TERMS AND CONDITIONS

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

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

1.1 "**Account**" means a commercial checking or demand deposit account maintained by Merchant for the crediting of collected funds and the debiting of fees and charges under this Agreement.

1.2 "**ACH**" means the Automated Clearing House paperless entry system controlled by the Federal Reserve Board.

1.3 "**Agreement**" means the Merchant Application, the Guaranty and these Terms and Conditions, and any supplementary documents referenced herein, and schedules, exhibits and amendments to the foregoing.

1.4 "**American Express**" means the Cards bearing the Marks of, and Card Network operated by, American Express Travel Related Services Company, Inc. or its affiliates.

1.5 "**Authorization**" means a computerized function or a direct phone call to a designated number to examine individual Transactions to obtain approval from the Card Issuer to charge the Card for the amount of the sale in accordance with the terms of this Agreement and the Network Rules.

1.6 "**Bank**" has the meaning set forth on the Merchant Application.

1.7 "**Card**" means (i) a valid credit card or debit card in the form issued under license from a Card Network. ("Bank Card"); or (ii) any other valid credit card or debit card or other payment device approved by Bank and accepted by Merchant.

1.8 "**Card Issuer**" means the financial institution or company which has provided a Card to a Cardholder.

1.9 "**Card Network**" means Visa U.S.A., Inc., MasterCard International, Inc., American Express Travel Related Services Company, Inc., DFS Services LLC (the owner of Discover) and their affiliates, or any other payment networks approved by Bank that provide Cards accepted by Merchant.

1.10 "**Card Not Present**" or "**CNP**" means that an Imprint of the Card is not obtained at the point-of-sale.

1.11 "**Cardholder**" (sometimes referred to as "Card Member" in certain Card Network materials) shall mean any person authorized to use the Cards or the accounts established in connection with the Cards.

1.12 "**Cardholder Information**" means any non-public, sensitive information about a Cardholder or related to a Card, including, but not limited to, any combination of Cardholder name plus the Cardholder's social security number, driver's license or other identification number, or credit or debit card number, or other bank account number.

1.13 "**Chargeback**" means the procedure by which a Transaction (or disputed portion thereof) is returned to Provider by a Card Issuer for any reason, including, but not limited to, cases where such item does not comply with the applicable Network Rules.

1.14 "**Cash Over**" means a Transaction using a Discover Card whereby the Cardholder elects to receive additional cash in excess of the purchase price, all as provided by Network Rules of Discover.

1.15 "**Credit Voucher**" means a document executed by a Merchant evidencing any refund or price adjustment relating to Cards to be credited to a Cardholder account.

1.16 "**Discover Card**" means a Card bearing the Discover Marks and accepted as part of the DFS Services Network.

1.17 "**Guarantor**" has the meaning set forth on the Merchant Application.

1.18 "**Guaranty**" has the meaning set forth ~~on the Merchant Application~~in Section 5.26 of this Agreement.

1.19 "**Imprint**" means (i) an impression on a Transaction Record manually obtained from a Card through the use of an imprinter, or (ii) the electronic equivalent obtained by swiping a Card through a terminal and electronically capturing Card data and printing a Transaction Record.

1.20 "**ISO**" has the meaning set forth on the Merchant Application.

1.21 "**Merchant**" has the meaning set forth on the Merchant Application.

1.22 "**Merchant Application**" has the meaning set forth on the Merchant Application.

1.23 "**Network Rules**" means the rules, regulations, releases, interpretations and other requirements (whether contractual or otherwise) imposed or adopted by any Card Networks and related authorities, including without limitation, those of the PCI Security Standards Council, LLC and the National Automated Clearing House Association (including, with respect to EBT, the Quest Operating Rules and with respect to PIN debit cards, the rules, regulations, policies and procedures of the applicable debit network).

1.24 "**Provider**" as provided by the introductory paragraph to these Terms and Conditions, means ISO and Bank together.

1.25 "**Transaction**" means any sale of products or services, or credit for such, from a Merchant for which the Cardholder makes payment through the use of any Card and which is presented to Provider for collection.

1.26 "**Transaction Record**" means evidence of a purchase, rental or lease of goods or services by a Cardholder from, and other payments to, Merchant using a Card, including preauthorized orders and Recurring Transactions (unless the context requires otherwise), regardless of whether the form of such evidence is in paper or electronic form or otherwise.

1.27 "**Voice Authorization**" means a direct phone call to a designated number to obtain credit approval on a Transaction from the Card Issuer, whether by voice or voice-activated systems.

Commented [LH1]: Note to Merrick – as soon as Merrick approves Anovia's request to assign the sponsorship agreement to its parent entity, SphereCommerce, LLC, this name will change.

ARTICLE II - CARD ACCEPTANCE

2.1   **Honoring Cards.** Merchant will accept all valid Cards when properly presented by Cardholders in payment for goods or services, subject to applicable Network Rules requiring Merchant to elect whether it will accept credit only, debit only or both debit and credit cards. Merchant's election is set forth in the Merchant Application. Except to the extent explicitly provided by the Network Rules, Merchant may not establish minimum or maximum amounts for Card sales as a condition for accepting any Card. Merchant may, subject to applicable Law and the Network Rules, (i) impose a surcharge, under certain conditions and with proper disclosure to a Cardholder who elects to use a Card in lieu of payment by cash, check or other method of payment, or (ii) offer cash discounts to Cardholders making payment by cash or check. Merchant shall not engage in any acceptance practice that discriminates against or discourages the use of a Card Network's Cards in favor of any other Card Network's Cards, or favor any particular Card Issuer over any other Card Issuers. Note, many states prohibit or limit cases where Merchant may surcharge a Cardholder or offer cash discounts and the Card Networks impose restrictions on surcharging and cash discounting. ~~Therefore, Provider strongly recommends that~~ Merchant ~~carefully consider and~~must comply with all applicable Law and the Network Rules before Merchant begins to surcharge Cardholders or offer any cash discount. Processor shall not be liable for any acts or omissions of Merchant in violation of applicable Laws or Network Rules. Merchant may not engage in a Transaction (other than a mail, internet, telephone order, or preauthorized sale to the extent permitted under this Agreement) if (i) the person seeking to charge the purchase to his or her Card account does not present the Card to permit Merchant to compare the signature on the Card to the signature on the Transaction Record; or (ii) the Merchant does not obtain an Imprint or otherwise use the physical Card to complete the Transaction.

2.2   **Merchant's General Duties**. Merchant will comply with Agreement for submitting and processing Transactions. Merchant, and not Bank, is responsible for any advice from, acts of, as well as omissions, acts of fraud or acts of misconduct by, Merchant's employees, processors, consultants, advisors, contractors, merchant servicers, agents, officers and directors. Merchant, and not Bank, is responsible for the use, unauthorized use or misuse of Merchant's equipment, point of sale equipment, or software. Merchant agrees that if Merchant does not use point of sale equipment that has been certified EMV (Europay/MasterCard/Visa) chip card compliant and enabled or when a lost or stolen chip and PIN card is used at an EMV enabled terminal capable of processing chip and signature only, Merchant may be liable for payment of any transactions submitted for chargeback by the applicable EMV chip card issuer(s) due to lost, stolen and never-received-issue fraud claims.

2.2~~2~~.3   **Advertising.** Subject to the Network Rules, Merchant will prominently display the promotional materials provided by Provider in its place(s) of business. Merchant's use of promotional materials and use of any trade name, trademark, service mark or logo type (collectively, the "Marks") associated with a Card is limited to informing the public that the Card will be accepted at Merchant's place(s) of business. During the term of this Agreement, Merchant may use promotional materials and Marks pursuant to and in strict compliance with the terms of this Agreement and the Network Rules. Upon notification by any Card Network or Provider, or upon termination of this Agreement, Merchant shall discontinue the use of such Card Network's Marks and return any inventory or promotional materials to Provider. Merchant may not use any promotional materials or Marks associated with the Card Network in any way which suggests or implies that a Card Network endorses any goods or services other than Card payment services. Merchant's website, if any, must prominently display the name of the Merchant and the name that will appear on the Cardholder statement.

2.3~~2~~.4   **Card Acceptance.** You have the option of accepting MasterCard credit cards, Visa credit cards, credit cards issued by Discover, American Express payment cards, MasterCard signature debit cards (MasterMoney Cards) or Visa signature debit cards (check cards), or debit cards issued by Discover. You may elect to accept any or all of these card types for payment. If you do not specifically indicate otherwise on the Merchant Application your application will be processed to accept ALL MasterCard, Discover, Visa and American Express card types. When accepting a Card, Merchant will follow the steps and guidelines set forth in the Network Rules or otherwise provided by Provider from time to time for accepting Cards and in particular, will: (a) determine in good faith and to the best of its ability that the Card is valid on its face; (b) obtain Authorization from the Card Issuer to charge the Cardholder's account; (c) comply with the additional terms set forth in in this Agreement with respect to Telephone Orders, Mail Orders, Internet, Preauthorized Orders and Installment Orders and with respect to any Card Not Present Transactions; (d) document the approved Transaction in accordance with this Agreement and the Network Rules; and (e) deliver a true and completed copy of the Transaction Record to the Cardholder at the time the goods are delivered or services performed or, if the Transaction Record is prepared by a point-of-sale terminal, at the time of the sale. Except to the extent otherwise provided for in this Agreement, each Transaction Record must contain the following information: (i) Merchant's legal name and/or registered trade name, Merchant's location, and the Merchant's merchant identification number designated by the Provider; (ii) the truncated version of the Card number as provided in the Network Rules; (iii) a brief description of the goods or services involved in the Transaction; (iv) the selling price, together with applicable taxes, other charges or gratuities, and the total amount of the Transaction; (v) signature of the Cardholder or authorized user as described in this Agreement, date of the Transaction and the Transaction approval number; (vi) any additional requirements of the Card Networks that may be applicable to specific merchant or transaction types, as amended from time to time; and (vii) such additional information which may from time to time be required by Provider, the Card Networks, or Card Issuers. Merchant will not transmit a Transaction Record to Provider until such time as: (i) the Transaction is completed; (ii) the goods or services have been shipped or provided, except as set forth in this Agreement and the Network Rules; or (iii) a Cardholder consent is obtained for a Recurring Transaction in accordance with terms of this Agreement and the Network Rules.

