



## Merchant Processing Agreement - Terms & Conditions

This Merchant Processing Agreement (this “Agreement”) is for merchant card payment processing services among the MERCHANT that signed the Merchant Application (“Merchant”), AVIDIA BANK, a \_\_\_\_\_ (“Merchant Bank”), and REV19, LLC, a Massachusetts limited liability company (“ISO”). ISO and Merchant Bank are collectively hereinafter referred to as the “Bank”. Subject to the requirements of the Rules, ISO and Merchant Bank reserve the right to allocate Bank’s duties and obligations amongst themselves as they deem appropriate in their sole discretion, and Merchant Bank or ISO may jointly or individually assert or exercise any rights or remedies provided to Bank hereunder.

### 1. DEFINITIONS

- 1.01 “ACH” means the Automated Clearing House paperless entry system controlled by the Federal Reserve Board.
- 1.02 “Affiliate” means a Person that, directly or indirectly, (i) owns or controls a party to this Agreement or (ii) is under common ownership or control with a party to this Agreement.
- 1.03 “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.
- 1.04 “American Express” means the Cards bearing the Marks of, and Card Association operated by, American Express Travel Related Services Company, Inc. or its Affiliates.
- 1.05 “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 Rules.
- 1.06 “Card” means (i) a Credit Card, (ii) a Debit Card; or (iii) any other valid credit card or debit card or other payment device approved by Bank and accepted by Merchant.
- 1.07 “Card Association” 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.
- 1.08 “Card Issuer” means the financial institution or company which has provided a Card to a Cardholder.
- 1.09 “Card Not Present” or “CNP” means that an Imprint of the Card is not obtained at the point-of-sale.
- 1.10 “Cardholder” (sometimes referred to as “Card Member” in certain Card Association materials) shall mean any person authorized to use the Cards or the accounts established in connection with the Cards.
- 1.11 “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.
- 1.12 “Chargeback” means the procedure by which a Transaction (or disputed portion thereof) is returned to Bank by a Card Issuer for any reason, including, but not limited to, cases where such item does not comply with the applicable Rules.
- 1.13 “Credit Card” means any card validly issued by a Card Association, other than Debit Cards.
- 1.14 “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.
- 1.15 “Debit Card” means a debit card validly issued by the debit card networks and a card in the form validly issued under license from a Card Association that accesses a consumer’s asset account within 14 days of purchase,

including but not limited to stored value, prepaid, payroll, EBT, gift, and Visa consumer check cards.

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 on the Merchant Application.

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 “Law” means 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.

1.21 “Merchant Application” means the Application for Merchant Card Processing.

1.22 “Operating 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.

1.23 “Person” means an individual, corporation, partnership, sole proprietorship, trust, association or any other legally recognized entity or organization, other than Merchant or Bank.

1.24 “Rules” means all rules, regulations, by-laws, standards and procedures adopted and/or amended from time to time by the Card Associations (including, without limitation, the Payment Card Industry Data Security Standard), Bank and each relevant Card Issuer.

1.25 “Services” means the activities undertaken by Bank to authorize, process and settle Card transactions undertaken by Cardholders at Merchant’s location(s), and all other services provided by Bank under this Agreement.

1.26 “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 Bank for collection.

1.27 “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.

1.28 “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.

## 2. CARD ACCEPTANCE

**2.01 Honoring Cards:** Merchant will accept all valid Cards when properly presented by Cardholders in payment for goods or services, subject to applicable 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 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 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 Association’s Cards in favor of any other Card Association’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 Associations impose restrictions on surcharging and cash discounting. Therefore, Bank strongly recommends that Merchant carefully consider and comply with all applicable Law and the Rules before Merchant begins to surcharge Cardholders or offer any cash discount. 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.

**2.02 Advertising:** Subject to the Rules, Merchant will prominently display the promotional materials provided by Bank 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 Rules. Upon notification by any Card Association or Bank, or upon termination of this Agreement, Merchant shall discontinue the use of such Card Association's Marks and return any inventory or promotional materials to Bank. Merchant may not use any promotional materials or Marks associated with the Card Association in any way which suggests or implies that a Card Association 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.

**2.03 Card Acceptance:** When accepting a Card, Merchant will follow the steps and guidelines set forth in the Rules or otherwise provided by Bank 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 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 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 Bank; (ii) the truncated version of the Card number as provided in the 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 Associations 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 Bank, the Card Associations, or Card Issuers. Merchant will not transmit a Transaction Record to Bank 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 Rules; or (iii) a Cardholder consent is obtained for a Recurring Transaction in accordance with terms of this Agreement and the Rules.

