

## MERCHANT PROCESSING AGREEMENT TERMS AND CONDITIONS

THIS DOCUMENT CONTAINS THE TERMS AND CONDITIONS (the "Terms and Conditions") INCORPORATED BY REFERENCE INTO THE ACCOMPANIED MERCHANT APPLICATION DOCUMENT ("Merchant Application" or "Application"), AND THE TERMS AND CONDITIONS HEREIN, TOGETHER WITH THE MERCHANT APPLICATION, COLLECTIVELY CONSTITUTE THE MERCHANT PROCESSING AGREEMENT ("Merchant Agreement" or "Agreement").

This Agreement is entered into on the day and year indicated in the Merchant Application submitted by Merchant and is by and among WESTAMERICA BANK, (hereinafter referred to as "Bank") whose principal place of business is 3750 Westwind Blvd, Suite 210, Santa Rosa, CA 95403, NEWTEK MERCHANT SOLUTIONS LLC, a New York limited liability company (hereinafter referred to as "NMS") whose principal place of business is 30 Jericho Executive Plaza, Suite 400E, Jericho, NY 11753, and MERCHANT (hereinafter referred to as "Merchant") whose personal name, address, business organization name and type of business are set forth on the Merchant Application. Merchant acknowledges that this Agreement is not and shall not be effective until accepted by Bank and NMS, and that the signature of the representative on the Merchant Application only constitutes acknowledgement of the offer made by the representative on behalf of, and contingent upon the approval of, Bank and NMS as evidenced by Bank's assignment of a merchant identification number to Merchant. Any of Merchant's warranties, representations, covenants, promises and agreements contained in the Merchant Agreement are made to both Bank and NMS unless otherwise specifically provided otherwise or the context clearly indicates otherwise.

### RECITALS

Merchant desires to accept Credit Cards, Debit Cards and/or Other Cards, as indicated on the Merchant Application, validly issued by members under license of Discover® Network ("Discover Network"), MasterCard® International, Inc. ("MasterCard"), and Visa® U.S.A., Inc. ("Visa") and the Debit Networks ("Debit Networks"). Bank and NMS desire to provide Card Processing services to Merchant. Therefore Bank, NMS and Merchant agree as follows:

### ARTICLE I – DEFINITIONS

- 1.01 "Account"** means a bank account maintained by Merchant as set forth in Article III, Section 3.01 for the crediting of collected funds and the debiting of fees and charges pursuant to the terms of this Agreement.
- 1.02 "ACH"** means the Automated Clearing House paperless entry system operated by the Federal Reserve.
- 1.03 "Agreement"** means these Terms & Conditions, the Merchant Application, the ACH Authorization, the schedule of fees and any supplementary documents indicated herein, as amended from time to time.
- 1.04 "Authorization"** means a computerized function or a direct phone call to a designated number to examine individual Transactions to obtain credit approval from the Card Issuer.
- 1.05 "AVS"** (Address Verification System) allows verification of the cardholder's Zip code and billing address while requesting authorizations for transactions or during a request for address verification only.
- 1.06 "Card"** means (i) a valid card in the form issued under license from Visa U.S.A., Inc., Visa International, Inc., or MasterCard International, Inc. ("Bank Card" or "Bankcard") or (ii) any other valid card accepted by Merchant by agreement with RMS, such as those issued by, or under license of, Discover Financial Services, Inc. or (iii) any valid card issued under license of a regional or national Debit Network.
- 1.07 "Card Association"** means Visa, MasterCard, Discover or any other Company that regulates and manages their respective brands of Cards that are accepted by Merchant by agreement with Bank.
- 1.08 "Cardholder"** means the person whose name is embossed upon the face of the Card presented to Merchant
- 1.09 "Card Issuer"** means the Financial Institution or Company which has provided a Card to a Cardholder.
- 1.10 "Chargeback"** means the procedure by which, and the value of, a Sales Draft (or disputed portion thereof) is returned to Bank by a Card Issuer.
- 1.11 "Credit Card"** means a plastic card that allows payments to be offset against a special-purpose account associated with a revolving line of credit and requiring some form of installment-based payment.
- 1.12 "Credit Voucher"** means a document executed by a Merchant evidencing any refund or price adjustment credited to a Cardholder account.
- 1.13 "Debit Card"** means a plastic card linked to a checking or savings account.
- 1.14 "Debit Network"** means a network upon which transactions linked to checking or savings accounts are routed.
- 1.15 "Discover"** means Discover Network or Discover Financial Services.
- 1.16 "Imprint"** means (i) an impression on a Sales Draft 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 printing a Sales Draft.
- 1.17 "MasterCard"** means MasterCard International, Inc. or MasterCard Worldwide, Inc.
- 1.18 "MCC"** means Merchant Category Code and indicates the Merchant's category classification by Visa and MasterCard describing specifically the type of business the Merchant operates.
- 1.19 "Retrieval"** means a Card Issuer's or Cardholder's request of the Transaction receipt.

**1.20 "Rules"** means the rules and regulations of any Card Association or Debit Network, as amended from time to time.

**1.21 "Sales Draft"** means the paper form, approved in advance by RMS, whether such form is electronically or manually imprinted, evidencing a sale Transaction.

**1.22 "Transaction"** means any retail sale of goods and services, or credit for such, from Merchant for which the customer makes payment through the use of any Card and which is presented to RMS for collection.

**1.23 "Visa"** means Visa U.S.A., Inc. or Visa International, Inc.

**1.24 "Voice Authorization"** means a direct phone call to a designated number to obtain credit approval on a Transaction.

### ARTICLE II - CARD ACCEPTANCE

#### 2.01 HONORING CARDS

**A. Without Discrimination.** Merchant will accept without discrimination, all valid Cards as indicated by Merchant on the Merchant Application when properly presented by Cardholders for payment for goods or services within the Merchant's Category (MCC) of acceptance. Merchant may not discriminate between payment Cards within a payment Card network on the basis of the Issuer that issued the presented payment Card.

**B. Acceptance.** Merchant will elect on the Merchant Application to accept (full acceptance) or not accept (limited acceptance) credit and/or debit cards for payment. A full acceptance Merchant will accept all valid Cards unless Merchant provides 30 days written notice to Bank and NMS requesting limited acceptance and stating Merchant's election of Card types. Limited acceptance is not applicable to non-US issued Cards.

**C. Advertised Price.** Merchant agrees to accept Cards for payment of goods or services without charging any amount over the advertised price as a condition of Card acceptance, unless local law requires Merchant be permitted to engage in such practice

**D. Minimums and Maximums.** (a) Merchant shall not establish minimum or maximum transaction dollar value for Signature-Debit or PIN-Debit Card sales as a condition for accepting such Debit Cards. (b) Merchant may set a minimum transaction dollar value for the acceptance of a Credit Card, only to the extent that: (i) such minimum dollar value does not exceed \$10; and (ii) such minimum dollar value is the same for all Issuers or payment card networks. (c) If Merchant is a federal agency or institution of higher education, Merchant may set a maximum dollar value for the acceptance of Credit Cards, to the extent that such maximum dollar value is the same for all Issuers or payment card networks.

**E. Surcharges.** Merchant shall not require any Cardholder to pay any part of any discount or other fee imposed upon Merchant by this Agreement, whether through an increase in price or otherwise requiring a Cardholder to pay a surcharge as a condition of sale that is not also required from a customer paying cash.

**F. Discounts.** Merchant may offer a discount or in-kind incentive as an inducement for a Cardholder to use a means of payment that the Merchant prefers, provided that the discount: (i) is clearly disclosed as a discount from the standard price; (ii) is non-discriminatory, by providing the same discount for all Cards accepted; (iii) does not differentiate on the basis of the Issuer or the Card Association; and (iv) is in accordance with the law and the Rules.

**G. Disputes with Cardholder.** (a) All disputes between Merchant and any Cardholder relating to any Card Transaction will be settled between Merchant and the Cardholder. Neither Bank nor RMS bears any responsibility for such transactions. (b) Merchant must not require a Cardholder, as a condition for honoring a Card, to sign a statement that waives the Cardholder's right to dispute the Transaction with the Card Issuer

**H. Cardholder Identification.** Merchant will identify the Cardholder and check the expiration date and signature on each Card. Merchant will not honor any Card if: (i) the Card has expired; (ii) the signature on the sales draft does not correspond with the signature on the Card; (iii) the account number embossed on the Card does not match the account number on the Card's magnetic stripe (as printed in electronic form); (iv) the Card was declined as a result of an Authorization attempt. Merchant may not require a Cardholder to provide personal information, such as a home or business telephone number, a home or business address; or a driver license number as a condition for honoring a Card unless permitted by law and the Card Association Rules.

**I. Non-presentment.** Merchant shall not accept a Card as payment (other than for mail order, Internet sale, telephone order, or preauthorized sale to the extent permitted under this Agreement), if the person seeking to use the Card does not present the Card to permit Merchant to examine it and obtain an imprint or otherwise use the physical Card to complete the Transaction.

**J. Card Recovery.** Merchant will use reasonable, best efforts and peaceful means to recover any Card if: (i) Merchant is advised by Bank, NMS, the issuer of the Card or the designated voice authorization center to retain it; or (ii) if Merchant has reasonable grounds to believe the Card is counterfeit, fraudulent or stolen, or not authorized by the Cardholder. NOTE: The obligation of Merchant imposed by this section to retain or recover a Card does not authorize a breach of the peace or any injury to persons or property and Merchant will hold Bank and NMS 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.

**K. Location.** Merchant may honor Cards only at location(s) approved by Bank and NMS. Additional locations may be added, subject to Bank's and NMS's approval. Either Merchant, NMS or Bank may delete location(s) by providing notice as provided in this Agreement.

#### 2.02 AUTHORIZATIONS

**A. Required on all Transactions.** Merchant will obtain prior Authorization for the total amount of a transaction via electronic terminal, gateway or other compliant and certified device before completing any transaction, and Merchant will not process any transaction that has not been authorized. Merchant will follow all

instructions received during the Authorization process. Upon receipt of an Authorization approval Merchant may consummate only the transaction authorized and must note on the Sales Draft the Authorization number. Where Authorization is obtained, Merchant will be deemed to warrant the true and matching identity of the customer as the Cardholder.

**B. No Guarantees.** Authorizations are not a guarantee of acceptance or payment of the Sales Draft. Authorizations do not waive any provisions of this Agreement or otherwise validate a fraudulent transaction or a transaction involving the use of an expired or otherwise invalid Card.

**C. Unreadable Magnetic Stripes.** When presenting Card transactions for Authorization electronically, and Merchant's terminal is unable to read the magnetic stripe on the card, Merchant must obtain a Phone Authorization (either via Voice or Automated Response Service, both carry additional fees) and Merchant must obtain an imprint of the Card and also obtain the Cardholder's signature on the imprinted Sales Draft before presenting the Sales Draft to Bank for processing. Failure to do so may result in a chargeback. If Merchant is presented an unembossed Card, and the Merchant's terminal is unable to read the magnetic stripe on the card, Merchant should not accept the Card since a manual imprint is unable to be obtained.

### 2.03 PRESENTMENT OF SALES DRAFTS

**A. Sales Draft Administration.** Unless the Sales Draft is electronically generated from a swiped transaction or is the result of an Internet, mail, phone or preauthorized sales order, Merchant must use a Sales Draft or other form approved by Bank to document each Card transaction. Each Sales Draft will be legibly imprinted with: (i) Merchant's name, location and account number; (ii) the information embossed on the Card presented by the Cardholder (either electronically or manually, and truncated if electronic); (iii) the date of the transaction; (iv) a brief description of the goods or services involved; (v) the transaction authorization number; (vi) the total amount of the sale including any applicable taxes, or credit transaction; and (vii) adjacent to the signature line, a notation that all sales are final, if applicable.

**B. Signatures.** Sales Drafts must be signed by the Cardholder unless the Card transaction is a valid mail/telephone/Internet order Card transaction, or PIN-based Debit Card transaction, which fully complies with the requirements set forth in this Agreement. Merchant may not require the Cardholder to sign the Sales Draft before Merchant enters the final transaction amount in the Sales Draft.

**C. Delivery and Retention of Sales Drafts.** Merchant will deliver a complete copy of the Sales Draft or credit voucher to the Cardholder at the time of the transaction. In addition to any records routinely furnished to Bank or NMS under this Agreement, Merchant shall preserve a paper or microfilm copy of all actual paper Sales Drafts and Credit Vouchers and if a mail, phone order or preauthorized order is involved, the Cardholder's signed Authorization for the Transaction for at least (3) years (or longer if required by law or Rules) after the date Merchant presents the Transaction and Merchant must preserve records in accordance with Article III, Section 3.04 of the Agreement.

**D. Electronic Transmission.** If Merchant utilizes electronic authorization and/or data capture equipment and/or services; Merchant will enter the data related to a Sales or Return transaction into a computer terminal or magnetic stripe reading terminal and transmit daily transactions to the Bank (or its duly assigned processor) no later than the close of business on the date the transactions are completed (unless otherwise permitted by the Rules). Failure to do so may result in the assessment of transaction penalties.

**E. Compliance.** If Merchant provides or uses their own electronic terminal, gateway or similar transaction device to capture transactions and generate Sales Drafts, such devices must meet Bank, NMS, Card Associations, PCI Security Standards Council (pursuant to Article III, Section 3.04 of this Agreement) and Government requirements for processing transactions.

**F. Inspection.** If Bank or NMS requests a copy of a Sales Draft, credit voucher or other transaction evidence, Merchant will provide it within 24 hours following the request.

**G. Multiple Transaction Records.** Merchant shall not prepare more than one Sales Draft for a single sale or for a single item and shall include all items or goods and services purchased in a single Transaction in the total amount on a single Sales Draft except: (i) for purchases in separate departments of a multiple department store; (ii) for installment payments; or (iii) for delayed or amended charges governed by the Rules for travel and entertainment merchants and transactions.

**H. Forms.** Merchant shall only use forms or modes of transmission of Sales Drafts and Credit Vouchers as provided or approved by Bank. Merchant shall not use forms provided by Bank other than in connection with Card Transactions without Bank's prior written consent.

**I. Endorsement.** The presentation of Sales Drafts to Bank for collection and payment is Merchant's agreement to sell and assign its right, title and interest in each Sales Draft completed in conformity with Bank's acceptance procedures and shall constitute an endorsement by Merchant to Bank of such Sales Drafts. Merchant hereby authorizes Bank to supply such endorsement on Merchant's behalf. Merchant agrees that this Agreement is a contract of financial accommodation within the meaning of Bankruptcy Code (11 U.S.C. § 365) as amended from time to time. Merchant acknowledges that its obligation to Bank for all amounts owed under this Agreement arise out of the same transaction as Bank's obligation to deposit funds to the Account.

### 2.04 DEPOSIT OF SALES DRAFTS AND FUNDS DUE MERCHANT

**A. Presentment and Acceptance.** Bank shall accept from Merchant all valid Sales Drafts presented by Merchant under the terms of this Agreement and shall present the same to the appropriate Card issuers for collection against Cardholder accounts. All presentment and assignment of Sales Drafts, collection therefor and re-assignment or rejection of such Sales Drafts are subject to this Agreement and the Rules. Bank shall be the only entity that will provisionally

credit the value of collected Sales Drafts to Merchant's Account and reserves the right to adjust amounts collected to reflect the value of Chargebacks, fees, fines and penalties, late submission charges and items for which Bank did not receive final payment. Bank may refuse to accept or withhold payment of any Sales Draft without notice until the expiration of any chargeback period, or revoke its prior acceptance of a Sales Draft, in the following circumstances: (i) Bank reasonably suspects that the Sales Draft was not made in compliance with this Agreement, Rules or applicable law; (ii) the Cardholder disputes its liability to Bank for any reason, including but not limited to Cardholder chargeback rights enumerated in the Rules; (iii) the transaction giving rise to the Sales Draft was not directly between Merchant and Cardholder; (iv) the transaction is outside the parameters indicated on the Merchant Application; (v) if Bank determines, at its sole and reasonable discretion, that a transaction or batch of transactions poses a risk of loss; (vi) Bank and NMS may impose a cap on the volume and/or ticket amount of Sales Drafts that Bank will process for Merchant, as indicated on Merchant Application or imposed otherwise by Bank. This limit may be modified by Bank and NMS upon written notice to Merchant. If Merchant exceeds the limit established by this Agreement, Bank may suspend processing, charge over limit fees, hold deposits over the cap, and/or return all Sales Drafts evidencing funds over the cap to Merchant or terminate this Agreement. Merchant will pay Bank, as appropriate, any amount previously credited to Merchant for a Sales Draft not accepted or later revoked by Bank. Merchant agrees that neither Bank nor NMS has any liability for any delay in funding and that neither Bank nor NMS is responsible for any losses Merchant may incur, including but not limited to NSF fees, due to delayed deposit of funds.

**B. Returns and Adjustments: Credit Vouchers.** Merchant agrees that it will conduct business in regards to returns as follows: (a) Merchant's policy for the exchange or return of goods sold and the adjustment for services rendered shall be established and posted in accordance with the Rules. Merchant agrees to disclose to a Cardholder before a Card sale is made, that if merchandise is returned: (i) no refund, or less than a full refund, will be given; (ii) returned merchandise will only be exchanged for similar merchandise of comparable value; (iii) only a credit toward purchases will be given; or (iv) special conditions or circumstances apply to the sale (e.g., late delivery, charges, or other noncredit terms). (b) Disclosures must be made on all copies of Sales Drafts in letters approximately 1/4" high in close proximity to the space provided for the Cardholder's signature on the Sales Draft and issued at the time of sale. (c) If Merchant does not make these disclosures and Cardholder requests a refund, a full refund in the form of a credit to the Cardholder's Card account must be given. Merchant shall not refund cash to a Cardholder who originally paid for the item by Card. (d) Credits must be made to the same Card account number on which the original sale Transaction was processed. (e) If Merchant accepts any goods for return, any services are terminated or canceled in conjunction with each such transaction. Merchant shall have sufficient funds in its account available to Bank to cover the amount of the transaction and any related fees. (f) Merchant warrants that any Credit Voucher it issues represents a bona fide refund or adjustment on a Card sale by Merchant with respect to which a Sales Draft has been accepted. (g) Under no circumstance will Bank be responsible for processing credits or adjustments related to Sales Drafts not originally processed by processor and Bank.

**C. Chargebacks.** Merchant and Guarantor(s) are fully liable for all transactions returned for whatever reason, otherwise known as "Chargebacks." Merchant will pay upon presentation the value of all Chargebacks. Authorization is granted by Merchant to Bank to offset from incoming transactions and to debit the Designated Account, the Reserve Account or any other account held at Bank or at any other financial institution the amount of all Chargebacks. Merchant will fully cooperate in complying with the Rules regarding chargebacks. Merchant agrees that: (a) failure to pay a Chargeback upon such presentation shall be considered a material breach of this Agreement and Merchant, in addition to any other remedies which may be exercised by Bank or NMS, shall be charged a late fee of (i) the maximum allowed by law; or (ii) one and one half percent (1.5%) per month or portion thereof on all unpaid Chargebacks, whichever is greater; (b) Merchant agrees to accept for Chargeback any sale for which the Cardholder disputes the validity of the sale according to the Rules, or Bank determines that Merchant has in any way failed to comply with the Rules or Bank procedures, including but not limited to the following: (i) Sales Draft is illegible, not signed by the Cardholder or has not been or cannot be presented to Bank within the required time frame(s); (ii) Sales Draft does not contain the Imprint of a valid unexpired Card; (iii) an Authorization has not been obtained and/or a valid Authorization number has not been correctly and legibly recorded on the Sales Draft; (iv) Sales Draft is a duplicate of a prior Transaction or is the result of two or more Transactions generated on one Card for a single sale; (v) Cardholder alleges that he or she did not participate in the sale, authorize the use of the Card, receive goods or services purchased, or receive a required credit adjustment, or disputes the quality of the goods or services purchased; (vi) price of goods or services on the Sales Draft differs from the amount which Merchant presents for payment; (vii) Transaction results from an Internet, mail, phone or preauthorized order and the Cardholder disputes entering into or authorizing the Transaction or the Transaction has been made on an expired or non-existing account number; (viii) Bank or NMS reasonably believes, within either of their sole discretion, that Merchant has violated any provision of this Agreement; (ix) Bank or NMS reasonably determines that the transaction record is fraudulent or that the Transaction is not bona fide or is subject to any claim of illegality, cancellation, rescission, avoidance, or offset for any reason whatsoever, including without limitation, negligence, fraud, or dishonesty on the part of Merchant or Merchant's agents or employees; (x) for whatever reason pertaining to not complying with the Rules. (b) Notwithstanding any authorization or request from a Cardholder Merchant shall not initiate a sale Transaction in an attempt to collect a Chargeback. (c) Guarantors are personally liable for all Chargebacks. In the event Merchant sells its business and a new owner incurs Chargebacks, the original

Merchant and all Guarantors will be held personally liable for the Chargebacks and any other liabilities of the new owner(s). (d) In the event the Account is closed or is otherwise unavailable to Bank for ACH debit, Merchant and/or Guarantors consent to Bank and NMS locating additional deposit accounts or assets by using any means available. In this event Merchant and/or Guarantors waive all rights to their privacy in favor of Bank and NMS until such time as all unpaid chargebacks and fees owed to Bank and/or NMS have been paid in full. (e) Merchant agrees to pay Chargeback fees as indicated on the Merchant Application for Chargebacks received by Bank regardless of outcome of a Merchant dispute of such Chargeback. (f) Merchant has the right to follow procedures outlined by the Rules to dispute a Chargeback, but such Merchant dispute has no guarantee to relieve Merchant from the responsibilities in respect to Chargebacks outlined in this Section.

**D. Excessive Activity.** Merchant's presentation to Bank of Excessive Activity will be a breach of this Agreement and cause for immediate termination of this Agreement. "Excessive Activity" means, during any monthly period for any one of Merchant's terminal identification numbers or merchant identification numbers: (i) the dollar amount and/or number of chargebacks and/or retrieval requests in excess of 1% of the average monthly dollar amount and/or number of Card transactions; (ii) sales activity that exceeds by 25% of the dollar volume indicated on the Application; or (iii) the dollar amount of returns equals 3% of the average monthly dollar amount of your Card transactions. Merchant authorizes, upon the occurrence of Excessive Activity, Bank and NMS to take any action deemed necessary including but not limited to, suspension or termination of processing privileges or creation or maintenance of a Reserve Account in accordance with this Agreement.

