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THE STATE OF NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION



Victoria F. Sheehan Commissioner

William Cass, P.E. Assistant Commissioner

Bureau of Turnpikes April 20, 2018

His Excellency, Governor Christopher T. Sununu and the Honorable Council State House Concord, New Hampshire 03301

REQUESTED ACTION

- 1. Pursuant to RSA 237:15-a, Transfers from the General Reserve Account, authorize the Department of Transportation, Bureau of Turnpikes to transfer funds in the amount of \$600,000 from the Turnpike General Reserve Account to budget and expend revenue for E-ZPass credit card transaction fees for the Division of Operations, to be effective upon Governor and Council approval through June 30, 2018. 100% Turnpike Funds.

FROM: 04-096-096-961017-363615-0000 Turnpike Fund Balance \$600,000

Table with 4 columns: Account Number, Current Budget FY 2018, Requested Change, Revised Budget FY 2018. Rows include Tpk Toll Collection, Expenses (020-103), Total, Source of Funds, and Revenue (000017 Turnpike Fund).

The audited Turnpike Fund Balance Surplus account as of June 30, 2017 was \$92.1 million, and is projected to be \$61.7 million as of June 30, 2018. See attached.

- 2. Authorize the Department of Transportation, Bureau of Turnpikes within the Division of Operations, to amend an existing professional service contract for the NH E-ZPass Back Office with Cubic Transportation Systems, Inc. (Cubic), (Vendor #267136). This amendment is for Cubic to become the Merchant of Record for all credit card transactions, effective upon Governor and Council approval. There is no time extension or additional cost as

result of this amendment. The original contract agreement was approved by Governor and Council on October 7, 2015, Item #25.

### EXPLANATION

RSA 237:16-b as amended in 2001 authorized the Department to participate in a regional Electronic Toll Collection system (E-ZPass). Governor and Council on August 22, 2001 authorized the Department to enter into an Interagency Group (IAG) agreement to implement electronic toll collection in a manner that provides a seamless toll system for motorists and commercial operators along the eastern seaboard of the United States.

On October 7, 2015, Governor and Council approved the original contract with Cubic for the design, testing, installation and maintenance services for the operation of the NH E-ZPass Back Office for the Bureau of Turnpikes within the Division of Operations to be effective for a 6-year period through June 20, 2021. The contract also included provisions for three additional three (3) year optional periods up to but not beyond, June 30, 2030 subject to Governor and Council approval.

On October 25, 2017, Governor and Council approved an amendment to the Agreement (Contract #2015-068, State Contract #5000591) between the State of New Hampshire Department of Transportation and Cubic Transportation Systems, Inc. ("Cubic") (VC# 267136) of San Diego, California, Item # 16, to be effective through June 30, 2018 for the restructuring of the contract for project deliverables, payment of project delivery and Operation and Maintenance costs, and Key Performance Indicators for fiscal year 2018.

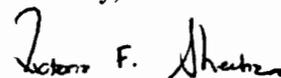
The original budget line item 04-096-096-961017-70500000-020-500200 Current Expense for payment of E-ZPass Credit Card fees was under estimated during the budget process. Based on the new merchant agreement rates and increase in E-ZPass usage, the credit card fees have increased for FY 18. Future credit card expenditures are being evaluated to determine if an increase will be needed in FY19 and if so it will be requested in a separate Governor and Council item.

A key deliverable in Contract Amendment #1 was for Cubic to become the Merchant of Record thus removing the Department of Transportation as the Merchant of Record. This was a requirement within the Contract's original RFP for the Back Office System and Customer Service Center. This amendment includes the Merchant Agreement between Cubic and Base Commerce to begin on May 16, 2018, or upon Governor and Council approval, whichever is the latter.

The contract has been approved by the Attorney General as to form and execution. Contract funding for 2018 is available in the original contract. Copies of the fully executed contract are on file at the Secretary of State's Office and the Department of Administrative Services' Office; and subsequent to Governor and Council approval will be on file at the Department of Transportation.

It is respectfully requested that this resolution be approved.

Sincerely,



Victoria F. Sheehan  
Commissioner

Attachment



**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF INFORMATION TECHNOLOGY**  
27 Hazen Dr., Concord, NH 03301  
Fax: 603-271-1516 TDD Access: 1-800-735-2964  
[www.nh.gov/doit](http://www.nh.gov/doit)

**Denis Goulet**  
*Commissioner*

March 14, 2018

Victoria F. Sheehan  
Commissioner  
State of New Hampshire  
Department of Transportation  
John O. Morton Bldg., 7 Hazen Drive  
Concord, NH 03302-0483

Dear Commissioner Sheehan:

This letter represents formal notification that the Department of Information Technology (DoIT) has approved your request to amend a contract with Cubic Transportation Systems, Inc. (Cubic), (Vendor #267136), as described below and referenced as DoIT No. 2015-068B.

The amendment authorizes the Department of Transportation (DOT), Bureau of Turnpikes within the Division of Operations, to amend an existing professional service contract with Cubic Transportation Systems, Inc. (Cubic) for the NH E-ZPass Back Office. This amendment removes the DOT as the Merchant of Record and names Cubic as the Merchant of Record. There is no time extension or additional cost as result of this amendment.

A copy of this letter should accompany the Department of Transportation's submission to the Governor and Executive Council for approval.

Sincerely,

Denis Goulet

DG/ik  
DOT 2015-068B

cc: Gail Hambleton



**Victoria F. Sheehan**  
Commissioner

**THE STATE OF NEW HAMPSHIRE**  
DEPARTMENT OF TRANSPORTATION



**William Cass, P.E.**  
Assistant Commissioner

March 14, 2018

Denis Goulet  
Commissioner / Chief Information Officer  
27 Hazen Drive  
Concord, New Hampshire 03301

**REQUESTED ACTION**

This letter represents formal request that the Department of Information Technology (DoIT) approve a request to amend a contract with Cubic Transportation Systems, Inc. (Cubic), (Vendor #267136), as described below and referenced as DoIT No. 2015-068 Amendment 2. This request is for the following items:

- Pursuant to RSA 237:15-a, Transfers from the General Reserve Account, authorize the Department of Transportation, Bureau of Turnpikes to transfer funds in the amount of \$600,000 from the Turnpike General Reserve Account to budget and expend revenue for E-ZPass credit card transaction fees for the Division of Operations, to be effective upon Governor and Council approval through June 30, 2018. This amendment uses 100% Turnpike Funds.

**FROM:** 04-096-096-961017-363615-0000 Turnpike Fund Balance \$600,000

04-096-096-961017-70500000	Current Budget FY 2018	Requested Change	Revised Budget FY 2018
<b>Tpk Toll Collection</b>			
<b>Expenses:</b>			
020 500200 Current Expense	\$3,000,000	\$600,000	\$3,600,000
022 500255 Rents-Leases Other than State	1,500	0	1,500
023 500291 Heat, Electricity, Water	20,814	0	20,814
024 500225 Maint Other than Bldg-Grnds	2,300,000	0	2,300,000
026 500251 Membership Fees	75,000	0	75,000
037 500166 Technology-Hardware	1,000	0	1,000
046 500463 Eng Consultants Non-Benefits	150,000	0	150,000
080 500710 Out of State Travel	9,000	0	9,000
102 500731 Contracts for Program Svcs	8,000,000	0	8,000,000
103 502664 Contracts for Operational Svcs	7,500	0	7,500
Total	\$13,564,814	\$600,000	\$14,164,814
<b>Source of Funds</b>			
<b>Revenue:</b>			
000017 Turnpike Fund	\$13,564,814	\$600,000	\$14,164,814

The audited Turnpike Fund Balance Surplus account as of June 30, 2017 was \$92.1 million, and is projected to be \$61.7 million as of June 30, 2018. See attached.

2. Authorize the Department of Transportation, Bureau of Turnpikes within the Division of Operations, to amend an existing professional service contract for the NH E-ZPass Back Office with Cubic Transportation Systems, Inc. (Cubic), (Vendor #267136). This amendment is to for Cubic to become the Merchant of Record. There is no time extension or additional cost as result of this amendment. The original contract agreement was approved by Governor and Council on October 7, 2015, Item #25.

### EXPLANATION

RSA 237:16-b as amended in 2001 authorized the Department to participate in a regional Electronic Toll Collection system (E-ZPass). Governor and Council on August 22, 2001 authorized the Department to enter into an Interagency Group (IAG) agreement to implement electronic toll collection in a manner that provides a seamless toll system for motorists and commercial operators along the eastern seaboard of the United States.

On October 7, 2015, Governor and Council approved the original contract with Cubic for the design, testing, installation and maintenance services for the operation of the NH E-ZPass Back Office for the Bureau of Turnpikes within the Division of Operations to be effective for a 6-year period through June 20, 2021. The contract also included provisions for three additional three (3) year optional periods up to but not beyond, June 30, 2030 subject to Governor and Council approval.

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A key deliverable in Contract Amendment #1 was for Cubic to become the Merchant of Record thus removing the Department of Transportation as the Merchant of Record. This was a requirement within the Contract's original RFP for the Back Office System and Customer Service Center. This amendment includes the Merchant Agreement between Cubic and Base Commerce to begin on May 1, 2018.

The contract has been approved by the Attorney General as to form and execution. Contract funding for 2018 is available in the original contract. Copies of the fully executed contract are on file at the Secretary of State's Office and the Department of Administrative Services' Office; and subsequent to Governor and Council approval will be on file at the Department of Transportation.

It is respectfully requested that this resolution be approved.

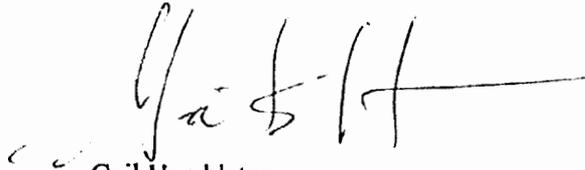
#### **CONTACT PERSON:**

John Corcoran  
Administrator  
NH Department of Transportation  
Bureau of Turnpikes  
36 Hackett Hill Road  
Hooksett, NH 03106  
Email: jcorcoran@dot.state.nh.us

**CERTIFICATION**

The undersigned hereby certify that the information provided in this document and any attachments is complete and accurate and that alternatives to the solution defined in this document have been appropriately considered.

Respectfully submitted,



Gail Hambleton  
IT Leader – Transportation, DoIT at NHDOT

Approved by:



Dave Rodrigue  
Director of Operations



Christopher Waszczuk  
DOT Deputy Commissioner

in the monthly Traffic & Revenue report. Average growth on the entire system is estimated to range between 1.4 between FY21 to FY22.

Transponder replacement revenue observed in FY16 & FY17, sales estimated at \$500K in future years. Includes property damage revenue, administrative fees & processing fees, real estate sales, etc. FY17 based on Hooksett Service Area Estimated Rent Based on Projections in Exhibit D of Contract (35-yr ground lease contract) FY17 interest is based on audited financials, FY18 forward assumes 0.30% interest on reserve accounts and 0.1

FY18 & FY19 based on approved budget with 2% growth thereafter  
Projected lapse in FY18 thru FY28 based on Lean Staffing Model in Tolls  
Future transponder replacement costs included at \$7.40 each. Transponder expense increased in FY16 & FY17 the fall of 2005.

FY18 & FY19 based on approved budget with 2% growth thereafter  
FY18 & FY19 based on approved budget with 2% growth thereafter  
Carry forward results from unexpended vendor costs of prior year.

Direct Tpk funding of Safety started in FY10. Funds transferred previously, FY18 & FY19 based on approved bu Direct Tpk funding to DRED for Welcome Centers, FY 18 & FY19 based on approved budget, with 2% growth the FY 09 to 17 based on audited financials (includes intra-agency transfers for Traffic, Bridge Maintenance, Hwy/Ma thereafter.

**TOTAL REVENUE LESS TOTAL OPERATING EXPENSES**

35% Federal Subsidy on BABs interest payments (reimbursement back into debt service account)  
FY12 forward, debt service on accrual basis (Bonds paid off in FY24)  
FY12 forward, debt service on accrual basis (Bonds paid off in FY21)  
FY12 forward, debt service on accrual basis (Bonds paid off in FY39)  
FY12 forward, debt service on accrual basis (Bonds paid off in FY43)  
2015 A Bonds (Bonds Paid off FY24)

From Treasury's spreadsheet "Turnpike DSR Accrual Calculation"

Funding Levels based on Governor's Operating Budget for FY 2018-2019 and draft Ten Year Plan for FY's 2020 Bridge Rehab Costs based on scope of work from TYLI dated March 2018 and anticipated additional costs ident

Balance of carry-forward in R&R Program. By statute, R&R budgeted amounts do not lapse.  
Advanced I-95 Payments in FY13, FY14 & FY15 (excluded from All Obligations Debt Service Coverage Ratio), re Payments from Turnpike General Reserve Account based on amortization schedule in I-95 transaction agreement (state fiscal year) are excluded from the All Obligations Debt Service Coverage Ratio

**LINE 35 LESS LINES 40 AND 48**

Operating Surplus (Line 50)  
Proposed bonds less than approved bonding capacity, delayed from FY 2012  
Bond issuance costs decrease as a percentage of bond issuance amounts based on experience

371.3 From 6/29/17 summary monthly capital report  
23.4 From 6/29/17 summary monthly capital report  
22.0 From 6/29/17 summary monthly capital report  
16.3 From 6/29/17 summary monthly capital report  
109.4 From 6/29/17 summary monthly capital report  
26.5 From 6/29/17 summary monthly capital report  
74.2 From 6/29/17 summary monthly capital report  
106.6 From 6/29/17 summary monthly capital report  
55.8 From 6/29/17 summary monthly capital report  
242.6 From 6/29/17 summary monthly capital report  
4.8 From 6/29/17 summary monthly capital report  
2.0 From 6/29/17 summary monthly capital report  
0.5 From 6/29/17 summary monthly capital report  
1,055.4  
1,055.4

**TOTAL CAPITAL ADDITIONS LESS TOTAL CAPITAL EXPENDITURES**

Add'l reserves based on max annual debt service and increase required to Revenue Bond Interest & Principal De Revenue Bond General Reserve Account of \$2M in CAFR has been unrestricted in FY11 CAFR.

Updated 1/29/18  
Updates to this model include the following:  
FY 2018 & 2019 Committee of Conference Budget Request entered in Operating Expenditures and R&R Program Audited FY 2017 Accrual Basis now shown, Annual Financial Report presented to Fiscal Committee dated 1/19/18  
2018 Carry-forwards in Toll Collection and R&R  
Existing Toll Revenue last updated 12/31/17. Will be updated quarterly, unless other major changes are done (line Reflecting 2% growth rates on lines 18, 24, 33, 36, 40, 63  
Reflects updated BABS info (no change to revenue) line 45  
Insurance Revenue increased by \$400K in FY 2017

121.4	127.1	127.9	129.1	130.9	132.9	134.9	136.9	138.8	140.8	142.8	144.9	146.9	149.0
0.6	1.1	0.9	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
2.2	1.8	3.9	4.0	4.1	4.1	4.3	4.4	4.4	4.5	4.6	4.7	4.8	4.8
0.1	0.8	0.9	0.8	0.8	0.9	0.9	0.9	1.0	1.0	1.0	1.0	1.0	1.1
0.1	1.0	0.4	0.2	0.2	0.3	0.3	0.3	0.3	0.3	0.4	0.4	0.4	0.5
124.4	131.8	134.0	134.6	136.5	138.7	140.8	142.9	145.0	147.1	149.3	151.4	153.6	155.9
26.6	24.1	28.8	31.9	32.0	32.6	33.3	34.0	34.6	35.3	36.0	36.8	37.5	38.2
0.6	1.1	0.8	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
1.7	1.2	1.5	2.3	2.3	2.3	2.4	2.4	2.5	2.5	2.6	2.6	2.7	2.7
6.4	6.9	6.9	8.1	6.2	7.5	7.5	7.7	7.8	8.0	8.1	8.3	8.4	8.6
6.3	7.2	8.7	8.7	8.7	8.9	9.1	9.2	9.4	9.6	9.8	10.0	10.2	10.4
1.0	0.9	0.9	1.1	1.1	1.1	1.2	1.2	1.2	1.2	1.3	1.3	1.3	1.3
1.8	1.6	2.3	2.3	2.3	2.3	2.4	2.4	2.5	2.5	2.6	2.6	2.7	2.7
44.4	43.0	45.9	68.4	52.6	52.9	53.8	54.9	56.1	57.2	58.4	59.6	60.8	62.1
36.5	33.8	39.5											
80.0	88.8	84.1	66.2	83.8	85.9	87.0	88.0	88.9	89.9	90.9	91.8	92.8	93.8
(2.9)	(2.8)	(2.9)	(2.9)	(2.9)	(2.9)	(2.9)	(2.9)	(2.8)	(2.6)	(2.5)	(2.5)	(2.3)	(2.0)
19	18.9	17	13.1	13.1	11	5.3	5.7	5.5	5.4	0.0	0.0	0.0	0.0
7.5	7.5	7.8	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4
8.9	8.9	8.9	8.9	8.9	8.9	10.0	17.2	17.1	16.9	16.8	16.6	16.4	16.2
6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5
0.1	2.3	4.0	8.3	8.3	10.4	15.0	8.0	1.3	0.0	0.0	0.0	0.0	0.0
42.0	44.1	44.2	44.2	44.2	44.2	44.2	37.4	30.4	28.8	23.3	23.1	22.9	22.7
39.1	41.3	41.3	41.3	41.3	41.3	41.3	34.5	27.6	26.2	20.8	20.6	20.6	20.7
39.0													
8.2	7.9	9.3	10.7	8.6	6.6	11.4	13.9	14.4	11.3	11.5	11.7	11.9	12.2
			2.1	5.7	5.7	1.8							
8.3			5.4										
5.9	0.4												
22.4	8.3	9.3	18.2	14.3	12.3	13.2	13.9	14.4	11.3	11.5	11.7	11.9	12.2
18.5	39.2	33.5	6.7	28.2	32.3	32.5	39.6	46.9	52.4	58.6	59.5	60.3	60.9
18.5	39.2	33.5	6.7	28.2	32.3	32.5	39.6	46.9	52.4	58.6	59.5	60.3	60.9
52.6													
(0.3)													
70.8	39.2	33.5	6.7	28.2	32.3	32.5	39.6	46.9	52.4	58.6	59.5	60.3	60.9
29.6	40.2	15.3	8.9										
0.1													
0.2	0.2	0.8	2.9	8.3	4.1								
		14.8	15.6	22.0	30.4	23.7	2.9						
		0.1	0.8	0.8		11.6	13.2						
0.1	0.1	1.0	3.5	1.8	4.5	4.0	18.0	20.0	21.2				
0.7	0.2	1.0	2.5			2.0	2.0	4.0	24.5	23.9	23.9		
0.5	1.6	2.0		1.5				2.0	2.0	12.0	15.0	14.0	18.6
0.1	0.2	0.2	2.9	1.4									24.4
0.5							2.0						
31.8	42.5	35.2	37.1	35.8	39.0	39.3	38.1	26.0	47.7	35.9	57.5	56.5	43.0
39.0	(3.3)	(1.7)	(30.4)	(7.6)	(6.7)	(6.8)	1.5	20.9	4.7	22.7	2.0	3.8	17.9
58.6	97.7	91.0	92.1	61.7	54.1	47.4	47.5	55.7	78.1	88.3	110.9	113.0	116.7
39.0	(3.3)	(1.7)	(30.4)	(7.6)	(6.7)	(6.8)	1.5	20.9	4.7	22.7	2.0	3.8	17.9
(0.9)	(3.7)	3.9				6.9	6.8	1.4	5.5				
1.0	0.3	(1.1)											
49.8	19.1												
47.9	71.9	92.1	61.7	54.1	47.4	47.5	55.7	78.1	88.3	110.9	113.0	116.7	134.7
59.6	61.1	(3.9)	59.4	59.4	59.4	(6.9)	(6.8)	(1.4)	(5.5)				
							45.7	44.1					