2.4~~2~~.5   **Authorization.** Merchant will obtain an Authorization for all Transactions using a means approved by Provider. If Merchant cannot, for any reason, obtain an electronic Authorization through the use of a terminal, Merchant will request a Voice Authorization from Provider's designated authorization center and will legibly print the authorization number on the Transaction Record. Merchant will not

Commented [LH2]: Adding in required EMV disclosure

Formatted: Font: Not Bold, No underline

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

2.5 2.6 **Retention and Retrieval of Cards.** Merchant will use its best efforts, by reasonable and peaceful means, to retain or recover a Card when receiving such instructions when making a request for Authorization or if Merchant has reasonable grounds to believe the Card is counterfeit, fraudulent or stolen. Merchant's obligations under this section do not authorize a breach of the peace or any injury to persons or property, and Merchant will hold Provider harmless from any claim arising from any injury to person or property or other breach of the peace in connection with the retention or recovery of a Card.

2.6 2.7 **Multiple Transaction Records; Partial Consideration.** Merchant may not prepare more than one Transaction Record for a single sale or for a single item, but will include all goods and services purchased in a single Transaction in the total amount on a single Transaction Record except under the following circumstances: (a) for purchases in separate departments of a multiple department store; (b) for partial payment, installment payment, delayed delivery or an advance deposit; or (c) for delayed or amended charges governed by Network Rules for travel and entertainment merchants and related Transactions.

2.7 2.8 **Telephone Orders, Mail Orders, Internet, Preauthorized Orders and Installment Orders.** Unless Merchant has been approved by Provider to accept mail, internet or telephone orders, Merchant warrants that it is a walk-in trade business, located in a retail business place where the public moves in and out freely in order to purchase merchandise or obtain services. If Merchant is not approved by Provider for Card Not Present Transactions and Provider determines Merchant has accepted unapproved Card Transactions which are placed by telephone, generated through telephone solicitation, mail order, internet sales or other means that does not create a Transaction Record that bears the Card Imprint and Cardholder's signature, this Agreement may be immediately terminated by Provider and the value of all Transaction Records collected from the first day of processing may be charged back to Merchant and all funds therefrom held as provided in Article IV of this Agreement. Unless approved by Provider, this Agreement does not contemplate regular acceptance of Cards for sales accepted by mail, internet or telephone nor through preauthorized orders. Regardless of whether Merchant has been approved by Provider for Card Not Present Transactions, Merchant assumes all responsibility for identification of the Cardholder and the validity of the Card information for Card Not Present Transactions. Merchant agrees to identify separately any high-risk transactions Merchant submits. The high-risk transactions include, but are not limited to, any under Merchant Category Code 5967 – Direct Marketing

Inbound Telemarketing Merchants.

2.8 2.9 **Lodging and Vehicle Rental Transactions.** For lodging and vehicle rental Transactions, Merchant must estimate and obtain Authorization for the amount of the Transaction based upon the Cardholder's intended length of stay or rental. Additional Authorization must be obtained and recorded for charges actually incurred in excess of the estimated amount. Regardless of the terms and conditions of any written preauthorization form, the Transaction Record amount for any lodging or vehicle rental Transaction must include only that portion of the sale, including any applicable taxes, evidencing a bona fide rental of real or personal property by Merchant to the Cardholder and may not include any consequential charges. Nothing contained herein is intended to restrict Merchant from enforcing the terms and conditions of its preauthorization form through means other than a Transaction.

2.9 2.10 **Returns and Adjustments; Credit Vouchers.** Merchant's policy for the exchange or return of goods sold and the adjustment for services rendered will be established and posted in accordance with the Network Rules of the applicable Card Networks. Merchant will disclose, if applicable, to a Cardholder before a Transaction is made, that if merchandise is returned: (a) no refund, or less than a full refund, will be given; (b) returned merchandise will only be exchanged for similar merchandise of comparable value; (c) only a credit toward purchases will be given; or (d) special conditions or circumstances apply to the sale (e.g., late delivery, delivery charges, or other non-credit terms). If Merchant does not make these disclosures, a full refund in the form of a credit to the Cardholder's Card account must be given. Disclosures must be made on all copies of Transaction Records or invoices in letters approximately 1/4" high in close proximity to the space provided for the Cardholder's signature or on an invoice issued at the time of the sale or on an invoice being presented for the Cardholder's signature. Any change in Merchant's return or cancellation policy must be submitted in writing to Provider not less than fourteen (14) days prior to the change. Provider may refuse to process any Transaction Record made subject to a revised return or cancellation policy of which Provider has not been notified as required herein.

2.10 2.11 **Cash Payments.** Merchant may not receive any payments from a Cardholder for charges included in any Transaction resulting from the use of any Card nor receive any payment from a Cardholder to prepare and present a Transaction for the purpose of effecting a deposit to the Cardholder's account.

2.11 2.12 **Cash Advances; Scrip Purchases.** Unless otherwise approved in advance by Provider, Merchant may not deposit any Transaction for

the purpose of obtaining or providing a cash advance either on Merchant's Card or the Card of any other party and may not accept any Card at a scrip terminal, and either action will be grounds for Provider's immediate termination of this Agreement.

2.122.13 Duplicate Transactions. Merchant may not deposit duplicate Transactions. Provider may debit Merchant for any adjustments for duplicate Transactions and Merchant is liable for any Chargebacks resulting therefrom.

2.132.14 Deposit of Fraudulent Transactions. Merchant may not accept or deposit any fraudulent or unauthorized Transactions and may not under any circumstances present for processing or credit, directly or indirectly, a Transaction which originated with any other merchant or any other source other than Transactions arising from bona fide purchases from Merchant for the goods and services for which Merchant has been approved under this Agreement. If Merchant deposits any such fraudulent or unauthorized Transaction, Provider may: (a) immediately terminate this Agreement; (b) withhold funds and demand an escrow as provided in this Agreement; or (c) report Merchant to the applicable Card Network. Merchant's employees' and agents' actions are chargeable to Merchant under this Agreement.

2.142.15 Collection of Pre-Existing Debt. Merchant may not prepare and present to Provider any Transaction representing the refinancing of an existing Cardholder obligation, including, but not limited to, obligations: (a) previously owed to Merchant; (b) arising from the dishonor of a Cardholder's personal check or relating to a Chargeback; or (c) representing the collection of any other pre-existing indebtedness, including collection of delinquent accounts on behalf of third parties.

2.152.16 Data Security/Personal Cardholder Information. Except as otherwise provided by the Network Rules, Merchant may not, as a condition of sale, impose a requirement on Cardholders to provide any personal information as a condition for honoring Cards unless such information is required to provide delivery of goods or services or Merchant has reason to believe the identity of the person presenting the Card may be different than that of the Cardholder. Merchant will not, under any circumstances, release, sell or otherwise disclose any Cardholder Information to any person other than Provider or the applicable Card Network, except as expressly authorized in writing by the Cardholder, or as required by Law or the Network Rules.

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

(b) Compliance with Card Network Rules. Merchant represents, warrants and covenants that it is and will remain throughout the Term of this Agreement in compliance with (i) Network Rules related to data security, data integrity and the safeguarding of Cardholder Information, including the Payment Card Industry Data Security Standard ("PCI"), Discover Information Security Compliance ("DISC"), MasterCard's Site Data Protection Program ("SDP"), the American Express Data Security Requirements ("DSR"), and Visa's Customer Information Security Program ("CISP"), in effect and as may be amended, supplemented or replaced from time to time, and

(ii) any data security guidelines or operating guide that Provider may provide to Merchant, as the same may be amended, supplemented or replaced from time to time. Merchant will cause all of its service providers, subcontractors and agents to comply with PCI, SDP, DISC, DSR and CISP requirements and any data security guidelines or operating guide provided by Provider at all times. Merchant will report any non-compliance immediately to Provider. To accomplish the foregoing, Merchant will encrypt all debit, credit or stored value card numbers whether in storage, transport or backup and will not store data security codes on its systems, network or software.

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

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

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

(e)(f) Federal regulations enacted pursuant to the USA PATRIOT Act and other applicable laws require financial institutions with which Processor has relationships with to verify the identity of every person who seeks to open an account with a financial institution.

As a result of Merchants' status as an account holder with Bank, Merchant shall provide documentary verification of Merchant's identity, such as a driver's license or passport for an individual and certified copy of organization documents for an entity in a manner acceptable to Provider. Provider reserves the right to verify Merchant's identity through other non-documentary methods as Provider deem appropriate in their sole discretion. Provider may retain a copy of any document it obtains to verify Merchant's identity with the financial institution.

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

(f)(h) Processor acknowledges that it will maintain compliance with all applicable PCI DSS requirements.

2.16**2.17** **Compliance with Laws and Network Rules.** Merchant will comply with and conduct its Card activities in accordance with all applicable local, state, and federal statutes, regulations, ordinances, rules and other binding law, as the same may be enacted or amended from time to time (collectively, "Laws") as well as all Network Rules. Merchant may not: (a) accept Cardholder payments for previous Card charges incurred at the Merchant location; (b) require a Cardholder to complete a postcard or similar device that includes the Cardholder's account number, card expiration date, signature, or any other card account data in plain view when mailed; (c) add any tax to transactions, unless applicable Law expressly requires that Merchant be permitted to impose a tax (any tax amount, if allowed, must be included in the transaction amount and not collected separately); (d) enter into interchange any Transaction Record for a Transaction that was previously the subject of a Chargeback to Provider and subsequently returned to Merchant, irrespective of Cardholder approval (Merchant may pursue payment from the Cardholder outside the Card Network system); (e) request or use an account number for any purpose other than as payment for its goods or services; (f) disburse funds in the form of travelers cheques, if the sole purpose is to allow the Cardholder to make a cash purchase of goods or services from Merchant; (g) disburse funds in the form of cash, unless: (i) Merchant is a lodging or cruise line merchant disbursing cash to a Cardholder, (ii) Merchant is dispensing funds in the form of travelers cheques, Cards, or foreign currency, or (iii) Merchant is participating in the Card Network cash back or Cash Over service; (h) accept a Card for manual cash disbursement; (i) accept a Card to collect or refinance existing debt that has been deemed uncollectible by Merchant providing the associated goods or services; (j) enter into a Transaction that represents collection of a dishonored check; or (k) accept a Card for an unlawful Internet gambling transaction. Merchant will pay all Card Network fines, fees, penalties and all other assessments or indebtedness levied by Card Network to Provider which are attributable, at Provider's discretion, to Merchant's Transaction processing or business. The Card Network may require that Bank limits Merchant's participation in the applicable Card Network and/or terminate this Agreement.