## 2.05 OTHER TYPES OF TRANSACTIONS

**A. Recurring Transactions.** For recurring transactions, Merchant must be approved by Bank to accept recurring transactions and obtain a written request from the Cardholder for the goods and services to be charged to the Cardholder's account, the frequency of the recurring charge, and the duration of time during which such charges may be made. Merchant will not complete any recurring transaction after receiving: (i) a cancellation notice from the Cardholder; (ii) notice from Bank, or (iii) a response that the Card is not to be honored. Merchant must print legibly on the Sales Draft the words "Recurring Transaction".

**B. Multiple Sales Drafts.** (a) Merchant will include a description and total amount of goods and services purchased in a single transaction on a single Sales Draft or Transaction record, unless (i) partial payment is entered on the Sales Draft or transaction record and the balance of the transaction amount is paid in cash or by check at the time of transaction, or (ii) a Sales Draft represents an advance deposit in a Card transaction completed in accordance with this Agreement and the Rules. (b) Merchant shall not submit duplicate Transactions. Merchant shall be debited for any duplicate Transactions and shall be liable for any Chargebacks resulting from duplicate Transactions.

**C. Mail Orders "MO", Telephone Orders "TO" and Internet Orders "IO."** (a) Unless Merchant has been implicitly approved by Bank and NMS to accept mail orders, telephone orders, or Internet orders, Merchant warrants that it is a walk-in trade business, located in a retail business place conducting face-to-face Transactions. If Merchant is found to be submitting Card Transactions for mail orders, telephone orders, or Internet orders without Bank and NMS approval, this Agreement may be terminated and the value of all Sales Drafts collected from the first day of processing may be charged back to Merchant and all funds thereof may be held pursuant to Article IV of this Agreement. (b) If Merchant is authorized by Bank and NMS to accept payment by mail order, telephone order, or Internet order, the Sales Draft may be completed without the Cardholder's signature or an imprint, but in such case Merchant shall create a Sales Draft containing Cardholder account number, expiration date, transaction date, an authorization number, the sale amount and the letters "MO", "TO", or "IO" as appropriate. In addition, the Merchant's business name, city and state must be included. Receiving an Authorization shall not relieve the Merchant of liability for Chargeback on any MO, TO or IO Transaction. (c) For Approved MO, TO, and IO Merchants, performing AVS (Address Verification System) is required. AVS is not a guarantee for payment, and the use of AVS will not waive any provision of this Agreement or otherwise validate a fraudulent transaction. (d) In the event the Merchant is approved to conduct MO, TO, or IO Transactions, Merchant is cautioned to apply fraud protection measures (as described on the Visa and MasterCard web sites) and Merchant understand that there is a higher risk of customer disputes and/or fraud associated with these types of Transactions. (e) If Merchant's Retail/Mail Order/Telephone Order, Internet mix changes from the percentages represented to Bank and NMS in the Merchant Application, Bank and NMS may cease accepting mail/telephone order transactions, or limit their acceptance of such transactions, or increase their fees, or terminate this Agreement, or impose a Reserve Account, unless prior written approval has been obtained from Bank and NMS. (g) Merchant may not deposit a MO, TO, or IO Sales Draft before the product is shipped.

**D. Lodging and Vehicle Rental Transactions.** (a) Merchant must estimate and obtain Authorization for the amount of the Transaction based upon the Cardholder's intended length of stay or rental and the Cardholder must be informed of the dollar amount Merchant intends to pre-authorize. Additional Authorization(s) must be obtained and recorded for charges actually incurred in excess of the estimated amount. (b) Regardless of the terms and conditions of any written preauthorization form, the Sales Draft amount for any lodging or vehicle rental Transaction shall include only that portion of the sale, including any applicable taxes, evidencing a bona fide rental of personal property by Merchant to the Cardholder and shall 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 Card Transaction. (c) It is the responsibility of the Merchant to comply with the Rules inherent to the Lodging and Vehicle Rental MCCs in order to qualify for special

Interchange pricing incentives for Lodging and Vehicle Rental merchants. Card Association Rules may be obtained and each Card Association's respective web site.

**E. Future Delivery.** (a) Merchant will not present for processing, whether by electronic means or otherwise, any Sales Draft, or other memorandum, to Bank and NMS representing a payment, partial payment or deposit for goods or services to be delivered in the future, without the prior written consent of Bank and NMS. Such consent will be subject to Bank's and NMS's final approval. (b) The acceptance of a Card for payment or partial payment of goods or services to be delivered in the future without prior consent will be deemed a breach of this Agreement and cause for immediate termination in addition to any other remedies available under the Laws or Rules. (c) If Bank and NMS have given such consent, Merchant represents and warrant to Bank and NMS that Merchant will not rely on any proceeds or credit resulting from such transactions to purchase or furnish goods or services. Merchant will maintain sufficient working capital to provide for the delivery of goods or services at the agreed upon future date, independent of any credit or proceeds resulting from sales drafts or other memoranda taken in connection with future delivery transactions. (d) If Merchant has obtained prior written consent, Merchant will complete such Card transactions in accordance with the terms set forth in this Agreement, the Rules, and the Laws. Cardholders must execute one Sales Draft when making a deposit with a Card and a second Sales Draft when paying the balance. Merchant will note upon the Sales Draft the words "deposit" or "balance" as appropriate. Merchant will not deposit the Sales Draft labeled "balance" until the goods have been delivered to Cardholder or Merchant has fully performed the services.

**F. American Express®.** Upon Merchant's request, Bank will provide authorization and/or data capture service, for American Express transactions. By signing this Merchant Agreement, and selecting American Express acceptance on the Merchant Application, Merchant agrees to abide by the terms and conditions of American Express. Neither Bank nor NMS is responsible for funding such transactions and Merchant understands that funding of such transactions is done by American Express and may generally take longer than Visa and MasterCard transactions. Initial setup fees and separate credit approval may apply.

## 2.06 DEBIT CARD PROCESSING

If Merchant indicated on Merchant Application to become a sponsored participant in the Debit Networks in order to accept Debit Network transaction, Merchant is bound under the terms and conditions set forth in this Section (in addition to the other sections of this Agreement), as follows:

**A. Debit Networks.** "Debit Networks" refers to those regional and national Debit Card networks accepted by Bank, including but not limited to the following organizations and their successors: Star, NYCE, Pulse, Interlink, AFFN, Alaska, Jeanie, Accel, Maestro and Money Station. This Section (2.06) pertains only to transactions authorized, captured and settled through such Debit Network.

**B. Participation.** Merchant agrees to become a participant in each Debit Network Bank is able to facilitate.

**C. Compliance.** Merchant agrees to comply with all Debit Network rules, regulations, procedures, fees, assessments, penalties, and other membership duties, obligations, and costs of each such Debit Network, which are applicable to Merchant during the term of this Agreement. Merchant shall complete only those POS transactions that comply in all respects with the Rules and which have been authorized. Merchant shall comply with the Graphics Standards Manual, the Security Manual, all federal, state, and local laws applicable to its participation in the system, including without limitation statutes, regulations, and judicial decisions relating to POS transactions, POS Terminals sharing, consumer credit, consumer protection, electronic funds transfers, antitrust, franchise, and other trade regulation matters, and shall indemnify and hold Bank, NMS and Debit Network harmless against any and all liability or expenses related thereto.

**D. Honoring Cards.** Merchant shall honor all valid cards when presented for payment of Debit transaction when such transactions can be initiated and completed electronically. If a technical malfunction prevents electronic initiation and completion of a transaction, Merchant is not obligated to complete such Debit transaction. Merchant shall treat transactions by any Debit Network cardholders in the same manner as transactions by any other cardholders as permitted by the Rules and law. Merchant may not require or request the cardholder's signature or any other means of verifying the cardholder's identity.

**E. Authorizations.** Bank will provide a transaction authorization service, which will enable the Merchant to offer its Cardholders a method of payment using PIN-Debit Cards. Merchant will be permitted to accept certain PIN-Debit Cards and access Bank's contracted data center facilities to perform authorization requests.

**F. Funds.** Bank will facilitate the transfer of funds received from the Debit Networks as a result of Merchant's transaction activity. Funds will be transferred to Merchant's Designated Account using the Automated Clearing House (ACH) of the Federal Reserve Bank, on a two-three (2-3) day delayed basis contingent upon receipt of funds by the Bank and method of Merchant statement reconciliation.

**G. Access.** Upon receipt of written instructions from any Debit Network to which Bank is providing access hereunder, Bank or NMS may immediately cease to provide to Merchant and its Cardholders, access to such Debit Network. Bank shall use reasonable efforts to promptly notify Merchant of such interruption in network access. Merchant shall indemnify and hold Bank, NMS harmless from any claims, liabilities, or losses, including costs and attorney's fees, resulting from Bank's compliance with the written instructions of any Debit Network.

**H. No Discrimination.** Merchant shall treat transactions by any Debit Network Cardholders in the same manner as transactions by any other cardholders, unless otherwise stipulated under law and the Rules.

**I. Equipment.** (a) Merchant shall, at its own expense, obtain and install POS Terminals, together with PIN-Pads and other facilities necessary to support the Debit Network transactions at Merchant location(s). Merchant shall provide Bank and the Debit Network with a list of all Merchant locations currently with compliant

POS Terminals capable of accepting cards and shall provide a list as applicable. All POS Terminals shall accept cards. Merchant at all times shall maintain and operate the POS Terminals in accordance with the Operating Rules. (b) Merchant shall take all reasonable steps necessary to ensure that all POS Terminals and PIN-Pads operated at Merchant locations shall: (i) be available for use by cardholders of all provided Debit Networks for POS transactions; and (ii) function with a minimum of error and in a reliable manner and meet all applicable standards contained in the Technical Specifications and the Security Manual for Debit Network. (c) Merchant shall have at, or in proximity to, any POS Terminal where a card is accepted, an operating Track 2 magnetic stripe reader and PIN-Pad that meets the standards contained in Article III, Section 3.04. The requirements of this paragraph shall not apply to POS transactions not involving the transfer of funds such as balance inquiries. Merchant shall be responsible for connecting the POS terminals at each Merchant location.

**J. Receipts.** At the time of any POS transaction involving a transfer of funds, Merchant shall make available to each cardholder a written receipt that complies fully with all applicable state and federal laws and regulation, including, but not limited to, Regulation E (12 C.F.R. § 205), and includes, but is not limited to, the following information: (i) the amount of the POS transaction; (ii) the transaction date; (iii) the type of POS transaction and, if more than one type of account may be accessed at the POS Terminal by the cardholder, the type of account (checking, savings, etc.) and, if more than one account of the same type may be accessed at the POS Terminal by the cardholder the specific account accessed must be uniquely identified; (iv) a number or code that uniquely identifies the cardholder initiating the POS transaction, or the cardholder's account, or the card used to initiate the POS transaction; (v) location of the POS terminal at which the POS transaction was initiated; (vi) the name of the Merchant providing the goods, services or money to the cardholder; and the trace number.

**K. Dispute Resolution.** Merchant will attempt to settle in good faith any dispute with a Cardholder involving a transaction. Merchant will establish a fair, consistent policy for the exchange and return of merchandise and for the adjustment of amounts due on Debit Card sales. Except as the Debit Networks may permit, Merchant will not make any cash refunds or payments for returns or adjustments on Debit Card transactions but will instead complete an adjustment form provided or approved by Bank. The Debit Card Sales Draft for which no refund or return will be accepted by Merchant must be clearly and conspicuously marked (including on the Cardholder's copy) as "final sale" or "no return" and must comply with the Rules. Merchant will refer Debit Card Cardholders with questions or problems to the institution that issued the Debit Card. Merchant will cooperate with Processor and with each applicable Debit Network and its other members to resolve any alleged errors relating to transactions. Merchant will permit and will pay all expenses of periodic examination and audit of functions related to each Debit Network, at such frequency as the applicable Debit Network deems appropriate. Audits will meet Debit Network standards, and the results will be made available to the Debit Network.

**L. Personal Identification Numbers.** (a) For each PIN-based Debit Card sale, Cardholder must enter a Personal Identification Number ("PIN") through a PIN-pad located at the point of sale. (b) PIN-pad(s) must be situated to permit Cardholders to input PINs without a chance of revealing it to another individual, including Merchant or its employee(s). (c) Merchant will instruct employees not to ask any Cardholder to disclose a PIN and in the event Merchant or employee(s) nevertheless becomes aware of any Cardholder's PIN, Merchant or employee(s) will not use such PIN or create or maintain any record of such PIN, and will not disclose such PIN to any other person. (d) Merchant must ensure the PIN message is encrypted, using a compliant encryption method, from the PIN-pad to the POS Terminal, and from the POS Terminal to the Debit Network and back (end-to-end). (e) The PIN encryption method considered compliant is the method mandated by the Card Associations, the Debit Networks and the PCI-SSC. (f) Merchant may only use a PIN entry device certified by Bank and listed as compliant by the PCI-SSC (including PTS and PCI-PED) for submitting PIN-Debit Transactions. Merchant will comply with any other requirements relating to PIN security as required by Bank, NMS or any Debit Network, inclusive of PIN encryption method.

**M. Inquiries.** Balance inquiries may be performed only at cardholder-operated terminals and shall at all times require entry of the cardholder's PIN and use of the magnetic stripe reader.

**N. Confidentiality.** Merchant shall not disclose to third parties, other than; (a) the Debit Network, NMS or Bank or (b) otherwise specifically required by law, any information related to POS transactions (including, but not limited to, cardholder account information) without the prior written consent of the cardholder and the card issuing bank.

**O. Cashback.** (a) Cashback transactions shall be limited to the maximum of \$200 per Cardholder on any transaction date. If Merchant allows Cardholders to initiate cashback transactions, Merchant must transmit to the Debit Network for each cashback transaction initiated at Merchant's location, the following information in its transaction message: (i) the amount of cashback given to the Cardholder pursuant to the POS transaction; and (ii) Whether the POS transactions involved the issuance of scrip to the cardholder. For purposes of cashback reporting required under this paragraph, the full amount debited from Cardholder's account during a Debit transaction initiated at terminal that issues scrip shall be reported as the cashback amount, regardless of the amount used by the Cardholder to purchase goods or services at the Merchant's location. (b) If Merchant receives, in response to a request for authorization for a cashback transaction involving the purchase of goods and services, a denial code indicating that a cashback transaction has been denied solely because the cashback portion of the Debit transaction would cause the Cardholder to exceed a limit on cash withdrawals imposed on the Cardholder by the Card issuing bank, Merchant shall inform Cardholder that the transaction was denied because it would cause the Cardholder to exceed such limit on cash withdrawals, but that a new Debit transaction in the amount of the purchase alone may be approved.

**P. Indemnity.** Merchant shall be responsible for and shall indemnify and hold Debit Network, NMS and Bank harmless against any and all liability or expense relating to the payment of federal, state, and local sales, use, and other taxes (other than such taxes based in whole or in part on income attributed to fees for services), when due or deemed to be due, as well as all other expenses, fees and charges imposed by a government, arising out of or incidental to its participation in the system.

**Q. Insurance.** Merchant is responsible for obtaining all insurance that may be required by reasonable prudent business practices.

**R. Inspection.** Merchant agrees that, upon request, it will promptly provide to Debit Network, NMS or Bank any information reasonably requested by it to aid in determining whether Merchant is in compliance with the Operating Rules, the Graphics Standards Manual, the Security Manual, this Agreement between Merchant, NMS and Bank, and Debit Network.

**S. Reimbursements.** Merchant shall promptly reimburse within three (3) business days of the event giving rise to any loss for the amount of all losses resulting from any of the following actions, including without limitation reasonable attorney's fees and court costs, in the event that Merchant or any of its agents or employees or any of the operators of its POS Terminals at Merchant locations or the employees or agents of any such operators: (i) knowingly permits anyone other than the Cardholder, or a person expressly authorized by the cardholder, to use the Card and to initiate any POS transaction; (ii) permits the amount debited in a POS transaction by use of a Card to exceed the actual amount of goods or services and cashback, if any, provided to such Cardholder at the time in respect to such transaction; (iii) circumvents the limit imposed by a Merchant on POS transactions by dual submissions for the same POS transaction; (iv) otherwise permits the use of any Card in any manner in violation of the Operating rules or the Security Manual; (v) completes any declined POS transactions; or (vi) otherwise participates in any fraud resulting in loss.

**T. Records.** Merchant shall retain records for each POS transaction for at least seven (7) years or for such longer period as is required by applicable federal or state law or regulation and/or in accordance with Network Operating Rules and in accordance with Article III, Section 3.04 of the Agreement.

**U. Investigation.** Merchant is responsible for investigation of any complaints regarding POS transactions in accordance with the requirements of the Operating Rules.

**V. Security.** Debit Networks, NMS, Bank or any of their designated agents, on behalf of itself or others, shall have the right to inspect Merchant security systems and procedures from time to time after reasonable notice to Merchant.

## 2.07 PROHIBITED AND HIGH RISK TRANSACTIONS

**IMPORTANT: FAILURE TO COMPLY IN FULL WITH THIS SECTION OF THE AGREEMENT MAY RESULT IN THE TERMINATION OF THIS AGREEMENT, AND MERCHANT ACCOUNT PRIVILEGES AND MERCHANT MAY BE ADDED TO THE CONSOLIDATED TERMINATED MERCHANT FILE (MATCH).**

**A. Fraud Transactions.** Merchant will not, under any circumstances, present for processing of Sale or Credit, directly or indirectly, any Transaction or any Transaction Merchant knows or should know to be fraudulent or not authorized by the Cardholder. Merchant must not request or use a Card Account Number for any purpose other than as payment for goods and services.

**B. Factoring.** Merchant will not, under any circumstances, present for processing of Sale or Credit, directly or indirectly, any Transaction not originated as a result of a bona-fide Card transaction directly between Merchant and Cardholder. Merchant will not present any Sales Drafts on behalf of another company, person, source or entity.

**C. Lawful Purposes.** Merchant will not, under any circumstance, engage in any Transaction, or use Card Acceptance and Transaction capabilities for selling goods and/or providing services prohibited by local, hyper-local, state, federal, international and other applicable laws included, but not limited to, the USA PATRIOT Act, Bank Secrecy Act, Consumer Protection Laws and the U.S. Tax Code. Merchant will not submit any Transactions prohibited by the Rules. Perpetrators of fraud or fraudulent Transactions will be referred to state and/or federal law enforcement agencies.

**D. Cash Payments.** Merchant will not, under any circumstances accept cash, checks or other negotiable items from any Cardholder and forward a Credit Transaction, as a purported payment or deposit to an account maintained by the Cardholder.

**E. Cash Advances.** Merchant will not submit, deposit or process any transaction for the purpose of obtaining or providing a cash advance. Merchant will not submit any transaction that involves a Card owned or controlled by Merchant for the purpose of obtaining a cash advance or deposit of funds into Merchant's own Designated Account. Merchant agrees that any such deposit or transaction shall be grounds for immediate termination.

**F. Refinancing Existing Debt.** Merchant will not accept a Card to collect or refinance an existing debt that: (i) has been deemed uncollectible by the Merchant providing the associated goods or services; (ii) represents any other pre-existing indebtedness by Cardholder, including collection of delinquent accounts on behalf of other parties; (iii) represents the collection of a dishonored check. Further, Merchant must not accept Cardholder payments for previous Card charges.

**G. Merchant Category.** Merchant may not accept Card payments for products and/or services delivered to Cardholder that are not directly applicable to the Merchant Category Code (MCC) entered on the Merchant Application, for which Merchant was approved. Should Merchant's MCC change after execution of this Agreement, Merchant shall not submit, deposit or process any Transactions until receiving Bank's and NMS's written approval of MCC change. Merchant understands that accepting payments for goods and/or services not directly relating to the approved MCC will result in termination of this Agreement.

**H. Card Association Rules.** Merchant shall comply with the Card Association Rules, as amended from time to time. Merchant is required to review the latest

versions of Card Association Rules, as applicable to Merchant's obligations under this Agreement, available online at each Card Association's respective web site.

**I. Cooperation.** Merchant will fully cooperate with Bank, NMS and each Card Association in the event that Bank, NMS or any Card Association determines that there is a substantial risk of fraud arising from Merchant's access to Card processing networks. Merchant will take whatever action(s) Bank, NMS or Card Associations reasonably deem necessary in order to protect Bank, NMS and the Card Associations and their members and Cardholders. Neither the Bank, NMS nor the Card Associations nor any of their respective personnel will have any liability to Merchant for any action taken in good faith.

**J. Prohibited Transactions.** Merchant will not submit any telemarketing (inbound or outbound) sales Transactions or any other Transactions that Bank or Card Associations deem to be High Risk unless Merchant obtains Bank's prior written consent. Such consent will be subject to Bank's final approval and may be revoked by Bank without prior notice. Such consent can only be obtained from Bank and cannot be granted by either of their agents, affiliates, ISOs, ISA's, MSPs or any other entities. Merchant may be subject to Card Association registration and reporting requirements. If Merchant processes any such Transactions without prior approval, Merchant may be terminated immediately and Bank and/or NMS may suspend funds and/or require Merchant to establish a Reserve Account.

## **ARTICLE III – MUTUAL OBLIGATIONS**

### **3.01 DESIGNATED ACCOUNT**

**A. Establishment and Authority.** Merchant will establish and maintain a demand deposit account at an ACH receiving depository institution approved by Bank ("Designated Account"). Merchant will maintain sufficient funds in the Designated Account to satisfy all obligations to Bank and NMS, including fees, contemplated by this Agreement. Merchant irrevocably authorizes Bank and NMS to debit the Designated Account for chargebacks, fees and any other penalties or amounts owed under this Agreement. This authority will remain in effect for at least two (2) years after termination of this Agreement whether or not Merchant has notified NMS and Bank of a change to the Designated Account. Merchant must obtain prior written consent from Bank or NMS to change the Designated Account. If Merchant does not obtain that consent, NMS and Bank may immediately terminate the Agreement and may take other action necessary, as determined by them within their sole discretion.