121.4	127.1	127.9	129.1	130.9	132.9	134.9	136.9	138.8	140.8	142.8	144.9	146.9	149.0
0.6	1.1	0.9	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.5
2.2	1.8	3.9	4.0	4.1	4.1	4.3	4.4	4.4	4.5	4.6	4.7	4.8	4.8
0.1	0.8	0.9	0.8	0.8	0.9	0.9	0.9	1.0	1.0	1.0	1.0	1.0	1.1
0.1	1.0	0.4	0.2	0.2	0.3	0.3	0.3	0.3	0.3	0.4	0.4	0.4	0.5
124.4	131.8	134.0	134.6	136.5	138.7	140.8	142.9	145.0	147.1	149.3	151.4	153.6	155.9
26.6	24.1	28.8	31.9	32.0	32.6	33.3	34.0	34.6	35.3	36.0	36.8	37.5	38.2
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1.7	1.2	1.5	2.3	2.3	2.3	2.4	2.4	2.5	2.5	2.6	2.6	2.7	2.7
6.4	6.9	6.9	8.1	6.2	7.5	7.5	7.7	7.8	8.0	8.1	8.3	8.4	8.6
6.3	7.2	8.7	8.7	8.7	8.9	9.1	9.2	9.4	9.6	9.8	10.0	10.2	10.4
1.0	0.9	0.9	1.1	1.1	1.1	1.2	1.2	1.2	1.2	1.3	1.3	1.3	1.3
1.8	1.6	2.3	2.3	2.3	2.3	2.4	2.4	2.5	2.5	2.6	2.6	2.7	2.7
44.4	43.0	45.9	68.4	52.6	52.9	53.8	54.9	56.1	57.2	58.4	59.6	60.8	62.1
36.5	33.8	39.5											
80.0	88.8	84.1	66.2	83.8	85.9	87.0	88.0	88.9	89.9	90.9	91.8	92.8	93.8
(2.9)	(2.8)	(2.9)	(2.9)	(2.9)	(2.9)	(2.9)	(2.9)	(2.8)	(2.6)	(2.5)	(2.5)	(2.3)	(2.0)
19	18.9	17	13.1	13.1	11	5.3	5.7	5.5	5.4	0.0	0.0	0.0	0.0
7.5	7.5	7.8	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4	7.4
8.9	8.9	8.9	8.9	8.9	8.9	10.0	17.2	17.1	16.9	16.8	16.6	16.4	16.2
6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5	6.5
0.1	2.3	4.0	8.3	8.3	10.4	15.0	8.0	1.3	0.0	0.0	0.0	0.0	0.0
42.0	44.1	44.2	44.2	44.2	44.2	44.2	37.4	30.4	28.8	23.3	23.1	22.9	22.7
39.1	41.3	41.3	41.3	41.3	41.3	41.3	34.5	27.6	26.2	20.8	20.6	20.6	20.7
39.0													
8.2	7.9	9.3	10.7	8.6	6.6	11.4	13.9	14.4	11.3	11.5	11.7	11.9	12.2
			2.1	5.7	5.7	1.8							
8.3			5.4										
5.9	0.4												
22.4	8.3	9.3	18.2	14.3	12.3	13.2	13.9	14.4	11.3	11.5	11.7	11.9	12.2
18.5	39.2	33.5	6.7	28.2	32.3	32.5	39.6	46.9	52.4	58.6	59.5	60.3	60.9
18.5	39.2	33.5	6.7	28.2	32.3	32.5	39.6	46.9	52.4	58.6	59.5	60.3	60.9
52.6													
(0.3)													
70.8	39.2	33.5	6.7	28.2	32.3	32.5	39.6	46.9	52.4	58.6	59.5	60.3	60.9
29.6	40.2	15.3	8.9										
0.1													
0.2	0.2	0.8	2.9	8.3	4.1								
		14.8	15.6	22.0	30.4								





*Victoria F. Sheehan*  
Commissioner

**THE STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF TRANSPORTATION**



*16 Beane*  
**William Cass, P.E.**  
Assistant Commissioner

His Excellency, Governor Christopher T. Sununu  
and the Honorable Executive Council  
State House  
Concord, New Hampshire 03301

Bureau of Turnpikes  
October 6, 2017

**REQUESTED ACTION**

Authorize the Department of Transportation, Bureau of Turnpikes within the Division of Operations, to amend an existing professional service contract for the NH E-ZPass Back Office with Cubic Transportation Systems, Inc. (Cubic), (Vendor #267136). This amendment is to restructure the schedule for deliverables, payment of project delivery and Operation and Maintenance costs, and Key Performance Indicators of the Contract for fiscal year 2018, to be effective upon Governor and Council approval through June 30, 2018. There is no time extension or additional cost as result of this amendment. The original contract agreement was approved by Governor and Council on October 7, 2015, Item #25.

**EXPLANATION**

RSA 237:16-b as amended in 2001 authorized the Department to participate in a regional Electronic Toll Collection system (E-ZPass). Governor and Council on August 22, 2001 authorized the Department to enter into an Interagency Group (IAG) agreement to implement electronic toll collection in a manner that provides a seamless toll system for motorists and commercial operators along the eastern seaboard of the United States.

On October 7, 2015, Governor and Council approved the original contract with Cubic for the design, testing, installation and maintenance services for the operation of the NH E-ZPass Back Office for the Bureau of Turnpikes within the Division of Operations to be effective for a 6-year period through June 20, 2021. The contract also included provisions for three additional three (3) year optional periods up to but not beyond, June 30, 2030 subject to Governor and Council approval.

A Back Office System to support Electronic Tolling, Video Tolling and Violation Processing is necessary to continue to operate the E-ZPass system. The above referenced approved contract engages Cubic Transportation Systems Inc. to perform design, testing, installation, maintenance and operation services for the NH E-ZPass Back Office for the Turnpike System within the Division of Operations. This amendment specifically addresses the implementation of the Back Office System (BOS) and Customer Service Center (CSC) and their related maintenance and operation services under RFP 2015-068.

The BOS is specifically intended to be designed and developed to support the management of NH E-ZPass accounts, including fund management on behalf of the Department; processing and reconciling all in-state and out-of-state toll revenue collected, financial reconciliation and reciprocity with other E-ZPass agencies within the Inter Agency Group; invoicing/violation processing for unpaid transactions; management of the transponder inventory and purchase and sale of transponders; integration of all functions of a customer call center; management of the operation of the E-ZPass walk-in-centers; and hosting and management of the NH E-ZPass website.

In addition the contract includes operation and maintenance of the NH E-ZPass BOS, and a locally established and operated CSC that includes but is not limited to account maintenance, invoice and violation processing,

reciprocity file management, website maintenance, customer service support and operation of three Walk-in-Centers.

The initial portion of the contract was scheduled to be 14 months and involved the design, development, testing and installation of an enhanced BOS and CSC. The BOS and CSC opened for operations on March 24, 2017, at a reduced level of functionality as defined under the contract. In accordance with the terms of the contract during this period, the Department has limited the Operations and Maintenance payments to "Pass Through" costs and E-ZPass Walk-in-Center (WIC) operations' costs only. There have been no further Operation and Maintenance payments made by the Department to the vendor.

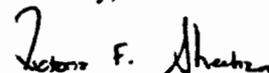
The BOS functionality has now reached approximately 60%. This contract amendment, effective upon approval date of Governor and Council, is to restructure the remaining deliverables and their associated schedule to bring the BOS up to 100% functionality as defined in the Contract by the end of FY 2018. Additionally, the project delivery and Operation and Maintenance payment schedules have been modified to reflect the estimated current 60% functionality of the BOS and include incremental increases to payments in subsequent months as additional functionality is added to the system through the release of twelve Spirals (computer programming releases) to bring the BOS up to 100% functionality. The increased monthly O&M payments are based on the positive effect of the additional functionality under each Spiral. The total O&M payment for FY 2018 will not exceed that specified in the original contract.

This amendment also restructures the Key Performance Indicators (KPIs) which are assessed monthly to ensure the Department and E-ZPass Customers are receiving the required level of service as defined within the Contract. Initial KPIs are set reflecting current functionality and, as Spirals are implemented and introduce additional functionality, additional KPIs will be implemented and assessed.

The contract has been approved by the Attorney General as to form and execution. Funding for 2018 is available and encumbered. Copies of the fully executed contract are on file at the Secretary of State's Office and the Department of Administrative Services' Office; and subsequent to Governor and Council approval will be on file at the Department of Transportation.

It is respectfully requested that this resolution be approved.

Sincerely,



Commissioner  
Victoria F. Sheehan



**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF INFORMATION TECHNOLOGY**  
27 Hazen Dr., Concord, NH 03301  
Fax: 603-271-1516 TDD Access: 1-800-735-2964  
[www.nh.gov/doi](http://www.nh.gov/doi)

**Denis Goulet**  
*Commissioner*

October 10, 2017

Victoria F. Sheehan  
Commissioner  
State of New Hampshire  
Department of Transportation  
John O. Morton Bldg., 7 Hazen Drive  
Concord, NH 03302-0483

Dear Commissioner Sheehan:

This letter represents formal notification that the Department of Information Technology (DoIT) has approved your request to amend a contract with Cubic Transportation Systems, Inc. (Cubic), (Vendor #267136), as described below and referenced as DoIT No. 2015-068 Amendment 1.

The purpose of this amendment is the restructure of the schedule for deliverables, payment of Operation and Maintenance costs and Key Performance Indicators of the Contract for fiscal year 2018. There is no time extension or additional cost as result of this amendment. The original contract agreement was approved by Governor and Council on October 7, 2015, Item #25.

A copy of this letter should accompany the submission to the Governor and Executive Council for approval.

Sincerely,

A handwritten signature in black ink, appearing to read "Denis Goulet", with a long horizontal flourish extending to the right.

Denis Goulet

DG/ik  
DOT 2015-068

cc: Gail Hambleton



THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF TRANSPORTATION



*Beaube  
25*

WILLIAM CASS, P.E.  
ASSISTANT COMMISSIONER

September 18, 2015  
Bureau of Turnpikes

Her Excellency, Governor Margaret Wood Hassan  
and the Honorable Council  
State House  
Concord, New Hampshire 03301

**REQUESTED ACTION**

- Pursuant to RSA 237:15-a, Transfers from the General Reserve Account, authorize the Department of Transportation, Bureau of Turnpikes to transfer funds in the amount of \$4,500,000 from the Turnpike General Reserve Account to budget and expend revenue for the design, testing, installation and consultant oversight of the NH E-ZPass Back Office for the Division of Operations, to be effective upon Governor and Council approval through June 30, 2016 and the amount requested for the FY 2017 budget. 100% Turnpike Funds.

**FROM:** 04-096-096-961017-363615-0000 Turnpike Fund Balance \$4,500,000

04-096-096-961017-70500000	Current Budget FY 2016	Requested Change	Revised Budget FY 2016
<b>Tpk Toll Collection</b>			
<b>Expenses:</b>			
020 500200 Current Expense	\$2,500,000	\$0	\$2,500,000
022 500255 Rents-Leases Other than State	1,500	0	1,500
023 500291 Heat, Electricity, Water	18,510	0	18,510
024 500225 Maint Other than Bldg-Grnds	3,950,162	0	3,950,162
026 500251 Membership Fees	75,000	0	75,000
046 500463 Eng Consultants Non-Benefits	3,500,000	3,150,000	6,650,000
080 500710 Out of State Travel	9,000	0	9,000
102 500731 Contracts for Program Svcs	8,506,063	0	8,506,063
103 502664 Contracts for Operational Svcs	8,900	0	8,900
Total	\$18,569,135	\$3,150,000	\$21,719,135
<b>Source of Funds</b>			
<b>Revenue:</b>			
000017 Turnpike Fund	\$18,569,135	\$3,150,000	\$21,719,135

04-096-096-961017-70500000	Budget Request FY 2017	Requested Change	Revised Budget Request FY 2017
<b>Tpk Toll Collection</b>			
<b>Expenses:</b>			
020 500200 Current Expense	\$2,600,000	\$0	\$2,600,000
022 500255 Rents-Leases Other than State	1,500	0	1,500
023 500291 Heat, Electricity, Water	18,510	0	18,510
024 500225 Maint Other than Bldg-Grnds	2,100,000	0	2,100,000
026 500251 Membership Fees	75,000	0	75,000
046 500463 Eng Consultants Non-Benefits	1,500,000	1,350,000	2,850,000
080 500710 Out of State Travel	9,000	0	9,000
102 500731 Contracts for Program Svcs	7,900,000	0	7,900,000
103 502664 Contracts for Operational Svcs	9,200	0	9,200
Total	\$14,213,210	\$1,350,000	\$15,563,210
<b>Source of Funds</b>			
<b>Revenue:</b>			
000017 Turnpike Fund	\$14,213,210	\$1,350,000	\$15,563,210

The unaudited Turnpike Fund Balance Surplus account as of June 30, 2015 was \$76.6 million, and is projected to be \$39.7 million as of June 30, 2016. See attached.

- Authorize the Department of Transportation to enter into a contract with Cubic Transportation Systems, Inc. (Vendor #267136) in the amount of \$51,889,724.83 for design, testing, installation and maintenance services for the operation of the NH E-ZPass Back Office for the Turnpike System within the Division of Operations effective upon Governor and Council approval, through June 30, 2021 with an option to renew, at the sole discretion of the State, for up to three (3) additional three (3) year optional operation periods up to, but not beyond June 30, 2030, subject to Governor and Council approval. 100% Turnpike Funds.

Funds to support this request are anticipated to be available in the following accounts in State FY 2018, State FY 2019, State FY 2020 and State FY 2021 upon the availability and continued appropriation of funds in the future operating budget, with the ability to adjust encumbrances between State Fiscal Years through the Budget Office, if needed and justified.

	<u>FY 2016</u>	<u>FY2017</u>	<u>FY2018</u>	<u>FY 2019</u>	<u>FY 2020</u>	<u>FY 2021</u>
04-096-096-961017-7050 Consultants 046-500463	\$6,650,000.00	\$2,850,000.00				
04-096-096-961017-7050 Credit Card Processing Services 020-500205		\$1,149,336.70	\$1,406,788.08	\$1,434,923.88	\$1,463,622.36	\$1,492,894.80
04-096-096-961017-7050 Contract Services 102-500731		\$4,817,712.52	\$7,687,841.03	\$7,511,094.86	\$7,616,184.11	\$7,809,326.49
Fiscal Year Totals	\$6,650,000.00	\$8,817,049.22	\$9,094,629.11	\$8,946,018.74	\$9,079,806.47	\$9,302,221.29

## EXPLANATION

### Transfer from General Reserve Account to NH Turnpike Toll Collection (70500000) – 100% Turnpike Funds:

Class 046 FY 2016: Increase Class 046 in Accounting Unit 7050 by \$3,150,000. This transfer will allow for payment of FY 2016 contract expenditures for the new Back Office system development, expected to begin in October, 2015. This account was budgeted in FY 2016 but the amount of the contract exceeds the budget.

Class 046 FY 2017: Increase Class 046 in Accounting Unit 7050 by \$1,350,000. This transfer will allow for payment of FY 2017 contract expenditures for the new Back Office system development. This account was budgeted in FY 2017 but the amount of the contract exceeds the budget.

RSA 237:16-b as amended in 2001 authorized the Department to participate in a regional Electronic Toll Collection system (E-ZPass). Governor and Council on August 22, 2001 authorized the Department to enter into an Interagency Group (IAG) agreement to implement electronic toll collection in a manner that provides a seamless toll system for motorists and commercial operators along the eastern seaboard of the United States.

A Back Office System to Support Electronic Tolling, Video Tolling and Violation Processing is necessary to continue to operate the E-ZPass system. The above referenced contract involves engaging Cubic Transportation Systems Inc. to perform design, testing, installation, maintenance and operation services for the NH E-ZPass Back Office for the Turnpike System within the Division of Operations. This request specifically addresses the procurement of the Back Office System (BOS) and Customer Service Center (CSC) and their related maintenance and operation services under RFP 2015-068.

The initial portion of the contract is estimated to be 14 months and involves the design, development, testing and installation of an enhanced BOS system and CSC with the following project goals as described in the RFP.

- Goal 1 – Procure a hosted back office platform which is sustainable and scalable for a minimum of 14 years (the maximum life of this contract).
- Goal 2 – Transition from the existing legacy system with minimal impact to operations and impacts to patrons.
- Goal 3 – Provide call center and back office operations supported locally.
- Goal 4 – Ability for greater adaptation to meet MAP-21 mandates.
- Goal 5 – Incorporate streamlined processes for capturing customer information, tracking violations through their lifecycle and license plate updates.
- Goal 6 – Ability to identify and to pursue multiple plate types with special characters.
- Goal 7 – Ability to pursue out-of-state violators with the potential to utilize registration holds with the corresponding DMVs.
- Goal 8 – Redesign the [www.ezpassnh.com](http://www.ezpassnh.com) website to be more customer friendly and interactive.

The BOS system will specifically be designed and developed to support the management of NH E-ZPass accounts, including fund management on behalf of the Department; process and reconcile all in-state and out-of-state toll revenue collected, including financial reconciliation and reciprocity with other E-ZPass agencies within the Inter Agency Group; administer invoicing/violation processing for unpaid transactions; manage the transponder inventory and purchase and sale of transponders; integrate all functions of a customer call center; manage the operation of the E-ZPass walk-in-centers; and host and manage the NH E-ZPass website. The BOS system will be designed, developed, tested and installed by September 1, 2016. The current vendor, Xerox, will continue to operate the existing legacy system and is retained to support the data migration under their existing contract during the transition period. The current Xerox contract expires on September 30, 2016.

In addition to the deployment of the enhanced BOS, the second portion of the contract includes operation and maintenance of the NH E-ZPass BOS, including a locally established and operated CSC. The scope of services includes but is not limited to account maintenance, invoice and violation processing, reciprocity file management, website maintenance, customer service support and operation of three Walk-in-Centers.

Working closely with Jacobs Engineering, the Turnpike Systems' Tolling Services consultant, to incorporate best practices in back office systems and customer service, the Bureau of Turnpikes developed the RFP using a best value procurement approach with the technical proposal and cost proposal apportioned at 70% and 30% respectively. The combined implementation and maintenance contract will be a fixed price contract for an approximate 6-year term beginning upon G&C approval and ending June 30, 2021, with the option, at the sole discretion of the State, to extend for up to three 3-year terms up to but not beyond June 30, 2030. The Department of Information Technology reviewed and approved the RFP on December 9, 2014.

On December 9, 2014, the Department publicly advertised the subject RFP. During the response period, the Department conducted a Vendor Conference for all vendors who responded with intent to submit and entertained questions and/or inquiries from the Vendors. Proposals were received from the following vendors in accordance with the requirements for submission, including the stipulated deadline of February 13, 2015:

**VENDOR NAME**

- Cubic Transportation Systems, Inc., San Diego, CA
- Egis Projects, Inc., Orlando, FL
- Xerox State & Local Solutions, Inc., Germantown, MD

Proposals from each vendor were reviewed by the Back Office Procurement RFP Selection Committee along with technical review support by the Bureau of Turnpikes' consultant, Jacobs Engineering. On April 7<sup>th</sup> and 8<sup>th</sup> of 2015, the Selection Committee held interviews with the three vendor teams, where each team conducted a presentation describing their team, capabilities, and pertinent aspects of their proposal; provided answers to a specific set of questions targeting each proposal; demonstrated their product; and participated in an open question and answer period. Following the interviews on April 8, 2015, the Selection Committee met to discuss the Vendor Interviews and finalize the ratings of the Proposals. The Selection Committee was comprised of Bureau of Turnpikes Assistant Administrator (RFP's Project Manager), Bureau of Turnpikes E-ZPass Program Manager, Bureau of Turnpikes Business Administrator, Bureau of Finance & Contracts' Administrator III, Commissioner's Office Assistant Director of Project Development, and Department of Information Technology IT Project Manager.

Following the interviews, the Selection Committee met to discuss the Vendor Interviews and finalize the ratings of the Proposals using the table below.

<b>CATAGORIES</b>	<b>POINTS</b>
<b>TECHNICAL PROPOSAL with the following potential maximum scores for each Technical Proposal category;</b>	<b>70</b>
<i>Proposed Back Office System Design and Technical</i>	<i>20</i>
<i>Back Office Service and Operations Approach</i>	<i>15</i>
<i>Firms Qualifications, Project Team, Capabilities and References</i>	<i>20</i>
<i>Implementation, Transition and Delivery Approach</i>	<i>15</i>
<b>*PRICE PROPOSAL POTENTIAL MAXIMUM POINTS</b>	<b>30</b>
<i>Deployment/Implementation</i>	<i>15</i>
<i>Operations</i>	<i>15</i>
<b>TOTAL POTENTIAL MAXIMUM POINTS AWARDED</b>	<b>100</b>

\*The following formula was used to assigned points for the price proposal: Vendor's Price Score = (Lowest Proposed Price/Vendor's Proposed Price) x 15.