2.17**2.18** **Merchant's Business.** Merchant will notify Provider immediately if it intends to (a) transfer or sell any substantial part of its total assets, or liquidate; (b) change the basic nature of its business, including selling any products or services not related to its current business; (c) change ownership or transfer control of its business; (d) enter into any joint venture, partnership or similar business arrangement whereby any person or entity not a party to this Agreement assumes any interest in Merchant or Merchant's business; (e) alter in any way Merchant's approved monthly volume, average, or maximum ticket; (f) changes its return policies or to another fulfillment house different from those identified in Merchant Application; or (g) changes to its Account. Merchant will notify Provider promptly in writing if it becomes subject to any voluntary or involuntary bankruptcy or insolvency petition or proceeding. Merchant's failure to provide notice as required above may be deemed a material breach and will be sufficient grounds for termination of the Agreement and for Provider's exercise of all its rights and remedies provided by this Agreement. If any change listed above occurs, Provider may immediately terminate this Agreement.

2.18**2.19** **Merchant's Representations and Warranties.** Merchant represents and warrants that: (a) all information contained in the Merchant Application or any other documents delivered to Provider in connection therewith is true and complete and properly reflects Merchant's business, financial condition and principals, partners, owners or officers (as applicable); (b) Merchant has power to execute, deliver and perform this Agreement, and this Agreement is duly authorized, and will not violate any provisions of Law, or conflict with any other agreement to which Merchant is subject; (c) Merchant holds all licenses, if any, required to conduct its business and is qualified to do business in every jurisdiction where it is required to do so; and (d) there is no action, suit or proceeding at law or in equity now pending or, to Merchant's knowledge, threatened by or against or affecting Merchant which would substantially impair its right to carry on its business as now conducted or adversely affect its financial condition or operations.

2.19 2.20 Merchant's Covenants. Merchants covenants that: (a) each Transaction Record presented to Provider for collection is genuine and is not the result of any fraudulent activity, or a Transaction prohibited by a Card Network, or is not being deposited on behalf of any business other than Merchant as authorized by this Agreement; (b) each Transaction Record is the result of a bona fide purchase of goods or services from Merchant by the Cardholder in the total amount stated on the Transaction Record; (c) Merchant will perform all of its obligations to the Cardholder in connection with the Transaction evidenced thereby; (d) Merchant will comply with Provider's procedures for accepting Cards, and the Transaction itself will not involve any element of credit for any other purposes other than as set forth in this Agreement, and will not be subject to any defense, dispute, offset or counterclaim which may be raised by any Cardholder under the Network Rules, the Consumer Credit Protection Act (15 USC §1601) or other Law; and any Credit Voucher which Merchant issues represents a bona fide refund or adjustment on a Transaction by Merchant with respect to which a Transaction Record has been accepted by Provider.

2.20 2.21 Third Parties. Merchant may desire to use a third-party service provider to assist Merchant with its Transactions. Merchant shall not utilize any such third parties unless Merchant has disclosed such use to Provider previously in writing, and unless such third party is fully compliant with all Laws and Network Rules. Any third party used by Merchant must be registered with the Card Network prior to the performance of any contracted services on behalf of Merchant. Further, as between the parties to the Agreement, Merchant will be bound by the acts and omissions of any third-party service provider and Merchant will be responsible for compliance by such third-party service provider with all Laws and Network Rules. Merchant will indemnify and hold harmless Provider from and against any loss, cost, or expense incurred in connection with or by reason of Merchant's use of any third parties, including third-party service providers. Provider is not responsible for any third-party service provider used by Merchant, nor is Provider required to process any Transaction which Provider receives from Merchant or its service providers in any format not approved by Provider. Provider has no responsibility for, and shall have no liability to Merchant in connection with, any hardware, software or services Merchant receives subject to a direct agreement (including any sale, warranty or end-user license agreement) between Merchant and a third party.

2.21 2.22 Recourse. Merchant acknowledges that ISO performs the services contemplated by this Agreement and ISO is responsible to Merchant for any failure to perform such services in accordance with the terms of this Agreement. While Bank satisfies settlement files pursuant to instructions provided by ISO, Bank is not responsible for independently verifying the accuracy of such settlement files. Accordingly, to the greatest extent permitted by the Network Rules, Merchant's sole recourse for any failure by Provider under this Agreement is against ISO (and not Bank).

2.22 2.23 Pre-Authorized Transactions. If Merchant agrees to accept a pre-authorized order, the Cardholder shall execute and deliver to Merchant a written request for such pre-authorization which will be retained by Merchant and made available upon request to Provider. Merchant will not deliver goods or perform services covered by a pre-authorization after receiving specific notification that the pre-authorization is cancelled or that the card covering the pre-authorization is not to be honored.

2.23 2.24 Pre-Authorization Health Care Transactions. If Merchant is a "Health Care Merchant" as indicated on the Merchant Application and accepts a pre-authorized health care Transaction(s) from a Cardholder, Merchant agrees to comply with any requirements in the Network Rules related to such Transactions.

2.24 2.25 Recurring Transactions. If Merchant agrees to accept a recurring transaction from a Cardholder for the purchase of goods or services which are delivered or performed periodically (a "Recurring Transaction"), the Cardholder shall complete and deliver to Merchant an order form containing a written request for such goods or services to be charged to the Cardholder's account, the frequency of the recurring charges and the duration of time for which such Cardholder's permission is granted. In the event a Recurring Transaction is renewed, the Cardholder shall complete and deliver to Merchant a subsequent order form for continuation of such goods or services to be charged to the Cardholder's account. A Recurring Transaction may not include partial payments made to Merchant for goods or services purchased in a single Transaction, nor may it be used for periodic payments of goods or services on which Merchant assesses additional finance charges. A copy of the order form must be retained for the duration of the recurring charges and provided in response to Provider's request. In addition, Merchant must record, retain, and promptly produce upon request the "ship to address" and address verification service code (where applicable) for each transaction. Merchant must not complete an initial or subsequent Recurring Transaction after receiving a cancellation notice from the Cardholder, the Card Issuer, Provider or other party or a response that the Card is not to be honored.

2.25 2.26 Limited Acceptance.

(a) If appropriately indicated on the Merchant Application, Merchant shall be a limited acceptance merchant, which means that Merchant has elected to accept only certain Visa and MasterCard Card types as indicated on the Merchant Application, or via later notification. The Visa or MasterCard credit acceptance option on the Merchant Application refers to Visa credit and business transactions, and is what MasterCard refers to as "Other Card" transactions. Notwithstanding anything to the contrary in the Merchant Application, Merchant can elect (i) to accept only Visa or MasterCard non-PIN based debit/stored value/electronic benefit transactions (sometimes referred to as "signature debit" transactions, whether or not an actual signature is required), (ii) to accept only Visa or MasterCard Credit transactions, or (iii) to accept all Visa or MasterCard credit and signature debit transactions; provided, however, that a Merchant who accepts any Visa or MasterCard Card types must accept all valid Visa or MasterCard Card types issued by a non-U.S. issuer. Merchant is not required to accept Cards of Card Networks other than Visa or MasterCard in order to accept Visa or MasterCard Cards (except that transactions using Diner's International Cards which also carry the MasterCard Mark must be accepted if Merchant accepts MasterCard Card transactions of the same type). Provider has no obligation other than those expressly provided under the Network Rules and applicable Law as they may relate to limited acceptance. Provider's obligations do not include policing card types at the point-of-sale. Merchant will be solely responsible for the implementation of its decision for limited acceptance including but not limited to policing the Card Network type(s) of transactions at the point-of-sale submitted for processing by Provider. Should

Merchant submit a Transaction for processing for a card type it has indicated it does not wish to accept, Provider may process that Transaction and Merchant will pay the applicable fees, charges, and assessments associated with that Transaction. Merchant will comply with any applicable Laws and Network Rules and other applicable rules and regulations for the Card Network type processed. (b) If Merchant has chosen to accept Discover Cards in the Merchant Application, Merchant must accept Discover Cards at all Merchant establishments, including in payment for purchases of goods and services, for charitable contributions and for Cash Over Transactions (subject to the terms of the Network Rules and other applicable rules and regulations), when properly presented for payment by a Cardholder. Subject to this section, Merchant must create a Transaction Record for each Discover Card Transaction and deliver at least one copy of the Transaction Record to the Cardholder. A Merchant may issue a Cash Over (subject to the terms of the Network Rules) in connection with a Discover Card Transaction. Merchant must deliver a single Authorization request for the aggregate total of the goods/services purchase amount and the Cash Over amount. In addition, the Transaction Record must include both the purchase amount and the Cash Over amount.

ARTICLE III - PRESENTMENT, PAYMENT, CHARGEBACK

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

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

3.3 **Prohibited Payments.** Provider may receive payment of any Transaction Record presented by Merchant and paid by Provider unless and until there is a Chargeback. Unless specifically authorized in writing by Provider, Merchant may not collect or attempt to collect any Transaction Record, including Chargebacks, and will hold in trust for Provider and promptly deliver in kind to Provider any payment Merchant receives, in whole or in part, of the amount of any accepted Transaction, together with the Cardholder's name and account number and any corresponding accompanying payment.

3.4 **Chargebacks.** Merchant will accept responsibility for all Chargebacks related to Merchant's Transactions. Accordingly, Merchant will be liable to Provider in the amount of any Transaction disputed by the Cardholder or Card Issuer for any reason under the Network Rules. Merchant authorizes Provider to offset from funds due to Merchant or to debit the Account or, if applicable, the Reserve Account for the amount of all Chargebacks. Merchant agrees to fully cooperate with Provider in complying with the Network Rules regarding all Chargebacks. Merchant may not initiate a sale Transaction in an attempt to collect a Chargeback. Merchant will pay the current published fees for each Chargeback as listed on the Merchant Application and any other fines, fees, or assessments imposed by any Card Network or Card Issuer.

