will notify Provider immediately if it intends to (a) transfer or sell any substantial part of its total assets, or liquidate; (b) change the basic nature of its business, including selling any products or services not related to its current business; (c) change ownership or transfer control of its business; (d) enter into any joint venture, partnership or similar business arrangement whereby any person or entity not a party to this Agreement assumes any interest in Merchant or Merchant's business; (e) alter in any way Merchant's approved monthly volume, average, or maximum ticket; (f) changes its return policies or to another fulfillment house different from those identified in Merchant Application; or (g) changes to its Account. Merchant will notify Provider promptly in writing if it becomes subject to any voluntary or involuntary bankruptcy or insolvency petition or proceeding. Merchant's failure to provide notice as required above may be deemed a material breach and will be sufficient grounds for termination of the Agreement and for Provider's exercise of all its rights and remedies provided by this Agreement. If any change listed above occurs, Provider may immediately terminate this Agreement.
- 2.19 Merchant's Representations and Warranties.** Merchant represents and warrants that: (a) all information contained in the Merchant Application or any other documents delivered to Provider in connection therewith is true and complete and properly reflects Merchant's business, financial condition and principals, partners, owners or officers (as applicable); (b) Merchant has power to execute, deliver and perform this Agreement, and this Agreement is duly authorized, and will not violate any provisions of Law, or conflict with any other agreement to which Merchant is subject; (c) Merchant holds all licenses, if any, required to conduct its business and is qualified to do business in every jurisdiction where it is required to do so; and (d) there is no action, suit or proceeding at law or in equity now pending or, to Merchant's knowledge, threatened by or against or affecting Merchant which would substantially impair its right to carry on its business as now conducted or adversely affect its financial condition or operations.
- 2.20 Merchant's Covenants.** Merchants covenants that: (a) each Transaction Record presented to Provider for collection is genuine and is not the result of any fraudulent activity, or a Transaction prohibited by a Card Network, or is not being deposited on behalf of any business other than Merchant as authorized by this Agreement; (b) each Transaction Record is the result of a bona fide purchase of goods or services from Merchant by the Cardholder in the total amount stated on the Transaction Record; (c) Merchant will perform all of its obligations to the Cardholder in connection with the Transaction evidenced thereby; (d) Merchant will comply with Provider's procedures for accepting Cards, and the Transaction itself will not involve any element of credit for any other purposes other than as set forth in this Agreement, and will not be subject to any defense, dispute, offset or counterclaim which may be raised by any Cardholder under the Network Rules, the Consumer Credit Protection Act (15 USC §1601) or other Law; and any Credit Voucher which Merchant issues represents a bona fide refund or adjustment on a Transaction by Merchant with respect to which a Transaction Record has been accepted by Provider.
- 2.21 Third Parties.** Merchant may desire to use a third-party service provider to assist Merchant with its Transactions. Merchant shall not utilize any such third parties unless Merchant has disclosed such use to Provider previously in writing, and unless such third party is fully compliant with all Laws and Network Rules. Any third party used by Merchant must be registered with the Card Network prior to the performance of any contracted services on behalf of Merchant. Further, as between the parties to the Agreement, Merchant will be bound by the acts and omissions of any third-party service provider and Merchant will be responsible for compliance by such third-party service provider with all Laws and Network Rules. Merchant will indemnify and hold harmless Provider from and against any loss, cost, or expense incurred in connection with or by reason of Merchant's use of any third parties, including third-party service providers. Provider is not responsible for any third-party service provider used by Merchant, nor is Provider required to process any Transaction which Provider receives from Merchant or its service providers in any format not approved by Provider. Provider has no responsibility

for, and shall have no liability to Merchant in connection with, any hardware, software or services Merchant receives subject to a direct agreement (including any sale, warranty or end-user license agreement) between Merchant and a third party.

- 2.22** **Recourse.** Merchant acknowledges that ISO performs the services contemplated by this Agreement and ISO is responsible to Merchant for any failure to perform such services in accordance with the terms of this Agreement. While Bank satisfies settlement files pursuant to instructions provided by ISO, Bank is not responsible for independently verifying the accuracy of such settlement files. Accordingly, to the greatest extent permitted by the Network Rules, Merchant's sole recourse for any failure by Provider under this Agreement is against ISO (and not Bank).
- 2.23** **Pre-Authorized Transactions.** If Merchant agrees to accept a pre-authorized order, the Cardholder shall execute and deliver to Merchant a written request for such pre-authorization which will be retained by Merchant and made available upon request to Provider. Merchant will not deliver goods or perform services covered by a pre-authorization after receiving specific notification that the pre-authorization is cancelled or that the card covering the pre-authorization is not to be honored.
- 2.24** **Pre-Authorization Health Care Transactions.** If Merchant is a "Health Care Merchant" as indicated on the Merchant Application and accepts a pre-authorized health care Transaction(s) from a Cardholder, Merchant agrees to comply with any requirements in the Network Rules related to such Transactions.
- 2.25** **Recurring Transactions.** If Merchant agrees to accept a recurring transaction from a Cardholder for the purchase of goods or services which are delivered or performed periodically (a "Recurring Transaction"), the Cardholder shall complete and deliver to Merchant an order form containing a written request for such goods or services to be charged to the Cardholder's account, the frequency of the recurring charges and the duration of time for which such Cardholder's permission is granted. In the event a Recurring Transaction is renewed, the Cardholder shall complete and deliver to Merchant a subsequent order form for continuation of such goods or services to be charged to the Cardholder's account. A Recurring Transaction may not include partial payments made to Merchant for goods or services purchased in a single Transaction, nor may it be used for periodic payments of goods or services on which Merchant assesses additional finance charges. A copy of the order form must be retained for the duration of the recurring charges and provided in response to Provider's request. In addition, Merchant must record, retain, and promptly produce upon request the "ship to address" and address verification service code (where applicable) for each transaction. Merchant must not complete an initial or subsequent Recurring Transaction after receiving a cancellation notice from the Cardholder, the Card Issuer, Provider or other party or a response that the Card is not to be honored.
- 2.26** **Limited Acceptance.**
- (a) If appropriately indicated on the Merchant Application, Merchant shall be a limited acceptance merchant, which means that Merchant has elected to accept only certain Visa and MasterCard Card types as indicated on the Merchant Application, or via later notification. The Visa or MasterCard credit acceptance option on the Merchant Application refers to Visa credit and business transactions, and is what MasterCard refers to as "Other Card" transactions. Notwithstanding anything to the contrary in the Merchant Application, Merchant can elect (i) to accept only Visa or MasterCard non-PIN based debit/stored value/electronic benefit transactions (sometimes referred to as "signature debit" transactions, whether or not an actual signature is required), (ii) to accept only Visa or MasterCard Credit transactions, or (iii) to accept all Visa or MasterCard credit and signature debit transactions; provided, however, that a Merchant who accepts any Visa or MasterCard Card types must accept all valid Visa or MasterCard Card types issued by a non-U.S. issuer. Merchant is not required to accept Cards of Card Networks other than Visa or MasterCard in order to accept Visa or MasterCard Cards (except that transactions using Diner's International Cards which also carry the MasterCard Mark must be accepted if Merchant accepts MasterCard Card transactions of the same type). Provider has no obligation other than those expressly provided under the Network Rules and applicable Law as they may relate to limited acceptance. Provider's obligations do not include policing card types at the point-of-sale. Merchant will be solely responsible for the implementation of its decision for limited acceptance including but not limited to policing the Card Network type(s) of transactions at the point-of-sale submitted for processing by Provider. Should Merchant submit a Transaction for processing for a card type it has indicated it does not wish to accept, Provider may process that Transaction and Merchant will pay the applicable fees, charges, and assessments associated with that Transaction. Merchant will comply with any applicable Laws and Network Rules and other applicable rules and regulations for the Card Network type processed.
- (b) If Merchant has chosen to accept Discover Cards in the Merchant Application, Merchant must accept Discover Cards at all Merchant establishments, including in payment for purchases of goods and services, for charitable contributions and for Cash Over Transactions (subject to the terms of the Network Rules and other applicable rules and regulations), when properly presented for payment by a Cardholder. Subject to this section, Merchant must create a Transaction Record for each Discover Card Transaction and deliver at least one copy of the Transaction Record to the Cardholder. A Merchant may issue a Cash Over (subject to the terms of the Network Rules) in connection with a Discover Card Transaction. Merchant must deliver a single Authorization request for the aggregate total of the goods/services purchase amount and the Cash Over amount. In addition, the Transaction Record must include both the purchase amount and the Cash Over amount.

### ARTICLE III - PRESENTMENT, PAYMENT, CHARGEBACK

- 3.1** **Acceptance.** Provider will accept from Merchant all Transaction Records deposited by Merchant under the terms of this Agreement and

will present the same to the appropriate Card Issuers for collection against Cardholder accounts. Merchant must transmit Transaction Records and Credit Vouchers to Provider or its processing vendor on the same or next business day immediately following the day that such Transaction Records and Credit Vouchers have been originated. All presentment and assignment of Transaction Records, collection therefor and reassignment or rejection of such Transaction Records are subject to the terms of this Agreement and the Network Rules. Provider will only provisionally credit the value of collected Transaction Records to Merchant's Account and reserves the right to adjust amounts collected to reflect the value of Chargebacks (actual and anticipated), fees, penalties, late submission charges, reserve deposits, negative Transaction Record batch deposits and items for which Provider did not receive final payment.

- 3.2 Endorsement.** By presenting Transaction Records to Provider for collection and payment, Merchant agrees to sell and assign all its right, title and interest in each Transaction Record completed in conformity with Provider's acceptance procedures. Merchant's presentment of Transaction Records to Provider constitutes an endorsement by Merchant to Provider of such Transaction Records. Provider may supply such endorsement on Merchant's behalf.
- 3.3 Prohibited Payments.** Provider may receive payment of any Transaction Record presented by Merchant and paid by Provider unless and until there is a Chargeback. Unless specifically authorized in writing by Provider, Merchant may not collect or attempt to collect any Transaction Record, including Chargebacks, and will hold in trust for Provider and promptly deliver in kind to Provider any payment Merchant receives, in whole or in part, of the amount of any accepted Transaction, together with the Cardholder's name and account number and any corresponding accompanying payment.
- 3.4 Retention of Records/Retrieval Requests.** Merchant will retain in a secure and confidential manner legible images or copies of all Transaction Records and card transaction drafts or sales records for a period of at least two years from the date of each Transaction (or for such period of time as required by the Card Networks). Provider will send Merchant any retrieval request that Provider cannot satisfy with the information Provider has on file concerning the Transaction. Merchant must provide all Transaction Records, sales records or other transaction records requested by Provider within seven business days after Provider sends notice. If Merchant does not respond or responds late to a retrieval request, Merchant may be without recourse for Chargebacks for 'non receipt of requested item' which in most cases cannot be referenced. Provider is not obligated to provide provisional credit to Merchant for any retrieval request and may suspend or discontinue any provisional credit in its sole and absolute discretion. Merchant may be charged a Retrieval Request Fee for each retrieval request. Merchant shall render all materials containing Cardholder Information unreadable prior to discarding. Merchant is responsible for ascertaining whether applicable laws require copies retained by Merchant to truncate card numbers and suppress expiration dates and for complying with all such laws.
- 3.5 Chargebacks.** Merchant will accept responsibility for all Chargebacks related to Merchant's Transactions. Accordingly, Merchant will be liable to Provider in the amount of any Transaction disputed by the Cardholder or Card Issuer for any reason under the Network Rules. Merchant authorizes Provider to offset from funds due to Merchant or to debit the Account or, if applicable, the Reserve Account for the amount of all Chargebacks. Merchant agrees to fully cooperate with Provider in complying with the Network Rules regarding all Chargebacks. Merchant may not initiate a sale Transaction in an attempt to collect a Chargeback. Merchant will pay the current published fees for each Chargeback as listed on the Merchant Application and any other fines, fees, or assessments imposed by any Card Network or Card Issuer. A Chargeback fee will be billed to the Merchant by Provider for each Chargeback occurrence.
- 3.6 Reserve Account.** Notwithstanding anything to the contrary in this Agreement and in addition to any other legal rights or remedies available to Provider, Bank may establish (without notice to Merchant) and Merchant agrees to fund and/or allow Provider to fund from the Account or by way of offset of funds otherwise due to Merchant, a non-interest bearing reserve account (the "Reserve Account") in an amount determined by Bank in its sole discretion. Such Reserve Account may be funded by all or any combination of the following, as determined by Bank: (i) one or more debits to Merchant's Account or any other accounts held by Bank or any of its affiliates in Merchant's name or on Merchant's behalf; (ii) one or more deductions or offsets to any payments otherwise due to Merchant; (iii) Merchant's delivery to Bank of a letter of credit; (iv) if Bank so agrees, Merchant's pledge to Bank of a freely transferable and negotiable certificate of deposit; or (v) Bank's demand of other security or increase of any discount rate, transaction fees or other fees. Any such letter of credit or certificate of deposit shall be issued by a financial institution reasonably acceptable to Bank. The Reserve Account may be established at any time or for any reason. Specific examples of reasons include, but are not limited to:
- (a) Merchant engages in any Transaction processing that creates an overcharge to a Cardholder by duplicating Transactions; (b) any activity designed by Merchant to circumvent a "call center" message when attempting to process a Transaction; (c) Merchant breaches this Agreement, violates any representation, covenant or warranty herein, or violates any Network Rule or Law; (d) the Merchant Application is in any way inaccurate or becomes inaccurate subsequent to Provider's approval of the Merchant Application; (e) Merchant changes its type of business without Provider's prior written approval; (f) fraud, Merchant processes an unauthorized charge, or other action that violates Provider's applicable risk management standards or is likely to cause a loss; (g) Merchant has Chargebacks exceeding one percent (1%) of the total number of transactions completed by Merchant in any thirty (30) calendar day period; (h) excessive numbers of requests from Cardholders or Card Issuers to retrieve documentation; (i) Merchant's financial stability is in question or Merchant ceases doing business; or (j) Merchant terminates this Agreement. Once the Reserve Account is established, collected funds will be placed in the Reserve Account by Bank. Before releasing funds after this Agreement is terminated, Merchant will pay any equipment cancellation fees and any outstanding charges, losses or amounts, and Chargebacks for which Merchant has provided indemnification under this Agreement. Further, Bank may require Merchant to deposit additional amounts based upon Merchant's

processing history and/or anticipated risk of loss to Bank into the Reserve Account. Once established, unless Bank determines otherwise at its sole discretion, the Reserve Account will remain in place for the later of (i) twelve (12) months, or (ii) such period thereafter during which Cardholder disputes may remain valid under the Network Rules. **The provisions of this Agreement relating to account debits and credits apply to the Reserve Account and survive this Agreement's termination until Bank terminates the Reserve Account. Any balance remaining after Chargeback rights have expired and all of Bank's other anticipated expenses, losses and damages have been paid will be disbursed to Merchant.**

- 3.7** **Insufficient Funds Fee.** The Insufficient Funds identified in the Merchant Application fee will be charged to Merchant for each unsuccessful debit of Merchant's Account.
- 3.8** **Errors and Disputes.** Provider shall be entitled to presume that any amounts Provider pays to or debits from Merchant are correct unless Merchant disputes these by sending Provider written notice within thirty days of the date of the applicable statement containing any disputed amounts or debits. ISO AND BANK SHALL NOT BE RESPONSIBLE FOR ANY DISPUTED PAYMENTS OR DEBITS, INCLUDING ANY ALLEGEDLY IMPROPER FEE(S), UNDERPAYMENTS, OR BILLING ERRORS, WHICH ARE NOT REPORTED TO PROVIDER IN WRITING WITHIN SUCH THIRTY-DAY PERIOD.

#### ARTICLE IV - TERMINATION AND EFFECT OF TERMINATION

- 4.1** **Term.** This Agreement will be effective on the date of Merchant's first live authorization attempt and, unless otherwise terminated, will continue for 3 years (the "Initial Term") with automatic 1 year renewal terms thereafter (each a "Renewal Term," and together with the Initial Term, the "Term") unless and until Merchant provides written notice of non-renewal to Provider not less than 90 days before the end of the then-current Term.
- 4.2** **Termination.**
- (a) **Without Cause.** Provider may terminate this Agreement, without cause, upon thirty (30) days' advance written notice to Merchant.
- (b) **For Cause.** Provider may terminate this Agreement in its sole discretion, effective immediately, upon written or verbal notice, or by closing Merchant's point-of-sale terminal, if Provider reasonably determines that any of the following conditions exists: (i) Merchant has violated any provision of this Agreement or Provider is otherwise entitled to terminate this Agreement pursuant to any provision of this Agreement; (ii) there is a material adverse change in Merchant's financial condition; (iii) if any case or proceeding is commenced by or against Merchant, its affiliates or principals under any Law dealing with insolvency, bankruptcy, receivership or other debt relief; any information which Merchant provided to Provider, including in the Merchant Application, was false, incomplete or misleading when received; (v) at any time during the Term, Merchant has had a monthly ratio of Chargebacks to total Transactions exceeding Card Network requirements or one percent (1%), or Chargebacks exceed three percent (3%) of any monthly dollar amount of total Transactions; (vi) an overdraft in the Account exists for more than three (3) days; (vii) Merchant or any of Merchant's officers or employees has been involved in processing Transactions arising from fraudulent or otherwise unauthorized transactions; (viii) Merchant is or will be unable or unwilling to perform its obligations under this Agreement or applicable Law; or the Network Rules (ix) Merchant has failed to timely pay Provider any amount due; (x) Merchant has failed to promptly perform or discharge any obligation under its Account or the Reserve Account; (xi) any of Merchant's representations or warranties made in connection with this Agreement was not true or accurate when given; (xii) Merchant has defaulted on any agreement it has with Provider; (xiii) Provider is served with legal process seeking to attach or garnish any of Merchant's funds or property in Provider's possession, and Merchant does not satisfy or appeal the legal process within fifteen (15) days of such service; (xiv) any Network Rules are amended in any way so that the continued existence of this Agreement would cause Provider to be in breach of those rules; (xv) any guaranty supporting Merchant's obligations is revoked, withdrawn, terminated or altered in any way; (xvi) if any circumstances arise regarding Merchant or its business that create harm or loss of goodwill to any Card Network; (xvii) termination is necessary to prevent loss to Provider or Card Issuers; (xviii) Merchant's type of business indicated on the Merchant Application or as conducted by Merchant could endanger Bank's safety or soundness; (xix) Merchant's owner, officer, Guarantor, or corporate entity has a separate relationship with Bank and that relationship is terminated, (xx) Merchant appears on any Card Network's security reporting; or (xxi) Provider's security for repayment becomes impaired; (xxii) Merchant's monthly payment card volume drops below 85% of the average monthly payment card volume from the prior 3 month period.
- (c) **Termination for Cause by Merchant.** Merchant may terminate this Agreement in the event of a material breach of the terms of the Agreement by Provider, provided Merchant gives Provider written notice of any alleged breach and such breach remains uncured for a period of thirty days following receipt of written notice by the Provider.
- 4.3** **Effect of Bankruptcy.** Any account or security held by Provider will not be subject to any preference, claim or stay by reason of bankruptcy or similar Law. The parties expressly agree that the acquisition of Transactions hereunder is a financial accommodation and if Merchant becomes a debtor in any bankruptcy or similar proceeding, this Agreement may not be assumed or enforced by any other person and Provider will be excused from performance hereunder.
- 4.4** **Effect of Termination; Early Termination Fee.** If this Agreement is terminated, regardless of cause, Provider may withhold and discontinue the disbursement for all Cards and other Transactions in the process of being collected and deposited. If the Agreement is terminated for cause, Merchant acknowledges that Provider may be required to report Merchant's business name and the names and

other identification of its principals to various Card Network and industry databases, including the Terminated Merchant File and the Merchant Alert to Control High Risk Merchants File ("MATCH"). **Merchant expressly agrees and consents to such reporting if Merchant is terminated for any reason requiring listing on the MATCH file.** Merchant waives and will hold harmless Provider from any claims that Merchant may raise as a result of Provider's MATCH file reporting. Upon termination of the Agreement, Merchant will immediately cease requesting Authorizations. If Merchant obtains any Authorization after termination, the fact that any Authorization was requested or obtained will not reinstate this Agreement. Further, Merchant will return all Provider property, forms, or equipment. All obligations for Transactions prior to termination (including payment for Chargebacks and Provider's expenses relating to Chargebacks) survive termination. Provider is not liable to Merchant for damages (including prospective sales or profits) due to termination. Following termination, Merchant will, upon request, provide Provider with all original and electronic copies of Transaction Records and Credit Vouchers, if any, that have been retained by Merchant as of the date of termination. Upon termination, any amounts due to Provider will accelerate and be immediately due and payable, without any notice, declaration or other act whatsoever by Provider. The parties agree that if this Agreement is terminated before completion of the Term for any reason other than a material uncured breach by Provider, Merchant will pay Provider an early termination fee of the greater of \$495.00 per MID or the value determined by multiplying (a) the number of months remaining from the date of termination to the end of the current Term, by the average monthly processing fees paid by Merchant to Provider, plus Provider's costs, collection fees and attorneys' fees incurred in connection with Merchant's termination of this Agreement. Merchant agrees that these damages are not a penalty but are a reasonable computation of the financial harm caused by the early termination of this Agreement.