**2.04 Authorization:** Merchant will obtain an Authorization for all Transactions using a means approved by Bank. If Merchant cannot, for any reason, obtain an electronic Authorization through the use of a terminal, Merchant will request a Voice Authorization from Bank's designated authorization center and will legibly print the authorization number on the Transaction Record. Merchant will not obtain or attempt to obtain Authorization from Bank's authorization center unless Merchant intends to submit to Bank 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. Bank 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 Bank 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 Bank has reason to believe that the Transaction Record was prepared in violation of any provision of this Agreement or the Rules. Merchant will use, and may not circumvent, fraud identification tools requested by Bank, 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.

**2.05 Retention and Retrieval of Card:** 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 Bank 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.

**2.06 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 Rules for travel and entertainment merchants and related Transactions.

**2.07 Telephone Orders, Mail Orders, Internet, Preauthorized Orders and Installment Orders:** Unless Merchant has been approved by Bank 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 Bank for Card Not Present Transactions and Bank 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 Bank 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 Bank, 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 Bank 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.

**2.08 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.

**2.09 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 Rules of the applicable Card Associations. 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 Bank not less than 14 days prior to the change. Bank may refuse to process any Transaction Record made subject to a revised return or cancellation policy of which Bank has not been notified as required herein.

**2.10 Cash Payment:** 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.

**2.11 Cash Advances; Scrip Purchases:** Unless otherwise approved in advance by Bank, 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 Bank's immediate termination of this Agreement.

**2.12 Duplicate Transactions:** Merchant may not deposit duplicate Transactions. Bank may debit Merchant for any adjustments for duplicate Transactions and Merchant is liable for any Chargebacks resulting therefrom.

**2.13 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, Bank 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 Association. Merchant's employees' and agents' actions are chargeable to Merchant under this Agreement.

**2.14 Data Security/Personal Cardholder Information:** Except as otherwise provided by the 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 Bank or the applicable Card Association, except as expressly authorized in writing by the Cardholder, or as required by Law or the 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 Rules.

(b) Compliance with Rules. Merchant represents, warrants and covenants that it is and will remain throughout the Term of this Agreement in compliance with (i) Rules related to data security, data integrity and the safeguarding of Cardholder Information, including the Payment Card Industry Data Security Standard ("PCI DSS"), 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 Bank 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 DSS, SDP, DISC, DSR and CISP requirements and any data security guidelines or operating guide provided by Bank at all times. Merchant will report any non-compliance immediately to Bank. 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 Bank if requested by Bank (in a form acceptable to Bank) certifying compliance with the data security provisions of this Agreement, including compliance with applicable Card Association requirements such as PCI DSS, 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 Bank'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 Rules.

(e) Response to Unauthorized Access. Merchant will notify Bank 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 Bank, Card Issuer, regulators, governmental authority or any Card Association 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 Bank and the issuing bank(s) or the Card Association to investigate the incident and provide assistance and cooperation to: (i) file suspicious activity reports (as applicable); (ii) notify their regulators (as applicable); and (iii) notify the affected Cardholder (as required). Unless the unauthorized access was due to Bank's acts or omissions, Merchant will bear the cost of notifying the affected Cardholder.

(f) Miscellaneous. Merchant may not make a claim against Bank or hold Bank liable for the acts or omissions of other merchants, service providers, Card Issuers, Card Association, financial institutions or others that do not have a written contractual relationship with Bank or over which Bank 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 Rules. Merchant agrees that Bank may disclose to any Card Association information regarding Merchant and Merchant's Transactions to any Card Association, and that such Card Association may use such information to perform its responsibilities in connection with its duties as a Card Association, promote the Card Association, perform analytics and create reports, and for any other lawful business purposes, including commercial marketing communications purposes within the parameters of Card Association Card acceptance, and transactional or relationship communications from a Card Association. A Card Association 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 Association marketing and administrative purposes. Merchant agrees it may receive messages from a Card Association, including important information about Card Association 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.