3.5 **Reserve Account.** Notwithstanding anything to the contrary in this Agreement and in addition to any other legal rights or remedies available to Provider, Bank may establish (without notice to Merchant) and Merchant agrees to fund and/or allow Provider to fund from the Account or by way of offset of funds otherwise due to Merchant, a non-interest bearing Chargeback reserve account (the "Reserve Account") in an amount determined by Bank in its sole discretion. Such Reserve Account may be funded by all or any combination of the following, as determined by Bank: (i) one or more debits to Merchant's Account or any other accounts held by Bank or any of its affiliates in Merchant's name or on Merchant's behalf; (ii) one or more deductions or offsets to any payments otherwise due to Merchant; (iii) Merchant's delivery to Bank of a letter of credit; (iv) if Bank so agrees, Merchant's pledge to Bank of a freely transferable and negotiable certificate of deposit; or (v) Bank's demand of other security or increase of any discount rate, transaction fees or other fees. Any such letter of credit or certificate of deposit shall be issued by a financial institution reasonably acceptable to Bank. The Reserve Account may be established at any time or for any reason. Specific examples of reasons include, but are not limited to,:

(a) Merchant engages in any Transaction processing that creates an overcharge to a Cardholder by duplicating Transactions; (b) any activity designed by Merchant to circumvent a "call center" message when attempting to process a Transaction; (c) Merchant breaches this Agreement, violates any representation, covenant or warranty herein, or violates any Network Rule or Law; (d) the Merchant Application is in any way inaccurate or becomes inaccurate subsequent to Provider's approval of the Merchant Application; (e) Merchant changes its type of business without Provider's prior written approval; (f) fraud, Merchant processes an unauthorized charge, or other action that violates Provider's applicable risk management standards or is likely to cause a loss; (g) Merchant has Chargebacks exceeding one percent (1%) of the total number of transactions completed by Merchant in any thirty (30) calendar day period; (h) excessive numbers of requests from Cardholders or Card Issuers to retrieve documentation; (i) Merchant's financial stability is in question or Merchant ceases doing business; or (j) Merchant terminates this Agreement. Once the Reserve Account is established, collected funds will be placed in the Reserve Account by Bank. Before releasing funds after this Agreement is terminated, Merchant will pay any equipment cancellation fees and any outstanding charges, losses or amounts, and Chargebacks for which Merchant has provided indemnification under this Agreement. Further, Bank may require Merchant to deposit additional amounts based upon Merchant's processing history

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

ARTICLE IV - TERMINATION AND EFFECT OF TERMINATION

4.1   **Term.** This Agreement will be effective once Provider accepts it and, unless otherwise terminated, will continue for _____ years (the "Initial Term") with automatic one (1) year renewal terms thereafter (each a "Renewal Term," and together with the Initial Term, the "Term") unless and until Merchant provides written notice of non-renewal to Provider not less than _____ days before the end of the then-current Term.

4.2   **Termination.**

(a) <u>Without Cause</u>. Provider may terminate this Agreement, without cause, upon thirty (30) days' advance written notice to Merchant.

(iii) (b) <u>For Cause</u>. Provider may terminate this Agreement in its sole discretion, effective immediately, upon written or verbal notice, or by closing Merchant's point-of-sale terminal, if Provider reasonably determines that any of the following conditions exists: (i) Merchant has violated any provision of this Agreement or Provider is otherwise entitled to terminate this Agreement pursuant to any provision of this Agreement; (ii) there is a material adverse change in Merchant's financial condition; (iii) if any case or proceeding is commenced by or against Merchant, its affiliates or principals under any Law dealing with insolvency, bankruptcy, receivership or other debt relief; any information which Merchant provided to Provider, including in the Merchant Application, was false, incomplete or misleading when received; (v) at any time during the Term, Merchant has had a monthly ratio of Chargebacks to total Transactions exceeding Card Network requirements or one percent (1%), or Chargebacks exceed three percent (3%) of any monthly dollar amount of total Transactions; (vi) an overdraft in the Account exists for more than three (3) days; (vii) Merchant or any of Merchant's officers or employees has been involved in processing Transactions arising from fraudulent or otherwise unauthorized transactions; (viii) Merchant is or will be unable or unwilling to perform its obligations under this Agreement or applicable Law; or the Network Rules (ix) Merchant has failed to timely pay Provider any amount due; (x) Merchant has failed to promptly perform or discharge any obligation under its Account or the Reserve Account; (xi) any of Merchant's representations or warranties made in connection with this Agreement was not true or accurate when given; (xii) Merchant has defaulted on any agreement it has with Provider; (xiii) Provider is served with legal process seeking to attach or garnish any of Merchant's funds or property in Provider's possession, and Merchant does not satisfy or appeal the legal process within fifteen (15) days of such service; (xiv) any Network Rules are amended in any way so that the continued existence of this Agreement would cause Provider to be in breach of those rules; (xv) any guaranty supporting Merchant's obligations is revoked, withdrawn, terminated or altered in any way; (xvi) if any circumstances arise regarding Merchant or its business that create harm or loss of goodwill to any Card Network; (xvii) termination is necessary to prevent loss to Provider or Card Issuers; (xviii) Merchant's type of business indicated on the Merchant Application or as conducted by Merchant could endanger Bank's safety or soundness; (xix) Merchant's owner, officer, Guarantor, or corporate entity has a separate relationship with Bank and that relationship is terminated, (xx) Merchant appears on any Card Network's security reporting; or (xxi) Provider's security for repayment becomes impaired.

4.3   **Effect of Bankruptcy.** Any account or security held by Provider will not be subject to any preference, claim or stay by reason of bankruptcy or similar Law. The parties expressly agree that the acquisition of Transactions hereunder is a financial accommodation and if Merchant becomes a debtor in any bankruptcy or similar proceeding, this Agreement may not be assumed or enforced by any other person and Provider will be excused from performance hereunder.

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

Merchant's termination of this Agreement. Merchant agrees that these damages are not a penalty but are a reasonable computation of the financial harm caused by the early termination of this Agreement.

ARTICLE V - MISCELLANEOUS

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

5.2   **Forms.** Merchant will use only the forms or modes of transmission of Transaction Records and Credit Vouchers that are provided or approved in advance by Provider, and Merchant may not use such forms other than in connection with Transactions.

5.3   **Indemnification.** Merchant will defend, indemnify and hold Provider and its officers, directors, members, shareholders, partners, employees, agents, subcontractors and representatives harmless from and against any and all fines, penalties, claims, damages, expenses, liabilities or fees of any nature whatsoever, including attorneys' fees and costs (collectively, "Damages"), asserted against or incurred by Provider arising out of, relating to or resulting from, either directly or indirectly: (a) a breach of the security of the system safeguarding Cardholder Information resulting in unauthorized access to Cardholder Information; (b) a breach of any representation, warranty or term of this Agreement, including, but not limited to, the data security provisions by Merchant, or any service provider, subcontractor or agent of Merchant; (c) the negligence, gross negligence or willful misconduct of Merchant in the performance of its obligations under this Agreement, including, but not limited to, the data security provisions; (d) any violation of applicable Law or Network Rules by Merchant; and (e) all third-party claims arising from the foregoing. Notwithstanding the preceding, Merchant is not liable to Provider if Damages are caused by, related to or arise out of Provider's gross negligence or willful misconduct, or Provider's breach of this Agreement. Merchant will promptly reimburse Provider for any assessments, fines, fees or penalties imposed by any Card Network in connection with this Agreement, including the data security provisions, and authorizes Bank to deduct any such sums from the Account, the Reserve Account or amount to otherwise be cleared and settled with Merchant.

5.4   **Records.** In addition to any records Merchant routinely furnishes to Provider under this Agreement, Merchant will preserve Transaction Records and Credit Vouchers and any written authorization of the Cardholder for the longer of the following: (a) two years after the Transaction is completed, (b) the period required by Law or the Network Rules, (c) if a dispute is pending, until such dispute is resolved.

5.5   **Requests for Copies.** Immediately after Merchant receives the request by Provider, Merchant will provide to Provider either the original or a legible copy (in a size comparable to the actual Transaction Record) of the paper Transaction Record and any other documentary evidence available to Merchant that Provider reasonably requests to meet Provider's obligations under Law (including its obligations under the Fair Credit Billing Act) or otherwise to respond to questions concerning Cardholder accounts.

5.6   **Exclusivity.** Merchant agrees that during the Term, Merchant will not enter into an agreement with any other entity that provides processing services similar to those provided by Provider and that Provider shall be Merchant's exclusive provider of all Card processing services as set forth in this Agreement.

5.7   **Fees and Charges.** Merchant will pay to Provider the fees and charges set forth on the Merchant Application including any additional charges applied to T~t~ransactions that fail to meet Card Network requirements for the lowest interchange levels. The fees and charges will either be debited from the Account through ACH or withheld from daily payments to Merchant for such amounts and for any other fees, charges or adjustments incurred by Merchant and associated with processing services. Provider may change fees, including adding fees for additional services utilized by Merchant, upon thirty (30) days' written notice to Merchant.