- 4.5 Sections 2.1, 2.2, 2.5, 2.6, 2.16, 2.17, 2.18, 2.19, 2.20, 2.21, 2.22, 3.1, 3.4, 3.5, 3.6, 4.4, and Article 5 will survive termination of this Agreement.

## ARTICLE V - MISCELLANEOUS

- 5.1 Account Monitoring.** Merchant acknowledges that Provider will monitor Merchant's Transaction activity. In addition to Provider's right to fund a Reserve Account as set forth in Section 3.05, Provider may upon reasonable grounds suspend disbursement of Merchant's funds for any reasonable period of time required to investigate suspicious or unusual Transaction activity. Provider will make good faith efforts to notify Merchant promptly following such suspension. Provider is not liable to Merchant for any loss, either direct or indirect, which Merchant may attribute to any suspension of funds disbursement.
- 5.2 Forms.** Merchant will use only the forms or modes of transmission of Transaction Records and Credit Vouchers that are provided or approved in advance by Provider, and Merchant may not use such forms other than in connection with Transactions.
- 5.3 Indemnification.** Merchant will defend, indemnify and hold Provider and its officers, directors, members, shareholders, partners, employees, agents, subcontractors and representatives harmless from and against any and all fines, penalties, claims, damages, expenses, liabilities or fees of any nature whatsoever, including attorneys' fees and costs (collectively, "Damages"), asserted against or incurred by Provider arising out of, relating to or resulting from, either directly or indirectly: (a) a breach of the security of the system safeguarding Cardholder Information resulting in unauthorized access to Cardholder Information; (b) a breach of any representation, warranty or term of this Agreement, including, but not limited to, the data security provisions by Merchant, or any service provider, subcontractor or agent of Merchant; (c) the negligence, gross negligence or willful misconduct of Merchant in the performance of its obligations under this Agreement, including, but not limited to, the data security provisions; (d) any violation of applicable Law or Network Rules by Merchant; and (e) all third-party claims arising from the foregoing. Notwithstanding the preceding, Merchant is not liable to Provider if Damages are caused by, related to or arise out of Provider's gross negligence or willful misconduct, or Provider's breach of this Agreement. Merchant will promptly reimburse Provider for any assessments, fines, fees or penalties imposed by any Card Network in connection with this Agreement, including the data security provisions, and authorizes Bank to deduct any such sums from the Account, the Reserve Account or amount to otherwise be cleared and settled with Merchant.
- 5.4 Records.** In addition to any records Merchant routinely furnishes to Provider under this Agreement, Merchant will preserve Transaction Records and Credit Vouchers and any written authorization of the Cardholder for the longer of the following: (a) two years after the Transaction is completed, (b) the period required by Law or the Network Rules, (c) if a dispute is pending, until such dispute is resolved.
- 5.5 Requests for Copies.** Immediately after Merchant receives the request by Provider, Merchant will provide to Provider either the original or a legible copy (in a size comparable to the actual Transaction Record) of the paper Transaction Record and any other documentary evidence available to Merchant that Provider reasonably requests to meet Provider's obligations under Law (including its obligations under the Fair Credit Billing Act) or otherwise to respond to questions concerning Cardholder accounts.
- 5.6 Other Processors.** To the extent permitted by applicable law, Merchant agrees that during the Term, Merchant will not enter into an agreement with any other entity that provides processing services similar to those provided by Provider without Provider's written approval.
- 5.7 Fees and Charges.** Merchant will pay to Provider the fees and charges set forth on the Merchant Application including any additional charges applied to Transactions that fail to meet Card Network requirements for the lowest interchange levels. The fees and charges will either be debited from the Account through ACH or withheld from daily payments to Merchant for such amounts and for any other

fees, charges or adjustments incurred by Merchant and associated with processing services. Provider may change fees, including adding fees for additional services utilized by Merchant, upon fifteen (15) days' written notice to Merchant. The fees set forth in the Merchant Application do not include any sales tax, which, if applicable, will be billed to Merchant by ISO. Merchant shall also be responsible for all other governmental taxes and fees associated with Merchant's purchase or use of equipment, including any use taxes, state or local property or excise taxes.

- 5.8 Security Interest.** This Agreement constitutes a security agreement under the Texas Commercial Code. To secure payment of Merchant's obligations under this Agreement, Merchant grants to Provider a security interest in all now existing or hereafter acquired:
- (a) Transactions, Transaction Records, Credit Vouchers and other items submitted to Provider for processing by or for Merchant; (b) accounts receivable and payment rights relating to or arising from this Agreement, including all amounts due Merchant (including any rights to receive credits or payments hereunder); (c) accounts maintained with Bank or any institution other than Bank, including without limitation the Account and the Reserve Account, in the name of or for the benefit of, Merchant or any Guarantor of Merchant's obligations under this Agreement; (d) deposits, regardless of source, to Merchant's or any Guarantor's accounts with Bank or any institution other than Bank, including the Account and the Reserve Account; (e) all deposits and all other property and funds deposited by Merchant or withheld by Bank, including funds and property withheld as the result of security monitoring; and (f) proceeds of the foregoing. If Provider reasonably determines that Merchant has breached any obligation under this Agreement, or that proceeds of Merchant's future Transactions are unlikely to cover anticipated Chargebacks, credits, fees and adjustments, as reasonably determined by Provider (whether because this Agreement has been terminated or for any other reason), Provider may setoff or otherwise exercise its security interest without notice or demand by immediately withdrawing from or freezing any account or otherwise exercising its rights under this Agreement or those rights available under the Network Rules, applicable Laws, including the Texas Uniform Commercial Code, or in equity. In addition to the collateral pledged above, Provider may require Merchant to furnish such other and different security as Provider deems appropriate in its sole discretion to secure Merchant's obligations under this Agreement. Bank may fully or partially prohibit withdrawal by Merchant of funds from Merchant's Account with Bank or financial institutions other than Bank, pending Bank's determination from time to time to exercise its rights as a secured party against such accounts in partial or full payment of Merchant's obligations to Bank. Merchant will execute any documents and take any actions required to comply with and perfect any security interest under this paragraph, at Merchant's cost. Merchant represents and warrants that no other party has a security interest or lien in any of the collateral pledged above, and Merchant will obtain Bank's written consent before it grants a lien or security interest in that pledged collateral to any other person. Merchant shall not assign to any third party any payments due to it under this Agreement, and all indebtedness arising from Transactions will be for bona fide sales of goods and services (or both) at its business locations and free of liens, claims, and encumbrances other than ordinary sales taxes; provided, however, that Merchant may sell and assign future Transaction receivables to Provider, its affiliated entities and/or any other cash advance funding source that partners with Provider or its affiliated entities, without consent from any Card Network. Notwithstanding the foregoing, Provider prohibits Merchant from selling or assigning future Transaction receivables to any third party without Provider's prior written consent.
- 5.9 Modifications to Agreement.** From time to time Provider may amend any provision or provisions of this Agreement, including, without limitation, those relating to the discount rate or to other fees and charges payable by Merchant by providing written notice to Merchant of the amendment at least fifteen (15) days prior to the effective date of the amendment, and the amendment will become effective unless Provider receives Merchant's written notice of termination of this Agreement before such effective date. Merchant acknowledges and agrees that notices hereunder, whether electronic or paper, may be provided to Merchant in the form of messages attached to the Merchant's monthly billing statements to the extent permitted by applicable Laws and the Network Rules. In accordance with this section, Merchant may be notified of an updated Merchant Agreement that can be found at <https://www.spherechannels.com/merchant-terms/>. If Merchant continues to submit Transaction Records to Provider or otherwise continues to process Transactions with Provider after such fifteen (15) day period (even if notice of objection was provided to Provider), then Merchant shall be deemed to have accepted and agreed to such amendment. In addition, Merchant acknowledges and agrees that this Agreement is subject to amendment by Provider to conform to the Network Rules and Law and that amendments required due to changes in either the Network Rules, Law or judicial decision may become effective on such shorter period of time as Provider may specify if necessary to comply with the applicable Network Rule, Law or decision. As a matter of clarification, Merchant may not terminate this Agreement if Provider amends the Agreement as necessary to comply with applicable Network Rules, Law or a judicial decision.
- 5.10 Warranty Disclaimer.** PROVIDER MAKES NO WARRANTIES REGARDING THE USE, OPERATION OR PERFORMANCE OR NON-PERFORMANCE OF SOFTWARE AND SYSTEMS UTILIZED FOR THIS AGREEMENT, WHETHER EXPRESS OR IMPLIED, AND PROVIDER EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OF ANY INTELLECTUAL PROPERTY RIGHT WITH RESPECT TO THE SERVICES PROVIDED HERUNDER. WITHOUT LIMITED THE FOREGOING, PROVIDER DOES NOT GUARANTEE OR WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR FREE.
- 5.11 Limitation of Liability.** Provider's liability with respect to any Transaction may not exceed the amount of the Transaction Record in connection with that Transaction less any applicable fees and charges. **To the maximum extent permitted by applicable law, in no event will Provider or its agents, officers, directors or employees be liable to Merchant for any indirect, incidental, exemplary, punitive, special or consequential damages whatsoever, including, but not limited to, interruption or loss of use, loss of data, or**

**lost profits whether or not such loss or damages were foreseeable or Provider was advised of the possibility thereof, and regardless of whether any limited remedy herein fails of its essential purpose.** Merchant waives all claims against Provider for any loss, claim, demand, penalty, action, delay, cost or expense (including reasonable attorneys' fees) of any kind unless Merchant provides written notice to Provider of the occurrence that gave rise to the alleged liability within thirty (30) days after Merchant knew or should have known of the occurrence. Merchant will indemnify and hold Provider harmless from any claim relating to any Transaction Record paid for by Provider as may be made by anyone by way of defense, dispute, offset, counterclaim or affirmative action, or for any damages of or losses that Provider may incur as a result of Merchant's breach of this Agreement. Further, Merchant will reimburse Provider for all expenses and costs, including attorneys' fees, with regard thereto. Merchant acknowledges that the fees for the services provided to Merchant by Provider are very small in relation to the funds advanced to Merchant for Transactions and consequently Provider's willingness to provide these services is based on the liability limitations contained in this Agreement. Therefore, in addition to greater limitations on Provider's liability that may be provided elsewhere (including the per Transaction Record limitation above), any liability of Provider under this Agreement, whether to Merchant or any other party, whatever the basis of the liability, will not exceed, in the aggregate, an amount equal to the lesser of (a) the fees paid by Merchant to Provider during the last three (3) months, exclusive of fees and variable costs incurred by Provider to process Transactions, such as interchange costs, assessments and fees imposed by a third party or (b) **fifty thousand dollars(\$50,000)**.

**5.12** **Waiver.** Provider's failure by Provider to enforce one or more of the provisions of this Agreement will not constitute a waiver of the right to enforce the same or other provision in the future.

**5.13** **Written Notices.**

(a) All notices or other communications required to be given by a party hereunder shall be in writing and shall be effective and deemed delivered immediately when hand delivered, sent via facsimile and the sender obtains a fax confirmation receipt, or upon mailing if sent by first class mail, postage prepaid, addressed as follows:

(i) If to Bank: At the facsimile number or address provided at the top of the Merchant Application.

(ii) If to ISO: 680 N Lake Shore Drive, Suite 110, #10001, Chicago, IL 60611

(iii) If to Merchant: At the email address or address provided as the billing address on record for the Merchant.

(b) In addition, by accessing and using the services of Provider pursuant to this Agreement, Merchant hereby consents and agrees that all communications, billing statements, amendments to such services or this Agreement, notices, and other disclosures or information regarding such services or Merchant's access to and use of such services (collectively, "Disclosures") may be sent to Merchant electronically and shall be effective and deemed delivered (1) if sent via e-mail, (2) by providing access to a web site that Provider designates in an e-mail notice Provider sends to Merchant at the time the information is available, or (3) to the extent permissible by applicable law, by providing access to a website that Provider will generally designate in advance for such purpose. If Merchant wants a paper copy, Merchant can print a copy of the Disclosure or download the information for Merchant's records. This consent applies to all future Disclosures sent to Merchant in connection with the services provided by Provider or this Agreement.

(c) By consent, Merchant agrees that electronic Disclosures have the same meaning and effect as if Provider provided paper Disclosures to Merchant. When Provider sends Merchant an email or other electronic notification alerting Merchant that the Disclosure is available electronically and/or makes it available online, that shall have the same meaning and effect as if Provider provided a paper Disclosure to Merchant, whether or not Merchant chooses to view or print or download the Disclosure.

**5.14** **Choice of Law; Jurisdiction.** Texas law governs this Agreement. Any claim or cause of action arising out of this Agreement against Provider must be initiated and maintained exclusively in the state or federal courts located in Dallas County, Texas.

**5.15** **Attorneys' Fees.** Merchant will be liable for and will indemnify and reimburse Provider for all attorneys' fees, including in-house legal fees, and other costs and expenses paid or incurred by Provider in the enforcement of this Merchant Agreement or in matters related to this Merchant Agreement, or arising from any breach by Merchant of this Merchant Agreement, or any wrongdoing by Merchant. In the event Bank must engage in any recovery or collection efforts to collect any amounts due from Merchant to Provider, Merchant will reimburse Provider for all fees and expenses incurred in such collection, plus reasonable administrative fees and expenses.

**5.16** **Arbitration. PLEASE READ THIS SECTION CAREFULLY AS IT AFFECTS YOUR RIGHTS AND THE RESOLUTION OF DISPUTES.** Merchant, Provider and Guarantor (if applicable) shall attempt to resolve any dispute or controversy concerning or relating to this Merchant Agreement through binding arbitration before a single arbitrator, held at Dallas, Texas in accordance with the provisions of the Federal Arbitration Act or any successor statute. In interpreting the Merchant Agreement, which the arbitrator must do, the arbitrator shall be limited from revising, altering, or amending any term of the Merchant Agreement without the express written consent of Provider and Merchant. Claims hereunder will be arbitrated on an individual basis and, as such, the arbitrator's authority is limited to claims between the Provider and Merchant (and any Guarantor) alone. Merchant and Provider expressly agree that the arbitrator may not consolidate or join more than one person's or party's claims, and may not otherwise preside over any form of a consolidated or class proceeding or over claims brought in a purported representative capacity on behalf of the general public, other merchants or other persons or entities similarly situated. Furthermore, the arbitrator may award relief (including monetary, injunctive and declaratory relief) only in favor of the individual party seeking relief and only to the extent necessary to provide relief necessitated by that party's individual claim. In the event that Provider is required to engage in any recovery or collection efforts to collect any outstanding payment due and owing from Merchant or any Guarantor under the Merchant Agreement and Guaranty, and

Merchant and/or any Guarantor does not unconditionally proceed with arbitration in accordance with this Section within 10 days after Provider sends a written demand for arbitration, Provider shall be entitled (but not obligated) to initiate litigation in any state or federal court located in Dallas County, Texas to recover any amount due and owing from Merchant to Provider.

- 5.17 Entire Agreement; Assignability.** This Agreement and all applicable Addenda attached hereto, is the complete and final agreement between Merchant, ISO and Bank and supersedes all prior or contemporaneous negotiations, stipulations or agreements between them with respect thereto. This Agreement may be assigned by Bank without Merchant's or ISO's consent. This Agreement may not be assigned, directly or by operation of law by either Merchant or ISO, without Bank's prior written consent. This Agreement will be binding upon and inure to the benefit of the parties' respective heirs, personal representatives, successors and assigns.
- 5.18 Deposit Account.** Merchant will at all times maintain an Account at a bank that is a member of the Federal Reserve ACH system and approved by Provider and will provide Provider with proper authorization to debit the Account. All credits for collected funds and debits for fees, payments and Chargebacks and other amounts for which Merchant is liable under the terms of this Agreement will be made to the Account. During the term of this Agreement and for a period of one (1) year after the termination of this Agreement, Merchant may not close or change the Account without prior written approval by Provider, which approval may not be unreasonably withheld. Merchant will be solely liable for all fees and costs associated with the Account and for all overdrafts. Merchant hereby grants to Provider a security interest in the Account to the extent of any and all fees, payments and Chargebacks and other amounts due which may arise under this Agreement, and Merchant will execute any document and obtain any consents or waivers from the bank at which the Account is maintained as requested by Provider to protect its security interests therein. Merchant will maintain sufficient funds in the Account to accommodate all Transactions contemplated by this Agreement and all other fees, charges, credits or other payments or amounts due under this Agreement.
- 5.19 Credit and Financial Inquiries; Additional Locations; Inspections.** Provider may make, at any time, any credit inquiries which it may consider necessary to accept or review acceptance of this Agreement or investigate Merchant's deposit or Card acceptance activities subsequent to acceptance of this Agreement. Such inquiries may include, but are not limited to, a credit and/or criminal check of Merchant and business including its proprietor, partners, principals, owners or shareholders or officers. Upon Provider's request, Merchant will provide the written consent of any person for which an inquiry has been or is to be made if such person has not executed this Agreement and will provide any financial statements, income tax and business tax returns and other financial information as Provider may consider necessary to perform initial or periodic reviews of Merchant's financial stability and business practices. Merchant may accept Cards only at locations approved by Provider. Additional locations may be added, subject to Provider's prior consent. Provider or Merchant may remove locations by providing notice as provided herein. Merchant will permit Provider, at any time and from time to time, to inspect locations to confirm that Merchant has or is adhering to the terms of this Agreement and is maintaining the proper facilities, equipment, inventory, records and license or permits (where necessary) to conduct its business. However, nothing in this paragraph may be deemed to waive Merchant's obligation to comply in all respects with the terms of this Agreement or the Network Rules. Provider, its internal and external auditors, and its regulators may audit compliance with this Agreement, compliance with Laws and Network Rules, including, but not limited to, relating to Card acceptance and Transaction processing, data security provisions and Card Network compliance. Merchant will make available its records maintained and produced under this Agreement, and Merchant's facilities will be made accessible, upon notice during normal business hours for examination and audit and shall cooperate with such audits or examinations. Nothing in this section may be construed to require Merchant to give access to its facilities, personnel or records in a manner that unreasonably interferes with its business operations. Each party will bear its own expenses of any audit.
- 5.20 Marketing of Non-Card Services.** From time to time, Provider may offer to Merchant certain additional products and services which may or may not be related to the processing of credit card and debit card Transactions. If such offers are made, Merchant may decline the offers or Merchant may accept the offers and be liable for payment therefor. If any additional product or service is offered by ISO independently of Bank, then ISO (and not Bank) shall be responsible to deliver and perform such product and service and, accordingly, Merchant may not assert any claim against Bank as it relates to such additional product or service provided by ISO. Likewise, if any additional product or service is offered by Bank independently of ISO, then Bank (and not ISO) shall be responsible to deliver and perform such product and service and, accordingly, Merchant may not assert any claim against ISO as it relates to such additional product or service provided by Bank.
- 5.21 Force Majeure.** The parties will be released from liability hereunder if they fail to perform any obligation where the failure occurs by reason of any act of God, fire, flood, storm, earthquake, tidal wave, communications failure, sabotage, war, military operation, terrorism, national emergency, mechanical or electronic breakdown, civil commotion or the order, requisition, request or recommendation of any governmental authority, or either party's compliance therewith, or governmental regulation, or priority, or any other similar cause beyond either party's reasonable control.
- 5.22 No Third-Party Beneficiary.** No other person or entity may be deemed to be a third-party beneficiary of this Agreement.
- 5.23 Severability; Conflict with Network Rules.** If any provision in this Agreement is for any reason held to be invalid or unenforceable, no other provision shall be effected thereby, and this Agreement shall be construed as if the invalid or unenforceable provision had never been a part of it. In the event of a conflict between this Agreement and the Network Rules, the Network Rules shall govern and control.