Based on the above mentioned analysis, the Selection Committee identified all three (3) vendors with technical scores exceeding 49 and worthy of consideration in the selection process. The table on the subsequent page outlines the Committee's technical scoring, each firm's base price proposal, corresponding price score and total score.

On April 23, 2015, the Department sent a Best and Final Offer (BAFO) request to Cubic requesting they review the following four items within their price proposal. Cubic's response was due on Friday, May 8, 2015.

- o Confirmation that Cash Payment and Reload Card cost was included in the contract.
- o Re-evaluation and potential cost reduction for BOS Design, Development, & Implementation which was the highest among all vendors.
- o Re-evaluation and potential cost reduction for Operational costs associated with Post-paid accounts (invoice/violation license plate processing) which were highest among all vendors.
- o Consideration to increase based fixed monthly cost from 350,000 accounts to 400,000 accounts while maintaining Cubic's original proposed fixed and variable costs for Pre-Paid IAG Account Maintenance.

Cubic returned their BAFO on Thursday, May 7, 2015. On Tuesday, May 19, 2015 the Department sent a follow up memo requesting a change in their BAFO's database system from Postgue SQL to Oracle and asked Cubic to make any necessary changes to their May 7<sup>th</sup>, BAFO. Cubic returned their final BAFO on Wednesday, May 20, 2015 with a change in the database system to Oracle and reduction in their overall Deployment and Operational Costs of \$3,299,842 from \$45,499,982 to \$42,200,140. The following table outlines the revise pricing based on Cubic's BAFO and also includes the "Pass Through" costs included in all the proposals. Per the RFP, Pass Through costs were not part of the Selection Committee's scoring. Pass through costs consist of Telephone fees, Cash Payment Network Fees, Credit Card fees, Postage fees, and other Communication fees.

Vendor	Tech. Score	Cost Score	Total Score	Deployment/ Implementation Price	Operations Price	Total Price for Deployment/ Implementation & Operations Cost	Pass Through Cost	Contract Total Price
Cubic	60.3	20.5	80.8	\$9,500,000 (BAFO)	\$32,700,140 (BAFO)	\$42,200,140 (BAFO)	9,689,584	\$51,889,724 (BAFO)
Egis	61.6	19.1	80.7	\$8,821,290	\$43,247,277	\$52,068,567	5,641,990	\$57,710,557
Xerox	50.4	29.7	80.1	\$4,406,071	\$34,183,839	\$38,589,910	9,754,622	\$48,344,532

Cubic's response to the four items noted in the BAFO resulted in a favorable reduction in the overall cost as described below:

- Cubic concurred that their price proposal included all design, development, testing and implementation of the Cash Payment Network and Reload Card. They will be utilizing InComm, who is presently operating in the E-ZPass Group.
- Cubic reduced the BOS Design, Development, & Implementation cost by \$2,500,111 from \$9,198,549 to \$6,698,438.
- Cubic reduced their price for the fixed and variable unit costs under the Post-paid accounts (invoice/violation license plate processing). This resulted in a reduction of the total cost over the 58-month maintenance period of \$1,859,958 from \$12,808,777 to \$10,948,819.

- Cubic also increased the account limit for the Pre-Paid E-ZPass Account Maintenance from 350,000 to 400,000 which results in a reduction in average cost per account over the 5-year term of Operations and Maintenance of approximately 5% per account.

Overall the Cubic system is highly configurable and adaptable, which will reduce the potential for change orders over the course of the contract term. This will allow the Bureau of Turnpikes to be more adaptive to future changes such as new interfaces and to support national tolling interoperability, other state DMV's for address lookup, violation processing reciprocity and DMV Holds. The Cubic system provides for strong financial controls allowing for the tracking, reconciliation and reporting of the financial history of transactions, particularly unpaid transactions. It will also provide Bureau of Turnpikes' Finance Section with a general ledger as well as the ability to interface with the Department's Financial System (Lawson) in an automated fashion. The Cubic system is user friendly for various users of the BOS system to address customer service matters, financials, reconciliation of files, alerts to the customer service representatives, as well as includes ad-hoc reporting queries utilizing user friendly 'drag and drop' type functions. Additional benefits include the ability for full system access to be achieved via a single interface using a web browser.

Cubic has sub-contracted with AECOM to operate the CSC, which will be located in Concord and will provide the creation of over 50 jobs in New Hampshire, including enhanced staffing at the Walk-in-Centers. Cubic will also provide a significant level of management staff locally, including the Project Manager, Operations Manager and Finance Manager all residing in New Hampshire with 100% time commitment to the project. AECOM has over 20 years of tolling experience in the customer service business including E-ZPass transaction processing, video billing, invoice/violation processing, DMV Hold, mailroom, and lockbox.

Based on the scoring and the above information, the Department requests approval to enter into a contact with Cubic Transportation System Inc. for an approximate 6-year term ending on June 30, 2021 with the option at the sole discretion of the State to extend for up to three 3-year terms up to but not beyond June 30, 2030.

This Contract has been approved by the Attorney General as to form and execution. The Department has verified that the necessary funds are available. Copies of the fully executed contract are on file at the Secretary of State's Office and the Department of Administrative Services, and subsequent to Governor and Council approval will be on file at the Department of Transportation.

It is respectfully requested that this resolution be approved.

Sincerely,



William Cass, P.E.  
Assistant Commissioner

Attachment: Proposal Scoring summary

cc: C. Waszczuk  
B. Janelle  
J. Corcoran

**STATE OF NEW HAMPSHIRE**  
**Department of Transportation**  
**Bureau of Turnpikes**  
**RFP 2015-068**  
**Back Office Systems to Support Electronic Tolling, Video**  
**Tolling & Violation Processing**  
**CONTRACT AMENDMENT 2**

**WHEREAS**, pursuant to an Agreement approved by Governor and Council, as a result of Back Office Systems (BOS) Request for Proposal, on October 7, 2015, (herein after referred to as the "Agreement"), Cubic Transportation Systems, Inc. ("Cubic") (VC# 267136) agreed to supply certain services upon the terms and conditions specified in the Agreement and the Department of Transportation (hereinafter referred to as the "Department") acting for the benefit of the Agency, agrees to manage the BOS and E-ZPass Customer Service Center Program;

**WHEREAS**, pursuant to Provision 19.7 of the Agreement, the Agreement may be modified or amended only by a written instrument executed by the parties thereto and approved by the Governor and Council;

**WHEREAS**, the Governor and Council approved an amendment to the Agreement (Contract #2015-068, State Contract #5000591) between the State of New Hampshire Department of Transportation and Cubic Transportation Systems, Inc. ("Cubic") (VC# 267136) of San Diego, California on October 25, 2017 Item # 16, to be effective through June 30, 2018;

**WHEREAS**, the Parties now wish to amend the Agreement as set forth in this Second Amendment;

**WHEREAS**, Cubic and the Department have agreed to amend the Agreement in certain respects:

**NOW THEREFORE**, in consideration of the foregoing, and the covenants and conditions contained in the Agreement and set forth herein, the parties hereto do agree as follows:

**1. General Provisions- Section 1.1 Contract Documents** is hereby amended to add the following:

- B Under Consolidated Exhibits - Exhibit P Merchant Agreement
- C Contract Amendment 2

**2. General Provisions- Section 1.2 Order of Precedence** is hereby deleted and replaced as follows:

In the event of a conflict among any of the provisions in this agreement, following Order of Precedence shall apply:

1. Contract Amendment 2;
2. Contract Amendment 1;
3. The State of New Hampshire, Department of Transportation Contract 2015-068 (resulting Contract from the RFP, once executed).
4. The State of New Hampshire Terms and Conditions, as stated in Appendix H of the RFP.
5. Final State Responses to Vendor Inquiries to RFP 2015-068.
6. RFP 2015-068 Back Office Systems to Support Electronic Tolling, Video Tolling and Violation processing dated December 9, 2014 with related attachments, appendices, and Addendum #1.
7. Cubic Proposal including interview presentation material and response to State's questions to RFP 2015-068.

**STATE OF NEW HAMPSHIRE**  
**Department of Transportation**  
**Bureau of Turnpikes**  
**RFP 2015-068**  
**Back Office Systems to Support Electronic Tolling, Video**  
**Tolling & Violation Processing**  
**CONTRACT AMENDMENT 2**

**3. Merchant Processing Agreement is hereby attached hereto as Exhibit P starting on May 16, 2018:**

For the purpose of allowing Cubic to process credit card transactions, Cubic shall enter into a written agreement with card processors as necessary. Cubic shall at all times comply with all associated merchant agreements and network rules. Revenues from credit card transactions will be deposited net of any chargebacks into a settlement account which may be a segregated account in a State approved financial institution in the name of Cubic, with funds held in trust on behalf of and for the account and benefit of State and with documentation of such account approved by the State Project Manager. Any fees charged by the merchant processor, including per transaction fees, discounts, pass through interchange and chargeback fees, shall be paid by Cubic out of a separate operations account. Cubic will then invoice the State, and the State will reimburse Cubic, for any such fees paid. Any liabilities associated with the merchant relationships and agreements, except for fees and chargebacks as discussed herein, shall be the responsibility of Cubic and Cubic agrees to indemnify the State from the same in accordance with Section 13 herein.

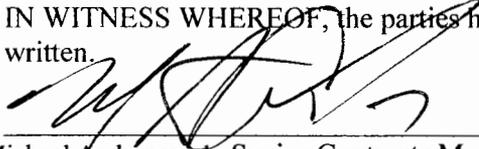
**4. The Agreement is hereby amended to add Exhibit P Back Office System Contract Amendment Descriptions as follows:**

<b>CONTRACT AND AMENDMENT NUMBER</b>	<b>AMENDMENT TYPE</b>	<b>EFFECTIVE DATE</b>	<b>CONTRACT AMOUNT</b>
	<b>Original Contract</b>	October 7, 2015 through June 30, 2021	<b>\$51,889,724.83</b>
<b>Amendment # 1</b>	<b>Amendment 01</b>	G&C approval date through June 30, 2018	<b>\$0.00</b>
<b>Amendment # 2</b>	<b>Amendment 02</b>	G&C approval date through June 30, 2021	<b>\$0.00</b>
	<b>CONTRACT TOTAL</b>		<b>\$51,889,724.83</b>

STATE OF NEW HAMPSHIRE  
Department of Transportation  
Bureau of Turnpikes  
RFP 2015-068  
Back Office Systems to Support Electronic Tolling, Video  
Tolling & Violation Processing  
CONTRACT AMENDMENT 2

Except as provided herein, all provisions of the Agreement shall remain in full force and effect. This modification shall take effect upon the approval date from the Governor and the Executive Council.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the day and year first above written.

  
Michael Andranovich, Senior Contracts Manager  
Cubic Transportation Systems, Inc.

Date: 4/18/2018

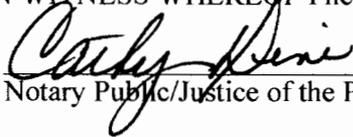
Corporate Signature Notarized:

STATE OF California

COUNTY OF San Diego

On this the 18<sup>th</sup> day of April, 2018, before me, Cathy Dine, Notary Public, the undersigned Officer Michael Andranovich, personally appeared and acknowledged ~~her~~/himself to be the Senior Contracts Manager, of Cubic Transportation Systems, Inc., a corporation, and that ~~she~~/he, as such Senior Contracts Manager being authorized to do so, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by ~~her~~/himself as Senior Contracts Manager.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

  
Cathy Dine  
Notary Public/Justice of the Peace

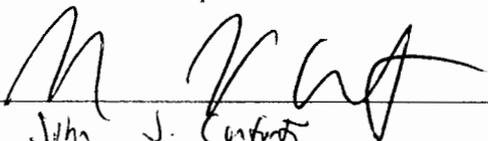
My Commission Expires: June 13, 2018

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

(SEAL)

Date: 4/27/18

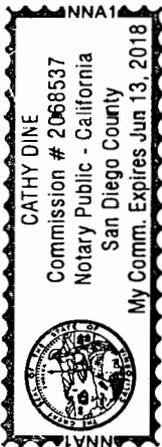
  
Victoria Sheehan,  
Commissioner  
State of New Hampshire  
Department of Transportation

  
John J. Carbone  
Approval by Attorney General Office

Date: 4/30/18

Approval by the Governor and Council

Date: \_\_\_\_\_





CUBIC TRANSPORTATION SYSTEMS, INC  
INCUMBENCY CERTIFICATE

I, Angela L. Hartley, Assistant Secretary of Cubic Transportation Systems, Inc., a California corporation (the "Corporation"), certify that, as such Officer, (a) I have access to all of the original records of the Corporation and that **Michael Andronovich** holds the office of Senior Contracts Manager, and (b) pursuant to a resolution by the Board of Directors of this Corporation effective October 2, 2017, has been authorized to execute and deliver, in their discretion, on behalf of the Corporation contracts or agreements in connection with the State of New Hampshire Department of Transportation Back Office Systems to Support Electronic Tolling, Video Tolling and Violation Processing, Bureau of Turnpikes – Contract RFP 2015-068. I further certify that said resolution is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal as Assistant Secretary of the Corporation this 18th day of April, 2018.

  
Angela L. Hartley  
Assistant Secretary

# State of New Hampshire

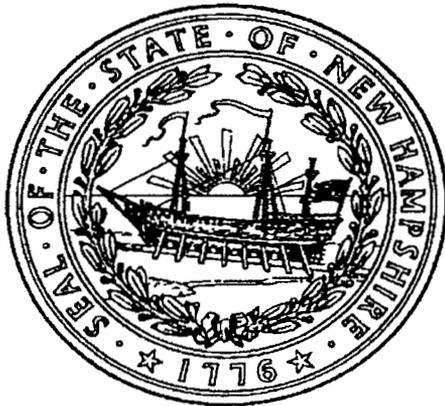
## Department of State

### CERTIFICATE

I, William M. Gardner, Secretary of State of the State of New Hampshire, do hereby certify that CUBIC TRANSPORTATION SYSTEMS, INC. is a California Profit Corporation registered to transact business in New Hampshire on June 30, 2015. I further certify that all fees and documents required by the Secretary of State's office have been received and is in good standing as far as this office is concerned.

Business ID: 728366

Certificate Number: 0004084047



IN TESTIMONY WHEREOF,

I hereto set my hand and cause to be affixed  
the Seal of the State of New Hampshire,  
this 18th day of April A.D. 2018.

A handwritten signature in black ink, appearing to read "William M. Gardner".

William M. Gardner  
Secretary of State





**ADDITIONAL REMARKS SCHEDULE**

AGENCY Arthur J. Gallagher & Co.	NAMED INSURED Cubic Transportation Systems Inc A Subsidiary of Cubic Corporation 5650 Kearny Mesa Road San Diego CA 92111
POLICY NUMBER	EFFECTIVE DATE
CARRIER	NAIC CODE

**ADDITIONAL REMARKS**

THIS ADDITIONAL REMARKS FORM IS A SCHEDULE TO ACORD FORM.

FORM NUMBER: 25      FORM TITLE: CERTIFICATE OF LIABILITY INSURANCE

Property Limit: \$1,000,000  
 RE Contract RFP 2015-068  
 Evidence of Insurance with respects to operations of the Named Insured  
 Insurance carrier shall endeavor to provide the State of New Hampshire Department of Transportation, Bureau of Turnpikes  
 no less than thirty (30) days prior written notice of cancellation of the policy by the issuer, except for cancellation  
 due to the non-payment of premium



## MERCHANT PROCESSING AGREEMENT SECURITY INTEREST ADDENDUM

This Merchant Processing Agreement Security Interest Addendum ("Security Interest Addendum") is effective this \_\_\_\_ day of March 2018 between Base Commerce, LLC, an Arizona Limited Liability Company ("Base Commerce"), Commercial Bank of California ("Merchant Bank"), and Cubic Transportation Systems, Inc., a Delaware Corporation, with its principal place of business at 5650 Kearny Mesa Road, San Diego, California, 92111 ("Cubic") (hereinafter Base Commerce, Merchant Bank, and Cubic are referred to collectively as "the Parties"). Capitalized terms used herein, which are not otherwise defined, shall have the same meaning ascribed to those terms in the Parties' Merchant Card Processing Agreement.

WHEREAS, Base Commerce, Merchant Bank, and Cubic are parties to a Merchant Card Processing Agreement ("Merchant Agreement") relating to the processing of ACH and credit card transactions for toll roads in New Hampshire ("NH Turnpike E-Z Pass Transactions");

WHEREAS, Cubic and State of New Hampshire Department of Transportation doing business as "NH Turnpike E-Z Pass" with a location address at 54 Regional Drive #4, Concord, New Hampshire, 03301 ("NH DOT") have entered into a contract whereby Cubic will manage and oversee NH DOT's administration and collection of NH Turnpike E-Z Pass Transactions;

WHEREAS, NH DOT's bond as well as other laws governing NH DOT's administration, collection, and handling of NH Turnpike E-Z Pass Transactions prohibit NH DOT from encumbering funds from such NH Turnpike E-Z Pass Transactions;

WHEREAS, NH DOT or Cubic shall establish a separate account from which Processing Fees, fines, costs or any other amounts Bank is entitled to collect pursuant to the terms of the Merchant Agreement shall be deducted, if necessary ("Fee Account");

WHEREAS, NH DOT and Cubic intend to provisionally settle Charges to the Settlement Account on a Net Settlement basis with the Bank assessing all Processing Fees, fines and other charges against the Fee Account;

WHEREAS, Bank and Merchant intend that revenues from Card Transactions will be deposited in an approved financial institution in the name of Cubic, with funds held in trust, on behalf of and, for the account and benefit of NH DOT.

WHEREAS, in lieu of providing a security interest in each Charge or otherwise in the proceeds of any Transactions processed pursuant to the terms of the Merchant Agreement, Bank shall have a security interest in the Fee Account;

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WHEREAS, the Parties have negotiated amendments to the Merchant Agreement that they wish to memorialize in this Security Interest Addendum in lieu of revising and amending the Merchant Agreement itself; and

WHEREAS, except as expressly set forth herein, the Parties intend to be bound by the Merchant Agreement, which shall govern the future conduct of the Parties and their contractual obligations to one another.

1. Amending the Definitions in Paragraph 1 of the Merchant Agreement to add the following underlined definitions:

"Fee Account" refers to any account maintained by Cubic at Merchant Bank for amounts which are due and owing to Merchant Bank or Processor pursuant to the terms of this Agreement, including but not limited to Monthly Fees, Processing Fees and any amounts required to raise the Net Settlement amount to zero.

"Net Settlement" shall be determined each banking day by subtracting from total amounts due to Merchant for all Credit Vouchers and Chargebacks hereunder. If the Net Settlement would be less than zero, an amount shall immediately be deducted from the Fee Account to increase the Net Settlement to zero. If there are insufficient funds in the Fee Account to raise the New Settlement to zero, Bank shall deduct an additional amount from the Reserve Account, if any, or any other account in the name of Cubic to bring the Net Settlement to zero. Bank shall not use a Net Settlement process to recoup Processing Fees or Monthly Fees.

2. Amending Paragraph 14 of the Merchant Agreement pertaining to Settlement Account, to delete the strikethrough text and to insert the underlined language as follows:

Merchant must maintain a Settlement Account in Merchant's name in satisfactory condition at a depository institution under arrangements acceptable to Bank in its sole and absolute discretion. The Settlement Account will be subject to the provisions of Paragraph 16 (Security Interest).