**B. Deposit.** Bank will initiate a deposit in an amount represented on Sales Drafts to the Designated Account subject to Article IV of this Agreement upon receipt of funds from Visa, MasterCard, Discover or a Debit Network. Typically, the deposit will be initiated three (3) business days following Bank's receipt of the Sales Draft, except for mail order/telephone order and electronic commerce transactions, which may be initiated five (5) business days following receipt of the Sales Draft. "Business Day" means Monday through Friday, excluding holidays observed by the Federal Reserve Bank of New York. Bank will be the only entity to deposit Sales Drafts to the Account subject to Article II, Section 2.04 of this Agreement. Merchant authorizes Bank to initiate reversal or adjustment entries and initiate or suspend such entries as may be necessary to grant Merchant conditional credit for any entry. Bank, in its sole discretion, may grant Merchant provisional credit for transaction amounts in the process of collection, subject to receipt of final payment by Bank and subject to all chargebacks.

**C. Asserted Errors.** Merchant must promptly examine all statements relating to the Designated Account, and immediately notify Bank and NMS in writing of any asserted errors. Merchant's written notice must include: (i) Merchant name and account number; (ii) the dollar amount of the asserted error, (iii) a description of the asserted error; and (iv) an explanation of why Merchant believes an error exists and the cause of it, if known. That written notice must be received by Bank and NMS within 90 calendar days of the date of the periodic statement containing the asserted error. Merchant's failure to so notify Bank and NMS in writing of any error within ninety (90) days of the date of the applicable periodic statement constitutes a waiver of any claim against Bank or NMS (or any other party) relating to that error. Merchant may not make any claim against Bank or NMS relating to any asserted error for 60 calendar days immediately following Bank's and NMS's receipt of Merchant's written notice. During that 60 day period, Bank and NMS will be entitled to investigate the asserted error.

**D. Indemnity.** Merchant will indemnify and hold NMS and Bank harmless from any action they take against the Designated Account, the Reserve Account, or any other account pursuant to this Agreement.

**E. ACH Authorization.** Merchant authorizes Bank to initiate debit/credit entries to the Designated Account, the Reserve Account, or any other account maintained by Merchant at any institution, all in accordance with this Agreement. This authorization will remain in effect beyond termination of this Agreement. In the event Merchant changes the Designated Account, this authorization will apply to the new account.

**F. Fees.** Unless otherwise approved in writing by Bank, Merchant agrees to pay \$25 for each debit or credit rejected or returned from the Designated Account.

### **3.02 MERCHANT OBLIGATIONS**

**A. Notification of Business Changes.** Merchant shall provide Bank and NMS with immediate notice if Merchant intends to: (i) transfer, sell or liquidate any substantial part of its total assets and/or equity; (ii) change the basic nature of its business affecting Merchant's MCC; (iii) change ownership or transfer control of its business; (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; or (v) modify Merchant's monthly processing volume and/or average ticket size as approved by Bank and NMS, collectively known as Business Changes. Notice to Bank and NMS should be made to in accordance with Article VII, Section 7.02. Failure or neglect to provide notice of Business Changes may be grounds for termination of this Agreement. In event of

Business Changes, either Bank or NMS, may at its sole discretion, act to terminate this Agreement or, if deemed acceptable by Bank and NMS, Bank and NMS may opt to initiate a new Agreement with Merchant. In the event Bank or NMS suffers a monetary loss caused by neglect to comply with this Section, Bank and/or NMS, as applicable, has the right to recover such losses by means of exercising its Security Interests per Article IV, Section 4.01 of the Agreement.

**B. Financial Condition.** (a) Merchant will notify Bank and NMS, within one business day, in event of bankruptcy, receivership, insolvency, or similar condition or action initiated by or against Merchant or any of its principals; hereafter collectively referred to as a "Financial Condition Change." (b) Merchant will include Bank and NMS as a creditor in Merchant's bankruptcy proceedings if Merchant has funds due to Bank for any reason including fees, chargebacks or ACH rejects. (c) In event of Financial Condition Change, or if Merchant is aware of future or imminent Financial Condition Change, Merchant will cease all Card acceptance at once and will no longer accept and submit Card Transactions until Bank and NMS have given Merchant permission to do so after receiving notice of Financial Condition Change. (d) In the event of Financial Condition Change, Merchant will not sell, transfer, or disclose any Cardholder information, inclusive of Card account numbers or personal information to agent, vendors or any other parties.

**C. Separate Notification.** Separate notification regarding changes to account information, including those to Account, must be made to outside services used by Merchant including but not limited to American Express and any leasing company.

**D. Equipment.** In the event where Merchant enters into a Lease agreement to obtain POS equipment from Bank: (a) Merchant is required to verify the terms of the Lease agreement by way of a telephone conference call between Merchant, Bank, and the leasing company. For each Lease agreement Merchant will have a scheduled appointment date and time to complete this verification. If Merchant does not verify Lease on the scheduled appointment date and time, a Bank representative will make two (2) additional attempts to contact Merchant and complete the verification. If the Lease cannot be successfully verified after these additional attempts, an ACH debit will be made to the Merchant's Account to recover cost of equipment, shipping and handling. Merchant may contact Bank to reschedule the appointment prior to the initial appointment date and time. The rescheduled appointment cannot be set more than five (5) business days from the original appointment date. (c) Merchant cannot return equipment after 30 days from receipt. Merchant agrees that any and all equipment returns are assessed a twenty percent (20%) restocking fee.

**E. Request for Copy.** Within 24 hours of receipt of any written or verbal request by Bank or NMS, Merchant shall provide either the actual paper Sales Draft or a legible copy thereof, in size comparable to the actual Sales Draft, and any other documentary evidence available to Merchant and reasonably requested by Bank or NMS to meet Bank's or NMS's obligations under law (including its obligations under the Fair Credit Billing Act, 15 U.S.C. § 1601 et seq.) or otherwise to respond to questions concerning Cardholder accounts. Unless otherwise approved by Bank, Merchant will be assessed a \$15 fee for each request for copy.

### **3.03 CREDIT INQUIRIES FINANCIAL EXAMINATION AND INSPECTIONS.**

**A. Credit Inquiries.** Merchant authorizes Bank and NMS to make credit inquiries considered necessary in order to review the acceptance and continuation of this Agreement. This authority is granted to Bank and NMS at any time during which Merchant owes any obligation to Bank and may survive the term of the Agreement. Such inquiries shall include, but are not limited to, a credit check of the business including its proprietor, principal owners or officers. If requested to do so by Bank or NMS, Merchant shall provide written consent of any individual for which an inquiry has been or is to be made if such individual did not execute this Agreement.

**B. OFAC.** Merchant, its principal owner(s) and guarantor(s) acknowledge that Bank is required by federal law (Section 326, USA PATRIOT Act of 2001) to inquire with the Office of Foreign Asset Control (OFAC) of the U.S. Treasury Department if Merchant, its principal owner(s), proprietor(s), officer(s) or Guarantor(s) are present on any lists maintained by OFAC prior to accepting Merchant.

**C. Inspections.** Merchant agrees to permit Bank and NMS to occasionally 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 permit(s) (where necessary) to conduct its business. However, nothing in this paragraph shall be interpreted as a waiver of Merchant's obligation to comply in all respects with the terms of this Agreement.

**D. Audits and Reviews.** Merchant authorizes Bank and NMS to audit Merchant's records, systems, processes or procedures to confirm compliance with this Agreement, as amended from time to time. Merchants processing dollar volumes in excess of \$100,000 per month will cooperate with Bank and NMS in performing annual financial reviews by presenting up-to-date financial statements, tax returns and bank statements in order to assure Bank and NMS that Merchant maintains a favorable capital position, liquidity, stability, business practices and general financial condition to fulfill the responsibilities tied to high volume Card processing.

### **3.04 SAFEGUARDING PAYMENT CARD INFORMATION**

**A. Release of Payment Card Information.** Merchant will not, under any circumstance, disclose, copy, distribute, release, make public or transmit payment card information including account number, expiration date, CVV2/CVC2 or other Card security codes, or any data element relating to the payment card to any third party, person, company, recipient or entity other than Bank or its authorized processing agent.

**B. Storing Card Data.** If Merchant is inclined to retain paper or electronic Sales Drafts or Credit Vouchers, Merchant may only do so if (i) Sales Drafts or Credit

Vouchers contain only Cardholder account information permitted to be retained by Merchant as mandated by the Rules; (ii) any type of electronic storage is maintained in strict accordance with the PCI-DSS on a PA-DSS certified system; (iii) Sales Drafts or Credit Vouchers which no longer bear an importance are properly destroyed in a manner which renders the data unreadable and unrecoverable.

**C. Prohibited Data Storage.** Neither Merchant nor any type of software system used by Merchant, shall store, save or retain, in whole or in part, either electronically, on paper or any other type of media, payment card magnetic stripe information, track data, or Card security codes (e.g. CVV, CVC, CID, CVV2 or CVC2) appearing or stored on the payment Card.

**D. Payment Applications.** Merchant may be using special services, hardware or software provided by a third party ("Third Party Payment System") to assist Merchant in processing transactions, including authorizations, batch settlement or accounting functions. In the event Merchant uses a Third Party Payment System including, but not limited to, a POS terminal, POS system, POS software, payment software, payment gateway, virtual terminal, cardholder activated terminal or automated fuel dispenser, Merchant is responsible for assuring third party system is PA-DSS certified and complies with the PABP (Payment Application Best Practices) as set forth by the Payment Card Industry Security Standards Council (PCI-SSC) and the Card Associations. Merchant must ensure that any software or system updates of Third Party Payment System(s) satisfies all security standards required under the Rules (including PABP, PA-DSS and PCI-DSS). All electronic commerce Merchants must provide Cardholders with a secure and encrypted transaction method, utilizing a valid Secure Sockets Layer (SSL) certificate or 3D Secure. Neither Bank nor NMS has any responsibility for any transaction until that point in time until such party, as applicable, receives data about the transaction. Merchant must notify Bank and NMS of its use of any Third Party Payment System that will have access to and/or stores Cardholder or Payment Card information.

**E. Electronic Terminals.** If Merchant provides its own Point-of-Sale electronic terminal or similar device ("POS Terminal"), such POS Terminals must comply with, and meet all requirements set forth by, Bank, NMS or any applicable processor, and directives set forth by the PCI-SSC as amended from time to time, in order to submit Transactions. Information regarding a sales or credit Transaction transmitted with a POS Terminal will be transmitted by Merchant to Bank or applicable Processing Host in the format Bank from time to time specifies or is required under the Rules. If Bank or NMS requests a copy of a Sales Draft, credit voucher or other Transaction evidence, Merchant will provide it within three (3) business days following the request. The means of transmission indicated in the Merchant Application shall be the exclusive means utilized by Merchant until Merchant has provided Bank and NMS with at least thirty (30) days prior written notice of Merchant's intention to change the means of such delivery or otherwise to alter in any material respect Merchant's medium of transmission of data to Bank or Processing Host.

**F. PCI-DSS Compliance.** Merchant shall be in full compliance with rules, regulations, guidelines and procedures adopted by any Card Association or Payment Network relating to the privacy and security of Cardholder and Card transaction data, including without limitation the most up-to-date version of the Payment Card Industry Data Security Standard (PCI-DSS), as amended from time to time by the Payment Card Industry Security Standards Council. Detailed information pertaining to aforementioned requirements may be found at <https://www.pcisecuritystandards.org>. Additional information regarding security requirements may be found on the Card Association's respective web sites.

**G. Merchant Responsibility.** (a) MERCHANT SHALL BE LIABLE FOR ALL FINES, CHARGES AND PENALTIES THAT MAY BE ASSESSED BY ANY CARD ASSOCIATION OR PAYMENT NETWORK AS A RESULT OF TRANSACTIONS MADE BY MERCHANT OR MERCHANT'S NONCOMPLIANCE WITH THE PRECEDING REQUIREMENTS. (b) Merchant acknowledges that it may be prohibited from participating in payment network programs if it is determined that Merchant is non-compliant. (c) Merchant acknowledges that Bank or NMS may cause Merchant to subject to an audit to verify Merchant's compliance with the foregoing security requirements. (d) Merchant must notify Bank and NMS within twenty-four (24) hours after becoming aware of: (i) any suspected or actual data security breach; or (ii) any noncompliance by Merchant with the security requirements set forth herein. (e) Merchant shall, at its own expense: (i) perform or cause to be performed an independent investigation of any data security breach of Card or Transaction data by an authorized assessor acceptable to Bank and NMS; (ii) take all such remedial actions recommended by such investigation, Bank, NMS or Card Association; and (iii) cooperate with Bank and NMS in the investigation and resolution of any security breach.

**H. Truncation.** Merchant must comply and adhere to the security provisions set forth in the Fair and Accurate Credit Transactions Act of 2003 (FACTA) which mandate that card receipts given to the Cardholder may not contain: (i) more than the last five digits of the credit card account number; and (ii) that the Card receipt may not contain the expiration date.

**I. Privacy Policy.** If Merchant sells goods or services on the Internet, Merchant's web site must contain Merchant's consumer privacy policy and a description of Merchant's method of safeguarding consumer transaction data.

**J. Passwords.** In the event where Merchant receives a password from Bank or NMS to access a transaction system or gateway, Merchant shall: (i) keep password confidential; (ii) not allow any other entity or individual to use the password or gain access to Bank's systems; (iii) be liable for all action taken by any user of the password; and (iv) promptly notify Bank and NMS if Merchant believes the confidentiality of Bank's system or Merchant's information has been compromised by use of such password.

### 3.05 FEES AND OTHER AMOUNTS OWED BANK

**A. Fees and Taxes.** Merchant will pay Bank fees for services, forms and equipment in accordance with the fees and rates set forth on the Application. Such fees will be calculated and debited from the Designated Account once each business day or month for the previous business day or month's activity, or will be deducted from funds due Merchant attributable to Sales Drafts presented to Bank. Bank reserves the right to adjust the fees set forth on the Application, including adding fees for additional services utilized by Merchant, provided that Bank must approve, and notify Merchant in advance of, any fee to or obligation of Merchant arising from or related to performance of this Agreement. Merchant is obligated to pay all taxes, and other charges imposed by any governmental authority on the services provided under this Agreement. Bank may not assign or otherwise transfer an obligation to pay or reimburse Merchant arising from, or related to, performance of this Agreement.

**B. Other Amounts Owed.** Merchant will immediately pay NMS and/or Bank any amount incurred by Bank and/or NMS, as applicable, attributable to this Agreement including but not limited to chargebacks, fines imposed by Card Associations non-sufficient funds fees, and ACH debits that overdraw the Designated Account, Reserve Account or are otherwise dishonored. Merchant authorizes Bank to debit via ACH the Designated Account, Reserve Account, or any other account Merchant has at Bank or at any other affiliate or subsidiary of Bank or other financial institution for any amount Merchant owes Bank or NMS under this Agreement or under any other contract, note, guaranty, instrument or dealing of any kind now existing or later entered into between Merchant, on the one hand, and Bank or NMS, on the other, whether Merchant obligation is direct, indirect, primary, secondary, fixed, contingent, joint or several. In the event Bank demand funds due or such ACH does not fully reimburse NMS and Bank for the amount owed, Merchant will immediately pay Bank and/or NMS, as applicable, such amount. Merchant acknowledges and agrees that Bank and NMS will impose an 18% per annum interest rate charged to Merchant on the balance of any overdue funds due to Bank, or the greatest amount allowed by law, whichever is greater.

## ARTICLE IV – SECURITY INTERESTS, RESERVE ACCOUNT, RECOURPMENT AND SET-OFF

### 4.01 SECURITY INTERESTS

**A. Security Agreement.** This Agreement is a security agreement under the Uniform Commercial Code. Merchant grants to Bank a security interest in and lien upon: (i) all funds at any time in the Designated Account, regardless of the source of such funds; (ii) all funds at any time in the Reserve Account, regardless of the source of such funds; (iii) present and future Sales Drafts; (iv) Merchant's electronic terminal, printer, imprinter and imprinter plate; (v) all accounts, regardless of source, wherever found, standing in the name of Merchant and/or Guarantor(s), including any affiliated companies of Merchant and/or Guarantor(s), whether established or designated and maintained pursuant to this Agreement or not; and (vi) any and all amounts which may be due to Merchant under this Agreement including, without limitation, all rights to receive any payments or credits under this Agreement (collectively, the "Secured Assets"). Merchant agrees to provide other collateral or security to Bank to secure its obligations under this Agreement upon Bank's request. These security interests and liens will secure all Merchant obligations under this Agreement and any other agreements now existing or later entered into between Merchant and Bank. This security interest may be exercised by Bank without notice or demand of any kind by making an immediate withdrawal or freezing the Secured Assets.

**B. Perfection.** Upon request of Bank, Merchant will execute one or more financing statements or other documents to evidence this security interest. Merchant will represent and warrant that no other person or entity has a security interest in the Secured Assets. Further, with respect to such security interests and liens, Bank will have all rights afforded under the Uniform Commercial Code, any other applicable law and in equity. Merchant will obtain from Bank written consent prior to granting a security interest of any kind in the Secured Assets to a third party. Merchant agrees that this is a contract of recoupment and Bank is not required to file a motion for relief from a bankruptcy action automatic stay for Bank to realize on any of its collateral (including any Reserve Account). Nevertheless Merchant agrees not to contest or object to any motion for relief from the automatic stay filed by Bank. Merchant authorizes Bank to appoint Bank as Merchant's attorney-in-fact to sign Merchant's name to any financing statement used for the perfection of any security interest or lien granted hereunder.

**C. Guaranty.** As a primary inducement to Bank and NMS to enter into this Agreement with Merchant, the undersigned Guarantor(s), whether by signing the Merchant Application or by acknowledging consent by electronic means, joint and several, unconditionally and irrevocably, guarantees the continuing full and faithful performance and payment by Merchant of each of its duties and obligations to Bank and NMS pursuant to this Agreement, as it now exists or is amended from time to time, with or without notice. Guarantor(s) understands further that Bank and/or may proceed directly against Guarantor(s) without first exhausting their remedies against any other individual or entity responsible therefor to it or any security held by Bank or Merchant. This guarantee will not be discharged or affected by the death of the undersigned, will bind all heirs, administrators, representatives and assigns of Merchant and may be enforced by or for the benefit of any successor of Bank. Guarantor(s) understand that the inducement to Bank and NMS to enter into this Agreement is consideration for this Guaranty, and that this Guaranty remains in full force and effect even if Guarantor(s) receives no additional benefit from the Guaranty.

### 4.02 RESERVE ACCOUNT

**A. Establishment.** Merchant will establish and maintain a non-interest bearing deposit account ("Reserve Account") at Bank initially or at any time in the future as requested by Bank or NMS, with sums sufficient to satisfy Merchant's current

and future obligations as determined by Bank and NMS. Merchant authorizes Bank to debit the Designated Account or any other account Merchant has at Bank or any other financial institution to establish or maintain funds in the Reserve Account. Bank may deposit into the Reserve Account funds it would otherwise be obligated to pay Merchant, for the purpose of establishing, maintaining or increasing the Reserve Account in accordance with this Section, if Bank or NMS determines such action is reasonably necessary to protect Bank's and/or NMS's interests.

**B. Use of Reserve Account.** Bank may, without notice to Merchant, apply deposits in the Reserve Account against any outstanding amounts Merchant owes under this Agreement or any other agreement between Merchant, on the one hand, and Bank or NMS, on the other. Further, Bank may exercise its right under this Agreement against the Reserve Account to collect any amounts due to Bank including, without limitation, rights of set-off and recoupment. Bank's and NMS's right to outstanding amounts owed it by Merchant pursuant to this Agreement shall in no way be limited to the balance or existence of the Reserve Account. Rights granted to Bank and/or NMS with respect to the Reserve Account, as well as the security interest under this Agreement, shall survive the termination of this Agreement.

**C. Funds.** Funds in the Reserve Account will remain in the Reserve Account until 270 calendar days following the later of termination of this Agreement, or Merchant's last transmission of Sales Drafts or Credit Voucher to Bank, or Chargeback submitted by Cardholder, provided, however, that Merchant will remain liable to Bank and/or NMS, for all liabilities occurring beyond such 270-day period. After the expiration of such 270-day period Merchant must provide Bank and NMS with written notification indicating Merchant's desire of a release of any funds remaining in the Reserve Account in order to receive such funds. Merchant agrees that Merchant will not use these funds in the Reserve Account for any purpose, including but not limited to paying chargebacks, fees, fines or other amounts Merchant owes Bank or NMS under this Agreement. Bank will have sole control of the funds in Reserve Account.

**D. Assurance.** In the event of a Bankruptcy proceeding, Bank does not consent to assumption of this Agreement. Nevertheless, in the event of a bankruptcy proceeding and the determination by the court that this Agreement is assumable under the Bankruptcy Code (11 U.S.C. § 365), as amended from time to time, Merchant must establish or maintain a Reserve Account in an amount satisfactory to Bank and NMS. Assumption will be made under terms and conditions that are acceptable to Bank and NMS and comply with the applicable federal or state laws governing such assumption.

**E. Recoupment and Set Off.** Bank and NMS each has the right of recoupment and set-off. Specifically, Bank may offset or recoup any outstanding/uncollected amounts owed by Merchant from: (i) any amounts Bank would otherwise be obligated to deposit into the Designated Account; (ii) any other amounts Bank or NMS may owe Merchant under this Agreement or any other agreement; and (iii) any funds in the Designated Account or Reserve Account. Merchant acknowledges that in the event of a bankruptcy proceeding, in order for Merchant to provide adequate protection under the Bankruptcy Code to Bank and NMS, Merchant must create or maintain the Reserve Account as required by Bank and NMS, and Bank must have the right to offset against the Reserve Account for any and all obligations which Merchant may owe to Bank and/or NMS, without regard to whether the obligations relate to Sales Drafts initiated or created before or after the filing of the bankruptcy petition.