- 5.24** **IRS Reporting Information.** Pursuant to Section 6050W of the Internal Revenue Code, merchant acquiring entities such as Bank and third-party settlement organizations are required to file an information return reflecting all payment card transactions and third-party network transactions occurring in a calendar year. This requirement applies to returns for all calendar years after December 31, 2010 and Merchant will receive a form 1099-K reporting Merchant's gross transaction amounts for each calendar year. In addition, amounts payable under Section 6050W are subject to backup withholding requirements. Merchant acquirers such as Bank, either itself or through third parties, are required to perform backup withholding by deducting and withholding income tax from reportable transactions if (a) the payee fails to provide the payee's taxpayer identification number (TIN) to the merchant acquirer; or (b) if the IRS notifies the merchant acquirer that the TIN (when matched with the name) provided by the payee is incorrect. Accordingly, to avoid backup withholding, it is very important that Merchant provides Bank with the correct name and TIN that Merchant uses when filing its income tax return that includes the transactions for Merchant's business. In addition to the fees set forth on the Merchant Application, if Merchant fails to comply with the obligations set forth in this section, Provider may charge Merchant additional amounts determined by Provider and may pass through any additional fines, costs or expenses incurred by Provider.
- 5.25** **Confidentiality.** Merchant shall protect all information or other items proprietary to Provider that Merchant obtains knowledge of or access to as a result of Provider's provision of the services pursuant to this Agreement (collectively, "Provider Confidential Information") from unauthorized disclosure, publication, or dissemination with the same standard of care and discretion Merchant uses to protect similar confidential information of Merchant's own, but in no event less than reasonable care. Furthermore, Merchant shall not use, reproduce, distribute, disclose, or otherwise disseminate Provider Confidential Information, except in connection with the performance of Merchant's obligations under this Agreement. The Provider Confidential Information described in the previous sentence, shall include, but not be limited to, the following types of information and other information of a similar nature (whether or not reduced to writing): scientific, technical, or business information, product makeup lists, ideas, concepts, designs, drawings, techniques, plans, calculations, system designs, formulae, algorithms, programs, software (source and object code), hardware, manuals, test procedures and results, identity and description of computerized records, identity and description of suppliers, customer lists, processes, procedures, trade secrets, "know-how," marketing techniques and material, marketing and development plans, price lists, pricing policies, IRS W-9 form, and all other financial information. The obligations of non-disclosure provided hereunder shall continue during the Term and, (i) with respect to Provider Confidential Information that does not constitute a trade secret, for a period of three (3) years thereafter and, (ii) with respect to Provider Confidential Information that rises to the level of a trade secret under applicable Law, for such period of time thereafter as the Provider Confidential Information shall retain its status as a trade secret under applicable law, and no less than three (3) years thereafter.
- 5.26** **Continuing Guaranty.** As a primary inducement to Provider to enter into this Agreement, and to approve the Merchant Application of Merchant, the Guarantor(s), individually and severally, who signed on the Guarantor signature line(s) on the Merchant Application, agree to be bound by all terms and provisions of this Agreement to the same extent and in the same manner as Merchant, and unconditionally and irrevocably, personally guarantee the continuing full and faithful performance and payment by Merchant of each and all of Merchant's duties and obligations to Provider under this Agreement or any other agreement currently in effect or in the future entered into between Merchant or its principals and Provider, as such agreements now exist or are amended from time to time, with or without notice to Guarantor(s).

Guarantor(s) understands that Provider, without notice to Guarantor(s), may from time to time renew or extend the Agreement, modify rates, limits, charges and fees, or modify the amount or type of services provided to Merchant all of which may increase the Guarantor's obligations under this Guaranty. Guarantor(s) further understands that Provider may proceed directly against Guarantor(s) without first exhausting Provider's remedies against the Merchant, any other person or entity responsible to Provider or any security held by Provider. This Guaranty is a continuing guaranty and will not be discharged or affected by the release or discharge of Merchant or the death of the Guarantor(s). This Guaranty will bind all heirs, administrators, and representatives of the Guarantor(s) and may be enforced by or for the benefit of any successor of Provider. To the fullest extent permissible under applicable law, Guarantor(s) waives any and all rights of subrogation, reimbursement or indemnity derived from Merchant, all other rights and defenses available to Merchant, and all other rights and defenses available to Guarantor(s).

Terms Below Are Additional Applicable Specifically to American Express Card Acceptance ("Program") (capitalized terms below not defined elsewhere in the Agreement shall have the meanings assigned in the American Express Network Rules). With respect to participation in the Program, in the event of a conflict between the terms below and other terms of this Agreement, the terms below shall control with respect to the Program. Furthermore, any conflict between any terms found in this Agreement and the terms provided by American Express, the terms provided by American Express shall control.

- A5.27 Transaction Data.** Merchant authorizes Provider and/or its affiliates to submit American Express Transactions to, and receive settlement on such Transactions from, American Express or Bank on behalf of Merchant. Merchant authorizes (i) Provider and/or its affiliates to collect and disclose Transaction Data, Merchant Data, and other information about Merchant to American Express, (ii) American

Express to use such information to perform its responsibilities in connection with the Program, promote the American Express Network, perform analytics and create reports, and for any other lawful business purposes, including commercial marketing communications purposes within the parameters of this Agreement, and important transactional or relationship communications from American Express. Merchant acknowledges and agrees that American Express may use the information obtained in the Program merchant application at the time of setup to screen and/or monitor Merchant in connection with Card marketing and administrative purposes.

- A5.28 Marketing Message Opt-Out.** Merchant may opt-out of receiving future commercial marketing communications from American Express by contacting Provider. Note that Merchant may continue to receive marketing communications while American Express updates its records to reflect this choice. Opting out of commercial marketing communications will not preclude Merchant from receiving important transactional or relationship messages from American Express.
- A5.29 Conversion to American Express Direct Merchant.** Merchant acknowledges that it may be converted from the Program to a direct relationship with American Express if and when its Transaction volumes exceed the eligibility thresholds for the Program, meaning Merchant becomes a High CV Merchant. If this occurs, upon such conversion, (i) Merchant will be bound by American Express' then-current Card Acceptance Agreement; and (ii) American Express will set pricing and other fees payable by Merchant.
- A5.30 American Express as Third Party Beneficiary.** Notwithstanding anything in the Agreement to the contrary, American Express shall have third-party beneficiary rights, but not obligations, to the terms of this Agreement applicable to the Program to enforce such terms against Merchant.
- A5.31 American Express Opt-Out.** Merchant may opt out of accepting American Express Cards at any time without directly or indirectly affecting its rights to accept Other Payment Products.
- A5.32 Refund Policies.** Merchant's refund policies for purchases on the Card must be at least as favorable as its refund policy for purchase on any Other Payment Products, and the refund policy must be disclosed to Cardmembers at the time of purchase and in compliance with Applicable Law. Merchant may not bill or attempt to collect from any Cardmember for any purchases or payment on the Card unless a Chargeback has been exercised, Merchant has fully paid for such Chargeback, and it otherwise has the right to do so.
- A5.33 Assignment.** Merchant shall not assign to any third party any payments due to it under the Program, and all indebtedness arising from Charges will be for bona fide sales of goods and services (or both) at its Establishments and free of liens, claims, and encumbrances other than ordinary sales taxes; provided, however, that Merchant may sell and assign future Transaction receivables to Provider, Bank, or affiliated entities and/or any other cash advance funding source that partners with Provider, Bank, or any of their affiliated entities, without consent of American Express.
- A5.34 Termination.** Provider may immediately terminate Merchant's right to accept Cards and Merchant's participation in the Program if (i) Merchant breaches any of the provisions of this Agreement, (ii) Merchant breaches any provision of the American Express Merchant Operating Guide, (iii) for cause or fraudulent or other activity, or (iv) upon request from American Express. Upon termination of this Agreement or upon Merchant's termination of the Program, Merchant shall cease all use of, and remove all American Express Licensed Marks from Merchant's website and wherever else they are displayed.
- A5.35 Laws and Regulations.** Merchant shall be bound by American Express Network Rules, including the American Express Merchant Operating Guide, which may be amended from time to time and is incorporated herein by reference: [https://icm.aexp-static.com/content/dam/gms/en\\_us/optblue/us-mog.pdf](https://icm.aexp-static.com/content/dam/gms/en_us/optblue/us-mog.pdf). Merchant must comply with all Applicable Laws, rules, and regulations relating to the conduct of Merchant's business. Merchant must comply with the American Express Data Security Requirements (DSR) and Payment Card Industry Data Security Standard (PCI DSS).
- A5.36 Data Security.** Merchant must ensure data quality and that Transaction Data and customer information is processed promptly, accurately and completely, and complies with the American Express Technical Specifications. Merchant is responsible for being aware of and adhering to privacy and data protection laws and provide specific and adequate disclosures to Cardmembers of collection, use, and processing of personal data. Merchant must report all instances of a Data Incident immediately to Provider after discovery of the incident.

Terms Below Are Additional Applicable Specifically to ACH Web Validation (capitalized terms below not defined elsewhere in the Agreement shall have the meanings assigned by NACHA).

- B.35 ACH Web Validation.** Nacha's WEB Debit Account Validation Rule requires validation of an account number to be used for WEB debit entries prior to storage or transactions. This applies to the first use of an account number or changes to the account number. This ACH WEB Validation service checks to make sure that the account is a legitimate, open account to which ACH entries may be posted. It does not verify that funds are available in the account, nor does it verify that there are no holds on any funds in the account.

## TRUSTCOMMERCE SERVICES PARTICIPATION ADDENDUM

This TrustCommerce Services Participation Addendum (this "Addendum") supplements, and is hereby made a part of, the Agreement between Merchant, ISO and Bank. This Addendum governs the provision of the products and services provided to Merchant by TCPP, LLC dba TrustCommerce ("TrustCommerce"). By using or accessing the TrustCommerce products or services, Merchant agrees to the applicable terms and conditions set forth in this Addendum. The TrustCommerce products and services are provided to Merchant by TrustCommerce, and not Bank. Bank is not a party to this Addendum, and Merchant acknowledges that Bank is not liable to Merchant in any way with respect to such products or services.

The TrustCommerce products and services, transactions processed, and the other matters contemplated under this Addendum are subject to the terms and conditions of the Agreement, as applicable, except to the extent the terms of this Addendum directly conflict with another provision of the Agreement, in which case the terms of this Addendum will control.

1. **Definitions.** Capitalized terms used herein shall have the meanings given to such terms as set forth in this Addendum or as defined elsewhere in the Agreement.
  - 1.1 **"Affiliate"** means a Person that, directly or indirectly, (i) owns or controls such Person, or (ii) is under common ownership or control with such Person.
  - 1.2 **"Control Panel"** means an interface provided by TrustCommerce to Merchant that enables Merchant to access and manage transactions displayed on a website via a web browser.
  - 1.3 **"Customer"** means a person or entity that makes a purchase of goods or services from Merchant, the transaction for which utilizes the TC Services.
  - 1.4 **"Merchant's Systems"** means Merchant's point of sale systems or any facility where Merchant processes and/or stores transaction data.
  - 1.5 **"Payment Messages"** means messages that relate to Card transactions, including, but not limited to, the terms "authorization," "capture," "void," "credit," "decline," "failed," "did not respond," "reversal," "post-authorization capture," and "successful settlement request".
  - 1.6 **"Person"** means a person or entity other than Merchant, ISO or TrustCommerce.
  - 1.7 **"TC Communicator"** means the software, rules and methodology developed by TrustCommerce to be used by Merchant to connect Merchant's website to the TC Server to enable transmission of transaction data between Merchant and the TC Server.
  - 1.8 **"TC Marks"** means the names, logos, emblems, brands, service marks, trademarks, trade names, tag lines or other proprietary designations of TrustCommerce.
  - 1.9 **"TC Server"** means the servers operated by or for TrustCommerce that communicate with Merchant's servers to permit access to the TC Services.
  - 1.10 **"TC Services"** means those services described in Section 6 below, the object code version of the TrustCommerce software related to such services, including the TC Communicator, and any related updates (including software maintenance or bug fixes) and any materials, documentation and derivative works released by TrustCommerce from time to time. For the avoidance of doubt, the term software in the preceding sentence does not include any software that may be obtained by Merchant separately from the TC Services.
  - 1.11 **"Third Party Services"** are the services, products, promotions or applications provided by someone other than TrustCommerce.
2. **Term and Termination.** The terms and conditions of this Addendum shall become effective on the day TrustCommerce begins providing the TC Services to Merchant and shall terminate upon termination of the Agreement unless otherwise terminated as set forth herein. This Addendum shall automatically renew concurrently with the Agreement unless either party gives the other party written notice of its intention not to renew this Addendum at least ninety (90) days prior to the end of the current term. The TC Services may be terminated for convenience at any time by TrustCommerce upon at least thirty (30) days' written notice to Merchant. In addition, TrustCommerce may suspend the TC Services, in whole or in part, or terminate this Addendum if (i) TrustCommerce determines that Merchant is using the TC Services for any fraudulent, illegal, or unauthorized purpose, (ii) TrustCommerce terminates its agreement with any third parties that are involved in providing the TC Services, or (iii) TrustCommerce otherwise decides to discontinue providing any part of the TC Services.
3. **Default.** If either party defaults in the performance of any of its obligations hereunder, and if any such default is not corrected within thirty (30) days after notice in writing, the non-defaulting party may terminate this Addendum and the TC Services upon written notice. This Addendum and the TC Services may be terminated by either party, upon written notice: (i) upon the institution by the other party of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of its debts, which are not dismissed or otherwise resolved in its favor within sixty (60) days thereafter; (ii) upon the other party's making a general assignment for the benefit of creditors; or (iii) upon the other party's dissolution or ceasing to conduct business in the ordinary course.
4. **Fees.** Merchant shall pay the fees for the TC Services as set forth in the Merchant Application and Agreement. All sums due, payable

and unpaid for over thirty (30) days shall incur a late fee of 1.5% per month or the maximum amount allowed by law, whichever is less.

5. **License Grant.** During the term of this Addendum, TrustCommerce grants to Merchant a personal, limited, non-exclusive, revocable, non-transferable license, without the right to sublicense or assign in any way, to electronically access and use the TC Services for Merchant's internal business use solely in the United States to manage Merchant's establishment and conduct associated point of sale activities within the United States in accordance with this Addendum. For purposes of this Addendum, "United States" does not include U.S. territories or possessions. The TC Services are for Merchant's internal business use only. This Addendum does not grant to Merchant any rights to the TC Marks. All intellectual property and proprietary rights in or related to the TC Services and the TC Marks are and will remain the sole and exclusive property of TrustCommerce, and any and all right, title and interest associated with the TC Services not expressly granted by TrustCommerce in this Addendum are deemed withheld.
6. **TC Services.** The TC Services applies only to Card transactions sent from Merchant to Provider for authorization and settlement pursuant to the Agreement, and specifically excludes electronic check transactions. TrustCommerce will transport data submitted by Merchant for authorization request from Merchant's Systems to ISO's systems. During the period when the transaction is being transmitted to ISO for authorization processing, all historical transaction data, including Card number and full magnetic stripe data (track data and expiration date), will be encrypted. Based on the submitted data, TrustCommerce will receive and transport ISO's responses to Merchant. TrustCommerce will provide Merchant access to the Control Panel via a web browser for the purposes of reporting, managing and reconciling Card transactions. TrustCommerce will also provide Merchant with the TC Communicator, which includes documentation and sample scripts necessary for Merchant to develop and test the necessary communications module. This module will enable Merchant's website and other systems to communicate with the TC Server.
7. **Retention of Merchant Data.** TrustCommerce will retain transaction detail concerning Merchant's Card transactions on the Control Panel for at least eighteen (18) months following the date on which the data relating to such transactions was first received by TrustCommerce in accordance with the TrustCommerce's data retention policy (available on TrustCommerce's TC Vault website at <https://vault.trustcommerce.com>>Account Information>Terms and Policies>Policies)
8. **Responsibilities of Merchant.** Merchant is responsible to comply with the following regarding its use of the TC Services:
  - 8.1 Merchant is required to comply with all federal and state laws, rules and regulations applicable to it, including the Network Rules and including taking all steps required to comply with the Payment Card Industry Data Security Standards (PCI DSS). Merchant must ensure that all third parties and software use by Merchant in connection with its payment processing are compliant with PCI DSS. Use of the TC Services will not, on its own, cause Merchant to be compliant or eliminate Merchant's obligations to comply with PCI DSS or any other Network Rule.
  - 8.2 Use of the TC Services is not a guarantee against an unauthorized breach of Merchant's Systems.
  - 8.3 Merchant must deploy the TC Services (including implementing any upgrades to such service within a commercially reasonable period of time after receipt of such upgrades) throughout Merchant's Systems.
  - 8.4 Merchant must establish, maintain and provide the necessary security over Merchant's Systems that integrate or communicate with TrustCommerce's systems, including but not limited to website(s), retail stores and call centers. Merchant is fully responsible for all goods or services offered for sale by it and for anyone to whom it provides access to the TC Services including any advertising for such goods or services regardless of the medium. Merchant is also fully liable for any promotions, whether appearing on Merchant's website or otherwise, proffered or offered by Merchant directly or indirectly in reference to any of Merchant's offerings. Merchant hereby certifies to TrustCommerce that Merchant is the owner of and/or has the legal right and authority to use, utilize and/or disseminate all information, data, graphics, text, video, music or intellectual property which either form a part of Merchant's website, are in any way or manner incorporated into Merchant's website, are provided by Merchant to its Customers or those accessing Merchant's website or are otherwise used or utilized by Merchant in its advertising or promotion through any medium available.
  - 8.5 Merchant must establish and maintain appropriate and necessary integration between Merchant's Systems and TC Services including, but not limited to, delivering the required data to TrustCommerce's server(s) and ensuring that the data to be transmitted in conjunction with the TC Services is accurate and in the format required by TrustCommerce.
  - 8.6 Merchant acknowledges that the integration and development described in this Section may require Merchant or Merchant's Internet service provider ("ISP") to use the services of a third party such as a web developer. Merchant hereby authorizes TrustCommerce to work with Merchant's designated third party to implement the TC Services contracted for under this Addendum.
  - 8.7 Merchant must establish and implement a connection to the TC Server. Merchant is solely responsible for testing this connection and ensuring that Merchant's Systems are generating correct Payment Messages and receiving correct responses. When Merchant is satisfied that its testing is complete and successful, it must notify TrustCommerce in writing or by email of its request to initiate the TC Services.
  - 8.8 Merchant will manage its business and the transactions resulting from that business including, but not limited to, all business involving its merchant account, customer support, reconciliation of its merchant account, and processing of its charge backs, returns and all other transaction types.

- 8.9** Merchant is required to comply with the terms and conditions of the Agreement.
- 8.10** Merchant acknowledges that it is solely responsible for the maintenance and security over Merchant's Systems including any PCI data maintained or passed by Merchant's Systems to TrustCommerce's systems.
- 8.11** If Merchant is provided an encryption key, Merchant acknowledges and agrees that the key is to be treated as TrustCommerce's confidential information and that TrustCommerce is the sole owner of the encryption key. Passing the encryption key on to third parties is strictly prohibited. Merchant agrees to be in compliance with the audit specifications established by the American National Standards Institute's (ANSI) Technical Report 39 (TR-39) and PCI PIN Transaction Security (PTS) standards to protect the encryption key, and will not use the encryption key unless such standards are in place. Merchant is not permitted in any way to decompile, reverse engineer, or segregate out any component of the encryption key, nor make such encryption key accessible to third parties other than as provided for herein. Merchant is not allowed to install by way of injection the encryption key to any POS device without TrustCommerce's express prior written consent.
- 8.12** Merchant will only provide the following data to TrustCommerce: payor/cardholder name; transaction (order) ID; Card number; Card expiration date; checking account number (if applicable) and transaction dollar amount. TrustCommerce does not require any additional data to process a payment transaction.
- 8.13** Merchant will only enter and/or transmit Primary Account Number (PAN) data to the appropriate fields as represented within the TC Ops Guide. TrustCommerce expressly precludes the entry and/or transmission of any PAN data, encrypted or not, in any field not designated for such information by Merchant.
- 8.14** Merchant is solely responsible for ensuring that its account numbers, passwords, security questions and answers, login credentials and any other security or access information used by Merchant to use or access the TC Services are kept safe and confidential. Merchant must prevent unauthorized access to and use of any Account Data controlled by Merchant. Merchant will: (a) implement appropriate measures designed to: (1) ensure the security and confidentiality of Account Data; (2) protect against any anticipated threats or hazards to the security or integrity of Account Data; (3) protect against unauthorized access to or use of Account Data that could result in substantial harm or inconvenience to any customer and (4) ensure the proper disposal of Account Data; and (b) take appropriate actions to address incidents of loss, theft or unauthorized access to or use of Account Data. The Control Panel contains confidential information of both TrustCommerce and Merchant including but not limited to: cardholder billing information; merchant billing information; custom fields; TrustCommerce developer guides; TrustCommerce training videos; TrustCommerce terms and policies; billing and invoice information; and reporting data. This data is considered "Confidential Information" pursuant to the Agreement. Merchant will advise third parties to whom they give access to the Control Panel of the confidential nature of the information contained therein and will enforce the terms and restrictions provided for in this Agreement related to confidentiality, and ensure that the third parties agree to abide by the same. Merchant agrees to be liable for any and all damages arising out of a breach of obligation of confidentiality and all use and misuse of the Confidential Information by Merchant or by the third parties to whom Merchant provides access.
- 8.15** Merchant will comply with all applicable Network Rules (including, without limitation, applicable data security rules). Merchant is responsible for all electronic communications sent to TrustCommerce or to any third-party containing Account Data and for all uses of the TC Services and any software. Merchant must immediately notify TrustCommerce if Merchant becomes aware of any loss, theft or unauthorized use of any Account Data. TrustCommerce reserves the right to deny Merchant access to the TC Services, in whole or in part, if TrustCommerce believes that any loss, theft or unauthorized use of any Account Data or access information has occurred. Merchant acknowledges that it is Merchant's duty to notify TrustCommerce of any data security compromise and to cooperate and assist TrustCommerce in any subsequent investigation. TrustCommerce may in its sole discretion, suspend or terminate services under this Agreement for any data security compromise caused by the acts or omissions of Merchant or by those third parties to whom Merchant granted access to the Control Panel.
- 8.16** Merchant is responsible for implementing the appropriate industry standard fraud protection tools to minimize the risk of fraudulent activity including but not limited to AVS, CAPTCHA, ReCAPTCHA or similar technologies. TrustCommerce shall not be responsible for any fees and costs resulting from the use, unauthorized use, or misuse of Merchant's software, website, point-of-sale equipment or merchant processing account.
- 8.17** Merchant will only use the TC Services for Merchant's internal business purposes in a manner consistent with this Addendum.
- 8.18** Merchant will use only unaltered version(s) of the TC Services and will not use, operate or combine the TC Services or any related software, materials or documentation, or any derivative works thereof with other products, materials or services in a manner inconsistent with the uses contemplated herein.
- 8.19** Merchant represents and warrants that Merchant and its affiliates, agents, contractors and/or employees must only use the following URL address to access and login to the TC Vault: <https://vault.trustcommerce.com/>. In the event that this URL is modified by TrustCommerce, TrustCommerce will provide Merchant with the updated URL address.
- 8.20** Merchant will promptly notify TrustCommerce of a breach of any terms of this Addendum.
- 9. Restrictions.**
- 9.1** All right, title and interest in and to all confidential information and intellectual property related to the TC Services (including TC Marks, the TC Communicator, all software, the content of any materials, web screens, layouts, processing techniques, procedures, algorithms, and methods and any updates, changes, alterations, or modifications to or derivative works from such intellectual property), owned, developed or licensed by TrustCommerce at any time or employed by TrustCommerce in connection with the TC Services, shall be

and will remain, as between TrustCommerce and Merchant, the sole and exclusive property of TrustCommerce or its licensors (as applicable), and all right, title and interest associated with the TC Services not expressly granted by TrustCommerce in this Addendum are deemed withheld. Merchant shall not use TC Marks in any manner, including in any advertisements, displays, or press releases, without the prior written consent of TrustCommerce.

