

# Terms and Conditions

Processing Terms and Conditions  
Funds Transfer Instructions  
Card Brand Rules  
ATM/Debit Network Rules  
American Express OptBlue<sup>SM</sup> Program Agreement  
Addendum

Provided by



**HARBORTOUCH<sup>®</sup>**

First National Bank of Omaha  
800.853.9586  
Member Bank for Visa, Inc. and MasterCard International, Inc.

Copyright © 2016  
TSYS Merchant Solutions, LLC, Omaha Nebraska. All rights reserved.

## PROCESSING TERMS AND CONDITIONS

This Merchant Transaction Processing Agreement (together with its addenda, attachments, and schedules shall be hereinafter known as the "AGREEMENT"), is by and among the parties in the Merchant Application (the "PARTIES"). The AGREEMENT shall become effective as set out in the signature block of the Merchant Application.

- A. WHEREAS, BANK is a Member of VISA, Inc. ("VISA") and MasterCard International, Inc. ("MASTERCARD"), and provides transaction processing and other services and products ("SERVICES") in relation to financial service cards issued by VISA, MASTERCARD, and other financial service card organizations, including ATM/Debit networks (together herein known as "CARD(S)"); VISA, MASTERCARD, ATM/Debit Networks, and the other financial service card organizations shall be collectively known as "CARD BRANDS";
- B. WHEREAS, MERCHANT, in furtherance of its business operations, wishes to accept CARDS and have BANK process the resulting transactions ("SALES") pursuant to the terms and conditions set out below. For purposes of this AGREEMENT, ATM/Debit transactions shall mean those transactions processed on an ATM/Debit network ("NETWORK(S)") in an on-line real time environment requiring the entry of a personal identification number ("PIN");
- C. WHEREAS, MERCHANT may desire to be sponsored as a participant in certain NETWORKS, under the terms of the rules and regulations of each such NETWORK;
- D. WHEREAS, CARD BRANDS and BANK each have adopted rules and regulations relating to all aspects of SALES and SERVICES. Such rules and regulations, as amended from time to time, are incorporated herein by this reference and shall be referred to as the "RULES"; and
- E. WHEREAS, MERCHANT understands that this is an agreement for transaction processing and that the DISCOUNT (as defined herein) for the SERVICES is calculated based on certain factors, including without limitation, the term of this AGREEMENT, the number of transactions processed, the business type, the type of goods and/or services sold, and the method of processing.
- F. WHEREAS, BANK has assigned and/or delegated some of its rights and obligations under this AGREEMENT to TSYS Merchant Solutions, LLC ("TMS"); provided however that it is able to do so by the CARD BRANDS, NETWORKS, RULES, and any applicable law. To the extent that BANK has assigned and/or delegated rights and/or obligations to TMS under any particular provision of this AGREEMENT, references to BANK in such provisions shall include TMS.;
- G. WHEREAS, all applicable ADDENDA are attached hereto and are made a part of this AGREEMENT.

NOW, THEREFORE, in consideration of the mutual promises made herein and other valuable consideration, receipt and sufficiency of which are hereby acknowledged, the PARTIES do hereby agree as follows:

### **1. GENERAL:**

- 1.1 As a result of MERCHANT submitting SALES for processing to BANK, BANK will process such SALES and credit or debit MERCHANT's DESIGNATED ACCOUNT (as defined herein) with the resulting financial proceeds of such SALES, provided, however, that no payment for SALES will take place unless and until BANK has received payment for such SALES from the CARD BRANDS. In addition, when a disputed transaction ("CHARGEBACK") occurs, MERCHANT agrees to provide all requested information to BANK and BANK agrees to forward such information to the CARD BRANDS in accordance with the RULES and the CARD BRANDS' dispute resolution guidelines. BANK is not responsible for the outcome of any CHARGEBACK.
- 1.2 The CARDS designated herein will be processed under the terms and conditions of the AGREEMENT as long as BANK is contractually permitted to offer such SERVICES by the respective CARD BRANDS.
- 1.3 On an exclusive basis, MERCHANT agrees to submit all SALES for processing from CARDS accepted in MERCHANT's business as described in the Merchant Application to BANK in accordance with the RULES and pursuant to the terms of this AGREEMENT.
- 1.4 MERCHANT and BANK agree to abide by the RULES, a summary of which is attached hereto as the CARD BRAND RULES and the ATM/DEBIT NETWORK RULES. The attached summaries are incorporated into the collective definition of the RULES. BANK and CARD BRANDS may from time to time amend the RULES or operating procedures related to SALES and SERVICES. MERCHANT has been supplied with a summary of the RULES and by signing AGREEMENT, acknowledges that it has reviewed them. MERCHANT agrees to comply with all applicable state, federal and local laws, rules and regulations ("LAWS"). MERCHANT agrees to assist BANK in complying in a complete and timely manner with all LAWS and RULES now or hereafter applicable to any SALE or this AGREEMENT. MERCHANT will execute and deliver to BANK all such instruments that BANK may from time to time deem necessary. It is MERCHANT's responsibility to know all applicable LAWS and the RULES that apply to MERCHANT's acceptance of CARDS and to ensure that MERCHANT's equipment complies with all LAWS and RULES. MERCHANT agrees to indemnify, defend, and hold BANK harmless from and against any loss, cost or damage (including reasonable legal fees and court costs) incurred as a result of MERCHANT's failure to comply with applicable LAWS or RULES.
- 1.5 MERCHANT agrees that it will not use for its own purposes, will not disclose to any third party, and will retain in strictest confidence all information and data belonging to or relating to the business of BANK, including but not limited to the terms of this AGREEMENT, and will safeguard such information and data by using a reasonable degree of care but in no event less than the same degree of care that MERCHANT uses to protect its own confidential information.

## 1.6 Security Standards.

- A. MERCHANT agrees it will not disclose to any third party any cardholder account information or other personal information except to their agent assisting in completing a card transaction, or as required by LAWS or RULES. MERCHANT must not request or use cardholder account number information for any purpose that MERCHANT knows or should have known to be fraudulent or in violation of the RULES, or for any purpose that the cardholder did not authorize, except to MERCHANT's agent assisting in completing a card transaction, or as required by law. MERCHANT must keep all systems and media containing account, cardholder or transaction information (physical or electronic, including but not limited to account numbers, card imprints, and terminal identification numbers) in a secure manner, to prevent access by or disclosure to anyone other than MERCHANT's authorized personnel. MERCHANT must destroy, in a manner that will render the data unreadable, all such media that MERCHANT no longer deems necessary or appropriate to store (except for Sales Drafts maintained in accordance with this AGREEMENT, LAWS or RULES). Further, MERCHANT must take all steps reasonably necessary to ensure cardholder information is not disclosed or otherwise misused. MERCHANT may not retain or store magnetic stripe, CVV2 or CVC2 data after authorization. MERCHANT must not store, and must ensure that all of MERCHANT's third party providers that have access to cardholder data do not store, magnetic stripe, CVV2 or CVC2 data after a transaction.
  - B. If MERCHANT uses any third parties who will have access to cardholder data ("Merchant Provider(s)"), or any third party payment application(s) or software, MERCHANT must notify BANK of the identity of the Merchant Provider(s) and/or the name and version of the payment application(s) or software. In addition, MERCHANT must: (1) only allow the Merchant Providers access to the cardholder data for purposes that are authorized by the RULES, (2) have proper security measures in place for the protection of cardholder data, (3) ensure that Merchant Providers have proper security measures in place for the protection of cardholder data, (4) comply with and assure that Merchant Providers comply with the Payment Card Industry ("PCI") Data Security Standard, as amended from time to time, which may be referred to as the Visa Cardholder Information Security Program ("CISP") (found at [www.visa.com](http://www.visa.com)) and the MasterCard Site Data Protection Program ("SDP") (found at [www.mastercard.com](http://www.mastercard.com)) and (5) have written agreements with Merchant Providers requiring the compliance set forth herein. MERCHANT will immediately notify BANK of any suspected or confirmed loss or theft of any transaction information, including any loss or theft from a Merchant Provider. MERCHANT is responsible for demonstrating MERCHANT's and Merchant Providers' compliance with the CISP, SDP, DISC, DSOP, and PCI programs, and providing reasonable access to MERCHANT's locations and ensuring Merchant Providers provide reasonable access to their locations to verify MERCHANT's and Merchant Providers' ability to prevent future security violations. Any fees, fines or penalties resulting from non-compliance will be passed through to MERCHANT. MERCHANT agrees to indemnify BANK and the CARD BRANDS against all costs, expenses, damages and/or losses resulting from any breach of security, or loss or theft of information.
  - C. In addition, in the event of a suspected or confirmed loss or theft of information, MERCHANT agrees, at MERCHANT's cost, to provide all information requested by BANK, a CARD BRAND, other financial institutions, or local, state or federal officials in connection with such event and to cooperate in any ensuing investigation. Any information provided in response to such investigation will (as between MERCHANT and BANK) be considered BANK's confidential information. MERCHANT agrees that BANK may release to the CARD BRANDS, other financial institutions and/or regulatory, local, state or federal officials, any information MERCHANT provides to BANK in connection with a suspected or confirmed loss or theft of transaction information. The requirements of this provision apply to cardholder data regardless of the medium in which the information is contained and regardless of whether MERCHANT processes transactions via Internet, mail, phone, face-to-face or any other method. Additional information regarding data security may be found at the CARD BRANDS' websites.
- 1.7 Submission by MERCHANT of SALES or participation in SERVICES at any time after seven (7) days from the date of distribution of or publication by the CARD BRANDS of amended RULES to MERCHANT shall be evidence that MERCHANT was provided with and/or received access to the amended RULES and has agreed to abide by them.
- 1.8 If MERCHANT is a healthcare provider or other entity covered by the Health Insurance Portability and Accountability Act of 1996, as amended, and the supporting regulations under 45 C.F.R. Part 160 and 164, as amended, MERCHANT agrees it will not provide BANK with Protected Healthcare Information (as defined in such act).

## **2. SPECIFIC OPERATING PROCEDURES:**

- 2.1 MERCHANT agrees that it will comply with all Card Acceptance Procedures in the RULES for each SALE, including, but not limited to the following:
  - A. MERCHANT agrees that it will obtain and record a valid positive authorization for all SALES in accordance with the RULES before submitting them to BANK for processing;
  - B. MERCHANT must be able to prove, by evidence of a terminal capture of the magnetic stripe or a signed SALES DRAFT (as defined in the RULES) showing imprint of the CARD, that the CARD was present at the time of SALE, unless specifically set up for Card Not Present transactions; and
  - C. Failure to read the magnetic stripe on the card may result in a DISCOUNT rate tier downgrade or a CHARGEBACK.
- 2.2 BANK and/or third party banks with which BANK has a relationship are members of certain NETWORKS and are willing to sponsor MERCHANT as a participant in such NETWORKS ("SPONSOR") as set forth in the Merchant Application. Additional NETWORKS may be available from time to time. BANK does not warrant the continuing availability of any NETWORK. MERCHANT agrees to pay BANK the then current FEES for any NETWORK added or deleted after the effective date of this AGREEMENT. MERCHANT hereby delegates to BANK the authority to decide to which NETWORK a given debit transaction will be routed.
- 2.3 MERCHANT agrees to accept valid CARDS of each of the selected NETWORKS and any minimums, maximums or surcharges imposed by MERCHANT will be in accordance with the NETWORKS, RULES and LAWS. MERCHANT agrees to comply with Federal Regulation E and the rules, procedures, fees, assessments, penalties, and other obligations of each NETWORK, as from time to time are in effect.
- 2.4 BANK may provide MERCHANT access through MERCHANT's terminals to the NETWORKS as set forth herein.

2.5 MERCHANT must Batch Out each POS terminal every day. Failure to Batch Out daily will delay the deposit of funds. "Batch Out" is the process by which MERCHANT totals and settles all transactions, on each POS terminal, which occurred before midnight (12:00 a.m.) and transmits the information to BANK. In all cases, MERCHANT must present the record within three (3) business days after the transaction date, unless otherwise permitted by the RULES. Transactions contained in an untimely Batch Out may incur higher rates, be refused, be held for a one hundred eighty (180) day period, or become subject to a CHARGEBACK. MERCHANT is responsible for re-submitting a Batch Out or a sales ticket if the POS terminal fails to properly Batch Out or if sales ticket data does not process through the normal payment cycle. BANK is not liable to MERCHANT for higher rates or for amounts BANK did not collect, including but not limited to amounts collected by third party service providers.

### **3. PAYMENT OF SUMS DUE:**

- 3.1 MERCHANT agrees to pay BANK the fees as set forth in the Merchant Application and all other sums owed to BANK for SALES and SERVICES as set forth in this AGREEMENT as amended from time to time ("FEES"). FEES include but are not limited to all CHARGEBACKS. MERCHANT agrees that it is jointly and severally liable for all FEES, charges, and other sums owed to BANK by any affiliated entities of MERCHANT.
- 3.2 As set out in the Merchant Application and the Rate Descriptions, discount ("DISCOUNT") is a FEE charged as a percentage of gross SALES submitted by MERCHANT, which generally includes "Processing," "Authorizations," "Assessments," and "Interchange." Assessments and Interchange are the standard fees that the CARD BRANDS charge for the clearing of SALES transactions and are subject to change by the CARD BRANDS. BANK has no direct control over these fees. Any adjustment in Interchange and Assessments by the CARD BRANDS may result in an adjustment to MERCHANT's DISCOUNT. BANK will notify MERCHANT in writing of any change in FEES caused by action of CARD BRANDS prior to any such change becoming effective. If permitted by the CARD BRANDS, notice to MERCHANT of any change in FEES caused by CARD BRANDS may be less than thirty (30) days.
- 3.3 DISCOUNT is quoted by BANK based on the information supplied by MERCHANT as set forth in the Merchant Application. MERCHANT agrees that the FEES are based on the term of this AGREEMENT, the method of processing, and the information set forth in the Merchant Application. MERCHANT agrees that such information is a material fact in the calculation of the DISCOUNT and other FEES. MERCHANT agrees that if such information is shown to be incorrect or if such information changes, BANK may amend FEES on less than thirty (30) days notice as set out herein and/or add FEES on less than thirty (30) days notice to reflect such change, unless prohibited by the CARD BRANDS. MERCHANT agrees to pay such amended and/or additional FEES.
- 3.4 MERCHANT agrees that FEES not listed in the AGREEMENT will be charged at BANK's current rate.
- 3.5 The FEES may be amended by BANK on thirty (30) days written notice to MERCHANT unless provided otherwise herein.
- 3.6 MERCHANT agrees to pay BANK for CHARGEBACKS related to SALES or SERVICES. MERCHANT understands that BANK is in no way financially responsible for CHARGEBACKS. Failure to comply with the RULES will increase MERCHANT's exposure to CHARGEBACKS. MERCHANT's obligation to pay CHARGEBACKS shall survive the termination or expiration of AGREEMENT.
- 3.7 If the CARD BRANDS or a regulatory body governing BANK should levy a fine or penalty or assess a charge to BANK as a result of MERCHANT's SALES or SERVICES or CHARGEBACK activity, MERCHANT agrees to pay such fines, penalties, or charges, and any administrative fees associated with same.
- 3.8 MERCHANT shall establish a designated account at the institution of its choice ("DESIGNATED ACCOUNT") for the credit and debit of sums between the PARTIES. MERCHANT, pursuant to the Funds Transfer Instructions set out herein, authorizes BANK to make deposits and withdrawals from the DESIGNATED ACCOUNT. MERCHANT hereby grants to BANK a security interest and lien upon the DESIGNATED ACCOUNT to secure all of MERCHANT's (or any related entity under MERCHANT's control) obligations to BANK under this AGREEMENT. If required by BANK, MERCHANT agrees to cooperate with BANK and the depository bank maintaining the DESIGNATED ACCOUNT to cause a Control Agreement to be executed with respect to the DESIGNATED ACCOUNT. MERCHANT agrees to maintain a balance in the DESIGNATED ACCOUNT in an amount specified by BANK and MERCHANT agrees to deposit funds into the DESIGNATED ACCOUNT so that the minimum balance required by BANK is maintained. If this AGREEMENT is terminated for any reason, the DESIGNATED ACCOUNT shall be maintained for a period of one hundred eighty (180) days, plus the period of any warranty or guarantee on goods and/or services sold by MERCHANT and processed as SALES, from the date of the last SALE processed by MERCHANT under AGREEMENT. BANK may recoup and debit from the DESIGNATED ACCOUNT all non-VISA and non-MASTERCARD related FEES and other obligations due to BANK under this AGREEMENT or any other agreement MERCHANT or MERCHANT's related entities have with BANK without prior notice to MERCHANT. BANK may recoup and debit from the DESIGNATED ACCOUNT all FEES and other obligations due to BANK under this AGREEMENT or any other agreement MERCHANT or MERCHANT's related entities have with BANK without prior notice to MERCHANT. After all obligations of MERCHANT under this AGREEMENT are satisfied in full, the balance in the DESIGNATED ACCOUNT, if any, shall be paid to MERCHANT. MERCHANT agrees to indemnify and hold harmless all financial institutions from any loss or claim incurred for acting on instructions from BANK with respect to the DESIGNATED ACCOUNT. MERCHANT agrees not to pledge or assign the DESIGNATED ACCOUNT, any proceeds of it or any other amounts due BANK under this AGREEMENT to any person or entity and MERCHANT shall continually maintain the DESIGNATED ACCOUNT free from all liens and encumbrances. In the event a RESERVE ACCOUNT, as defined below, is established, MERCHANT authorizes BANK to make withdrawals from the DESIGNATED ACCOUNT to replenish the RESERVE ACCOUNT as necessary.
- 3.9 MERCHANT agrees to provide BANK with a deposit in the amount of money required by BANK ("RESERVE ACCOUNT"), if determined necessary by BANK: (i) at the time this AGREEMENT is executed; (ii) if in the opinion of BANK, information received or discovered about MERCHANT reflects an adverse change in status; (iii) in the event that any information requested by BANK is not received; (iv) upon the notice of termination or expiration of the AGREEMENT; or (v) at any time during the term of this AGREEMENT. BANK may withhold the payment for SALES in an amount reasonably determined by BANK as necessary to secure payment by MERCHANT of all FEES and other obligations under this AGREEMENT and the amounts so withheld shall be deposited into the RESERVE ACCOUNT. If there is not enough money retained to cover the anticipated FEES, BANK may require MERCHANT to remit additional funds. The RESERVE ACCOUNT shall be maintained in a bank account with BANK in

the name of BANK and under the sole control of BANK, and MERCHANT grants to BANK a security interest and lien upon the RESERVE ACCOUNT to secure all of MERCHANT's obligations to BANK under this AGREEMENT. If this AGREEMENT is terminated for any reason, the RESERVE ACCOUNT shall be maintained for a period of one hundred eighty (180) days, plus the period of any warranty or guarantee on goods and/or services sold by MERCHANT and processed as SALES, from the date of the last SALE processed by MERCHANT under AGREEMENT, or for such longer period if determined necessary by BANK in their reasonable discretion to protect BANK from future risk of loss. BANK may recoup and debit from the RESERVE ACCOUNT all FEES and other obligations due to BANK under this AGREEMENT without prior notice to MERCHANT. After all obligations of MERCHANT under this AGREEMENT are satisfied in full, the balance in the RESERVE ACCOUNT, if any, shall be paid to MERCHANT.