**F. Recoupment of Chargebacks.** In the event of Merchant's default in payment of chargebacks, Merchant and Guarantor(s) agree: (i) that all personal Bank accounts standing in their names shall be subject to this Agreement and ACH debits; (ii) all ACH debits, whether made against Merchant's Account or a Guarantor's personal account shall bear a commercial account code designation (CCD) for purposes of electronic collection via the ACH system; and (iii) Merchant and/or Guarantor(s) irrevocably consent to Bank and NMS utilizing any means available to locate such deposit accounts until such time when all amounts due have been satisfied. Bank may enforce this security interest as applicable by: (a) making an immediate debit/charge via the ACH system (code CCD) to any deposit account standing in the name or names of Merchant and/or Guarantor(s), without notice or demand of any kind; and/or interrupting the electronic transmission of funds to any account through the ACH system; (b) freezing the Designated Account and Reserve Account, without notice or demand of any kind; (c) taking possession of any or all of Merchant's Sales Drafts; (d) taking possession of any and/or all of Merchant's electronic terminals, printers, imprinters, and imprinter plates; (e) by placing a receiver within Merchant's place of business without notice or bond to intercept and collect all income derived from Merchant's operations until such time as any indebtedness owed to Bank and/or NMS arising under this Agreement has been satisfied in full; (f) by obtaining either a writ of attachment or a writ of possession without bond pertaining to Merchant and/or Guarantor(s)'s personal property upon a showing of a presumption that Merchant has committed an act of fraud or is about to misappropriate funds to which it is not entitled. Merchant shall provide any statement or notice that Bank or NMS determines to be necessary in order to preserve and protect this security interest. The granting of this security interest by Merchant and/or Guarantor(s) in no way limits Merchant's liabilities to Bank or NMS under this Agreement.

**G. Account Monitoring.** (a) Merchant acknowledges that Bank will, and NMS may, monitor Merchant's daily deposit activity. The deposit activity must remain consistent to the monthly volume and average ticket amount implicitly approved or adjusted by Bank and NMS ("Risk Parameters"). If Merchant should exceed Risk Parameters, Merchant agrees to provide documentation as set forth by Bank and NMS if so required. **Merchant agrees that Bank may not deposit total Sales Draft dollar volume in excess of the implicitly approved monthly volume. Merchant agrees that Bank may, at its sole discretion, suspend Merchant's transaction deposits for any reasonable period of time required to investigate suspicious or unusual transaction activity. Bank shall make a good faith effort to notify Merchant immediately.** Bank shall have no liability

for any losses, direct or indirect, which Merchant may attribute to any suspension of funds disbursement. (b) If a batch is suspended by Bank, Merchant acknowledges that the consumer's product or service must be delivered just as if the Merchant has been paid. Further, if a batch or a transaction is suspended, Merchant acknowledges that fees, including security fees, will be assessed by Bank.

## **ARTICLE V – TERM AND TERMINATION EVENTS**

### **5.01 TERM AND TERMINATION**

**A. Term.** The Agreement will become effective on the date the later of Bank or NMS executes this Agreement ("Effective Date"), provided, however that if Merchant submits a transaction prior to the Effective Date, Merchant will be bound by all terms of this Agreement. The Agreement will remain in effect for a period of two (2) years ("Initial Term") and will renew for successive one (1) year terms ("Renewal Term") unless terminated as set forth below.

**B. Termination.** The Agreement may be terminated by Bank, NMS or Merchant to be effective at the end of the Initial Term or any Renewal Term by giving written notice of an intention not to renew at least 90 calendar days before the end of the current term. Further, this Agreement may be terminated at any time with or without notice and with or without cause by Bank or NMS. All rights and obligations of the parties existing hereunder as of the effective time of termination shall survive the termination of this Agreement.

**C. Debit Termination.** Processing under a particular Debit Network may be suspended or terminated (without terminating this entire Agreement) if: (i) the Debit Network determines to suspend or terminate processing; or (ii) automatically, upon termination or expiration of Bank's or Merchant's access to such Debit Network whether caused by termination or expiration of Bank's agreement with such Debit Network or otherwise. In addition, in the event that Bank's participation in such Debit Network is suspended for any reason, processing through such Debit Network by Merchant will be suspended for the period of time of such suspension and Bank will notify Merchant of that event. Neither Bank nor any Debit Network will have any liability to Merchant as a result of any such suspension or termination.

**D. Terminated Merchant File.** Merchant acknowledges that MATCH (formerly known as the Combined Terminated Merchant Files or "CTMF") is a file maintained by MasterCard and accessed by Card Associations and banks containing the business names and the identification of principals of Merchant, which have been terminated for one or more reasons specified in the Rules. Merchant acknowledges that Bank is required to report the business name of Merchant and the names and identification of its principals to MATCH when Merchant is terminated for such reasons. Merchant consents to such reporting to the Card Associations by Bank. Further, Merchant waives and will hold harmless Bank from any claims, which Merchant may raise as a result of such reporting.

**E. Designated Account.** All Merchant obligations regarding accepted Sales Drafts will survive termination. Merchant must maintain in the Designated Account and the Reserve Account enough funds to cover all chargebacks, deposit charges, refunds and fees incurred by Merchant for a reasonable time, but in any event not less than the time specified in this agreement. Merchant authorizes Bank to charge those accounts, or any other account maintained under this Agreement, for all such amounts. If the amount in the Designated Account or Reserve Account is not adequate, Merchant will pay Bank the amount owed to Bank upon demand, together with all costs and expenses incurred to collect that amount, including reasonable attorneys' fees.

**F. Reason to Terminate:** Either Bank or NMS may terminate this Agreement immediately without prior notice if (i) Bank or NMS reasonably believes that fraudulent Card Transactions or other activity prohibited by this Agreement is occurring at any Merchant location; (ii) Bank or NMS is required to take action to prevent loss to Bank, NMS or Card Issuers, (iii) in the event of any significant circumstances that do or could create harm or loss of goodwill to any Card Association; (iv) Merchant appears on any Card Association's security or termination reporting, or (v) Merchant Acceptance Criteria of Bank or NMS, or laws in respect to Merchant's business, changes.

**G. Bankruptcy.** If any case or proceeding is commenced by or against Merchant under any federal or state law dealing with insolvency, bankruptcy, receivership or other debt relief, Bank shall automatically terminate, and any amounts due to Bank and/or NMS shall accelerate and become immediately due and payable, without the necessity of any notice, declaration or other act whatsoever by Bank or NMS.

### **5.02 ACTION TAKEN UPON TERMINATION**

**A. Discontinuation of Services.** In the event of termination for any reason, Merchant expressly authorizes Bank and NMS to withhold and discontinue the disbursement for all Cards and other payment transactions of Merchant in the process of being collected and deposited. Upon termination for any reason, Merchant will immediately cease requesting Authorizations and will cease transmitting Sales Drafts to Bank. In the event Merchant obtains any Authorization after termination, Merchant expressly acknowledges and agrees that the fact that any Authorization was requested or obtained shall not operate to reinstate this Agreement.

**B. Maintaining Reserves.** Collected funds will be placed in a Reserve Account until Merchant pays any equipment and processing cancellation fees and any outstanding charges, losses or amounts for which Merchant is liable under this Agreement. Further, Bank reserves the right to require Merchant to deposit additional amounts based upon Merchant's processing history and/or anticipated risk of loss to Bank and NMS into the Reserve Account. The Reserve Account shall be maintained for a minimum of 270 days after the termination date and for a reasonable time thereafter during which Cardholder disputes may remain valid under the Rules. The provisions of this Agreement relating to the debiting and crediting of the Account shall be applied to the Reserve Account and shall survive

termination of this Agreement until Bank and NMS terminate the Reserve Account. Any remaining balance after Chargeback rights have expired and all other expenses, losses, and damages have been paid will be disbursed to Merchant upon request.

**C. Early Termination.** If Merchant terminates this Agreement before the end of the Initial Term or either NMS or Bank terminates this Agreement for any reason other than without cause before the end of the Initial Term, Merchant will immediately pay each of Bank and NMS, as deconversion costs, an early termination fee equal to \$395. Merchant agrees that the early termination fee is not a penalty, but rather is reasonable in light of the financial harm caused by Merchant's early termination. Other remedies Bank and NMS may have under this Agreement still apply.

**D. Records.** Following termination, Merchant shall upon request provide Bank with all original and microfilm copies of Sales Drafts and Credit Vouchers to be retained as of the date of termination.

**E. Return to Bank.** All promotional materials, advertising displays, signage, emblems, Sales Draft forms, credit memoranda and other forms supplied to Merchant and not purchased by Merchant or consumed in use will remain the property of Bank or NMS, as applicable, and will be immediately returned to Bank or NMS, as applicable, upon termination of this Agreement. Merchant is fully liable for all loss, cost, and expense suffered or incurred by Bank and/or NMS arising out of the failure to return or destroy such materials following termination.

## **ARTICLE VI – INDEMNIFICATION, LIMITATION OF LIABILITY, WARRANTIES**

### **6.01 LIMITATION OF LIABILITY OF BANK**

**A. Limitation of Liability.** Any liability of Bank under this Agreement whether to Merchant or to any other party, whatever the basis of liability, shall not exceed in the aggregate the difference between: (i) the amount of fees paid by Merchant to Bank during the month in which the transaction out of which the liability arose occurred; and (ii) assessments, Chargebacks, and any offsets authorized under this Agreement against such fees which arose during such month. In the event more than one month was involved, the aggregate amount of Bank's liability shall not exceed the lowest amount determined in accord with the foregoing calculation for any one-month involved. In no event will Bank, nor its officers, agents, directors, or employees be liable for any indirect, special, or consequential damages including loss profits, revenues and business opportunities. **IN NO EVENT SHALL BANK, OR ANY OF ITS AFFILIATES, DIRECTORS, OFFICERS, EMPLOYEES, AGENTS OR SUBCONTRACTORS 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 FORSEEABLE OR WHETHER ANY PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. MERCHANT ACKNOWLEDGES AND AGREES THAT PAYMENT OF ANY EARLY TERMINATION FEE AS PROVIDED IN ARTICLE V, SECTION 5.02.C ABOVE SHALL NOT BE PROHIBITED BY THIS SECTION.**

**B. Limitation of Liability of NMS.** Any liability of NMS under this Agreement to Merchant or to any other party other than Bank, whatever the basis of liability, shall not exceed in the aggregate the difference between: (i) the amount of fees paid by Merchant NMS with respect to transactions processed for Merchant during the month in which the transaction out of which the liability arose occurred net of any expenses incurred by NMS with respect to such transactions; and (ii) assessments, Chargebacks, and any offsets authorized under this Agreement against such fees which arose during such month. In the event more than one month was involved, the aggregate amount of NMS's liability shall not exceed the lowest amount determined in accord with the foregoing calculation for any one-month involved. In no event will NMS or its officers, agents, directors, or employees be liable for any indirect, special, or consequential damages including loss profits, revenues and business opportunities. **IN NO EVENT SHALL NMS, OR ANY OF ITS AFFILIATES, DIRECTORS, OFFICERS, EMPLOYEES, AGENTS OR SUBCONTRACTORS 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 FORSEEABLE OR WHETHER ANY PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. MERCHANT ACKNOWLEDGES AND AGREES THAT PAYMENT OF ANY EARLY TERMINATION FEE AS PROVIDED IN ARTICLE V, SECTION 5.02.C ABOVE SHALL NOT BE PROHIBITED BY THIS SECTION.**

**C. Indemnification.** Merchant shall hold harmless and indemnify the Card Associations, Bank, NMS and all of their affiliates, officers, directors, agents, representatives and employees harmless from: (i) any claim relating to a dispute between Merchant and a Cardholder; (ii) against all claims by third parties arising out of this Agreement; (iii) any Sales Draft paid for by Bank as may be made by anyone by way of defense, dispute, off-set, counterclaim or affirmative action, or for any damages of, or losses that Bank and/or NMS may incur as a result of Merchant's breach of this Agreement; and (iv) for all attorney fees and other costs and expenses paid or incurred by Bank and NMS in the enforcement of the Agreement, including but not limited to those resulting from any breach by Merchant of this Agreement and those related to any bankruptcy proceeding.

**D. Service Agreement. THIS AGREEMENT IS A SERVICE AGREEMENT. BANK AND NMS DISCLAIM ALL REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, MADE TO MERCHANT OR ANY OTHER INDIVIDUAL,**

**INCLUDING WITHOUT LIMITATION, ANY WARRANTIES REGARDING QUALITY, SUITABILITY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT OR OTHERWISE OF ANY SERVICES OR ANY GOODS PROVIDED UNDER THIS AGREEMENT, INCLUDING WITHOUT LIMITATION ANY SERVICES OR ANY GOODS PROVIDED BY A THIRD PARTY.**

### **6.02 REPRESENTATIONS AND WARRANTIES**

**A. Performance.** Bank will perform all services in accordance with this Agreement. Neither Bank nor NMS makes any other warranty, express or implied, regarding the services, and nothing contained in the Agreement will constitute such warranty. Bank and NMS disclaim all implied warranties, including those of merchantability and fitness for a particular purpose. Neither Bank nor NMS will be liable to the other parties for any failure or delay in its performance of this Agreement if such failure or delay arises out of causes beyond their respective control and without their respective fault or negligence. Neither Bank nor NMS is liable for the acts or omissions of any third party.

**B. Terminals not Provided by Bank.** Merchant will notify Bank immediately if Merchant decides to use electronic authorization or data capture Terminals or Software provided by any entity other than Bank or its authorized designee ("Third-Party Terminals") to process transactions. If Merchant elects to use Third-Party Terminal(s), Merchant agrees: (i) the third party providing the terminals or software will be Merchant's agent in the delivery of the Transactions to Bank via a data processing system or network; and (ii) to assume full responsibility and liability for any failure of that third party to comply with the Rules of this Agreement and the provisions of Article III, Section 3.04 of the Agreement. Neither Bank nor NMS will be responsible for any losses or additional fees incurred by Merchant as a result of any error by a third party agent or a malfunction in a third party's software or terminal.

**C. Warranties of Merchant.** Merchant represents and warrants to Bank and NMS at the time of execution and during the term of this Agreement the following: (a) All information contained in the Merchant Application or any other documents delivered to Bank and/or NMS in connection herewith and therewith is true and complete and properly reflects Merchant's business, financial condition, and principal partners, owners or officers. (b) Merchant is a Corporation, Limited Liability Company, Partnership, Sole Proprietorship or other legitimate and legally organized organization validly existing and organized in the United States. (c) Merchant and individual signing this agreement have the power and authority 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) Individuals signing this agreement ("Signers") are duly authorized by the legal entity represented by Signers in the Merchant Application to bind Merchant into this Agreement on behalf of Merchant. (d) Merchant has 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. (e) Merchant is not engaged or affiliated with any businesses, products or methods of selling other than those set forth on the Merchant Application, unless Merchant obtains the prior written consent of Bank and NMS. (f) 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. (g) Merchant has performed or will perform all of its obligations to the Cardholder in connection with the Card Transaction evidenced thereby. (h) Merchant has complied with Bank procedures accepting Cards, and the Card Transaction itself shall not involve any element of credit for any other purposes other than as set forth in this Agreement and shall not be subject to any defense, dispute, offset or counter claim which may be raised by any Cardholder under the rules, the Consumer Credit Protection Act (15 USC § 1601) or other relevant state or federal statutes or regulations. (i) Merchant warrants that any Credit Voucher, which it issues represent a bona fide refund or adjustment on a Card sale by Merchant with respect to which a Sales Draft has been accepted. (j) Unless Merchant notifies Bank and NMS in writing, either on Merchant Application or otherwise, no other processing relationship exists between Merchant and any other Bankcard processing institution, for this business, or any other business managed or owned by Merchant. (k) All transactions are bona fide. No transaction involves the use of a Card for any purpose other than the purchase of goods or services from Merchant. (l) Merchant and Guarantor(s) acknowledge that all documents submitted in conjunction with this Agreement are being submitted in order to induce a federally insured financial institution to extend them credit and that submission of any false information herein may subject them to criminal prosecution, fine and/or imprisonment. (m) Merchant has supplied its true and correct taxpayer identification number on the Merchant Application.

**D. Authorization of Agreement.** Merchant represents and warrants that the individual signing the Merchant Application and Agreement, physically or by acknowledging consent by electronic means, is duly authorized to bind Merchant to all provisions of this Agreement and that such individual is duly authorized to execute any contract document on behalf of Merchant. Merchant will execute a separate Entity Certification if requested to do so by Bank or NMS.

**E. Signature.** Merchant, by its signature, upon its first transmission of Transactions, or first payment of fees, acknowledges receipt, acceptance and comprehension of this Agreement. If Merchant has not entered into this Agreement by executing this Agreement via counter signature or electronic means, Merchant agrees that Merchant's first transmission of a transaction or first payment of fees to Bank constitutes Merchant's acceptance of this Agreement.

**F. Attorneys' Fees.** Merchant will be liable for and will indemnify and reimburse Bank and NMS for all attorneys' fees and other costs and expenses paid or incurred by them or their agents in the enforcement of this Agreement, or in collecting any amounts due from Merchant or resulting from any breach by Merchant of this Agreement.

## **ARTICLE VII – MISCELLANEOUS**

### **7.01 USE OF TRADEMARKS AND CONFIDENTIALITY**

**A. Card Signage.** Merchants will prominently display Card signage provided by Bank or NMS in its place(s) of business and the type of signage displayed will be in accordance with the card brands accepted by Merchant and if Merchant participates in full or limited acceptance.

**B. Use of Trademarks.** (a) Use of trade name, trademark, service mark or logotype ("Marks") associated with any of the Card Associations and their brands shall be limited to informing the public that Card(s) will be accepted at Merchant's place(s) of business. Merchant's use of promotional materials and Marks is subject to the direction of Bank and must fully comply with the Rules. (b) Merchant may use promotional materials and Marks during the term of this Agreement and shall immediately cease their use and return any inventory to Bank (or if given to Merchant by NMS, then returned to NMS) upon termination thereof. (c) Merchant shall not use any promotional materials or Marks associated with the Card Associations and Debit Networks in any way that implies that the Card Associations or Debit Networks endorse any goods or services other than their own.

**C. Confidentiality.** Merchant shall protect all information or other items proprietary to Bank or NMS that Merchant obtains knowledge of or access to as a result of Bank's or NMS'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 or as required by applicable law. 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, pricing information of Bank or NMS of any nature (including without limitation any schedule of fees whether as part of the Merchant Application or otherwise provided), and all other financial information. The obligations of non-disclosure provided hereunder shall continue during the Term and, (a) with respect to Provider Confidential Information that does not constitute a trade secret, for a period of three (3) years thereafter and, (b) 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. The Merchant further agrees that upon termination of this Agreement for any reason, it will immediately return all Private Confidential Information to Bank and NMS, as applicable, such property to Bank.

### **7.02 GENERAL PROVISIONS**

**A. Entire Agreement.** This Agreement, including the Merchant Application, the Schedule of Fees, the Rules, and Exhibits to this Agreement expresses the entire understanding of the parties with respect to its subject matter and except as provided herein, all prior or other agreements or representations, written or oral, are superseded. Reference to "this Agreement" also includes all documents incorporated into this Agreement by reference.

**B. Governing Law and Venue.** Bank, NMS Merchant and Guarantor(s) agree that all performances and transactions under this Agreement will be deemed to have occurred in California and that Merchant's entry into and performance of this Agreement will be deemed to be the transaction of business within the State of California. This Agreement will be governed by California law, without regard to its conflicts-of-law principles, and applicable federal law. Bank, Merchant and Guarantor(s) hereby consent to the exclusive jurisdiction and venue for any action relating to the subject matter of this Agreement in Sonoma County, California and/or California Superior Court in Sonoma County, California and/or United States District Court for the Northern District of California. The parties consent to the jurisdiction of such courts and agree that process may be served in the manner allowed by the laws of the State of California or United States federal law.

**C. Reserved for future use.**

**D. Construction.** The typographical headings used in this Agreement are inserted for reading convenience only and will not affect the interpretation of any provision. The language used will be deemed to be the language chosen by the parties to express their mutual intent, and no rule of strict construction will be applied against any party. Any alteration or strikeover in the text of this pre-printed Agreement will have no binding effect, and will not be deemed to amend this Agreement. This Agreement may be executed by facsimile, and facsimile copies of signatures to this Agreement shall be deemed to be originals and may be relied on to the same extent as the originals.

**E. Assignability.** This Agreement may not be assigned by Merchant directly or by operation of law, without the prior written consent of Bank. If Merchant nevertheless assigns this Agreement without such consent of Bank, Merchant shall remain liable and the Agreement also shall be binding upon the assignee. Original Merchant and Guarantor(s) shall be held personally liable in the event such assignee incurs chargebacks, retrievals, ACH rejects, losses, fines or any other liabilities under this Agreement. This Agreement shall be binding upon and

inure to the benefit of the parties' respective heirs, personal representatives, successors, and assigns. Bank may assign this Agreement.

**F. Amendment.** This Agreement is subject to amendment in order to conform and comply with any amendments or modifications of the Rules or law. From time to time Bank may amend any provision of this Agreement, including, without limitation, those relating to discount rates or other fees and charges payable by Merchant by providing written notice (including without limitation via electronic delivery) to Merchant of the amendment, and the amendment shall become effective and enforceable unless Bank receives Merchant's notice of termination of this Agreement within seven (7) days of the date of such notice. Amendments due to changes in either Card Association's fees, interchange, assessments, Rules or any 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.