Subject to the terms and conditions of this Agreement, including, without limitation, Paragraph 4(a)(vii), Bank agrees to provisionally credit Merchant with Net Settlements for each Charge that Bank accepts from Merchant. Bank shall apply all Chargebacks, anticipated Chargebacks, and Credit Vouchers on a Net Settlement basis before attempting to assess such Chargebacks, anticipated Chargebacks or Credit Vouchers against the Fee Account identified below in Paragraph 15. Merchant agrees that Merchant Bank may debit or credit the Settlement Account for all amounts owed by Merchant in accordance with this Agreement, ~~including, but not limited to,~~ for the amount of any Charge or Credit Voucher processed under this Agreement, Chargebacks, or anticipated Chargebacks, ~~Processing Fees and any other fees owed, fines, penalties,~~

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~~loss allocations, damages, expenses (including, without limitation, attorneys' fees, investigatory and/or remediation expenses), charges, assessments, registrations, certification expenses, payment obligations owed by Merchant to Bank under this Agreement (including, without limitation, indemnity obligations), and any and all or other amounts due Bank, the Card Networks, or any governmental, banking, or regulatory agency, or claimed by third parties arising out of this Agreement or involving Merchant's business, actions, omissions, or use of the services contemplated under this Agreement.~~

Merchant expressly authorizes Merchant Bank or its agents or designated representatives to initiate debit and credit entries and Adjustments to the Settlement Account (whether maintained at Merchant Bank or another financial institution), the Fee Account (described in Paragraph 15) or the Reserve Account (described in Paragraph 15) through the ACH settlement process for all amounts due under this Agreement, including, but not limited to, the amounts described in the above paragraph. This authorization will remain in full force and effect until termination of the Agreement and after termination until the full and final payment of all obligations of Merchant due under this Agreement. Merchant agrees to be bound by all applicable terms and provisions of the ACH Rules or other applicable network(s), in effect from time to time.

Merchant acknowledges and agrees that Bank will not be liable for any delays in receipt of funds, any failure by Merchant to receive funds, or errors in debit or credit entries caused by Merchant, or third parties, including but not limited to any Card Network or any financial institution.

Merchant agrees that Bank may audit all Charge calculations and that Merchant Bank shall have the right, without notice, to make withdrawals, deposits, or other Adjustments to or from the Settlement Account for any deficiencies or overages, or to pay any amounts owed by Merchant under this Agreement.

Bank shall presume that any amounts Bank pays to or debits from Merchant are correct unless Merchant disputes these by sending Bank written notice within thirty (30) days of the date of the applicable statement containing any disputed payments or debits.

If Merchant chooses to rent or lease processing equipment from Processor or utilizes software provided by Processor for use in processing transactions, Merchant agrees to pay Bank: (1) a pre-determined monthly rental fee; (2) any initial upfront costs as required; and (3) all applicable taxes for such Card processing equipment or software utilization.

If, for any reason whatsoever, the Settlement Account is closed, Bank's ability to initiate debit or credit entries to the Settlement Account is blocked, or debit or credit entries

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initiated by Bank to the Settlement Account are rejected, Merchant Bank or Processor may terminate this Agreement and suspend processing of all Transactions, effective immediately, unless Merchant cures the breach, within one (1) Business Day of Bank's notification to Merchant of its inability to access the Settlement Account, by unblocking access to the Settlement Account or otherwise or opens or provides access to another Settlement Account that is acceptable to Bank, in its sole and absolute discretion. If Merchant takes any action, whether during the term of this Agreement or after termination, to close the Settlement Account or the Fee Account, or block or reject any debit, credit, or other entries initiated by Bank to the Settlement Account or the Fee Account for payment of any obligations of Merchant owed under this Agreement, Merchant expressly waives and foregoes any and all right funds or property maintained at Bank, until such time as the breach is cured by unblocking access to the Settlement Account and the Fee Account or otherwise, a new Settlement Account or Fee Account is opened, and/or all of Merchant's payment obligations owed to Bank under this Agreement are paid in full. Notwithstanding the foregoing, Merchant acknowledges and agrees that it shall not have legal title, a possessory or equitable interest in any funds that have not been settled or that are otherwise maintained in the Reserve Account, and that Bank may identify, sequester, or transfer to itself (including its own bank account(s)) any or all of the Reserve Account or any other funds or property maintained at Bank that Bank believes is needed to pay any of Merchant's obligations, and Bank may hold and use such amount for its own benefit and protection. The aforementioned rights and remedies are not intended to be Bank's exclusive rights or remedies, all of which are expressly reserved, and all rights and remedies are intended to be cumulative with all other rights and remedies of Bank under this Agreement and applicable law.

3. Amending the following paragraphs from Merchant Agreement, Section 15, Additional Collateral Security; Reserve Account, to delete the strikethrough text and to insert the underlined text as follows:

As a condition for providing Card Program services, Merchant may be required to provide additional collateral security for Merchant's obligations hereunder, which additional collateral security shall be of a kind, and in amounts, satisfactory to Bank in Bank's sole and absolute discretion, and which shall be in addition to all other collateral provided for in Paragraph 16 hereof. Such additional collateral security may include, for example, (A) a letter of credit, if issued in an amount and on terms acceptable to Bank by a letter of credit issuing bank acceptable to Bank, or (B) the pledge to Bank of a certificate of deposit owned by Merchant in amount satisfactory to Bank and provided all agreements (including agreements of third parties) in form and substance satisfactory to Bank and all filings and/or other actions necessary in order to perfect in Bank a continuing first priority security interest therein on terms acceptable to Bank, are entered into, made and/or taken as the case may be.

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Bank may require that all or any part of the additional collateral take the form of a Reserve Account, established as hereinafter set forth in this Paragraph 15, at any time when: (i) the Agreement, or the provisions of Card Program services hereunder, shall have terminated for any reason or any party hereto shall have given notice of termination thereof, or (ii) there shall have occurred an event which entitles Bank to terminate this Agreement or the provision of Card Program services hereunder or which, with the giving of notice and/or the passage of time would entitle Bank to terminate this Agreement or the provision of Card Program services hereunder, and Merchant has not provided alternative additional collateral security of a kind, and in amounts, satisfactory to Bank as set forth above in this Paragraph, or (iii) neither (i) nor (ii) above in this Paragraph is applicable, but Bank has determined, for any reason in its sole and absolute discretion, that additional collateral security is required, has requested that Merchant provide same, and Merchant has failed to provide alternative additional collateral security of a kind, and in amounts satisfactory to Bank as set forth above in this Paragraph. Any Reserve Account that is established shall be subject to the terms and conditions of Paragraph 16 and all other terms and conditions of this Agreement relating to the "Reserve Account".

Whenever Bank requires that additional collateral security take the form of a Reserve Account, the following provisions of this Paragraph 15 shall apply:

## Reserve Account During Term of Agreement

- i. ~~Merchant may be required to deposit, or Merchant Bank may deposit by deducting from any payment due to Merchant or from any funds in the Settlement Account or any other deposit account of Merchant,~~ into an account maintained by Merchant Bank (or at another approved depository institution) (the "Reserve Account"), initially or at any time in the future as requested by Bank, sums sufficient to satisfy Merchant's current and/or future obligations, including, but not limited to, Chargebacks, anticipated Chargebacks, Credit Vouchers, Processing Fees and any other fees owed, fines, penalties, loss allocations, damages, expenses (including, without limitation, attorneys' fees, investigatory and/or remediation expenses), charges, assessments, registrations, certification expenses, payment obligations owed by Merchant to Bank under this Agreement (including, without limitation, indemnity obligations), and any and all or other amounts due Bank, the Card Networks, or any governmental, banking, or regulatory agency, or claimed by third parties, arising out of this Agreement or involving Merchant's business, actions, omissions, or use of the services contemplated under this Agreement, in such amount as determined by Bank in its sole and absolute discretion.
- ii. The Reserve Account will be separate from the Settlement Account. Merchant shall have no right of withdrawal from the Reserve Account. The Reserve Account shall be under the sole control of Merchant Bank. Any and all earnings, including



interest, from deposits of the Merchant to the Reserve Account shall be the sole property of the Bank. Merchant shall not have legal title nor a possessory or equitable interest in the Reserve Account.

#### Reserve Account Deposits and Additions

- i. At any time (whether during an Initial or Renewal Term or after termination) in Bank's sole and absolute discretion, Bank may (i) designate the minimum balance required to be deposited in the Reserve Account, (ii) require that the amount on deposit in the Reserve Account be increased, ~~or (iii) require that the Merchant deposit, or Merchant Bank may deposit for Merchant into the Reserve Account, a percentage of, or a fixed amount from each Charge processed, or (iv) otherwise~~ determine the amount to be deposited in the Reserve Account. Bank at its sole and absolute discretion may require that each month Merchant deposit, ~~or Merchant Bank may deposit by deducting from any payment due to Merchant or from any funds in the Settlement Account or any other deposit account of Merchant,~~ sums into the Reserve Account no later than the twentieth (20th) day of the month. Bank shall notify the Merchant as to the amount of the funds to be deposited each month.
- ii. Without limiting any of Bank's rights or remedies set forth in the above paragraph or elsewhere in this Agreement, if Bank has reason to believe, in its sole and absolute discretion, that Merchant may be liable to customers or Bank for Chargebacks, anticipated Chargebacks, or any other reason or amounts exceeding the balance of the Reserve Account, Bank may ~~(i) immediately place in the Reserve Account up to 100% of amounts due to Merchant (including for provisional credits or Charges) and/or stop processing Charges for Merchant until such time as the extent of Merchant's obligations to Bank, or Merchant's liability for Chargebacks or other amounts, or Merchant's liability to its customers is known, and Bank no longer deems itself insecure, and/or (ii) demand from Merchant an amount that, in Bank's judgment, is needed to ensure payment of Merchant's obligations and liabilities owed under this Agreement. In addition to all of its other rights and remedies under this Agreement, Merchant's failure to pay any amount requested or otherwise fund the Reserve Account with an amount acceptable to Bank, within one (1) Business Day after Bank's request, will permit Bank to immediately terminate this Agreement and suspend processing of Charges for Merchant without advance notice.~~
- iii. Merchant acknowledges and agrees that the Reserve Account may contain both funds deposited by the Merchant and funds of other merchants of the Bank. Merchant acknowledges and agrees that, until such time as all of the amounts owed by Merchant and its obligations are paid to Bank in full, all funds in the Reserve Account shall be considered to be held by Bank for Bank's sole interest,

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benefit, and protection, shall be considered to be the property of Bank, and shall not be considered to be held for the benefit of Merchant or be considered to be an asset for or property of Merchant. The aforementioned rights and remedies are not intended to be Bank's exclusive rights or remedies, all of which are expressly reserved, and all rights and remedies are intended to be cumulative with all other rights and remedies of Bank under this Agreement and applicable law.

- iv. Merchant further acknowledges and agrees that the Reserve Account is not required to be an interest bearing account and that, if any interest accrues, such accrued interest is the sole property of Bank and not Merchant.

~~Replenishment of Reserve Account Deficiencies. Whenever the balance in the Reserve Account is less than the minimum balance required, or is otherwise deficient, Merchant Bank may, without prior notice, deposit the deficiency into the Reserve Account by reducing any payment to Merchant required by this Agreement or deduct the deficiency from the Settlement Account or any other deposit account of Merchant with another depository institution (including accounts of Merchant's Principals, Guarantor(s), and general partners if Merchant is a partnership) and deposit it into the Reserve Account. Merchant authorizes deductions from all of its bank accounts about which Bank obtains account information, regardless of the timing, reason, or manner in which Bank obtained such account information, by ACH entry, sight draft, preauthorized check, reverse wire, or otherwise as Bank deems appropriate under the circumstances, without giving prior notice to the Merchant. In addition to, and without limiting the Bank's foregoing rights, Merchant will deposit any deficiency into the Reserve Account within one (1) Business Day after receiving Bank's oral or written request. Without limiting and in addition to Bank's other remedies, Merchant's failure to deposit any deficiency on time will permit Bank, without advance notice, to suspend or cease processing additional Charges and Credit Vouchers. Bank will give Merchant written notice of any suspension or cessation of processing.~~

## Fee Account.

To secure Merchant's performance of its obligations under this Agreement, and any other agreement with Bank, Merchant shall establish and designate a separate Fee Account in which it shall maintain sufficient funds for monthly Processing Fees and any Chargebacks that are not recovered through any Net Settlement. Merchant acknowledges and agrees that it shall maintain sufficient funds in the Fee Account to satisfy Merchant's current and/or future obligations, including, but not limited to, Chargebacks, anticipated Chargebacks, Credit Vouchers, Processing Fees and any other fees owed, fines, penalties, loss allocations, damages, expenses (including, without limitation, attorneys' fees, investigatory and/or remediation expenses), charges, assessments, registrations, certification expenses, payment obligations owed by Merchant to Bank under this Agreement (including, without limitation, indemnity

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obligations), and any and all or other amounts due Bank, the Card Networks, or any governmental, banking, or regulatory agency, or claimed by third parties, arising out of this Agreement or involving Merchant's business, actions, omissions, or use of the services contemplated under the Agreement, including this Addendum, in such amount as determined by Bank in its sole and absolute discretion.

At any time (whether during an Initial or Renewal Term or after termination) in Bank's sole and absolute discretion, Bank may (i) require that the amount on deposit in the Fee Account be increased, or (ii) or otherwise determine the amount to be deposited in the Fee Account.

Bank and Merchant intend that revenues from Card Transactions will be deposited net of any Chargebacks into the Settlement Account, which shall be a segregated account in an approved financial institution in the name of Cubic, with funds held in trust, on behalf of and, for the account and benefit of NH DOT.

Any fees charged by Bank, including per transaction fees, discounts, pass through interchange fees, fines or other amounts Merchant may owe Bank shall be collected first from the Fee Account before being setoff against a Reserve Account, if any, maintained by Merchant Bank. Merchant expressly authorizes Bank to debit and/or credit the Fee Account designated by Merchant according to the terms of the Agreement, including this Addendum. For the avoidance of doubt, Merchant expressly authorizes Bank to debit the Fee Account for all amounts owed to Bank.

4. The remaining provisions of Section 15 pertaining to Deductions of Reserve Account and Reserve Account After Agreement Terminates shall remain unchanged.

5. Amending the following paragraphs from Merchant Agreement, Section 16, Security Interest, to delete the strikethrough text and to insert the underlined text as follows:

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## Merchant's Grant of Security Interest.

- i. To secure Merchant's performance of its obligations under this Agreement, and any other agreement with Bank, Merchant grants Bank a security interest in the Fee Account and Reserve Account ~~each Charge and its proceeds, the Settlement Account, the Reserve Account and any other deposit account of Merchant with a financial institution, whether now existing or established in the future, and in the proceeds of all those accounts, any funds due Merchant from Bank, any of Merchant's property held by Bank, and any inventory with respect to which a Charge has occurred but has not yet been fulfilled (collectively, the "Secured Assets")~~. Pursuant to Article 9 of the Uniform Commercial Code, as amended from time to time, Bank has control over and may direct the disposition of the Secured Assets Fee Account and Reserve Account without further notice, demand, or consent of the Merchant. The security interests granted under this Agreement will continue after this Agreement terminates, until Merchant satisfies all of its payment and other obligations to Bank.
- ii. Furthermore, and with respect to any security interests granted herein, Bank will have all rights afforded under the Uniform Commercial Code, as the same may, from time to time, be in effect in the State of California; provided, however, in the event that, by reason of mandatory provisions of law, any or all of the attachment, perfection or priority of the security interests granted herein is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State of California, then Bank will have all rights afforded under the Uniform Commercial Code as in effect from time to time in such other jurisdiction for purposes of the provisions relating to such attachment, perfection or priority of the security interests, as well as any other applicable law.

Perfection of Security Interest. Upon request of Bank, Merchant will execute and deliver to Bank such documents, in form satisfactory to Bank, as Bank may reasonably request in order to perfect Bank's security interest in the ~~Secured Assets~~ Fee Account and Reserve Account, and will pay all costs and expenses associated with filing the same or this Agreement in all public filing offices, where filing is deemed by Bank to be necessary or desirable. Merchant shall cooperate with Bank in obtaining any control agreement or similar agreement with a depository bank necessary to perfect the security interests granted herein. Bank is authorized to file financing statements relating to the ~~Secured Assets~~ Fee Account or Reserve Account where authorized by law. In addition, Merchant agrees that its signature on the Application will be considered Merchant's signature agreeing to any control agreement as defined in Article 9 of the Uniform Commercial Code among Merchant, Bank and any other financial institution under which Bank, Merchant and any other financial institution agree to the disposition of the ~~Secured Assets~~ Fee Account or Reserve Account. Merchant further appoints Bank as its attorney-in-fact to execute such documents as

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is necessary or desirable to accomplish perfection of any security interests.

This appointment is coupled with an interest and shall be irrevocable as long as Merchant owes any amount to Bank. In addition to the security interest in the ~~Secured Assets~~ Fee Account and Reserve Account, Bank shall have a contractual right of setoff against the ~~Secured Assets~~ Fee Account and Reserve Account.

6. Amending the following paragraphs from Merchant Agreement, Section 18, Processing Fees, to delete the strikethrough text and to insert the underlined text as follows

Merchant will pay Processing Fees in the amount specified in the FEE SCHEDULE attached to the Application or as otherwise provided for in this Agreement or an Addendum thereto, as any of them may be amended from time to time. Bank may increase the Processing Fees by giving Merchant thirty (30) days advance written notice effective for Charges and Credit Vouchers submitted on and after the effective date of the change.

Bank will not be required to provide the Merchant with thirty (30) days' notice of an increase in Processing Fees in the event that any Card Network, or any other entity having such authority, increases the Processing Fees and the effective date for implementation of the increase in the Processing Fees is less than thirty (30) days. In such cases, the Bank shall make reasonable efforts including, but not limited to, written correspondence, notification on statements, website notification, email, fax or direct contact via the telephone or otherwise, to provide reasonable notification to Merchant. However, failure to provide advance notice of the increase in Processing Fees will not affect Merchant's obligation to pay the increased Processing Fees. The increase(s) in Processing Fees shall be effective on the date specified by Bank. Merchant's submission of any Charge to Bank after receiving notice of a change in the Processing Fees shall constitute Merchant's agreement to the new Processing Fees.

Processing Fees and other service charges or amounts owed by Merchant to Bank, including for Chargebacks, anticipated Chargebacks, Credit Vouchers, Processing Fees and any other fees owed, fines, penalties, loss allocations, damages, expenses (including, without limitation, attorneys' fees, investigatory and/or remediation expenses), charges, assessments, registrations, certification expenses, payment obligations owed by Merchant to Bank under this Agreement (including, without limitation, indemnity obligations), and any and all or other amounts due Bank, the Card Networks, or any governmental, banking, or regulatory agency, or claimed by third parties, arising out of this Agreement or involving Merchant's business, actions, omissions, or use of the services contemplated under this Agreement, may be deducted by Merchant Bank from the Fee Account or amounts due Merchant, or from the Settlement Account or from the Reserve Account without prior notice needed to Merchant. Merchant will pay the amounts due by the next Business Day if sufficient funds are not available in the ~~Settlement Account~~ Fee Account and/or the Reserve Account. If there are not sufficient funds in the ~~Settlement Fee~~

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Account or ~~and/or~~ Reserve Account, or Bank cannot access either the ~~Settlement-Fee~~ Account or Reserve Account for any reason, or Merchant does not pay the amounts due by the next Business Day, in addition to all other rights and remedies under this Agreement, Bank may collect any and all amounts due by Merchant by debiting or deducting funds from any other bank account(s) of Merchant about which Bank obtains account information, regardless of the timing, reason, or manner in which Bank obtained information about the other bank account(s) for Merchant (including, but not limited to, bank account(s) that Merchant identifies to Bank or bank account(s) for Merchant that Bank identifies through its own lawful research or investigation), ~~and/or by setting off against any amounts that Bank owes Merchant,~~ without any obligation to give prior notice to Merchant. Merchant shall provide Bank the information necessary to collect all amounts owed by Merchant under this Agreement or the Operating Rules or applicable laws, rules, and regulations. Merchant will be responsible for any and all attorneys' fees and other costs and expenses Bank may incur in collecting any fees or other amounts Merchant owes to Bank.

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

8. Interpretation; Construction. Should any provision of this Security Interest Addendum require interpretation or construction, the Parties agree that this Security Interest Addendum will be interpreted or construed without any presumption that the provisions of this Security Interest Addendum are to be construed against the party that prepared this Addendum. Further, the Parties agree that the Parties, their respective counsel, and other agents have fully and equally participated in the preparation, negotiation, review, and approval of all the provisions of this Security Interest Addendum.

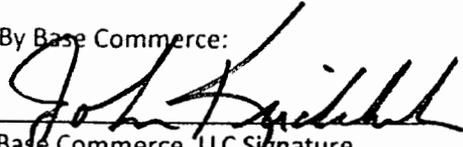
9. Copies; Execution in Counter-Parts. Facsimile, electronic, and photocopies of this Security Interest Addendum shall be considered originals for all purposes, including, but not limited to, any court proceedings. Execution of this Addendum in counterparts is acceptable.

10. Authority. Each of the individuals signing this Security Interest Addendum represents and warrants that he or she has full power and authority to bind the party identified above his or her name.