5.8   **Security Interest.** This Agreement constitutes a security agreement under the ~~Utah~~ Texas Commercial Code. To secure payment of Merchant's obligations under this Agreement, Merchant grants to Provider a security interest in all now existing or hereafter acquired: (a) Transactions, Transaction Records, Credit Vouchers and other items submitted to Provider for processing by or for Merchant; (b) accounts receivable and payment rights relating to or arising from this Agreement, including all amounts due Merchant (including any rights to receive credits or payments hereunder); (c) accounts maintained with Bank or any institution other than Bank, including without limitation the Account and the Reserve Account, in the name of or for the benefit of, Merchant or any Guarantor of Merchant's obligations under this Agreement; (d) deposits, regardless of source, to Merchant's or any Guarantor's accounts with Bank or any institution other than Bank, including the Account and the Reserve Account; (e) all deposits and all other property and funds deposited by Merchant or withheld by Bank, including funds and property withheld as the result of security monitoring; and (f) proceeds of the foregoing. If Provider reasonably determines that Merchant has breached any obligation under this Agreement, or that proceeds of Merchant's future Transactions are unlikely to cover anticipated Chargebacks, credits, fees and adjustments, as reasonably determined by Provider (whether because this Agreement has been terminated or for any other reason), Provider may setoff or otherwise exercise its security interest without notice or demand by immediately withdrawing from or freezing any account or otherwise exercising its rights under this Agreement or those rights available under the Network Rules, applicable Laws, including the ~~Utah~~ Texas Uniform Commercial Code, or in equity. In addition to the collateral pledged above, Provider may require Merchant to furnish such other and different security as Provider deems appropriate in its sole discretion to secure Merchant's obligations under this Agreement. Bank may fully or partially prohibit withdrawal by Merchant of funds from Merchant's Account with Bank or financial institutions other than Bank, pending Bank's determination from time to time to exercise its rights as a secured party against such accounts in partial or full payment of Merchant's obligations to Bank. Merchant will execute any documents and take any actions required to comply with and

Commented [LH3]: Question to Merrick – can we change venue to Texas? And governing law to Texas?

perfect any security interest under this paragraph, at Merchant's cost. Merchant represents and warrants that no other party has a security interest or lien in any of the collateral pledged above, and Merchant will obtain Bank's written consent before it grants a lien or security interest in that pledged collateral to any other person. Merchant shall not assign to any third party any payments due to it under this Agreement, and all indebtedness arising from Transactions will be for bona fide sales of goods and services (or both) at its business locations and free of liens, claims, and encumbrances other than ordinary sales taxes; provided, however, that Merchant may sell and assign future Transaction receivables to Provider, its affiliated entities and/or any other cash advance funding source that partners with Provider or its affiliated entities, without consent from any Card Network. Notwithstanding the foregoing, Provider prohibits Merchant from selling or assigning future Transaction receivables to any third party without Provider's prior written consent.

5.9 **Modifications to Agreement.** From time to time Provider may amend any provision or provisions of this Agreement, including, without limitation, those relating to the discount rate or to other fees and charges payable by Merchant by ~~mailing~~ providing written notice to Merchant of the amendment at least ~~thirty (30)~~fifteen (15) days prior to the effective date of the amendment, and the amendment will become effective unless Provider receives Merchant's written notice of termination of this Agreement before such effective date. Merchant acknowledges and agrees that notices hereunder, whether electronic or paper, may be provided to Merchant in the form of messages attached to the Merchant's monthly billing statements to the extent permitted by applicable Laws and the Network Rules. If Merchant continues to submit Transaction Records to Provider or otherwise continues to process Transactions with Provider after such thirty (30) day period (even if notice of objection was provided to Provider), then Merchant shall be deemed to have accepted and agreed to such amendment. In addition, Merchant acknowledges and agrees that this Agreement is subject to amendment by Provider to conform to the Network Rules and Law and that amendments required due to changes in either the Network Rules, Law or judicial decision may become effective on such shorter period of time as Provider may specify if necessary to comply with the applicable Network Rule, Law or decision. As a matter of clarification, Merchant may not terminate this Agreement if Provider amends the Agreement as necessary to comply with applicable Network Rules, Law or a judicial decision.

5.10 **Warranty Disclaimer.** PROVIDER MAKES NO WARRANTIES REGARDING THE USE, OPERATION OR PERFORMANCE OR NON-PERFORMANCE OF SOFTWARE AND SYSTEMS UTILIZED FOR THIS AGREEMENT, WHETHER EXPRESS OR IMPLIED, AND PROVIDER EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

5.11 **Limitation of Liability.** Provider's liability with respect to any Transaction may not exceed the amount of the Transaction Record in connection with that Transaction less any applicable fees and charges. **In no event will Provider or its agents, officers, directors or employees be liable to Merchant for any indirect, incidental, exemplary, punitive, special or consequential damages whatsoever, including, but not limited to, lost profits**. Merchant waives all claims against Provider for any loss, claim, demand, penalty, action, delay, cost or expense (including reasonable attorneys' fees) of any kind unless Merchant provides written notice to Provider of the occurrence that gave rise to the alleged liability within thirty (30) days after Merchant knew or should have known of the occurrence. Merchant will indemnify and hold Provider harmless from any claim relating to any Transaction Record paid for by Provider as may be made by anyone by way of defense, dispute, offset, counterclaim or affirmative action, or for any damages of or losses that Provider may incur as a result of Merchant's breach of this Agreement. Further, Merchant will reimburse Provider for all expenses and costs, including attorneys' fees, with regard thereto. Merchant acknowledges that the fees for the services provided to Merchant by Provider are very small in relation to the funds advanced to Merchant for Transactions and consequently Provider's willingness to provide these services is based on the liability limitations contained in this Agreement. Therefore, in addition to greater limitations on Provider's liability that may be provided elsewhere (including the per Transaction Record limitation above), any liability of Provider under this Agreement, whether to Merchant or any other party, whatever the basis of the liability, will not exceed, in the aggregate, an amount equal to the lesser of (a) the fees paid by Merchant to Provider during the last three (3) months, exclusive of fees and variable costs incurred by Provider to process Transactions, such as interchange costs, assessments and fees imposed by a third party or (b) **fifty thousand dollars ($50,000).**

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

5.13 **Written Notices.**

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

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

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

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

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

(c) By consent, Merchant agrees that electronic Disclosures have the same meaning and effect as if Provider provided paper Disclosures

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

5.14 **Choice of Law; Jurisdiction;** ~~Waiver of Jury Trial.~~ ~~Utah~~ Texas law governs this Agreement. Any claim or cause of action arising out of this Agreement against Provider must be initiated and maintained exclusively in the state or federal courts located in ~~Salt Lake~~Val ~~Verde~~Dallas County, ~~Utah~~Texas. ~~To the extent permitted by applicable Law, Merchant and Provider waive any right to trial by jury in any action or proceedings regarding any litigation related to this Agreement and each agree that any such actions or proceedings will be tried by a judge without a jury.~~

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

5.16 <u>**Arbitration**. Merchant, Provider and Guarantor (if applicable) will settle any dispute or controversy concerning or relating to this Merchant Agreement through binding arbitration before a single arbitrator, held at Dallas, Texas in accordance with the provisions of the Federal Arbitration Act or any successor statute. In interpreting the Merchant Agreement, which the arbitrator must do, the arbitrator shall be limited from revising, altering, or amending any term of the Merchant Agreement without the express written consent of Provider and Merchant. Claims hereunder will be arbitrated on an individual basis and, as such, the arbitrator's authority is limited to claims between the Provider and Merchant (and any Guarantor) alone. Merchant and Provider expressly agree that the arbitrator may not consolidate or join more than one person's or party's claims, and may not otherwise preside over any form of a consolidated or class proceeding or over claims brought in a purported representative capacity on behalf of the general public, other merchants or other persons or entities similarly situated. Furthermore, the arbitrator may aware relief (including monetary, injunctive and declaratory relief) only in favor of the individual party seeking relief and only to the extent necessary to provide relief necessitated by that party's individual claim. In the event that Provider is required to engage in any recovery or collection efforts to collect any outstanding payment due and owing from Merchant or any Guarantor under the Merchant Agreement and Guaranty, and Merchant and/or any Guarantor does not unconditionally proceed with arbitration in accordance with this Section 5.16 within 10 days after Provider sends a written demand for arbitration, Provider shall be entitled (but not obligated) to initiate litigation in any state or federal court located in Dallas County, Texas to recover any amount due and owing from Merchant to Provider.</u>

~~5.15~~5.17 **Entire Agreement; Assignability.** This Agreement expresses the entire understanding of the parties with respect to the subject matter hereof. This Agreement may be assigned by Bank without Merchant's or ISO's consent. This Agreement may not be assigned, directly or by operation of law by either Merchant or ISO, without Bank's prior written consent. This Agreement will be binding upon and inure to the benefit of the parties' respective heirs, personal representatives, successors and assigns.

~~5.16~~5.18 **Deposit Account.** Merchant will at all times maintain an Account at a bank that is a member of the Federal Reserve ACH system and approved by Provider and will provide Provider with proper authorization to debit the Account. All credits for collected funds and debits for fees, payments and Chargebacks and other amounts for which Merchant is liable under the terms of this Agreement will be made to the Account. During the term of this Agreement and for a period of one (1) year after the termination of this Agreement, Merchant may not close or change the Account without prior written approval by Provider, which approval may not be unreasonably withheld. Merchant will be solely liable for all fees and costs associated with the Account and for all overdrafts. Merchant hereby grants to Provider a security interest in the Account to the extent of any and all fees, payments and Chargebacks and other amounts due which may arise under this Agreement, and Merchant will execute any document and obtain any consents or waivers from the bank at which the Account is maintained as requested by Provider to protect its security interests therein. Merchant will maintain sufficient funds in the Account to accommodate all Transactions contemplated by this Agreement and all other fees, charges, credits or other payments or amounts due under this Agreement.

~~5.17~~5.19 **Credit and Financial Inquiries; Additional Locations; Inspections.** Provider may make, at any time, any credit inquires which it may consider necessary to accept or review acceptance of this Agreement or investigate Merchant's deposit or Card acceptance activities subsequent to acceptance of this Agreement. Such inquiries may include, but are not limited to, a credit and/or criminal check of Merchant and business including its proprietor, partners, principals, owners or shareholders or officers. Upon Provider's request, Merchant will provide the written consent of any person for which an inquiry has been or is to be made if such person has not executed this Agreement and will provide any financial statements, income tax and business tax returns and other financial information as Provider may consider necessary to perform initial or periodic reviews of Merchant's financial stability and business practices. Merchant may accept Cards only at locations approved by Provider. Additional locations may be added, subject to Provider's prior consent. Provider or Merchant may remove locations by providing notice as provided herein. Merchant will permit Provider, at any time and from time to time, to inspect locations to confirm that Merchant has or is adhering to the terms of this Agreement and is maintaining the proper facilities, equipment, inventory, records and license or permits (where necessary) to conduct its business. However, nothing in this paragraph may be deemed to waive Merchant's obligation to comply in all respects with the terms of this Agreement or the Network Rules. Provider, its internal and external auditors, and its regulators may audit compliance with this Agreement, compliance with Laws and Network Rules, including, but not limited to, relating to Card acceptance and Transaction processing, data security provisions and Card Network compliance. Merchant will make available its records maintained and produced under this Agreement, and Merchant's facilities will be made accessible, upon notice during normal business hours for examination and audit and shall cooperate with such

Commented [LH5]: Added a recovery of attorneys fees section – this is drafted using the defined term "Provider" which includes bank and processor.