**2.15 Compliance with Laws and Rules:** Merchant will comply with and conduct its Card activities in accordance with all applicable Laws as well as all 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 Bank and subsequently returned to Merchant, irrespective of Cardholder approval (Merchant may pursue payment from the Cardholder outside the Card Association 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 Association cash back 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 Association fines, fees, penalties and all other assessments or indebtedness levied by Card Association to Bank which are attributable, at Bank's discretion, to Merchant's Transaction processing or business. The Card Association may require that Bank limit Merchant's participation in the applicable Card Association and/or terminate this Agreement.

**2.16 Merchant's Business:** Merchant will notify Bank 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 Operating Account. Merchant will notify Bank 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 Bank's exercise of all its rights and remedies provided by this Agreement. If any change listed above occurs, Bank may immediately terminate this Agreement.

**2.17 Merchant's Representations and Warranties:** Merchant represents and warrants that: (a) all information contained in the Merchant Application or any other documents delivered to Bank 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.

**2.18 Merchant's Covenants:** Merchants covenants that: (a) each Transaction Record presented to Bank for collection is genuine and is not the result of any fraudulent activity, or a Transaction prohibited by a Card Association, 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 Bank'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 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 Bank.

**2.19 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 Bank previously in writing, and unless such third party is fully compliant with all Laws and Rules. Any third party used by Merchant must be registered with the Card Association 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 Rules. Merchant will indemnify and hold harmless Bank 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. Bank is not responsible for any third-party service provider used by Merchant, nor is Bank required to process any Transaction which Bank receives from Merchant or its service providers in any format not approved by Bank. Bank 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.

**2.20 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 Bank'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, Bank or other party or a response that the Card is not to be honored.

### **3. PRESENTMENT; PAYMENT; CHARGEBACK**

**3.01 Acceptance:** Bank 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 Bank 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 Rules. Bank will only provisionally credit the value of collected Transaction Records to Merchant's Operating 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 Bank did not receive final payment.

**3.02 Endorsement:** By presenting Transaction Records to Bank for collection and payment, Merchant agrees to sell and assign all its right, title and interest in each Transaction Record completed in conformity with Bank's acceptance procedures. Merchant's presentment of Transaction Records to Bank constitutes an endorsement by Merchant to Bank of such Transaction Records. Bank may supply such endorsement on Merchant's behalf.



**3.03 Prohibited Payments:** Bank may receive payment of any Transaction Record presented by Merchant and paid by Bank unless and until there is a Chargeback. Unless specifically authorized in writing by Bank, Merchant may not collect or attempt to collect any Transaction Record, including Chargebacks, and will hold in trust for Bank and promptly deliver in kind to Bank 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.

**3.04 Chargebacks:** Merchant will accept responsibility for all Chargebacks related to Merchant's Transactions. Accordingly, Merchant will be liable to Bank in the amount of any Transaction disputed by the Cardholder or Card Issuer for any reason under the Rules. Merchant authorizes Bank to offset from funds due to Merchant or to debit the Operating Account or, if applicable, the Reserve Account for the amount of all Chargebacks. Merchant agrees to fully cooperate with Bank in complying with the 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 Schedule A of the Merchant Application and any other fines, fees, or assessments imposed by any Card Association or Card Issuer as a result of Chargeback activity.

**3.05 Reserve Account:** Notwithstanding anything to the contrary in this Agreement and in addition to any other legal rights or remedies available to Bank, Bank may establish (without notice to Merchant) a non-interest bearing reserve account at Bank (the "Reserve Account") for all future indebtedness of Merchant to Bank that may arise out of or relate to the obligations of Merchant under this Agreement, including, but not limited to, Chargebacks and fees, in such amount as Bank from time to time may determine in its sole discretion. Bank may fund the Reserve Account by deducting amounts from payments due to Merchant, by effecting a charge against Merchant's Operating Account or against any of Merchant's accounts at Bank, or by demanding payment from Merchant (which payment Merchant shall make within 10 days after receipt of any such demand). The Reserve Account will be maintained for a minimum of nine months after the date on which this Agreement terminates or until such time as Bank determines that the release of the funds to Merchant is prudent, in the best interest of Bank, and commercially reasonable based on anticipated risk of loss to Bank, and that Merchant's account with Bank is fully resolved. **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.**

**3.06 Merchant Statement:** At least once each month, Bank shall provide a statement (the "Merchant Statement") to Merchant. All information appearing on the Merchant Statement shall be deemed accurate and affirmed by Merchant unless Merchant objects by written notice specifying the particular item in dispute within 30 days of the date of the Merchant Statement.