**G. Consent to Electronic Communications.** Notwithstanding anything in this Agreement to the contrary, Merchant agrees that each of Bank and NMS may deliver any communications to be delivered by it to Merchant under or in connection with this Agreement (collectively, "Provider Communications"), including without limitation all notices (for the avoidance of doubt, including without limitation any written notices), disclosures, monthly or other periodic statements, tax reports or forms (including without limitation Form 1099K's) and any other documents and information, to Merchant by electronic means chosen by Bank or NMS (including without limitation delivery via e-mail or by making the Provider Communication available through internet or intranet websites as communicated to Merchant by Bank or NMS from time to time). Merchant is responsible for ensuring that (a) it has at all times a current and operable email address on file with both Bank and NMS for delivery of Provider Communications, and Merchant agrees to regularly check such email address; (b) it has, or will have, the technical means and resources to access any internet or intranet websites communicated to Merchant by either Bank or NMS from time to time for Provider Communications and Merchant agrees to regularly check such websites; and (c) it complies with any technical requirements as may be required to access any Provider Communication made available to Merchant through such websites as may be communicated to Merchant by Bank or NMS from time to time. Merchant understands that it will not receive a paper copy of any Provider Communication that Bank or NMS elects to make available to Merchant electronically, including without limitation monthly or other periodic statements and Form 1099K's, unless Bank or NMS provides Merchant an option to obtain a paper copy of the Provider Communication (for which Merchant understands and agrees that Bank or NMS may also charge Merchant a fee). In the event Merchant is unable to access any Provider Communication that has been made available by Bank or NMS electronically, it is the Merchant's obligation to notify Provider in writing immediately. By applying for services and confirming that it has read the Merchant Agreement, Merchant is confirming to Bank and NMS that it has the means to access the Internet through its own service provider and download or print electronic communications.

**H. Notices; Consent to Electronic Communications.** All notices and other communications required or permitted under this Agreement by Bank or NMS to Merchant, including without limitation any amendments of this Agreement, may be made available by Bank or NMS to Merchant either electronically in accordance with Section 7.02(G) of this Agreement or as otherwise permitted by this Agreement or delivered by fax, overnight carrier or first class mail, postage or other charges prepaid, addressed and transmitted as set forth below; for the avoidance of doubt, notices contained in monthly statements sent to the Merchant shall be deemed in compliance with this Section 7.02(H). All notices and other communications required or permitted under this Agreement by Merchant to Bank and/or NMS shall be delivered by Merchant to Bank or NMS, as applicable, by overnight carrier or certified mail, postage or other charges prepaid, addressed and transmitted as set forth below. Notice by fax or electronic means, if permitted hereunder, shall be deemed delivered when transmitted or otherwise made available to Merchant electronically. Notice by mail or overnight carrier shall be deemed delivered on the first business day after mailing or delivery to the carrier. Following are the addresses for the purposes of notices and other communications hereunder, which may be changed by written notice in accordance with this section: (a) If to Bank, addressed and transmitted as follows: **Westamerica Bank, 3750 Westwind Blvd, Suite 210, Santa Rosa, CA 95403, Fax: (707) 578-7055;** (b) If to NMS, addressed and transmitted as follows: **Newtek Merchant Solutions, LLC, Attn: President, 30 Jericho Executive Plaza, Suite 400E, Jericho, NY 11753, with a copy sent to NewtekOne, Inc., Attn: Chief Legal Officer, 4800 T-Rex Ave., Suite 120, Boca Raton, FL 33431;** and (c) If to Merchant, at the address provided as the billing address, or the fax number or e-mail address and to the contact listed on the Merchant Application or such more recent email address, fax number or mailing address as Bank or NMS may have on file.

**I. Force Majeure.** Any delay in or failure of performance by Bank or NMS under this Agreement will not be considered a breach of this Agreement and will be excused to the extent caused by any occurrence beyond their reasonable control, including, but not limited to, acts of God, power outages, failures of the Internet, failures of banking, ACH or payment networks not under direct control of Bank.

**J. Amendments.** Bank or NMS may amend this Agreement at any time upon notice to Merchant. With regard to increases in existing fees, or imposition of new fees, Bank or NMS will provide Merchant with a thirty (30) day notice to the extent it has received such prior notification of new fees.

**K. Severability and Waiver.** If any provision of this Agreement is illegal, the invalidity of that provision will not affect any of the remaining provisions and this Agreement will be construed as if the illegal provision is not contained in the Agreement. Neither the failure nor delay by Bank or NMS to exercise, or partial exercise of, any right under this Agreement will operate as a waiver or estoppel of such right, nor shall it amend this Agreement. All waivers must be signed by the waiving party.

**L. Remedies Cumulative.** All rights and remedies conferred upon Bank and NMS in this Agreement, at law or in equity, are not intended to be exclusive of one another. Rather, each and every right of Bank and NMS under this Agreement, at law or in equity, will be cumulative and concurrent and in addition to every other right available to them.

**M. Severability.** If any provision of this Agreement is held invalid or unenforceable by any court of final jurisdiction, it is the intent of the parties that all other provisions of this Agreement be construed to remain fully valid, enforceable, and binding on the parties.

**N. Relationship of Parties.** The parties are independent contractors and nothing in this Agreement shall make them joint ventures, partners, employees, agents or other representatives of the other party.

**O. Employee Actions.** Merchant is responsible for its employee's actions while in its employ.

**P. Survival.** All Sections of this Agreement that by their nature should survive termination or expiration will survive, including, without limitation, accrued rights to payment, indemnification obligations, confidentiality obligations, warranty disclaimers, limitations of liability, Sections 2.04.C, 2.07, 3.01, 3.04, 3.05, and Articles 4, 5, 6 and 7.01.C.

**Q. Further Assurances.** At any time or from time to time, upon the request of Bank or NMS, Merchant will execute and deliver further documents as Bank or NMS may reasonably request in order to effectuate fully the purposes of this Agreement.

**R. Counterparts; Electronic Execution.** Unless either Bank or NMS requires otherwise, to the extent this Agreement, any component thereof, or any other document, agreement or instrument to be executed in connection with this Agreement (whether contemporaneously therewith or in the future) or the transactions contemplated thereby (collectively, including this Agreement, the "Transaction Documents"), is to be signed by a party, such signature thereto delivered by a party via telecopy transmission or other electronic means shall be deemed to be an original signature. The words "execution," "execute," "signed," "signature," and words of like import in or related to any Transaction Document shall be deemed to include electronic signatures and the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature or the use of a paper-based recordkeeping system, as the case may be, to the extent and as provided for in any applicable law, including the Federal Electronic Signatures in Global and National Commerce Act and the California parallel law, the model Uniform Electronic Transactions Act ("UETA"), which authorizes electronic records and signatures as a matter of state law. California's version of UETA begins at Civil Code §1633.1. Notwithstanding the foregoing, if either Bank or NMS requires any Transaction Document be signed manually, then such Transaction Document must be signed by Merchant manually. Unless otherwise required by Bank or NMS, any Transaction Document may be executed in one or more counterparts, each of which, when taken together, shall be deemed an original and each of which may be introduced as evidence or used for any other purpose without the production of its duplicate counterparts.

S. All addendums, exhibits and other attachments attached hereto or accompanied herewith, including without limitation, the American Express Card Acceptance Addendum to Merchant Processing Agreement, the TransArmor Data Protection Terms and the Third Party Products and Services Addendum, are hereby incorporated herein as if fully set forth herein.

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Merchant Initials

# American Express Card Acceptance Addendum to Merchant Processing Agreement

**1. Addendum.** Notwithstanding anything to the contrary in the Agreement, including (if applicable to you) provisions in the Agreement that bind you to the American Express Agreement for American Express Card Acceptance - American Express One-Point Program ("Amex CAA"), you acknowledge and agree that you will accept American Express Cards under the Agreement under a direct agreement with us (the "Direct Program"), and the additional terms and conditions set forth in this American Express Card Acceptance Addendum to the Merchant Processing Agreement (this "Addendum") shall apply. The effective date of this Addendum will be on or about the first business day after your request to participate in the Direct Program with us or the first day you accept American Express Cards under the Direct Plan. **Accepting American Express Cards under the Direct Program and submitting the related transactions will constitute your agreement to all of the terms and conditions set forth in the Agreement, as supplemented and amended by this Addendum.** This Addendum supplements and amends, and is hereby made a part of, the agreements among Merchant, NMS, and Bank, contained in the Merchant Application and the Merchant Processing Agreement Terms and Conditions (the "Terms and Conditions"), and any schedules, exhibits, addendums or the like thereto and any documents incorporated therein, each as amended from time to time, which collectively constitute the agreement among the parties (as supplemented by this Addendum, the "Agreement"). The Agreement, including this Addendum, governs your acceptance of American Express Cards under a direct agreement with us. This Addendum should be read in conjunction with the rest of the Agreement. If there is a conflict between the terms of this Addendum and the terms of any part of the rest of the Agreement, the terms of this Addendum will control. Except as expressly set forth herein, the Agreement is hereby ratified in all respects and shall remain in full force and effect. American Express Card acceptance services are provided to you by NMS and not Bank. Bank is not a party to this Addendum, and you acknowledge that Bank is not liable to you with respect to American Express Card acceptance services.

**2. Definitions.** Capitalized terms not defined in this Addendum have the meanings set forth in the Terms and Conditions, as supplemented by Section 23 hereof.

**3. Card Descriptions.** A new Section 2.08 is hereby added to the Terms and Conditions as follows:

## **2.08 AMERICAN EXPRESS CARD DESCRIPTIONS.**

At the point of sale, the American Express Card must be carefully examined to determine whether it is a legitimate and valid American Express Card and not visibly altered or mutilated. The name of the American Express Card (American Express) should appear in bold letters on the Card. The following is a description of the authorized American Express Card design:

### American Express:

- All American Express Card Numbers start with "37" or "34," The Card number appears embossed on the front of the Card. Embossing must be clear, and uniform in sizing and spacing. Some Cards also have the Card Number printed on the back of the Card in the signature panel. These numbers, plus the last four digits printed on the Sales Draft, must match.
- Pre-printed Card Identification (CID) Numbers must always appear above the Card Number on either the right or left edge of the Card.

- Only the person whose name appears on an American Express Card is entitled to use it. Cards are not transferable.
- Some Cards contain a holographic image on the front or back of the plastic to determine authenticity. Not all American Express Cards have a holographic image.
- Some Cards have a chip on which data is stored and used to conduct a transaction.
- The signature on the back of the Card must match the Cardholder's signature on the Credit Draft, and must be the same name that appears on the front of the Card. The signature panel /must not be taped over, mutilated, erased or painted over. Some Cards also have a three-digit Card Security Code (CSC) number printed on the signature panel.

**4. Refunds/Exchanges.** Your obligations under the Agreement regarding limiting refunds or exchanges or imposing other specific conditions for Card sales (which may be set forth in Section 2.04 (B) of the Terms and Conditions) are clarified by the terms set forth below:

If you limit refunds or exchanges or impose other specific conditions for Card sales, you must provide proper disclosure to the Cardholder at the time of transaction in accordance with applicable law. If applicable, the words "No Exchange, No Refund," etc. must be clearly printed (in 1/4" letters) on the Sales Draft near or above the Cardholder's signature. The Cardholder's copy of the Sales Draft, as well as your copy, must clearly display this information near or above the Cardholders signature. Applicable disclosures may vary by transaction type.

**5. Delayed Delivery or Deposit Balance Transactions.** Your obligations under the Agreement regarding Future Delivery transactions (which may be set forth in Section 2.05(E) of the Terms and Conditions) are supplemented by the following terms and conditions for American Express:

### Advance Payment Charges for American Express Transactions.

An advance payment Charge is a Charge for which full payment is made in advance of you providing the goods and/or rendering services to the Cardholder and such Charges carry higher risk. American Express may withhold settlement for part or all of such Charges until it is determined that the risk has diminished.

You must follow the procedures below if you offer Cardholders the option or require them to make advance payment Charges for the following types of goods and/or services:

- Custom-orders (e.g., orders for goods to be manufactured to a customer's specifications),
- Entertainment/ticketing (e.g., sporting events, concerts, season tickets).
- Tuition, room and board, and other mandatory fees (e.g., library fees) of higher educational institutions.
- Airline tickets, vehicle rentals, rail tickets, cruise line tickets, lodging, travel-related services (e.g., tours, guided expeditions).
- For an advance payment Charge, you must: -
- State your full cancellation and refund policies, clearly disclose your intent and obtain written consent from the Cardholder to bill the Card for an advance payment Charge before you request an Authorization. The Cardholder's consent must include his or her agreement to all the terms of the sale (including price and any cancellation and refund policies), and a detailed description and the expected

delivery date of the goods and/or services to be provided (including, if applicable, expected arrival and departure dates).

- Complete a Sales Draft. If the advance payment Charge is a Card Not Present Charge, you must also: ensure that the Sales Draft contains the words "Advance Payment;" and within twenty-four (24) hours of the Charge being incurred, provide the Cardholder written confirmation (e.g., email or facsimile) of the advance payment Charge, the amount, the confirmation number (if applicable), a detailed description and expected delivery date of the goods and/or services to be provided (including expected arrival and departure dates, if applicable) and details of your cancellation/ refund policy.

If you cannot deliver goods and/or services (e.g., because custom-ordered merchandise cannot be fulfilled), and if alternate arrangements cannot be made, you must immediately issue a Credit for the full amount of the advance payment Charge which cannot be fulfilled.

In addition to other Chargeback rights, a Chargeback may be exercised for any disputed advance payment Charge or portion thereof if the dispute cannot be resolved in your favor based upon unambiguous terms contained in the terms of sale to which you obtained the Cardholder's written consent.

#### **6. Recurring Transaction/Preauthorized Order Regulations.**

Your obligations under the Agreement with respect to recurring transactions (which may be set forth in Section 2.05(A) of the Terms and Conditions) are clarified by the terms set forth below:

If we or you have terminated the Agreement, you may not submit authorization requests or sales data for recurring transactions that are due after the termination date of the Agreement, and you must inform Cardholders for which you have submitted the recurring transactions that you no longer accept the Card.

You must obtain an Authorization for each transaction and write "Recurring Transaction" (or "Signature on File" for American Express transactions) on the Sales Draft in lieu of the Cardholder's signature. A positive authorization response for one recurring transaction Card Sale is not a guarantee that any future recurring transaction authorization request will be approved or paid.

For American Express recurring transactions, you should periodically verify with Cardholders that their information (e.g., Card number, expiration date, billing address) is still accurate. This will improve the likelihood of obtaining an approval to an Authorization request.

The method to secure consent for recurring Charges must contain a disclosure that you may receive updated Card account information from the Issuer. You must retain evidence of consent to receive updated Card account information from the Issuer for twenty-four (24) months from the date you submit the last recurring billing Charge. If you offer Cardholders the option to make recurring billing Charges, you must:

- Ensure that your process for cancellation of recurring billing is simple and expeditious;
- Clearly and conspicuously disclose all material terms of the option, including, if applicable, the fact that recurring billing will continue until the option is cancelled by the Cardholder;
- Offer their American Express customers the option to receive written notification for the recurring transaction(s) at least

(10) ten days prior to submitting, or any time the Charge amount exceeds a maximum amount that has been set by the Cardholder;

- Within twenty-four (24) hours of incurring the first recurring billing Charge, provide the Cardholder written confirmation (e.g., email or facsimile) of such Charge, including all material terms of the option and details of your cancellation/refund policy; and
- Where the material terms of the option change after submission of the first recurring billing Charge, promptly notify the Cardholder in writing of such change and obtain the Cardholder's express written consent to the new terms prior to submitting another recurring billing Charge.

The cancellation of an American Express Card constitutes immediate cancellation of that Cardholder's consent for recurring Charges. American Express will not have any liability from such cancellation. If an American Express Card is cancelled or a Cardholder withdraws consent to recurring Charges, you are responsible for arranging another form of payment with the Cardholder.

**7. Setup Fees.** The last sentence of Section 2.05(F) of the Terms and Conditions is hereby deleted in its entirety.

**8. Customer Activated Terminals.** A new Section 2.05(G) is hereby added to the Terms and Conditions as follows:

**G. Customer Activated Terminals.** Prior to conducting customer activated terminal ("CAT") transactions or self-service terminal transactions you must contact us for approval and further instructions, rules and requirements that apply to CAT and self-service terminal transactions. Failure to do so could result in additional charges or termination of the Agreement.

Customer Activated Terminals for American Express Transactions  
Sales Drafts for Charges for purchases at your CAT's must include:

- Full Magnetic Stripe data stream or chip Card data in all Authorization requests, and;
- CAT indicator on all Authorization requests and Submissions.

American Express will not be liable for actual or alleged fraudulent Charges occurring through CAT's and will have the right to Chargeback for those Charges.

**9. Displays and Advertising.** A new Section 2.01(L) is hereby added to the Terms and Conditions as follows:

**L. American Express Displays and Advertising.** If you elected to accept the American Express Card on your Application, whenever payment methods are communicated to customers, or when customers ask what payments are accepted, you must indicate your acceptance of the American Express Card and display the American Express Marks (including any Card application forms provided to you) as prominently and in the same manner as you do for any other Card or payment products. You must not use the American Express Marks in any way that injures or diminishes the goodwill associated with the American Express Marks, nor (without prior written consent from us) indicate that American Express endorse your goods or services. You shall only use the American Express Marks as permitted by the Agreement and shall cease using the American Express Marks upon termination of the Agreement.

American Express sublicense to Use American Express Marks. You shall only use the American Express Marks as reasonably necessary to perform your obligations under the Agreement. The guidelines listed below apply to the Merchant's use of the American Express "Blue Box" logo.

- The "Blue Box" logo must always be shown in the pre-approved "American Express blue" or, in one- or two-color communications, or black.
- The space around the "Blue Box" must equal at least 1/3 the size of the box.
- The "Blue Box" logo minimum size is 3/8" and 1/2" is the preferred size.
- A minimum distance of 1-1/2 times the size of the "Blue Box" must be allowed between the "Blue Box" logo and another Mark.
- For additional guidelines on the use of the American Express Marks, you can visit the American Express website at [www.americanexpress.com/decals](http://www.americanexpress.com/decals).
- You must remove American Express Marks from your website and wherever else they are displayed upon termination of the Agreement or if you do not elect to accept or are not authorized to accept American Express Cards.

**10. Suspect Transactions.** A new Section 2.01(M) is hereby added to the Terms and Conditions as follows:

**M. Suspect Transactions.** Ask yourself, does the customer:

- frequently make purchases and then return goods for cash?
- use a prepaid Card to purchase other prepaid Cards?
- use a large numbers of prepaid Cards to make purchases?

Ask yourself, does the Card have an altered Magnetic Stripe?

**11. Sales/Credit Drafts.** A new Section 2.03(J) is hereby added to the Terms and Conditions as follows:

**J. Sales Drafts for American Express Transactions.** You must create a Sales Draft for every Charge. For each Charge submitted electronically, you must create an electronically reproducible Sales Draft. The Sales Draft (and a copy of the customer's receipt) must disclose your return and/or cancellation policies.

If the Cardholder wants to use different Cards for payment of a purchase, you may create a separate Sales Draft for each Card used. However, if the Cardholder is using a single Card for payment of a purchase, you shall not divide the purchase into more than one Charge, nor shall you create more than one Sales Draft.

- Submit the Charge to American Express directly, or through your NMS, for payment.
- Retain the original Sales Draft (as applicable) and all documents evidencing the Charge, or reproducible records thereof, for the timeframe listed in our country-specific policies.
- Provide a copy of the Sales Draft to the Cardholder.

You may be able to create more than one Sales Draft if the purchase qualifies for a delayed delivery Charge. The retention time frame for Sales Drafts is twenty-four (24) months from the date you submitted the corresponding Charge to us. Pursuant to applicable law, truncate the Card number and do not print the Card's expiration date on the copies of Sales Drafts delivered to Cardholders. Truncated Card number digits must be masked with replacement characters such as "x," or "#," and not blank spaces or numbers. If you submit Charges on paper, you must create a Sales Draft containing all of the following required data:

- Full Card number and expiration date (pursuant to applicable law), and if available, Cardholder name.
- The date the Charge was incurred.

- The amount of the Charge, which must be the total price for the purchase of goods and services (plus applicable taxes and gratuities) purchased on the Card.
- A clear description of the goods or services purchased by the Cardholder.
- An imprint or other descriptor of you name, address, Merchant Account Number and, if applicable, store number.
- The words "no refunds" if you have a no refund policy, and you return and/or cancellation policies.

**American Express No Signature Program.** You may participate in the American Express No Signature Program. The No Signature Program allows establishments not to request a signature from Cardholders on the Sales Draft. To qualify for the No Signature Program, both the establishment and each Charge must meet the following criteria:

**Establishment Criteria.** If your establishment is classified in an industry that accepts in-person Charges, then the establishment may participate in the No Signature Program with the exception of the following categories:

- Merchants who do not conduct in-person Charges (i.e., internet, mail order or telephone order).
- Prohibited transactions or illegal transactions or activity, as described elsewhere in the Agreement.
- High Risk Merchants (e.g., establishments whose business type has had historically high occurrences of fraud and disputed charges with American Express or as compared to other similarly situated merchants (or both); examples include internet electronic services or nightclubs/lounges) as determined by American Express in its sole discretion.
- Merchants placed in American Express' Fraud Full Recourse Program.

**Charge Criteria:**

- The amount or Charge must meet the threshold established in American Express' country specific policy.
- The Charge submission must include the appropriate indicator to reflect that the Card and the Cardholder were present at the point of sale.
- The Charge Submission must include a valid approval.

Under the No Signature Program, Chargebacks will not be exercised for such Charges based solely on the establishment's failure to obtain the Cardholder's signature at the point of sale. If a disproportionate amount or a number of disputed Charges under the No Signature Program occur, you must cooperate to reduce the amount or number of disputed Charges. If such efforts fail, you may be placed in American Express Chargeback programs, or your establishment's participation in the No Signature Program may be modified or terminated. The established threshold for charges to qualify under the No Signature Program is \$50.00 or less.

**12. Card Not Present Sales.** A new Section 2.05(H) is hereby added to the Terms and Conditions as follows:

**H. American Express Internet Charges.**

For internet orders, you must use separate Merchant Account Numbers provided to you for internet orders on all your requests for Authorization and submission of charges, provide at least one (1) month's prior written notice of any change in your internet address, and comply with any additional requirements that may be added from time to time. Additionally, if a disputed Charge arises involving a Card Not Present Charge that is an internet electronic delivery Charge, a Chargeback may be exercised for the full amount.