- 3.10 BANK agrees to pay MERCHANT for SALES less FEES owed to BANK by MERCHANT. BANK shall recoup and deduct FEES from incoming transactions or recoup and debit the same from MERCHANT's DESIGNATED ACCOUNT or the RESERVE ACCOUNT. MERCHANT agrees that BANK has the right to deduct these FEES at any time including on a daily basis if necessary. BANK is not obligated to pay MERCHANT or credit the DESIGNATED ACCOUNT for any SALES transmitted or delivered to BANK after MERCHANT becomes insolvent, ceases to do business, or dissolves.
- 3.11 BANK has the right of recoupment and set-off. This means that BANK may recoup and offset any outstanding or uncollected amounts owed to BANK under this AGREEMENT from: (i) any amounts BANK would otherwise be obligated to deposit into the DESIGNATED ACCOUNT, and (ii) any other amounts BANK may owe MERCHANT under this AGREEMENT or any other agreement.
- 3.12 If MERCHANT does not pay any sums due within thirty (30) days from date of notice, BANK will charge, and MERCHANT agrees to pay, a late fee of one and one-half percent (1.5%) per month on the balance outstanding or the highest amount allowed by law.
- 3.13 If MERCHANT breaches AGREEMENT or if BANK identifies suspicious or irregular activity related to SALES or SERVICES, BANK may refuse to process SALES or to provide SERVICES and/or may hold funds pending the cure of such breach or resolution of such activity.
- 3.14 If BANK takes any action against MERCHANT to collect any FEES or monies due to BANK from MERCHANT, MERCHANT agrees to pay all costs of collection, including but not limited to, attorney fees, to the extent allowed by law.
- 3.15 If MERCHANT is a participant in a BANK third party program including, but not limited to, Agent Bank and/or CARD BRAND programs, and MERCHANT subsequently leaves such third party, BANK may amend the FEES or terminate the AGREEMENT.

#### **4. TERM OF AGREEMENT:**

- 4.1 The initial term of this AGREEMENT shall be for three (3) years ("INITIAL TERM") commencing on the date this AGREEMENT is approved by BANK or approved and uploaded by BANK's Risk Department.
- 4.2 At the expiration of the INITIAL TERM, this AGREEMENT will automatically renew for successive two (2) year periods ("RENEWAL TERM") unless terminated as set out below.

#### **5. TERMINATION OF AGREEMENT:**

- 5.1 This AGREEMENT may be terminated by BANK at any time effective upon thirty (30) days written notice.
- 5.2 MERCHANT may terminate this AGREEMENT as follows:
  - A. upon BANK's default of any material obligation to MERCHANT thereunder and the failure of BANK to cure such default within thirty (30) days after written notice of such default;
  - B. upon written notice of non-renewal at least thirty (30) days prior to the commencement of any RENEWAL TERM; or
  - C. on thirty (30) days notice of termination accompanied by payment of the ACCOUNT CLOSURE FEE.
- 5.3 In order to protect the CARD BRANDS and BANK, BANK may terminate this AGREEMENT effective immediately for any of the following reasons:
  - A. insolvency, receivership, voluntary or involuntary bankruptcy, assignment of any of MERCHANT's assets for the benefit of MERCHANT's property creditors, or if any part of MERCHANT's property is or becomes subject to any levy, seizure, assignment or sale for or by any creditor or governmental agency without being released within thirty (30) days thereafter;
  - B. if MERCHANT fails to pay any FEES when due;
  - C. if MERCHANT has misrepresented or omitted any material information provided to BANK;
  - D. if MERCHANT is in breach of the AGREEMENT or the RULES;
  - E. if MERCHANT, after BANK's request, fails to send copies of SALES DRAFTS to BANK;
  - F. if MERCHANT submits for processing SALES that were not originated as a result of a direct SALE transaction between a cardholder and MERCHANT in the normal course of business ("LAUNDERING");
  - G. if the number of CHARGEBACKS experienced by MERCHANT in any one (1) month exceeds one percent (1%) of the number of SALES in that or any prior month;
  - H. in the event of a material change of MERCHANT's business as described in the Merchant Application ("BUSINESS");
  - I. in the event the CARD BRANDS identify MERCHANT, its principal, or associated parties under any program designed to monitor merchants, or MERCHANT creates circumstances that cause harm or loss of goodwill to BANK or the VISA system;
  - J. if MERCHANT is inactive for ninety (90) days and is not a seasonal MERCHANT; or
  - K. in the event that Guarantor (if designated) gives notice of its intention to withdraw the Guaranty.
- 5.4 Effect of Termination of the AGREEMENT:
  - A. In the event that this AGREEMENT is terminated by BANK for cause, BANK may be required to report the name and address of MERCHANT and MERCHANT's principals to the CARD BRANDS for inclusion on the Terminated Merchant File and in other programs that monitor merchants. In the event that this AGREEMENT is terminated for cause and MERCHANT is obligated to BANK for sums due and the principals of MERCHANT are liable for such debts, a negative credit report may be submitted to a credit-reporting agency.

- B. MERCHANT hereby releases, indemnifies and holds BANK and the CARD BRANDS harmless to the fullest extent permitted by applicable law for any loss or damage it may incur as a result of reporting MERCHANT or its principals to a credit reporting agency hereunder or as a consequence of MERCHANT or its principals being placed by BANK or its Agents on the CARD BRANDS' merchant monitoring lists.

**6. BANKRUPTCY:**

- 6.1 In the event of a bankruptcy filing by MERCHANT, BANK reserves the right to suspend or discontinue processing SALES or providing SERVICES. Upon filing voluntary or involuntary bankruptcy proceedings by or against MERCHANT, MERCHANT must notify BANK in writing within five (5) days. Notification must be sent by certified mail to BANK at the address for NOTICES set out herein.
- 6.2 Credits to MERCHANT's DESIGNATED ACCOUNT and other payments to MERCHANT are provisional. The PARTIES acknowledge the AGREEMENT is an agreement whereby BANK is extending financial accommodations to MERCHANT within the meaning of 11 U.S.C. § 365(c)(2) of the Bankruptcy Code as amended from time to time. The right of MERCHANT to receive any amounts due or to become due from BANK is expressly subject and subordinate to the CHARGEBACKS, recoupment, setoff, lien, and security interest rights of BANK under this AGREEMENT without regard to whether such CHARGEBACKS, recoupment, setoff, lien, and/or security interest rights are being applied to claims that are liquidated, unliquidated, fixed, contingent, matured, or unmatured.

**7. INFORMATION AND DOCUMENTATION:**

- 7.1 MERCHANT agrees to comply with all requests for information and documentation regarding SALES and the CARDS utilized in processing such SALES or SERVICES under AGREEMENT within the time period stated by BANK in its request.
- 7.2 **USA PATRIOT ACT REQUIREMENTS.** To help the government fight the funding of terrorism and money laundering activities, the USA PATRIOT Act requires all financial institutions to obtain, verify, and record information that identifies each person (including business entities) who opens an account. What this means: When MERCHANT opens an account, BANK will ask for the applicant's name, physical address, date of birth, taxpayer identification number, and other information that will allow BANK to identify the applicant. BANK may also ask to see the applicant's driver's license or other identifying documents. BANK will advise MERCHANT if additional information is required.
- 7.3 Upon BANK's request, MERCHANT shall provide BANK with current financial statements in a format acceptable to BANK.
- 7.4 MERCHANT, its signing officer/owner/partner/principal, and any Personal Guarantor authorize BANK, or its agents or assigns, to make, from time to time, any business and personal credit and other inquiries BANK considers necessary to review the acceptance and continuation of this AGREEMENT. MERCHANT authorizes parties contacted by BANK or any of its affiliates, in relation to this AGREEMENT, to release the credit information requested by BANK or any affiliate. By executing this AGREEMENT, MERCHANT, its signing officer/owner/partner/principal and any Personal Guarantor acknowledge that BANK has a legitimate business need for the information contained in any personal credit report that may be obtained in connection with this AGREEMENT, and that this AGREEMENT is a business transaction that was initiated by the MERCHANT and/or any Personal Guarantor identified in the Merchant Application.
- 7.5 MERCHANT is supplied with monthly reports by BANK regarding MERCHANT's SALES or SERVICES activity. It is MERCHANT's sole responsibility to report any error or discrepancies detected by MERCHANT in writing to BANK within ninety (90) days following the end of the monthly reporting period. After such period, MERCHANT will be deemed to have accepted the monthly reports as delivered.
- 7.6 MERCHANT will notify BANK immediately of any change in ownership, corporate or "d/b/a" name, location address, or the information contained on MERCHANT's imprinter plates.
- 7.7 If MERCHANT participates in any BANK third party program, MERCHANT agrees that BANK may report information as required to such third party.
- 7.8 MERCHANT is solely responsible for maintaining complete backup records of all information relating to its customers' orders, inquiries, purchases, SALES and any other customer information in accordance with this AGREEMENT, LAWS, and RULES.

**8. PROCESSING RESTRICTIONS:**

- 8.1 MERCHANT agrees that it will not materially change its BUSINESS or the method in which it markets or sells the goods and services of BUSINESS without informing BANK in advance of such change. BANK will only process SALES from the BUSINESS as defined in the AGREEMENT.
- 8.2 If actual monthly SALES volume substantially exceeds the projected annual SALES volume as provided in the Merchant Application and pro-rated to one month, BANK may, at its option, do one or more of the following: (i) refuse to process SALES in excess of such sum; (ii) process such SALES and retain the proceeds of such SALES until the next month and release such sums to MERCHANT at that time counting this volume as SALES volume for that month; (iii) terminate this AGREEMENT; and/or (iv) amend this AGREEMENT in a way as to ensure that BANK has security for the increased volume. Such rights of termination and retention of funds are in addition to those already provided for herein.
- 8.3 In the event of failure, including bankruptcy, insolvency, or other suspension of business operations by MERCHANT, MERCHANT shall not sell, transfer, or disclose any materials that contain cardholder account numbers, personal information, or other CARD BRAND transaction information to third parties. Upon request from BANK, MERCHANT shall either (i) provide this information or (ii) provide acceptable proof of destruction of this information.

**9. USE OF THE INTERNET, SYSTEM INTEGRATORS, AND/OR THIRD PARTY SERVICE PROVIDERS:**

- 9.1 If MERCHANT accepts SALES through its web site or through a system integrator, MERCHANT shall at all times maintain and be responsible for the security of the transmission of data relating to the processing of SALES associated with this AGREEMENT. MERCHANT shall be responsible for obtaining and maintaining web site security, for the encryption of all data, and for any and all storage of data. MERCHANT shall display on its web site its: (i) consumer data privacy policy and (ii) security method for transmission of payment data. An e-commerce MERCHANT must display the address of its "permanent establishment" on its web site along with MERCHANT's country of domicile, either: a) on the same screen view as the checkout screen used to present the total purchase amount; or b) within the sequence of web pages the cardholder accesses during the checkout process.

- 9.2 MERCHANT shall be responsible for obtaining and contracting with any third party service provider(s), payment engine(s), payment gateway(s), and any other Internet service provider(s) and/or system integrator(s). MERCHANT shall ensure that said third parties appropriately format and transmit SALES to BANK in accordance with the then current RULES and requirements of BANK and CARD BRANDS. If MERCHANT is using a third party's terminal or software application, (i.e. dial terminal or equivalent sales capture solution), and the third party is providing the customer service, then such third party is a separate entity and is not an agent of BANK. MERCHANT understands the AGREEMENT is between BANK and MERCHANT. Disputes involving a third party shall be dealt with independently from BANK. If disputes are unresolved and relate to SERVICES provided under the AGREEMENT, MERCHANT shall notify BANK at the address set out in the AGREEMENT. MERCHANT must pay BANK regardless of any disputes it has with any third party. If MERCHANT elects to use the terminal or software of third party providers to capture and transmit SALES to BANK, MERCHANT must disclose the relationship to BANK and MERCHANT assumes full responsibility and liability for such third party provider's failure to comply with the RULES. The third party provider may be the source for information regarding SALES, authorizations and CHARGEBACKS that may be needed by BANK. Certain CHARGEBACKS require authorization information to reverse. MERCHANT is responsible for obtaining this information from such third party provider. BANK is not liable for SALES that it did not receive. MERCHANT understands that in the event MERCHANT rents BANK terminals, the communications vendor is not responsible for losses arising from the SALES processed using the vendor's service.
- 9.3 MERCHANT agrees that BANK is not responsible for any services or equipment provided by any third party with which MERCHANT has contracted. MERCHANT agrees that BANK is not responsible for and is not able to provide customer service for the point of sale ("POS") devices installed by and/or operated by any third party with which MERCHANT has contracted. MERCHANT should contact the third party for service of this equipment. MERCHANT shall not allow any third party to install, remove, or modify any terminal software application of BANK without the express written consent of BANK. MERCHANT agrees BANK can only process SALES received by BANK, and any third party is responsible for ensuring SALES are formatted and transmitted to BANK in accordance with the then current requirements of BANK and CARD BRANDS. BANK may increase FEES if a third party presents SALES transactions not in accordance with the then current CARD BRANDS' requirements. MERCHANT assumes full responsibility and liability for DISCOUNT rate tier downgrades caused by any third party. MERCHANT assumes full responsibility and liability for third party providers' failure to comply with the RULES. MERCHANT is responsible for obtaining from the third party provider any information needed by BANK.
- 9.4 MERCHANT shall assume full liability and shall indemnify and hold BANK and CARD BRANDS harmless for: (i) the actions and/or inactions of any third party with which MERCHANT has contracted or (ii) the failure of any third party with which MERCHANT has contracted to comply with the LAWS or RULES.

#### **10. LIMITATION OF LIABILITY AND DISCLAIMER OF WARRANTIES:**

- 10.1 MERCHANT's rights and remedies hereunder are exclusive and in lieu of all other rights and remedies. BANK shall not otherwise be liable for any error, omission, delay, computer virus, loss of data or records or disclosure of confidential information which may occur as a result of, or in any way be connected with, the rendering of SERVICES hereunder. BANK shall not be liable for any services or products of third parties. In any event, BANK's liability to MERCHANT, whether arising in contract, tort (including, without limitation, negligence and strict liability) or otherwise, shall not exceed the lesser of the direct loss to MERCHANT or an amount equal to the processing portion of the DISCOUNT paid to BANK by MERCHANT in the month prior to the incident giving rise to liability. In no event shall BANK, the CARD BRANDS, or the CARD BRANDS' contractors be liable for losses, damages, or liabilities whether in contract, tort (including negligence), strict liability or under any other theory incurred by MERCHANT, MERCHANT's customers, or any other person or entity arising under this AGREEMENT. IN NO EVENT SHALL BANK, THE CARD BRANDS, OR THE CARD BRANDS' CONTRACTORS BE LIABLE FOR SPECIAL, INCIDENTAL, INDIRECT, CONSEQUENTIAL OR EXEMPLARY DAMAGES OR FOR ANY INTERRUPTION OR LOSS OF USE, DATA, VIRUSES, BUSINESS OR PROFITS, WHETHER OR NOT SUCH LOSSES OR DAMAGES WERE FORESEEABLE OR BANK WAS ADVISED OF THE POSSIBILITY THEREOF AND REGARDLESS OF WHETHER ANY LIMITED REMEDY HEREIN FAILS OF ITS ESSENTIAL PURPOSE.
- 10.2 THE SERVICES ARE PROVIDED "AS IS," "AS AVAILABLE," AND ALL WARRANTIES, EXPRESS OR IMPLIED, ARE DISCLAIMED BY BANK, THE CARD BRANDS, AND THE CARD BRANDS' CONTRACTORS, INCLUDING BUT NOT LIMITED TO, THE DISCLAIMER OF ANY IMPLIED WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE. BANK ASSUMES NO LIABILITY OR RESPONSIBILITY FOR ANY ERRORS OR OMISSIONS IN THE CONTENT. THIS AGREEMENT IS A SERVICE AGREEMENT AND THE PROVISIONS OF THE UNIFORM COMMERCIAL CODE SHALL NOT APPLY.

#### **11. WARRANTIES AND INDEMNITIES:**

- 11.1 MERCHANT understands that BANK merely provides processing services for SALES or SERVICES and is neither a partner in MERCHANT's business operations nor a guarantor of the receipt by MERCHANT of the proceeds of SALES or SERVICES. Furthermore, BANK does not guarantee that SALES or SERVICES will not be subject to CHARGEBACKS.
- 11.2 MERCHANT warrants there is no action, suit or proceeding pending or to MERCHANT's knowledge threatened, which, if decided adversely, would impair MERCHANT's ability to carry on MERCHANT's business substantially as now conducted or which would adversely affect MERCHANT's financial condition or operations. MERCHANT warrants that it, or its principals or sales agents have not been terminated from depositing SALES with any other member of the CARD BRANDS, have never been placed on the MasterCard MATCH system, or on the Combined Terminated Merchant File except as disclosed in writing to BANK.
- 11.3 MERCHANT warrants that at the time of depositing SALES for processing: (i) it has the right to assign such SALES to BANK and does by this reference assign all its rights, title, and interest to payment for such SALES to BANK so that BANK may process SALES under the AGREEMENT; (ii) it has no knowledge of any fact that would impair the collectability of the SALES; and (iii) that the SALES represent a valid obligation of the cardholder: (a) in the amount indicated; (b) for merchandise sold and delivered or services rendered to the cardholder by the MERCHANT; and (c) it does not involve any element of credit for any other purpose.