#### **4. TERMINATION; EFFECT OF TERMINATION**

**4.01 Term:** This Agreement will be effective once Bank accepts it and, unless otherwise terminated, will continue for a period of 3 years (the "Initial Term") with automatic 3 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 Bank not less than 90 days before the end of the then-current Term.

#### **4.02 Termination:**

(a) Without Cause. Bank may terminate this Agreement, without cause, upon 30 days' advance written notice to Merchant.

(b) For Cause. Bank 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 Bank reasonably determines that any of the following conditions exists: (i) Merchant has violated any provision of this Agreement or Bank 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; (iv) any information which Merchant provided to Bank, 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 Association requirements or one percent (1%), or Chargebacks exceed three percent (3%) of any monthly dollar amount of total Transactions; (vi) an overdraft in the Operating Account exists for more than 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 Rules (ix) Merchant has failed to timely pay Bank any amount due; (x) Merchant has failed to promptly perform or discharge any obligation under its Operating 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 Bank; (xiii) Bank is served with legal process seeking to attach or garnish any of Merchant's funds or property in Bank's possession, and Merchant does not satisfy or appeal the legal process within 15 days of such service; (xiv) any Rules are amended in any way so that the continued existence of this Agreement would cause Bank 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 Association; (xvii) termination is necessary to prevent loss to Bank 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 Association's security reporting; or (xxi) Bank's security for repayment becomes impaired.

**4.03 Effect of Bankruptcy:** Any account or security held by Bank 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 Bank will be excused from performance hereunder.

**4.04 Effect of Termination; Early Termination Fee.** If this Agreement is terminated, regardless of cause, Bank may withhold and discontinue the disbursement for all Cards and other Transactions in the process of being collected and deposited. If this Agreement is terminated for cause, Merchant acknowledges that Bank may be required to report Merchant's business name and the names and other identification of its principals to various Card Association 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 Bank from any claims that Merchant may raise as a result of Bank'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 Bank property, forms, or equipment. All obligations for Transactions prior to termination (including payment for Chargebacks and Bank's expenses relating to Chargebacks) survive termination. Bank is not liable to Merchant for damages (including prospective sales or profits) due to termination. The parties agree that if this Agreement is terminated before completion of the Term for any reason other than a material uncured breach by Bank, Merchant will pay Bank an early termination fee in the amount set forth in the Merchant Application. 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. Upon termination, any amounts due to Bank will accelerate and be immediately due and payable, without any notice, declaration or other act whatsoever by Bank.

## 5. MISCELLANEOUS

**5.01 Account Monitoring:** Merchant acknowledges that Bank will monitor Merchant's Transaction activity. In addition to Bank's right to fund a Reserve Account as set forth in Section 3.05, Bank may upon reasonable grounds suspend disbursement of Merchant's funds for any reasonable period of time required to investigate suspicious or unusual Transaction activity. Bank will make good faith efforts to notify Merchant promptly following such suspension. Bank is not liable to Merchant for any loss, either direct or indirect, which Merchant may attribute to any suspension of funds disbursement.

**5.02 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 Bank, and Merchant may not use such forms other than in connection with Transactions.

**5.03 Indemnification:** Merchant will defend, indemnify and hold Bank 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 Bank 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 Rules by Merchant; and (e) all third-party claims arising from the foregoing. Notwithstanding the preceding, Merchant is not liable to Bank if Damages are caused by, related to or arise out of Bank's gross negligence or willful misconduct, or Bank's breach of this Agreement. Merchant will promptly reimburse Bank for any assessments, fines, fees or penalties imposed by any Card Association in connection with this Agreement, including the data security provisions, and authorizes Bank to deduct any such sums from the Operating Account, the Reserve Account or amount to otherwise be cleared and settled with Merchant.

**5.04 Records:** In addition to any records Merchant routinely furnishes to Bank 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 Rules, (c) if a dispute is pending, until such dispute is resolved.

**5.05 Request for Copies:** Immediately after Merchant receives the request by Bank, Merchant will provide to Bank 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 Bank reasonably requests to meet Bank's obligations under Law (including its obligations under the Fair Credit Billing Act) or otherwise to respond to questions concerning Cardholder accounts.

**5.06 Exclusivity:** Merchant agrees that during the Term, Merchant will use Bank as its exclusive provider of all Services.