Processing a Card Not Present Charge for American Express Transactions you must:

- Submit the Charge to American Express;

For Card Not Present Charges, you must create a Sales Draft and ask the Cardholder to provide:

- Card number;
- Card expiration date;

In addition, it is recommended that you ask for:

- Name as it appears on the Card,
- Cardholder's billing address, and
- Ship-to address, if different from the billing address.

American Express will not Chargeback for such charges based solely upon a Cardholder claim that he or she did not receive the disputed goods if you have:

- Verified the address to which the goods were shipped was the Cardholder's full billing address.
- Provided proof of delivery signed by the Cardholder or an authorized signer of the Card indicating the delivery of the goods or services to the Cardholder's full billing address.

American Express will not be liable for actual or alleged fraudulent transactions over the internet and will have the right to Chargeback for those charges.

Additionally, if a disputed Charge arises involving a Card Not Present Charge that is an internet electronic delivery Charge, American Express may exercise Chargeback for the full amount of the Charge and place you in any of its Chargeback programs.

**13. Authorizations.** Your obligations under the Agreement with respect to Authorizations (which may be set forth in Section 2.02 of the Terms and Conditions) are supplemented by the following terms and conditions:

An Authorization approval code only indicates the availability of Credit on an account at the time the Authorization is requested. It does not warrant that the person presenting the Card is the rightful Cardholder, nor is it a promise or guarantee that you will not be subject to a Chargeback.

For American Express, you must obtain an Authorization approval code except for charges under a floor limit. The Authorization must be for the full amount of the Charge except for merchants that are classified in the restaurant industry.

A positive Authorization response for American Express Non T&E transactions are good for seven (7) days, and American Express T&E transactions are good for thirty (30) days.

Do not discuss reason for decline with a Cardholder rather refer them to the customer service number on the back of the Card.

An authorization reversal may only be submitted if the transaction has not settled. Once the transaction has settled, only a Credit or refund can occur.

**14. Settlement.** A new Section 2.04(E) is hereby added to the Terms and Conditions as follows:

**E. Settlement.** For the avoidance of doubt, with respect to the payments you have elected to accept on your Merchant Processing Application, you authorize us to submit Card transactions to, and receive settlement for such transactions from, the applicable Card Organizations on your behalf.

**15. Credits.** Your obligations under the Agreement with respect to refunds/exchanges (Credits) (which may be set forth in Section 2.04(B) of the Terms and Conditions) are supplemented by the following terms and conditions:

Processing a Credit for American Express Transactions. These are additional requirements for a Credit for purchases or payments made on an American Express Card. To issue a Credit, you must:

1. Compare the last four digits on the Sales Draft against the Card presented (when applicable).
2. Have the Cardholder sign the Credit Draft (when applicable).
3. Provide a copy of the Credit Draft to the Cardholder.

You must not issue a Credit when there is no corresponding Charge, nor issue a Credit in exchange for cash or other consideration from a Cardholder. You must submit all Credits under the establishment where the Credit originated. A Credit must be issued in the currency in which the original Charge was submitted to us. You must issue Credits to the Card used to make the original purchase; however, if the Credit is for the return of a gift by someone other than the Cardholder who made the original purchase, apply your usual refund policy.

If the Cardholder indicates that the Card on which the purchase was originally made is no longer active or available, do the following:

- For all Cards except Prepaid Cards, advise the Cardholder that you must issue the Credit to that Card. If the Cardholder has questions, advise him or her to call the customer service number on the back of the Card in question.
- If the inactive or unavailable Card is a Prepaid Card, apply your usual refund policy for returns.

American Express will retain all fees collected by it on all Chargebacks and Credits. This means that if you issue a Credit or incur a Chargeback, American Express will not refund any fees collected by it with respect to the corresponding Charge.

Your return and cancellation policies must be fair and clearly disclosed at the time of sale in compliance with applicable law. Your policies must be conveyed to the Cardholder prior to completion of the Charge and printed on a copy of a receipt or Sales Draft. Your refund policy for purchases on the American Express Card must be at least as favorable as your refund policy for purchases made with other payment products or other payment methods.

Return Policy recommendations.

Provide clear return instructions for your customers, including the following information:

- Customer service telephone number.
- Reference number for the return.
- Expected processing time for the Credit.
- Return address, preferably on a pre-formatted shipping label (if applicable).

You must submit all Credits to us within seven (7) days of determining that a Credit is due.

#### Cancellation Policy Recommendations.

- Provide document cancellation policy and terms and conditions on the contract the Cardholder signs, or on your website, as applicable.
- Provide Cardholder with a cancellation number that can be tracked in your records.

#### American Express Return Policy for Prepaid Products.

If your return policy for the purchase of prepaid products is different from your standard return policy, you must ensure that such prepaid product-specific return policy is clearly disclosed to the Cardholder at the time of purchase in accordance with applicable law and also coded to print on all receipts and copies of Sales Drafts you provide to Cardholders.

### **16. Special Provisions for American Express.**

A new Article VIII is hereby added to the Terms and Conditions as follows:

#### **ARTICLE VIII – SPECIAL PROVISIONS FOR AMERICAN EXPRESS.**

In this Article VIII, “we”, “us” and the like refer to NMS exclusively.

##### **8.01 CARD ACCEPTANCE.**

If you elect to accept American Express Cards under the Agreement, You must accept the American Express Card as payment for goods and services sold (other than those goods or services identified under “Prohibited Uses of the American Express Card” below), or (if applicable) for charitable contributions made, at all of your establishments, except as expressly permitted by applicable law. You are jointly and severally liable for the obligations of your establishments under the Agreement.

##### **8.02 ARBITRATION AGREEMENT FOR CLAIMS INVOLVING AMERICAN EXPRESS.**

In the event that you or we are not able to resolve a Claim this Section 8.02 explains how Claims may be resolved through arbitration. You or we or American Express may elect to resolve any Claim by binding individual arbitration. Claims will be decided by a neutral arbitrator.

If arbitration is elected by any party to resolve a Claim, the parties understand and agree that neither you nor we nor American Express will have the right to litigate or have a jury trial on that Claim in court. Further, you, we, and American Express understand and agree that the parties will not have the right to participate in a class action or in a representative capacity or in a group of persons alleged to be similarly situated pertaining to any Claim subject to arbitration under the Agreement. Arbitrator’s decisions are final and binding, with very limited review by a court, and once confirmed by a court of competent jurisdiction, an arbitrator’s final decision on a Claim is generally enforceable as a court order. Other rights you, we, or American Express would have in court may also not be available in arbitration.

**A. Initiation of Arbitration.** Claims may be referred to either JAMS or AAA, as selected by the party electing arbitration. Claims will be resolved pursuant to this Section 8.02 and the selected arbitration organization’s rules in effect when the Claim is filed, except where those rules conflict with the Agreement. Contact JAMS or AAA to begin an arbitration or for other information. Claims may be referred to another arbitration organization if all parties agree in writing, if [American Express or we, on one hand, selects the organization and you, on the other hand,] select the other within 30 days thereafter or if an arbitrator is appointed pursuant to section

5 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA). Any arbitration hearing will take place in New York, NY.

**B. Limitations on Arbitration.** If any party elects to resolve a Claim by arbitration, that Claim will be arbitrated on an individual basis. No Claim is to be arbitrated on a class or purported representative basis or on behalf of the general public or other persons allegedly similarly situated. The arbitrator’s authority is limited to Claims between you, us, and American Express. An arbitration award and any judgment confirming it will apply only to the specific case brought by you, us or American Express and cannot be used in any other case except to enforce the award as between you, NMS and American Express. This prohibition is intended to, and does, preclude you from participating in any action by any trade association or other organization against American Express. Notwithstanding any other provision in this Section 8.02, if any portion of these Limitations on Arbitration set forth in this Section 8.02 (ii) is found invalid or unenforceable, then the entire Section 8.02 (other than this sentence) will not apply, except that you, we, and American Express do not waive the right to appeal that decision.

**C. Previously Filed Claims/No Waiver.** You, we, or American Express may elect to arbitrate any Claim that has been filed in court at any time before trial has begun or final judgment has been entered on the Claim. You, we, or American Express may choose to delay enforcing or to not exercise rights under this Section 8.02, including the right to elect to arbitrate a claim, without waiving the right to exercise or enforce those rights on any other occasion. For the avoidance of any confusion, and not to limit its scope, this Section 8.02 applies to any class-action lawsuit relating to the “Honor All Cards,” “non-discrimination,” or “no steering” provisions of the American Express Merchant Regulations, or any similar provisions of any prior American Express Card acceptance agreement, that was filed against American Express prior to the effective date of the Agreement to the extent that such claims are not already subject to arbitration pursuant to a prior agreement between Merchant and American Express.

**D. Arbitrator’s Authority.** The arbitrator will have the power and authority to award any relief that would have been available in court and that is authorized under the Agreement. The arbitrator has no power or authority to alter the Agreement or any of its separate provisions, including this Section 8.02.

**E. Split Proceedings for Equitable Relief.** You, we, or American Express may seek equitable relief in aid of arbitration prior to arbitration on the merits if necessary to preserve the status quo pending completion of the arbitration. This Section 8.02 shall be enforced by any court of competent jurisdiction.

**F. Small Claims.** American Express will not elect arbitration for any Claim you properly file in a small claims court so long as the Claim seeks individual relief only and is pending only in that court.

**G. Governing Law/Arbitration Procedures/Entry of Judgment.** This Section 8.02 is made pursuant to a transaction involving interstate commerce and is governed by the FAA. The arbitrator shall apply New York law and applicable statutes of limitations and honor claims of privilege recognized by law. The arbitrator shall apply the rules of the arbitration organization selected, as applicable to matters relating to evidence and discovery, not federal or any state rules of procedure or evidence, provided that any party may ask the arbitrator to expand discovery by making a written request, to which the other parties will have 15 days to respond before the arbitrator rules on the request. If your Claim is for \$10,000 or less, you may choose whether the arbitration will be conducted solely based on documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing under the rules of the selected arbitration organization. At the timely request of a party, the arbitrator will provide a written opinion explaining his/her award. The arbitrator’s decision will be final and binding, except for any rights of

appeal provided by the FAA. Judgment on an award rendered by the arbitrator may be entered in any state or federal court in the federal judicial district where your headquarters or your assets are located.

**H. Confidentiality.** The arbitration proceeding and all information submitted, relating to or presented in connection with or during the proceeding, shall be deemed confidential information not to be disclosed to any person not a party to the arbitration. All communications, whether written or oral, made in the course of or in connection with the Claim and its resolution, by or on behalf of any party or by the arbitrator or a mediator, including any arbitration award or judgment related thereto, are confidential and inadmissible for any purpose, including impeachment or estoppel, in any other litigation or proceeding; provided, however, that evidence shall not be rendered inadmissible or non-discoverable solely as a result of its use in the arbitration.

**I. Costs of Arbitration Proceedings.** You will be responsible for paying your share of any arbitration fees (including filing, administrative, hearing or other fees), but only up to the amount of the filing fees you would have incurred if you had brought a claim in court. American Express will be responsible for any additional arbitration fees. At your written request, American Express will consider in good faith making a temporary advance of your share of any arbitration fees, or paying for the reasonable fees of an expert appointed by the arbitrator for good cause.

**J. Additional Arbitration Awards.** If the arbitrator rules in your favor against American Express for an amount greater than any final settlement offer American Express made before arbitration, the arbitrator's award will include: (1) any money to which you are entitled as determined by the arbitrator, but in no case less than \$5,000; and (2) any reasonable attorneys' fees, costs and expert and other witness fees incurred by you.

**K. Definitions.** For purposes of this Section 8.02 only, (i) "American Express" includes its Affiliates, licensees, predecessors, successors, or assigns, any purchasers of any receivables, and all agents, directors, and representatives of any of the foregoing, (ii) "You" includes your Affiliates, licensees, predecessors, successors, or assigns, any purchasers of any receivables and all agents, directors, and representatives of any of the foregoing, and (iii) "Claim" means any allegation of an entitlement to relief, whether damages, injunctive or any other form of relief, against American Express or any other entity (including you or us) that American Express has the right to join, including any allegation involving a transaction using an American Express product or network or regarding an American Express policy or procedure.

### 8.03 TREATMENT OF THE AMERICAN EXPRESS BRAND.

Except as expressly permitted by applicable law, you must not:

- indicate or imply that you prefer, directly or indirectly, any other payment products over the Card,
- try to dissuade Cardholders from using the Card,
- criticize or mischaracterize the Card or any of American Express' services or programs,
- try to persuade or prompt Cardholders to use any other payment products or any other method of payment (e.g., payment by check),
- impose any restrictions, conditions, disadvantages or fees when the Card is accepted that are not imposed equally on all other payment products, except for electronic funds transfer, or cash and check,
- suggest or require Cardholders to waive their right to dispute any transaction,
- engage in activities that harm the American Express business or the American Express Brand (or both), promote any other payment products (except your own private label

card that you issues for use solely at your establishments) more actively than you promote the Card, or

- convert the currency of the original sale transaction to another currency when requesting Authorization or submitting transactions (or both).

You may offer discounts or in-kind incentives from your regular prices for payments in cash, ACH funds transfer, check, Debit Card or Credit Card, provided that (to the extent required by applicable law): (i) you clearly and conspicuously disclose the terms of the discount or in-kind incentive to your customers, (ii) the discount or in-kind incentive is offered to all of your prospective customers, and (iii) the discount or in-kind incentive does not differentiate on the basis of the issuer or, except as expressly permitted by applicable law and Card Organization (e.g., Visa, MasterCard, Discover, JCB, American Express). The offering of discounts or in-kind incentives in compliance with the terms of this section will not constitute a violation of the provisions set forth in the above section "Treatment of the American Express Brand."

### 8.04 PROHIBITED USES OF THE AMERICAN EXPRESS CARD.

You must not accept the Card for any of the following:

- adult digital content sold via internet electronic delivery,
- amounts that do not represent bona fide sales of goods or services (or, if applicable, amounts that do not represent bona fide charitable contributions made) at your establishments. For example, purchases at your establishments by your owners (or their family members) or employees contrived for cash flow purposes, or payments that you have accepted in order to advance cash to Cardholders in connection with the transaction,
- amounts that do not represent bona fide, direct sales by your establishment to Cardholders made in the ordinary course of your business,
- cash or cash equivalent (e.g., gold, silver, platinum, and palladium bullion and/or bars). Collectible coins and jewelry are not prohibited,
- charges that the Cardholder has not specifically approved,
- costs or fees over the normal price of the goods or services (plus applicable taxes) that the Cardholder has not specifically approved,
- damages, losses, penalties, or fines of any kind,
- gambling services (including online gambling), gambling chips, gambling credits, or lottery tickets,
- unlawful/illegal activities, fraudulent business transactions or when providing the goods or services is unlawful/illegal (e.g. unlawful/illegal online internet sales of prescription medications or controlled substances; sales of any goods that infringe the rights of a rights-holder under laws applicable to us, you, or the Cardholder; online child pornography),
- overdue amounts or amounts covering returned, previously dishonored or stop-payment checks (e.g., where the Card is used as a payment of last resort),
- sales made by third parties or entities conducting business in industries other than yours,
- other items of which either we or American Express notifies you of,
- You must not use the Card to verify a customer's age.

### 8.05 AMERICAN EXPRESS TRANSACTION DATA.

The transaction data you collect to facilitate the Charge must be or have been provided directly to you by the Cardholder. You must not accept or have accepted transaction data from, nor shall you provide or have provided transaction data to, any third parties other

than your covered parties (as defined in the Data Security Operating Policy (DSOP)). If you fail to comply with this requirement, in addition to other rights and remedies regarding "monitoring", you may be charged a fee as indicated on the Merchant Processing Application, we may suspend Card acceptance privileges at your establishments, or terminate the Agreement. Where Cardholders pay you using payment or "e-wallet" accounts (which Cardholders may have created by providing Cardholder information when the account was established), the transaction data collected to facilitate the Card Not Present Charge has already been provided directly by the Cardholder. You are not required to have the Cardholder re-enter the transaction data. All information required by American Express evidencing one or more transactions, including information obtained at the point of sale, information obtained or generated during Authorization and Submission, and any Chargeback.

#### **8.06 TREATMENT OF AMERICAN EXPRESS CARDHOLDER INFORMATION.**

You acknowledge that any and all American Express Cardholder information is confidential and the sole property of the Issuer, American Express or any of its Affiliates. Except as otherwise specified in the Agreement, you must not disclose Cardholder information, nor use nor store it, other than to facilitate transactions at your establishments in accordance with the Agreement.

#### **8.07 DISCLOSURE AND USE OF DATA COLLECTED UNDER AGREEMENT.**

We may disclose to American Express data and information that you provide on your Application and that we collect as part of performing American Express payment processing services or transaction related services including information about you. American Express may use the information that you provide in the Application at the time of setup to screen and/or monitor you 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 your 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.

**A. Consent for American Express to Contact You by Phone, Email, Text or Facsimile.** American Express may use the information you provide in the Application (as such information may be updated) to call you or send you communications or materials via email, SMS, text or facsimile regarding American Express products, services and resources available to you. You consent and agree to receive autodialed, automated and/or prerecorded calls and communications (which may include SMS or text messages) at the telephone number(s) you have provided. If you provide a fax number, you consent and agree to receiving fax communications from American Express. In connection with the foregoing, you understand that the calls made or communications sent to you by American Express may be subject to charges or fees by your telecommunications or other applicable service provider that are your responsibility to pay. You understand that your consent under this Section 8.07 is not a condition of purchasing or receiving any product or service or entering into the Agreement. **Opt-Out:** You may opt-out of receiving marketing related communications and materials from American Express by calling NMS's Customer Service at 1-800-277-6980 or such other customer service or other number provided to you by NMS from time to time. If you have opted-out, you may still receive messages or communications from

American Express related to important information about your account.

#### **8.08 CONVERSION TO A DIRECT RELATIONSHIP WITH AMERICAN EXPRESS.**

You acknowledge and agree that upon written notice from us, you will be converted to a direct American Express Card acceptance relationship with American Express if and when the annual American Express Card charges that you submit under the Agreement are greater than \$1,000,000. You agree that, upon conversion, (i) you will be bound by American Express' then-current Card Acceptance Agreement with respect to American Express Transactions; (ii) American Express will set pricing and other fees payable by you for American Express Card acceptance; and (iii) you will no longer be able to submit American Express Card transactions under the Agreement, but the Agreement will continue in full force and effect with respect to other payments and services you elected to receive on your Application.

#### **8.09 NO ASSIGNMENT OF PAYMENTS.**

You acknowledge and agree that you shall not assign to any third party any payments due to you under the Agreement as the result of American Express Card transactions, and all indebtedness arising from American Express Card charges will be for bona fide sales of goods and services (or both) at your establishments and free of liens, claims, and encumbrances other than ordinary sales taxes; provided, however, that you may sell and assign future transaction receivables to us, our Affiliates and/or any other funding source that partners with us or our Affiliates,

#### **8.10 THIRD PARTY BENEFICIARY RIGHTS.**

American Express is a direct and intended third-party beneficiary of the Agreement, and may enforce any terms of the Agreement that apply to American Express, including American Express Card acceptance and transaction processing, directly against you.

#### **8.11 YOUR RIGHT TO OPT OUT OF AMERICAN EXPRESS CARD ACCEPTANCE.**

You may opt out of accepting American Express Cards at any time without directly or indirectly affecting your rights to accept any other payment products by calling NMS's Customer Service at 1-800-277-6980 or such other customer service or other number provided to you by NMS from time to time.

#### **8.12 Collections from American Express Cardholder.**

You may not bill or collect from any American Express Cardholder for any purchase or payment on the American Express Card unless a Chargeback has been exercised, you have fully paid for such Charge, and you otherwise have the right to do so.

#### **8.13 COMPLETING A TRANSACTION AT THE POINT OF SALE.**

All valid transactions begin with a Cardholder's purchase at the point of sale. Whether the physical Card is used to facilitate a Card present Charge, or the Cardholder provides his or her Cardholder Information over the phone, via mail order, or the internet, the transaction must not be completed without the Card and/or information provided by the Cardholder. To accept the Card for charges at your establishments, at the point of sale, you must:

- Clearly and conspicuously, disclose all material terms of sale prior to obtaining an Authorization, and
- Clearly and conspicuously inform Cardholders at all points of interaction (e.g., sales conducted in person, over the internet, mobile or via mail or telephone order) what entity is making the sales offer, so that the Cardholder can clearly distinguish you from any other party involved in the interaction (e.g., a vendor of goods or provider of services

you may engage, or another merchant seeking to conduct business with the Cardholder).

The transaction data you collect to facilitate the Charge must be or have been provided directly to you by the Cardholder. You must not accept or have accepted transaction data from, nor shall you provide or have provided transaction data to, any third parties other than your covered parties (as defined in the Data Security Operating Policy (DSOP)). If you fail to comply with this requirement, you may be charged noncompliance or other fees as indicated on the Merchant Processing Application and/or have your Card acceptance privileges at required your establishments suspended or disentitled.

#### **8.14 IN PERSON CHARGES.**

In-person charges refer to charges in which the Card and Cardholder are present at the point of sale. An example of this is when a Cardholder presents a Card to the merchant at a retail store. For all in-person charges, the Card must be presented. There are several ways in which you can conduct the in-person Charge. The steps you take vary according to how you go about conducting both types of in-person charges.

#### **8.15 ELECTRONIC CHARGES OR KEY-ENTERED CHARGES.**

Electronic point of sale systems automatically capture required information from the Card so it can be used to request Authorization for the Charge. Electronic charges can be conducted in a variety of ways depending on the type of card presented.

- Magnetic Stripe Cards – contain Card Member and Card account information on the stripe on the back of the Car, or in a contactless Chip embedded in the Card.
- Chip Cards – contain a Chip on which data is stored (including Card Member and Card account information), which the point of sale system can read in order to guide the processing of the Transaction.

Some Magnetic Strip and Chip Cards may be read over the contactless interface of the point of sale system. The Charge record is then created from the information captured during the electronic Charge.

When providing proof of delivery, a signature from the Cardholder or an authorized signer of the Card is not required.