IN WITNESS WHEREOF, this Security Interest Addendum shall be effective as of the day this Addendum is signed by an authorized representative of Base and Merchant below.

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By Base Commerce:

  
Base Commerce, LLC Signature

JOHN KIRCHHOFER  
Printed Name

LAO / CCO  
Title

4-3-18  
Date

By Cubic:

  
Cubic Transportation Systems, Inc.  
Michael Andranovich

Printed Name

Sr. Contracts Manager

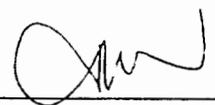
Title

3 April 2018

Date

Agreed as to form:

By Commercial Bank of California

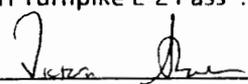
  
Commercial Bank of California

JEFFREY M. WAIS  
Printed Name

COO  
Title

5/3/18  
Date

By New Hampshire Department of  
Transportation doing business as  
"NH Turnpike E-Z Pass":

  
NH Turnpike E-Z Pass

VICTORIA SHEEHAN  
Printed Name

COMMISSIONER  
Title

4/30/18  
Date



## Merchant Processing Agreement – Commercial Bank of California

### MERCHANT CARD PROCESSING AGREEMENT

This Merchant Card Processing Agreement is for merchant card payment processing services between the merchant ("Merchant") that signed the Application (the "Application") and Commercial Bank of California ("Merchant Bank") and Base Commerce, LLC ("Processor"). The Processor and Merchant Bank are collectively hereinafter referred to as the "Bank." Processor and Merchant Bank reserve the right to allocate Bank's duties and obligations amongst themselves as they deem appropriate without notice to Merchant and in their sole and absolute discretion, and Merchant Bank or Processor may jointly or individually assert or exercise any rights or remedies provided to Bank under this Agreement as well as all applicable ACH Rules, Operating Rules, and laws, rules, and regulations.

Notwithstanding the foregoing or any other provision in this Agreement, Merchant understands and agrees: (A) that Merchant Bank does not sponsor Processor into the Discover Financial Network, American Express, Carte Blanche, or JCB Networks, is not providing or agreeing to provide Merchant any services hereunder with respect to Discover Network Services, American Express, Carte Blanche, or JCB Network Card transactions, does not determine; or approve or agree upon any fees, charges, pricing, or any other terms and conditions relating to American Express, Carte Blanche, or JCB Network Card transactions, and has no responsibility or liability to Merchant for Discover Network Services, American Express, Diners Club/Carte Blanche, or JCB Network Card transactions; (B) that Merchant Bank does not provide or agree to provide Merchant any services under this Agreement or have any responsibility or liability to Merchant with respect to any PIN-based debit or stored value, or electronic benefit transfer transactions (except only to the extent, if any, required under Visa's or MasterCard's Operating Rules or under any mandatory provisions of applicable law), or any other Card type transactions (other than Visa and MasterCard credit and non-PIN based debit/stored value/electronic benefit transactions, including any such transactions made with Diner's International Cards which also carry the MasterCard mark and are processed as MasterCard transactions), or any other services specified in the Application as covered in whole or in part by this Agreement but as not being provided by Merchant Bank; and (C) that to the extent applicable to Discover, American Express, Carte Blanche, or JCB Network Cards or transactions, or to any of the other types of Cards, transactions, or services referred to above or in the Application as not being provided by Merchant Bank, any reference herein or in any of the other documents constituting part of the "Agreement" (as defined below) to the terms "Bank" or "Merchant Bank" (except only to the extent the reference constitutes a complete disclaimer of responsibility or liability on the part of Bank or Merchant Bank, or constitutes an obligation on the part of Merchant to indemnify, defend, or hold harmless Bank or Merchant Bank from or against any responsibility or liability) means Processor only.

The Application, appendices, addenda, amendments, exhibits, schedules, and FEE SCHEDULE that accompany the Application or this Merchant Card Processing Agreement, as amended from time to time, as well as the Operating Rules, are expressly incorporated by reference into and made a part of this Merchant Card Processing Agreement and shall be collectively referred to herein as the "Agreement" or the "Merchant Agreement."

According to the processing services selected by Merchant on the Application and, in accordance with the terms of this Agreement and applicable Operating Rules, Merchant agrees to participate in the Bank's Card processing program by honoring Valid Cards in accordance with this Agreement; and to submit sales drafts, Credit Vouchers, and other electronic data to Bank for the Card Program services provided by Bank.

#### **With respect to Visa Transactions:**

Merchant Bank is responsible for providing settlement funds directly to Merchant.

#### **With respect to MasterCard Transactions:**

For purposes of the Agreement and performance of the Agreement by the Processor: (1) the Processor is the exclusive agent of Merchant Bank; (2) Merchant Bank is at all times and entirely responsible for, and in control of, Processor's performance; and (3) Merchant Bank must approve, in advance, any fee to or obligation of the Merchant arising from or related to performance of the Agreement.

The Agreement is not effective and may not be modified in any material respect without the express written consent of Merchant Bank.

Processor may not have access, directly or indirectly, to any account for funds or funds due to a Merchant and/or funds withheld from a Merchant for Chargebacks arising from, or related to, performance of the Agreement. Merchant Bank may not assign or otherwise transfer an obligation to pay or reimburse a Merchant arising from, or related to, performance of the Agreement to Processor.

Processor may not subcontract, sublicense, assign, license, franchise, or in any manner extend or transfer to any third party, any right or obligation of Processor set forth in the Agreement.

Merchant Bank is responsible for the Card Program and for the Merchant's participation in the Card Program. The Agreement shall not take effect until the Application is approved and signed by Bank.

## 1. DEFINITIONS.

"Acceptance" is the process by which the Merchant allows a Card or an electronic debit or credit entry to be used by a Cardholder as a means of payment.

"ACH" means the Automated Clearing House Network.

"ACH Rules" means, collectively, the National Automated Clearing House Association ("NACHA") Operating Rules and NACHA Operating Guidelines, as the same are amended from time to time.

"Address Verification Service" (AVS) is a Card fraud prevention tool designed for mail order, telephone order and electronic commerce (internet) merchants and other electronic transactions. Use of AVS is not a guarantee that a Card Transaction is valid.

"Adjustment" is one or more transactions involving a Credit Voucher, a Chargeback, or a correction to the Settlement Account resulting from a Card Transaction processing error, or from Merchant's failure to follow the Operating Rules.

"Application" is the Application for Merchant Agreement that Merchant completed and signed and which is subsequently individually accepted by both Processor and Merchant Bank by execution or as otherwise provided herein.

"Authorization" is the process whereby Merchant, in compliance with the Operating Rules for each Card, obtains approval of a Charge from the Card Issuer. An Authorization indicates only the availability of the Cardholder's credit limit at the time the Authorization is requested.

"Authorization Code" is a message obtained through the Card Networks' Authorization networks that informs Merchant that a Card transaction has been approved.

"Batch" is a term that collectively refers to Card transactions delivered for processing in a file and processed within a given period of time, usually daily.

"Business Day" is Monday through Friday excluding Merchant Bank holidays. Each Business Day ends at the cut-off time specified by Merchant Bank. Charges submitted for processing on a holiday, weekend, or after the cut-off time are treated as received the following Business Day.

"Card" is any Visa-branded or MasterCard-branded or Discover® Network-branded Credit and Business Cards or Debit Cards, private-label credit card, ATM/debit Card, or any other card issued by a member of a Card Network which Bank may at any time specify in writing as an additional Card payment option available to Merchant (See also "Valid Card").

"Card Not Present" or "CNP" is a Card Transaction wherein neither the Cardholder nor the Card is physically present at the Point of Sale. Mail order and telephone order (MO/TO), electronic commerce, and Preauthorized Transactions are collectively referred to as "CNP Transactions".

"Card Program" is one or more programs of financial service Cards honored by Merchants and financial institutions for presentment and collection of Cardholder indebtedness.

"Card Transaction" is the honoring of a Card by Merchant to purchase Merchant's goods or services.

"Cardholder" is the person issued a Card and a corresponding account by a Card Issuer.

"Cardholder Account" is the account of a Cardholder as represented by a Card.

“Card Network” refers to any entity formed to administer and promote Cards, including, without limitation, MasterCard International, Incorporated (“MasterCard”), Visa U.S.A. Inc. and Visa International (collectively, “Visa”), and Discover Network. In the case of On-line Debit Transactions, “Card Network” includes the Debit Networks.

“Card Issuer” is the institution authorized by a Card Network to issue Cards to Cardholders and that has issued a Card presented to Merchant for a Charge or Credit Voucher.

“Card Verification Value (CVV)/Card Validation Code 2 (CVC2)/Card Identification Data (CID)” is a unique value encoded on the Magnetic Stripe of a Card used to validate Card information during the Authorization process.

“Card Verification Value 2 (CVV2)/Card Validation Code 2 (CVC2)/Card Identification Data (CID)” is a code derived by the Card Issuer and printed on the reverse side of a Card. The CVV2/CVC2/CID is used to deter fraudulent use of an account number in a CNP Transaction.

“Charge” is the evidence of an obligation of a Cardholder arising from a Card Transaction with Merchant which is submitted by Merchant in paper or electronic form to Bank for processing through a Card Network’s interchange system so that payment may be made to Merchant and the amount of the Charge posted to the Cardholder Account. A Charge also may be referred to as a “Charge Record,” “sales draft,” or “sales slip.”

“Chargeback” is a return of a Charge to Merchant, typically initiated by a Cardholder through a Card Issuer, for transmittal to and payment by Merchant under Operating Rules established by the Card Networks.

“Credit and Business Cards” are any Visa-branded, MasterCard-branded, or Discover Network-branded Cards that are adopted by Visa, MasterCard, or Discover Network for use in connection with their consumer credit and charge Card Programs, any Visa-branded, MasterCard-branded, or Discover Network-branded business, corporate, or commercial Card (includes business, corporate and public sector credit, charge or debit Cards), and any other Visa-branded, MasterCard-branded, or Discover Network-branded Card that is not defined as a Debit Card.

“Credit Voucher” is the evidence of a partial or total refund of a Charge submitted by Merchant to Bank in paper or electronic form for processing through a Card Network interchange system so that credit may be made to a Cardholder Account. A Credit Voucher may also be referred to as a “Credit Slip.”

“Debit Cards” are Visa-branded, MasterCard-branded, or Discover Network-branded consumer Cards issued by U.S. Card Issuers that, when presented for payment, access, debit, hold, or settle funds from a consumer’s demand deposit, investment, or other asset account. Examples of Debit Cards include: Visa Classic, Gold, and Platinum Check Cards; Visa Check Card II Check Cards; Visa Buxx Cards; Visa Payroll Cards; Visa Gift Cards; and MasterCard Standard, Gold, and Platinum Debit Cards.

“Debit Network” is an online data processing system used to support PIN based Card Transactions.

“Installment Billing Transaction” is a single purchase of goods that is divided into two or more installment payment transactions made in a Card Not Present environment.

“Magnetic Stripe” refers to a stripe of magnetic information affixed to the back of a plastic credit or debit Card. The Magnetic Stripe contains essential Cardholder and account information.

“Merchant Affiliate” is any entity or account designated as “Affiliated” on the Application or, in addition, any person or entity which is owned or controlled, in whole or in part, by Merchant or any of Merchant’s principal business owners (“Principals”).

“Merchant Bank” is Commercial Bank of California.

“Merchant Identification Number (MID)” is the identification number assigned to Merchant by Bank for the purposes of participation in Bank’s Card Program.

“Merchant Servicer” means any contractor, agent, hardware provider, software provider, or service provider who is engaged directly or indirectly by Merchant or who otherwise acts for or on behalf of Merchant in connection with Merchant’s Acceptance of Cards or the submission of Charges or Credit Vouchers to Bank, or who otherwise assists Merchant in the performance of Merchant’s obligations under this Agreement, and includes, without limitation any “Agent,” “Merchant Servicer,” “Third Party,” “Merchant Processor,” “Data Storage Entity,” “Payment Service Provider,” “Internet Payment Service Provider,” or “Payment Facilitator” who acts for or on behalf of Merchant within the meaning of the Operating Rules, and any other person or entity who will store, transmit, process, or otherwise have access to, any Cardholder or Card transaction data in connection with Merchant’s performance of Merchant’s obligations under this Agreement.

"Online Debit Card Transaction" is a Card Transaction between the Merchant and the Cardholder that is initiated with a Card that is processed through a Debit Network, and that requires entry of a Cardholder's personal identification number ("PIN") during the transaction process.

"Operating Rules" are relevant portions of Operating Rules, Operating Regulations, Operating Manuals, Official Rules, Bulletins, Notices, and similar documents issued by Card Networks, Debit Networks, Merchant Bank, or Processor. Merchant acknowledges that (1) MasterCard has published the "MasterCard Rules," a "Chargeback Guide," a "Transaction Processing Guide," "Security Rules and Procedures," and numerous modules explaining MasterCard's customer compliance programs, all which are available at the MasterCard web site, and (2) Visa has published a public version of the "Visa Core Rules and Visa Product and Service Rules," "Card Acceptance Guidelines for Visa Merchants," and "Chargeback Management Guidelines for Visa Merchants," all of which are available at the Visa website. Merchant further acknowledges that American Express has published a Merchant Operating Guide, which can be found at [www.americanexpress.com/merchanthtopguide](http://www.americanexpress.com/merchanthtopguide). Merchant represents, warrants, and agrees that Merchant has accessed and reviewed each of the above documents, and that Merchant will at all times continue to maintain the capability to access, and will access, review, and comply with each of the above-listed documents as in effect from time to time, including any changed versions thereof as may be published from time to time by the applicable Card Network. Merchant shall not rely upon Bank to notify Merchant of any changes to the Operating Rules or any of the above-listed documents and is solely responsible for accessing, reviewing, and complying with the Operating Rules and all of the above-listed documents, as any of them may be amended or changed from time to time. In the event there shall be any inconsistency between any such published version of a Card Network's Operating Rules and the version made applicable to Merchant Bank from time to time by the applicable Card Network, the version made applicable to Merchant Bank from time to time by the applicable Card Network shall control to the extent of the inconsistency. The Operating Rules and requirements contained in each of the above-listed documents, as in effect from time to time, are expressly incorporated herein by this reference. References herein to any particular sections of any Operating Rules of a Card Network, are deemed to include any future changed, supplemented and/or re-numbered versions of those sections, when and as made effective from time to time by the applicable Card Network.

"Point of Sale" or "POS" is each location of Merchant where Merchant and Cardholder can jointly complete a Charge or Credit Voucher transaction in connection with the Cardholder's purchase of goods or services provided by Merchant.

"Preauthorized Health Care Transaction" is a Card Transaction for which a Cardholder has given a health care Merchant written permission to charge the Cardholder Account for health care services.

"Preauthorized Transaction" is a Card Transaction for which a Cardholder has given advance permission to periodically charge the Cardholder Account. Preauthorized Transactions include Recurring Transactions, Installment Billing Transactions, and Preauthorized Health Care Transactions.

"Processing Fees" are the fees payable by Merchant to Bank for the Card Program services Bank provides to Merchant in connection with this Agreement, as specified in the FEE SCHEDULE to the Application or as otherwise provided for in this Agreement, or an Addendum thereto.

"Recurring Transaction" is a Card Transaction where the Cardholder provides permission, in either written or electronic format, to a Merchant to periodically charge the Cardholder Account for recurring goods or services, including, but not limited to, insurance premiums, subscriptions, monthly internet access fees, membership fees, tuition, or utility charges.

"Regulation E" means the regulations, together with all staff interpretations issued thereunder, published by the Federal Reserve Board to implement The Electronic Funds Transfer Act, 15 U.S.C. § 1693, et seq. "Regulation E" also includes specific rules for all parties involved governing the issuance and use of Debit Cards and the processing of On-line Debit Card Transactions.

"Settlement Account" is the checking account or other acceptable deposit account Merchant maintains at a depository institution acceptable to Bank for credit of Charges by Merchant Bank and debit of Credit Vouchers, Chargebacks, Processing Fees, any fines or fees assessed by Card Networks, other governmental agency or entity having authority, and any other amounts owed by Merchant to Merchant Bank or Processor under this Agreement.

"Valid Card" is a Card that is (1) properly issued under the authority of a Card Network (not counterfeit); (2) "current" according to any beginning and expiration dates on the Card; (3) signed by the Cardholder named on the front or other authorized signer, or in the case of CNP Transactions, in compliance with the applicable Operating Rules; (4) not listed at the time of a Charge in a warning bulletin or notice issued by a Card Network; and (5) not visibly altered or mutilated when physically present at the POS.

## 2. MERCHANT'S APPLICATION AND INFORMATION.

By completing and signing the Application, Merchant applies for the Card Program services covered by the Application and this Agreement. In its sole and absolute discretion, Processor and/or Merchant Bank may accept or reject Merchant's Application. Merchant may present Charges to Bank only for the activities and in the volumes described on the Application and that are approved by Bank, including the percentage of mail/phone order and electronic commerce (internet) transactions. Without limiting the generality of the foregoing, Merchant understands and agrees that Merchant shall not present Charges to Bank which arise from any internet gambling transactions, or any other form of gambling transactions, unless (i) such activities by Merchant are described in the Merchant Application and (ii) there shall first have been entered into a separate Agreement with Merchant with regard to such transactions, signed by both Processor and Merchant Bank.

## 3. MERCHANT'S GENERAL DUTIES.

- Merchant will comply with this Agreement, as well as the Operating Rules and all applicable laws, rules, and regulations for submitting and processing Charges and Credit Vouchers with Bank. Bank is responsible to Merchant for processing Card Transactions under the Operating Rules for the Card Program services to which Merchant subscribes, which may vary among Card types.
- a. Merchant may choose to accept (in the case of Visa or MasterCard Acceptance) (i) Debit Cards only, or (ii) Credit and Business Cards only, or (iii) both Debit Cards and Credit and Business Cards, in each case of the Card Networks designated by Merchant on the Application. The applicable discount rates for Debit Cards and Credit and Business Cards are stated on the FEE SCHEDULE provided in or with the Application, as the same may be modified from time to time as provided herein. Merchant shall designate which Card type(s) Merchant will accept upon the signing of the Application.
  - b. For Card Transactions, Merchant agrees (in the case of each of the following, to the extent such agreement is not prohibited by mandatory provisions of applicable laws, rules, or regulations) to: (i) honor all Valid Cards of the Card type(s) selected under Paragraph 3(b); (ii) with respect to the Card Networks whose Cards Merchant so selects, honor all Cards, regardless of type(s), issued by a non U.S. Card Issuer; (iii) not accept Cardholder payments for previous Card charges incurred at the Merchant location; (iv) not establish minimum or maximum amounts for Card Charges or Credit Vouchers unless otherwise required or allowed by the Operating Rules; (v) not impose any surcharge or convenience fee on Card Charges or transactions if the surcharge or convenience fee is prohibited by the Operating Rules; (vi) not require a Cardholder to complete a postcard or similar device that includes the Cardholder Account number, Card expiration date, signature or any other Card account data in plain view when mailed; (vii) not add any tax to transactions, unless applicable law expressly requires that Merchant be permitted to impose a tax; any tax amount, if allowed, must be included in the Charge amount and not collected separately; (viii) not request or use a Cardholder Account number for any purpose other than as payment for Merchant's goods or services; (ix) not disburse funds in the form of travelers checks or other non-cash media, if the sole purpose is to allow a Cardholder to make a cash purchase of goods or services from Merchant; (x) not use a Charge to make a cash advance to any person or to disburse funds in the form of cash, except for specialized transactions previously authorized by Bank in writing; (xi) not require a Cardholder to provide fingerprints or other personal information, such as address, license, telephone number, or social security number as a condition for honoring a Card, unless required to do so by the Operating Rules; (xii) not make a photocopy of a Card or require the Cardholder to provide a photocopy or facsimile of a Card unless the photocopy or facsimile is needed for a Card recovery program of Bank or a Card Network; (xiii) not submit Card Charges for processing without physical possession of a Card unless pre-approved in writing by Bank, either on the Application or in other written form; (xiv) comply with all applicable laws, rules and regulations in completing Card Transactions, performing obligations under this Agreement, and otherwise conducting Merchant's business; (xv) not accept Cards for transactions that are classified as "Quasi-Cash Transactions" including, but not limited to, the sale of casino gaming chips, money orders, opening deposits on financial or other accounts, wire transfer money orders, or the issuance of scrip; (xvi) not accept a Card to collect or refinance an existing debt that has been deemed uncollectible by Merchant; (xvii) not enter into interchange a Charge that represents collection of a dishonored check; (xviii) not require a Cardholder, as a condition of honoring a Card, to sign a statement that waives the Cardholder's rights to dispute the transaction with the Card Issuer; (xix) as applicable, accept CNP Transactions in accordance with the terms of the CNP ADDENDUM.
  - c. Merchant, and not Bank, is responsible for any advice from and the acts or omissions (whether negligent, fraudulent, or intentional) by Merchant's employees, representatives, Merchant Servicers, processors, consultants,

advisors, contractors, agents, officers, and directors. Merchant, and not Bank, is responsible for the use, unauthorized use, or misuse of Merchant's equipment, POS terminals, or software.