**9.2** If TrustCommerce provides Merchant with copies of or access to any software or documentation, including any encryption key, unless otherwise expressly stated in writing, that software and documentation is provided on a personal, non-exclusive, non-transferable, non-assignable, revocable limited license for the period of subscription to the TC Services and solely for Merchant to access and use the software and documentation to receive the TC Services for its intended purpose on systems owned or licensed by Merchant.

**9.3** Merchant shall not and shall not permit any third party to do any of the following: (a) access or attempt to access the TC Services (or any part) that is not intended to be made available to Merchant or made available for public use; (b) decompile, disassemble, reverse engineer, or otherwise attempt to reconstruct or discover by any means any source code, underlying ideas or algorithms of the TC Services (or any part), except to the extent that such restriction is expressly prohibited by law; (c) modify, translate, or alter in any manner, the TC Services (or any part) or the TC Marks; (d) create derivative works of or based on the TC Services (or any part) or the TC Marks; (e) except for backup and archival purposes, directly or indirectly copy the TC Services (or any part); (f) republish, upload, post, transmit, disclose, or distribute (in any format) the TC Services (or any part) except as permitted herein; (g) access or use (in any format) the TC Service (or any part) through anytime-sharing service, service bureau, network, consortium, or other means; (h) rent, lease, sell, sublicense, assign, or otherwise transfer Merchant's license rights to any third party, whether by operation of law or otherwise; (i) use or ship the TC Services (or any part) outside of the United States, or access the TC Services (or any part) from outside the United States, without in any case obtaining the advance written consent of TrustCommerce; (j) remove, modify, relocate, or otherwise alter any proprietary rights notices from the TC Services (or any part) or the TC Marks; (k) perform or attempt to perform any actions that would interfere with the proper working of the TC Services, prevent access to or use of the TC Services by other users, or in TrustCommerce's reasonable judgment impose an unreasonable or disproportionately large load on TrustCommerce's infrastructure, network capability or bandwidth; or (l) use the TC Services (or any part) except as permitted herein. Merchant shall not take any action inconsistent with the stated title and ownership provided herein. Merchant will not file any action, in any forum that challenges the ownership of any part of the TC Services, any related software, materials or documentation. Failure to comply with this provision will constitute a material breach of this Addendum. TrustCommerce has the right to immediately terminate this Addendum and Merchant's access to and use of the TC Services in the event of a challenge by Merchant.

**10. TC Services Limitations and Requirements.**

**10.1** TrustCommerce may perform maintenance on the TC Services from time to time which may result in service interruptions, delays, or errors. TrustCommerce will not be liable for any such interruptions, delays, errors, or bugs. Merchant agrees that TrustCommerce may contact Merchant in order to assist Merchant with the TC Services and obtain information needed to identify and fix any errors.

**10.2** Merchant shall at all times comply with any operating procedures, requirements, or guidelines regarding Merchant's use of the TC Services that are posted on the TrustCommerce website or otherwise provided or made available to Merchant (collectively, the "TC Ops Guide"). TrustCommerce will provide Merchant with advance written notice of any changes to the TC Ops Guide.

**11. Privacy and Data Use.** All data collected from Merchant in connection with Merchant's use of the TC Services, including Customer information, transaction information and information about Merchant's business used with or stored in or by the TC Services (collectively, "Account Data"), is collected by TrustCommerce and not ISO or Bank; therefore, the use and sharing of such Account Data is controlled by the TrustCommerce Privacy Policy (available at <http://www.trustcommerce.com/privacy-policy>). Merchant acknowledges and agrees that ISO may access Merchant's Account Data upon ISO's request to TrustCommerce, and ISO's use of Merchant's Account Data is governed by the terms set forth in the Agreement.

**12. Protecting Merchant's Information.** Merchant is solely responsible for ensuring that its account numbers, passwords, security questions and answers, login details and any other security or access information used by Merchant to use or access the TC Services are kept safe and confidential. Merchant must prevent unauthorized access to and use of any Account Data. Merchant will: (a) implement appropriate measures designed to: (1) ensure the security and confidentiality of Account Data; (2) protect against any anticipated threats or hazards to the security or integrity of Account Data; (3) protect against unauthorized access to or use of Account Data that could result in substantial harm or inconvenience to any customer and (4) ensure the proper disposal of Account Data; and (b) take appropriate actions to address incidents of loss, theft or unauthorized access to or use of Account Data. Merchant will comply with all applicable Network Rules (including, without limitation, applicable data security rules). Merchant is responsible for all electronic communications sent to TrustCommerce, ISO or to any third party containing Account Data and for all uses of the TC Services and any software. Merchant must immediately notify TrustCommerce if Merchant becomes aware of any loss, theft or unauthorized use of any Account Data. TrustCommerce reserves the right to deny Merchant access to the TC Services, in whole or in part, if TrustCommerce believes that any loss, theft or unauthorized use of any Account Data or access information has occurred. TrustCommerce may in its sole discretion, suspend or terminate services under this Addendum for any data security compromise. Merchant also understands and acknowledges that Merchant is solely responsible for the compliance of any and all third parties that are granted access by Merchant to Account Data. Merchant also acknowledges that it is Merchant's duty to notify TrustCommerce of any data security compromise and to cooperate and assist TrustCommerce in any subsequent investigation.

**13. Confidentiality.**

- 13.1** Merchant must not use, disclose, store, sell or disseminate any Account Data except as may be allowed under this Addendum. Merchant acknowledges that Merchant will not obtain ownership rights in any information relating to and derived from Account Data. No Account Data, including any databases containing such information, may not be sold or disclosed to a Person as an asset upon a bankruptcy, insolvency or failure of Merchant's business.
- 13.2** Merchant will treat information supplied or otherwise made accessible by TrustCommerce, its agents or Affiliates as confidential, including without limitation, (i) Account Data, information about TrustCommerce's or its Affiliate's products, services, operations, procedures and pricing; and (ii) all documentation, computer software, source code, object code, and databases. Merchant receives confidential information of TrustCommerce in confidence and shall not disclose the confidential information to any third party, except as may be agreed upon in writing by TrustCommerce. Merchant shall safeguard all of TrustCommerce's confidential information using a reasonable degree of care, but not less than that degree of care used by it in safeguarding its own similar information or material. Upon request by TrustCommerce or upon termination of this Addendum, Merchant shall return to TrustCommerce or destroy all of TrustCommerce's confidential information in its possession or control.
- 13.3** The obligations of confidentiality and restrictions on use in this Section shall not apply to any confidential information that: (i) was in the public domain prior to the date of the Agreement or subsequently came into the public domain through no fault of Merchant; (ii) was received from a third party free of any obligation of confidence of Merchant to the third party and which third party, to Merchant's knowledge, was not under an obligation to keep the information confidential; (iii) was already in Merchant's possession prior to receipt from TrustCommerce; or (iv) is subsequently and independently developed by Merchant employees, consultants or agents without use of or reference to TrustCommerce's confidential information.
- 13.4** Except as specifically provided for herein, this Section does not confer any right, license, interest or title in, to or under TrustCommerce's confidential information to Merchant. Except as specifically provided for herein, no license is hereby granted to Merchant under any patent, trademark, copyright, trade secret or other proprietary rights of TrustCommerce.
- 13.5** Merchant acknowledges that breach of the restrictions on use or disclosure of any of TrustCommerce's confidential information would result in immediate and irreparable harm to TrustCommerce, and money damages would be inadequate to compensate for that harm. TrustCommerce shall be entitled to equitable relief, in addition to all other available remedies, to redress any breach.
- 14.** **Disclaimer.** USE OF THE TC SERVICES IS AT MERCHANT'S OWN RISK. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE TC SERVICES ARE PROVIDED "AS IS" AND TRUSTCOMMERCE MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND (EXPRESS OR IMPLIED) TO MERCHANT OR ANY OTHER PERSON, INCLUDING, WITHOUT LIMITATION, WARRANTIES REGARDING QUALITY, SUITABILITY, ACCURACY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON- INFRINGEMENT, OR THAT THE TC SERVICES WILL FUNCTION OR OPERATE UNINTERRUPTED OR ERROR-FREE, OR THAT THE TC SERVICES ARE SECURE, FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS OR DOES NOT INFRINGE ON THE RIGHTS OF ANY PERSON.
- 15.** **Audit of Use.** TrustCommerce may at any time and from time to time audit Merchant's use of the TC Services. Audits shall be conducted during regular business hours at Merchant's place or places of business and shall not unreasonably interfere with Merchant's business activities. If, as a result of any such audit, TrustCommerce identifies unauthorized use of the TC Services, Merchant shall pay, in addition to any fees charged in conjunction with the TC Services, the reasonable expense of TrustCommerce in conducting the audit.
- 16.** **Indemnification.** Merchant agrees to indemnify and hold TrustCommerce harmless from and against all losses, liabilities, damages, and expenses (including reasonable attorneys' fees) arising out of or relating to: (a) Merchant's failure to comply with or Merchant's breach of, any term or condition, representation or warranty in this Addendum, including, but not limited to the TC Ops Guide, or the Agreement; (b) Merchant's use of the TC Services; or (c) any other party's access and/or use of the TC Services with Merchant's user names, password, other appropriate security code, or any other sign on credentials/access controls for the TC Services and any software.
- 17.** **Exclusions of Consequential Damages; Limitation on Liability.**
- 17.1** NOTWITHSTANDING ANYTHING IN THIS ADDENDUM TO THE CONTRARY, IN NO EVENT SHALL TRUSTCOMMERCE OR ITS AFFILIATES BE LIABLE UNDER ANY THEORY OF TORT, CONTRACT, STRICT LIABILITY OR OTHER LEGAL THEORY FOR LOST PROFITS, LOST REVENUES, LOST BUSINESS OPPORTUNITIES, EXEMPLARY, PUNITIVE, SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES, EACH OF WHICH IS HEREBY EXCLUDED BY AGREEMENT OF THE PARTIES, REGARDLESS OF WHETHER SUCH DAMAGES WERE FORESEEABLE OR WHETHER ANY PARTY OR ANY ENTITY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
- 17.2** NOTWITHSTANDING ANYTHING IN THIS ADDENDUM TO THE CONTRARY, TRUSTCOMMERCE AND ITS AFFILIATES' CUMULATIVE LIABILITY, IN THE AGGREGATE (INCLUSIVE OF ANY AND ALL CLAIMS MADE BY MERCHANT AGAINST TRUSTCOMMERCE AND/OR ITS AFFILIATES, WHETHER RELATED OR UNRELATED) FOR ALL LOSSES, CLAIMS, SUITS, CONTROVERSIES, BREACHES, OR DAMAGES FOR ANY CAUSE WHATSOEVER AND REGARDLESS OF THE FORM OF ACTION OR LEGAL THEORY SHALL NOT EXCEED THE LESSER OF, (I) \$10,000; OR (II) THE AMOUNT OF FEES RECEIVED BY TRUSTCOMMERCE PURSUANT THIS ADDENDUM FOR TC SERVICES PERFORMED IN THE IMMEDIATELY PRECEDING THREE (3) MONTHS.
- 18.** **Amendment.** TrustCommerce has the right to change or add to the terms of this Addendum at any time, and to change, delete, discontinue, or impose conditions on any feature or aspect of the TC Services with notice provided to Merchant as set forth in the Notices section of this Addendum. Any use of the TC Services after TrustCommerce's publication of any such changes shall constitute Merchant's acceptance of this Addendum as modified.

19. **Third Party Beneficiaries.** TrustCommerce's Affiliates and any Persons TrustCommerce uses in providing the TC Services are intended third party beneficiaries of this Addendum, and each of them may enforce its provisions as if it was a party hereto. Except as expressly provided in this Addendum, nothing in this Addendum is intended to confer upon any Persons any rights or remedies, and the parties do not intend for any Persons to be third-party beneficiaries of this Addendum.
20. **General.**
- 20.1 **Relationship of Parties.** The parties hereto shall each be independent contractors in the performance of their obligations under this Addendum, and nothing contained herein shall be deemed to constitute either party as the agent, representative or franchisee of the other party, or both parties as joint venturers or partners for any purpose.
- 20.2 **Assignment.** Neither party may assign its rights or delegate its obligations under this Addendum without the other party's prior written consent, which will not be unreasonably withheld. However, TrustCommerce, may assign any or all of its rights or delegate any or all of its obligations to an Affiliate or an entity acquiring all or substantially all of the assets of TrustCommerce.
- 20.3 **Governing Law.** This Addendum shall be governed by and construed in accordance with the laws of the State of Texas (without regard to its choice of law provisions). The exclusive venue for any actions or claims arising under or related to this Addendum shall be in the appropriate state or federal court located in Dallas County, Texas.
- 20.4 **Waiver of Jury Trial.** THE PARTIES HEREBY IRREVOCABLY WAIVE ANY AND ALL RIGHTS THEY MAY HAVE TO A TRIAL BY JURY IN ANY JUDICIAL PROCEEDING INVOLVING ANY CLAIM RELATING TO OR ARISING UNDER THIS ADDENDUM.
- 20.5 **Notices.** Except as otherwise specifically provided, all notices and other communications required or permitted hereunder shall be in writing, if to Merchant at the address set forth in the Agreement or by any electronic means, including but not limited to the e-mail address Merchant has provided. If to TrustCommerce, at 680 N Lake Shore Drive, Suite 110, #10001, Chicago, IL 60611, Attention: Legal Department. Notices shall be deemed to have been given (i) if sent by mail or courier, upon the earlier of five (5) days after mailing or when actually received or, in the case of courier, when delivered. Notice given in any other manner shall be effective when confirmed by the receiving party. Failure to provide notice in the manner described in this Section will be deemed ineffective.
- 20.6 **Entire Agreement; Waiver.** This Addendum constitutes the entire agreement between Merchant and TrustCommerce with respect to the subject matter thereof, and supersede any previous agreements and understandings. Except as provided herein, this Addendum can be changed only by a written agreement signed by Merchant and TrustCommerce. A party's waiver of a breach of any term or condition of this Addendum shall not be deemed a waiver of any subsequent breach of the same or another term or condition.
- 20.7 **Force Majeure.** TrustCommerce shall not be held responsible for any delays in or failure or suspension of service caused, directly or indirectly, by mechanical or power failure, computer malfunctions (including, without limitation, software, hardware and firmware malfunctions), the nonperformance, delay or error by a third party or in any other third party system for any similar cause beyond the reasonable control of such party, including without limitation, failures or fluctuations in telecommunications, transmission links or other equipment; strikes, labor difficulties, fire, inability to operate or obtain service for its equipment, unusual delays in transportation, earthquake, fire, flood, elements of nature or other acts of God, any act or omission of Merchant or any government authority, or other causes reasonably beyond the control of TrustCommerce.
- 20.8 **Headings.** Headings are for convenience only and are not to be used in the interpretation of this Addendum.
- 20.9 **Severability.** Every provision of this Addendum is severable. If any provision of this Addendum is held to be invalid, illegal, void or unenforceable by reason of any judicial decision, then such provision will be interpreted, construed or reformed to the extent reasonably required to render the same valid, enforceable and consistent with the original intent underlying such provision, and all other provisions of this Addendum will nevertheless remain in full force and effect. In such case, the parties will in good faith modify or substitute a provision consistent with their original intent. If any remedy fails of its essential purpose, then all other provisions, including the limitations on liability and exclusion of damages, will remain fully effective.
- 20.10 **Survival of Obligations.** The rights and obligations of the parties that would be intended to survive by their nature or context will survive expiration or termination of this Addendum.
- 20.11 **Hosted Omni-Channel Payment Solutions:** The following terms and conditions apply to the use of the Hosted Omni-Channel Payment Solutions:
- 1) In regards to the Hosted Omni-Channel Payments for Ecommerce Solution, Merchant may display NACHA and credit/debit card terms to the end user, however, it is Merchant's responsibility to ensure their terms meet compliance requirements and to provide Processor with the terms they require to be displayed to the end user.
  - 2) If Merchant allows for a payment method to be stored by end user, Merchant is responsible for following guidelines set forth in Processor Developer Guides to ensure that the appropriate BillingID token is associated with, and presented to, the applicable cardholder. Improper BillingID token management by the Merchant may result in unauthorized payments.

Merchant's use of Hosted Omni-Channel Payment Suite is conditioned upon Merchant's acceptance of these terms and conditions and its accurate provision of any and all information necessary for Company to provide the Services described in this Agreement.

## Automated Clearing House (ACH) Addendum

(To be used in conjunction with the Application for Merchant Card Processing if choosing to process credit card and ACH transactions)

This document is an Addendum ("Addendum") to the Merchant Application ("Application") and the Terms and Conditions (the Application and the Terms and Conditions are collectively referred to as the "Merchant Agreement"), by and between SphereCommerce, LLC or one of its affiliated entities ("Processor"), and the Merchant identified in the Business Information section herein. Merchant and Processor are hereinafter collectively referred to as the "Parties".

PROCESSING FEES			
<u>Return Fees:</u>		<u>Misc Administrative Charges:</u>	
ACH Return		Check 21 Adjustment	
Check 21 Return		Authorization Review Request	
Re-presentment		Failure to Notify of Bank Account Change	
Re-presentment with Collected State Fee		Correction of Duplicate Deposits	
Unauthorized Returns (applies even if authorization is later proven)		Return Against Settlement Account	
Transaction Fee (Cost is per transaction)		Debit Blocks	
TC ACH Web Validation Per Item		Research Charge	(per hour, one hour minimum)
		ACH One Time Setup Fee (per MID/CustID)	
		ACH Monthly Fee (per CustID)	

Velocity Information	
Please provide responses to the following questions regarding your average ACH processing volumes:	
Debit Single Day Count	
Debit Single Transaction Amount	
Debit Period Amount	
Debit Period Count	
Debit Single Day Amount	
Recipient 1 Velocity Email Address	

**NOW, THEREFORE**, in consideration of the mutual promises and covenants contained in this Addendum, the Parties agree and desire to amend the Merchant Agreement to include the Merchant's election to process credit card and ACH transactions and to incorporate the information provided by the Merchant above. The Parties further agree as follows:

1. Capitalized Terms. Capitalized terms in this Addendum that are not defined herein shall have the same meaning given to them in the Merchant Agreement.
2. Authorization for Automatic Funds Transfer (ACH). Processor is authorized to initiate or transmit automatic debit and / or credit entries to the account identified in the Merchant Application for any and all services and fees contemplated under this Addendum and the Merchant Agreement. Said authority is granted to Processor, its affiliates and agents.
3. Acknowledgements by Merchant. Merchant acknowledges that it has received the ACH Terms and Conditions (attached hereto as Exhibit A) and the Terms and Conditions of the Merchant Agreement and acknowledges that it has read, reviewed, understood and accepts and agrees to be bound by both the ACH Terms and Conditions and terms and conditions of the Merchant Agreement. Merchant further agrees to the Processing Fees set forth above.

4. Merchant Agreement is in full force and effect. The Parties expressly acknowledge, accept and agree that except as otherwise amended pursuant to this Addendum, the Merchant Agreement remains in full force and effect in accordance with its terms.

5. Entire Agreement. In the event of a conflict between the terms and conditions of the Merchant Agreement and this Addendum, the terms and conditions of the Merchant Agreement shall govern. The Merchant Agreement, as amended by this Addendum, constitutes the complete and entire understanding of the parties with respect to the subject matter hereof.

6. Voluntary Agreement. The Parties have consulted with or had the opportunity to consult legal counsel concerning this Addendum, and have conducted such inquiry as they deem necessary and advisable prior entering into this Addendum.

7. Merchant Card Application and Signature(s). The Merchant accepts and agrees that the persons signing the Application have read and agree to be bound by the terms and conditions of the Merchant Agreement and this Addendum. Further, the Merchant agrees that by filling out and submitting this Addendum with its signed Application, the Merchant has elected to process credit card and ACH transactions and that the Merchant accepts and agrees to be bound by the terms of this Addendum, the Merchant Agreement, the ACH Terms and Conditions and any and all other rules and regulations governing the processing of credit card and ACH transactions.