**5.07 Fees and Charges:** Merchant will pay to Bank the fees and charges set forth on Schedule A of the Merchant Application including any additional charges applied to transactions that fail to meet Card Association requirements for the lowest interchange levels. The fees and charges will either be debited from the Operating 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 the Services. Bank may change fees, including adding fees for additional services utilized by Merchant, upon 30 days' written notice to Merchant.

**5.08 Security Interest:** To secure payment of Merchant's obligations under this Agreement, Merchant grants to Bank a security interest in all now existing or hereafter acquired: (a) Transactions, Transaction Records, Credit

Vouchers and other items submitted to Bank 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) or funds withheld by Bank for security monitoring; (c) accounts maintained with Bank or any institution other than Bank, including without limitation the Operating 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; and (d) proceeds of the foregoing. With respect to any security interests granted herein, Bank will have all rights afforded under the Uniform Commercial Code, as the same may, from time to time, be in effect in the State of Massachusetts; provided, however, in the event that, by reason of mandatory provisions of law, any or all of the attachment, perfection or priority of the security interests granted herein is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State of Massachusetts, then Bank will have all rights afforded under the Uniform Commercial Code as in effect from time to time in such other jurisdiction for purposes of the provisions relating to such attachment, perfection or priority of the security interests, as well as any other applicable law. Bank may fully or partially prohibit withdrawal by Merchant of funds from Merchant's Operating 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. Bank prohibits Merchant from selling or assigning future Transaction receivables to any third party without Bank's prior written consent.

**5.09 Right of Set Off:** If Bank 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 Bank (whether because this Agreement has been terminated or for any other reason), Bank 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 Rules, applicable Laws, or in equity.

**5.10. Modifications to Agreement:** From time to time Bank 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 mailing written notice to Merchant of the amendment at least 30 days prior to the effective date of the amendment, and the amendment will become effective unless Bank receives Merchant's written notice of termination of this Agreement before such effective date. If Merchant continues to submit Transaction Records to Bank or otherwise continues to process Transactions with Bank after such 30 day period (even if notice of objection was provided to Bank), 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 Bank to conform to the Rules and Law and that amendments required due to changes in either the Rules, Law or judicial decision may become effective on such shorter period of time as Bank may specify if necessary to comply with the applicable Rule, Law or decision. As a matter of clarification, Merchant may not terminate this Agreement if Bank amends the Agreement as necessary to comply with applicable Rules, Law or a judicial decision.

**5.11 Warranty Disclaimer:** BANK 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 BANK EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

**5.12 Limitation of Liability:** Bank'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. In no event will Bank 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, lost profits. Merchant waives all claims against Bank for any loss, claim, demand, penalty, action, delay, cost or expense (including reasonable attorneys' fees) of any kind unless Merchant provides written notice to Bank of the occurrence that gave rise to the alleged liability within 30 days after Merchant knew or should have known of the occurrence. Merchant acknowledges that the fees for the services provided to Merchant by Bank are very small in relation to the funds advanced to Merchant for Transactions and consequently Bank's willingness to provide these services is based on the liability limitations contained in this Agreement. Therefore, in addition to greater limitations on Bank's liability that may be provided elsewhere (including the per Transaction Record limitation above), any liability of Bank 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 Bank during the last three (3) months, exclusive of fees and variable costs incurred by Bank to process Transactions, such as interchange costs, assessments and fees imposed by a third party or (b) \$25,000.

**5.13 Waiver:** Bank's failure by Bank 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.

**5.14 Written Notices:** All written notices and other written communications required or permitted under this Agreement will be deemed delivered immediately when hand-delivered, and upon mailing when sent first class mail, postage prepaid, addressed as follows:

(a) If to Merchant Bank: At \_\_\_\_\_, Attention: \_\_\_\_\_.

(b) If to ISO: At 2535 E Southlake Blvd., Suite 140, Southlake, TX 76092, Attention: President.

(b) If to Merchant: At the facsimile number or address provided as the billing address and to the contact listed on the Merchant Application.

**5.15 Choice of Law; Jurisdiction; Waiver of Jury Trial:** Massachusetts law governs this Agreement. Any claim or cause of action arising out of this Agreement against Bank must be initiated and maintained exclusively in the state or federal courts located in Middlesex County, Massachusetts. TO THE EXTENT PERMITTED BY APPLICABLE LAW, MERCHANT AND BANK WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDINGS REGARDING ANY LITIGATION RELATED TO THIS AGREEMENT AND EACH AGREE THAT ANY SUCH ACTIONS OR PROCEEDINGS WILL BE TRIED BY A JUDGE WITHOUT A JURY.