- 11.4 MERCHANT agrees to indemnify and hold harmless BANK, SPONSORS, and CARD BRANDS, including the CARD BRANDS' contractors, from and against any claims, demands, or judgments, made or recovered against it, arising out of any misrepresentation or breach by MERCHANT of the terms of this AGREEMENT or arising from any act or omission by MERCHANT which violates any LAWS, the RULES, or the rights of another person or otherwise injures any third party. BANK, SPONSORS, or the CARD BRANDS may defend on its own any such claims or demands or request MERCHANT to take up such defense. In either event MERCHANT will further indemnify BANK, SPONSORS, and the CARD BRANDS for reasonable attorney fees or any other necessary expenses incurred by BANK by reason of such defense.
- 11.5 MERCHANT shall be solely responsible for losses and CHARGEBACKS incurred as a result of, or arising out of, any fraud including LAUNDERING, negligence, or willful misconduct on the part of MERCHANT, or MERCHANT's employee(s) or agent(s).
- 11.6 MERCHANT is responsible for any electronic virus or viruses that may be encountered and is responsible for routinely scanning its computers and diskettes using a reliable virus product to detect and remove any viruses found.

## **12. NOTICES:**

- 12.1 All notices required under this AGREEMENT from MERCHANT shall be written paper notices effective, unless otherwise stated in AGREEMENT, upon the earlier of actual receipt thereof or the third (3rd) business day following such notices being deposited postage prepaid in the United States Postal System.
- 12.2 All written paper notices shall be sent to the following addresses, which may be changed by any PARTY by designating an alternate address, effective upon fourteen (14) days notice of such change:

If to BANK:

TSYS Merchant Solutions, LLC  
Attention: Merchant Legal Department  
1601 Dodge Street, 23E  
Omaha, NE 68102-1637

If to MERCHANT:

At the address set out in the Merchant Application or such alternative address as designated in writing by MERCHANT.

If to ISO:

At the address set out in the Merchant Application or such alternative address as designated in writing by ISO.

- 12.3 MERCHANT consents to receiving electronically rather than in paper form all notices, disclosures and other documents ("DOCUMENTS") which are to be provided to MERCHANT under this AGREEMENT. MERCHANT will be notified that a DOCUMENT is available at BANK's web site with a link to that specific page of the web site containing the DOCUMENT. MERCHANT agrees that such notification will be sent to MERCHANT at the e-mail address provided as part of the Merchant Application. Any DOCUMENT sent to MERCHANT electronically will be maintained on the website for not less than six (6) months from the date of its posting on the web site. MERCHANT understands and acknowledges that access to the Internet, e-mail and the worldwide web are required for MERCHANT to access a DOCUMENT electronically and MERCHANT confirms that MERCHANT has such access. MERCHANT understands that there are costs related to access DOCUMENTS electronically and MERCHANT agrees that MERCHANT is responsible for these related access costs. Without advance notice to MERCHANT and at any time, electronic DOCUMENTS may no longer be sent to MERCHANT, in which case a paper copy of the DOCUMENT will be sent to MERCHANT pursuant to Sections 12.1 and 12.2.

## **13. MISCELLANEOUS:**

- 13.1 Assignment. Except as expressly provided in this AGREEMENT, MERCHANT may not assign its rights or delegate its responsibilities under this AGREEMENT without the prior written consent of BANK. BANK may assign its rights or delegate duties under this AGREEMENT without the prior consent of MERCHANT. Without limiting the generality of the foregoing, MERCHANT shall not assign, transfer or encumber its present or future payment rights under this AGREEMENT or connected with a RESERVE ACCOUNT, if any; nor shall BANK be obligated to honor such purported attempt to assign, transfer or encumber such rights or funds unless BANK consents in writing.
- 13.2 Governing Law and Forum. The PARTIES acknowledge and agree that this AGREEMENT and the Guaranty contained herein was, and shall be deemed to have been, made and delivered in Douglas County, Nebraska. The laws of the State of Nebraska, without giving effect to its conflicts of law principles, shall govern all matters (whether in contract, statute, tort or however characterized) arising out of or relating to this AGREEMENT and any Guaranty contained herein, including, without limitation, the validity, interpretation, construction, performance and enforcement of the AGREEMENT and Guaranty. The PARTIES agree that, in the event of any dispute regarding, arising out of or relating to this AGREEMENT or any Guaranty contained herein, the courts of the State of Nebraska shall have and be vested with personal jurisdiction over the PARTIES. The PARTIES further agree that any and all actions, claims, suits or proceedings arising out of or relating (directly or indirectly) to this AGREEMENT or any Guaranty contained herein shall be filed and litigated only in courts located in Douglas County, Nebraska, and such courts shall have exclusive jurisdiction over any action, claims, suit or proceeding arising out of or relating (directly or indirectly) to this AGREEMENT or any Guaranty contained herein.
- 13.3 Waiver of Jury Trial and Covenant Not to Participate in a Class Action. MERCHANT HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THIS AGREEMENT OR ANY ACTION, LAWSUIT, CLAIM, COUNTERCLAIM OR OTHER ACTION RELATING TO, OR ARISING UNDER THIS AGREEMENT AND/OR ANY TRANSACTION GOVERNED BY THIS AGREEMENT. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY, VOLUNTARILY AND INTENTIONALLY BY MERCHANT, AND IS INTENDED TO ENCOMPASS EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE BE AVAILABLE. BANK IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY MERCHANT. MERCHANT ALSO COVENANTS NOT TO BRING OR PARTICIPATE IN ANY CLASS ACTION AGAINST BANK BASED UPON ANY CLAIMS ARISING FROM THIS AGREEMENT. IF A CLASS PROCEEDING IS INITIATED AGAINST BANK, MERCHANT MAY NOT JOIN THAT PROCEEDING OR PARTICIPATE AS A MEMBER OF THAT CLASS. If MERCHANT brings legal action against BANK for any reason, MERCHANT shall commence the action within one (1) year of the date the error or the incident giving rise to such action occurred.

- 13.4 Waiver. No delay or failure by either PARTY to exercise any right under AGREEMENT and no partial or single exercise of that right shall constitute a waiver of that right or any other right, unless expressly provided for in AGREEMENT.
- 13.5 Force Majeure. BANK is not liable or responsible for any failure or delay in performance caused by any Act of God, strikes, flood, fire, war, public enemy, electrical or equipment failure, failures by third parties, or other events beyond its control.
- 13.6 Entire Agreement. This AGREEMENT constitutes the entire understandings of the PARTIES as to the subject matter contained herein and supersedes all prior contracts, agreements, and negotiations between the PARTIES whether verbal or written.
- 13.7 Costs. Neither PARTY shall be responsible for the costs incurred by the other in negotiating or implementing this AGREEMENT.
- 13.8 Survival. The obligations of all PARTIES incurred prior to the effective date of termination of this AGREEMENT will survive the termination of this AGREEMENT. If any portion of the AGREEMENT is held invalid or unenforceable for any reason, it is agreed that any invalidity or unenforceability will not affect the remainder of the same and the remaining provisions will remain in full force and effect. The PARTIES agree that the Court of competent jurisdiction may modify any objectionable provision of the AGREEMENT so as to render it valid, reasonable and enforceable.
- 13.9 Amendment. This AGREEMENT may be amended or modified by BANK effective upon thirty (30) days written notice. Any alteration or strikeover in the text of this pre-printed AGREEMENT will have no binding effect and will not be deemed to amend this AGREEMENT.
- 13.10 Authority. By signing the AGREEMENT, each PARTY represents that it has the full legal power and authority to enter into performance obligations under this AGREEMENT. Each PARTY represents that the entering into of this AGREEMENT has been duly authorized; the signer is a duly authorized signatory; this AGREEMENT constitutes a legal, valid, and binding obligation of each PARTY; and that this AGREEMENT is enforceable against each PARTY in accordance with its terms.
- 13.11 P-Card. To the extent applicable, BANK agrees not to use any information supplied by MERCHANT in the Purchasing Card Information that is required for acceptance of purchasing cards, in its decision as to whether to accept MERCHANT for processing. MERCHANT agrees to hold BANK harmless from any and all claims relating to the collection, processing, dissemination, and use or misuse of the information contained in the Purchasing Card Information. MERCHANT acknowledges that the information from the Purchasing Card Information will be sent to MERCHANT's corporate customers who pay with a purchasing card. MERCHANT agrees that BANK is not responsible for any actions or omissions of others regarding this information.
- 13.12 Taxes. MERCHANT agrees to pay all federal, state, and local sales, use, property and excise taxes, including penalties and interest, which may be assessed in connection with the services and related products provided under this AGREEMENT. The FEES set forth in the AGREEMENT are exclusive of any and all applicable taxes or assessments, whether designated as sales taxes, use taxes, ad valorem taxes, GST/HST taxes, VAT taxes or by some other name or designation, and including any interest or penalties thereon, which may be levied or assessed by any governmental or taxing jurisdiction in connection with the performance of services or provision of materials to MERCHANT by BANK. In the event of the payment of or for any such tax, assessment or expense by BANK, MERCHANT shall in turn pay BANK for such items.
- 13.13 Disclosure of Merchant Identification Number ("MID"). For security reasons, MERCHANT must disclose its MID thereby authorizing BANK to make changes to its account. BANK may request from MERCHANT additional information to further verify MERCHANT's identity. BANK may assume that the person disclosing the MID has the authority to make changes to MERCHANT's account. MERCHANT authorizes BANK to share information regarding the MERCHANT's account with the person disclosing the MID. MERCHANT is responsible and liable for changes made after disclosure of its MID. MERCHANT is responsible for insuring its MID is kept confidential.
- 13.14 Information. MERCHANT authorizes BANK to release and use MERCHANT's information, in connection with offering or providing business products and services, to third parties that provide services to BANK or MERCHANT or to any third party that requests and has a reason to know such information, including but not limited to the CARD BRANDS, and any third-party having regulatory control over the PARTIES.
- 13.15 Counterparts/Facsimile. This AGREEMENT may be executed and delivered in any number of counterparts, each of which shall be an original but all of which together shall constitute one and the same instrument. Any photocopy, facsimile, electronic or other copies shall have the same effect for all purposes as an ink-signed original. MERCHANT hereby authorizes BANK and its affiliates to send facsimiles to the MERCHANT's facsimile number set forth in this AGREEMENT.
- 13.16 Monitoring. MERCHANT understands and agrees that any telephone conversation between MERCHANT and BANK may be monitored and recorded.
- 13.17 Binding Agreement. This AGREEMENT shall not become a binding AGREEMENT between the PARTIES until (i) it is approved by BANK; and (ii) BANK has received a negative response to its inquiry of the CARD BRANDS' programs designed to monitor merchants. The commencement of transaction processing under this AGREEMENT shall constitute BANK's approval and its signature to this AGREEMENT.
- 13.18 Products and Services. BANK may from time to time add products and/or services to the SERVICES. At MERCHANT's request, BANK may provide such additional products and/or services to MERCHANT at BANK's then current rate. MERCHANT agrees to abide by all parameters set by BANK for such products and/or services as set out in any product specification or documentation as amended from time to time. MERCHANT is responsible for any coding and testing, if necessary, for such products and/or services. BANK has made reasonable efforts to secure information and abides by the CARD BRANDS' security guidelines but BANK does not guarantee security. MERCHANT is responsible for protecting access to any passwords or user identification numbers. Access to and use of password protected areas of any products and/or services are restricted to authorized users only. It is the MERCHANT's obligation to notify BANK immediately if its passwords or user identification numbers have been lost or stolen or if there has been unauthorized access. BANK shall at all times retain all title to and ownership of the products and SERVICES. MERCHANT agrees not to, directly or indirectly, modify, reverse engineer, decompile, disassemble or derive source code from the products and SERVICES. Any PARTY may terminate a product and/or service at any time upon thirty (30) days written notice to the other without terminating the AGREEMENT.
- 13.19 Communication. MERCHANT authorizes BANK and its affiliates to communicate with, solicit and/or market to MERCHANT via regular mail, telephone, e-mail and facsimile in connection with the provision of goods or services by BANK, its affiliates, or any

third party that BANK shares, transfers, exchanges, discloses or provides information with or to pursuant this AGREEMENT and will hold BANK, its affiliates and such third parties harmless against any and all claims pursuant to the federal CAN-SPAM ACT of 2003, the Telephone Consumer Protection Act and any and all other state or federal laws relating to transmissions or solicitations by any of the methods described above.

- 13.20 **Disclosure.** The CARD BRANDS require that the following be disclosed to MERCHANT: (i) if applicable, BANK is in control of Independent Sales Organization's ("ISO") and/or Member Service Provider's ("MSP") performance under this AGREEMENT; (ii) BANK must pre-approve all FEES; (iii) the AGREEMENT may not be amended without BANK's express written consent; (iv) if applicable, ISO and/or MSP may not have access to MERCHANT's funds; and (v) BANK may not waive the foregoing requirements.

#### FUNDS TRANSFER INSTRUCTIONS

MERCHANT desires to effect settlement of credits and debits from MERCHANT's DESIGNATED ACCOUNT by means of ACH and/or wire transfer in conjunction with the processing of SALES transactions or SERVICES as anticipated by AGREEMENT. In accordance with this desire, MERCHANT authorizes BANK to initiate debit and credit entries to the DESIGNATED ACCOUNT (the details of which are set out herein and in the Merchant Application). MERCHANT agrees to maintain sufficient funds in DESIGNATED ACCOUNT to cover debit transactions. By signing this AGREEMENT, MERCHANT states that it has authority to agree to such transactions and that the DESIGNATED ACCOUNT indicated is a valid and legitimate account for the handling of these transactions. This authority is to remain in effect until BANK receives written notice from MERCHANT revoking it. This authorization is for the payment of SALES, returns and FEES, CHARGEBACKS, or any other sums owed between the PARTIES. MERCHANT also certifies that the appropriate authorizations are in place to allow MERCHANT to authorize this method of settlement. All changes to the identification of the DESIGNATED ACCOUNT under this authorization must be made in writing in accordance with the AGREEMENT. MERCHANT understands that if the information supplied as to the ABA Routing Number and Account Number of the DESIGNATED ACCOUNT is incorrect, and funds are incorrectly deposited, BANK will attempt to assist MERCHANT in the recovery of such funds but has no liability as to restitution of the same. BANK's assistance in recovering the funds, where available, will be billed to MERCHANT at BANK's current hourly rate for such work. MERCHANT acknowledges that the origination of ACH transactions to the DESIGNATED ACCOUNT must comply with the provisions of U.S. law.

#### CARD BRAND RULES

**NOTICE: This information is a summary of common CARD BRAND regulations; however card acceptance, processing and chargeback procedures are subject to change. Capitalized Terms not defined herein shall have the meaning ascribed to them in the CARD BRANDS' regulations. If there are any differences between the CARD BRANDS' regulations and these RULES, the CARD BRANDS' regulations will prevail in every instance. To the extent these RULES or the CARD BRANDS' regulations conflict with applicable local, state, or federal laws, rules, or regulations, such local, state, or federal laws, rules or regulations shall govern. The CARD BRANDS publish summaries of the regulations for merchants. Some of these summaries may be accessed at [www.visa.com](http://www.visa.com) and [www.mastercard.com](http://www.mastercard.com), while AMERICAN EXPRESS and DISCOVER regulations may be accessed at [www.harbortouch.com/terms/americanexpress](http://www.harbortouch.com/terms/americanexpress). The AMERICAN EXPRESS OptBlue<sup>SM</sup> Program Merchant Operating Guide may be accessed at [www.harbortouch.com/terms/americanexpress](http://www.harbortouch.com/terms/americanexpress).**

#### CARD BRAND CARD ACCEPTANCE PROCEDURES

##### 1. Honor All CARDS:

- 1.1 MERCHANT shall honor all CARDS issued by a CARD BRAND, when presented in accordance with these RULES, for the purchase of goods or services by an authorized holder of CARD or in processing a request for credit resulting from such a transaction, unless MERCHANT provides TMS and BANK with a thirty (30) day written notice that it no longer wishes to accept either credit or debit cards, including check or prepaid cards (i.e., non-PIN based debit). If MERCHANT has provided such notice to TMS and BANK, upon the expiration of the thirty (30) day notice period, MERCHANT will no longer be required to accept such cards.
- 1.2 If a cardholder presents a VISA CARD that is in the MERCHANT's category of acceptance and that bears a mark representing another payment service: (i) MERCHANT must honor the cardholder's request if the cardholder indicates that the transaction is to be processed as a VISA transaction and (ii) MERCHANT may process the transaction as something other than a VISA transaction despite an initial indication by the cardholder that the transaction is to be processed as a VISA transaction, but only if the cardholder agrees that the transaction may be processed as something other than a VISA transaction. MERCHANT may not mislead the cardholder concerning what payment service or system will be used. These rules do not require MERCHANT to explain any loss of consumer rights if the transaction is not processed as a VISA transaction, but if MERCHANT provides any information on this topic, that information must be accurate.
- 1.3 PROHIBITIONS - A MERCHANT must not:
  - A. Accept cardholder payments for previous Visa Card or Visa Electron 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 surcharge to transactions, except as permitted by the RULES;
  - D. Add any tax to transactions, unless applicable laws or regulations permit a MERCHANT to collect a tax. Any tax amount, if allowed, must be included in the transaction amount and not collected separately;
  - E. Enter into interchange any transaction receipt for a transaction that was previously charged back and subsequently returned to the MERCHANT irrespective of cardholder approval. The MERCHANT may pursue payment from the customer outside the VISA system;
  - F. Request or use an account number for any purpose other than as payment for its goods or services, except to support the Health Care Eligibility Service or VISA Activation and Load Service, as specified in VISA regulations;

- G. 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;
- H. Disburse funds in the form of cash, unless:
  - 1) MERCHANT is dispensing funds in the form of travelers cheques, Visa TravelMoney Cards, or Foreign Currency. In this case, the transaction amount is limited to the value of the travelers cheques, Visa TravelMoney Card, or Foreign currency plus any commission or fee charged by the MERCHANT; or
  - 2) MERCHANT is participating in the Visa Cash Back Service, as further specified in the VISA regulations.
- I. Accept a Visa Card or Visa Electron card for the purchase of Scrip;
- J. Accept a Visa electron Card for Manual Cash Disbursement;
- K. Accept a Visa TravelMoney Card for a Manual Cash Disbursement;
- L. Accept a card to collect or refinance an existing debt that has been deemed uncollectible by the merchant providing the associated goods or services. (Note: A transaction that represents a payment on an existing obligation must be identified by the appropriate indicator in the Authorization Request and Clearing Record.);
- M. Enter into interchange a transaction that represents collection of a dishonored check;
- N. Require a cardholder to waive his or her rights to dispute the transaction as a condition of the SALE; or
- O. Establish a minimum or maximum transaction amount as a condition for honoring a Visa Card or Visa Electron Card, except as permitted by the RULES.