8. Effective Date of the Merchant Agreement and this Addendum. The Parties agree that the effective date of the Merchant Agreement and this Addendum will be the date the Bank and Processor processes the first Transaction for merchant (including a test Transaction), with such processing signifying approval of the Merchant Agreement and Addendum and the Merchant's acceptance and agreement to be bound by the Merchant Agreement and ACH Terms and Conditions.

# Exhibit A

## ACH Terms and Conditions

### ARTICLE 1: DEFINITIONS

**1.1 General.** Unless otherwise defined herein, capitalized terms shall have the meaning provided in the NACHA Operating Rules.

**1.2 Defined Terms.** The following terms shall have the meanings provided for the purpose of this Agreement and the Exhibits attached hereto:

1.2.1 **ACH Transaction** shall mean an electronic payment transaction originated by Merchant and processed through the ACH Network in the Federal Reserve System.

1.2.2 **Application** shall mean the Application completed by Merchant and accepted by SphereCommerce, LLC ("Processor") for the provision of the Services.

1.2.3 **Agreement** shall mean this agreement by and between Processor and Merchant, and all addenda, schedules, exhibits and attachments hereto, including the Application.

1.2.4 **Authorized Individual** means those persons designated by Merchant from time to time in writing, or by other means acceptable to Processor, as authorized to effect transaction requests or initiate Services, or give notices to Processor with regard to this Agreement and a Service.

1.2.5 **Automated Clearing House Network or "ACH Network"** shall mean the network of participants involved in an ACH transaction, including parties originating Entries, ODFIs, RDFIs and parties receiving Entries.

1.2.5 **Bank of First Deposit** shall mean a Check 21 transaction, the financial institution which receives the Entry from Processor or a third party sender and transmits the Entry through the Federal Reserve Bank system for transmittal to the Customer's financial institution for debit or credit to the Customer's account.

1.2.6 **Check 21** shall mean the Check for the 21<sup>st</sup> Century (Check 21) Act and all regulations pertaining to the Check 21 Act.

1.2.7 **Check 21 Transaction** shall mean an electronic payment transaction utilizing a Substitute Check image permitted by Check 21.

1.2.8 **Customer** shall mean Merchant's customer who submits a payment to Merchant by means of a paper check or ACH transfer.

1.2.9 **Data** shall mean, as applicable, prenotifications, Returned Entries, adjustment Entries, notifications of change and/or other notices or data transmitted through one or more ACH Operators pursuant to the Rules.

1.2.10 **Entry** shall mean a transaction submitted by Merchant for processing by the Services and further defined in the NACHA Rules.

1.2.11 **Hardware** shall mean the scanner equipment used to electronically scan and capture the paper check image.

1.2.12 **Guidelines** mean the ACH operating guidelines that contain instructions and requirements for use of the specific Services provided to Merchant. The Guidelines as amended from time to time are hereby incorporated into this Agreement by reference.

1.2.13 **Fee Schedule** shall mean the schedule of fees and charges which are applicable to the Services, as initially set forth in the Addendum, which Fee Schedule is subject to revision as provided herein.

1.2.14 **Maximum Exposure Limit** shall mean the maximum amount of funds in aggregate that Merchant is permitted to have outstanding and unsettled at any given time.

1.2.15 **NACHA Operating Rules or NACHA Rules** shall mean the then-current rules, regulations and procedural guidelines published by the National Automated Clearing House Association ("NACHA") and/or all regional payment alliances associated with NACHA.

1.2.16 **Originating Depository Financial Institution or ODFI** shall mean in an ACH Transaction, the financial institution which receives the Entry and transmits the Entry to its ACH Operator for transmittal to a Receiving Depository Financial Institution for debit or credit to the Customer's account, as these terms are further defined in the NACHA Rules.

1.2.17 **Returns** shall mean all Entries that are returned as Return Entries as set forth in Appendix Five of the NACHA Operating Rules.

1.2.18 **Rules** shall collectively mean all laws, rules, and regulations applicable to ACH transactions, including, but not limited to: (i) the NACHA Operating Rules, (ii) formal rules interpretations which are issued by NACHA, (iii) the NACHA Operating Guidelines, (iv) the applicable rules of any Card Network, (v) Federal Reserve Bank Operating Circular 4 on Automated Clearing House Items, (vi) the Electronic Funds Transfer Act and Regulation E issued by the Board of Governors of the Federal Reserve System, (vii) Internal Revenue Service regulations and procedures issued under the Electronic Federal Tax Payment System (EFTPS), (viii) regulations

issued by the Department of the Treasury Fiscal Service on Federal Government Participation in the Automated Clearing House (31 C.F.R. Part 210), (ix) Article 4A of the Uniform Commercial Code; (x) Federal Trade Commission ("FTC") Act (15 U.S.C. §§ 41, et seq.); (xi) Telemarketing Sales Rule (16 C.F.R. 310, et seq.); (xii) Federal Reserve Board Regulation J, if applicable; (xiii) the rules and sanctions laws of the Office of Foreign Asset and Control ("OFAC"); (xiv) Unlawful Internet Gambling Enforcement Act (31 U.S.C. §§ 5361, et seq.) and accompanying regulations (12 C.F.R. 233; 31 C.F.R. 132); (xv) the Prevent All Cigarette Trafficking Act ("PACT Act") (15 U.S.C. §§ 376, et seq.), Jenkins Act (15 U.S.C. §§ 375, et seq.) and accompanying regulations; and (xvi) all applicable state laws and regulations. The Rules, each as amended from time to time, are incorporated into this Agreement by reference.

1.2.19 **Security Procedures** means those security procedures specified in the Guidelines.

1.2.20 **Services** shall mean the ACH or Check 21 Processing Services provided to Merchant under this Agreement.

1.2.21 **Settlement Account** shall mean a commercial demand deposit bank account which Merchant has established for JHA's access and use to settle financial payment transactions processed by JHA on behalf of Merchant.

1.2.22 **Substitute Check** means the electronic image of a paper check, as defined in Check 21.

1.2.23 **Transaction Limit** shall mean the maximum amount of funds that Merchant may initiate or authorize for a single Entry or transaction.

## ARTICLE 2: ACKNOWLEDGEMENT OF ODFI RELATIONSHIP

2.1 **General.** Merchant hereby retains and appoints Processor and any third party sender it may from time to time utilize (a "Third-Party Sender"), as Merchant's data processing and collection agent for processing Entries originated by Merchant for Credit and Debit to accounts of Customers, in accordance with the terms and conditions contained herein. Merchant acknowledges that the services (the "Services") provided by Processor or its Third-Party Sender pursuant to this Agreement are by virtue of Processor's or Third-Party Sender's contractual relationship with the ODFI, which is a federally insured financial institution regulated by Federal and state banking agencies ("Agencies"). Processor, Third-Party Sender, ODFI, and the Agencies are relying upon the accuracy of all information provided by Merchant pursuant to this Agreement and Merchant's performance of its obligations hereunder.

2.2 **ODFI's Rights.** Merchant agrees to assume the obligations of an Originator under the NACHA Operating Rules for all Entries initiated by Processor or its Third-Party Sender on behalf of Merchant. Processor and Third-Party Sender are obligated to provide the ODFI with any information that the ODFI considers to be reasonably necessary to identify each Originator for which the ODFI transmits Entries. Merchant authorizes Processor and its Third-Party Sender to provide any information regarding Merchant to the ODFI or applicable Agencies as may be requested by them. Merchant acknowledges that Processor, its Third-Party Sender, the ODFI and applicable Agencies have the right to periodically review the volume and character of the Entries initiated by Merchant and Merchant's business operations to evaluate the credit risk associated with processing Entries on behalf of Merchant. Merchant agrees to make payment to the ODFI for all Credit or Debit Entries originated by Merchant and for any Debit Entries returned by an RDFI.

2.3 **ODFI Is A Third-Party Beneficiary.** Merchant and Processor acknowledge that the ODFI is a third-party beneficiary of this Agreement, and the ODFI has all the rights under this Agreement as if it were a party thereto.

2.4 **Third-Party Sender is a Third-Party Beneficiary.** Merchant and Processor acknowledge that any third-party sender utilized by Processor to provide Services under this Agreement, is an intended third-party beneficiary of this Agreement and has all the rights under this Agreement as if it were a party thereto, including, without limitation, the right to enforce any terms of the Agreement or assert claims against Merchant for breach of the Agreement.

## ARTICLE 3: CUSTOMER AUTHORIZATIONS; RECORDS RETENTION; COMPLIANCE

3.1 **Authorization.** Before Merchant initiates any Entry on behalf of a Customer, Merchant shall obtain from the Customer such authorization as is required by the Rules. Merchant shall initiate no Entry after such authorization has been revoked.

3.2 **Records.** Merchant shall retain the original or a copy of each authorization for the period specified by the Rules and will promptly furnish a copy thereof if requested by Processor, Third-Party Sender or the ODFI. Merchant further agrees to retain all documentary evidence that proves it is compliant with the Rules and ODFI and Agency requirements to the satisfaction of the ODFI, NACHA, FTC, any state Attorneys General, or any applicable Agency or government authority for a period of no less than three (3) years, or as otherwise required by any Rule or ODFI or Agency requirements. Merchant shall provide copies of such documentary evidence to PROCESSOR or its Third-Party Sender if applicable immediately upon request.

3.3 **Compliance with Rules and Guidelines.** Merchant shall at all times comply with the Rules and has all of the rights, responsibilities, obligations, and liabilities of an "Originator" under the NACHA Operating Rules. Additionally, Merchant agrees to comply with the procedures set forth in any Guideline, ODFI or Agency requirement or other document provided to Merchant or made available to Merchant regarding proper use of the Services. In the event of any conflict between the terms of this Agreement and any Guideline, the terms of this Agreement shall govern. In the event of any conflict between the terms of this Agreement or any Guideline, Rule, ODFI or Agency requirement, the terms of a specific, on point, Rule or ODFI or Agency requirement shall govern. Merchant expressly acknowledges that full compliance by it with these procedures is essential and material to Processor's or Third-Party Sender's ability to provide Services to Merchant in accordance with this Agreement. Processor, or its Third-Party Sender, if applicable, reserves the right to change such procedures from time to time as it deems reasonable or necessary to provide said Services in an efficient and timely manner, or to conform with changes in Rules, ODFI or Agency requirements or other events beyond its control, which affect the manner in which such Services can be provided. Except as may be necessary to comply with any Rule, written notice of any changes shall be given to Merchant at least 30 days before any such changes become effective.

3.4 **Compliance with Laws.** Merchant shall comply with all applicable U.S. Federal and state laws in its business and when initiating Entries, including but not limited to the requirements of the Federal Trade Commission's Telemarketing Sales Rule and the laws and regulations identified in Section 1.2.18 of this Agreement. Merchant shall not, among other things, violate any prohibitions promulgated or enforced by the Office of Foreign Assets Control, or act on behalf of, or transmit funds to or from, any party subject to such prohibitions.

#### ARTICLE 4: SUBMISSION AND PROCESSING OF ENTRIES

4.1 **General.** Merchant may only transmit Entries in the Standard Entry Class Codes indicated in the Application. Cross-Border Payment Entries (CBR or PRR Entries) may not be initiated by Merchant under this Agreement. Merchant shall transmit all Debt and Credit Entries to Processor to the location(s) and in compliance with the formatting, content and other requirements set forth in the Rules and the Guidelines. Processor shall not be liable for any loss or damages resulting from Merchant's failure to deliver any Entry or Files of Entries in accordance with the foregoing.

4.2 **Processing Services Requirements.** All checks deposited electronically through use of the Services shall be subject to the following requirements:

- (a) The original paper check will not be deposited through the Services more than once;
- (b) All checks will conform to the requirements of Merchant's deposit agreement with its financial institution;
- (c) All checks will conform to the requirements of the applicable NACHA Rules and Check 21;
- (d) Merchant, as applicable, shall review and validate the accuracy and completeness of the check data being captured including but not limited to the amount of the check and the legibility of the check image generated from use of the Services.

4.3 **Effective Entry Date For Entries.** The Effective Entry Date for an Entry is the date Merchant intends the Debit or Credit to post to the account of the Customer, as stated in the Entry or File of Entries. The Effective Entry Date for an Entry may be converted to a Settlement Date by the ACH Operator if the Effective Entry Date is the same day or prior to the transmission date, or if the Effective Entry Date falls on a Saturday, Sunday, or holiday on which the ACH Operator is closed.

4.4 **Suspension of Services.** If Merchant initiates or attempts to initiate Entries which exceed the Maximum Exposure Limit, Processor shall suspend its Services and Processor shall initiate no additional Entries on behalf of Merchant until Processor receives the consent of the ODFI. In addition, if Merchant attempts to initiate an Entry which exceeds the Transaction Limit, Processor shall not initiate such Entry until Processor receives the consent of the ODFI.

#### 4.5 Security.

4.5.1 Merchant, Processor, and its Third Party Sender shall comply with the Security Procedures with respect to Entries transmitted by Merchant to Processor or its Third Party Sender. Merchant acknowledges that the purpose of such Security Procedures is for verification of authenticity and not to detect an error in the transmission or content of an Entry. No Security Procedures for the detection of any such error has been agreed upon between Processor and Merchant.

4.5.2 Merchant is strictly responsible to establish and maintain the procedures to safeguard against unauthorized transmissions. Merchant warrants that no individual will be allowed to initiate transfers in the absence of proper supervision and safeguards, and agrees to take reasonable steps to maintain the confidentiality of the security procedures and any passwords, codes, security devices and related instructions provided by Processor or its Third-Party Sender in connection with the Security Procedures. If Merchant believes or suspects that any such information or instructions have been known or accessed by unauthorized persons, Merchant agrees to notify Processor immediately followed by written confirmation. The occurrence of unauthorized access will not affect any transfers made in good faith by Processor, its Third-Party Sender where applicable, or an ODFI prior to receipt of such notification and within a reasonable time period to prevent unauthorized transfers.

4.5.3 If an Entry (or a request for cancellation or amendment of an Entry) received by Processor, through its Third-Party Sender where applicable, purports to have been transmitted or authorized by Merchant, it will be deemed effective as Merchant's Entry (or request) and Merchant shall be obligated to pay Processor the amount of such Entry even though the Entry (or request) was not authorized by Merchant, provided Processor or its Third-Party Sender accepted the Entry in good faith and acted in compliance with the Security Procedures with respect to such Entry. If signature comparison is to be used as a part of those security procedures, Processor shall be deemed to have complied with that part of such procedures if it compares the signature accompanying a file of Entries (or request for cancellation or amendment of an Entry) received with the signature of an Authorized Individual and, on the basis of such comparison, believes the signature of Merchant sending such file to be that of such Authorized Individual.

4.5.4 If an Entry (or request for cancellation or amendment of an Entry) received by Processor or its Third-Party Sender was transmitted or authorized by Merchant, Merchant shall pay Processor the amount of the Entry, whether or not Processor complied with the Security Procedures with respect to that Entry and whether or not that Entry was erroneous in any respect or that error would have been detected if Processor had complied with such Security Procedures.

4.5.5 Any banking information, including, but not limited to, an Entry, Entry Data, a routing number, an account number, and a PIN or other identification symbol, that is transmitted or exchanged between Merchant and Processor, its Third-Party Sender, or a Customer via an Unsecured Electronic Network (including the Internet), must, prior to the key-entry and through transmission of any banking information, (i) be encrypted using a technology that provides a commercially reasonable level of security that complies with

applicable security requirements, or (ii) be transmitted via a secure session utilizing a technology that provides a commercially reasonable level of security that complies with applicable regulatory requirements.

**4.6 Inconsistency of Name and Account Number.** Merchant acknowledges and agrees that, if an Entry describes the Receiver inconsistently by name and account number, payment of the Entry transmitted by Processor, through its Third-Party Sender where applicable, to the ODFI or from the ODFI to the RDFI may be made by the RDFI (or by the ODFI in the case of an On-Us Entry) on the basis of the account number supplied by Merchant, even if it identifies a person different from the named Receiver, and that Merchant's obligation to pay the amount of the Entry is not excused in such circumstances. Without limitation, Processor, its Third-Party Sender and the ODFI shall be entitled to rely on the routing and transit number provided to Processor by Merchant, even though the routing and transit number does not correctly identify the financial institution named in the Entry.

**4.7 Erroneous Entry by Merchant.** If Merchant discovers that any Entry it has initiated was in error, it may notify Processor of such error and Processor or its Third-Party Sender will utilize commercially reasonable efforts, consistent with the Rules, to correct the Entry. In all such cases, it shall be the responsibility of Merchant to notify its affected Customers that an Entry has been made that is at variance with the Customer's authorization or is otherwise erroneous. Processor, its Third-Party Sender, and the ODFI shall have no liability to Merchant or any Customer arising out of Merchants initiation of erroneous Entries or Processor's or Third-Party Sender's attempts to correct such Entries, and Merchant shall indemnify and hold Processor, its Third-Party Sender, and the ODFI harmless from any such liability and any pecuniary loss therefrom, including all reasonable expenses, court costs, and attorney's fees, incurred in connection with any claim or claims asserting such liability.

#### **4.8 Rejected or Returned Entry.**

4.8.1 In the event any Entries are rejected or returned by the ACH Operator and rejection was due to mishandling of such Entries by Processor or its Third-Party Sender and sufficient data is available to Processor or its Third-Party Sender to permit it to remake such Entries, then Processor or its Third-Party Sender shall remake such Entries. Merchant shall retain and make readily available to Processor, or its Third-Party Sender on request all information necessary to remake any Files of Entries for the preceding ten (10) Business Days.

4.8.2 Except as provided in Section 4.8.1, in the event any Entries are rejected or returned by the ACH Operator, Processor, or its Third-Party Sender, for any reason whatsoever, Merchant shall be responsible to remake and resubmit such Entries or otherwise resolve the rejection or return in accordance with the Rules. Processor's, or its Third-Party Sender's, responsibility shall be limited to receiving rejected and Returned Entries from the ACH Operator, performing necessary processing, control, and settlement functions, and forwarding such Entries to Merchant.

4.8.3 Processor, its Third-Party Sender, and the ODFI have the right to reject any Entry if (a) Merchant fails to comply with its Reserve Account requirements or Merchant fails to maintain the Reserve Balance; (b) Merchant fails to make any payment to Processor when due; (c) Merchant fails to maintain sufficient funds in the Settlement Account; (d) The Entry would cause Processor, its Third-Party Sender, or the ODFI to violate any Federal Reserve or other regulatory risk control program or any other law or regulation; (e) The Entry or Entries would cause Merchant to exceed the Maximum Exposure Limit or Transaction Limit; or (f) Merchant breaches any of its obligations under this Agreement.

4.8.4 Processor, or its Third-Party Sender, shall attempt to promptly notify Merchant by phone, fax, or e-mail of such rejection. PROCESSOR, its Third-Party Sender, and the ODFI shall have no liability to Merchant by reason of the rejection of any such Entry or the fact that such notice is not given at an earlier time than that provided for herein.

4.8.5 Except as provided in Section 4.8.1, Merchant is solely responsible for all returned Entries.

**4.9 Notification of Change.** Processor, or its Third-Party Sender, shall provide Merchant all information, as required by the NACHA Operating Rules, with respect to each Notification of Change (NOC) Entry or Corrected Notification of Change (Corrected NOC) Entry received by Processor, or its Third-Party Sender, relating to Entries transmitted by Merchant. Processor, or its Third-Party Sender, must provide such information to Merchant within two (2) Banking Days of the Settlement Date of each NOC or Corrected NOC Entry. Merchant shall ensure that changes requested by the NOC or Corrected NOC are made within six (6) Banking Days of Merchant's receipt of the NOC information from Processor, or its Third-Party Sender, or prior to initiating another Entry to the Receiver's account, whichever is later.

**4.10 Notice of Erroneous Unauthorized Transfers.** Merchant agrees to promptly and regularly review all Entries and other communications received from Processor or its Third-Party Sender and to immediately notify Processor or its Third Party Sender if there are any discrepancies between Merchant's records and those provided by Processor, its Third-Party Sender, the ODFI or Merchant bank, or with respect to any transfer not authorized by Merchant. If Merchant fails to notify Processor, or its Third-Party Sender, within seven (7) days of the date Processor or its Third Party Sender provides a statement of account or other report of activity to Merchant, then Merchant will be responsible for all losses or other costs associated with any erroneous or unauthorized transfer.

**4.11 Notice of Changes.** Merchant shall provide Processor, or its Third-Party Sender, with immediate notice of intent to: (i) transfer or sell any substantial part of its assets, or to liquidate; (ii) change the basic nature of its business, including selling any products or services not related to its current business; (iii) change ownership or transfer control of its business; or (iv) enter into any joint venture, partnership or similar business arrangement whereby any person or entity not a party to this Agreement assumes any interest in Merchant's business. Any such charges shall be sufficient grounds for Processor's immediate termination of this Agreement.

**4.12 Audit.** Merchant hereby grants to Processor, or its Third-Party Sender, and the ODFI and/or their respective auditors the right of access to Merchant's books and records and agrees to provide assistance at all times during the term of this Agreement for

the purposes of allowing Processor, its Third-Party Sender, and the ODFI and/or auditors to conduct an audit and/or verify Merchant's compliance with this Agreement and the Rules.