**5.16 Entire Agreement; Assignability:** This Agreement expresses the entire understanding of the parties with respect to the subject matter hereof. This Agreement may be assigned by Bank without Merchant's consent. This Agreement may not be assigned, directly or by operation of law by Merchant, 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.

**5.17 Operating Account:** Merchant will at all times maintain an Operating Account at a bank that is a member of the Federal Reserve ACH system and approved by Bank and will provide Bank with proper authorization to debit the Operating 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 Operating Account. During the term of this Agreement and for a period of one year after the termination of this Agreement, Merchant may not close or change the Operating Account without prior written approval by Bank, which approval may not be unreasonably withheld. Merchant will be solely liable for all fees and costs associated with the Operating Account and for all overdrafts. Merchant will maintain sufficient funds in the Operating Account to accommodate all Transactions contemplated by this Agreement and all other fees, charges, credits or other payments or amounts due under this Agreement.

**5.18 Credit and Financial Inquiries; Additional Locations; Inspections:** Bank 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 Bank'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 Bank 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 Bank. Additional locations may be added, subject to Bank's prior consent. Bank or Merchant may remove locations by providing notice as provided herein. Merchant will permit Bank, 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 Rules. Bank, its internal and external auditors, and its regulators may audit compliance with this Agreement, compliance with Laws and Rules, including, but not limited to, relating to Card acceptance and Transaction processing, data security provisions and Card Association 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.

**5.19 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.

**5.20 Services:** Subject to the Rules, Services may be performed by Bank, its Affiliates, its agents or other third parties Bank may designate from time to time in connection with this Agreement. Information related to Merchant's Transaction activity or any credit or financial information of Merchant may be disclosed to any such third party servicers or any referral bank partner.

**5.21 Third Party Beneficiary:** Bank's respective Affiliates and any Persons Bank uses in providing the Services are third party beneficiaries of this Agreement and each of them may enforce its provisions as if it was a party hereto. Except as expressly provided in this Agreement, nothing in this Agreement is intended to confer upon any Person any rights or remedies, and the parties do not intend for any Persons to be third-party beneficiaries of this Agreement.

**5.22 Severability; Conflict with 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 Rules, the Rules shall govern and control.

**5.23 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, Bank may charge Merchant additional amounts determined by Bank and may pass through any additional fines, costs or expenses incurred by Bank.

**5.24 Confidentiality:** Merchant shall protect all information or other items proprietary to Bank that Merchant obtains knowledge of or access to as a result of Bank's provision of the services pursuant to this Agreement (collectively, "Bank 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 Bank Confidential Information, except in connection with the performance of Merchant's obligations under this Agreement. The obligations of non-disclosure provided hereunder shall continue during the Term and for a period of five years thereafter.

**5.25 E-Sign Consent Agreement:** By accessing and using the Services, Merchant hereby consents and agrees that:

- (a) Bank can provide disclosures required by Law and other information about Merchant's legal rights and duties to Merchant electronically.
- (b) Where required or requested, Merchant's electronic signature (via "click-through" or other method) on agreements and documents relating to use of the Services has the same effect as if Merchant signed them in ink.
- (c) Bank can send all communications, billing statements, amendments to the Services or this Agreement, notices, and other disclosures or information regarding the Services or Merchant's access to and use of the Services (collectively, "Disclosures") to Merchant electronically (1) via e-mail, (2) by access to a web site that Bank designates in an e-mail notice Bank sends to Merchant at the time the information is available, or (3) to the extent permissible by Law, by access to a website that Bank will generally designate in advance for such purpose.
- (d) If Merchant wants a paper copy, Merchant can print a copy of the Disclosure or download the information for Merchant's records.
- (e) This consent applies to all future Disclosures sent to Merchant in connection with the Services or this Agreement.