## **2. Sales Transactions:**

- 2.1 No SALE may be completed if cardholder (the duly authorized holder and user of CARD) fails to present his/her CARD to MERCHANT at time of SALE, except in the case of Card Not Present environments where MERCHANT has received written permission by TMS and BANK to do so.
- 2.2 IF USING AN ELECTRONIC DEVICE, MERCHANT MUST HAVE THE CARD SUCCESSFULLY READ BY A MAGNETIC STRIPE CARD READER/TERMINAL WITH PRINTER ATTACHED. If MERCHANT's terminal cannot successfully read the magnetic stripe, MERCHANT must imprint the card, even if it is a key entered transaction. MERCHANT must imprint the CARD on the same SALES DRAFT (a paper record evidencing the purchase of goods or services using a CARD) containing the remainder of the transaction information and the cardholder signature. Failure to obtain a signed and imprinted SALES DRAFT when a transaction is not captured by swiping through a magnetic stripe reader will expose MERCHANT to a CHARGEBACK on such a transaction regardless of the authorization that may or may not be received.
- 2.3 MERCHANT shall obtain the cardholder's signature on the SALES DRAFT, where required by the RULES.
- 2.4 Unless specifically permitted by TMS and BANK to the contrary, goods and services purchased must be delivered to cardholder at time of SALE.
- 2.5 MERCHANT shall not require cardholders to provide personal information (such as telephone number or address) as a condition for honoring a SALE, unless required by the RULES.
- 2.6 If MERCHANT receives BIN information from TMS and BANK, MERCHANT must not use such information for any reason other than to identify VISA debit category products at the point of sale, unless authorized by VISA. VISA BIN information is proprietary and confidential information belonging to VISA. MERCHANT must not disclose VISA BIN information to any third party without prior written permission from VISA. If MERCHANT uses an agent or Merchant Servicer, MERCHANT must include the foregoing provisions in its agreement or contract with such agent or Merchant Servicer.

## **3. SALES DRAFTS:**

- 3.1 MERCHANT shall deliver to the cardholder, at the time of a SALE, a true, complete, and legible copy of the SALES DRAFT or suitable receipt evidencing a SALE involving use of CARD.
- 3.2 At a minimum, the following information must be included on the SALES DRAFT (additional information may be required by the RULES depending on the transaction):
  - A. final four digits of CARD account number. MERCHANT is responsible for determining and complying with all applicable LAWS regarding CARD account number truncation requirements and CARD expiration date requirements for SALES DRAFTS;
  - B. MERCHANT's d/b/a name;
  - C. MERCHANT's city and state;
  - D. amount of the SALE (including any applicable taxes or amount of adjustment or credit);
  - E. date of the SALE;
  - F. space for cardholder signature if applicable;
  - G. transaction payment type;
  - H. legend identifying the party to whom it will be delivered (i.e. merchant copy, customer copy);
  - I. authorization code;
  - J. clear imprint of the CARD unless successfully read by a magnetic stripe reader; and
  - K. brief description of the goods or services sold, returned, or cancelled.
- 3.3 MERCHANT shall store all SALES DRAFTS and transaction records in the manner and timeframes required by the RULES.
- 3.4 MERCHANT shall not deposit SALES DRAFTS that it knows or should have known to be either fraudulent or not authorized by the cardholder.

## **4. Security Features:**

- 4.1 In all cases, MERCHANT is required to examine the card security features prior to completing a SALE.
- 4.2 When an Electronic Cash Register ("ECR") or Electronic Draft Capture ("EDC") terminal reads the magnetic stripe on the CARD, MERCHANT must check the CARD account number on the terminal (if displayed) against the account number embossed on the

CARD or follow such other security check as is mandated by TMS and BANK from time to time. If the CARD is read with a terminal that displays the CARD number and the SALES DRAFT is printed, MERCHANT shall verify that the account number displayed on the terminal match the embossed numbers on the face of the CARD. In the event that they do not match, the SALE must not be completed. Failure to follow these checks and procedures will expose MERCHANT to CHARGEBACKS.

- 4.3 In the event that the terminal is programmed to require MERCHANT to key the last four (or more) digits of each CARD used for a SALE, and the terminal indicates that the numbers keyed are not the same as those present on the card, the SALE must not be completed.
- 4.4 In order to protect the integrity of the CARD BRANDS' systems, BANK may hold funds settled by MERCHANT in the event of a breach of AGREEMENT, irregular SALES activity, or receipt of detrimental financial information.

#### **5. Authorization:**

- 5.1 On all SALES, MERCHANT shall request an authorization for the total amount of the SALE and shall record the positive authorization response code on the SALES DRAFT prior to completing the SALE. If MERCHANT receives a negative authorization response, MERCHANT shall not complete the SALE and may receive further instructions from the authorization center.
- 5.2 MERCHANT may not, after receiving a negative response or decline on an authorization request:
  - A. split the SALE amount into multiple transactions in order to obtain a valid authorization for each one, so that the separate transactions total the original dollar amount of the SALE; or
  - B. attempt any further electronic or voice authorizations.
- 5.3 In the event that an unsigned CARD is presented at the point of sale, MERCHANT must request that cardholder provide proof of identification and sign the card before completing the SALE. Details of the identification provided must be placed on the SALES DRAFT unless prohibited by local law. In the event that the cardholder refuses to do so, the SALE must not be completed.
- 5.4 MERCHANT agrees to obtain authorization from the voice authorization center as required by the RULES.

#### **6 Returned Merchandise and Adjustments:**

- 6.1 If MERCHANT agrees to credit a cardholder for any merchandise or service that was the subject of a SALE, MERCHANT must provide a Credit Transaction Receipt using the same CARD as in the original SALE. Such credit shall not exceed the original SALE amount. MERCHANT shall not make any cash refund on SALES.
- 6.2 MERCHANT may limit its acceptance of returned merchandise or establish a policy to make price adjustments for any SALE provided proper disclosure is made and purchased goods and service are delivered to the cardholder at the time of the SALE.
- 6.3 Proper disclosure means the words "NO REFUND," "EXCHANGE ONLY," or "IN STORE CREDIT ONLY" are printed in large letters near the signature line on all copies of the SALES DRAFT prior to obtaining the cardholder's signature on the SALES DRAFT. MERCHANT may stipulate other special circumstances or terms of the SALE on the SALES DRAFT.
- 6.4 For each credit transaction, MERCHANT must be able to provide TMS and BANK with evidence of the original purchase.

#### **7. Cash Transaction:**

- 7.1 MERCHANT shall not receive money from a cardholder and subsequently prepare a credit voucher for the purpose of depositing to the cardholder's account.
- 7.2 Cash disbursement by MERCHANT to a cardholder is not permitted unless you are a financial institution with written authorization from BANK and as specifically permitted by the RULES. Additionally, MERCHANT shall not make any cash advance to an employee, principal, or family member of MERCHANT, who is a cardholder.
- 7.3 MERCHANT will not accept SALES from cardholders where the primary purpose of the transaction is for the provision of working capital to business and not the purchase of goods and/or services from the business.

#### **8. Use of Promotional Materials and Marks:**

- 8.1 MERCHANT will adequately display promotional materials as required by the RULES or provided by TMS and BANK to inform the public that MERCHANT will honor CARDS.
- 8.2 MERCHANT shall prominently display the CARD BRANDS' Marks at or near all major public access points to inform the public that MERCHANT will honor CARDS. MERCHANT shall always display the Marks in their full color version. The MERCHANT must display the Marks upon acceptance of the CARDS.
- 8.3 MERCHANT shall not use the CARD BRAND's Marks for any other purpose without the express written consent of the CARD BRANDS. MERCHANTS who use the Marks shall obtain no interest in the Marks except the right to use them in accordance with the RULES.
- 8.4 All uses by MERCHANT of decals, signs, printed and broadcast materials, and other promotional materials must be in conformity with the requirements of the CARD BRANDS, SPONSORS, TMS and BANK. MERCHANT will not at any time do or cause to be done any act or deed in any way impairing or intended to impair TMS's, BANK's, CARD BRANDS', or SPONSOR's exclusive right, title, and interest in and to its respective protected Marks.
- 8.5 MERCHANT may use promotional materials only to indicate that CARDS are accepted for payment and shall not indicate, directly or indirectly, that MERCHANT has received endorsement of any goods or services other than the CARDS' services.
- 8.6 MERCHANT may not refer to the CARDS in stating eligibility for its products, services, or membership.
- 8.7 MERCHANT shall permit TMS, BANK, CARD BRANDS, and SPONSORS, at all reasonable times, to inspect the MERCHANT's use of the promotional materials and Marks. Should any materials so submitted fail to meet with TMS's, BANK's, CARD BRANDS', or SPONSOR's approval or fail to comply with the RULES, for any reason whatsoever, the MERCHANT agrees to cease using such material. Neither TMS, BANK, CARD BRANDS, nor SPONSOR shall have any liability to MERCHANT relating to disapproval of use of such materials.
- 8.8 MERCHANT's right to use and display the Marks shall terminate upon termination of this Agreement. Upon termination, voluntary or involuntary, the MERCHANT shall immediately remove all Marks from all terminals and from any other display location maintained by such MERCHANT and shall immediately cease the use of all promotional materials using the Marks of CARD BRANDS.

**9. CARDS Other than VISA, MASTERCARD, AMERICAN EXPRESS and DISCOVER:**

- 9.1 MERCHANT is required to comply with the specific regulations, as set out in its agreements with CARD BRANDS other than VISA, MASTERCARD, AMERICAN EXPRESS, and/or DISCOVER with regard to the acceptance of cards issued by such CARD BRANDS. TMS and BANK are not responsible for the funding of such transactions. Further, TMS and BANK are not responsible for payment for SALES for any CARD BRANDS unless and until TMS and BANK have received payment for such SALES from the CARD BRANDS.

**CHARGEBACKS**

**10. General:**

- 10.1 Failure to comply with the RULES will reduce TMS's and BANK's ability to reverse CHARGEBACKS and increase the likelihood of MERCHANT receiving a CHARGEBACK.
- 10.2 MERCHANT may be subject to a CHARGEBACK on SALES for a minimum period of 180 days, plus the period of any warranty or guarantee on goods and/or services sold by MERCHANT, from the date the SALE was entered into the CARD BRANDS' processing system.
- 10.3 TMS and BANK agree to mail all CHARGEBACK documentation to the address provided by MERCHANT. MERCHANT agrees to respond promptly to all CHARGEBACKS. If TMS and/or BANK elects, at their sole discretion, to take action on CHARGEBACKS after the CARD BRAND time limits have expired, such action shall be done at additional cost.
- 10.4 MERCHANT agrees that it will not re-deposit SALES that have been previously charged back and not represented. This restriction applies whether or not the cardholder consents to such activity.
- 10.5 MERCHANT agrees that if it receives a CHARGEBACK for an international cardholder, the MERCHANT is responsible for any currency conversion differences in the dollar amount.

**11. CHARGEBACK Reasons:**

- 11.1 MERCHANT should refer to the RULES for a complete list of CHARGEBACK reasons.

**12. CHARGEBACK Monitoring Programs:**

- 12.1 Any MERCHANT location that exceeds a one percent (1%) CHARGEBACK to Interchange ratio for all incoming CHARGEBACKS for that location is considered an excessive chargeback merchant and may be subject to Visa and MasterCard's monitoring programs. Merchants are responsible for monitoring their monthly chargeback percentage and developing chargeback reduction plans as required by Visa and MasterCard. Excessive CHARGEBACK activity for an unreasonable period of time may result in termination of this AGREEMENT. MERCHANT will pay TMS and/or BANK for any fine or charge levied by the CARD BRANDS on TMS and/or BANK or MERCHANT as a result of its chargeback activity. This section may be amended from time to time as a result of action by CARD BRANDS.

**13. Other CARD BRAND Monitoring Programs:**

- 13.1 If MERCHANT is identified by certain CARD BRAND monitoring programs, TMS's and BANK's ability to reverse CHARGEBACKS may be severely restricted.
- 13.2 Certain monitoring programs review the number of lost, stolen and counterfeit CARDS accepted by MERCHANT in its normal course of business and the percentage of CARDS used for SALES that were not read electronically by terminals or ECRs. The purpose of these programs is to reduce the use of lost, stolen and counterfeit CARDS.
- 13.3 In the event that MERCHANT is identified under these programs as exceeding the acceptable threshold value of such CARDS, MERCHANT may become liable for CHARGEBACKS and SALES on lost, stolen, or counterfeit CARDS regardless of the CARD ACCEPTANCE PROCEDURES followed, and AGREEMENT may be terminated by TMS and BANK.

**14. CARD BRAND Registration Programs:**

- 14.1 If MERCHANT is identified by certain CARD BRAND registration programs, TMS and/or BANK will take the necessary steps to register the merchant. MERCHANT will pay TMS and BANK for any fine or charge levied by the CARD BRANDS on TMS, BANK, or MERCHANT as a result of the registration program including but not limited to one-time registration fees, ongoing registration fees and non-compliance fees. This section may be amended from time to time as a result of action by CARD BRANDS.

**UNIQUE BUSINESS REQUIREMENTS**

**15. Card Not Present Merchants:**

- 15.1 MERCHANT may not accept Card Not Present SALES unless AGREEMENT specifically refers to Card Not Present SALES. If this is not the case, MERCHANT should contact TMS and BANK if they wish to accept Card Not Present SALES and provide descriptions of product types and marketing methods. TMS and BANK may refuse MERCHANT permission to accept Card Not Present SALES.
- 15.2 If MERCHANT is specifically authorized by TMS and BANK to accept Card Not Present SALES, no SALE shall be submitted for processing prior to the shipping of the product or the provision of services purchased by the cardholder.
- 15.3 Card Not Present SALES do not require the cardholder's signature on the SALES DRAFT. MERCHANT is required to obtain the valid dates for each CARD used for a SALE. The expiration date must be submitted as part of the Authorization inquiry.
- 15.4 If MERCHANT supplies goods and/or services under a Pre-Authorization Order ("PO"), it shall not charge a cardholder for goods after receiving notice from a cardholder that the authorization for goods or services is canceled.
- 15.5 The receipt of a valid Authorization does not protect MERCHANT from CHARGEBACKS on SALES for the Unauthorized Purchaser reason code. The shipping documents indicating the address the goods were shipped to and a signature of an individual (even cardholder) will not normally be sufficient to reverse an Unauthorized Purchaser reason code.
- 15.6 MERCHANT assumes the risk associated with accepting Card Not Present SALES transactions.
- 15.7 Card Not Present MERCHANTS are encouraged to investigate the CHARGEBACK protection attributes of the various Address Verification Services and Card Verification Value Services available from CARD BRANDS.
- 15.8 MERCHANT, or its agent, shall implement and maintain all of the security requirements specified in PCI. MERCHANT shall immediately notify TMS and BANK of the use an agent. MERCHANT shall immediately notify TMS and BANK of any suspected or confirmed loss or theft of material or records that contain account information and both:

- A. demonstrate its ability to prevent future loss or theft of account or transaction information; and
  - B. allow the CARD BRANDS, or an acceptable independent third party, to verify this ability by conducting a security review.
- 15.9 Electronic Commerce Merchants (VISA):

- A. VISA makes the 3-D Authentication system available to Electronic Commerce Merchants as a way to reduce fraud in Internet Transactions. Electronic Commerce Merchants may elect to implement 3-D Secure. Electronic Commerce Merchants that process 3-D Secure Transactions must comply with requirements specified in the: (i) VISA Operating Regulations; (ii) the VISA 3-D Secure: Merchant Implementation Guide and (iii) VISA Cardholder Information Security Program.
- B. A web site operated by an Electronic Commerce Merchant must contain all of the following information: (i) a complete description of the goods or services offered; (ii) the merchant's returned merchandise and refund policy; (iii) the merchant's customer service contact, including electronic mail addresses and/or telephone number; (iv) the transaction currency; (v) any export or legal restrictions (if known); (vi) the merchant's delivery policy; (vii) the address of the merchant's permanent establishment; (viii) the merchant's consumer data privacy policy; and (ix) the security method for the transmission of payment data.
- C. Electronic Commerce Merchants must offer cardholders a secure transaction method, such as: (i) Secure Sockets Layer (SSL), or (ii) 3-D Secure.

**16. Travel and Entertainment ("T&E") Merchants:**

- 16.1 A MERCHANT whose primary function is to provide travel related services shall be referred to as a Travel & Entertainment ("T&E") MERCHANT. These include but are not limited to car rental, lodging, and central reservation services.
- 16.2 A T&E MERCHANT may process delayed or amended charges if the cardholder has consented to be liable for those charges. These charges may NOT include charges for loss, theft, or damage.

**17. T&E Services:**

- 17.1 A T&E MERCHANT may participate in any of the following VISA T&E Services:

- A. Priority Check-Out Service
- B. T&E Advance Deposit Service
- C. T&E Cash Disbursement Service
- D. VISA Reservation Service

RULES which apply to the VISA T&E Services are available upon request.