## **ARTICLE 5: SETTLEMENT ACCOUNT**

5.1 **Settlement Account.** Processor, through its Third-Party Sender where applicable, will establish a demand deposit account ("Settlement Account") on behalf of Merchant with the ODFI. Merchant will maintain funds in the Settlement Account sufficient to offset (i) all Entries submitted and against which Returns Entries may be credited or debited as described on the Fee Schedule, and (ii) all fees and other charges imposed by Processor, or its Third-Party Sender, under this Agreement including those set forth in Article 7 and in the Fee Schedule. Merchant hereby grants Processor, its Third-Party Sender, and the ODFI the right to access the Settlement Account for the purpose of performing the Services contemplated by this Agreement and ensuring that Merchant performs its obligations hereunder.

5.2 **Operation of Settlement Account.** Processor, through its Third-Party Sender where applicable, is entitled to debit the Settlement Account for (i) fees charged under Article 7 and the Fee Schedule, (ii) the settlement of Credit Entries, (iii) the offsetting of any Debit Entries that are rejected or returned by the ACH Operator, or (iv) any overpayments that Processor or its Third-Party Sender may make to Merchant in error.

5.3 **Settlement by Merchant for Entries.** Processor, through its Third-Party Sender where applicable, will either debit or credit the Settlement Account to offset any Credit or Debit Entry initiated by Merchant. Merchant shall reimburse Processor, through its Third-Party Sender where applicable, with good and collected funds if, after settlement has been made, (i) any Debit Entry is rejected or returned, or (ii) Processor or its Third-Party Sender receives any other adjustment that relates to any such Debit Entry. Merchant shall make such reimbursement on the date of such rejection or the date Processor or its Third-Party Sender receives notification of the adjustment.

## **ARTICLE 6: RESERVE ACCOUNT, SECURITY AGREEMENT; TRANSACTION LIMITS AND MAXIMUM EXPOSURE LIMITS, VOLUME ANALYSIS**

### **6.1 Reserve Account.**

6.1.1 If required by Processor or its Third-Party Sender, Merchant shall maintain the Reserve Balance in a reserve account ("Reserve Account") to be held in escrow by Processor or its Third-Party Sender where applicable at a financial institution designated by Processor or Third-Party Sender for the term of this Agreement and a period of two (2) years after the last Debit Entry initiated by Merchant, whether Processor or Third-Party Sender cease to process transactions for Merchant or this Agreement terminates for any reason.

6.1.2 Merchant shall maintain a Reserve Balance (the "Reserve Balance") in its Reserve Account. The Reserve Balance shall be established by Processor, or its Third-Party Sender where applicable, and the ODFI and may be modified by Processor, its Third-Party Sender where applicable, or the ODFI at any time upon providing Merchant with written notice. Merchant shall maintain readily available funds in its Reserve Account that shall not be less than the Reserve Balance. The Reserve Balance for the Reserve Account will be based on Merchant's return history and File activity. The time period in which Merchant shall have to fund the Reserve Balance shall be determined by Processor or Third-Party Sender where applicable and the ODFI on a case-by-case basis.

6.1.3 If the amount held in the Reserve Account falls below the Reserve Balance established for Merchant, Processor or its Third-Party Sender shall notify Merchant via telephone, facsimile, or other form of electronic communication, and Merchant shall immediately transfer funds to the Reserve Account so that the funds available in the Reserve Account is equal to or greater than the Reserve Balance. Merchant will immediately provide funds to Processor or its Third Party Sender, to satisfy any and all fees incurred by Processor or Third Party Sender if any deposited item or Debit Entry is returned and there are insufficient funds in the Reserve Account to cover such Returns.

6.1.4 Processor, its Third-Party Sender, and the ODFI shall have access to such Reserve Account and shall have the right to debit such Reserve Account for any amount due and payable to Processor, its Third-Party Sender, or the ODFI by Merchant, directly or indirectly, or to settle any Return or any other loss corresponding to an Entry initiated by or on behalf of Merchant. Processor, its Third-Party Sender, and the ODFI shall have no obligation to provide notice or obtain the consent of Merchant prior to accessing such Reserve Account. Merchant shall provide all authorizations and consents necessary for Processor, its Third-Party Sender, and the ODFI to effect the foregoing.

6.1.5 Without limiting the foregoing, Processor, its Third-Party Sender, and the ODFI shall have the right to access the Reserve Account for the following purposes: (a) to receive payment for any Returns; (b) to reimburse Processor, its Third-Party Sender, or the ODFI for any Entries for which Processor, its Third-Party Sender, or the ODFI expended any funds on behalf of Merchant; and (c) to indemnify Processor, its Third-Party Sender, or the ODFI in case of any errors, mistakes or other unforeseen problems that may arise which are associated with any Entries.

6.1.6 Merchant shall maintain the Reserve Balance in the Reserve Account throughout the period in which Merchant continues this contractual relationship with Processor and for a period of at least two (2) years after the last Debit Entry initiated by Merchant.

6.2 **Security Interest.** To secure all of Merchant's present and future obligations to Processor, its Third-Party Sender, and the ODFI (Processor, its Third-Party Sender, and the ODFI are referred to as "Secured Party" for purposes of this Section 6.2) under this Agreement, Merchant hereby grants to Secured Party liens and security interests in all of Merchant's rights to and interests in the following, presently existing or hereafter acquired, and in any interest earned thereon and proceeds thereof (collectively, "Collateral"):

(i) the Reserve Account, (ii) the Settlement Account, (iii) any of Merchant's funds now or hereafter in the possession of the Secured Party, and (iv) all amounts now or hereafter owing to Merchant under this Agreement. Each Secured Party is hereby authorized (and any related notice and demand are hereby expressly waived), to set off, recoup and to appropriate and to apply any and all such amounts owing, funds held, account balances and other Collateral against and on account of Merchant's obligations under this Agreement, whether such obligations are liquidated, unliquidated, fixed, contingent matured or unmatured. In the case of any Collateral consisting of a deposit account with any other Secured Party or any other financial institution, Merchant hereby agrees that Secured Party shall have control thereof and the depository will (and is hereby authorized to) comply with instructions originated by Secured Party directing disposition of funds in the deposit account without further consent by Merchant. Merchant agrees to duly execute and deliver to Secured Party such additional instruments, documents and agreements as may be reasonably requested to perfect and confirm the liens, security interests in deposit accounts and other Collateral set forth in this Agreement. Merchant agrees that Secured Party may file such financing statements in Merchant's name describing any or all of the Collateral and take such other action as they may require in order to perfect their liens and security interests therein.

**6.3 Transaction Limits and Maximum Exposure Limit.** Prior to or contemporaneous with the execution of this Agreement, Processor or its Third-Party Sender where applicable and the ODFI shall review the financial and business history of Merchant and establish Merchant's Transaction Limit and Maximum Exposure Limit. Processor or its Third-Party Sender where applicable and the ODFI shall have the right to modify the Transaction Limit and Maximum Exposure Limit established for Merchant at any time upon providing Merchant written notice.

**6.4 Volume Analysis.** Processor or its Third-Party Sender will routinely analyze Merchant origination and return activity. In the event the Merchant exceeds its established threshold parameters or ceases to do business with Processor or its Third-Party Sender, Processor or its Third-Party Sender shall have the right at any time to place all of the provisional or final credit provided to Merchant for each Debit Entry originated by it in an account held by Processor or its Third-Party Sender for a period of two years from the last Debit Entry. Processor or its Third-Party Sender shall have the right to offset against amounts owed to Merchant for all returned Entries, fees, damages, or other costs that may arise out of ACH processing for the Merchant.

#### **ARTICLE 7: FEES**

**7.1 Charges.** Processor's charges for Services rendered to Merchant under this Agreement shall be computed in accordance with the Fee Schedule. Processor or its Third Party Sender may change the fees upon 15 days' prior written notice to Merchant. Payment of these fees will be made by a direct charge to the Settlement Account. If a Debit for Processor's fees is returned or uncollectible for a period of three days after its transmittal, Processor may cease providing Services for Merchant and will be excused from the performance of all its obligations hereunder until the fees and all service charges with respect thereto have been paid in good funds.

**7.2 Taxes.** The charges do not include any taxes, duties or other governmental charges (collectively "Taxes"), such as but not limited to sales, use, excise, and value added taxes. Merchant shall pay all Taxes levied or imposed by any governmental authority in connection with the Services, but excluding taxes which are imposed on Processor's net income.

#### **ARTICLE 8: REPRESENTATIONS, WARRANTIES AND INDEMNIFICATION**

**8.1 Representations and Warranties of Merchant.** Merchant represents and warrants the following to Processor, its Third-Party Sender, and the ODFI; now and as of the time it initiates each Entry:

**8.1.1** As to each Credit Entry submitted by Merchant: (a) Each person shown as the Receiver on an Entry received by Processor or its Third-Party Sender from Merchant has authorized the initiation of such Entry and the crediting of its account in the amount and on the Effective Entry Date shown on such Entry; (b) Such authorization is operative at the time of transmittal or crediting by Processor or its Third-Party Sender as provided herein; (c) Entries transmitted to Processor or its Third-Party Sender by Merchant are limited to those types of credit Entries set forth on the Application and in the Guidelines; (d) The Entry is timely; (e) The Entry is in conformity with the Rules; (f) That, at the time the Entry is transmitted to the automated clearing house ("ACH") by Processor or its Third-Party Sender, Merchant does not have actual knowledge of the revocation or termination of the authorization by the Receiver; (g) That the Receiver's authorization is neither inoperative nor ineffective by operation of law, nor has it been terminated by operation of law; (h) That Merchant has provided all written disclosures required by the Rules and all applicable laws and regulations to all consumers on whose behalf Processor or its Third-Party Sender performs any Service; (i) Merchant will comply with all provisions of the Rules applicable to the Services provided to Merchant; and (j) Merchant acknowledges and agrees that all Entries originated as part of a Service shall comply with all applicable laws and regulations, including but not limited to, any economic sanctions administered by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and shall not act on behalf of, or transmit funds to or from, any party subject to such sanctions.

**8.1.2** As to each Debit Entry submitted by Merchant: (a) The Entry is for a sum due and owing to the Originator from a Customer or for a sum specified by a Customer to be paid to the Originator; (b) The Entry is timely; (c) The Entry is forwarded in accordance with an authorization executed by the Receiver and held by the Originator; (d) The Entry is in conformity with the Rules; (e) That, at the time the Entry is transmitted to the ACH by Processor or its Third-Party Sender, Merchant does not have actual knowledge of the revocation or termination of the authorization by the Receiver; (f) That the Receiver's authorization is neither inoperative nor ineffective by operation of law, nor has it been terminated by operation of law; (g) The Entry is of a type of debit Entry specified in the Application and the Guidelines; (h) The Originator has complied with the Rules pertaining to the Entry; (i) Merchant shall be bound by and comply with the Rules as in effect from time to time, including, without limitation, the provision making payment of an Entry by the Receiving Depository Financial Institution of final settlement for such Entry; and Merchant specifically acknowledges that it has received notice of the Rule regarding provisional payment and of the fact that, if such settlement is not received, the Receiving Depository Financial Institution shall be entitled to a refund from the Receiver of the amount credited and Merchant shall not be deemed to have paid the

Receiver the amount of the Entry; (j) Merchant will comply with all provisions of the Rules applicable to the Services provided to Merchant; and (k) Merchant acknowledges and agrees that all Entries originated as part of a Service shall comply with all applicable laws and regulations, including but not limited to, any economic sanctions administered by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and shall not act on behalf of, or transmit funds to or from, any party subject to such sanctions.

8.1.3 Merchant has complied with and shall remain in compliance with all applicable laws (including rules, regulations, codes, plans, injunctions, judgments, orders, decrees, rulings, and charges thereunder) of all federal, state, local and foreign governments and all agencies thereof, and no action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, or notice has been filed or commenced against any of them alleging any failure to comply. Merchant further represents and warrants that it shall not originate any Entries that constitute (i) improper outbound telemarketing in violation of the TSR or other applicable Rules; (ii) sales or marketing of advance-fee credit cards in violation of the TSR or other applicable Rules; (iii) restricted Internet gambling transactions; and/or (iv) unlawful Internet or other remote tobacco sales.

8.1.4 Merchant is duly organized, validly existing, and in good standing under the laws of the jurisdiction of its organization.

8.1.5 Merchant has full power and to execute and deliver this Agreement and to perform their obligations hereunder. This Agreement constitutes valid and legally binding obligations of Merchant and is enforceable in accordance with its terms and conditions.

8.1.6 Neither the execution delivery of this Agreement, nor the consummation of the transactions contemplated hereby will violate any statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government, government agency, or court to which Merchant is subject or any charter of Merchant, or conflict with or create any right to accelerate, terminate, modify, or cancel or require any notice under any other agreement, or other arrangement to which Merchant is a party or by which either is bound.

8.1.7 The information, documents, reports, financial statements, and other documentation provided by Merchant pursuant to this Agreement are correct, accurate, and complete and do not contain any untrue or misleading statement or fact.

8.1.8 The representations and warranties made by Merchant in this Agreement shall survive termination of this Agreement and the termination of processing services provided by Third-Party Sender.

8.1.9 If Merchant breaches these representations and warranties, any other representations and warranties made elsewhere in this Agreement, or has initiated any unauthorized Entries, Merchant acknowledges that Processor, its Third-Party Sender where applicable, and/or the ODFI will suffer irreparable harm and the total amount of monetary damages for any injury to one or all of them will be impossible to calculate and therefore are an inadequate remedy. Accordingly, Processor, its Third-Party Sender or ODFI, as applicable, may (i) seek temporary and permanent injunctive relief against Merchant, or (ii) exercise any other rights and seek any other remedies to which Processor, its Third-Party Sender or ODFI, as applicable, may be entitled to at law, in equity and under this Agreement. This Paragraph 8.1.9 shall survive any expiration or termination of the Agreement.

8.2 **Indemnification.** Merchant agrees to indemnify and hold harmless Processor, its Third-Party Sender, and the ODFI, and each of their respective directors, officers, employees, and affiliates, against any and all liability, loss, claims, demands, damages or costs of any kind, including reasonable attorneys' fees and costs of litigation, arising from any third party or governmental actions resulting from (i) Merchant's actual or alleged negligence or willful misconduct or that of Merchant's directors, officers, agents or employees, (ii) any and all fines and/or liabilities imposed against Processor, its Third-Party Sender, or the ODFI for a Rules violation caused by an action or omission of Merchant or that of Merchant's directors, officers, agents or employees, regardless of how the violation occurs, (iii) Merchant's actual or alleged breach of any representation, warranty or obligation under this Agreement, (iv) Merchant's actual or alleged violation of any Rule, NACHA Operating Rule, Guideline or ODFI or Agency requirements, or (v) Merchant's business activities that are the subject of this Agreement.

#### **ARTICLE 9: PROCESSOR'S, THIRD-PARTY SENDER'S AND ODFI'S LIABILITY**

9.1 **Reliance on Merchant.** In the performance of the Services required by this Agreement, PROCESSOR, its Third-Party Sender, and the ODFI shall be entitled to rely on the information, representations, and warranties that Merchant or its Authorized Individuals provide, and shall not be responsible for the accuracy, completeness, or authenticity thereof.

9.2 **Disclaimer.** THIS AGREEMENT IS A SERVICE AGREEMENT. THE SERVICES AND OTHER INDIVIDUAL COMPONENTS ARE PROVIDED "AS IS" WITHOUT WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED. PROCESSOR, ITS THIRD-PARTY SENDER, AND EACH ODFI DISCLAIMS ALL OTHER REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, MADE TO MERCHANT OR ANY OTHER PERSON, INCLUDING WITHOUT LIMITATION, ANY WARRANTIES REGARDING NON-INFRINGEMENT, QUALITY, SUITABILITY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR OTHERWISE OF ANY SERVICES OR ANY GOODS PROVIDED INCIDENTAL TO THE SERVICES PROVIDED UNDER THIS AGREEMENT.

9.3 **Consequential Damages.** IN NO EVENT WILL PROCESSOR, ITS THIRD-PARTY SENDER, OR THE ODFI BE LIABLE FOR LOST PROFITS, LOSS OF USE, LOSS OF DATA, BUSINESS INTERRUPTION, COST OF PROCUREMENT OF SUBSTITUTE SERVICES, OR OTHER SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES, HOWSOEVER CAUSED, AND ON ANY THEORY OF LIABILITY, WHETHER FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), OR OTHERWISE. THESE LIMITATIONS WILL APPLY WHETHER OR NOT A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. THE PARTIES ACKNOWLEDGE THAT THE CONSIDERATION BARGAINED FOR IN THIS AGREEMENT WAS BASED UPON THE FOREGOING LIMITATION OF LIABILITY.

**9.4 Limitation of Liability.** SUBJECT TO THE FOREGOING, PROCESSOR'S, ITS THIRD-PARTY SENDER'S, AND/OR EACH ODFI'S JOINT AND SEVERAL LIABILITY FOR DAMAGES OF ANY KIND OR NATURE IN CONNECTION WITH THIS AGREEMENT SHALL IN NO EVENT EXCEED THE LESSER OF: (A) THE CHARGES FOR THE TRANSACTIONS WHICH PROCESSOR, OR ITS THIRD-PARTY SENDER HAS FAILED TO PROCESS IN ACCORDANCE WITH THIS AGREEMENT OR (B) \$5,000.

**9.5 Force Majeure.** NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, IN NO EVENT SHALL PROCESSOR, ITS THIRD-PARTY SENDER, OR ANY ODFI BE LIABLE OR RESPONSIBLE FOR ANY DELAYS OR ERRORS IN ITS PERFORMANCE OF THE SERVICES. IF AND TO THE EXTENT SUCH DEFAULT OR DELAY IS CAUSED, DIRECTLY OR INDIRECTLY, BY (I) FIRE, FLOOD, ELEMENTS OF NATURE OR OTHER ACTS OF GOD; (II) ANY OUTBREAK OR ESCALATION OF HOSTILITIES, WAR, RIOTS OR CIVIL DISORDERS IN ANY COUNTRY; (III) ANY ACT OR OMISSION BY MERCHANT OR ANY GOVERNMENT AUTHORITY; (IV) ANY LABOR DISPUTES (WHETHER OR NOT EMPLOYEES' DEMANDS ARE REASONABLE OR WITHIN THE PARTY'S POWER TO SATISFY); OR (V) THE NONPERFORMANCE BY A THIRD PARTY, INCLUDING WITHOUT LIMITATION, FAILURES OR FLUCTUATIONS IN TELECOMMUNICATIONS OR OTHER EQUIPMENT. IN ANY SUCH EVENT, PROCESSOR AND EACH ODFI SHALL BE EXCUSED FROM ANY FURTHER PERFORMANCE AND OBSERVANCE OF THE OBLIGATIONS SO AFFECTED.

#### **ARTICLE 10: TERM AND TERMINATION**

**10.1 General.** The initial term of this Agreement shall be for a period of three (3) years beginning on the later of (a) the date of acceptance of this Agreement by Processor; or (b) commencement of processing (the "Term"), and shall renew for additional successive one (1) year terms unless any party hereto provides the other written notice of its intent not to renew prior to the expiration of the then current term. This Agreement may be terminated by Processor, or its Third-Party Sender, upon thirty (30) days written notice to Merchant, provided that applicable portions of this Agreement shall remain in effect for two (2) years after the effective date of termination with respect to the Reserve Account and any Entries that Merchant initiates prior to the effective termination date, to clear all Returns against the Settlement Account. After termination of this Agreement for any reason whatsoever, Merchant shall continue to bear total responsibility for all Returns, fees and adjustments resulting from Entries processed pursuant to this Agreement and all other amounts then due or which thereafter may become due under this Agreement. Nothing in this Section or this Agreement shall affect Processor's or its Third-Party Sender's right to immediately suspend or terminate processing for Merchant under Section 10.2 of this Agreement.

**10.2 Termination for Cause.** Processor, or its Third-Party Sender, shall also have the right to terminate this Agreement immediately for cause, which shall include but not be limited to:

- 10.2.1 Merchant's failure to pay or settle Entries;
- 10.2.2 Merchant's failure to maintain the requisite balance in the Settlement Account or Reserve Account;
- 10.2.3 Merchant's failure to pay Processor's or its Third-Party Sender's fees or service charges within three days after transmittal of a Debit to the Settlement Account therefore;
- 10.2.4 Merchant's noncompliance with applicable laws, the Rules or any ODFI or Agency requirement;
- 10.2.5 Any breach or violation of any of the Merchant's representations and warranties made in this Agreement;
- 10.2.6 Excessive returned or rejected Entries (Excessive Return Thresholds) submitted by Merchant, in terms of number or amount;
- 10.2.7 Processor's or its Third-Party Sender's receipt of unauthorized, false, or fraudulent Entries or Files of Entries, or inaccurate or fraudulent authentication data;
- 10.2.8 Merchant's failure to conform to Processor's specifications;
- 10.2.9 The ODFI is required by the Agencies or other state or federal regulatory bodies to terminate its contractual relationship with Processor; or
- 10.2.10 Processor, or its Third-Party Sender where applicable, is required by the ODFI or any applicable Agency to terminate processing for or its contractual relationship with Merchant.