#### **8.16 MAGNETIC STRIPE CARD CHARGES.**

When presented with a Card at the point of sale you must:

- Verify that the Card is not visibly altered or mutilated.
- Verify that the customer is the Cardholder (Cards are not transferable).
- Obtain an Authorization Approval.
- Capture Magnetic Stripe data by swiping the Card (unless the Charge was already initiated by waving the contactless chip Card in close proximity to the point of sale system).
- Match the Card number and the expiration date on the Card to the same information on the Sales Draft.
- Ensure the name that prints on the Sales Draft matches the name on the front of the Card except when the Cardholder name is not captured on the Sales Draft or for prepaid Cards that do not show a name on their face.
- Validate the Card's presence by taking an imprint of the Card (the imprint is for your records). Failure to validate the Card's presence by taking an imprint of the Card can render merchant liable for Chargebacks if the Cardholder disputes the Charge, except when the Cardholder name is not captured on the Sales Draft or for prepaid Cards that do not show a name on their face.

#### **8.17 AMERICAN EXPRESS MOBILE CONTACTLESS CHARGES.**

When presented with a contactless-enabled mobile phone, in addition to the "Magnetic Stripe Card Charges" requirements, you must:

- Capture Magnetic Stripe or chip Card data by waving the contactless-enabled mobile phone in close proximity to the contactless reader.
- Compare the signature (when obtained) on the Sales Draft with the signature on the companion physical Card or a valid form of formal identification (e.g. driver's license). You must not record or store the information from such formal identification in any way.

If a mobile contactless transaction cannot be processed for any reason, you should require that the Cardholder provide the companion physical Card to complete the transaction.

#### **8.18 AMERICAN EXPRESS CONTACT CHIP CHARGES.**

When presented with a chip Card to be inserted into a chip Card reader, in addition to the "Magnetic Stripe Card Charges" requirements, you must:

- Capture chip Card data by inserting the Card into the chip Card reader, the point of sale system will advise Cardholders to enter their PIN (a chip and PIN Charge) or sign for the Charge (a chip and signature Charge).
- Chip and PIN Charges. Cardholders will enter their PIN into the point of sale system using the keypad. If the chip and PIN Charge are unable to be completed due to a technical problem, the point of sale system will show an error message.
- Chip and signature Charge. Failure to obtain a signature, when required, can render you liable for Chargebacks if the Cardholder disputes the Charge. Obtaining a signature may not be required if merchant's establishment and the Charge qualify for the No Signature Program.

#### **8.19 AMERICAN EXPRESS CONTACTLESS CHIP CHARGES.**

When presented with a chip Card to be read via a contactless reader and the Charge qualifies for the No Signature Program, in addition to the "Magnetic Stripe Card Charges" requirements, you must:

- Capture Magnetic Stripe or chip Card data using the contactless reader.
- For charges that do not qualify under the No Signature Program, follow the relevant Card acceptance procedures outlined in either:
  - "Magnetic Stripe Card Charges," or
  - "Contact Chip Card Charges."

#### **8.20 AMERICAN EXPRESS KEY-ENTERED CHARGES.**

If a Card cannot be read electronically, in addition to the "Magnetic Stripe Card Charges" requirements, you must:

- Key enter the data.
- Validate the Card's presence by taking an imprint of the Card (the imprint is for your records). Failure to validate the Card's presence by taking an imprint of the Card can render you liable for Chargebacks if the Cardholder disputes the Charge.

#### **8.21 KEYED NO IMPRINT FOR AMERICAN EXPRESS TRANSACTIONS.**

- Your establishments may be eligible to participate in the American Express “Keyed No Imprint Program.” The “Keyed No Imprint Program” allows you to submit in-person charges without taking an imprint of the Card if you meet the following Charge criteria:
- All Cards qualify for the “Keyed No Imprint Program.”
- The Charge must be key-entered.
- The Charge Submission must include the appropriate indicator to reflect that the Card and the Cardholder were present at the point of sale.
- The Charge Submission must include a valid approval, and;
- The CID Number must be confirmed as a positive match. Under the “Keyed No Imprint Program,” Chargebacks will not be exercised for such Charges based solely on the establishment’s failure to obtain an imprint of the Card. If a disproportionate amount or number of disputed Charges under the “Keyed No Imprint Program” occurs, you must cooperate to reduce the number of disputed Charges. If such efforts fail, you may be placed in any of American Express’ Chargeback programs or your participation in the “Keyed No Imprint Program” may be modified or terminated.

#### **8.22 MERCHANT WEBSITE INFORMATION DISPLAY GUIDELINES.**

- An accurate description of the goods/services offered, including the currency type for the transaction (e.g., U.S. Dollars). Transaction currency must be in U.S. Dollars.
- Your physical address in the U.S.
- An email address and a telephone number for customer service disputes.
- Return/refund policy.
- A description of your delivery policy (e.g., No COD, No overnight).
- A description of your security practices (e.g., information highlighting security practices you use to secure transactions conducted on the internet).
- A statement of known export restrictions, tariffs, and any other regulations.
- A privacy statement regarding the type of personal information collected and how the information is used. Additionally, you must provide to customers the option to decline being included in marketing campaigns or having their personal information included on lists sold to third parties.

#### **8.23 AGGREGATED CHARGES.**

If you are classified as an internet industry, you may process aggregated charges, provided the following criteria are met:

- Clearly disclose your intent and obtain written consent from the Cardholder that their purchases or refunds (or both) on the Card may be aggregated and combined with other purchases or refunds (or both) before you request an Authorization.
- Each individual purchase or refund (or both) that comprises the aggregated Charge must be incurred under the same merchant number and on the same Card.
- Obtain a pre-Authorization of no more than \$15. 00
- Create a Sales Draft for the full amount of the aggregated Charge.
- The amount of the aggregated Charge must not exceed \$15 or the amount for which you obtained pre-Authorization.

- Submit each Sales Draft within our submission timeframe.
- Provide the Cardholder with an email containing the date, amount, and description of each individual purchase or refund (or both) that comprises the aggregated Charge, and the date and the amount of the aggregated Charge.

#### **8.24 AMERICAN EXPRESS PREPAID CARD SECURITY FEATURES.**

Although there are a number of unique prepaid Cards, all prepaid Cards share similar features, except that Prepaid Cards may or may not be embossed, and the following features may appear on the front or back of the Card (or a combination of both):

- The American Express logo generally appears in the bottom right corner.
- The words PREPAID or INCENTIVE will generally be shown above the American Express logo.
- Cards pre-loaded with funds may show the dollar amount or the total points (reloadable Cards generally will not show a number).
- The CID Number will appear usually above the Card number or above the logo.
- The Card number appears on the Card.
- The valid date or expiration date appears on the Card.
- The recipient’s name or company name may appear on the Card.

#### **8.25 AMERICAN EXPRESS PROCESSING PREPAID CARDS.**

Prepaid Cards are available for a variety of uses: gifting, travel, incentive, etc. All American Express prepaid Cards show the American Express “Blue Box” logo either on the face or back of the prepaid Card. Prepaid Cards may or may not be embossed. Most prepaid Cards can be used for both in-store and online purchases. Prepaid Cards are valid through the date on the Card. Simply swipe the Card at the point of sale just like any other Card. A prepaid Card must be tendered for an amount that is no greater than the funds available on the Card.

- Instruct Cardholders that, before making a purchase, they must check their remaining funds by calling the twenty-four (24) hour, toll-free number on the back of the Card.
- Because prepaid Cards are pre-funded, if you receive a decline when seeking Authorization, ask the customer to call the toll-free number on the back of the Card to confirm that the purchase price does not exceed the available funds on the prepaid Card.
- If the prepaid Card does not have enough funds to cover the purchase price, process a split tender transaction or request an alternative form of payment.
- You must create a Sales Draft for a prepaid Card as you would any other Card.
- Be on the lookout for Suspect Transactions.

#### **8.26 AMERICAN EXPRESS POLICIES AND PROCEDURES FOR SPECIFIC INDUSTRIES.**

This Section 8.26 states additional American Express policies and procedures applicable to merchants classified in specific industries. All other provisions and requirements of the Agreement apply to these merchants as well. To the extent possible, the provisions of this Section 8.26 and the other provisions of the Agreement applicable to American Express transactions shall be interpreted to give each their full effect. However, if a conflict is deemed to exist between them, then the provisions of this Section 8.26 shall govern.

**A. Auto dealers.** This section applies to merchants classified in an auto dealer industry.

The following requirements will apply to Charges for the down payment or the entire purchase price of new and used motor vehicles. You may accept the Card for down payment of a motor vehicle, subject to the following provisions:

- You must not submit a Charge for the down payment price of a used motor vehicle unless and until you have a written agreement/bill of sale signed by the Cardholder setting forth the terms of the sale, including down payment price, and your cancellation policy.
- In addition to its other Chargeback rights, American Express also has Chargeback rights for any portion of the Charge for the down payment price of a used motor vehicle which is disputed by the Cardholder, if such disputed charge cannot be resolved in your favor based upon unambiguous language contained in the written agreement/bill of sale.
- Should a Cardholder exercise his or her right to rescind the written agreement/bill of sale during any rescission period set forth in the Cardholder's agreement with you or at law, you shall submit a Credit to us promptly.
- If American Express has classified you as an auto dealer of used motor vehicles exclusively, the down payment must not exceed 50% of the full purchase price of the motor vehicle.
- If the Cardholder denies making or authorizing the Charge, American Express will have Chargeback rights for such Charge in addition to our other Chargeback rights.

You may also accept the Card for the entire purchase price of a new or used motor vehicle, subject to the following provisions:

- You are classified as an auto dealer of new or new and used motor vehicles (i.e. Your dealership sells new motor vehicles exclusively or both new and used motor vehicles).
- The amount of the Charge does not exceed the total price of the motor vehicle after deduction of applicable discounts, taxes, rebates, cash down payments, and trade-in values.
- You must not submit a Charge for the entire purchase price of a new or used motor vehicle unless and until you have a written agreement/bill of sale signed by the Cardholder setting forth the terms of the sale, including purchase price, delivery date and your cancellation policy.
- In addition to other Chargeback rights, American Express also has Chargeback rights for any portion of the Charge for the entire purchase price of a new or used motor vehicle which is disputed by the Cardholder, if such disputed Charge cannot be resolved in your favor based upon unambiguous language contained in the written agreement/bill of sale.
- Should a Cardholder exercise his or her right to rescind the written agreement/bill of sale during any rescission period set forth in the Cardholder's agreement with you or at law, you shall submit a Credit to us promptly.
- If the Cardholder denies making or authorizing the Charge and you have not transferred title or physical possession of the motor vehicle to the Cardholder, American Express will have Chargeback rights for such Charge in addition to its other Chargeback rights.

**B. Business-to-Business (B2B)/ Wholesale Distribution.** If you are classified in the business-to-business (B2B) or wholesale distribution industries, and American Express determines that you are not in the telecommunications industry, then notwithstanding the prohibition in Section 8.4, "Prohibited Uses of the Card", you may accept the Card for overdue amounts to the extent that acceptance of overdue amounts is a common practice in your industry and does not constitute an attempt to obtain payment from the Cardholder whose prior methods of payment have, in American Express'

reasonable judgment, been difficult to collect or uncollectible. An indicator of such difficulty, for example, may be the fact that you have sent a customer account to collections.

To minimize your risk of a Chargeback with B2B Charges, always:

- Obtain a signature for all in-person charges. For Card Not Present Charges, obtain Proof of Delivery, and
- Maintain clear and accurate records of orders and returns.
- Notwithstanding anything in this Agreement to the contrary, you must not submit any Charge until the goods have been shipped or services have been provided to the Cardholder. To the extent that you have clearly disclosed your intentions to the Cardholder and the Cardholder agrees, then you may submit the following types of Charges to us before you ship the goods to the Cardholder:
- Charges representing deposits on custom and special orders (so long as you comply with applicable law) or goods not in inventory at the time the order is placed.
- Charges representing advance, partial, or full payment for goods that the Cardholder requests you to ship at a later date.

**C. Insurance.** This section contains provisions specific to establishments that are classified in the insurance industry. If any of your goods or services are sold or billed by independent agencies, then you must provide to American Express a list of such independent agencies and notify us of any subsequent changes in the list. American Express may use this list to conduct mailings that encourage such independent agencies to accept the Card. American Express may mention your name in such mailings, and you must provide us with a letter of endorsement or assistance as American Express may require. You must use your best efforts to encourage independent agencies to accept the Card. American Express acknowledges that you have no control over such independent agencies. From time to time, and subject to prohibited uses of the Card, American Express may establish joint marketing campaigns that promote Card acceptance specifically at your establishments or, generally, at insurance companies. A necessary purpose for which you submit Cardholder Information that is responsive to such joint marketing campaigns includes American Express' use of that information to perform back-end analyses to determine the success of such joint marketing campaigns. American Express undertakes no responsibility on your behalf for the collection or timely remittance of premiums. American Express will not be subject to any liability, under any circumstances, for any claim arising from, or related to, any insurance policy issued by you or your agencies. If the Card is accepted as payment for fixed rate cash value life insurance policies or fixed rate annuities under the Agreement, you represent and warrant to NMS that the fixed rate cash value life insurance policies and fixed rate annuities for which the Card will be accepted for premium payments are not securities requiring registration under the Securities Act of 1933.

**D. Oil/Petroleum.** If you are classified in the oil and petroleum industry, American Express may place you in the Fraud Full Recourse Program if you accept charges originating at a Customer Activated Terminal (CAT) gas pump. American Express will not exercise Chargeback up to a certain dollar amount for charges that qualify under the Oil Fraud Protection Program described below.

**Oil/Petroleum Requirements.** If you are classified in the oil and petroleum industry, you must:

- Obtain a unique Merchant Account Number for your CAT gas pump sales. If you conduct any other business at your

establishment (e.g., convenience store sales, car washing services), you must obtain a unique Merchant Account Number for those lines of business.

- Submit dealer location data along with each Authorization request and each Submission file. Dealer location data consists of your business':
- dealer number (store number)
- name
- street address
- city
- postal code

**Oil/Petroleum Recommendations.** American Express has implemented several policies and fraud prevention tools to assist in combating fraud at the gasoline pump.

American Express recommends that you:

- Set a pre-Authorization request of \$100 at your CAT gas pumps.
- For higher charges such as diesel, adjust the pre-Authorization amount to accommodate the higher charges.
- Set your CAT gas pumps to shut off when they reach the preauthorization amount.
- Request a separate Authorization for purchases that exceed the original pre-Authorization amount.

**Oil Fraud Protection Program.** The Oil Fraud Protection Program addresses counterfeit fraud Chargebacks at fuel pump CATs. Under this program, American Express will not exercise Chargeback for the amount of the Charge up to \$100 provided that both the establishment and each Charge meet the following criteria:

- The Authorization request meets the data requirements listed under CATs.
- The Authorization request must include the correct merchant category code (MCC) for "automated fuel dispensers" (5542),
- The Issuer determines that the Card used to initiate the Charge was counterfeit, and
- The establishment qualified for Chargeback protection under the program at the time of the Charge, as follows:

For an establishment to qualify under the Oil Fraud Protection Program, it (i) must authorize and submit Transactions under the unique Merchant Account Number (Seller ID) assigned to the establishment, and (ii) must have, in a given month, a counterfeit fraud to Charge volume ratio below 1%. An establishment whose counterfeit fraud to Charge volume ratio rises to or exceeds 1 % in a given month will not qualify under the Oil Fraud Protection Program until the ratio falls below 1% for three (3) consecutive months. Notwithstanding the foregoing, the Oil Fraud Protection Program does not apply to merchants that submit one Merchant Account Number (Seller ID) consolidated charges from multiple establishments (i.e., central submitters) or to the establishments that those merchants submit on behalf of. American Express offers a variety of fraud prevention tools which may enable merchants to reduce fraud in order to qualify and retain eligibility for the program.

**E. Restaurants.** If you are classified in the restaurant or bar industry, then the following Authorization procedures apply. If the final restaurant or bar Charge is no greater than the amount for which you obtained Authorization plus 20% of that amount, no further Authorization is necessary. If the final restaurant or bar Charge is greater than the amount for which you obtained Authorization by more than 20%, you must obtain Authorization for any additional amount of the Charge that is greater than the original

Authorization. When submitting the Charge, only include the initial approval.

**F. Telecommunications.** If American Express classifies you in the Telecommunications industry, notwithstanding anything to the contrary in the Agreement, American Express may place you in one or more of the following Chargeback programs: Partial Immediate Chargeback Program for an amount of \$50 or less; or Fraud Full Recourse Program. American Express may establish audit procedures determined in American Express' discretion to ensure that no charges except for recurring billing charges are submitted under the Merchant Account Number designated for recurring billing charges. We may request that you provide us with a list of Affiliates and the list you provide must include any agency in the geographic area -where you offer any telecommunications services.

**G. Government/Utilities/Education.** This section applies to merchants classified in the government, utilities, or certain education industries (i.e. higher education, private school - kindergarten to grade 12). Industry MCCs: 4900 – Public Utility, 8211 – Elementary and Secondary Schools, 8220 – Colleges and Universities, 8244 – Business Schools, 8249 – Trade Schools, 9211 – Court Costs, 9222 – Fines, 9311 – Tax Payments, 9399 – Government Services.

Customers should feel free to use all forms of payment that you accept without being penalized for choosing a particular form of payment. To promote consumer choice, you are generally prohibited from imposing any restrictions, conditions, or disadvantages when the Card is accepted that are not imposed equally on all other payment products. See "Treatment of the American Express Brand". Merchants in these specific industries may assess convenience fees on charges, provided that they comply with the other requirements of this section, as follows:

- Merchants must not impose a higher convenience fee on charges than it imposes on other payment products, except for Automated Clearing House funds transfers, cash, and checks.
- Merchants classified as government Entities, including government utilities, and privately owned utilities may assess convenience fees on all Charges.
- Merchants classified as educational institutions may assess convenience fees only on charges for tuition, room and board, school lunch payments or other mandatory fees.
- You must clearly disclose the amount of convenience fees to the customer and give the customer the opportunity to cancel the Charge if the customer does not want to pay the convenience fee.

Any explanation, verbal or written, describing why the convenience fee is being assessed, or how it is calculated, must characterize the convenience fee as an assessment to cover your administrative costs and not as an assessment to cover your cost of accepting the Card. You must obtain separate Authorizations and approval codes for each of the principal charges and the convenience fee. Furthermore, the descriptor on the convenience fee must clearly state that it is a convenience fee (e.g., Official Payments - City of X (principal payment) and Official Payments Convenience Fee (convenience fee)). Your third-party service provider can only assess a convenience fee when it accepts the Card for the foregoing charges in compliance with the requirements of this section.

**H. Internet/Online Pharmacies.**

If it is determined that you are an internet/online pharmacy merchant that accepts the Card for sales of prescription medications (as

defined by applicable law) in the Card Not Present environment:

- You must be certified by the Verified Internet Pharmacy Practice Sites program of the National Association of Boards of Pharmacy ), or,
- You or your authorized representative must attest that you comply with the licensing and inspection requirements of (i) U.S. federal law and the state in which you are located and (ii) each state to which you dispense pharmaceuticals.

Upon request, you must promptly provide documentation that you fulfill the foregoing requirements. Failure to provide this documentation promptly may result in suspension or disentanglement of Card acceptance privileges. Specific procedures exist for transaction processing by internet/online merchants.

**I. Online/mail order tobacco retail.** If you are classified or it is otherwise determined that you are an online or mail order (or both) tobacco or e-cigarette merchant, then you must provide the website address of the online store from which you sell your tobacco products. If your website facilitates tobacco sales, you will be required on request to provide an executed and notarized Affidavit of Compliance with Laws - Online/Mail Order Tobacco. If you fail to complete the Affidavit, Card acceptance privileges may be suspended. American Express may monitor your website.

#### **8.27 AMERICAN EXPRESS-EXCESSIVE DISPUTES.**

You may be subject to various fees and assessments as set forth on the Application including fees for excessive disputes. Some fees and assessments are for special products or services, while others may be applied based upon noncompliance of American Express policies and procedures. Many noncompliance fees and assessments can be avoided by correcting the actions that are causing such non-compliance.

**8.28 AMERICAN EXPRESS RIGHT TO MODIFY OR TERMINATE AGREEMENT.** American Express has the right to modify the Agreement (as supplemented by this Addendum) with respect to American Express Card transactions or to terminate your acceptance of American Express Card transactions and to require NMS to investigate your activities with respect to American Express Card transactions.

#### **17. Fees: Adjustments: Collection of Amounts Due.**

The following additional terms shall apply to the parties' rights and obligations under the Agreement with respect to Fees and Other Amounts Owed Bank (which may be set forth in Section 3.05 of the Terms and Conditions), which shall be added to the Terms and Conditions as a new Section 3.05(C):

**C. Other Debits.** We may also debit your Designated Account or your settlement funds in the event we are required to pay Card Association fees, charges, fines, penalties or other assessments as a consequence of your sales activities. Such debits shall not be subject to any limitations of time specified elsewhere in the Agreement:

- Card Association fees, charges, fines, penalties, registration fees, or other assessments including any fees levied against us or any amount for which you are obligated to indemnify us.
- Currency conversion was incorrectly calculated. NOTE: For Discover transactions, you are not permitted to convert from your local Discover approved currency into another currency, nor may you quote the price of a transaction in U.S. Dollars if completed in another approved currency.
- Discount Rate not previously charged.
- Reversal of deposit posted to your account in error.

- Debit for Summary Adjustment not previously posted. Reversal of Credit for deposit previously posted.
- Debit for Chargeback never posted to your account.
- Debit for EDO Batch error fee.
- Card Organization Merchant Chargeback/fraud monitoring fees - excessive Chargeback handling fees.
- Failure of transaction to meet Member Controller Authorization Service ("MCAS")-Cardholder account number on exception file.
- Original transaction currency (foreign) not provided.
- Travel Voucher exceeds maximum value.
- Debit and/or fee for investigation and/or Chargeback costs related to the Agreement, or for costs related to our collection activities in an amount no less than \$100.00.
- Costs arising from replacement or damage to equipment rented.
- Payment of current or past due amounts for any equipment purchase, rental or lease.
- Incorrect merchant descriptor (name and/or city, state) submitted.
- Incorrect transaction date submitted.
- Shipping and handling fees.
- Costs or expenses associated with responding to any subpoena, garnishment, levy or other legal process associated with your account in an amount no less than \$150.00.