- 17.2 Visa Reservation Service: Any MERCHANT who accepts CARDS to guarantee reservations must do so in accordance with the following requirements:

- A. MERCHANT must accept all VISA CARDS;
- B. MERCHANT will obtain the cardholder's account number, expiration date, and name embossed on the CARD. MERCHANT must quote to cardholder the rate of reserved accommodation, MERCHANT name and address, and the Confirmation Code advising that it be retained. Advise the cardholder that if he/she has not checked in by checkout time the following day after his/her scheduled arrival date or the reservation was not properly canceled, the cardholder will be billed for one night's lodging plus applicable taxes. If requested, the MERCHANT will provide a written confirmation with the above information including the VISA Reservation Service provisions relating to the cardholder's obligation, and any other reservation details;
- C. MERCHANT must accept all cancellations prior to the specified time. The MERCHANT must not require more than seventy-two (72) hours cancellation notification prior to the scheduled arrival date. But, if the cardholder makes the reservation within seventy-two (72) hours of the scheduled arrival date, the cancellation deadline must be no earlier than 6:00 p.m. on the arrival date. If the MERCHANT requires that the cardholder cancel before 6:00 p.m. on the arrival date, the MERCHANT must mail the cancellation policy to the cardholder;
- D. if the reservation is properly canceled, MERCHANT must provide a cancellation code and advise the cardholder to retain it. If requested, MERCHANT must mail a confirmation of cancellation that includes the following: cardholder name, account number, card expiration date, cancellation code, and details related to the canceled reservation;
- E. if cardholder has not claimed or canceled the accommodation by the specified time, the room(s) must be held available in accordance with the reservation until checkout time the following day. MERCHANT may then complete a SALES DRAFT for one night's lodging plus applicable tax, indicating the cardholder's account number, expiration date, and name embossed on the CARD and the words "No Show" on the cardholder signature line. MERCHANT must obtain an authorization code for the no show transaction; and
- F. if guaranteed accommodations are unavailable, MERCHANT must provide cardholder with comparable accommodations for one night at another establishment, transportation to the location of the alternative establishment, and if requested, provide cardholder with a three (3) minute telephone call and message forwarding to the alternate establishment. These services shall be provided at no cost to cardholder.

**18. Pre-authorized Health Care Transactions:**

- 18.1 MERCHANTS accepting Pre-authorized Health Care Transactions must have the cardholder complete an order form containing the following:

- A. a request for the services to be charged to the cardholder's account;
- B. assignment of insurance benefits to the MERCHANT;
- C. authorization for the MERCHANT to charge the cardholder's account for only that portion of the bill subsequent to MERCHANT's receipt of any applicable insurance payment;
- D. duration of time, not to exceed one (1) year, for which permission is granted; and
- E. if the Pre-authorized Health Care Transaction is renewed, the cardholder must provide an updated order form.

- 18.2 MERCHANT must:

- A. retain a copy of the order form during the period it is in effect;

- B. provide a copy of the order form upon TMS's and/or BANK's request;
  - C. type or print the words "Pre-authorized Health Care" on the signature line of the SALES DRAFT; and
  - D. submit a SALES DRAFT within ninety (90) days of the service date and request authorization for the amount due upon receipt of notice of adjudication from the cardholder's insurance company.
- 18.3 MERCHANT must not complete a Pre-authorized Health Care Transaction after receiving a notice of cancellation from cardholder, TMS, BANK, or if the MERCHANT receives a decline response.

**19. Recurring Transactions:**

- 19.1 MERCHANT will not accept recurring SALES transactions where the delivery of, provision of, or billing for, goods or services is performed on a periodic basis ("RECURRING TRANSACTIONS") without the express written consent of TMS and BANK and without following the rules stated below.
- 19.2 MERCHANT must obtain from the cardholder a completed Order Form containing a written request for the goods or services to be charged to the cardholder's CARD. The Order Form must include the transaction amount (unless the RECURRING TRANSACTIONS are for varying amounts), the frequency of the recurring charges, and the duration of time for which the cardholder's permission is granted. The cardholder signature (including electronic signature or other similar authentication) must be effective under applicable law.
- 19.3 MERCHANT must retain a copy of the Order Form for the duration of the RECURRING SERVICES and provide it to TMS and BANK upon request.
- 19.4 Upon completion of the SALES DRAFT, MERCHANT should write the words "Recurring Transaction" on the signature line.
- 19.5 When a RECURRING TRANSACTION is renewed, MERCHANT must obtain an updated Order Form (as set out above) from the cardholder.
- 19.6 For an Electronic Commerce Transaction, include the frequency and duration of the RECURRING TRANSACTION, as agreed to by the cardholder, on the SALES DRAFT and provide a simple and easily accessible online cancellation procedure, if the cardholder's request for goods or services was initially accepted online.
- 19.7 For RECURRING TRANSACTIONS, MERCHANT must not:
- A. include partial payment for goods or services purchased in a single transaction;
  - B. include additional finance charges on a RECURRING TRANSACTION;
  - C. complete a RECURRING TRANSACTION if it does not receive an Authorization or if it receives a cancellation notice from the cardholder; or
  - D. request or use a cardholder account number for purposes other than as payment for its goods or services.
- 19.8 For RECURRING TRANSACTIONS of varying amounts, the MERCHANT must:
- A. on the Order Form, allow the cardholder to specify a minimum and a maximum transaction amount to be charged;
  - B. inform the cardholder of his/her right to receive, with at least ten (10) days notice before the transaction date, a written notification of the amount and date of the next charge; and
  - C. allow the cardholder to choose to receive notice in any of the following ways: (i) for every charge; (ii) when the transaction amount is outside of the specified minimum and maximum amount range; and (iii) when the transaction amount will differ from the most recent charge by more than an agreed upon amount.

**20. Employee Purchases:**

- 20.1 MERCHANT is prohibited from conducting Cash Advances, Card Sales or returns for goods or services with the MERCHANT's owners, officers or employees using such individual's personal Card(s), except for bona fide Card Transactions in the ordinary course of MERCHANT's business. MERCHANT is responsible for the actions and omissions of MERCHANT's principals, officers, employees and agents, including any fraud committed by, and/or any intentional or negligent acts or omissions by, any owner, officer or employee of MERCHANT.

**MISCELLANEOUS RULES**

**21. Liability of MERCHANT:**

- 21.1 MERCHANT shall be liable for all actions of its employees and agents and shall insure that they comply with the RULES and all LAWS.

**22. Supply of Information:**

- 22.1 MERCHANTS must submit all information requested by the CARD BRANDS, TMS, and BANK, including, but not limited to, lists and mailing addresses of terminals.
- 22.2 A MERCHANT shall not sell, purchase, provide, or exchange account number information in the form of transaction receipts, carbon copies of transaction receipts, mailing lists, tapes, or other media obtained by reason of a SALE to any third party other than to the MERCHANT's agents for the purpose of assisting the MERCHANT in its business; or to the CARD BRANDS, TMS and/or BANK; or pursuant to a government request.

**ATM/DEBIT NETWORK RULES**

**NOTICE: The following summary of NETWORK RULES only applies to ATM/Debit transactions that are processed by a Cardholder entering a PIN. Such ATM/Debit transactions are subject to the rest of the Agreement, as applicable, except to the extent the terms of the NETWORK RULES summary directly conflicts with another provision of this Agreement, in which case, the terms of this NETWORK RULES summary will control. The following information is a summary of common rules that are specific to ATM/Debit Network transactions; however card acceptance, processing and chargeback procedures are subject to change. If there are any differences between the NETWORKS' regulations and these Rules, the NETWORKS' regulations will prevail in every instance. To the extent these RULES or the NETWORKS' regulations conflict with applicable local, state, or federal laws, rules, or regulations, such local, state, or federal laws, rules or regulations shall govern.**

## **ATM/DEBIT NETWORK CARD ACCEPTANCE PROCEDURES**

### **1. Discrimination:**

- 1.1 MERCHANT shall not require cardholders to provide personal information (such as telephone number or address) as a condition for honoring a CARD, unless required by the RULES.
- 1.2 MERCHANT may not require or request the cardholder's signature or any other means of verifying the cardholder's identity.
- 1.3 MERCHANT shall place the PIN Entry Device in an area accessible by all cardholders and that can reasonably prevent others from observing the entered PIN.
- 1.4 MERCHANT shall not request or require the cardholder to provide or disclose their PIN in any oral or written manner to the MERCHANT.

### **2. SALES DRAFTS:**

- 2.1 MERCHANT shall deliver to the cardholder at the time of a SALE a true and completed copy of the SALES DRAFT evidencing a SALE involving use of a CARD. The SALES draft must comply with the requirements of all RULES, and LAWS.
- 2.2 The following information must be included on the SALES DRAFT: (i) CARD account number; (ii) MERCHANT's DBA name; (iii) MERCHANT's city and state; (iv) amount of SALE; and (v) SALE date.
- 2.3 A SALES DRAFT shall be made available to the cardholder at each terminal.
- 2.4 MERCHANT may not require or request the cardholder to divulge the PIN belonging to that cardholder.
- 2.5 MERCHANT shall not impose any fee or charge without the prior written consent of TMS and BANK. If surcharging is approved by TMS and BANK, it must be a separate line item on the SALES draft and must be in compliance with all NETWORKS' rules, and LAWS.
- 2.6 MERCHANT shall not process any SALE if the terminal does not receive an authorization code. When a denial to an authorization request is received, the POS transaction shall not be completed, unless completed as a MERCHANT Store and Forward Transaction or Resubmission Transaction.
- 2.7 A SALE shall not be completed if the MERCHANT knows or should know that the SALE is fraudulent or not authorized by the cardholder.
- 2.8 A SALE may be reversed or voided electronically, but only if such reversal/void is entered prior to midnight of the calendar day on which the SALE was initiated. To effect a reversal or void, cardholder must re-enter the PIN, the magnetic stripe reader must read the card, and MERCHANT must transmit the trace number and the exact dollar amount of the SALE to be reversed or voided. A reversal or void must be initiated at the same MERCHANT identified on the SALES draft at which the original SALE was initiated, but need not be initiated at the same POS terminal.
- 2.9 All returns shall be processed in accordance with the MERCHANT's normal procedures, except that MERCHANT or cardholder shall not attempt to reverse a previously approved POS Transaction, unless otherwise permitted in accordance with the rules.
- 2.10 Any SALES known by the MERCHANT to be erroneous should be canceled and re-billed, in the cardholder's presence.
- 2.11 Balance inquiries may be performed only by the cardholder at a cardholder-operated terminal and shall at all times require the cardholder to enter the PIN and use the magnetic stripe reader.

### **3. SALES DRAFTS - Distribution and Storage of Information:**

- 3.1 MERCHANT shall not disclose a cardholder's account information or any other personal information to third parties other than to MERCHANT's agents for the purpose of completing the SALE or as specifically required by law or by the RULES.
- 3.2 MERCHANT shall store in a limited access area for at least one (1) year after the date of SALES all transaction records and MERCHANT shall make and retain for at least two (2) years the original or legible microfilm copies of both sides of all transaction records; Prior to discarding, MERCHANT shall destroy or make unreadable all material containing cardholder account numbers.
- 3.3 There are no voice authorizations for transactions and no manually imprinted SALES drafts.

## **CHARGEBACKS**

### **4. General:**

- 4.1 MERCHANT agrees to pay TMS and/or BANK for any NETWORK fees, fines or charges imposed on MERCHANT or TMS and BANK. Such reimbursement will be accomplished by the debit of the sum(s) involved from the MERCHANT's DESIGNATED ACCOUNT.
- 4.2 Failure to comply with the RULES will increase MERCHANT's exposure to CHARGEBACKS.
- 4.3 TMS agrees to mail all CHARGEBACK documentation to MERCHANT promptly to MERCHANT's address shown on AGREEMENT. MERCHANT agrees to respond promptly to all CHARGEBACKS. If TMS and BANK elect, at their discretion, to take action on CHARGEBACKS after the NETWORK time limits have expired, such action shall be done at additional cost. Upon request of NETWORK, TMS, or BANK, the MERCHANT will retrieve and forward to TMS, within the time frame required by the NETWORKS, either the original or a readable copy of the Terminal journal tape or duplicate transaction receipt for the transaction in question and, if requested, will give the NETWORK such information from such transaction records as it requests by telephone. The MERCHANT will, on request of the NETWORK, cooperate fully with the NETWORK and the card-issuing participant in order that the participant may comply with the error resolution procedures.

### **5. Monitoring Programs:**

- 5.1 If certain monitoring programs identify MERCHANT, TMS's and BANK's ability to reverse CHARGEBACKS can be severely restricted.
- 5.2 Certain Monitoring Programs review the number of Lost, Stolen and Counterfeit CARDS accepted by MERCHANT in its normal course of business. The purpose of these Programs is to reduce the use of Lost, Stolen and Counterfeit CARDS.
- 5.3 In the event that MERCHANT is identified under these PROGRAMS as exceeding the acceptable threshold value of such CARDS, MERCHANT may become liable for CHARGEBACKS and SALES on Lost, Stolen, or Counterfeit CARDS regardless of the CARD ACCEPTANCE PROCEDURES followed, and AGREEMENT may be terminated on notice by TMS and BANK.

## OPERATIONAL REQUIREMENTS

### **6. MERCHANT Name and Address:**

6.1 All forms submitted to TMS and BANK must bear both the corporate and "Doing Business As" ("DBA") name.

### **7. Equipment:**

- 7.1 A MERCHANT shall take all necessary steps to insure that all POS Terminals and PIN Pads operated in all of its locations:
- A. are placed in an area accessible by all cardholders;
  - B. are available for use whenever open for business;
  - C. will function with a minimum of error meeting all applicable technical specifications and security regulations; and
  - D. will require the cardholder to enter the cardholder's PIN at or near the check out location when initiating a POS Transaction.
- 7.2 A PIN pad or PIN processor must meet the ANSI standard format X9.8, 1995 or newer requirements, as they are released.
- 7.3 Terminals must have a Magnetic Stripe reader capable of reading Track 2 on the CARDS.
- 7.4 PINS used in conjunction with any store and forward transaction or MERCHANT resubmission must be encrypted and stored within a Tamper Resistant Security Module.
- 7.5 If MERCHANT's authorization system is capable of store and forward, it must comply with the NETWORKS's rules and regulations regarding this capability. TMS, BANK, the Issuer, and the NETWORKS shall not be liable for any losses suffered by a MERCHANT arising from the use of the store and forward function.
- 7.6 A PIN must never be logged in any form as a function of software either in the clear or encrypted.

### **8. Left CARDS:**

- 8.1 CARDS that are inadvertently left at a MERCHANT location must be held under dual control during the time they are retained.
- 8.2 CARDS inadvertently left at a MERCHANT location may be returned to the cardholder by MERCHANT under the following conditions: (i) the CARD was inadvertently left by the cardholder at an on-premise location, and (ii) the cardholder requests the CARD within one business day, and (iii) the cardholder provides two forms of current identification, one of which is a photo identification.
- 8.3 If the cardholder has not requested the CARD within one business day, the CARD should be destroyed by cutting it in half through the stripe and processed in the normal manner.

### **9. Security Features:**

- 9.1 TMS, BANK, NETWORK or their designated agent, on behalf of itself or others, shall have the right to inspect MERCHANT's security systems and procedures from time to time.

### **AMERICAN EXPRESS OPTBLUE<sup>SM</sup> PROGRAM AGREEMENT**

**Important Note: BANK is not a party to the American Express OptBlue Program Agreement and has no responsibility under it. MERCHANT acknowledges and agrees that BANK and their affiliates have no obligation or liability whatsoever for: (1) AMERICAN EXPRESS transactions whether under the American Express OptBlue Program Agreement, the Merchant Transaction Processing Agreement or otherwise; or (2) any actions or omissions of ISO or AMERICAN EXPRESS. MERCHANT agrees that any claims or disputes arising out of the foregoing will be resolved without involving BANK and that BANK is entitled to rely on MERCHANT's agreements in this paragraph.**

THIS Agreement ("AMERICAN EXPRESS OPTBLUE PROGRAM AGREEMENT"), by and between ISO and MERCHANT, shall become effective on the date executed or approved by a duly authorized representative of ISO.

ISO and MERCHANT shall be collectively known hereafter as the "Parties."

WHEREAS, First National Bank of Omaha, ISO, and MERCHANT are PARTIES to a Merchant Transaction Processing Agreement (together with its addenda, attachments, and schedules shall be hereinafter known as the "AGREEMENT"); and

WHEREAS, TSYS Acquiring Solutions, LLC has a relationship with American Express Travel Related Services Company, Inc. ("AMERICAN EXPRESS"); and

WHEREAS, the PARTIES desire to enter into this AMERICAN EXPRESS OPTBLUE PROGRAM AGREEMENT under which ISO will provide payment processing services as to AMERICAN EXPRESS transactions.

NOW THEREFORE, in consideration of the mutual promises made herein, and other valuable consideration, receipt and sufficiency of which are hereby acknowledged, the PARTIES do hereby agree as follows:

Terms set forth herein, which are typed in all capitalized letters and not defined herein, shall have the same meaning as set out in the AGREEMENT.

The terms of the AGREEMENT, including the Merchant Application, are hereby incorporated by reference into this AMERICAN EXPRESS OPTBLUE PROGRAM AGREEMENT, except that no references to BANK under the AGREEMENT shall apply herein.

MERCHANT agrees to pay ISO the FEES related to AMERICAN EXPRESS as set out on the Merchant Application.

The following terms and conditions apply to MERCHANT's participation in the AMERICAN EXPRESS OptBlue<sup>SM</sup> Program ("AMERICAN EXPRESS CARD ACCEPTANCE"):

MERCHANT's participation in AMERICAN EXPRESS CARD ACCEPTANCE is subject to the approval of AMERICAN EXPRESS. MERCHANT authorizes ISO and/or its affiliates to submit AMERICAN EXPRESS SALES To, and receive settlement on such SALES from, AMERICAN EXPRESS on behalf of MERCHANT.

MERCHANT agrees that ISO may disclose to AMERICAN EXPRESS information regarding MERCHANT and MERCHANT's SALES to AMERICAN EXPRESS, and that AMERICAN EXPRESS may use such information to perform its responsibilities in connection with AMERICAN EXPRESS CARD ACCEPTANCE, promote AMERICAN EXPRESS, perform analytics and create reports, and for any other lawful business purposes, including commercial marketing communications purposes within the parameters of AMERICAN EXPRESS CARD ACCEPTANCE, and important transactional or relationship communications from AMERICAN EXPRESS. AMERICAN EXPRESS may use the information about MERCHANT obtained in the AGREEMENT at the time of setup to screen and/or monitor MERCHANT in connection with AMERICAN EXPRESS marketing and administrative purposes. MERCHANT agrees it may receive messages from AMERICAN EXPRESS, including important information about AMERICAN EXPRESS 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.