Formatted: Font: Not Bold, No underline

Commented [LH6]: In place of a jury waiver I put in an arbitration provision with a class action waiver. Again, it's drafted using "Provider" so this provides protection to both bank and processor.

Formatted: Font: Not Bold, No underline

Formatted: Indent: Left: 0.58", No bullets or numbering

audits or examinations. Nothing in this section may be construed to require Merchant to give access to its facilities, personnel or records in a manner that unreasonably interferes with its business operations. Each party will bear its own expenses of any audit.

5.18**5.20** **Marketing of Non-Card Services.** From time to time, Provider may offer to Merchant certain additional products and services which may or may not be related to the processing of credit card and debit card Transactions. If such offers are made, Merchant may decline the offers or ~~be deemed to have~~Merchant may accept~~ed~~ the offers and be liable for payment therefor. If any additional product or service is offered by ISO independently of Bank, then ISO (and not Bank) shall be responsible to deliver and perform such product and service and, accordingly, Merchant may not assert any claim against Bank as it relates to such additional product or service provided by ISO. Likewise, if any additional product or service is offered by Bank independently of ISO, then Bank (and not ISO) shall be responsible to deliver and perform such product and service and, accordingly, Merchant may not assert any claim against ISO as it relates to such additional product or service provided by Bank.

5.19**5.21** **Force Majeure.** The parties will be released from liability hereunder if they fail to perform any obligation where the failure occurs by reason of any act of God, fire, flood, storm, earthquake, tidal wave, communications failure, sabotage, war, military operation, terrorism, national emergency, mechanical or electronic breakdown, civil commotion or the order, requisition, request or recommendation of any governmental authority, or either party's compliance therewith, or governmental regulation, or priority, or any other similar cause beyond either party's reasonable control.

5.20**5.22** **No Third-Party Beneficiary.** No other person or entity may be deemed to be a third-party beneficiary of this Agreement.

5.21**5.23** **Severability; Conflict with Network Rules.** If any provision in this Agreement is for any reason held to be invalid or unenforceable, no other provision shall be effected thereby, and this Agreement shall be construed as if the invalid or unenforceable provision had never been a part of it. In the event of a conflict between this Agreement and the Network Rules, the Network Rules shall govern and control.

5.22**5.24** **IRS Reporting Information.** Pursuant to Section 6050W of the Internal Revenue Code, merchant acquiring entities such as Bank and third-party settlement organizations are required to file an information return reflecting all payment card transactions and third-party network transactions occurring in a calendar year. This requirement applies to returns for all calendar years after December 31, 2010 and Merchant will receive a form 1099-K reporting Merchant's gross transaction amounts for each calendar year. In addition, amounts payable under Section 6050W are subject to backup withholding requirements. Merchant acquirers such as Bank, either itself or through third parties, are required to perform backup withholding by deducting and withholding income tax from reportable transactions if (a) the payee fails to provide the payee's taxpayer identification number (TIN) to the merchant acquirer; or
(b) if the IRS notifies the merchant acquirer that the TIN (when matched with the name) provided by the payee is incorrect. Accordingly, to avoid backup withholding, it is very important that Merchant provides Bank with the correct name and TIN that Merchant uses when filing its income tax return that includes the transactions for Merchant's business. In addition to the fees set forth on the Merchant Application, if Merchant fails to comply with the obligations set forth in this section, Provider may charge Merchant additional amounts determined by Provider and may pass through any additional fines, costs or expenses incurred by Provider.

5.25 **Confidentiality.** Merchant shall protect all information or other items proprietary to Provider that Merchant obtains knowledge of or access to as a result of Provider's provision of the services pursuant to this Agreement (collectively, "Provider Confidential Information") from unauthorized disclosure, publication, or dissemination with the same standard of care and discretion Merchant uses to protect similar confidential information of Merchant's own, but in no event less than reasonable care. Furthermore, Merchant shall not use, reproduce, distribute, disclose, or otherwise disseminate Provider Confidential Information, except in connection with the performance of Merchant's obligations under this Agreement. The Provider Confidential Information described in the previous sentence, shall include, but not be limited to, the following types of information and other information of a similar nature (whether or not reduced to writing): scientific, technical, or business information, product makeup lists, ideas, concepts, designs, drawings, techniques, plans, calculations, system designs, formulae, algorithms, programs, software (source and object code), hardware, manuals, test procedures and results, identity and description of computerized records, identity and description of suppliers, customer lists, processes, procedures, trade secrets, "know-how," marketing techniques and material, marketing and development plans, price lists, pricing policies, and all other financial information. The obligations of non-disclosure provided hereunder shall continue during the Term and, (i) with respect to Provider Confidential Information that does not constitute a trade secret, for a period of three (3) years thereafter and, (ii) with respect to Provider Confidential Information that rises to the level of a trade secret under applicable Law, for such period of time thereafter as the Provider Confidential Information shall retain its status as a trade secret under applicable law, and no less than three (3) years thereafter.

5.26 **Continuing Guaranty.** As a primary inducement to Provider to enter into this Agreement, and to approve the Merchant Application of Merchant, the Guarantor(s), individually and severally, who signed on the Guarantor signature line(s) on the Merchant Application, agree to be bound by all terms and provisions of this Agreement to the same extent and in the same manner as Merchant, and unconditionally and irrevocably, personally guarantee the continuing full and faithful performance and payment by Merchant of each and all of Merchant's duties and obligations to Provider under this Agreement or any other agreement currently in effect or in the future entered into between Merchant or its principals and Provider, as such agreements now exist or are amended from time to time, with or without notice to Guarantor(s).

Guarantor(s) understands that Provider, without notice to Guarantor(s), may from time to time renew or extend the Agreement, modify rates, limits, charges and fees, or modify the amount or type of services provided to Merchant all of which may increase the Guarantor's obligations under this Guaranty. Guarantor(s) further understands that Provider may proceed directly against Guarantor(s) without first exhausting Provider's remedies against the Merchant, any other person or entity responsible to Provider or any security held by Provider. This Guaranty is a continuing guaranty and will not be discharged or affected by the release or discharge of Merchant or the death of the

Guarantor(s). This Guaranty will bind all heirs, administrators, and representatives of the Guarantor(s) and may be enforced by or for the benefit of any successor of Provider. To the fullest extent permissible under applicable law, Guarantor(s) waives any and all rights of subrogation, reimbursement or indemnity derived from Merchant, all other rights and defenses available to Merchant, and all other rights and defenses available to Guarantor(s).

5.23

Terms Below Are Additional Applicable Specifically to American Express Card Acceptance (capitalized terms below not defined elsewhere in the Agreement shall have the meanings assigned in the American Express Network Rules). With respect to participation in an American Express acceptance program, in the event of a conflict between the terms below and other terms of this Agreement, the terms below shall control.

A5.~~24~~ 27 **Transaction Data**. Merchant authorizes Provider and/or its affiliates to submit American Express Transactions to, and receive settlement on such Transactions from, American Express or Bank on behalf of Merchant.

A5.~~25~~ 28 **Marketing Message Opt-Out**. Merchant may opt-out of receiving future commercial marketing communications from American Express by contacting Provider. Note that Merchant may continue to receive marketing communications while American Express updates its records to reflect this choice. Opting out of commercial marketing communications will not preclude Merchant from receiving important transactional or relationship messages from American Express.

A5.~~26~~ 29 **Conversion to American Express Direct Merchant**. Merchant acknowledges that it may be converted from American Express Card OptBlue program to a direct relationship with American Express if and when its Transaction volumes exceed the eligibility thresholds for the OptBlue program. If this occurs, upon such conversion, (i) Merchant will be bound by American Express' then-current Card Acceptance Agreement; and (ii) American Express will set pricing and other fees payable by Merchant.

A5.~~27~~ 30 **American Express as Third Party Beneficiary**. Notwithstanding anything in the Agreement to the contrary, American Express shall have third-party beneficiary rights, but not obligations, to the terms of this Agreement applicable to American Express Card acceptance to enforce such terms against Merchant.

A5.~~28~~ 31 **American Express Opt-Out**. Merchant may opt out of accepting American Express at any time without directly or indirectly affecting its rights to accept Cards bearing Marks of other Card Networks.

A5.~~29~~ 32 **Refund Policies**. Merchant's refund policies for American Express purchases must be at least as favorable as its refund policy for purchase on any other Card Network, and the refund policy must be disclosed to Cardholders at the time of purchase and in compliance with Law. Merchant may not bill or attempt to collect from any Cardholder for any American Express Transaction unless a Chargeback has been exercised, Merchant has fully paid for such Chargeback, and it otherwise has the right to do so.

A5.~~30~~ 33 **Establishment Closing**. If Merchant closes any of its Establishments, Merchant must follow these guidelines: (i) notify ISO immediately; (ii) policies must be conveyed to the Cardholder prior to completion of the Transaction and printed on the copy of a receipt or Transaction record the Cardholder signs; (iii) if not providing refunds or exchanges, post notices indicating that all sales are final (e.g., at the front doors, by the cash registers, on the Transaction record and on websites and catalogs); (iv) return and cancellation policies must be clearly disclosed at the time of sale; and (v) for Advance Payment Charges or Delayed Delivery Charges, Merchant must either deliver the goods or services for which Merchant has already charged the Cardholder or issue Credit for any portion of the Transaction for which Merchant has not delivered the goods or services.

A5.~~31~~ 34 **Network Rules.** Merchant shall be bound by American Express Network Rules, including the Merchant Operating Guide: www.americanexpress.com/merchantopguide

TRUSTCOMMERCE SERVICES PARTICIPATION ADDENDUM

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

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

1. **Definitions.** Capitalized terms used herein shall have the meanings given to such terms as set forth in this Addendum or as defined elsewhere in the Agreement.

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

1.2 **"Control Panel"** means an interface provided by TrustCommerce to Merchant that enables Merchant to access and manage transactions displayed on a website via a web browser.

1.3 **"Customer"** means a person or entity that makes a purchase of goods or services from Merchant, the transaction for which utilizes the TC Services.