**10.3 Termination Fee.** Termination of this Agreement prior to the expiration of the term shall result in the assessment of fees determined as follows: (1) \$250 for Merchants with less than twelve months remaining from the date of termination to the end of the then current Term, or; (2) \$500 for Merchants with more than twelve months remaining, or such portion of the foregoing as may be permitted by applicable law.

#### **ARTICLE 11: DISPUTES**

**11.1 Disputes.** Any Dispute (defined below) between the parties, including third-party beneficiaries, arising out of, or relating to, the validity, construction, interpretation or performance of this Agreement that cannot be amicably resolved will be submitted to binding arbitration in accordance with the terms of this Article 11. A "Dispute" shall mean any action, dispute, claim or controversy of any kind, whether in contract or tort, statutory or common law, legal or equitable, now existing or hereafter arising under or in connection with, or in any way pertaining to this Agreement. Any party may by summary proceedings, bring an action in court to compel arbitration of

a Dispute. Any party who fails or refuses to submit to arbitration following a lawful demand by any other party shall bear all costs and expenses incurred by such other party in compelling arbitration of any Dispute.

11.2 **Governing Rules.** Arbitration proceedings shall be administered by the American Arbitration Association ("AAA") or such other administrator as the parties shall mutually agree upon. Arbitration shall be conducted in accordance with the AAA Commercial Arbitration Rules. If there is any inconsistency between the terms hereof and any such rules, the terms and procedures set forth herein shall control. All Disputes submitted to arbitration shall be resolved in accordance with the Federal Arbitration Act (Title 9 of the United States Code). The arbitration shall be conducted at a location in Dallas, Texas selected by the AAA or other administrator. All statutes of limitation applicable to any Dispute shall apply to any arbitration proceeding. All discovery activities shall be expressly limited to matters directly relevant to the Dispute being arbitrated Judgment upon any award rendered in an arbitration may be entered in any court having jurisdiction; provided however, that nothing contained herein shall be deemed to be a waiver, by any party that is a bank, of the protections afforded to it under 12 U.S.C. §91 or any similar applicable state law.

11.3 **No Waiver; Provisional Remedies.** No provision hereof shall limit the right of any party to obtain provisional or ancillary remedies, including, without limitation, a temporary restraining order, injunctive relief, attachment, or the appointment of a receiver, from a court of competent jurisdiction before, after or during the pendency of any arbitration or other proceeding. The exercise of any such remedy shall not waive the right of any party to compel arbitration or reference hereunder.

11.4 **Arbitrator Qualifications and Powers; Awards.** Arbitrators are empowered to resolve Disputes by summary rulings in response to motions filed prior to the final arbitration hearing. Arbitrators (i) shall resolve all Disputes in accordance with the substantive law of the state of Texas, (ii) may grant any remedy or relief that a court of the state of Texas could order or grant within the scope hereof and such ancillary relief as is necessary to make effective any award, and (iii) shall have the power to award recovery of all costs and fees, to impose sanctions and to take such other actions as they deem necessary to the same extent a judge could pursuant to the Federal Rules of Civil Procedure, the Texas Rules of Civil Procedure or other applicable law. Any Dispute in which the amount in controversy is \$1,000,000 or less shall be decided by a single arbitrator who shall not render an award of greater than \$1,000,000 (including damages, costs, fees and expenses). By submission to a single arbitrator, each party expressly waives any right or claim to recover more than \$1,000,000. Any Dispute in which the amount in controversy exceeds \$1,000,000 shall be decided by majority vote of a panel of three arbitrators; provided however, that all three arbitrators must actively participate in all hearings and deliberations.

11.5 **Damages.** The arbitrator(s) will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute. The arbitrator(s) shall not award consequential damages in any arbitration initiated under this Section. Any award in arbitration under this Section shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount. The prevailing party in any arbitration regarding the enforcement, interpretation, or violation of this Agreement shall be entitled to an award of all reasonable expenses, costs, and attorney's fees incurred in connection with such arbitration.

11.6 **Miscellaneous.** To the maximum extent practicable, the AAA, the arbitrators and the parties shall take all action required to conclude any arbitration proceeding within 180 days of the filing of the Dispute with the AAA. No arbitrator or other party to an arbitration proceeding may disclose the existence, content or results thereof, except for disclosures of information by a party required in the ordinary course of its business, by applicable law or regulation, or to the extent necessary to exercise any judicial review rights set forth herein. This arbitration provision shall survive termination, amendment or expiration of the Agreement or any relationship between the parties.

## ARTICLE 12: MISCELLANEOUS

12.1 **Amendments.** This Agreement may be amended by Processor at any time upon thirty (30) days written notice to Merchant. All intended third-party beneficiaries to this Agreement, including the ODFI and Third-Party Sender, shall also be considered to be intended third-party beneficiaries of any amendments.

12.2 **Implementation Materials.** Promptly on or following the Effective Date, Merchant will be allowed to access and utilize the Services and Merchant will be provided with some information and materials to utilize the Services. Such information and materials and all intellectual property rights associated therewith will remain the property of Processor and/or its suppliers. Merchant agrees to restrict use and access to Merchant's password and log-on ID to Merchant's employees and agents as may be reasonably necessary, and will ensure that each such employee or agent complies with all applicable provisions of this Agreement. Merchant will not give, transfer, assign, sell, resell or otherwise dispose of the information and materials provided to Merchant to utilize the Services. Merchant is solely responsible for maintaining adequate security and control of any and all IDs, passwords, or any other codes that are issued to Merchant by Processor or its suppliers.

12.3 **Assignment.** This Agreement is binding upon and shall inure to the benefit of the legal successors and assigns of Merchant and Processor. Merchant will not have the right or the power to assign any of Merchant's rights or delegate the performance of any of Merchant's obligations under this Agreement without the prior written consent of Processor, or its Third-Party Sender, including in the case of a merger. Processor, or its Third-Party Sender, will have the right to assign this Agreement.

12.4 **Entire Agreement; Effective Date.** This Agreement, including the exhibits and schedules hereto, constitutes the entire agreement between the parties, supersedes all prior agreements, oral or written, and may be modified or amended only by a writing signed by both parties. This Agreement becomes effective when the first Entry is initiated by Processor, through its Third-Party Sender where applicable, on behalf of Merchant.

12.5 **Headings.** The headings in this Agreement are for convenience of reference only and shall not limit or otherwise affect any of the terms or provisions hereof.

12.6 **Governing Law.** This Agreement and the rights and obligations of the parties hereto shall be governed by and construed and enforced in accordance with the internal laws of the United States and the State of Texas, excluding its conflict of laws rules. Merchant and Guarantor agree to bring any claim or other litigation arising from or relating to this Agreement that it or they may have in the county and district courts in and for Dallas County, Texas, and Merchant and any Guarantor irrevocably and unconditionally submit to the jurisdiction of such courts with respect to any such litigation.

12.7 **Jurisdiction and Venue.** In the event that either party commences legal action seeking monetary, declaratory, or injunctive relief with respect to enforcement, interpretation, or violation of this Agreement or any other agreement between Processor and Merchant, the parties (i) agree that any such action may be commenced only in a court of competent subject-matter jurisdiction in Dallas County, Texas, (ii) consent to venue and personal jurisdiction in such a court, and (iii) waive any defense of lack of venue or personal jurisdiction in any such suit, action, or proceeding. The parties further (A) agree that process in any such suit, action, or proceeding may be served by mailing a copy thereof by certified mail, return receipt requested, to the other party at the address set forth on the application for the Services, and (B) waive any defense of insufficiency of service of such process.

12.8 **Attorney's Fees.** The prevailing party in any legal action regarding the enforcement, interpretation, or violation of this Agreement shall be entitled to an award of all reasonable expenses, court costs, and attorney's fees incurred in connection with such litigation.

12.9 **Severability.** If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws effective during the term hereof, such provision shall be fully severable, and this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision never comprised a part hereof; and the remaining provisions herein shall remain in full force and effect. Furthermore, in lieu of such illegal, invalid, or unenforceable provision, there shall be added automatically as part of this Agreement a provision as similar in its terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

12.10 **Waiver.** Waiver of the benefit of any provision of this Agreement must be in writing to be effective. The waiver by any party hereto of a breach of any provision hereof shall not operate or be construed as a waiver of any subsequent breach. No action taken pursuant to this Agreement shall be deemed to constitute a waiver by such party of compliance by the other party hereto with any of the covenants or other obligations contained herein. A failure by a party to insist upon strict compliance with any term of this Agreement, enforce any right, or seek any remedy upon any default of any other party shall not affect, or constitute a waiver of, such party's right to insist upon such strict compliance, enforce that right, or seek that remedy with respect to that default or any prior, contemporaneous, or subsequent default.

12.11 **Notice.** Any notice or other communication required or permitted by this Agreement shall be in writing and may be given by personal delivery, overnight delivery service, certified mail (return receipt requested) (postage prepaid), facsimile or electronic delivery. Notice shall be deemed given upon personal, facsimile or electronic delivery thereof, on the day after such notice is deposited with an overnight delivery service or upon receipt of delivery of such notice by certified mail. Notices shall be sent to the addresses set forth on the Application. Failure or refusal of a party to accept receipt of a notice or other communication hereunder shall in no manner invalidate the notice.

12.12 **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which together will constitute one and the same instrument. This Agreement may be executed by facsimile signatures, which shall have the same force and effect as original signatures.

12.13 **No Partnership or Agency; independent Contractors.** No agency, partnership, joint venture or employment relationship is created between Merchant and Processor or its Third-Party Sender by way of this Agreement. In the performance of their respective obligations hereunder, the parties are, and will be, independent contractors. Nothing in this Agreement will be construed to constitute either party as the agent for the other for any purpose whatsoever. Neither party will bind, or attempt to bind, the other party to any contract or the performance of any obligation, and neither party will represent to any third party that it has any right to enter into any binding obligation on the other party's behalf.

12.14 **Continuing Guaranty.** As a primary inducement to Processor to enter into this Agreement, and to approve the Application of Merchant, the Guarantor(s), individually and severally, who signed on the Guarantor signature line(s) on the Application, agree to be bound by all terms and provisions of this Agreement to the same extent and in the same manner as Merchant, and unconditionally and irrevocably, personally guarantee the continuing full and faithful performance and payment by Merchant of each and all of Merchant's duties and obligations to Processor, or its Third-Party Sender, under this Agreement and/or any other agreement currently in effect and/or in the future entered into between Merchant and/or its principals and Processor, or its Third-Party Sender, as such agreements now exist and/or are amended from time to time, with or without notice to Guarantor(s). Guarantor(s) understands that Processor, or its Third-Party Sender, without notice to Guarantor(s), may from time to time renew or extend the Agreement, modify rates, limits, charges and fees, and/or modify the amount or type of services provided to Merchant all of which may increase the Guarantor's obligations under this Guaranty. Guarantor(s) further understands that Processor, or its Third-Party Sender, may proceed directly against Guarantor(s) without first exhausting Processor remedies against the Merchant, any other person or entity responsible to Processor, or its Third-Party Sender and/or any security held by Processor. This Guaranty is a continuing guaranty and will not be discharged and/or affected by the release or discharge of Merchant or the death of the Guarantor(s). This Guaranty will bind all heirs, administrators, and representatives of the Guarantor(s) and may be enforced by or for the benefit of any successor of Processor, or its Third-Party Sender. To the fullest extent permissible under applicable law, Guarantor(s) waives any and all rights of subrogation, reimbursement and/or indemnity derived from Merchant, all other rights and defenses available to Merchant, and all other rights and defenses available to Guarantor(s).

**TC IPA SOFTWARE LICENSE AGREEMENT – THE FOLLOWING TERMS SHALL APPLY IF MERCHANT IS UTILIZING THE TC IPA PRODUCT**

THIS SOFTWARE LICENSE AGREEMENT (the "SLA") supplements, and is hereby made a part of, the Agreement between Merchant, ISO and Bank. This SLA governs the provision of the TC IPA product provided to Merchant by TCPP, LLC dba TrustCommerce "TrustCommerce". By using or accessing TC IPA, Merchant agrees to the applicable terms and conditions set forth in this SLA. The TC IPA product is provided to Merchant by TrustCommerce, and not Bank. Bank is not a part to this SLA, and Merchant acknowledges that Bank is not liable to Merchant in any way with respect to the TC IPA product.

**BACKGROUND**

- A. TrustCommerce holds all right, title and interest in certain proprietary software and related documentation.
  - B. Merchant wishes to license the Licensed Product (as hereinafter defined), and TrustCommerce wishes to grant such license.
- NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in further consideration of the mutual promises set forth herein, TrustCommerce and Merchant agree as follows:

**1. DEFINITIONS**

Whenever used in this Agreement, the capitalized terms quoted below will have the meaning ascribed to them in this section.

- 1.1 "Acceptance" means the date Merchant accepts the Licensed Product as more specifically provided in Section 2.2 of this Agreement.
- 1.2 "SLA" means this Software License Agreement.
- 1.3 "Confidential Information" has the meaning set forth in Section 11 of this SLA.
- 1.4 "Copy" or "Copies" means the Licensed Product (including the components thereof), any Releases, Error Correction, or Enhancement pertaining thereto, and any reproductions of the Licensed Product or any Release, Error Correction, or Enhancement pertaining thereto.
- 1.5 "Customization" means the paid for hire development of enhancements or modifications to the licensed software per the Merchant's specifications.
- 1.6 "DAL" means Device Access Layer that resides on the user's desktop and links the physical credit card device to TC IPA.
- 1.7 "Delivery Date" means the date that the Licensed Product goes live in a production environment.
- 1.8 "Enhancement" means a modification of the Licensed Software by TrustCommerce which provides (a) a capability not defined in the Product Specifications or (b) an improvement in the efficiency of the Licensed Software. TrustCommerce may designate an Enhancement as "Major" or "Minor" depending on (a) TrustCommerce's reasonable assessment of the Enhancement's value and (b) whether the Enhancement adds a functional extension to the pre-existing Licensed Software. An Enhancement may entail a modification to the Product Specifications and/or the Object Code and/or the Source Code.
- 1.9 "Error" means a failure of the Licensed Software to conform in all material respects to the Product Specifications. Provided, however, any nonconformity resulting from Merchant's improper use of the Licensed Software, combining or merging the Licensed Software with software not approved by TrustCommerce for use with the Licensed Software, or modification of the Licensed Software which has not been performed by TrustCommerce (other than a change or modification properly made by Merchant pursuant to instructions contained in the Source Code for the Licensed Software) shall not be considered an Error.
- 1.10 "Error Correction" means a modification of the Licensed Software by TrustCommerce which corrects Errors discovered in the Licensed Software and enables the Licensed Software to conform to the Product Specifications.
- 1.11 "Hosted TC IPA Services" means TrustCommerce's applications that reside within a third party cloud computing environment.
- 1.12 "Intellectual Property Rights" or "Industrial Property Rights" means all proprietary information, patents, patent applications, trademarks, trade names, service marks, certification marks, collective marks, designs, processes, inventions, licenses, copyrights, Source Code, know-how and trade secrets relating to the origin, design, manufacture, programming, operations, function, configuration, or service of the Licensed Product.
- 1.13 "Licensed Documentation" means all written materials, binders, training disks, and other materials supplied by TrustCommerce and related to the Licensed Software, other than the Licensed Software.
- 1.14 "Licensed Product" means collectively the Licensed Software and Licensed Documentation.
- 1.15 "Licensed Software" means the computer software identified in Schedule A attached hereto and made a part of this SLA, all Error Corrections, Enhancements, and Releases thereof supplied by TrustCommerce during the term of this SLA, and all permitted copies of the foregoing. In this SLA, Licensed Software shall refer to the software in Object Code only. Merchant will have no rights or interest in the Source Code, which at all times remain the exclusive Intellectual Property of TrustCommerce.
- 1.16 "Multi User File Server" means an environment, including applications software, which may enable one Copy of the Licensed Software to be used or accessed by more than one operator at one time or may enable the Licensed Software to be used or accessed over a computer network.
- 1.17 "Object Code" means machine readable computer programs.
- 1.18 "Operators" means the employees, or agents under the control and direction, of Merchant, bound by the confidentiality provisions herein, and permitted access to or use of the Licensed Product.
- 1.19 "Original" means the first edition of the Licensed Product delivered by TrustCommerce to Merchant pursuant to this SLA.
- 1.20 "PAL" means Payment Application Layer that allows the communication between the Merchant's 3rd party software and TC IPA.
- 1.21 "Product Specifications" means the performance functions of the Licensed Software, all as specifically set forth in the Licensed Documentation.
- 1.22 "Release" or "Releases" means the edition(s) of the Licensed Software subsequent to the Original Licensed Product. A Release may include Licensed Documentation provided by TrustCommerce for Error Correction or Enhancement.
- 1.23 "Statement of Work (SOW)" means the documented features and functionality to be developed by TrustCommerce at the request and approval of Merchant. SOW will contain an estimate of hours, cost for development and related payment schedule unless previously addressed and agreed upon in writing.
- 1.24 "Software Maintenance Program" means the procedure for ongoing software maintenance set forth in Section 5 of this SLA.
- 1.25 "Source Code" means the plain text readable computer programming code, associated procedural code, and supporting documentation for the Original Licensed Software and any Releases, Error Corrections, or Enhancements pertaining thereto.
- 1.26 "TC IPA" means the TrustCommerce Integrated Payment Application developed by TrustCommerce that provides a secure, semi-integrated or independent system for payment processing.
- 1.27 "Term" means the period of time from the Effective Date, until the expiration of the SLA as set forth in Section 2.4 of this SLA.
- 1.28 "Warranty Period" means that period set forth in Section 8.1 of this SLA.

**2. GRANT OF LICENSE**

## 2.1 Grant.

TrustCommerce grants to Merchant a nonexclusive and non-transferable license to install, execute, and use the Licensed Product in the United States in the manner described in this SLA. TrustCommerce reserves all rights in the Licensed Product. Merchant may only use the Licensed Product in conjunction with TrustCommerce gateway processing services only as expressly permitted in this SLA. Merchant must use the Licensed Product only in a manner and for the purposes for which the Licensed Product was designed. Subject to the provisions of Section 7 of this SLA, Merchant may make copies of the Licensed Software for backup, disaster recovery and/or archival purposes. Except as provided herein, Merchant shall not release software to other non-affiliated entities without the prior written consent of TrustCommerce. All uses not permitted under this Section 2.1 are prohibited. By way of example and without limitation, in making the uses permitted in this Section 2.1, Merchant may not:

- (a) disassemble, decompile, reverse engineer, or modify the Licensed Software;
- (b) examine the Licensed Software with debugging, memory inspection, or disk inspection tools;
- (c) rent or sublicense the Licensed Product;
- (d) permit use of the License Product by a person who is not an Operator;
- (e) transmit an electronic copy of the Licensed Software by any means; or
- (f) use the Licensed Software in the operation of a service bureau or time sharing arrangement or to provide outsourcing services.

## 2.2 Acceptance.

Merchant may reject the Licensed Software by giving written notice of rejection and deleting the Licensed Product from all Merchant's systems within thirty (30) days of the Delivery Date. Acceptance shall be deemed to have occurred thirty (30) days after the Delivery Date. Merchant shall be responsible for providing the required environment for the Licensed Software, including preparation of the Merchant's servers on which the software will be installed. Merchant is exclusively responsible for hosting and maintaining the software and environment on their systems. Merchant is responsible for the security and protection of the environment. If compliance is required with any third party governing laws, regulations, agencies or organizations including, but not limited to Hitech, HITRUST and HIPAA compliance, Merchant will be exclusively responsible for this compliance. TrustCommerce expressly disclaims any responsibility or control over Merchant's environment.

## 2.3 Ownership.

TrustCommerce owns the media on which the Licensed Software is originally or subsequently recorded; provided, however, subject to the terms and conditions of this SLA, Merchant may store and use the Licensed Software in electronic form on the Merchant's servers for use solely by Merchant. TrustCommerce retains title to the Licensed Software (both as recorded on the original media and on any subsequent media), the Licensed Documentation, and any Copies thereof in any form. This SLA is a license to use, and not a contract of sale for, the Licensed Product. All Intellectual Property Rights in and to the Licensed Product are retained by TrustCommerce. Merchant shall not use either the name of Trust Commerce or the name of the Licensed Product licensed under this SLA for any commercial purpose or in any advertising, promotional or public statement without the prior, written consent of TrustCommerce. In the event Merchant fails to comply with the terms of this SLA in any way, or fails to make prompt payment of the required Fees associated with the License, the rights of use shall immediately terminate.

## 2.4 Term.

The term of this SLA ("Term") shall become effective on the day TrustCommerce begins providing the TC IPA Services to Merchant and shall terminate upon termination of the Agreement unless otherwise terminated as set forth herein. This SLA shall automatically renew concurrently with the Agreement unless either party gives the other party written notice of its intention not to renew this SLA at least ninety (90) days prior to the end of the current term. Upon expiration of the Term, and unless otherwise extended, the Merchant's rights of use will be terminated.