- d. Merchant consents to receiving electronically rather than in paper form all written notices, disclosures, and other documents ("Documents") which are to be provided by Bank to Merchant under this Agreement. Bank will notify Merchant that a Document is available at Processor'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 Application.
- e. 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 may be costs related to accessing Documents electronically, and Merchant agrees that Merchant is responsible for these related access costs.
- f. At any time, and without giving Merchant advance notice, Merchant Bank and/or Processor may elect not to send a Document electronically, in which case a paper copy of the Document will be sent to Merchant or such Document shall otherwise be provided as set forth in Paragraph 20 of this Agreement regarding Notices.

#### 4. PROCEDURES FOR CARD TRANSACTIONS.

- a. Operating Procedures for Card Transactions. In accepting Cards for the purchase of Merchant's goods and services, Merchant shall comply with all requirements of this Agreement, including, but not limited to, the Operating Rules, as the same are revised from time to time, and all applicable laws, rules, and regulations, as they may be amended from time to time.
  - i. Authorization. Unless specifically exempted by Operating Rules, Merchant agrees to obtain Authorization for the total amount of the transaction, including the tip and tax, if applicable, and shall record the positive Authorization Code on the sales draft prior to completing the transaction. Such Authorization must be obtained for every Card Transaction on the transaction date and prior to completing the transaction, unless otherwise specified in the Operating Rules. Procedures for obtaining Authorizations are set forth in the Operating Rules and Merchant shall obtain Authorizations in a manner required by the Operating Rules and in the manner, and following the processes and procedures, determined from time to time by Bank, in its sole and absolute discretion, and communicated to Merchant by Bank. If a Merchant completes a Charge without Authorization, Merchant will be responsible for any Chargeback of the Charge and this Agreement shall be subject to immediate termination without notice. Obtaining Authorization does not assure that the person using the Card is the Cardholder and will not prevent a Chargeback to Merchant for any of a variety of reasons under the Operating Rules, including use of the Card by an unauthorized user, a Cardholder claim, or defense relating to the Charge. Merchant shall use its best efforts, by reasonable and peaceful means, to retain or recover any Card, (a) if Merchant is advised by the authorizing center to retain it, (b) if Merchant has reasonable grounds to believe such Card is counterfeit, fraudulent, or stolen, or (c) if the Card's embossed account number, indent printed account number, and/or encoded account number do not match, or an unexpired Card does not have the appropriate hologram on the Card face. Merchant's efforts to recover a Card will at all times be reasonable under the circumstances. The obligation of Merchant to retain or recover a Card imposed by this Paragraph does not authorize a breach of the peace or any injury to persons or property, and Merchant will defend and hold Bank harmless from any claim arising from any injury to person or property or other breach of the peace.
  - ii. Recording a Charge. Merchant must record each Charge and Credit Voucher by following procedures in a format and manner specified by Bank and using records such as sales drafts, sales slips, or electronic processing records and methods, as set forth in the Operating Rules. Merchant will complete each sale as a single Charge, except as alternative methods are specifically approved by Bank in writing. Merchant will deliver to the Cardholder an accurate and complete copy of the Charge, no later than the time of delivery of the goods or performance of services, using a format approved by the Card Networks and supplied by Bank. Merchant must provide on the Cardholder's copy of the Charge the truncated Card account number of the Cardholder.

iii. REFUNDS; ADJUSTMENTS; CREDIT VOUCHERS.

- a) Merchant Policy. Merchant may limit returned merchandise or limit price adjustments, to the same extent as for sales not involving a Card, provided that Merchant clearly and properly discloses its policy to the Cardholder before the sale, the limits are clearly and properly disclosed on the Charge Record before the Cardholder signs it, and the purchased goods or services are delivered to the Cardholder at the time the Charge takes place. Proper disclosure means the words "NO REFUND," "NO RETURNS," "FINAL SALE," "EXCHANGE ONLY," or "IN STORE CREDIT ONLY" are printed in large letters near the signature line on all copies of the Charge Record prior to obtaining the Cardholder's signature on the Charge Record. Merchant must advise Cardholder in writing of any policy of Merchant that provides for no-cash refunds and in-store credit only. Merchant shall follow Card Network reservation/no-show policies, and shall notify Cardholders in writing of this policy on all advance reservations. Merchant shall also notify Cardholders at the time of the reservation of the exact number of days required for reservation deposit refunds. Merchant will submit any changes to its return policy to Bank in writing at least thirty (30) days before the change and will not implement any change to which Bank reasonably objects. Merchant's policies will not override the Operating Rules, or any applicable law, rule, or regulation, and will not prevent Chargebacks to Merchant under the Operating Rules, any penalties, or other liability arising out of Merchant's failure to comply with applicable laws, rules, or regulations. For the avoidance of any doubt, all of Merchant's return and exchange policies must comply with all applicable Operating Rules and laws, rules, and regulations, and Merchant represents and warrants that its return and exchange policies are at all times in compliance with all applicable Operating Rules and laws, rules, and regulations.
- b) Credit Vouchers. Merchant will not make a refund or Adjustment for a Charge in cash (except when required by law), but will deliver to Bank a Credit Voucher for a refund or Adjustment to the Cardholder Account within three (3) days of the refund or Adjustment and deliver to the Cardholder a copy of the Credit Voucher at the time the refund or Adjustment is made. Merchant will include the refund date, amount, and a brief description of the refund or Adjustment on the Credit Voucher in sufficient detail to identify the Card used and original Charge. The amount of the Credit Voucher must not exceed the amount of the original Charge except for any amount that Merchant agrees to reimburse the Cardholder for return postage. Merchant may not deliver a Credit Voucher to Bank for any refund or Adjustment of a purchase not originating as a Charge with the same Cardholder requesting the refund or Adjustment, a Charge not made with Merchant, or a Charge not originally processed by Bank. Merchant will not complete a Credit Voucher for a Card issued to it, its Principals, or employees except for a valid refund of a Charge originating with Merchant. Merchant may not receive money from a Cardholder and subsequently deliver to Bank a Credit Voucher to make a deposit to the account of the Cardholder. Bank may delay processing Credit Vouchers on any day to the extent they exceed the total of valid Charges presented on that day and the balance in the Settlement Account available to cover the Credit Vouchers until the sum of valid Charges and the balance in the Settlement Account is sufficient to cover the Credit Vouchers.
- c) Credit Vouchers After Agreement Termination. After this Agreement terminates, Bank is not obligated to process any Credit Vouchers that Merchant submits. All Chargebacks related to Credit Voucher disputes will be Merchant's sole responsibility. If Merchant enters into a new Card processing service agreement with a new processor and provides Bank the name and address of Merchant's new processor, Bank will work with the new processor at Merchant's expense to reasonably resolve disputes.
- iv. Submission of Valid Charges. Merchant will submit to Bank a Charge only if the Charge is made or approved by the Cardholder who is issued the Card used for the Charge. Except as otherwise permitted by the Operating Rules and as approved by Bank in advance, Merchant will not submit a Charge for processing by Bank until Merchant has delivered or shipped the goods and/or performed all its services. Merchant will not submit directly or indirectly: (1) any Card Transaction previously

submitted to Bank; (2) any Card Transaction that Merchant knows or should have known to be illegal, fraudulent, or not authorized by the Cardholder; (3) any Card Transaction that results from a transaction outside of Merchant's normal course of business, as described on the Application and approved by Bank; (4) any Card Transaction that results from a transaction not involving Merchant or not originated as the result of an act between Merchant and a Cardholder; (5) any Card Transaction containing the account of a Card issued to Merchant or any account numbers issued to Merchant's business owners, family members, or Principals for transactions that do not represent a purchase of goods or services from Merchant or a related credit; or (6) any Card Transaction until Merchant has performed its obligations to the Cardholder in connection with the Card Transaction or obtained Cardholder's consent for a Pre-Authorized or Recurring Transaction. Merchant is responsible for all of its employees' actions or omissions while in Merchant's employ. Merchant will submit Charges and Credit Vouchers within the applicable time limits specified in the applicable Operating Rules (including, without limitation, those referred to in Paragraph 4(a) (vi) below).

- v. Deposit Requirements and Restrictions. Merchant must deposit only transactions that directly result from Cardholder transactions with Merchant. However, a Merchant Servicer which acts in the capacity of an Internet Payment Service Provider (IPSP), Payment Facilitator (PF), or Payment Service Provider (PSP) in accordance with the applicable Operating Rules, may deposit transaction receipts on behalf of Merchant, as long as such Merchant Servicer has been approved in advance by the Merchant Bank (in accordance with the provisions of this Agreement, including but not limited to, Paragraph 7(f)) to act in such IPSP, PF or PSP capacity for the Merchant). Except as otherwise set forth in the Operating Rules: such Merchant Servicer's name may appear in the clearing record only if both of the following conditions are met: (i) Cardholder accesses the web site of the Merchant Servicer directly, and (ii) the name of the Merchant Servicer is visible to the Cardholder during the selection, order, and payment processing services. If the Cardholder accesses the Merchant's website and is then linked to the web site of the Merchant Servicer for payment, the Merchant Servicer's name must appear in the clearing record in conjunction with the Merchant's name. Merchant must not deposit a transaction until it does one of the following: (a) completes the transaction, (b) ships or provides the goods, (c) performs the purchased service, or (d) obtains the Cardholder's consent for a Recurring Transaction. Merchant may deposit a prepayment, within the time limits specified in Paragraph 4(a)(vi) below, if the Merchant advises the Cardholder of the immediate billing at the time of the transaction, for (1) Prepayment of services, excluding estimates for services to be provided, and (2) Full prepayment of custom-ordered merchandise, manufactured to the Cardholder's specifications. For prepayment of services, the transaction date is considered to be the date of Cardholder prepayment. An Advance Payment Service Merchant must only deposit a transaction representing a partial or complete advance payment, provided Merchant informs the Cardholder of the following: (1) Total price of the services or activity, (2) Advance payment amount, (3) Advance payment confirmation code, and (4) Cancellation terms. For more information on restrictions related to Advance Payment Service transactions, see the Special Services Addendum, Paragraph 2. In the case of Installment Billing Transactions, Merchant must not deposit the first Installment Billing Transaction with Bank until the shipment date of the goods. The Merchant must deposit subsequent Installment Billing Transaction Receipts at either of the following intervals: (1) 30 calendar days or more; or (2) monthly anniversary of the shipment date (same day of each month). For more information on restrictions related to Installment Billing Transactions, see the Card Not Present (CNP) Addendum, Paragraph 5. If Merchant has multiple outlets, Merchant must ensure that Processor and Merchant Bank are able to: 1) Identify the location of each transaction on the transaction receipt, and 2) Include this identification in the clearing record.
- vi. Visa Deposit Time Limits. Except as may otherwise be set forth in the Visa Operating Rules or as may otherwise be required by any applicable law, rule, or regulation: (1) Merchant must deposit Charge transaction receipts within 5 calendar days of the transaction date and Credit transaction receipts within three (3) calendar days of the transaction date, except as specified below; (2) Merchant must deposit Charge transactions for Delayed Delivery Transactions within five (5) calendar days of the date of both the deposit and final payment; (3) Merchants with multiple outlets (and which accumulate transaction receipts at a central office or facility) and these business types: transportation companies subject to federal or foreign regulations, oil companies, car rental companies, hotels, motels, and restaurant chains, must deposit transactions as follows: (a)

Charge transaction receipts within fifteen (15) calendar days of the transaction date, and (b) Credit transaction receipts within five (5) calendar days of the transaction date.

vii. Payments to Merchants for Valid Charges.

- a) Merchant Bank will provide provisional credit to Merchant for each valid Charge which Merchant submits to Bank by crediting Merchant's Settlement Account, provided Merchant Bank has received settlement for the valid Charge through the interchange procedures specified by the Card Network applicable to the Card used for the Charge (Bank does not provide payment for all Card types for which Authorization services are provided). Merchant Bank is not obligated to provide provisional credit to Merchant for Charges submitted that are not valid Charges, and may suspend or discontinue any provisional credit at any time in Merchant Bank's and/or Processor's sole and absolute discretion, including to mitigate Chargeback or other risk, to pay amounts owed by Merchant under this Agreement, or for any reason that would justify termination of this Agreement. Each provisional credit from Merchant Bank to Merchant will be subject to Adjustment, including revocation, upon Bank's further review and verification. Provisional credit to Merchant for a Charge disputed by a Cardholder for any reason is not final.
- b) Merchant Bank may deduct from any payment to Merchant the amount of any Credit Voucher processed for Merchant, any Chargeback to Merchant, any amount to be deposited in the Reserve Account, any Processing Fees, Card Network assessments, fines, or charges due from Merchant, and any other amount owed by Merchant under this Agreement. Merchant must immediately pay Bank the amount by which a Credit Voucher processed on any day exceeds valid Charges submitted on that day. Without limiting Bank's remedies, Merchant Bank may obtain all amounts due from Merchant for Credit Vouchers, Chargebacks, Processing Fees, Card Network assessments, fines or charges, or any other amount owed by Merchant under this Agreement by deducting it from the Settlement Account, Reserve Account, or any other accounts of or funds due Merchant, without notice to Merchant. Merchant expressly agrees that, if there are not sufficient funds in its Settlement Account, Reserve Account, or from funds due to Merchant for provisional credits or otherwise, or Bank cannot access such accounts or funds for any reason, Bank may deduct any and all amounts owed by Merchant under this Agreement, without notice to Merchant, from any other bank account(s) for Merchant about which Bank has account information, regardless of the timing, reason, or manner in which Bank obtained information about the other bank account(s) for Merchant (including, but not limited to, bank account(s) that Merchant identifies to Bank or bank account(s) for Merchant that Bank identifies through its own lawful research or investigation).
- c) Merchant acknowledges that all payments and credits provided to Merchant are provisional and subject to suspension, to Chargebacks and to Adjustments in accordance with this Agreement and the Operating Rules.

viii. Retrieval Requests. If Merchant deposits Charge Records with Bank through magnetic tape, electronic transmission, or electronic data capture terminal, upon the request of a Card Network or Bank, Merchant shall respond to all transaction documentation (retrieval) requests within the time frames specified in the applicable Operating Rules. If Merchant does not respond or responds late to a transaction documentation request, Merchant may be without recourse, as Chargebacks for "non-receipt of requested item" in most cases cannot be reversed.

- b. Procedures for On-Line Debit Card Transactions. Merchant must obtain Authorization for each On-line Debit Card Transaction before Merchant can complete the transaction. Merchant will not complete an On-line Debit Card Transaction unless it has been authorized by the Card Issuer by using the POS Equipment (defined in Paragraph 4(d)) and following the procedures of the Card Network. Merchant may not complete an On-line Debit Card Transaction without entry of the PIN by the Cardholder. Merchant will comply with Regulation E, all other applicable laws, rules, and regulations, and all applicable Operating Rules in connection with each On-line Debt Card Transaction.

- c. CNP Transactions. The CNP ADDENDUM applies to all Card Transactions wherein neither the Cardholder nor the Card is physically present at the Point of Sale. CNP Transactions include mail order and telephone order, electronic commerce (internet), and Preauthorized Transactions. A Merchant may only accept CNP Transactions if the Merchant has completed the appropriate areas on the Application and has been authorized by Merchant Bank and Processor to accept such Card Transactions.
- d. Equipment; Supplies; Displays.
  - i. At Merchant's request, Processor will supply Merchant with POS equipment and/or software, including electronic terminals, other processing equipment, and for On-line Debit Card Transactions and PIN pads (collectively "POS Equipment") that comply with the Operating Rules. Processor will use reasonable and good faith efforts to program the POS Equipment to operate at Merchant's location in compliance with the Operating Rules. However, Processor makes no representations or warranties that Processor's programming of the POS Equipment furnished by Processor will operate in compliance with the Operating Rules. Merchant acknowledges and agrees that it is Merchant's obligation to operate POS Equipment in compliance with the Operating Rules.
  - ii. All third party software, equipment, and services provided or procured by Processor under this Agreement are provided "AS-IS" and without any warranties of merchantability or fitness for a particular purpose, but Processor will, at Merchant's expense, use reasonable commercial efforts to assist Merchant in enforcing any warranty offered by the third party supplier of such software, equipment or services.
  - iii. Merchant will use only the forms for Charges and electronic processing formats provided or approved in advance by Bank. Bank may change the forms from time to time, and, upon notification, Merchant will comply with any changes. Merchant will use Charge forms or materials provided by Bank only for Charges which Merchant submits to Bank.
  - iv. Merchant shall display Visa, MasterCard, Discover Network, and, if applicable, other Card Network decals, program marks, and advertising and promotional materials in compliance with the Operating Rules. Merchant shall only display Visa, MasterCard, and Discover Network approved decals, program marks, and advertising and promotional materials for the Card type(s) that Merchant selected under Paragraph 3(b). Merchant is prohibited from using each Card Network's program marks other than as expressly authorized in writing by Merchant Bank. Program marks mean the brands, emblems, trademarks and/or logos that identify the applicable Card Network's Cards. Additionally, Merchant shall not use the program marks other than to display decals, signage, advertising, and other forms depicting the program marks that are provided to Merchant-by-Merchant Bank pursuant to the Merchant program provided for in this Agreement, or otherwise approved in advance in writing by Merchant Bank. Merchant may use the program marks only to promote the services covered by the program marks by using them on decals, indoor and outdoor signs, websites, advertising materials, and marketing materials; provided that all such uses by Merchant must be approved in advance by Merchant Bank in writing. Merchant shall not use the program marks in such a way that customers could believe that the products or services offered by Merchant are sponsored or guaranteed by the owners of the program marks. Merchant recognizes that it has no ownership rights in the program marks. Merchant shall not assign to any third party any of the rights to use the program marks.
  - v. Merchant may not (a) indicate or imply that the Card Networks or Bank endorses any Merchant goods or services, (b) refer to a Card Network or Bank in stating eligibility for Merchant's products, services, or membership, or (c) use any marks, symbols or logos owned by any Card Network or Bank for any purpose other than those permitted in this Agreement and the Operating Rules.

## 5. CHARGEBACKS.

Bank will chargeback to Merchant and Merchant will pay Bank, the amount of each Charge which Merchant or a Merchant Affiliate submits to Bank for processing that is subject to Chargeback to Bank for any reason under the Operating Rules, or to the extent Bank receives claims regarding the Charges from Cardholders under other provisions of any applicable laws, rules, or regulations.