1.4 **"Merchant's Systems"** means Merchant's point of sale systems or any facility where Merchant processes and/or stores transaction data.

1.5 **"Payment Messages"** means messages that relate to Card transactions, including, but not limited to, the terms "authorization," "capture," "void," "credit," "decline," "failed," "did not respond," "reversal," "post-authorization capture," and "successful settlement request".

1.6 **"Person"** means a person or entity other than Merchant, ISO or TrustCommerce.

1.7 **"TC Communicator"** means the software, rules and methodology developed by TrustCommerce to be used by Merchant to connect Merchant's website to the TC Server to enable transmission of transaction data between Merchant and the TC Server.

1.8 **"TC Marks"** means the names, logos, emblems, brands, service marks, trademarks, trade names, tag lines or other proprietary designations of TrustCommerce.

1.9 **"TC Server"** means the servers operated by or for TrustCommerce that communicate with Merchant's servers to permit access to the TC Services.

1.10 **"TC Services"** means those services described in Section 6 below, the object code version of the TrustCommerce software related to such services, including the TC Communicator, and any related updates (including software maintenance or bug fixes) and any materials, documentation and derivative works released by TrustCommerce from time to time. For the avoidance of doubt, the term software in the preceding sentence does not include any software that may be obtained by Merchant separately from the TC Services.

1.11 **"Third Party Services"** are the services, products, promotions or applications provided by someone other than TrustCommerce.

2. **Term and Termination.** The terms and conditions of this Addendum shall become effective on the day TrustCommerce begins providing the TC Services to Merchant and shall ~~end three (3) years~~terminate upon termination of the Agreement ~~thereafter~~ unless otherwise terminated as set forth herein. This Addendum shall automatically renew ~~for successive terms of twelve (12) months~~concurrently with the Agreement unless either party gives the other party written notice of its intention not to renew this Addendum at least ninety (90) days prior to the end of the current term. The TC Services may be terminated for convenience at any time by TrustCommerce upon at least thirty (30) days' written notice to Merchant. In addition, TrustCommerce may suspend the TC Services, in whole or in part, or terminate this Addendum if (i) TrustCommerce determines that Merchant is using the TC Services for any fraudulent, illegal, or unauthorized purpose, (ii) TrustCommerce terminates its agreement with any third parties that are involved in providing the TC Services, or (iii) TrustCommerce otherwise decides to discontinue providing any part of the TC Services.

3. **Default.** If either party defaults in the performance of any of its obligations hereunder, and if any such default is not corrected within thirty (30) days after notice in writing, the non-defaulting party may terminate this Addendum and the TC Services upon written notice. This Addendum and the TC Services may be terminated by either party, upon written notice:(i) upon the institution by the other party of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of its debts, which are not dismissed or otherwise resolved in its favor within sixty (60) days thereafter; (ii) upon the other party's making a general assignment for the benefit of creditors; or (iii) upon the other party's dissolution or ceasing to conduct business in the ordinary course.

4. **Fees.** Merchant shall pay the fees for the TC Services as set forth in the Merchant Application and Agreement. All sums due, payable and unpaid for over thirty (30) days shall incur a late fee of 1.5% per month or the maximum amount allowed by law, whichever is less.

5. **License Grant.** During the term of this Addendum, TrustCommerce grants to Merchant a personal, limited, non-exclusive, revocable, non-transferable license, without the right to sublicense or assign in any way, to electronically access and use the TC Services for Merchant's internal business use solely in the United States to manage Merchant's establishment and conduct associated point of

sale activities within the United States in accordance with this Addendum. For purposes of this Addendum, "United States" does not include U.S. territories or possessions. The TC Services are for Merchant's internal business use only. This Addendum does not grant to Merchant any rights to the TC Marks. All intellectual property and proprietary rights in or related to the TC Services and the TC Marks are and will remain the sole and exclusive property of TrustCommerce, and any and all right, title and interest associated with the TC Services not expressly granted by TrustCommerce in this Addendum are deemed withheld.

6. **TC Services.** The TC Services applies only to Card transactions sent from Merchant to Provider for authorization and settlement pursuant to the Agreement, and specifically excludes electronic check transactions. TrustCommerce will transport data submitted by Merchant for authorization request from Merchant's Systems to ISO's systems. During the period when the transaction is being transmitted to ISO for authorization processing, all historical transaction data, including Card number and full magnetic stripe data (track data and expiration date), will be encrypted. Based on the submitted data, TrustCommerce will receive and transport ISO's responses to Merchant. TrustCommerce will provide Merchant access to the Control Panel via a web browser for the purposes of reporting, managing and reconciling Card transactions. TrustCommerce will also provide Merchant with the TC Communicator, which includes documentation and sample scripts necessary for Merchant to develop and test the necessary communications module. This module will enable Merchant's website and other systems to communicate with the TC Server.

7. **Retention of Merchant Data.** TrustCommerce will retain transaction detail concerning Merchant's Card transactions on the Control Panel for at least twelve (12) months following the date on which the data relating to such transactions was first received by TrustCommerce in accordance with the TrustCommerce's data retention policy (available on TrustCommerce's TC Vault website at https://vault.trustcommerce.com>Account Information>Terms and Policies>Polices)

8. **Responsibilities of Merchant.** Merchant is responsible to comply with the following regarding its use of the TC Services:

8.1 Merchant is required to comply with all federal and state laws, rules and regulations applicable to it, including the Network Rules and including taking all steps required to comply with the Payment Card Industry Data Security Standards (PCI DSS). Merchant must ensure that all third parties and software use by Merchant in connection with its payment processing are compliant with PCI DSS. Use of the TC Services will not, on its own, cause Merchant to be compliant or eliminate Merchant's obligations to comply with PCI DSS or any other Network Rule.

8.2 Use of the TC Services is not a guarantee against an unauthorized breach of Merchant's Systems.

8.3 Merchant must deploy the TC Services (including implementing any upgrades to such service within a commercially reasonable period of time after receipt of such upgrades) throughout Merchant's Systems.

8.4 Merchant must establish, maintain and provide the necessary security over Merchant's Systems that integrate or communicate with TrustCommerce's systems, including but not limited to website(s), retail stores and call centers. Merchant is fully responsible for all goods or services offered for sale by it and for anyone to whom it provides access to the TC Services including any advertising for such goods or services regardless of the medium. Merchant is also fully liable for any promotions, whether appearing on Merchant's website or otherwise, proffered or offered by Merchant directly or indirectly in reference to any of Merchant's offerings. Merchant hereby certifies to TrustCommerce that Merchant is the owner of and/or has the legal right and authority to use, utilize and/or disseminate all information, data, graphics, text, video, music or intellectual property which either form a part of Merchant's website, are in any way or manner incorporated into Merchant's website, are provided by Merchant to its Customers or those accessing Merchant's website or are otherwise used or utilized by Merchant in its advertising or promotion through any medium available.

8.5 Merchant must establish and maintain appropriate and necessary integration between Merchant's Systems and TC Services including, but not limited to, delivering the required data to TrustCommerce's server(s) and ensuring that the data to be transmitted in conjunction with the TC Services is accurate and in the format required by TrustCommerce.

8.6 Merchant acknowledges that the integration and development described in this Section may require Merchant or Merchant's Internet service provider ("ISP") to use the services of a third party such as a web developer. Merchant hereby authorizes TrustCommerce to work with Merchant's designated third party to implement the TC Services contracted for under this Addendum.

8.7 Merchant must establish and implement a connection to the TC Server. Merchant is solely responsible for testing this connection and ensuring that Merchant's Systems are generating correct Payment Messages and receiving correct responses. When Merchant is satisfied that its testing is complete and successful, it must notify TrustCommerce in writing or by email of its request to initiate the TC Services.

8.8 Merchant will manage its business and the transactions resulting from that business including, but not limited to, all business involving its merchant account, customer support, reconciliation of its merchant account, and processing of its charge backs, returns and all other transaction types.

8.9 Merchant is required to comply with the terms and conditions of the Agreement.

8.10 Merchant acknowledges that it is solely responsible for the maintenance and security over Merchant's Systems including any PCI data maintained or passed by Merchant's ~~systems~~ Systems to TrustCommerce's systems.

8.11 If Merchant is provided an encryption key, Merchant acknowledges and agrees that the key is to be treated as TrustCommerce's confidential information and that TrustCommerce is the sole owner of the encryption key. Passing the encryption key on to third parties is strictly prohibited. Merchant agrees to be in compliance with the audit specifications established by the American National Standards Institute's (ANSI) Technical Report 39 (TR-39) and PCI PIN Transaction Security (PTS) standards to protect the encryption key, and will not use the encryption key unless such standards are in place. Merchant is not permitted in any way to decompile, reverse engineer, or segregate out any component of the encryption key, nor make such encryption key accessible to third parties

other than as provided for herein. Merchant is not allowed to install by way of injection the encryption key to any POS device without TrustCommerce's express prior written consent.

8.12 Merchant will only provide the following data to TrustCommerce: payor/cardholder name; transaction (order) ID; Card number; Card expiration date; checking account number (if applicable) and transaction dollar amount. TrustCommerce does not require any additional data to process a payment transaction.

8.13 Merchant will only enter and/or transmit Primary Account Number (PAN) data to the appropriate fields as represented within the TC Ops Guide. TrustCommerce expressly precludes the entry and/or transmission of any PAN data, encrypted or not, in any field not designated for such information by Merchant.

8.14 Merchant will only use the TC Services for Merchant's internal business purposes in a manner consistent with this Addendum.

8.15 Merchant will use only unaltered version(s) of the TC Services and will not use, operate or combine the TC Services or any related software, materials or documentation, or any derivative works thereof with other products, materials or services in a manner inconsistent with the uses contemplated herein.

8.16 Merchant will promptly notify TrustCommerce of a breach of any terms of this Addendum.

9.   Restrictions.

9.1 All right, title and interest in and to all confidential information and intellectual property related to the TC Services (including TC Marks, the TC Communicator, all software, the content of any materials, web screens, layouts, processing techniques, procedures, algorithms, and methods and any updates, changes, alterations, or modifications to or derivative works from such intellectual property), owned, developed or licensed by TrustCommerce at any time or employed by TrustCommerce in connection with the TC Services, shall be and will remain, as between TrustCommerce and Merchant, the sole and exclusive property of TrustCommerce or its licensors (as applicable), and all right, title and interest associated with the TC Services not expressly granted by TrustCommerce in this Addendum are deemed withheld. Merchant shall not use TC Marks in any manner, including in any advertisements, displays, or press releases, without the prior written consent of TrustCommerce.