**MERCHANT may opt-out of receiving future commercial marketing communications from AMERICAN EXPRESS by contacting ISO. 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.**

MERCHANT acknowledges that it may be converted from AMERICAN EXPRESS CARD ACCEPTANCE to a direct relationship with AMERICAN EXPRESS if and when its SALES volumes exceed the eligibility thresholds for AMERICAN EXPRESS CARD ACCEPTANCE. 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.

MERCHANT shall not assign to any third party any payments due to it under AMERICAN EXPRESS CARD ACCEPTANCE, and all indebtedness arising from SALES 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 the MERCHANT may sell and assign future SALES receivables to ISO, its affiliated entities and/or any other cash advance funding source that partners with ISO or its affiliated entities, without consent of AMERICAN EXPRESS. Notwithstanding the foregoing, ISO prohibits MERCHANT from selling or assigning future SALES receivables to any third party.

Notwithstanding anything in the AGREEMENT to the contrary, AMERICAN EXPRESS shall have third-party beneficiary rights, but not obligations, to the terms of the AGREEMENT applicable to AMERICAN EXPRESS CARD ACCEPTANCE to enforce such terms against MERCHANT.

MERCHANT may opt out of accepting AMERICAN EXPRESS at any time without directly or indirectly affecting its rights to accept other CARD BRANDS.

ISO shall have the right to terminate MERCHANT'S participation in AMERICAN EXPRESS CARD ACCEPTANCE immediately upon written notice to MERCHANT (i) if MERCHANT breaches any of the provisions of this AMERICAN EXPRESS OPTBLUE PROGRAM AGREEMENT or any other terms of the AGREEMENT applicable to AMERICAN EXPRESS CARD ACCEPTANCE, or (ii) for cause or fraudulent or other activity, or upon AMERICAN EXPRESS' request. In the event MERCHANT's participation in AMERICAN EXPRESS CARD ACCEPTANCE is terminated for any reason, MERCHANT must immediately remove all AMERICAN EXPRESS branding and marks from MERCHANT's website and wherever else they are displayed.

MERCHANT'S refund policies for AMERICAN EXPRESS SALES must be at least as favorable as its refund policy for purchase on any other CARD BRAND, and the refund policy must be disclosed to cardholders at the time of purchase and in compliance with LAWS. MERCHANT may not bill or attempt to collect from any cardholder for any AMERICAN EXPRESS SALE unless a CHARGEBACK has been exercised, MERCHANT has fully paid for such CHARGEBACK, and it otherwise has the right to do so.

MERCHANT must accept AMERICAN EXPRESS as payment for goods and services (other than those goods and services prohibited by this AMERICAN EXPRESS OPTBLUE PROGRAM AGREEMENT, the AGREEMENT, or the RULES) sold, or (if applicable) for charitable contributions made at all of its business locations and websites, except as expressly permitted by state statute. MERCHANT is jointly and severally liable for the obligations of MERCHANT's business locations and websites under the AGREEMENT.

In the event that MERCHANT or ISO is not able to resolve a Claim against AMERICAN EXPRESS, or a Claim against ISO or any other entity that AMERICAN EXPRESS has a right to join in resolving a Claim, this section explains how Claims can be resolved through arbitration. MERCHANT or AMERICAN EXPRESS may elect to resolve any Claim by individual, binding arbitration. Claims are decided by a neutral arbitrator.

**If arbitration is chosen by any party, neither MERCHANT nor ISO nor AMERICAN EXPRESS will have the right to litigate that Claim in court or have a jury trial on that Claim. Further, MERCHANT, ISO, and AMERICAN EXPRESS will not have the right to participate in a representative capacity or as a member of any class pertaining or be a named party to a class-action with respect to any Claim for which any party elects arbitration. Arbitration procedures are generally simpler than the rules that apply in court, and discovery is more limited. The arbitrator's decisions are as enforceable as any court order and are subject**

**to very limited review by a court. Except as set forth below, the arbitrator's decision will be final and binding. Other rights MERCHANT, ISO, or AMERICAN EXPRESS would have in court may also not be available in arbitration.**

i. Initiation of Arbitration. Claims will be referred to either JAMS or AAA, as selected by the party electing arbitration. Claims will be resolved pursuant to this Arbitration Agreement and the selected organization's rules in effect when the Claim is filed, except where those rules conflict with the AGREEMENT. Contact JAMS or AAA to begin an arbitration or for other information. Claims may be referred to another arbitration organization if all parties agree in writing, or to an arbitrator appointed pursuant to section 5 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA). Any arbitration hearing that MERCHANT attends shall take place in New York, New York unless all parties agree to an alternate venue.

**ii. Limitations on Arbitration. If any party elects to resolve a Claim by arbitration, that Claim will be arbitrated on an individual basis. There will be no right or authority for any Claims to be arbitrated on a class action basis or on bases involving Claims brought in a purported representative capacity on behalf of the general public, other merchants or other persons or entities similarly situated.** The arbitrator's authority is limited to Claims between MERCHANT, ISO, and AMERICAN EXPRESS. Claims may not be joined or consolidated unless all parties to this agreement agree in writing. An arbitration award and any judgment confirming it will apply only to the specific case brought by MERCHANT, ISO or AMERICAN EXPRESS and cannot be used in any other case except to enforce the award as between MERCHANT, ISO and AMERICAN EXPRESS. This prohibition is intended to, and does, preclude MERCHANT from participating in any action by any trade association or other organization against AMERICAN EXPRESS. Notwithstanding any other provision and without waiving the right to appeal such decision, if any portion of these *Limitations on Arbitration* is deemed invalid or unenforceable, then the entire Arbitration provision (other than this sentence) will not apply.

iii. Previously Filed Claims/No Waiver. MERCHANT, ISO, or AMERICAN EXPRESS may elect to arbitrate any Claim that has been filed in court at any time before trial has begun or final judgment has been entered on the Claim. MERCHANT, ISO, or AMERICAN EXPRESS may choose to delay enforcing or to not exercise rights under this arbitration provision, including the right to elect to arbitrate a Claim, without waiving the right to exercise or enforce those rights on any other occasion. For the avoidance of any confusion, and not to limit its scope, this section applies to any class-action lawsuit relating to the "Honor All Cards," "non-discrimination," or "no steering" provisions of the American Express Merchant Regulations, or any similar provisions of any prior American Express Card acceptance agreement, that was filed against AMERICAN EXPRESS prior to the effective date of the AGREEMENT.

iv. Arbitrator's Authority. The arbitrator shall have the power and authority to award any relief that would have been available in court, including equitable relief (e.g., injunction, specific performance) and cumulative with all other remedies, shall grant specific performance whenever possible. The arbitrator shall have no power or authority to alter the AGREEMENT or any of its separate provisions, including this section, nor to determine any matter or make any award except as provided in this section.

v. Split Proceedings for Equitable Relief. MERCHANT, ISO, or AMERICAN EXPRESS may seek equitable relief in aid of arbitration prior to arbitration on the merits to preserve the status quo pending completion of such process. This section shall be enforced by any court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all reasonable attorneys' fees and costs, including legal fees, to be paid by the party against whom enforcement is ordered.

vi. Small Claims. AMERICAN EXPRESS shall not elect to use arbitration under this section for any Claim MERCHANT properly files in a small claims court so long as the Claim seeks individual relief only and is pending only in that court.

vii. Governing Law/Arbitration Procedures/Entry of Judgment. This arbitration section is made pursuant to a transaction involving interstate commerce and is governed by the FAA. The arbitrator shall apply New York law and applicable statutes of limitations and shall honor claims of privilege recognized by law. The arbitrator shall apply the rules of the arbitration organization selected, as applicable to matters relating to evidence and discovery, not the federal or any state rules of civil procedure or rules of evidence, provided that any party may request that the arbitrator to expand the scope of discovery by doing so in writing and copying any other parties, who shall have fifteen (15) days to make objections, and the arbitrator shall notify the parties of his/her decision within twenty (20) days of any objecting party's submission. If a Claim is for \$10,000 or less, MERCHANT or AMERICAN EXPRESS may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the rules of the selected arbitration organization. At the timely request of a party, the arbitrator shall provide a written and reasoned opinion explaining his/her award. The arbitrator's decision shall be final and binding, except for any rights of appeal provided by the FAA. If a Claim is for \$100,000 or more, or includes a request for injunctive relief, (a) any party to this AGREEMENT shall be entitled to reasonable document and deposition discovery, including (x) reasonable discovery of electronically stored information, as approved by the arbitrator, who shall consider, *inter alia*, whether the discovery sought from one party is proportional to the discovery received by another party, and (y) no less than five depositions per party; and (b) within sixty (60) days of the initial award, either party can file a notice of appeal to a three-arbitrator panel administered by the selected arbitration organization, which shall reconsider *de novo* any aspect requested of that award and whose decision shall be final and binding. If more than sixty (60) days after the written arbitration decision is issued the losing party fails to satisfy or comply with an award or file a notice of appeal, if applicable, the prevailing party shall have the right to seek judicial confirmation of the award in any state or federal court where MERCHANT's headquarters or MERCHANT's assets are located.

viii. Confidentiality. The arbitration proceeding and all testimony, filings, documents, and any information relating to or presented during the proceedings shall be deemed to be confidential information not to be disclosed to any other party. All offers, promises, conduct, and statements, whether written or oral, made in the course of the Claim resolution process, including but not limited to any related negotiations, mediations, arbitration, and proceedings to confirm arbitration awards by either party, its agents, employees, experts or attorneys, or by mediator or arbitrator, including any arbitration award or judgment related thereto, are confidential and inadmissible for any purpose, including impeachment or estoppel, in any other litigation or proceeding involving any of the parties or

non-parties; provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non discoverable as a result of its use in the negotiation, mediation, or arbitration.

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

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

**xi.** Definitions. For purposes of the above arbitration provisions only, (i) *AMERICAN EXPRESS* includes any of its affiliates, licensees, predecessors, successors, or assigns, any purchasers of any receivables, and all agents, directors, and representatives of any of the foregoing, and (ii) *MERCHANT* includes any of MERCHANT's affiliates, licensees, predecessors, successors, or assigns, any purchasers of any receivables and all agents, directors, and representatives of any of the foregoing, and (iii) *Claim* means any allegation of an entitlement to relief, whether damages, injunctive or any other form of relief, against AMERICAN EXPRESS or against ISO or any other entity that AMERICAN EXPRESS has the right to join in resolving a Claim, including, a transaction using an AMERICAN EXPRESS product or network or regarding an AMERICAN EXPRESS policy or procedure.

Except as expressly permitted by LAWS, MERCHANT must not:

- o indicate or imply that it prefers, directly or indirectly, any other CARD BRANDS over AMERICAN EXPRESS,
- o try to dissuade cardholders from using AMERICAN EXPRESS,
- o criticize or mischaracterize AMERICAN EXPRESS or any of its services or programs,
- o try to persuade or prompt cardholders to use any other CARD BRANDS or any other method of payment (e.g., payment by check),
- o impose any restrictions, conditions, disadvantages or fees when AMERICAN EXPRESS is accepted that are not imposed equally on all other CARD BRANDS, except for electronic funds transfer, or cash and check,
- o suggest or require cardholders to waive their right to dispute any SALE,
- o engage in activities that harm the AMERICAN EXPRESS business or brand (or both),
- o promote any other CARD BRAND (except MERCHANT's own private label card that MERCHANT issues for use solely at MERCHANT's business locations and websites) more actively than MERCHANT promotes AMERICAN EXPRESS, or
- o convert the currency of the original SALE to another currency when requesting authorization or submitting SALES (or both).

MERCHANT may offer discounts or in-kind incentives from MERCHANT's regular prices for payments in cash, ACH funds transfer, check, debit card or credit/charge card, provided that (to the extent required by LAWS): (i) MERCHANT clearly and conspicuously disclose the terms of the discount or in-kind incentive to MERCHANT's customers, (ii) the discount or in-kind incentive is offered to all of MERCHANT's prospective customers, and (iii) the discount or in-kind incentive does not differentiate on the basis of the issuer or, except as expressly permitted by applicable state statute, payment card network (e.g., Visa, MasterCard, Discover, JCB, American Express). The offering of discounts or in-kind incentives in compliance with the terms of this paragraph will not constitute a violation of the provisions set forth above.

Whenever payment methods are communicated to customers, or when customers ask what payments are accepted, MERCHANT must indicate MERCHANT's acceptance of AMERICAN EXPRESS and display AMERICAN EXPRESS' marks (including any AMERICAN EXPRESS card application forms provided to MERCHANT) as prominently and in the same manner as any other CARD BRANDS. MERCHANT must not use the AMERICAN EXPRESS marks in any way that injures or diminishes the goodwill associated with the mark, nor (without prior written consent from ISO) indicate that AMERICAN EXPRESS endorses MERCHANT's goods or services. MERCHANT shall only use the AMERICAN EXPRESS marks as permitted by the AGREEMENT and shall cease using AMERICAN EXPRESS' marks upon termination of the AGREEMENT. For additional guidelines on the use of the AMERICAN EXPRESS marks, contact ISO.

Any and all cardholder information is confidential and the sole property of the applicable issuer, AMERICAN EXPRESS or its affiliates. Except as otherwise specified, MERCHANT must not disclose cardholder information, nor use nor store it, other than to facilitate SALES at MERCHANT's business locations and websites in accordance with the AGREEMENT.

MERCHANT must ensure that it and any third parties it enlists to facilitate SALES processing complies with the American Express Technical Specifications (available at [www.tsystransactionssummary.com](http://www.tsystransactionssummary.com)) (valid and accurate data must be provided for all data elements in accordance with the American Express Technical Specifications). Failure to comply with the American Express Technical Specifications may impact Merchant's ability to successfully process SALES. MERCHANTS may be assessed non-compliance fees if MERCHANT fails to comply with the Technical Specifications. To ensure compliance with the Technical Specifications, MERCHANTS should work with ISO.

MERCHANT must comply with and assure that Merchant Providers comply with the American Express Data Security Operating Policy ("DSOP") (found at [www.americanexpress.com/datasecurity](http://www.americanexpress.com/datasecurity)), the American Express Program Merchant Data Security Requirements (found at [www.harbortouch.com/terms/americanexpress](http://www.harbortouch.com/terms/americanexpress)) and the American Express Information Protection Contract Requirements (IPCR) (found at [www.harbortouch.com/terms/americanexpress](http://www.harbortouch.com/terms/americanexpress)).

**ADDENDUM TO MERCHANT TRANSACTION PROCESSING AGREEMENT**

**PARAGRAPH 3 REQUIRES ALL DISPUTES WITH HARBORTOUCH TO BE RESOLVED IN BINDING INDIVIDUAL ARBITRATION—NOT IN A CLASS ACTION, AND NOT IN COURT BEFORE A JUDGE OR JURY. PARAGRAPH 30 LIMITS HARBORTOUCH'S LIABILITY AND YOUR REMEDIES. PLEASE READ THEM.**

THIS Addendum ("ADDENDUM") is by and between FIRST NATIONAL BANK OF OMAHA ("FNBO" or "BANK"), HARBORTOUCH PAYMENTS, LLC ("Harbortouch") and MERCHANT, the name of which is set out in the Merchant Application.

WHEREAS, BANK, Harbortouch, and MERCHANT are PARTIES to a Merchant Transaction Processing Agreement (together with its Terms and Conditions, ADDENDA, attachments, schedules and Merchant Application shall be hereinafter known as the "AGREEMENT"), under which BANK and Harbortouch provide transaction processing and other products and services, as more fully set out in the AGREEMENT; and

WHEREAS, Harbortouch has a relationship with the Discover Network ("DISCOVER"), and American Express Travel Related Services Company, Inc. ("AMERICAN EXPRESS") (collectively included in the definition of "CARDS" above). DISCOVER and AMERICAN EXPRESS shall be included in the definition of "CARD BRANDS", provided that BANK and its affiliates are in no way responsible for the actions, inactions, performance or nonperformance of Harbortouch, DISCOVER, or AMERICAN EXPRESS, or for disputes or resolving disputes of any kind arising from DISCOVER or AMERICAN EXPRESS processing; and

WHEREAS, the PARTIES desire to amend the AGREEMENT as set forth below.

NOW THEREFORE, in consideration of the mutual promises made herein, and other valuable consideration, receipt and sufficiency of which are hereby acknowledged, the PARTIES agree as follows:

1. Capitalized terms not defined in this ADDENDUM have the same meaning as when defined in the AGREEMENT's Processing Terms and Conditions.
2. The PARTIES agree to delete the first paragraph of the AGREEMENT's Processing Terms and Conditions and replace it in its entirety with the following:

This Merchant Transaction Processing Agreement (together with its Terms and Conditions, ADDENDA, attachments, schedules and Merchant Application shall be hereinafter known as the "AGREEMENT"), is by and among the MERCHANT identified in the Merchant Application, Harbortouch and BANK (the "PARTIES"). Harbortouch shall be referred to as "SERVICE PROVIDER." The AGREEMENT shall become effective as set out in the signature block of the Merchant Application.

3. The PARTIES agree to add the following as § 13.25 of the AGREEMENT:

13.25 **Binding Arbitration Agreement.** The term "Merchant" in this Section 13.25 ("Arbitration Agreement") includes MERCHANT and the Guarantor(s) listed in the Merchant Application. This Arbitration Agreement binds all of them, Harbortouch, and Harbortouch's Independent Sales Representatives.