A Chargeback may occur for any one or more of several reasons under the Operating Rules or through operation of consumer protection and other applicable laws, such as the Truth in Lending Act and the Fair Credit Billing Act. Chargeback reasons include, without limitation:

- i. The Charge Record or any material information it contains as provided by Merchant (such as the Card account number, expiration date of the Card, merchant description, purchase amount, Charge date and Authorization date) is illegible, incomplete, incorrect, unsigned, or is not transmitted to Bank within the required time limits;
- ii. Merchant knew, or by following proper practices, should have known that the Card was not to be charged;
- iii. The Charge was completed with a counterfeit or altered Card, before the valid date, or after the expiration date of the Card;
- iv. Merchant did not obtain Authorization, or did not provide a correct and legible Authorization Code on the Charge Record;
- v. The Charge Record is a duplicate of another Charge Record, represents one of two or more Charges arising from a single purchase, or the Charge has been submitted to another merchant card processor;
- vi. The Cardholder disputes participating in or approving the Charge, signing the Charge Record, or the sale, delivery, quality, or performance of the purchase; the Cardholder alleges that return of goods or a Credit Voucher was improperly refused; or the Cardholder alleges that a Credit Voucher issued by Merchant was not processed for the Cardholder Account;
- vii. The amount on the Charge Record submitted to Bank differs from the amount on the copy required to be delivered to the Cardholder;
- viii. The Charge was fraudulent or the related purchase was not a bona fide purchase in Merchant's ordinary course of business, was subject to any claim of illegality, cancellation, avoidance, or offset for any reason, including, without limitation, negligence, fraud, or dishonesty on the part of Merchant or Merchant's agents or employees or was submitted in violation of Paragraph 6;
- ix. The Cardholder has asserted what the Cardholder believes is a good faith claim or defense against the Charge.
- x. The Charge is in violation of any applicable law, rule, or regulation;
- xi. The Charge is in violation of any applicable Operating Rule or term of this Agreement;
- xii. A Charge is charged back by a Card Issuer;
- xiii. The Card Transaction is one that Bank, for any reason, is or would be required to pay, repurchase, or Chargeback by virtue of Operating Rules or otherwise, and was processed under this Agreement or any agreement with any Merchant Affiliate;
- xiv. The Charge was based on a pre-authorization form, the Card on which the Authorization was based was canceled, and Merchant was so notified prior to the Charge;
- xv. The Card used for the Charge was canceled prior to or at the time of the Charge, and Merchant received notice of the cancellation through the electronic terminal, in writing, or otherwise;
- xvi. The Card expired prior to the date of the Charge or the date of the Charge was prior to the validation date, if any, indicated on the Charge;
- xvii. The Charge information required by this Agreement or the Operating Rules was not submitted to the Bank, or the procedures required by this Agreement or the Operating Rules to be followed in connection with processing a Charge were not followed; or
- xviii. Any representation or warranty made by Merchant in connection with the Charge is false or inaccurate in any respect.

The above list of potential Chargeback reasons is illustrative only and is not intended to be exhaustive.

In the event of any Chargeback or anticipated Chargeback, Bank shall not be obligated to accept a Charge for credit to the Settlement Account. If Bank has credited the Settlement Account or Reserve Account for such a Charge, Bank may return the Charge to the Merchant, and Merchant shall pay Bank the amount of the Chargeback and any associated fees or charges. Merchant acknowledges and agrees that it is solely responsible for all Chargebacks.

Merchant may not enter into interchange any Charge for a Card Transaction that was previously charged back to the Merchant Bank and returned to Merchant, irrespective of Cardholder approval.

If Bank determines that Merchant has or is reasonably likely to have a monthly ratio of Chargebacks to Charges exceeding one percent (1%), Bank may, but is not obligated to, notify Merchant of new procedures it should adopt and additional Processing Fees imposed for processing Chargebacks, and/or may immediately terminate this Agreement, at Merchant Bank's or Processor's sole and absolute discretion, without advance notice. Merchant must immediately pay any fines, assessments, or fees imposed by a Card Network or Bank relating to Chargebacks to Merchant.

The Card Networks have established guidelines, merchant monitoring programs, and reports to track merchant activity such as, but not limited to, excessive credits and Chargebacks, and increased deposit activity. In the event Merchant exceeds the guidelines or submits suspicious transactions as identified by a Card Network or any related program or reports, Merchant may be subject to: (a) operating procedure requirement modifications; (b) incremental Chargebacks and/or fees; (c) settlement delay or withholding; (d) termination of this Agreement; and/or (e) audit and imposition of fines. Merchant hereby releases Bank from any and all damages, liability, costs, or expenses that Merchant may incur as a result of Bank's compliance with Card Network directives.

Each Chargeback to Merchant, along with all fees, fines, assessments, or other amounts imposed by Bank or a Card Network relating to the Chargebacks, is immediately due and payable by Merchant. Without limiting any of Bank's other remedies or Bank's security interest described in Paragraph 16 below, Merchant Bank may, without prior notice to Merchant: (i) deduct and/or debit the amount of a Chargeback or anticipated Chargeback from the Settlement Account, Reserve Account, or any Merchant account at Merchant Bank, (ii) set off or deduct from the amount of a Chargeback or anticipated Chargeback against any other property of Merchant held by Bank, (iii) deduct and/or debit the amount of a Chargeback or anticipated Chargeback from any Settlement Account or Reserve Account of a Merchant Affiliate, (iv) recoup, deduct, or withhold the amount of a Chargeback or anticipated Chargeback by Adjustment of the credits due to Merchant; or (v) demand immediate payment from Merchant for the amount of the Chargeback or anticipated Chargeback. Bank will send Chargeback reports to Merchant as debits occur. To the extent funds are not available from the previously described accounts, funds, or property of the Merchant or Merchant Affiliate, Merchant irrevocably authorizes Merchant Bank to attach and initiate withdrawals of funds from Merchant's accounts at other financial institutions, by ACH entry, sight draft, preauthorized checks, reverse wires, or otherwise to cover the Chargebacks, and Merchant hereby irrevocably authorizes the other financial institutions to withdraw the funds from Merchant's accounts and pay Bank the amount of the Chargebacks. Merchant Bank will release to Merchant any of Merchant's deposits, funds or property (including, but not limited to, the Reserve Account) after Bank determines in its sole and absolute discretion that the deposits, funds, or property are not likely to be needed to cover any Chargebacks or anticipated Chargebacks.

## **6. MERCHANT'S REPRESENTATIONS AND WARRANTIES.**

Upon signing the Application, and each time Merchant submits a Charge, Merchant represents and warrants to Bank that:

- i. Merchant has abided by this Agreement, and all applicable laws, rules and regulations, and the Operating Rules for the Charge;
- ii. Each statement made on the Application and all information contained therein was true and correct, and properly reflects the business, financial condition, Principals, owners, and/or officers of Merchant as of the date Merchant signed the Application agreeing to be bound by this Agreement;
- iii. There have been no materially adverse changes in information provided in the Application or in Merchant's financial condition, or management;
- iv. Merchant is a corporation, limited liability company, partnership, governmental agency, or sole proprietorship validly existing and organized in the United States, Merchant does not do business under a trade name or style not previously disclosed in writing, and there has been no change in the nature of Merchant's business or the product lines that Merchant sells not previously disclosed;
- v. The Charge is genuine and arises from a bona fide sale of merchandise or services by Merchant, within the scope of Merchant's normal course of business as described on the Merchant Application and approved by Bank, represents a valid obligation for the amount shown on the Charge Record, and does not involve the use of the Card for any other purpose;

- vi. Merchant has title to the Charge, there are no liens or other encumbrances on it, and Merchant has the authority to convey the Charge for processing;
- vii. The Charge is not subject to any dispute, set-off, or counterclaim;
- viii. The Charge has not been previously presented for processing unless allowed by the Operating Rules;
- ix. Each statement on the Charge is true and correct, and Merchant has no knowledge of facts that would impair the validity or collectability of the amount of the Charge;
- x. Merchant has completed only one Charge per sale, or one Charge per shipment of merchandise where the Cardholder has agreed to partial shipments;
- xi. The person who executed the Application on behalf of the Merchant has the full power and authority to execute the Application, to enter into and perform under this Agreement, and that person is duly authorized to execute documents and take any action on behalf of Merchant which may be required by Bank now or in the future;
- xii. This Agreement is the legal, valid, and binding obligation of the Merchant enforceable against the Merchant and any Guarantor(s) in accordance with its terms;
- xiii. Merchant shall submit transactions and/or Charges only in accordance with the information contained in the Application and the terms of this Agreement;
- xiv. Merchant has the power and authority to authorize the automatic funds transfer provided for in Agreement;
- xv. The Settlement Account described in Paragraph 14 is owned and controlled by the Merchant and is a valid account for processing debit and credit transactions under this Agreement.
- xvi. That Merchant will immediately notify Merchant Bank and Processor of any material changes to any information provided herein or in the Application including, but not limited to, a change in Merchant's legal entity, location, business type, or the types of goods and services offered for sale by Merchant.
- xvii. Merchant is not (i) a Sanctioned Person, under any of the regulations of the Office of Foreign Assets Control of the U.S. Treasury, (ii) located in or operating under a license issued by a jurisdiction whose government has been identified by the U.S. Department of State as a sponsor of international terrorism under 22 U.S.C. 2371 or 50 U.S.C. App. 2405(j), (iii) located in or operating under a license issued by a jurisdiction that has been designated as non-cooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the U.S. is a member, or (iv) located in or operating under a license issued by a jurisdiction that has been designated by the U.S. Secretary of Treasury pursuant to 31 U.S.C. 5318A as warranting special measures due to money laundering concerns.
- xviii. Merchant has never been placed on the MasterCard MATCH system or the Combined Terminated Merchant File except as disclosed in writing to Bank. There is no action, suit, investigation, or proceeding pending, or to Merchant's knowledge threatened, which if decided adversely, would adversely affect Merchant's financial condition or operations.

## **7. CONFIDENTIALITY; DATA SECURITY.**

Merchant will retain in a secure and confidential manner original or complete and legible copies of each Charge Record, each Credit Voucher required to be provided to Cardholders, and all information required to be submitted in connection with a Card Transaction for at least two (2) years or longer if required by any applicable law, rule, or regulation, or the Operating Rules. Merchant shall render all materials containing Cardholder Account numbers unreadable prior to discarding.

Merchant will store Charge Records and all media containing Cardholder names, Cardholder account information, and other personal information, as well as Card imprints (such as sales drafts and credit records, auto rental agreements, and carbons) in an area limited to selected personnel, and when record-retention requirements have been met, Merchant will destroy the records so that Charge Records are rendered unreadable. If Merchant stores any electronically captured signature of a Cardholder, Merchant may not reproduce such signature except upon the specific request of Bank.

**Merchant will not:**

- i. Provide Cardholder Account numbers, personal Cardholder information, or Card Transaction information to anyone except Bank, Card Networks, or Merchant's agents/Merchant Servicers (but only those who have been approved by Bank as required under this Agreement and are properly registered with the Card Networks) for the purpose of assisting Merchant in completing Card Transactions, or as specifically required by the Operating Rules, or any applicable law, rule, or regulation.
- ii. Retain or store Card Magnetic Stripe, CVV, CVV2, CVC2 or CID data (including Track Data) subsequent to Authorization for a Card Transaction.
- iii. Sell, purchase, provide, or exchange Card account number information or other Card transaction or Cardholder information to any third party, or to any entity other than Merchant's authorized agents/Merchant Servicers (but only those who have been approved by Bank as required under this Agreement and are properly registered with the Card Networks), the Bank, the Card Networks, or in response to valid legal process or subpoena.
- iv. Release any Cardholder information over the telephone under any circumstances.

Merchant may not, without the express written consent of Bank or Cardholder, or an order from a Court of competent jurisdiction, in the event of its (and Merchant shall ensure, and by contract provide, that Merchant's agents/Merchant Servicers shall not, in the event of their or Merchant's) failure, including bankruptcy, insolvency, or other suspension of business operations, sell, transfer, or disclose any materials that contain Cardholder Account numbers, personal Cardholder information, or Card Transaction information to third parties. In the event that Merchant's (or such an agent's/Merchant Servicer's) business fails or ceases to exist, Merchant is required to return (and shall ensure and by contract provide, that such agent/Merchant Servicer shall return) to Bank all such information or provide proof of destruction of this information to Bank.

Merchant confirms that it is, and shall be, in full compliance during the term of this Agreement with all federal, state, and local statutes, rules and regulations (including, without limitation, the information privacy and security requirements of the Gramm Leach Bliley Act and regulations thereunder), as well as all rules and operating regulations, and bylaws of the Card Networks, relating to the establishment and maintenance (pursuant to a comprehensive written information security program, to the extent required by any of such laws, rules, or regulations, or by any such rules, operating regulations, or bylaws of the Card Networks) of appropriate administrative, technical and physical security procedures and safeguards to ensure the security, confidentiality and integrity of Card Transaction and Cardholder information and Merchant shall comply, and shall demonstrate its compliance with, the Visa Cardholder Information Security Program ("CISP"), MasterCard's Site Data Protection ("SDP") Program, Discover Information Security Compliance Program ("DISC"), the Payment Card Industry Data Security Standard (PCI DSS) and Payment Application Data Security Standard (PA-DSS), and any other similar requirements contained in the Operating Rules. Merchant may find the details of the CISP program at [www.visa.com/cisp](http://www.visa.com/cisp). Merchant may find details of the DISC program at <https://www.discovernetwork.com/fraudsecurity/disc.html>. Merchant may find details of the SDP program at <https://www.mastercard.us/en-us/merchants/safety-security/security-recommendations/site-data-protection-PCI.html>

Detailed information about PCI DSS can be found at the PCI DSS Council's Website: [www.pcisecuritystandards.org](http://www.pcisecuritystandards.org). *The Card Networks may impose restrictions, fines, or prohibit Merchant from participating in Card Acceptance programs if it is determined that Merchant is non-compliant with any of the applicable data security requirements. Merchant may be required to comply with an audit to verify compliance with data security requirements and procedures. Merchant is solely responsible for understanding and complying in full with all applicable data security requirements, including, without limitation, PC-DSS, PA-DSS, CISP, SDP, and DISC.*

Merchant acknowledges that any failure to comply, or to demonstrate compliance, with security requirements may result in the imposition of restrictions on Merchant or the permanent prohibition of Merchant's participation in Card Acceptance programs by the Card Networks. Without limiting any of Merchant's obligations or liabilities under other provisions of this Agreement, Merchant hereby agrees to defend, indemnify, and hold harmless Processor and Merchant Bank, including each of their officers, directors, employees, and agents, from any claims, costs, expenses, or losses of any kind arising out of or relating to any actual or suspected data breach or data compromise, including, but not limited to: any fees, fines, or penalties that may be assessed by the Card Networks or any governmental agency; investigation costs; costs of forensic exam or audit; assessments by the Card Networks to reimburse Card Issuers for losses or to assign liability for Card Issuer losses; case management or any other fees assessed by the Card Networks to cover the Card Networks' investigation or other costs; card replacement fees; all claims and demands of Cardholders, Card Issuers, Card Networks, governmental agencies, or others; and all litigation costs and expenses, including reasonable attorney's fees, costs, and expert witness

fees; and all other costs, expenses, or losses of any kind that are associated with, arise out of, or are related to any actual or suspected data security breach, data compromise, or Merchant's noncompliance with Card Network data security requirements or data security requirements of any applicable laws, rules, or regulations. Merchant agrees to promptly pay all of the above amounts to Processor or Merchant Bank, regardless of its belief that it has complied with Card Network data security requirements or any other security precautions and is not responsible for the data breach or compromise, and regardless of any determination by the Card Networks or otherwise that Merchant was or was not the likely source of any loss, disclosure, theft, or compromise of Cardholder data. In addition to the foregoing, in the event of a computer or other data security breach, or suspected computer or other data security breach or data compromise, Merchant agrees to abide by Card Network requirements which may include, without limitation, a forensic network exam by a Qualified Incident Response Assessor (QIRA) and Merchant agrees to cooperate with Processor and Merchant Bank in order to effectively manage the breach response. The defense and indemnity obligation in this Paragraph is in addition to all other defense and indemnity obligations of Merchant under this Agreement and shall survive the termination of this Agreement.

Mandatory Payment Card Industry Data Security Standard (PCI DSS) and Payment Application Data Security Standard (PA-DSS) and PIN Security Compliance. Without limiting the generality of the foregoing, Merchant understands that the payment card industry requires all merchants to be PCI DSS compliant. Processor and Merchant Bank, in compliance with payment brand mandates, will not board merchants for the Card Program services provided for in this Agreement, who are not PCI DSS compliant. In signing this Agreement, Merchant and Merchant's principals agree that they are PCI DSS compliant.

Processor and Merchant Bank also require compliance with the PA-DSS in compliance with industry mandates, and with all applicable Card Network mandates relating to PIN and PIN entry device (PED) security, including without limitation, and as applicable, the applicable Payment Card Industry PCI PIN Security Requirements, PCI PIN-Entry Device Security Requirements, and PCI Encrypting PIN Pad Security Requirements. Merchant agrees that all point-of-sale (POS) and/or terminal hardware and software (make and version) is PA-DSS compliant, and compliant with all applicable PIN and PED security requirements, and that any future changes in POS hardware or software will be in compliance with the PA-DSS and all applicable PIN and PED security requirements.

Merchant must notify Bank and receive Bank's approval prior to engaging, directly or indirectly, any independent contractor or agent, Merchant Servicer in connection with Merchant's Acceptance of Cards, or the submission of Charges or Credit Vouchers to Bank, or otherwise to assist Merchant in the performance of Merchant's obligations under this Agreement, and including without limitation any such person or entity who will have access to Cardholder or Card Transaction data. Such third parties may include, but are not limited to, Merchant's software providers and/or equipment providers. Merchant shall provide Merchant Bank and Processor at least sixty (60) days advance written notice of Merchant's election to use an agent or independent contractor or Merchant Servicer. Merchant Bank and/or Processor may individually approve or deny the use of an agent, independent contractor, or Merchant Servicer in their sole and absolute discretion and at any time. If any such entity is required to be designated a service provider or Merchant Servicer under any applicable Operating Regulation or is otherwise required to certify, register, or act in any fashion pursuant to the Operating Rules, Merchant shall cause such Agent to cooperate with Merchant Bank in completing any steps required for registration and/or certification and/or action. Merchant is solely responsible for any and all applicable fees, costs, expenses, and liabilities associated with such registration and/or certification and/or action. Bank shall in no event be liable to Merchant or any third party for any actions or inactions of any agent, independent contractor, or Merchant Servicer used by Merchant, and Merchant hereby expressly assumes all such liability. Merchant's agreement with any such third party must contain provisions obligating the third party to comply with all applicable laws, rules, and regulations, CISP, SDP, DISC, PCI- DSS, PA-DSS, PIN, and PED security requirements, all other Card Network requirements pertaining to confidentiality, security and integrity of Cardholder and Card Transaction data, all Operating Rules prohibiting storage of certain Card Transaction data, and all other applicable Operating Rules.

Merchant will immediately notify Bank if Merchant decides to use electronic authorization, data capture software, or terminals provided by any entity other than Bank or its authorized designee ("Third Party Terminals") to process transactions, including leasing a terminal from a third party. If Merchant elects to use Third Party Terminals, (i) the third party providing the terminals will be Merchant's Merchant Servicer in the delivery of Card transactions to Bank; and (ii) Merchant assumes full responsibility and liability for any failure of that third party to comply with the requirements of Bank, the Operating Rules, applicable laws, rules or regulations, and this Agreement. Bank will not be responsible for any losses or additional fees incurred by Merchant as a result of any error by a third party agent or Merchant Servicer or a malfunction in a Third Party Terminal.

The use of an agent, Merchant Servicer, or an agent's or Merchant Servicer's software application that has connectivity to the Internet poses an increased risk, and Merchant assumes all liability for such increased risks. If Merchant utilizes software or hardware with a connection to the Internet and such hardware or software interacts in any capacity with the provision of

services contemplated pursuant to this Agreement, Merchant is solely liable without limitation for any and all consequences of such interaction.

Merchant agrees and shall ensure (and by contract shall require) that Merchant's agents and Merchant Servicers provide the same levels of security as those required of Merchant, and that such agents and Merchant Servicers transmit data in accordance with: (1) the required format(s) of the Card Networks; (2) the Operating Rules; and (3) the requirements of Bank.

Merchant must immediately notify Merchant Bank and Processor of any suspected or confirmed loss or theft of materials or records that contain Cardholder Account numbers, Cardholder personal information, or Card Transaction information. In the event of a suspected or confirmed loss or theft, Merchant shall provide immediate access to all facilities, systems, procedures, equipment, and documents as may be deemed appropriate by Bank or its designated representatives for inspection, audit, and copying as deemed appropriate by both Merchant Bank and Processor in their individual sole and absolute discretion. Merchant shall be responsible for all costs associated with such inspection, audit, and copying however such costs may occur.

Merchant authorizes Bank to release its name and address to any third party whom the Bank determines needs to know such information in order for Bank to perform the Card Program services under this Agreement and who has requested such information. Merchant authorizes Bank to disclose Card Transaction data and other information relating to the Merchant, Guarantor, and each of their Principals (including credit and other financial information obtained under Paragraph 10 of this Agreement), to the Card Networks, current and prospective Card Issuers, current and prospective acquirers or other merchant or sponsor banks, third parties in connection with a potential sale of some or all of Merchant Bank's or Processor's merchant portfolio, business, or a merger transaction, regulatory authorities, and other entities to whom Bank or any such entity may be required to provide such information, and to Bank's and each such entity's affiliates, agents, subcontractors, and employees, for purposes Bank or such other entities deem necessary in Bank's or their reasonable discretion, including without limitation, in connection with the performance of their various obligations hereunder or under their other applicable agreements or under the Operating Rules or applicable laws, rules, or regulations.