You are solely responsible to inform us in writing if you want any fees or other adjustments to be debited from an account other than your Designated Account. You agree that in addition to any rights we have under the Agreement, we can offset any amounts owed to us or our Affiliates related to activity in other accounts maintained in your name or accounts guaranteed by you, any of your principals, guarantors or authorized signors. Alternatively, we may elect to invoice you for any such amounts, net due 30 days after the invoice date or on such earlier date as may be specified.

**18. Termination.** Terms applicable to the effect of termination of the Agreement (which may be set forth in Section 5.01 of the Terms and Conditions) are clarified by the addition of the following terms and conditions:

Should you fail to notify us in writing of your request to terminate you acknowledge and agree you will continue to be charged fees pursuant to the Agreement notwithstanding non- use of your account. If you have any equipment lease, termination of the Agreement does not terminate that equipment lease.

**19. Indemnification.** You acknowledge and agree that your obligations under the Agreement to indemnify and hold us harmless from and against certain losses, liabilities, damages and expenses obligations identified in the Agreement (which maybe set forth in Section 27 (Indemnification) of the Program Guide), hereby also apply to the Card Associations.

**20. Special Provisions Regarding American Express Cards.** Terms applicable to American Express transactions (which may be set forth in Section 2.05(F) of the Terms and Conditions) are amended as follows:

You understand and agree that if, based upon your anticipated Card transaction volume you do not qualify for our full service program (acceptance of American Express card Transactions pursuant to a direct agreement with us) but have otherwise been approved for accepting American Express transactions, your authorizations will be obtained from and funded by American Express. American Express will provide you with its own agreement that governs those

transactions. You understand and agree that we are not responsible and assume absolutely no liability with regard to any such transactions, including but not limited to the funding and settlement of American Express transactions, and that American Express will charge additional fees for the services they provide.

**21. Compliance with Law.** For the avoidance of doubt, you acknowledge and agree that in connection with your obligation under the Agreement to comply with all laws and regulations applicable to you, you will not use your merchant account and/or the Services for illegal transactions, for example, those prohibited by the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. Section 5361 et seq, as may be amended from time to time, or those involving any Person listed on the U.S. Department of Treasury, Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List (available at [www.treas.gov/ofac](http://www.treas.gov/ofac)) or the U.S. Department of State's Terrorist Exclusion List (available at [www.state.gov](http://www.state.gov)), or for the processing and acceptance of transactions in certain jurisdictions pursuant to 31 CFR Part 500 et seq. and other laws enforced by the Office of Foreign Assets Control ("OFAC") or in connection with illegal activity of any kind.

**22. Compliance with Operating Regulations.** You agree to comply with the American Express Operating Regulations as may be in effect from time to time.

**23. Glossary.** The following definitions shall have the following meanings ascribed to them and shall also be added to or amended in the Terms and Conditions, as applicable:

"**Affiliate**" of a person or entity means another person or entity that, directly or indirectly, (i) owns or controls such person or entity or (ii) is under common ownership or control with such person or entity.

"**American Express**" means "American Express Company Inc.

"**Card**" means (i) a valid card in the form issued under license from Visa or MasterCard ("Bank Card" or "Bankcard") or (ii) any other valid card accepted by Merchant by Agreement with RMS or NMS, such as those issued by, Discover Financial Services, Inc. or American Express or (iii) any valid card issued under license of a regional or national Debit Network.

"**Card Association**" means Visa, MasterCard, Discover, American Express or any other company that regulates and manages their

respective brands of Cards that are accepted by Merchant by agreement with Bank and/or NMS.

"**Cardholder**" means the person whose name is embossed on a Card and any authorized user of such Card, including the person that has entered into an agreement establishing a Card account with a Card Issuer. Some Card Associations may refer to Cardholder(s) as Card Member(s)).

"**Card Not Present Sale/Transaction**" means a transaction that occurs when the Card is not present at the point-of-sale, including Internet, mail-order and telephone-order Card sales.

"**Charge**" or "**Charges**" (or as the context requires, "**charge**" or "**charges**") means the total price, including all applicable taxes and gratuities, for the purchase of goods or services of/from a merchant for which a Cardholder has signed a Sales Draft or otherwise indicated intent to pay with a Card.

"**Credit**" means a refund or price adjustment given for a previous purchase transaction.

"**Chip**" means an integrated microchip embedded on a Card containing Cardholder and account information.

"**Chip Card**" means a Card with an embedded EMV-compliant chip containing memory and interactive capabilities used to identify and store additional data about a Cardholder, account information or both.

"**EMV**" was developed by Europay, MasterCard and Visa. It is the global standard for Chip based payments.

"**Issuer**" means the financial institution or Card Association (or other entity authorized by a Card Association) which has issued a Card to a Cardholder.

"**Magnetic Stripe**" means a stripe of magnetic information affixed to the back of a plastic Credit or Debit Card. The Magnetic Stripe contains essential Cardholder and account information.

"**Marks**" mean the names, logos, emblems, brands, service marks, trademarks, trade names, tag lines or other proprietary designations.

"**Merchant Account Number**" means a number that numerically identifies each merchant location, outlet, or line of business to the Processor for accounting and billing purposes.

"**We**" or "**us**" refers to NMS.

"**You**" means the Merchant.

## TRANSARMOR DATA PROTECTION TERMS

### For the Merchant Processing Agreement Terms and Conditions of Westamerica Bank

The TransArmor Data Protection Terms set forth below are appended to and made part of the Merchant Processing Agreement Terms and Conditions comprising part of the Agreement by and among Westamerica Bank (“Bank”), Newtek Merchant Solutions, LLC (“NMS”) and Merchant.

#### 9. Special Provisions Regarding Data Protection Service (“Data Protection Service”).

9.1 If Merchant elects to utilize the Data Protection Service, the terms and conditions of this Section 9 shall apply.

9.2 The Data Protection Service provided, transactions processed and other matters contemplated under this Section 9 are subject to the rest of the Agreement, as applicable, except to the extent the terms of this Section 9 directly conflict with another provision of the Agreement, in which case the terms of this Section 9 will control. Notwithstanding in this Section 9 or anywhere else in the Agreement, the Data Protection Service is provided to Merchant by NMS and not Bank; accordingly, Bank will have absolutely no liability under the Agreement for the Data Protection Service.

9.3 **Definitions.** Capitalized terms used herein shall have the meanings given to such terms as set forth in this Section 9 or as defined elsewhere in the Agreement, including in the Terms and Conditions.

9.4 **Grant of License.** NMS grants to Merchant a non-transferable, non-assignable, non-exclusive, revocable sub-license during the term of this Section 9 to use the Data Protection Service and the Data Protection Service Marks (as identified in the Data Protection Rules and Procedures) in the United States, excluding any United States territories or possessions, in accordance with this Section 9, including without limitation the Data Protection Rules and Procedures. Any rights with respect to the Data Protection Service not expressly granted by NMS in this Section 9 are withheld.

9.5 **Services.** The Data Protection Service applies only to Card transactions sent from Merchant to NMS or its third party providers for authorization and interchange settlement pursuant to the Agreement, and specifically excludes electronic check transactions, closed-loop gift card transactions, STAR contactless transactions read in contactless mode, Wright Express Transactions, Voyager Transactions, and other Card types that are not capable of being Tokenized. NMS or its third party providers will provide an encryption key to Merchant to be used to encrypt (make unreadable) Card data during transport of the authorization request from Merchant’s point of sale to systems of NMS. During the period when the transaction is being transmitted to NMS or its third party providers for authorization processing, all historical transaction data, including Card number and full magnetic stripe data (track data and expiration date), will be encrypted. NMS or its third party providers will then generate or retrieve a unique, randomly generated token assigned to the Card number that will be returned to Merchant in the authorization response (“Token”).

9.6 **Responsibilities of Merchant.** Merchant is responsible to comply with the following regarding Merchant’s use of the Data Protection Service:

- (a) Merchant is required to comply with the Rules, 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 Merchant’s payment processing is compliant with PCI DSS. Use of the Data Protection Service will not cause Merchant to be compliant or eliminate Merchant’s obligations to comply with PCI DSS or any other Rule. Merchant must demonstrate and maintain Merchant’s current PCI DSS compliance certification. Compliance must be validated either by a Qualified Security Assessor with corresponding Report on Compliance or by successful completion of the applicable PCI DSS Self-Assessment Questionnaire or Report on

Compliance, as applicable, and if applicable to Merchant's business, passing quarterly network scans performed by an Approved Scan Vendor, all in accordance with the Rules and PCI DSS.

- (b) Use of the Data Protection Service is not a guarantee against an unauthorized breach of Merchant's systems or point-of-sale devices (collectively, "Merchant's Systems").
- (c) Merchant must deploy the Data Protection Service (including implementing any upgrades to such service within a commercially reasonable period of time after receipt of such upgrades) throughout Merchant's Systems, including replacing existing Card numbers on Merchant's Systems with Tokens. Full Card numbers must never be retained, whether in electronic form or hard copy.
- (d) Merchant must use the Token in lieu of the Card number for ALL activities subsequent to receipt of the authorization response associated with the transaction, including without limitation, settlement processing, retrieval processing, chargeback and adjustment processing and transaction reviews.
- (e) Any point of sale device, gateway and/or value added reseller "VAR" use by Merchant in connection with the Data Protection Service must be certified for use with the Data Protection Service.
- (f) If Merchant sends or receives batch files containing completed Card transaction information to/from NMS, Merchant must use the service provided by NMS or its third party providers to enable such files to contain only Tokens or truncated information.
- (g) Merchant must use truncated report viewing and data extract creation within reporting tools provided by NMS.
- (h) Merchant is required to follow rules or procedures NMS may provide to Merchant from time to time related to Merchant's use of the Data Protection Service ("Data Protection Rules and Procedures"). NMS will provide Merchant with advance notice of any such rules or procedures or changes to such rules or procedures.
- (i) Merchant has no right, title or interest in or to the Data Protection Service, any related software, materials or documentation, or any derivative works thereof, and nothing in this Agreement assigns or transfers any such right, title or interest to Merchant. Merchant shall not take any action inconsistent with the stated title and ownership in this Section 9. Merchant will not file any action, in any forum, that challenges the ownership of the Data Protection Service, any related software, materials or documentation. Failure to comply with this provision will constitute a material breach of the Agreement. NMS has the right to immediately terminate this Section 9 and Merchant's access to and use of the Data Protection Service in the event of a challenge by Merchant. No additional rights are granted by implication, estoppel or otherwise.
- (j) Merchant will not: (i) distribute, lease, license, sublicense or otherwise disseminate the Data Protection Service or any portion of it to any third party; (ii) modify, enhance, translate, supplement, create derivative works from, reverse engineer, decompile or otherwise reduce to human-readable form the Data Protection Service or any portion of it; or (iii) sell, license or otherwise distribute the Data Protection Service or any portion of it; (iv) make any copies, or permit any copying, of the Data Protection Service or any portion of it; or (v) use any portion of the Data Protection Service as a standalone program or in any way independently from the Data Protection Service. If any portion of the Data Protection Service contains any copyright notice or any other legend denoting the proprietary interest of NMS or any third party, Merchant will not remove, alter, modify, relocate or erase such notice or legend on such item.
- (k) Merchant will only use the Data Protection Service for its internal business purposes in a manner consistent with this Agreement.
- (l) Merchant will use only unaltered version(s) of the Data Protection Service and will not use, operate

or combine the Data Protection Service 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 in this Section 9.

(m) Merchant will promptly notify NMS of a breach of any terms of this Section 9.

**9.7 Amendment; Termination.**

(a) Unless prohibited by applicable law, NMS may modify this Section 9 by providing written (including via statement messaging) or electronic notice of such modifications to Merchant.

(b) The Data Protection Service being provided under this Section 9 may be terminated upon thirty days written notice from one party to the other party.

**9.8 Data Protection Limited Warranty.** NMS provides the following limited warranty to Merchant with respect to the Data Protection Service: SUBJECT TO SECTION 9.10, NMS WARRANTS TO MERCHANT THAT THE TOKEN RETURNED TO MERCHANT AS A RESULT OF USING THE DATA PROTECTION SERVICE CANNOT BE USED TO INITIATE A SALE TRANSACTION BY AN UNAUTHORIZED PERSON/ENTITY OUTSIDE OF MERCHANT'S COVERED SYSTEMS. "**Covered Systems**" means Merchant's systems or point-of-sale devices that are using the TransArmor Data Protection Service.

**9.9 Exclusive Remedy for Breach of Limited Warranty.** Subject to Section 9.10 of these Special Provisions and the terms of the Agreement (including the damages cap(s), damages exclusion(s), and other limitations on liability in Section 6 of the Agreement), NMS will indemnify Merchant for direct damages resulting from NMS's breach of the Data Protection Service limited warranty in Section 9.8. For clarity, "direct damages" are limited to third party claims asserted against Merchant arising from NMS's breach of the limited warranty in Section 9.8. THE INDEMNIFICATION IN THIS SECTION 9.9 IS THE SOLE AND EXCLUSIVE REMEDY, AND NMS'S ENTIRE LIABILITY, FOR NMS'S BREACH OF THE LIMITED WARRANTY IN SECTION 9.8, AND IS SUBJECT IN ALL RESPECTS TO THE LIMITATIONS OF LIABILITY SET FORTH IN THIS AGREEMENT.

**9.10 Exceptions to Limited Warranty and Exclusive Remedy.** The limited warranty in Section 9.8 and the indemnification in Section 9.9 will not apply and will be voidable at NMS's election, and NMS will have no liability of any kind arising from the limited warranty if Merchant (a) is not receiving authorization and settlement services from NMS under the Agreement, (b) is not in compliance with all terms of the Agreement and any other agreement relating to payment forms eligible for the Data Protection Service, (c) uses the Data Protection Service in a manner not contemplated by, or in violation of, this Agreement, (d) is negligent, or (e) engages in intentional misconduct.

**9.11 Warranty Disclaimer.** EXCEPT FOR THE LIMITED WARRANTY IN SECTION 9.8 AND IN ADDITION TO THE DISCLAIMERS SET FORTH IN THE AGREEMENT, NMS AND ITS THIRD PARTY PROVIDERS DISCLAIM ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, OR IMPOSED BY STATUTE OR OTHER LAW, THAT ARISE OUT OF OR RELATE TO THE SPECIAL PROVISIONS OF THIS SECTION 9, THE DATA PROTECTION SERVICE, OR ANY ASPECT OF THE DATA PROTECTION SERVICE, INCLUDING: (a) WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, (b) WARRANTIES OF NON-INFRINGEMENT OR NON-INTERFERENCE, AND (c) ANY WARRANTY THAT THE DATA PROTECTION SERVICE (OR ANY ASPECT OF THE DATA PROTECTION SERVICE) WILL (i) MEET MERCHANT'S REQUIREMENTS, (ii) OPERATE ACCORDING TO MERCHANT'S EXPECTATIONS, (iii) DETECT EVERY VULNERABILITY ON MERCHANT'S SYSTEMS, (iv) GUARANTEE COMPLIANCE WITH APPLICABLE LAW, THE RULES, OR APPLICABLE STANDARDS (INCLUDING PCI DSS), (v) PREVENT A DATA BREACH OR COMPROMISE OF DATA SECURITY, (vi) PROVIDE ACCURATE OR COMPLETE DATA, OR (vii) OPERATE UNINTERRUPTED OR ERROR FREE.

9.12 **Third Party Beneficiary.** NMS has been granted the right by First Data Merchant Services LLC (“First Data”) to sublicense the Data Protection Service and the Data Protection Service Marks to Merchant. As such, First Data (including its successors or assigns) is a third-party beneficiary of this Section 9, with the right to receive all benefits that NMS receives under this Section 9 and the right to initiate enforcement of the terms of this Section 9, including applicable terms of this Agreement, against Merchant at First Data’s sole discretion.

### THIRD PARTY PRODUCTS AND SERVICES ADDENDUM

The terms of this Third Party Products and Services Addendum set forth below are appended to and made part of the Terms and Conditions comprising part of the Agreement by and among WESTAMERICA BANK ("Bank"), Newtek Merchant Solutions, LLC ("NMS" and together with Bank, the "Providers") and Merchant. Unless otherwise specified in this Addendum, undefined capitalized terms shall have the meaning assigned to them in the Terms and Conditions unless the context clearly requires otherwise.

**WHEREAS**, under the Agreement the Providers have agreed make certain electronic credit and debit card processing services as identified therein (the "Processing Services").

**WHEREAS**, NMS may, via resale or referral to a third party, make products and services, including, but not limited to, equipment and software (including gateways), provided/supplied/ manufactured/created/performed by third parties ("Third Party Provider") other than the Processing Services ("Third Party Products and Services") available to Merchant; and

**WHEREAS**, Merchant understands that NMS cannot control the performance of the Third Party Products and Services and agrees that such Third Party Products and Services will only be made available to Merchant subject to the terms and conditions set forth in this Addendum.

**TPP.1 Warranties.** For the avoidance of doubt the Third Party Products and Services are provided by or through NMS and not Bank; accordingly, Merchant acknowledges and agrees that Bank will have absolutely no liability for the performance or operation (or lack thereof) of any Third Party Products or Services. Additionally, Merchant acknowledges and agrees that NMS is only a reseller of, or referral source, for Third Party Products and Services, and as such, NMS shall not in any way be liable for the performance or operation (or lack thereof) of Third Party Products and Services and neither NMS nor Bank makes any warranties, representations or covenants with respect thereto. Any and all warranties, representations or covenants regarding Third Party Products and Services, if any, are and will be governed by the terms and conditions pursuant to which the Third Party Provider makes the applicable Third Party Products and Services available to Merchant. In the event that NMS resells any Third Party Products and Services to Merchant, it will pass through any warranties made available to NMS by the applicable Third Party Provider that such Third Party Provider permits to be passed through to Merchant. NEITHER NMS NOR BANK MAKES ANY WARRANTY, EXPRESS, IMPLIED OR STATUTORY, WITH RESPECT TO THE THIRD PARTY PRODUCTS AND SERVICES AND EACH EXPRESSLY DISCLAIMS ALL WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF TITLE, AVAILABILITY, RELIABILITY, USEFULNESS, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, OR ARISING FROM COURSE OF PERFORMANCE, DEALING, USAGE OR TRADE. THIRD PARTY PRODUCTS AND SERVICES ARE BEING PROVIDED "AS-IS" BY OR THROUGH NMS (TO THE EXTENT EVEN BEING PROVIDED THEREBY), AND NEITHER NMS NOR BANK WARRANTS THAT THEY WILL MEET MERCHANT'S REQUIREMENTS OR BE UNINTERRUPTED, TIMELY, AVAILABLE, SECURE OR ERROR FREE, OR THAT ANY ERRORS WILL BE CORRECTED.

**TPP.2 Limitation of Liability.** NEITHER BANK NOR NMS SHALL BE LIABLE TO MERCHANT FOR ANY DAMAGES OR COSTS ARISING OUT OF OR RELATING TO NMS'S RESALE OR REFERRAL OF THIRD PARTY PRODUCTS AND SERVICES TO MERCHANT, INCLUDING COSTS OF PROCUREMENT OF SUBSTITUTE PRODUCTS, SOFTWARE OR SERVICE FOR THE THIRD PARTY PRODUCTS AND SERVICES, NOR FOR ANY LOSS OF BUSINESS, LOSS OF USE OR OF DATA, INTERRUPTION OF BUSINESS, LOST PROFITS OR GOODWILL, OR OTHER INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF THIS ADDENDUM OR THIRD PARTY PRODUCTS AND SERVICES, EVEN IF NMS OR BANK HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS, AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. THIS EXCLUSION INCLUDES ANY LIABILITY THAT MAY ARISE OUT OF THIRD-PARTY CLAIMS AGAINST MERCHANT. UNDER NO CIRCUMSTANCES SHALL NMS'S TOTAL LIABILITY OF ALL KINDS ARISING OUT OF OR RELATED TO THIS ADDENDUM AND/OR THIRD PARTY PRODUCTS AND SERVICES, REGARDLESS OF THE FORUM AND REGARDLESS OF WHETHER ANY ACTION OR CLAIM IS BASED ON CONTRACT, TORT OR OTHERWISE, EXCEED THE NET PROFITS EARNED BY NMS UNDER THE MERCHANT AGREEMENT OVER THE ONE (1) MONTH PRIOR TO THE DATE WHEN THE RESPECTIVE CLAIM IS FIRST MADE LESS ANY AMOUNTS OWED BY MERCHANT TO NMS AND BANK. THE EXISTENCE OF ONE OR MORE CLAIMS WILL NOT ENLARGE THAT LIMIT. MERCHANT ACKNOWLEDGES THAT THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. NO CLAIM, SUIT OR ACTION SHALL BE BROUGHT AGAINST NMS (OR BANK) IF MORE THAN ONE YEAR AFTER THE RELATED CAUSE OF ACTION HAS TRANSPIRED. UNDER NO CIRCUMSTANCES SHALL BANK HAVE ANY LIABILITY WHATSOEVER WITH RESPECT TO THE THIRD PARTY PRODUCTS AND SERVICES.

**TPP.3 Title and Delivery.** Risk of loss will pass to Merchant at the time and place of delivery to a carrier for transportation to Merchant.

**TPP.4 Final Sale.** ALL REALES OF THIRD PARTY PRODUCTS AND SERVICES BY NMS ARE FINAL AND NO REFUNDS WILL BE ISSUED.

**TPP.5 Indemnification.** Merchant will at all times indemnify and hold harmless each Provider, each of their affiliates and each of their and their affiliates' officers, directors, managers, shareholders, employees, affiliates, successors and assigns from and against any and all claims, damages, liabilities, costs and expenses, including reasonable legal fees and expenses suffered by any of them arising out of or relating to the use or operation (or failure to operate) of Third Party Products and Services.