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

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

10.   TC Services Limitations and Requirements.

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

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

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

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

13. **Confidentiality.**

13.1 Merchant must not use, disclose, store, sell or disseminate any Account Data except as may be allowed under this Addendum. Merchant acknowledges that Merchant will not obtain ownership rights in any information relating to and derived from Account Data. No Account Data, including any databases containing such information, may not be sold or disclosed to a Person as an asset upon a bankruptcy, insolvency or failure of Merchant's business.

13.2 Merchant will treat ~~this Addendum, and any~~ information supplied or otherwise made accessible by TrustCommerce, its agents or Affiliates as confidential, including without limitation, (i) Account Data, information about TrustCommerce's or its Affiliate's products, services, operations, procedures and pricing; and (ii) all documentation, computer software, source code, object code, and databases. Merchant receives confidential information of TrustCommerce in confidence and shall not disclose the confidential information to any third party, except as may be agreed upon in writing by TrustCommerce. Merchant shall safeguard all of TrustCommerce's confidential information using a reasonable degree of care, but not less than that degree of care used by it in safeguarding its own similar information or material. Upon request by TrustCommerce or upon termination of this Addendum, Merchant shall return to TrustCommerce or destroy all of TrustCommerce's confidential information in its possession or control.

13.3 The obligations of confidentiality and restrictions on use in this Section shall not apply to any confidential information that: (i) was in the public domain prior to the date of the Agreement or subsequently came into the public domain through no fault of Merchant; (ii) was received from a third party free of any obligation of confidence of Merchant to the third party and which third party, to Merchant's knowledge, was not under an obligation to keep the information confidential; (iii) was already in Merchant's possession prior to receipt from TrustCommerce; or (iv) is subsequently and independently developed by Merchant employees, consultants or agents without use of or reference to TrustCommerce's confidential information.

13.4 Except as specifically provided for herein, this Section does not confer any right, license, interest or title in, to or under TrustCommerce's confidential information to Merchant. Except as specifically provided for herein, no license is hereby granted to Merchant under any patent, trademark, copyright, trade secret or other proprietary rights of TrustCommerce.

13.5 Merchant acknowledges that breach of the restrictions on use or disclosure of any of TrustCommerce's confidential information would result in immediate and irreparable harm to TrustCommerce, and money damages would be inadequate to compensate for that harm. TrustCommerce shall be entitled to equitable relief, in addition to all other available remedies, to redress any breach.

14. **Disclaimer.** USE OF THE TC SERVICES IS AT MERCHANT'S OWN RISK. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE TC SERVICES ARE PROVIDED "AS IS" AND TRUSTCOMMERCE MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND (EXPRESS OR IMPLIED) TO MERCHANT OR ANY OTHER PERSON, INCLUDING, WITHOUT LIMITATION, WARRANTIES REGARDING QUALITY, SUITABILITY, ACCURACY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON- INFRINGEMENT, OR THAT THE TC SERVICES WILL FUNCTION OR OPERATE UNINTERRUPTED OR ERROR-FREE, OR THAT THE TC SERVICES ARE SECURE, FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS OR DOES NOT INFRINGE ON THE RIGHTS OF ANY PERSON.

15. **Audit of Use.** TrustCommerce may at any time and from time to time audit Merchant's use of the TC Services. Audits shall be conducted during regular business hours at Merchant's place or places of business and shall not unreasonably interfere with Merchant's business activities. If, as a result of any such audit, TrustCommerce identifies unauthorized use of the TC Services, Merchant shall pay, in addition to any fees charged in conjunction with the TC Services, the reasonable expense of TrustCommerce in conducting the audit.

16. **Indemnification.** Merchant agrees to indemnify and hold TrustCommerce harmless from and against all losses, liabilities, damages, and expenses (including reasonable attorneys' fees) arising out of or relating to: (a) Merchant's failure to comply with or Merchant's breach of, any term or condition, representation or warranty in this Addendum, including, but not limited to the TC Ops Guide, or the Agreement; (b) Merchant's use of the TC Services; or (c) any other party's access and/or use of the TC Services with Merchant's user names, password, other appropriate security code, or any other sign on credentials/access controls for the TC Services and any software.

17. **Exclusions of Consequential Damages; Limitation on Liability.**

17.1 NOTWITHSTANDING ANYTHING IN THIS ADDENDUM TO THE CONTRARY, IN NO EVENT SHALL TRUSTCOMMERCE OR ITS AFFILIATES BE LIABLE UNDER ANY THEORY OF TORT, CONTRACT, STRICT LIABILITY OR OTHER LEGAL THEORY FOR LOST PROFITS, LOST REVENUES, LOST BUSINESS OPPORTUNITIES, EXEMPLARY, PUNITIVE, SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES, EACH OF WHICH IS HEREBY EXCLUDED BY AGREEMENT OF THE PARTIES, REGARDLESS OF WHETHER SUCH DAMAGES WERE FORESEEABLE OR WHETHER ANY PARTY OR ANY ENTITY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

17.2 NOTWITHSTANDING ANYTHING IN THIS ADDENDUM TO THE CONTRARY, TRUSTCOMMERCE AND ITS AFFILIATES' CUMULATIVE LIABILITY, IN THE AGGREGATE (INCLUSIVE OF ANY AND ALL CLAIMS MADE BY MERCHANT AGAINST TRUSTCOMMERCE AND/OR ITS AFFILIATES, WHETHER RELATED OR UNRELATED) FOR ALL LOSSES, CLAIMS, SUITS, CONTROVERSIES, BREACHES, OR DAMAGES FOR ANY CAUSE WHATSOEVER AND REGARDLESS OF THE FORM OF ACTION OR LEGAL THEORY SHALL NOT EXCEED THE LESSER OF, (I) $10,000; OR (II) THE AMOUNT OF FEES RECEIVED BY TRUSTCOMMERCE PURSUANT THIS ADDENDUM FOR TC SERVICES PERFORMED IN THE IMMEDIATELY PRECEDING THREE (3) MONTHS.

18. **Amendment.** TrustCommerce has the right to change or add to the terms of this Addendum at any time, and to change, delete, discontinue, or impose conditions on any feature or aspect of the TC Services with notice provided to Merchant as set forth in the Notices section of this Addendum. Any use of the TC Services after TrustCommerce's publication of any such changes shall constitute Merchant's acceptance of this Addendum as modified.

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

20. **General.**

20.1 Relationship of Parties. The parties hereto shall each be independent contractors in the performance of their obligations under this Addendum, and nothing contained herein shall be deemed to constitute either party as the agent, representative or franchisee of the other party, or both parties as joint venturers or partners for any purpose.

20.2 Assignment. Neither party may assign its rights or delegate its obligations under this Addendum without the other party's prior written consent, which will not be unreasonably withheld. However, TrustCommerce, may assign any or all of its rights or delegate any or all of its obligations to an Affiliate or an entity acquiring all or substantially all of the assets of TrustCommerce.

20.3 Governing Law. This Addendum shall be governed by and construed in accordance with the laws of the State of Texas (without regard to its choice of law provisions). The exclusive venue for any actions or claims arising under or related to this Addendum shall be in the appropriate state or federal court located in Dallas County, Texas.

20.4 Waiver of Jury Trial. THE PARTIES HEREBY IRREVOCABLY WAIVE ANY AND ALL RIGHTS THEY MAY HAVE TO A TRIAL BY JURY IN ANY JUDICIAL PROCEEDING INVOLVING ANY CLAIM RELATING TO OR ARISING UNDER THIS ADDENDUM.

20.5 Notices. Except as otherwise specifically provided, all notices and other communications required or permitted hereunder shall be in writing, if to Merchant at the address set forth in the Agreement or by any electronic means, including but not limited to the e-mail address Merchant has provided. If to TrustCommerce, at One MacArthur Place, Suite 400, Santa Ana, CA 92707-5927, Attention: Legal Department. Notices shall be deemed to have been given (i) if sent by mail or courier, upon the earlier of five (5) days after mailing or when actually received or, in the case of courier, when delivered. Notice given in any other manner shall be effective when confirmed by the receiving party. Failure to provide notice in the manner described in this Section will be deemed ineffective.

20.6 Entire Agreement; Waiver. This Addendum constitutes the entire agreement between Merchant and TrustCommerce with respect to the subject matter thereof, and supersede any previous agreements and understandings. Except as provided herein, this Addendum can be changed only by a written agreement signed by Merchant and TrustCommerce. A party's waiver of a breach of any term or condition of this Addendum shall not be deemed a waiver of any subsequent breach of the same or another term or condition.

20.7 Force Majeure. TrustCommerce shall not be held responsible for any delays in or failure or suspension of service caused, directly or indirectly, by mechanical or power failure, computer malfunctions (including, without limitation, software, hardware and firmware malfunctions), the nonperformance, delay or error by a third party or in any other third party system for any similar cause beyond the reasonable control of such party, including without limitation, failures or fluctuations in telecommunications, transmission links or other equipment; strikes, labor difficulties, fire, inability to operate or obtain service for its equipment, unusual delays in transportation, earthquake, fire, flood, elements of nature or other acts of God, any act or omission of Merchant or any government authority, or other causes reasonably beyond the control of TrustCommerce.

20.8 Headings. Headings are for convenience only and are not to be used in the interpretation of this Addendum.

20.9 Severability. Every provision of this Addendum is severable. If any provision of this Addendum is held to be invalid, illegal, void or unenforceable by reason of any judicial decision, then such provision will be interpreted, construed or reformed to the extent reasonably required to render the same valid, enforceable and consistent with the original intent underlying such provision, and all other provisions of this Addendum will nevertheless remain in full force and effect. In such case, the parties will in good faith modify or substitute a provision consistent with their original intent. If any remedy fails of its essential purpose, then all other provisions, including the limitations on liability and exclusion of damages, will remain fully effective.

20.10 Survival of Obligations. The rights and obligations of the parties that would be intended to survive by their nature or context will survive expiration or termination of this Addendum.