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

## **6. SPECIAL PROVISIONS FOR AMERICAN EXPRESS**

**The provisions of this Section 6 apply to American Express Card acceptance (capitalized terms below not defined elsewhere in this Agreement shall have the meanings assigned in the American Express Network Rules). With respect to participation in an American Express acceptance program, in the event of a conflict between the terms of this Section 6 and other terms of this Agreement, the terms below shall control with respect to American Express transactions only. Merchant shall be bound by American Express Network Rules, including the Merchant Operating Guide: [www.americanexpress.com/merchantopguide](http://www.americanexpress.com/merchantopguide).**

**6.01 Transaction Data:** Merchant authorizes Bank 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.

**6.02 Treatment of American Express Cardholder Information:** Merchant acknowledges that any and all American Express Cardholder information is confidential and the sole property of the Card Issuer, American Express or any of its Affiliates. Except as otherwise specified in this Agreement, Merchant must not disclose Cardholder information, nor use nor store it, other than to facilitate Transactions at Merchant's establishments in accordance with this Agreement.

**6.03 Disclosure and Use of Data Collected Under Agreement:** Bank may disclose to American Express data and information that is provided by Merchant on the Merchant Application and that Bank collects as part of performing American Express payment processing services or transaction related services including information about Merchant. American Express may use the information that is provided by Merchant in the Merchant Application at the time of setup to screen and/or monitor Merchant in connection with Card marketing and administrative purposes. American Express also may use such information to perform its responsibilities in connection with American Express Card acceptance, promote the American Express Network, perform analytics and create reports, and for any other lawful business purposes, including marketing purposes. American Express may otherwise use and share Merchant information for business purposes and as permitted by applicable Law. American Express uses reasonable administrative, technical and physical security measures to protect Program Merchant information consistent with the sensitivity of the information.

**6.04 Consent for American Express to Contact Merchant by Phone, Email, Text or Facsimile:** American Express may use the information that is provided by Merchant in the Merchant Application (as such information may be updated) to call Merchant or send to Merchant communications or materials via email, SMS, text or facsimile regarding American Express products, services and resources available to Merchant. Merchant consents and agrees to receive autodialed, automated and/or prerecorded calls and communications (which may include SMS or text messages) at the telephone number(s) Merchant has provided. If Merchant provides a fax number, Merchant consents and agrees to receiving fax communications from American Express. In connection with the foregoing, Merchant understands that the calls made, or communications sent to Merchant by American Express may be subject to charges or fees by Merchant's telecommunications or other applicable service provider that are Merchant's responsibility to pay. Merchant understands that Merchant's consent under this Section 6.04 is not a condition of purchasing or receiving any product or service or entering into this Agreement.

**6.05 Marketing Message Opt-Out:** Merchant may opt-out of receiving future commercial marketing communications from American Express by contacting Bank. 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.

**6.06 Conversion to American Express Direct Merchant:** Merchant acknowledges that it may be converted from American Express Card OptBlue program to a direct relationship with American Express if and when its Transaction volumes exceed the eligibility thresholds for the OptBlue program. 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.

**6.07 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 American Express Card acceptance to enforce such terms against Merchant.

**6.08 American Express Opt-Out:** Merchant may opt out of accepting American Express Card at any time without directly or indirectly affecting its rights to accept Cards bearing Marks of other Card Associations.



**6.09 Refund Policies:** Merchant's refund policies for American Express purchases must be at least as favorable as its refund policy for purchase on any other Card Association, and the refund policy must be disclosed to Cardholders at the time of purchase and in compliance with Law. Merchant may not bill or attempt to collect from any Cardholder for any American Express Transaction unless a Chargeback has been exercised, Merchant has fully paid for such Chargeback, and it otherwise has the right to do so.

**6.10 Establishment Closing:** If Merchant closes any of its Establishments, Merchant must follow these guidelines: (i) notify Bank immediately; (ii) policies must be conveyed to the Cardholder prior to completion of the Transaction and printed on the copy of a receipt or Transaction record the Cardholder signs; (iii) if not providing refunds or exchanges, post notices indicating that all sales are final (e.g., at the front doors, by the cash registers, on the Transaction record and on websites and catalogs); (iv) return and cancellation policies must be clearly disclosed at the time of sale; and (v) for Advance Payment Charges or Delayed Delivery Charges, Merchant must either deliver the goods or services for which Merchant has already charged the Cardholder or issue Credit for any portion of the Transaction for which Merchant has not delivered the goods or services.

**6.11 American Express Right to Modify or Terminate Agreement:** American Express has to the right to modify this Agreement with respect to American Express Transactions or to terminate Merchant's acceptance of American Express Transactions and to require Bank to investigate Merchant's activities with respect to American Express Transactions.

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