## 3. REPORTING AND AUDIT OF USE

### 3.1 Reporting.

Upon request, Merchant shall provide TrustCommerce with a statement setting forth the number of Copies of the Licensed Product, or any component thereof, in existence. Merchant shall provide said statement within thirty (30) days of Merchant's receipt of any reporting request from TrustCommerce.

### 3.2 Audit of Use.

TrustCommerce may, at its expense, audit Merchant's use of the Licensed Products. Audits shall be conducted during regular business hours at Merchant's place or places of business and shall not unreasonably interfere with Merchant's business activities. Audits shall be conducted no more than once annually. If, as a result of any such audit, TrustCommerce identifies unauthorized use of the Licensed Software, Merchant shall pay, in addition to any fees charged in conjunction with the Licensed Software in use by Merchant, the reasonable expense of TrustCommerce in conducting the audit.

### 3.3 Suspension of Use.

TrustCommerce may immediately suspend Merchant's use of the Licensed Product hereunder upon notice to Merchant in the event Merchant is in breach of any of its obligations hereunder including but not limited to Merchant's non-compliance with all state, federal and local laws, rules, regulations and mandates. In addition, TrustCommerce may suspend use of the Licensed Product, in whole or in part, or terminate this SLA if TrustCommerce determines that Merchant is using the Licensed Product for any fraudulent, illegal, or unauthorized purpose. TrustCommerce may immediately suspend Merchant's use of the Licensed Product for security related concerns provided that TrustCommerce provide notice to Merchant as soon as commercially practicable.

## 4. TECHNICAL ASSISTANCE

### 4.1 Technical Assistance.

TrustCommerce shall provide the necessary training and instructions on the operation, installation and testing of the Licensed Software. Should the information provided not be sufficient, technical assistance will be provided to answer questions and troubleshoot installation and operational issues during the testing and implementation phase. This assistance will be offered via phone and/or web.

## 5. SOFTWARE MAINTENANCE

### 5.1 Notification of Suspected Licensed Software Defects.

If Merchant believes there is an Error in the Licensed Software, Merchant must notify TrustCommerce of such Error in writing, or by telephone with written confirmation sent within two (2) days thereafter. After TrustCommerce's analysis of the reported Error, TrustCommerce will: (i) notify Merchant whether TrustCommerce has verified the Error; (ii) where an Error has been verified, advise Merchant of available remedies; and (iii) where a remedy is not immediately available, notify Merchant of the need for further investigation.

5.1.1 Errors reported to TrustCommerce during the first ninety (90) days of production and subsequently verified by TrustCommerce will be corrected in accordance with this SLA at no charge to Merchant.

5.1.2 TrustCommerce reserves the right to determine the disposition of any and all reported Errors.

## 5.2 Error Correction and Enhancement Releases.

5.2.1 Provided Merchant is not in breach of the SLA, TrustCommerce shall provide Error Correction Releases (which do not contain any Enhancements), if any, and Minor Enhancement Releases, if any, at no charge during the term of this SLA.

5.2.2 Error Correction and Enhancement Releases are the property of TrustCommerce. Error Correction and Enhancement Releases are licensed to Merchant subject to the terms and conditions of this SLA and, upon release, become a part of the Licensed Software and the Licensed Product, as the case may be. Each Release shall consist of one or more Licensed Software programs and/or files in Object Code. Each Release shall also provide documentation informing Merchant of the Error Correction or Enhancement, including any significant operational differences known to TrustCommerce. The documentation for any Releases shall be a part of the Licensed Documentation.

5.2.3 Merchant shall be responsible for the installation of all Error Correction or Enhancement Releases.

## 6. MERCHANT'S REPRESENTATIONS AND WARRANTIES

### 6.1 Compliance with Terms.

Merchant shall monitor the Licensed Product and ensure that it is used only in compliance with this SLA. Merchant shall be responsible and liable for any and all non-compliance with this SLA by Merchant or by any person or entity who obtains access to the Licensed Product through Merchant.

### 6.2 Suitability of Licensed Product.

At Acceptance, Merchant has evaluated, tested, and examined the Licensed Product and has determined independently that the Licensed Product is suitable for the use intended by this SLA. Merchant assumes all responsibility and risk of selection, installation, use, efficiency and suitability of the Licensed Product, and subject to the provisions of Section 8, TrustCommerce shall have no liability therefor.

### 6.3 Notification of Defects.

Merchant shall notify TrustCommerce of any material defect Merchant believes exists in the Licensed Product, and Merchant shall provide to TrustCommerce all information known or reasonably available to Merchant regarding the alleged defect.

### 6.4 Third Party Material.

With respect to all computer programs and data and hardware not provided by TrustCommerce and to be used or reproduced during Merchant's use of the Licensed Software, Merchant represents that it has all necessary rights to use or reproduce the computer programs and that no use of the Licensed Software in connection therewith shall be made that causes an infringement of the right of any third party.

## 7. REPRODUCTION AND IMPROVEMENTS

### 7.1 Reproduction.

Merchant may make up to two (2) copies of the Licensed Software and Licensed Documentation for backup, disaster recovery and/ or archival purposes only. Each and every such copy, in whole or in part, of the Licensed Software shall contain all of TrustCommerce's restrictive and proprietary notices in the form and content as they appear on or in the Licensed Software or Licensed Documentation provided by TrustCommerce. All Copies shall remain the property of TrustCommerce.

## 8. LIMITED WARRANTY

### 8.1 Limited Warranty.

TrustCommerce warrants to Merchant that the media on which the Licensed Software is furnished will be free from defects in materials and workmanship for a period of ninety (90) days from the date of receipt by Merchant. Any defects identified by Merchant and confirmed by TrustCommerce will then be remedied subject to the terms of the Maintenance provisions contained herein.

TrustCommerce warrants that the Licensed Software will substantially conform to the Product Specifications when properly installed. This warranty does not apply to problems resulting from:

- (a) improper installation of the Licensed Software by Merchant or installation by Merchant of the Licensed Software on improper hardware;
- (b) modification of the Licensed Software not undertaken or performed by TrustCommerce;
- (c) malfunctions in any computer hardware or software or systems files not provided by TrustCommerce;
- (d) accident of Merchant;
- (e) neglect of Merchant;
- (f) misuse of the Licensed Software by Merchant;
- (g) use of the Licensed Software with data of any entity other than Merchant;
- (h) power surge or failure at the Designated Location; or
- (i) changes to the computing environment instituted by the Merchant.

TrustCommerce does not warrant:

- (a) that the Licensed Software will meet Merchant's requirements, except as agreed to in writing and in advance;
- (b) that operation of the Licensed Software will be uninterrupted;
- (c) that the Licensed Product is error free;
- (d) that all defects in the Licensed Product will be corrected; or
- (e) any change or modification of the Licensed Software made by Merchant.

TrustCommerce warrants that, except for third party software contained in the Licensed Software which TrustCommerce has obtained pursuant to valid license agreements, TrustCommerce owns the Licensed Product and all related Intellectual Property Rights. TrustCommerce further warrants that TrustCommerce has the right to grant this license without limitation or restriction, other than those limitations or restrictions set forth in any license or sublicense for third party software contained in the Licensed Software.

The Warranty Period for the Licensed Software runs for the duration of the SLA as long as Merchant installs upgrades and patches as instructed by TrustCommerce.

Warranty service shall be requested by Merchant in the manner set forth in this SLA.

### 8.2 Exclusion of Alternative Remedies; Damages.

The remedies specifically set forth herein are Merchant's sole and exclusive remedies for breach of warranty by TrustCommerce for the Licensed Product. TRUSTCOMMERCE SHALL NOT BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL OR INDIRECT DAMAGES OF ANY SORT, EVEN IF TRUSTCOMMERCE HAS BEEN ADVISED OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES, INCLUDING, WITHOUT LIMITATION, (a) ANY DAMAGES FOR LOST PROFITS, OR (b) ANY DAMAGES RESULTING FROM LOSS OF USE OR LOSS OF DATA. UNDER NO CIRCUMSTANCE SHALL TRUSTCOMMERCE BE LIABLE FOR ANY AMOUNT IN EXCESS OF THE LICENSE FEES PAID BY MERCHANT FOR THE LICENSED PRODUCT THAT IS THE SUBJECT OF A WARRANTY OR INFRINGEMENT CLAIM. IN NO EVENT SHALL TRUSTCOMMERCE BE

LIABLE TO MERCHANT FOR ANY ACTION OR REMEDY BEYOND THOSE DESCRIBED IN THIS SLA. IN NO EVENT AND FOR NO REASON WILL TRUSTCOMMERCE'S MAXIMUM LIABILITY EXCEED THE TOTAL FEES PAID FOR THE LICENSED PRODUCT.

### 8.3 Allocation of Risk.

This Section 8 of this SLA allocates the risks under this SLA between TrustCommerce and Merchant. TrustCommerce's License Fees reflect this allocation of risk and the warranties, limitation of warranties, and limitation of liability in this Section 8.

### 8.4 Representations of TrustCommerce.

TrustCommerce further represents to Merchant that: (a) TrustCommerce has the right to enter into this SLA and grant the rights granted thereunder; (b) the Licensed Software, and all component parts thereof, is fully compatible with and, if properly installed, will function properly on the computer system described on Schedule A hereto; (c) neither the Licensed Software nor any component part thereof contains, or will in the future contain, any "software locks" or any similar devices which, upon the occurrence of a certain event, the passage of a certain amount of time, or the taking of any action (or the failure to take action) by or on behalf of TrustCommerce, will cause the Licensed Software, or any component part thereof, to be destroyed, erased, damaged or otherwise made inoperable; (d) the Licensed Software is, and during the term of this SLA will remain, able to successfully manage, manipulate, input, accept, process, display, store and output data involving 4 digit year dates and leap year dates, including single century formulae and multi century formulae, and will not malfunction or generate incorrect values or invalid results involving such dates; (e) there are no pending or threatened suits, legal proceedings, claims or governmental investigations against TrustCommerce relating to any claim that the Licensed Software or any component part thereof infringes or violates any third party's patents, copyrights, trademarks, trade secrets or other proprietary rights; and (f) TrustCommerce has not received any written notice of any claim that the Licensed Software or any component part thereof infringes or violates any third party's patents, copyrights, trademarks, trade secrets or other proprietary rights.

## 9. INDEMNITY

### 9.1 Indemnity by Merchant to TrustCommerce.

Merchant shall be solely responsible for, and shall indemnify, defend, and hold TrustCommerce free and harmless from all damages, liabilities, charges, and expenses (including reasonable attorneys' fees) from all claims, lawsuits, or other proceedings arising out of or relating to (i) Merchant's use of the Licensed Product in a manner not permitted by this SLA, not permitted by TrustCommerce, or not in conformance with TrustCommerce written requirements, (ii) the acts or omissions of Merchant, its employees, and agents and all persons or entities who have access through Merchant to the Licensed Product, or (iii) relating to an infringement of any right resulting in any way from the use of the Licensed Software with other software or materials not licensed to Merchant by or not approved by TrustCommerce.

### 9.2 Remedy for Claimed Infringement.

If a claim is made that the Licensed Product, or any portion thereof, infringes any United States patent, copyright, trade secret, or other proprietary right, TrustCommerce, at its sole expense, shall either: (i) procure for Merchant the right to exercise the rights and licenses granted hereunder with respect to the Licensed Product; (ii) modify the Licensed Product to make it non infringing but continue to meet the Product Specifications; (iii) replace the Licensed Product with equivalent but non infringing software of like functionality that meet the Product Specifications; or (iv) terminate this SLA and refund the License Fee and, upon the return to TrustCommerce of the Licensed Product, refund the purchase price paid by Merchant for the Licensed Product; provided, however, that the liability of TrustCommerce pursuant to this Section 9.2 shall be subject to the limitations set forth in Section 8.2 of this SLA, and TrustCommerce shall have no liability for any claim of infringement based on use of a superseded or altered Release of the Licensed Product if the infringement would have been avoided by the use of the most current, unaltered Release of the Licensed Product which is available to Merchant either during the Warranty Period or would be available under the Software Maintenance Program, regardless of whether Merchant subscribes to the Software Maintenance Program.

### 9.3 Limitation of Indemnity.

TrustCommerce shall have no liability to Merchant or any assignee, transferee, or sublicensee of Merchant for any claim of infringement that is based upon any combination of the Licensed Software with software not supplied by or authorized by TrustCommerce if such claim would have been avoided but for such combination; or any modifications to the Licensed Software other than Releases provided by TrustCommerce or otherwise approved by TrustCommerce.

## 10. TERMINATION AND DEFAULT

### 10.1 Termination by TrustCommerce.

TrustCommerce may terminate this SLA and the license granted to Merchant upon the occurrence of any of the following events:

- (a) Merchant fails to pay any fee, charge, tax, or other reimbursement when due;
- (b) Merchant transfers title to or possession of the Licensed Product without TrustCommerce's prior written consent;
- (c) Merchant breaches any material obligation of Merchant under this SLA and such breach is not cured within thirty (30) days of Merchant's receipt of written notice thereof from TrustCommerce;
- (d) Merchant becomes insolvent, or is adjudicated a bankrupt, or voluntarily seeks protection under any bankruptcy or insolvency law; or
- (e) Merchant makes an assignment of its assets for the benefit of creditors or any arrangement with its creditors.

### 10.2 TrustCommerce Remedies Upon Termination.

In the event of any termination of this SLA:

- (a) Merchant shall cease all further use of the Licensed Product, or any portion thereof, in all forms and on all media and computer memory, and Merchant shall immediately: (i) surrender and deliver the Licensed Product and all Copies thereof to TrustCommerce; or (ii) destroy all Copies of Licensed Product, including backup and archival copies, and provide satisfactory evidence of such destruction to TrustCommerce within one (1) month following termination;
- (b) TrustCommerce may cease performance of TrustCommerce's obligations under this SLA, without liability to Merchant; and,
- (c) where such termination is the result of a breach or threatened breach of this SLA by Merchant, TrustCommerce may apply for and obtain injunctive relief against the breach or threatened breach.

### 10.4 Survival.

All those terms by their nature that are intended to survive shall do so.

## 11. CONFIDENTIALITY.

11.1 As used in this SLA, the term "Confidential Information" means: all information, including, but not limited to, the trade secrets and know-how of the respective Parties, any information marked "Confidential" or "Proprietary" and, in the case of TrustCommerce, the Licensed Product; provided, however, Confidential Information shall not mean any information that:

- (a) is known to the receiving Party at the time of disclosure by the disclosing Party;
- (b) is developed independently by the receiving Party without use of the disclosing Party's Confidential Information;
- (c) is within the public domain without breach of this SLA by the receiving Party;
- (d) is publicly disclosed with written approval of the disclosing Party; or
- (e) becomes lawfully known or available to the receiving Party without restriction from a source having the lawful right to disclose the information without breach of this SLA by the receiving Party.

The receiving Party shall have the burden of proof as to establishing by competent evidence any of the exceptions set forth in Section 11.1(a) to (e) above.

11.2 In the event the receiving Party is legally requested or compelled in any form to disclose any of the disclosing Party's Confidential Information, the receiving Party, unless prohibited by applicable law, shall provide the disclosing Party with prompt written notice of such request, so that the disclosing Party may seek a protective order or pursue other appropriate remedies to protect the confidentiality of its information. If such protective order or other remedy is not obtained, the receiving Party will furnish only that portion of the Confidential Information which the receiving Party, upon the opinion of its counsel, is legally required to furnish. The receiving Party will reasonably assist the disclosing Party in its efforts to obtain a protective order or other remedies to protect or limit the disclosure of the information subject to the request.

11.3 Each Party acknowledges that in the performance of this SLA a Party may receive Confidential Information from a disclosing Party and that such Confidential Information is the exclusive property of the disclosing Party. The receiving Party agrees to hold the Confidential Information of the disclosing Party in strict confidence in accordance with the provisions of this SLA. A receiving Party

- (a) shall not permit or suffer its employees or agents to remove any proprietary or other legends or restrictive notices contained or included in any Confidential Information provided by the disclosing Party;
- (b) shall not permit or suffer its employees or agents to copy or modify any Confidential Information except as specifically authorized in this SLA;
- (c) shall not disclose any Confidential Information to a third party without the prior written consent of the disclosing Party;
- (d) shall only use the disclosing Party's Confidential information for purposes of performing its obligations under this Agreement, and shall not otherwise use the information for its own benefit or for the benefit of any third party; and
- (e) agrees to keep secure and maintain the Confidential Information of the disclosing Party in a manner no less protective than that used to maintain the confidentiality of the receiving Party's own Confidential Information but in any event no less than a reasonable standard.

11.4 Limitation on Disclosure.

A receiving Party may disclose Confidential Information to its employees or agents under the control and direction of the receiving Party only in the normal course of business and on a need to know basis within the scope and purpose of this SLA. Provided, however, prior to any disclosure all such agents shall have entered into written agreements with the receiving Party requiring such agents to treat and use all such Confidential Information in a manner consistent with the terms and conditions of this SLA. Except as expressly set forth herein, no licenses under any patent, copyright or other intellectual property rights of either Party are granted.

11.5 Disclosure of Software Constitutes Incurable Material Breach.

Merchant acknowledges and agrees that any disclosure of the Software to a third party in violation of the terms of this SLA constitutes a material, incurable breach of this SLA and shall result in the automatic termination of this SLA and the immediate termination of all licenses granted to Merchant by this SLA. Merchant further agrees that it shall be strictly liable for all damages to TrustCommerce that result from any disclosure of the Software to any third party.

## **12. GENERAL**

12.1 Relationship of the Parties.

The Parties hereto are and shall remain independent contractors. Nothing herein shall be deemed to establish a partnership, joint venture, or agency relationship between the Parties. Neither Party shall have the right to obligate or bind the other Party in any manner to any third party.

12.2 Assignment/Sublicense.

Merchant shall not, directly or indirectly, by operation of law or otherwise, transfer or assign the Licensed Product or this SLA, or transfer, assign or sublicense any license rights granted hereunder, in whole or in part, without having secured the prior written consent of TrustCommerce. Any attempted assignment in violation of this Section 12.2 shall be void.

12.3 Export Controls.

Each party to this SLA acknowledges its obligations to control access to Technical Data (as defined by the U.S. Department of Commerce, Office of Export Administration) under the U.S. Export Control Laws and Regulations and agrees to adhere to such U.S. Export Control Laws and Regulations with regard to any Technical Data received under this SLA.

12.4 Integration.

This SLA, including the Schedules attached hereto and incorporated herein, constitutes the entire SLA between the Parties and supersedes all prior agreements and understandings between them, whether written or oral, between them relating to the subject matter of this SLA. This SLA may not be supplemented, explained or interpreted by any evidence of trade usage or course of dealing.

12.5 Waiver.

No waiver of any provision of this SLA shall be effective unless made in writing and signed by the waiving Party, nor shall any such waiver, if made, constitute a waiver of any subsequent breach of the same or of any other provision of this SLA.

12.6 Force Majeure.

Neither Party shall be liable to the other by reason of any failure of performance hereunder (except obligations to pay) if such failure arises out of causes beyond such Party's reasonable control, despite the reasonable efforts, and without the fault or negligence of such Party. A Party experiencing such an event shall give as prompt notice as possible under the circumstances.

12.7 Jurisdiction and Venue.

Should any claim or controversy arise between the Parties under the terms of this SLA or in furtherance of this SLA, such claim or controversy shall be resolved only in the state or federal courts of Texas, and said state and federal courts for the State of Texas shall be the only appropriate jurisdiction and venue therefore. Merchant hereby submits to said jurisdiction and venue.

12.8 Governing Law.

This SLA shall be construed in accordance with and governed by the substantive laws of the State of Texas. The Parties hereby agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply to this SLA.

12.9 Severability

If any provision of this SLA is held invalid or unenforceable under any applicable law, such invalidity or unenforceability will not affect any other provision

of this SLA that can be given effect without the invalid or unenforceable provision, and this SLA shall be construed as if said invalid or unenforceable provision had not been contained herein.

#### **Schedule A – Software**

The Licensed Product means collectively the Licensed Software and Licensed Documentation, which includes Error Corrections, and Releases thereof supplied by TrustCommerce during the term of this SLA, and all permitted copies of the foregoing. In this SLA, Licensed Software shall refer to the software in Object Code only. Merchant will have no rights or interest in the Source Code, which at all times remain the exclusive Intellectual Property of TrustCommerce.

The Licensed Product is 1) a semi-integrated payment application designed to allow Merchant the ability to accept and apply payments from multiple and varying platform inputs (“TC IPA”), 2) the “DAL” Device Access Layer that resides on the user’s desktop and links the physical credit card device to TC IPA and 3) the “PAL” Payment Application Layer that allows the communication between the Merchant’s 3rd party software and TC IPA.

Although the Licensed Product integrates with the TC Services, these TC Services remain separate and distinct. Actual processing of payments will continue to be performed by TrustCommerce’s hosted third party TC Services processing platform. At a minimum the Licensed Software via its integration with the TC Services shall:

- have the capability to process credit cards;
- have the capability to interface to other Merchant systems in a secure manner to remove the necessity of those systems to process payments and centralize the process with the TrustCommerce application;
- be PCI DSS compliant;
- interact and manage POS devices including the certification of EMV;
- utilize encryption and tokenization where applicable;
- work within the Merchant’s environment.

Timing of delivery of Software is contingent upon execution of SLA and completion of requirements.