**A. Lawsuit and Class Action Waiver. Merchant and Harbortouch waive their rights to sue before a judge or jury and to participate in a class action, class-wide arbitration, private attorney general action, or any other proceeding in which a party acts in a representative capacity. Instead, any claim or dispute will be resolved on an individual basis by a neutral arbitrator whose decision (called an "award") will be final except for a limited right of appeal under the Federal Arbitration Act. The arbitrator may not join or consolidate proceedings together without the consent of all parties to all proceedings.**

**B. Harbortouch and Merchant agree to resolve all claims and disputes of every kind between them or their respective owners, partners, shareholders, affiliates (including parents, subsidiaries, and other related entities), predecessors, successors, assigns, or Independent Sales Representatives only through binding individual arbitration before the American Arbitration Association ("AAA"). This Arbitration Agreement is to be broadly interpreted. It includes: (A) all claims or disputes arising out of or relating to any aspect of the relationship between Harbortouch (including its Independent Sales Representatives) and Merchant including, without limitation, this AGREEMENT, the SERVICES, any Harbortouch product or service, and any DISCOUNT, fee, charge, assessment, or payment, whether based in contract, tort, statute, regulation, fraud, misrepresentation, omission, or any other theory; (B) claims or disputes that arose before this AGREEMENT became effective (including claims or disputes relating to advertising); (C) claims or disputes that are the subject of purported class action litigation on the date this AGREEMENT becomes effective but Merchant is not a member of a certified class on that date; and (D) claims or disputes that arise after the termination of this AGREEMENT but relate to one of the matters this Arbitration Agreement covers.**

**C. Before seeking arbitration, Harbortouch or Merchant must first send to the other, by certified mail return receipt requested or a courier service that requires a signature upon delivery, a written Notice of Dispute ("Notice"). A Notice to Harbortouch must be addressed to: Harbortouch Legal Department, 2202 N. Irving Street, Allentown, PA 18109. A Notice to Merchant must be addressed to its address in Harbortouch's records. The Notice must (A) describe the nature and basis of the claim or dispute; and (B) set forth the specific relief sought. If Harbortouch and Merchant do not reach an agreement to resolve the claim or dispute within 30 days after the Notice is received, Merchant or Harbortouch may commence an arbitration.**

**D. Harbortouch or Merchant may bring an individual suit in a small claims court instead of sending a Notice or arbitrating, if the case meets the court's requirements. Merchant may sue in the small claims court in the county of Merchant's principal place of business or Lehigh County, Pennsylvania; Harbortouch may sue in the small claims court in Merchant's principal place of business. This Arbitration Agreement does not preclude Merchant from bringing issues to the attention**

of federal, state, or local agencies (including an attorney general or the Office of the Comptroller of the Currency). Such agencies can, if the law allows, seek relief against Harbortouch on Merchant's behalf.

- E. The AAA's Commercial Arbitration Rules, as modified by this Arbitration Agreement, apply. To commence an arbitration, submit a Demand for Arbitration with the required fee to the AAA and send a copy to Harbortouch at the address in Section 13.25.C. For information, visit [adr.org](http://adr.org) or call 1-800-778-7879. For disputes involving \$25,000 or less, any hearing will be telephonic unless the arbitrator finds good cause to hold an in-person hearing. Any in-person hearing will be held in the county of Merchant's principal place of business.
  - F. For disputes involving \$75,000 or less, Harbortouch will pay all AAA and arbitrator's fees and will promptly refund Merchant's filing fee, unless the arbitrator finds the arbitration frivolous or brought for an improper purpose. For disputes involving more than \$75,000, AAA rules govern fees. Harbortouch will not seek its attorney's fees or expenses in any arbitration.
  - G. The arbitrator may award the same relief as a court could but may award declaratory or injunctive relief only to the individual party and only to the extent necessary to provide relief for that party's individual claim. Any court with jurisdiction may enforce the arbitrator's award.
  - H. If the class action waiver in Section 13.25.A is found to be illegal or unenforceable as to all or any part of a claim or dispute, then this Arbitration Agreement is null and void as to that part, which shall proceed in court with the rest proceeding in individual arbitration. If any other provision of this Arbitration Agreement is found to be illegal or unenforceable, that provision shall be severed and the rest of this Arbitration Agreement will continue to apply.
  - I. BANK is not a party to this Arbitration Agreement; claims or disputes against BANK will not be arbitrated. If claims by or against both BANK and Harbortouch (including its Independent Sales Organizations) are asserted in the same proceeding, the claims by or against BANK will be severed and proceed in court, but this Arbitration Agreement will continue to apply to the claims by or against Harbortouch (including its Independent Sales Representatives), and they will proceed in arbitration. If claims are brought in the same proceeding by or against both BANK and Harbortouch (including its Independent Sales Representatives) but cannot be severed, they shall be brought only in courts located in Douglas County, Nebraska and be governed by the laws of the State of Nebraska, without giving effect to its conflict of laws principles. MERCHANT and Harbortouch shall take all necessary steps to ensure that any such action whose claims against BANK cannot be severed is transferred to a court located in Douglas County, Nebraska.
  - J. Harbortouch's Independent Sales Organizations are third-party beneficiaries of this Arbitration Agreement. They agree to do everything it requires Harbortouch to do.
  - K. Notwithstanding any provision to the contrary, if Harbortouch makes any future change to this Arbitration Agreement (other than address changes) during the Initial Term or a Renewal Term, Merchant may reject that change by sending Harbortouch written notice within 30 days of receiving notice of the change to the address in Section 13.25.C. The version of the Arbitration Agreement in force just before the rejected change will govern.
- 4. The PARTIES agree to delete the last sentence of Section 1.1 of the AGREEMENT and replace it in its entirety with the following: BANK and Harbortouch are not responsible for the outcome of any CHARGEBACK.
  - 5. The PARTIES agree to delete Section 1.3 of the AGREEMENT and replace it in its entirety with the following:
    - 1.3 On an exclusive basis, MERCHANT agrees to submit all SALES for processing from CARDS accepted in MERCHANT's business as described in the Merchant Application to BANK through Harbortouch in accordance with the RULES and pursuant to the terms of this AGREEMENT.
  - 6. The PARTIES agree to delete Section 1.6.B and Section 1.6.C of the AGREEMENT and replace them in their entirety with the following:
    - 1.6 [Security Standards.]
    - B. If MERCHANT uses any third parties who will have access to cardholder data ("Merchant Provider(s)", or any third party payment applications(s) or software, MERCHANT must notify BANK, and Harbortouch of the identity of the Merchant Provider(s) and/or the name and version of the payment application(s) or software. In addition, MERCHANT must (1) only allow the Merchant Providers access to the cardholder data for purposes that are authorized by the RULES, (2) have proper security measures in place for the protection of cardholder data, (3) ensure that Merchant Providers have proper security measures in place for the protection of cardholder data, (4) comply with and assure that Merchant Providers comply with the Payment Card Industry ("PCI") Data Security Standard, as amended from time to time, which may be referred to as the Visa Cardholder Information Security Program ("CISP") (found at [www.visa.com](http://www.visa.com)) or the MasterCard Site Data Protection Program ("SDP") (found at [www.mastercard.com](http://www.mastercard.com)), and (5) have written agreements with Merchant Providers requiring the compliance set forth herein. MERCHANT will immediately notify BANK and Harbortouch of any suspected or confirmed loss or theft of any transaction information, including any loss or theft from a Merchant Provider. MERCHANT is responsible for demonstrating MERCHANT's and Merchant Providers' compliance with the CISP, SDP, and PCI programs, and providing reasonable access to their locations to verify MERCHANT's and Merchant Providers' ability to prevent future security violations. Any fees, fines, or penalties resulting from non-compliance will be passed through to MERCHANT. MERCHANT agrees to indemnify BANK, Harbortouch and the CARD BRANDS against all costs, expenses, damages and/or losses resulting from any breach of security, or loss or theft of information.
    - C. In addition, in the event of a suspected or confirmed loss or theft of information, MERCHANT agrees, at MERCHANT's cost, to provide all information requested by BANK, Harbortouch, a CARD BRAND, financial institutions or local, state or federal officials in connection with such event and to cooperate in any ensuing investigation. Any information provided in

response to such investigation will (as between MERCHANT and/or BANK) be considered to be BANK's confidential information. You agree that BANK and/or Harbortouch may release to CARD BRANDS, financial institutions and/or regulatory, local, state or federal officials, any information MERCHANT provides to BANK in connection with a suspected or confirmed loss or theft of transaction information. The requirements of this provision apply to cardholder data regardless of the medium in which the information is contained and regardless of whether MERCHANT processes transactions via Internet, mail, phone, face-to-face or any other method. Additional information regarding data security may be found at the CARD BRANDS websites.

7. The PARTIES agree to delete the third sentence of Section 2.2 of the AGREEMENT and replace it in its entirety with the following:
  - 2.2 BANK and Harbortouch do not warrant the continuing availability of the NETWORK.
8. The PARTIES agree to delete Section 2.4 of the AGREEMENT and replace it in its entirety with the following:
  - 2.4 [SPECIFIC OPERATING PROCEDURES] BANK and Harbortouch may provide MERCHANT access through MERCHANT's terminals to the NETWORKS as set forth herein.
9. The PARTIES agree to delete the last sentence of Section 2.5 of the AGREEMENT and replace it in its entirety with the following:
  - 2.5 Neither BANK nor Harbortouch is liable to MERCHANT for higher rates or for amounts BANK or Harbortouch did not collect, including but not limited to amounts collected by third party service providers.
10. The PARTIES agree to delete Section 3.1 of the AGREEMENT and replace it in its entirety with the following:
  - 3.1 MERCHANT agrees to pay BANK and Harbortouch the fees set forth in the Merchant Application and all other sums owed to BANK or Harbortouch for SALES and SERVICES as set forth in this AGREEMENT. MERCHANT agrees that it is jointly and severally liable for all FEES, charges and other sums owed to BANK or Harbortouch by any affiliated entities of MERCHANT and permits BANK or Harbortouch to withhold funds from any affiliated entity to satisfy an obligation of MERCHANT.
11. The PARTIES agree to delete the fourth sentence of Section 3.3 of the AGREEMENT and replace it in its entirety with the following:
  - 3.3 [PAYMENT OF SUMS DUE] MERCHANT agrees that if such information is shown to be incorrect or such information changes, BANK, and/or Harbortouch may amend FEES on less than thirty (30) days notice as set out herein and/or add FEES on less than thirty (30) days notice to reflect such change, unless prohibited by the CARD BRANDS.
12. The PARTIES agree to delete Section 3.4 of the AGREEMENT and replace it in its entirety with the following:
  - 3.4 MERCHANT agrees that FEES not listed in the AGREEMENT will be charged at BANK or Harbortouch's then current rate, as applicable.
13. The PARTIES agree to delete Section 3.5 of the AGREEMENT and replace it in its entirety with the following:
  - 3.5 [FEES] The FEES may be amended by BANK or Harbortouch on thirty (30) days written notice to MERCHANT unless provided otherwise herein.
14. The PARTIES agree to delete the second sentence of Section 3.6 of the AGREEMENT and replace it in its entirety with the following:
  - 3.6 MERCHANT understands that BANK or Harbortouch are no way financially responsible for CHARGEBACKS.
15. The PARTIES agree to delete Section 3.7 of the AGREEMENT and replace it in its entirety with the following:
  - 3.7 If the CARD BRANDS or a regulatory body governing BANK or Harbortouch should levy a fine or penalty or assess a charge to BANK or Harbortouch as a result of MERCHANT's SALES or SERVICES or CHARGEBACK activity, MERCHANT agrees to pay such fines, penalties, or charges, and any administrative fees associated with same.
16. The PARTIES agree to delete the second, seventh, and tenth sentences of Section 3.8 of the AGREEMENT and replace them in their entirety with the following:
  - 3.8 MERCHANT, pursuant to Funds Transfer Instructions set out herein, authorizes BANK and/or Harbortouch to make deposits and withdrawals for the DESIGNATED ACCOUNT.  
  
BANK and/or Harbortouch may recoup and debit from the DESIGNATED ACCOUNT all non-VISA and non-MASTERCARD related FEES and other obligations due to BANK under this AGREEMENT or any other agreement MERCHANT or MERCHANT's related entities have with BANK and/or Harbortouch without prior notice to MERCHANT.  
  
MERCHANT agrees to indemnify and hold harmless all financial institutions from any loss or claim incurred for acting on instructions from BANK and/or Harbortouch with respect to the DESIGNATED ACCOUNT.
17. The PARTIES agree to add to the end of Section 3.8 the following sentence:
  - 3.8 MERCHANT shall notify BANK and Harbortouch at least five (5) business days prior to a change in the DESIGNATED ACCOUNT, and shall submit an ACH Change Form to BANK and Harbortouch.

18. The PARTIES agree to delete Section 3.9 of the AGREEMENT and replace it in its entirety with the following:
- 3.9 MERCHANT agrees to provide BANK with a deposit in the amount required by BANK and/or Harbortouch (“RESERVE ACCOUNT”), if determined necessary by BANK and/or Harbortouch: (i) at the time this AGREEMENT is executed, (ii) if in the opinion of BANK and/or Harbortouch, information received or discovered about MERCHANT reflects an adverse change in status; (iii) in the event that any information requested by BANK and/or Harbortouch is not received; (iv) upon notice of termination or expiration of the AGREEMENT; or (v) at any time during the term of the AGREEMENT. BANK may withhold the payment for SALES in an amount reasonably determined by BANK and/or Harbortouch as necessary to secure payment by MERCHANT of all FEES and other obligations under this AGREEMENT and the amounts so withheld shall be deposited into the RESERVE ACCOUNT. If there is not enough money retained to cover the anticipated FEES, BANK and/or Harbortouch may require MERCHANT to remit additional funds. The RESERVE ACCOUNT shall be maintained in a bank account with BANK in the name of BANK and under the sole control of BANK, and MERCHANT grants to BANK a security interest and lien upon the RESERVE ACCOUNT to secure all of MERCHANT’s obligations to BANK and/or Harbortouch under this AGREEMENT. RESERVE ACCOUNT funds may be commingled with other funds, and need not be maintained in a separate account designated to MERCHANT. If this AGREEMENT is terminated for any reason, the RESERVE ACCOUNT shall be maintained for a period of one hundred eighty (180) days plus the period of any warranty or guarantee on goods and/or services sold by MERCHANT and processed as SALES, from the date of the last SALE processed by MERCHANT under AGREEMENT. BANK, and/or Harbortouch may recoup and debit from the RESERVE ACCOUNT all FEES and other obligations due to BANK and/or Harbortouch under this AGREEMENT or any other agreement MERCHANT or MERCHANT’s related entities have with BANK and/or Harbortouch without prior notice to MERCHANT. After all obligations of MERCHANT under this AGREEMENT are satisfied in full, the balance of the RESERVE ACCOUNT, if any, shall be paid to the MERCHANT.
19. The PARTIES agree to delete Section 3.10 of the AGREEMENT and replace it in its entirety with the following:
- 3.10 BANK agrees to pay MERCHANT for SALES less FEES owed to BANK and/or Harbortouch by MERCHANT. BANK and/or Harbortouch shall recoup and deduct FEES for incoming transactions or recoup and debit the same from MERCHANT’s DESIGNATED ACCOUNT or the RESERVE ACCOUNT. MERCHANT agrees that BANK and/or Harbortouch have the right to deduct these FEES at any time including on a daily basis if necessary. BANK is not obligated to pay MERCHANT or credit the DESIGNATED ACCOUNT for any SALES transmitted or delivered to BANK after MERCHANT becomes insolvent, ceases to do business, or dissolves.
20. The PARTIES agree to delete Section 3.11 of the AGREEMENT and replace it in its entirety with the following:
- 3.11 BANK and/or Harbortouch have the right of recoupment and set-off. This means that BANK and/or Harbortouch may recoup and offset any outstanding or uncollected amounts owed to BANK and/or Harbortouch from (i) any amounts BANK or Harbortouch would otherwise be obligated to deposit into the DESIGNATED ACCOUNT, and (ii) any other amounts BANK and/or Harbortouch may owe MERCHANT under this AGREEMENT or any other agreement. MERCHANT acknowledges that in the event of a bankruptcy proceeding, in order for MERCHANT to provide adequate protection under Bankruptcy Code § 362 to BANK and/or Harbortouch, MERCHANT must create or maintain the RESERVE ACCOUNT as required by BANK, and/or Harbortouch, and BANK and Harbortouch will have the right to offset against the RESERVE ACCOUNT for any and all obligations MERCHANT may owe to BANK and Harbortouch without regard to whether the obligations relate to Sales Drafts initiated or created before or after the filing of the bankruptcy petition.
21. The PARTIES agree to delete the second sentence of Section 3.13 of the AGREEMENT and replace it in its entirety with the following:
- 3.13 If MERCHANT breaches AGREEMENT or if BANK and/or Harbortouch identify suspicious or irregular activity related to SALES or SERVICES, Bank and/or Harbortouch may refuse to process SALES or to provide SERVICES and/or may hold funds pending the cure of such breach or resolution of such activity.
22. The PARTIES agree to delete Section 3.14 of the AGREEMENT and replace it in its entirety with the following:
- 3.14 If any action is taken against MERCHANT to collect any FEES or monies due pursuant to this AGREEMENT, MERCHANT agrees to pay all costs of collection, including but not limited to, attorney’s fees, to the extent allowed by law.
23. The PARTIES agree to delete Section 5.1 of the AGREEMENT and replace it in its entirety with the following:
- 5.1 [TERMINATION OF AGREEMENT] This AGREEMENT may be terminated by BANK and/or Harbortouch at any time effective upon thirty (30) days written notice, but the Arbitration Agreement in Section 13.25, added by Paragraph 3, survives termination, whether by BANK, Harbortouch, or MERCHANT.
24. The PARTIES agree to delete Section 5.2(B) of the AGREEMENT and replace it in its entirety with the following:
- 5.2 (B) upon written notice of non-renewal at least thirty (30) and no more than ninety (90) days prior to the commencement of any RENEWAL TERM; or
25. The PARTIES agree to delete the first sentence of Section 5.3 of the AGREEMENT and replace it with the following:
- 5.3 In order to protect the CARD BRANDS, BANK and/or Harbortouch may terminate this AGREEMENT effective immediately for any of the following reasons:

26. The PARTIES agree to delete Section 5.4 of the AGREEMENT and replace it in its entirety with the following:
- 5.4 Effect of Termination of the AGREEMENT:
- A. In the event that this AGREEMENT is terminated by BANK and/or Harbortouch for cause, BANK and/or Harbortouch may be required to report the name and address of MERCHANT and MERCHANT's principals to the CARD BRANDS for inclusion on the Terminated Merchant File and in other programs that monitor merchants. In the event that this AGREEMENT is terminated for cause and MERCHANT is obligated to BANK and/or Harbortouch for sums due and the principals of MERCHANT are liable for such debts, a negative credit report may be submitted to a credit-reporting agency.
- B. MERCHANT hereby releases, indemnifies and holds BANK, Harbortouch, and the CARD BRANDS harmless to the fullest extent permitted by applicable law for any loss or damage they may incur as a result of reporting MERCHANT or its principals to a credit reporting agency hereunder or as a consequence of MERCHANT or its principals being placed by BANK, and/or Harbortouch, or their agents on the CARD BRANDS' merchant monitoring lists.
27. The PARTIES agree to delete the second and third sentences of Section 6.1 of the AGREEMENT and replace them in their entirety with the following:
- 6.1 [BANKRUPTCY] Upon filing voluntary or involuntary bankruptcy proceedings by or against MERCHANT, MERCHANT must notify BANK and Harbortouch in writing within five (5) days. Notification must be sent by certified mail to BANK and Harbortouch at the addresses for NOTICES set out herein.
28. The PARTIES agree to add the following sentence after the second sentence of Section 6.2 of the AGREEMENT:
- 6.2 MERCHANT acknowledges that MERCHANT's obligation to BANK and Harbortouch for all amounts owed under this AGREEMENT arise out of the same transaction as BANK's obligation to deposit funds in the DESIGNATED ACCOUNT.
29. The PARTIES agree to delete Section 7.1 of the AGREEMENT and replace it in its entirety with the following:
- 7.1 [INFORMATION AND DOCUMENTATION] MERCHANT agrees to comply with all requests for information and documentation regarding SALES and the CARDS utilized in processing SALES or SERVICES under AGREEMENT within the time stated by BANK and/or Harbortouch in its request. MERCHANT authorizes BANK and/or Harbortouch to audit MERCHANT's records to confirm compliance with AGREEMENT. MERCHANT will obtain, and submit a copy of, an audit of MERCHANT's business when requested by BANK and/or Harbortouch.
30. The PARTIES agree to delete Section 7.3 of the AGREEMENT and replace it in its entirety with the following:
- 7.3 Upon request by BANK and/or Harbortouch, MERCHANT shall provide BANK and/or Harbortouch with current financial statements in a format acceptable to whichever party requested the financial statements.
31. The Parties agree to delete the first sentence of Section 7.4 of the AGREEMENT and replace it in its entirety with the following:
- 7.4 MERCHANT, its signing officer/owner/partner/principal, and any Personal Guarantor authorize Bank and Harbortouch, or their agents or assigns, to make, from time to time, any business and personal credit and other inquiries BANK or Harbortouch consider necessary to review the acceptance and continuation of this AGREEMENT.
32. The PARTIES agree to delete Section 7.5 of the AGREEMENT and replace it in its entirety with the following:
- 7.5 MERCHANT is supplied with monthly reports by Harbortouch regarding MERCHANT's SALES or SERVICES activity. It is MERCHANT's sole responsibility to review those reports promptly and report any errors or discrepancies or improper fees or charges in writing to Harbortouch within thirty (30) days following the end of the monthly reporting period. After such period, MERCHANT will be deemed to have accepted the monthly reports and to have accepted any change in FEES listed in said reports as delivered.
33. The PARTIES agree to delete Section 7.6 of the AGREEMENT and replace it in its entirety with the following:
- 7.6 MERCHANT will notify BANK and Harbortouch immediately of any change in ownership, Corporate or "DBA" name, location address, or the information contained on MERCHANT's imprinter plates.
34. The PARTIES agree to delete the first sentence of Section 8.1 of the AGREEMENT and replace it in its entirety with the following:
- 8.1 [PROCESSING RESTRICTIONS] MERCHANT agrees that it will not materially change its BUSINESS or the method in which it markets or sells the goods and services of BUSINESS without informing BANK and Harbortouch in advance of such change.
35. The PARTIES agree to delete Section 8.2 of the AGREEMENT and replace it in its entirety with the following:
- 8.2 [PROCESSING RESTRICTIONS] If actual monthly SALES volume substantially exceeds the projected annual SALES volume as provide in the Merchant Application and pro-rated to one month, Bank or Harbortouch, may, at their option, do one or more of the following: (i) refuse to process SALES in excess of such sum; (ii) process such SALES and retain the proceeds of such SALES until the next month and release such sums to MERCHANT at that time counting this volume as SALES volume for that month; (iii) terminate this AGREEMENT; and/or (iv) amend this AGREEMENT in a way to ensure that BANK and Harbortouch have security for the increased volume. Such rights of termination, retention of funds, and ability to amend the AGREEMENT are in addition to those already provided herein.

36. The PARTIES agree to delete the first sentence of Section 9.3 of the AGREEMENT and replace it with the following:

9.3 [USE OF THE INTERNET, SYSTEM INTEGRATORS, AND/OR THIRD PARTY SERVICE PROVIDERS] MERCHANT agrees that BANK and Harbortouch are not responsible for any services or equipment provided by any third party with which MERCHANT has contracted.

37. The PARTIES agree to delete Section 9.4 of the AGREEMENT and replace it in its entirety with the following:

9.4 MERCHANT shall assume full liability and shall indemnify and hold BANK, Harbortouch and CARD BRANDS harmless for: (i) the actions and/or inactions of any third party with which MERCHANT has contracted or (ii) the failure of any third party with which MERCHANT has contracted to comply with the LAWS or RULES.

38. The PARTIES agree to delete Section 10 of the AGREEMENT and replace it in its entirety with the following:

LIMITATION OF LIABILITY AND DISCLAIMER OF WARRANTIES:

10.1 MERCHANT's rights and remedies hereunder are exclusive and in lieu of all other rights and remedies. BANK and Harbortouch shall not otherwise be liable for any error, omission, delay, computer virus, malware, loss of data or records or disclosure of confidential information which may occur as a result of, or in any way be connected with, the rendering of SERVICES hereunder. BANK and Harbortouch shall not be liable for any services or products of third parties. In any event, BANK's and Harbortouch's liability to MERCHANT, whether arising in contract, tort (including, without limitation, negligence and strict liability), statute, regulation, or otherwise, shall not exceed the lesser of the direct loss to MERCHANT or an amount equal to the processing portion of the DISCOUNT paid by MERCHANT in the month prior to the incident giving rise to liability. In no event shall CARD BRANDS or VISA's contractors be liable for losses, damages, or liabilities whether in contract, tort (including without limitation negligence and strict liability), statute, regulation, or under any other theory incurred by MERCHANT, MERCHANT's customers, or any other person or entity arising under or relating to this AGREEMENT or SERVICES. IN NO EVENT SHALL BANK, HARBORTOUCH, CARD BRANDS, OR VISA'S CONTRACTORS BE LIABLE FOR SPECIAL, INCIDENTAL, INDIRECT, CONSEQUENTIAL OR EXEMPLARY DAMAGES OR FOR ANY INTERRUPTION OR LOSS OF USE, DATA, VIRUSES, MALWARE, LOST BUSINESS OR PROFITS, WHETHER OR NOT SUCH LOSSES OR DAMAGES WERE FORESEEABLE OR BANK OR HARBORTOUCH WERE ADVISED OF THE POSSIBILITY THEREOF AND REGARDLESS OF WHETHER ANY LIMITED REMEDY HEREIN FAILS OF ITS ESSENTIAL PURPOSE.

10.2 THE SERVICES ARE PROVIDED "AS IS," "AS AVAILABLE," AND ALL WARRANTIES, EXPRESS OR IMPLIED, ARE DISCLAIMED BY BANK, HARBORTOUCH, CARD BRANDS, AND VISA'S CONTRACTORS, INCLUDING BUT NOT LIMITED TO, THE DISCLAIMER OF ANY IMPLIED WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE. BANK AND HARBORTOUCH ASSUME NO LIABILITY OR RESPONSIBILITY FOR ANY ERRORS OR OMISSIONS IN THE CONTENT. THIS AGREEMENT IS A SERVICE AGREEMENT AND THE PROVISIONS OF THE UNIFORM COMMERCIAL CODE SHALL NOT APPLY.

39. The PARTIES agree to delete Section 11.4 of the AGREEMENT and replace it in its entirety with the following:

11.4 [WARRANTIES AND INDEMNITIES] MERCHANT agrees to indemnify and hold harmless BANK, Harbortouch, SPONSORS, and CARD BRANDS, including VISA's contractors, from and against any claims, demands, or judgments, made or recovered against them, arising out of any misrepresentation or breach by MERCHANT of the terms of this AGREEMENT or arising from any act or omission by MERCHANT which violates any applicable LAWS, the RULES or the rights of another person or otherwise injures any third party. BANK, Harbortouch, SPONSORS, or the CARD BRANDS may defend on their own any such claims or demands or request MERCHANT to take up such defense at MERCHANT's expense. In either event MERCHANT will further indemnify BANK, Harbortouch, SPONSORS, and the CARD BRANDS for reasonable attorney's fees and any other reasonable expenses incurred by BANK and/or Harbortouch by reason of such defense.

40. The PARTIES agree to add the following to Section 12.2 of the AGREEMENT:

[NOTICES] If to Harbortouch:

Harbortouch  
2202 N. Irving Street  
Allentown, PA 18109  
Attn: Legal Department

41. The PARTIES agree to delete the first and second sentences of Section 12.3 of the AGREEMENT and replace them in their entirety with the following:

12.3 MERCHANT consents to receiving electronically rather than in paper form all notices, disclosures, and other documents ("DOCUMENTS") which are to be provided to MERCHANT under this AGREEMENT. MERCHANT will be notified that a DOCUMENT is available at BANK's or Harbortouch's web site with a link to that specific page of the web site containing the DOCUMENT or instructions on where merchant can log in to retrieve it.

42. The PARTIES agree to delete the second sentence of Section 13.1 of the AGREEMENT and replace it in its entirety with the following:

13.1 [MISCELLANEOUS] BANK and/or Harbortouch may assign their rights or delegate duties under this AGREEMENT without the prior consent of MERCHANT.

43. The PARTIES agree to add the following to the end of Section 13.2 of the AGREEMENT:

[GOVERNING LAW AND FORUM] In matters or disputes solely between MERCHANT and Harbortouch (or among MERCHANT, Harbortouch, and/or a Harbortouch Independent Sales Organization), the laws of the state where MERCHANT's principal place of business is located, without giving effect to its conflict of laws principles, shall govern all matters (whether in contract, statute, regulation, tort, or however characterized) arising out of or relating (directly or indirectly) to this AGREEMENT and any Guaranty contained herein, including without limitation, the validity, interpretation, construction, performance and enforcement of the AGREEMENT and Guaranty. **The PARTIES further agree that if any action, claim, suit, or proceeding solely between Harbortouch and MERCHANT (or among MERCHANT, Harbortouch, and/or a Harbortouch Independent Sales Organization) arising out of or relating (directly or indirectly) to this AGREEMENT or any Guaranty contained herein should be found not subject to arbitration under Section 13.25, it shall be filed and litigated only in courts located in Lehigh County, Pennsylvania or the United States District Court for the Eastern District of Pennsylvania, and such courts shall have exclusive jurisdiction over any actions, claims, suits, or proceedings arising out of or relating (directly or indirectly) to this AGREEMENT or any Guaranty contained herein, except claims brought in small claims court.** Section 13.25.I sets forth how claims shall be asserted against BANK or by or against BANK and Harbortouch (including its Independent Sales Representatives) in the same action.

44. The PARTIES agree to delete the last sentence of Section 13.3 of the AGREEMENT and replace it in its entirety with the following:

13.3 **Legal Action Must Be Brought Within One Year. If MERCHANT brings legal action (including arbitration) against BANK and/or Harbortouch for any reason, MERCHANT shall commence the action within one (1) year of the date the error or the incident giving rise to such action occurred. Otherwise, it is permanently barred.**

45. The PARTIES agree to delete Section 13.7 of the AGREEMENT and replace it in its entirety with the following:

13.7 Costs. BANK and Harbortouch shall not be responsible for the costs incurred by MERCHANT in negotiating or implementing this AGREEMENT.

46. The PARTIES agree to add the following to the end of Section 13.8 of the AGREEMENT:

13.8 Section 13.25.H says what happens if parts of the Arbitration Agreement (Section 13.25, added by Paragraph 3) are found to be illegal or unenforceable. Section 13.25.H prevails over this section if inconsistent with it.

47. The PARTIES agree to delete the first sentence of Section 13.9 of the AGREEMENT and replace it in its entirety with the following:

13.9 This AGREEMENT may be amended or modified by BANK and/or Harbortouch effective upon thirty (30) days written notice. MERCHANT reject any change to the Arbitration Agreement. See Section 13.25.K, added by Paragraph 3.

48. The PARTIES agree to delete Section 13.13 of the AGREEMENT and replace it in its entirety with the following:

13.13 Disclosure of Merchant identification Number ("MID"). For security reasons, MERCHANT must disclose its MID thereby authorizing BANK and/or Harbortouch to make changes to its account. BANK and/or Harbortouch may request from MERCHANT additional information to further verify MERCHANT's identity. BANK and/or Harbortouch may assume that the person disclosing the MID has the authority to make changes to MERCHANT's account. MERCHANT is responsible and liable for changes made after disclosure of its MID. MERCHANT is responsible for insuring the MID is kept confidential.

49. The PARTIES agree to delete Section 13.14 of the AGREEMENT and replace it in its entirety with the following:

13.14 Information Release. MERCHANT authorizes BANK and Harbortouch to release MERCHANT's information to third parties that provide services to BANK and/or Harbortouch or MERCHANT or to any third party that requests and has reason to know such information, including but not limited to the CARD BRANDS, and any third-party having regulatory control over the PARTIES.

50. The PARTIES agree to delete Section 13.16 of the AGREEMENT and replace it in its entirety with the following:

13.16 Monitoring. MERCHANT understands and agrees that any telephone conversation between MERCHANT and BANK and/or Harbortouch may be monitored and recorded.

51. The PARTIES agree to delete Section 13.18 of the AGREEMENT and replace it in its entirety with the following:

13.18 Products and Services. Harbortouch may from time to time add products and/or services to the SERVICES. At MERCHANT's request, Harbortouch may provide such additional products and/or services to MERCHANT at Harbortouch's then current rate. MERCHANT agrees to abide by all parameters set by Harbortouch for such products and/or services as set out in any product specification or documentation, as amended from time to time. MERCHANT is responsible for any coding and testing, if necessary, for such products and/or services. Harbortouch has made reasonable efforts to secure information and abide by the CARD BRANDS' security guidelines but Harbortouch does not guarantee security. MERCHANT is responsible for protecting access to any passwords or user identification numbers. Access to and use of password protected areas of any products and/or services are restricted to authorized users only. It is the MERCHANT's obligation to notify Harbortouch immediately if its passwords or user identification numbers have been lost or stolen or if there has been unauthorized access. Harbortouch shall at all times retain all title to and ownership to the products and SERVICES. MERCHANT agrees not to, directly or indirectly, modify, reverse engineer, decompile, disassemble, or derive source code from the products and SERVICES. Any PARTY may terminate a product

and/or service at any time upon thirty (30) days written notice to the other without terminating the AGREEMENT. MERCHANT agrees that BANK is not a party to such products and/or services added by Harbortouch and acknowledges and agrees that BANK and its affiliates have no responsibility or liability for such products and/or services or any actions or omissions of Harbortouch. MERCHANT agrees that any claims or disputes arising out of the foregoing will be resolved without involving BANK or its affiliates and that BANK is entitled to rely on MERCHANT's agreements in this and the preceding sentence.

The PARTIES agree to delete the second sentence of Section 9.1 of the "CARD BRAND Rules" portion of the AGREEMENT and replace it in its entirety with the following:

9.1 [CARDS other than VISA and MASTERCARD] Neither BANK nor Harbortouch is responsible for the funding of such transactions.

52. The PARTIES agree to add the following as Section 13.21 of the AGREEMENT:

13.21 **Early Termination Fee.** If this AGREEMENT is terminated early either during the INITIAL TERM or any RENEWAL TERM for any reason other than set out in Section 5.1, 5.2.A or 5.2.B, MERCHANT agrees to pay an early termination fee ("EARLY TERMINATION FEE") equal to the greater of \$250 or \$35 multiplied by the number of months remaining in the then-current term, in addition to all other amounts MERCHANT owes. MERCHANT agrees that the EARLY TERMINATION FEE is not a penalty, but rather is reasonable in light of the financial harm caused by MERCHANT's early termination. Notwithstanding the foregoing, the early termination fee will not exceed the maximum amount set forth by applicable law.

53. The PARTIES agree to add the following as Section 13.22 of the AGREEMENT:

13.22 Deconversion Costs. If this AGREEMENT is terminated, MERCHANT shall pay all costs associated with deconversion. Deconversion means assistance in moving MERCHANT to a new processor. Deconversion costs include but are not limited to customer service or technical support during the period of deconversion, communication costs, and attorney's fees.

54. The PARTIES agree to add the following as Section 13.23 of the AGREEMENT:

13.23 Third Party Providers. If MERCHANT is using a third party provider's terminal, (i.e. dial terminal or equivalent sales capture device), and the third party provider is providing the customer service, then such third party provider is a separate entity and is not an agent of BANK and/or Harbortouch. MERCHANT understands the AGREEMENT is among BANK, Harbortouch and MERCHANT. Disputes involving a third party provider shall be dealt with independently from, BANK or Harbortouch. If disputes are unresolved and relate to SERVICES provided under the AGREEMENT, MERCHANT shall notify BANK and Harbortouch at the addresses set out in the AGREEMENT. MERCHANT shall pay BANK and Harbortouch regardless of any disputes it has with any third party provider.

55. The PARTIES agree to add the following as Section 13.24 of the AGREEMENT:

13.24 Harbortouch Fees. In addition to FEES, MERCHANT agrees to pay Harbortouch the fees, charges, dues, and assessments as set forth in the Merchant Application and the Rate Descriptions and all other sums owed to Harbortouch ("Harbortouch FEES") for SALES and SERVICES as set forth in this AGREEMENT, as amended from time to time as this AGREEMENT permits.

56. The PARTIES agree to delete the second sentence of the FUNDS TRANSFER INSTRUCTIONS and replace it in its entirety with the following:

In accordance with this desire, MERCHANT authorizes BANK and Harbortouch to initiate debit and credit entries to the DESIGNATED ACCOUNT (the details of which are set out herein and in the Merchant Application).

57. Entire Agreement. This ADDENDUM, together with the other parts of the AGREEMENT including its amendments, attachments, exhibits, and schedules, constitutes the entire AGREEMENT between the PARTIES as to transaction processing, and any other representations, inducements, promises, or agreements not contained herein shall be of no force and effect as to transaction processing.

58. Reaffirm AGREEMENT. Except as amended hereby, BANK, Harbortouch, and MERCHANT reaffirm the obligations of each as they are contained in the AGREEMENT.