Federal regulations enacted pursuant to the USA PATRIOT Act and other applicable laws require financial institutions to verify the identity of every person who seeks to open an account with a financial institution. As a result of Merchant's status as an account holder with Merchant Bank, Merchant shall provide documentary verification of Merchant's identity, such as a driver's license or passport for an individual, and certified copy of organization documents for an entity in a manner acceptable to Bank. Bank reserves the right to verify Merchant's identity through other non-documentary methods as Bank deems appropriate in its sole and absolute discretion. Bank may retain a copy of any document it obtains to verify Merchant's identity with the financial institution.

Merchant is responsible for ensuring its Merchant Identification Number ("MID") is kept confidential. When a change to a Merchant account is required, Merchant shall disclose its MID to the Bank representative as confirmation that the person requesting the change has authority. If the person requesting the change discloses the proper MID, Bank shall assume that person has the proper authority to make the change. Merchant shall be fully liable for any changes to its account after disclosure of the MID. Bank may request from Merchant additional information to further verify Merchant's identity.

**MasterCard:** Merchant must not store in any system or in any manner, discretionary card-read data, CVC2 data, Card Identification Data (CID), PIN data, Address Verification Service (AVS) data, or any other prohibited information as set forth in the MasterCard Merchant Rules Manual, except during the Authorization process for a Transaction, that is, from the time an Authorization request message is transmitted and up to the time the Authorization request response message is received. MasterCard permits storage of only the card account number, expiration date, Cardholder name, and service code, in a secure environment to which access is limited, and then only to the extent that this data is required for bona fide purposes and only for the length of time that the data is required for such purposes. The MasterCard Merchant Security Rules and Procedures may be accessed at: <https://www.basecommerce.com/docs/mastercard/merchant-security-rules-and-procedures.pdf>.

Merchant will not contact any Cardholder with respect to any matter arising under the Operating Rules, except as required or permitted under the Operating Rules.

## 8. OPERATING RULES.

Merchant, including all of its employees, agents, Merchant Affiliates, Merchant Servicers, and representatives, must comply with the Operating Rules, as the same may be amended from time to time. Merchant expressly represents and warrants that it, and all of its employees, agents, Merchant Affiliates, Merchant Servicers, and representatives, will comply

with the Operating Rules, as they may be amended from time to time, in connection with any and all actions taken in connection with this Agreement, submitting Card Transactions, and otherwise in Merchant's business activities. The Operating Rules may change with little or no advance notice to Merchant, and Merchant, as well as all of its employees, agents, Merchant Affiliates, Merchant Servicers, and representatives, will be bound by all such changes. Merchant is solely responsible for reviewing and complying with all Operating Rules and any changes that may be made to the Operating Rules from time to time, and may not rely upon Bank to notify Merchant of any changes in the Operating Rules. If Merchant objects to any change in the Operating Rules, it must immediately stop accepting new Charges for Cards governed by the change. The Operating Rules will govern in the event that there is any inconsistency between this Agreement and the Operating Rules. However, nothing in this Agreement shall be construed to impose on Merchant a requirement (including a requirement under the Operating Rules) the imposition of which on Merchant is prohibited by mandatory provisions of applicable law (i.e., where the applicability of such provisions of law to this Agreement, and of the law's prohibition to the particular requirement which otherwise would be imposed on Merchant hereunder, cannot lawfully be waived by agreement), but the requirement hereunder shall be construed to continue in effect and to be imposed on Merchant in all respects and at all times to the fullest extent possible without violating the law's prohibition, with only those particular applications of the requirement which would violate the law's prohibition deemed severed from the provisions hereof.

Operating Rules of the Debit Networks may differ among them with respect to the transactions they allow. Bank, at its discretion, may require that the most restrictive requirements of one Debit Network apply to all of Merchant's On-line Debit Card Transactions, regardless of Card-type.

Merchant further acknowledges and agrees that it is responsible for the actions or omissions of all of its employees, agents, Merchant Affiliates, Merchant Servicers, and representatives, relating to compliance with the Operating Rules and Operating Rules of the Debit Networks.

If Merchant selects, and Bank provides Card Program services for, any one or more of American Express, Diners Club/Carte Blanche or JCB as payment options and Merchant's selection is approved by Bank, Merchant understands that Merchant's acceptance of any of those payment options may require execution of a separate merchant card acceptance agreement with those individual Card Issuers, as applicable, and that agreement will govern the completion, processing, settlement, and other procedures relating to transactions with those Card Issuers. If Merchant experiences problems with transmission or delivery of those Card Issuers' transactions, Merchant will be obligated to contact the appropriate service provider(s) for service.

#### **9. COMPLIANCE WITH APPLICABLE LAWS; MERCHANT'S BUSINESS; OTHER PROCESSORS.**

In addition to complying with the Operating Rules, Merchant, and all of its employees, agents, Merchant Affiliates, Merchant Servicers, and representatives, must comply with all applicable ACH Rules and Federal, state, and local laws, rules, and regulations, including, but not limited to, laws and regulations regarding anti-money laundering compliance and Office of Foreign Asset Control compliance, in completing Charges, submitting them to Bank, performing its obligations under this Agreement, and otherwise conducting Merchant's business. Merchant expressly represents and warrants that it, and all of its employees, agents, Merchant Affiliates, Merchant Servicers, and representatives, will comply with all applicable ACH Rules and Federal, state, and local laws, rules, and regulations in completing Charges, submitting them to Bank, performing its obligations under this Agreement, and otherwise conducting Merchant's business. Merchant is solely responsible for reviewing and complying with all applicable laws, rules, and regulations, including any amendments to same, and may not rely upon Bank to advise Merchant regarding compliance with or notify Merchant of any changes in applicable laws, rules, or regulations.

Merchant will give Merchant Bank and Processor at least thirty (30) days' prior written notice before any change in Merchant's name or location, any change in ownership or management of Merchant's business, any sale, assignment, rental, lease, or transfer of ownership of any location that accepts Cards, or any material change in information concerning Merchant in the Application, and material change in the type or nature of the business carried out by Merchant or otherwise required to be provided to Bank.

Merchant, to the extent permitted under applicable law, agrees that it will not participate in a Card Program (involving a Card for which the Network and Card type is one Merchant has selected under this Agreement as provided in Paragraph 3(b)) with another financial institution or processor without Bank's written approval.

**10. AUDIT, CREDIT REPORTS, AND OTHER INFORMATION.**

- a. Reports about Merchant. From time to time, Bank may obtain credit and other information on Merchant, Principals, owners of Merchant, and officers of Merchant, from Merchant or others (such as customers and suppliers of Merchant, lenders, and credit reporting agencies), and may furnish information on Merchant's relationship with Bank and Bank's experience with Merchant to others seeking the information. Merchant authorizes all parties contacted by Bank to release the credit or other information requested by Bank, and Merchant agrees to provide a separate authorization for release of credit information, if requested by Bank.
- b. Reports from Merchant. Merchant will provide Bank with updated business and financial information concerning Merchant, including financial statements, tax returns, evidence of required licenses, and other information and documents Bank may reasonably request from time to time. Such information shall be provided no later than five (5) Business Days after Bank's request and shall be true, complete, and accurate. Merchant acknowledges and agrees that Bank may furnish the information obtained under this Paragraph and any other information related to Merchant's relationship with Bank and Bank's experience with Merchant to others seeking the information, including, without limitation, the Card Networks, current and prospective Card Issuers, current and prospective acquirers, or other merchant or sponsor banks, third parties in connection with a potential sale of some or all of Merchant Bank's or Processor's merchant portfolio, business, or a merger transaction, regulatory authorities, and other entities to whom Bank or any such entity may be required to provide such information, and to Bank's and each such entity's affiliates, agents, subcontractors, and employees for purposes Bank or such other entities deem necessary in Bank's or their reasonable discretion, including in connection with the performance of their various obligations hereunder or under their other applicable agreements or under the Operating Rules or any applicable law, rule, or regulation. All material marked "confidential" which Bank receives from Merchant will be used only by Bank or Card Network in performing the Card Program services under this Agreement or related services and reporting, or as necessary to comply with any requirements of applicable law or of a Card Network or of any state or federal governmental agency with supervisory authority over Merchant Bank. At any reasonable time, Bank, any Card Network, or any other entity having authority has the right to audit Merchant's records relating to this Agreement. Merchant understands and agrees that, if at the time of signing this Agreement, Merchant is undergoing a forensic investigation, Merchant must notify Bank of the investigation and must fully cooperate with the investigation until it is completed.

**11. ASSIGNMENT; BANKRUPTCY.**

Assignment. This Agreement is binding upon the successors and assigns of Bank and Merchant. Merchant shall not assign this Agreement to another entity without Bank's prior written consent; provided, however, that if Merchant assigns this Agreement without Bank's consent, this Agreement shall be binding upon the assignee as well as Merchant. If Merchant sells its business, the original owner and all Guarantor(s) shall be personally liable for any liabilities of the new owners under this Agreement. Bank may assign its rights and obligations under this Agreement without any prior or subsequent notice to Merchant. Assignment of this Agreement by Bank shall relieve Bank of any further obligations under this Agreement.

Bankruptcy.

- i. Merchant will notify Bank immediately if any bankruptcy, receivership, insolvency, or similar action or petition is filed by or against Merchant. Merchant will include Processor and Merchant Bank on the list and matrix of creditors as filed with the Bankruptcy Court, whether or not a claim may exist at the time of filing, and failure to do so will be cause for immediate termination of this Agreement or any other action available to Merchant under applicable laws, rules and regulations, or the Operating Rules. Merchant and Bank agree that in the event of Merchant's bankruptcy, Bank shall be entitled to suspend further performance under this Agreement.
- ii. Merchant acknowledges and agrees that in the event of a bankruptcy proceeding, in order for Merchant to provide adequate protection under Bankruptcy Code § 362 to Bank, Merchant must establish a Reserve Account or maintain a previously established and then current Reserve Account in amounts required by Bank and in accordance with any Reserve Account provision specified in this Agreement. Merchant Bank will have the right to set off against the Reserve Account for any and all obligations which Merchant may owe Bank, without regard as to whether the obligations relate to Charges initiated or created before or after the filing of the bankruptcy petition. Merchant agrees that it will enter into a stipulation with Bank for filing with the bankruptcy court to obtain authorization for the following: (a) affording Bank relief from the automatic stay and

the ability to set off against the Reserve Account or other Merchant funds to cover Chargebacks and other Merchant liabilities without regard to the pre-petition or post-petition nature of the claim or otherwise providing adequate protection to Bank for Chargebacks or other amounts due; (b) the entry of an order deeming the Agreement assumed; (c) allowing Bank to terminate the assumed Agreement with fifteen (15) days' notice; and (d) the creation or continuation of a judicially sanctioned additional Reserve Account to cover Merchant Chargebacks and other amounts owed to Bank related to processing services. In any event, Merchant further agrees not to oppose, contest, defend against, challenge, or object to any motion for relief from the automatic stay filed by Bank to allow it to enforce and protect its rights and interests under this Agreement including, but not limited to, its rights with respect to the Reserve Account. Merchant agrees to execute and deliver to Bank such instruments and documents Bank may reasonably request to protect and preserve its rights and interests under this Agreement. Merchant agrees to execute and deliver to Bank such instruments and documents Bank may reasonably request to protect and preserve its rights and interests under this Agreement.

- iii. Bank and Merchant agree that the Bank's services and obligations in this Agreement constitute a "financial accommodation" as defined in 11 USC § 365.
- iv. Merchant acknowledges and agrees that it shall not have legal title, a possessory or equitable interest in any pre-Petition funds that have not been settled or that are otherwise maintained in the Reserve Account.

## 12. AMENDMENTS; WAIVERS.

**Amendments.** Unless otherwise provided for in this Agreement, Bank may amend this Agreement at any time by providing Merchant with fifteen (15) days' prior notice by: (a) sending Merchant written notice of such amendment, or (b) posting such amendment to the Processor's web site and/or providing Merchant with electronic notice, which is expressly authorized as provided in Paragraph 20. The amendment will become effective unless Bank receives Merchant's notice terminating this Agreement before the effective date of the amendment. Bank may amend this Agreement upon less than fifteen (15) days' prior notice if Bank reasonably determines that immediate modification is required by any applicable law rule, or regulation, the Operating Rules, or any adverse change in Merchant's financial condition. Further, without limiting the generality of the foregoing, in the event that one or more of the Card Networks increase interchange, fees, assessments, or other charges, Bank may increase Merchant's fees and charges to reflect such increases without notice to Merchant and Merchant shall pay such increased fees and charges. Amendments submitted by Merchant will bind Bank only if in writing and approved and signed by Merchant Bank and Processor.

**Waivers.** Bank's delay, waiver, or failure to enforce any part of this Agreement will not waive Bank's rights under this Agreement. Waivers of any provision of this Agreement must be in writing and signed by Merchant Bank and Processor. A waiver in one instance will not apply to other occasions unless that intent is clear from the signed waiver. All remedies afforded by this Agreement for a breach hereof shall be cumulative.

## 13. TERM; TERMINATION.

- a. **Term/Renewal.** The initial term of this Agreement shall be for the term of one (1) year (the "Initial Term") commencing on the date this Agreement is executed by authorized officers of Merchant Bank and Processor. At the expiration of the Initial Term, this Agreement will automatically renew for successive one (1) year periods ("Renewal Term") unless a party provides the other parties with notice of its intent not to renew this Agreement at least thirty (30) days' prior to the expiration of the then current term.
- b. **TERMINATION.**
  - i. **Termination without Cause.** Processor may terminate this Agreement as to all Card types or individually specified Card types, without cause, upon thirty (30) days' advance written notice. Merchant Bank may terminate this Agreement as to Visa, MasterCard, and Discover Card types without cause upon thirty (30) days' advance written notice. Merchant may terminate this Agreement, without cause, provided that Merchant gives Bank 30 days' advance written notice of its intent to terminate this Agreement.
  - ii. **Early Termination Fees.** The parties agree that if this Agreement is terminated by Merchant before completion of the Initial Term for any reason other than a material uncured breach by Provider, Merchant

will pay Provider an early termination fee determined by multiplying (a) the number of months remaining from the date of termination to the end of the Initial Term, by (b) the average monthly processing fees paid by Merchant to Provider, plus Provider's costs and attorneys' fees incurred in connection with Merchant's termination of this Agreement. Early Termination Fees shall not exceed \$2,500. Merchant agrees that these damages are not a penalty, but are a reasonable computation of the financial harm caused by the early termination of this Agreement.

- iii. **Termination for Cause by Bank.** Merchant Bank or Processor may terminate this Agreement in either's sole and absolute discretion, effective immediately, upon written, electronic, or oral notice to Merchant if Merchant Bank or Processor reasonably determines that any of the following conditions exists:
- a) Merchant has violated any provision of this Agreement or any Card Network requests or requires Bank to terminate this Agreement as to any Card type.
  - b) There is a material adverse change in Merchant's financial condition, a change in Merchant's products/services or volume or mix thereof, or otherwise in Merchant's business, or in Merchant's customer Acceptance policy, which increases Processor's or Merchant Bank's risks.
  - c) A petition in bankruptcy has been filed by or against Merchant, Merchant is generally unable to pay its debts as they become due, a receiver, custodian, trustee, liquidator, or similar official is appointed for a substantial portion of Merchant's business, there is a general assignment for the benefit of creditors, or Merchant's business terminates.
  - d) Any information that Merchant, Principals, or Guarantor(s) provided to Bank, including Application information, was false, incomplete, or misleading when received, or Merchant, Principals, or Guarantor(s) fails to provide financial statements or other requested information suitable to Bank upon request.
  - e) At anytime during the term of this Agreement, Merchant has had a monthly ratio of Chargebacks to Charges exceeding one percent (1%), or Chargebacks are in excess of three percent (3%) of any monthly dollar amount of Charges.
  - f) Merchant fails to maintain sufficient funds in the Settlement Account to cover the amounts due to Bank under this Agreement, there is an overdraft for three (3) days or more in the Settlement Account, overdrafts in the Settlement Account are otherwise excessive, Merchant closes the Settlement Account, or Merchant blocks Bank from submitting debit or other entries to the Settlement Account to pay amounts owed by Merchant under this Agreement.
  - g) Merchant or any of Merchant's Principals, officers, employees, Merchant Affiliates, Merchant Servicers, agents, contractors, or representatives, has been involved in processing Charges with Bank or other parties arising from illegal, fraudulent, or otherwise unauthorized transactions.
  - h) Bank has a good faith belief that Merchant, including any of its employees, Principals, officers, Merchant Affiliates, Merchant Servicers, agents, contractors, or representatives, has violated, are violating, or is likely to violate, the Operating Rules, or any applicable laws, rules, or regulations, or that Merchant will be unable or unwilling to perform its obligations under this Agreement.
  - i) Merchant has failed to pay Bank any amount when due.
  - j) Merchant has failed to promptly perform or discharge any obligation under this Agreement, the Settlement Account, or the Reserve Account.
  - k) Any of Merchant's representations or warranties made in connection with the Application or this Agreement were not true or accurate when given, or there is a breach of any representation or warranty made by Merchant to Bank.
  - l) Merchant has defaulted in the performance of any of its obligations under this Agreement or any agreement Merchant has with Bank.
  - m) Bank is served with legal process seeking to attach or garnish any of Merchant's funds or property in Bank's possession, and Merchant does not satisfy or appeal the legal process within fifteen (15) days of the Bank being served.

- n) The Operating Rules are amended in any way so that the continued existence of this Agreement would cause Bank to be in breach of such Rules.
- o) Any Guaranty supporting Merchant's obligations is revoked, withdrawn, terminated, or altered in any way.
- p) If any circumstances arise regarding Merchant or its business that create harm to reputation or loss of goodwill to any Card Network, Merchant Bank, Processor, or the payment system.
- q) Merchant engages in any activity that causes Bank to be in breach of Bank's policies and procedures, the Operating Rules, or any applicable laws, rules, or regulations.
- r) The circumstances otherwise warrant immediate termination.
- s) Bank has evidence or has reached the conclusion, in its sole and absolute discretion but based upon reasonable facts, that Merchant has engaged in fraudulent activity to include failure to deliver goods and services as advertised or promised, or Merchant has engaged in fraudulent advertising practices.
- t) Bank becomes aware that Merchant is accepting payments for goods or services not approved in advance by Bank and where Bank, any Card Network, the Operating Rules, or applicable laws, rules, or regulations specifically prohibits the sale of such, or where Merchant accepting payments for such unapproved goods or services creates a risk of legal, financial, operational, reputational or any other harm to Bank.
- u) Any information concerning Merchant, Principals, or Guarantor(s) obtained by Bank is unsatisfactory to Bank, in Bank's sole and absolute discretion.
- v) Merchant's percentage of error transactions or retrieval requests is excessive in the sole and absolute discretion and opinion of Bank.
- w) Any insurance policy obtained by Bank or Merchant relating to Card Transactions and/or Chargebacks is cancelled or terminated for any reason.
- x) Bank does not or cannot perform its duties under this Agreement and Bank determines in its sole and absolute discretion that it is not feasible to provide the services contemplated by this Agreement to Merchant. Bank is not obligated to provide replacement services if Bank does not or cannot perform.

Bank may selectively terminate one or more of Merchant's approved locations without terminating this entire Agreement.

Bank's rights of termination under this Agreement are cumulative. A specific right of termination shall not limit any other right of Bank to terminate this Agreement expressed elsewhere in this Agreement. Notice of termination may be given orally or in writing (including electronically), and if given orally, shall be thereafter confirmed in writing.

c) **Liquidated Damages.** Upon termination by Bank for cause as specifically indicated in Paragraph 13(b)(iii)(sub-paragraphs A, E, G, H, K, Q, S and T) above and notwithstanding any other provision of this Agreement, or any other remedy provided hereunder, in the event that Bank reasonably believes Merchant is violating or has violated any applicable Operating Rule, ACH Rule, Regulation E, or any other applicable law, rule or regulation, or is in breach of any of its representations and warranties made in this Agreement relating to Merchant's compliance with all applicable Operating Rules, ACH Rules, Regulation E, or any other applicable laws, rules or regulations, Merchant shall pay to Bank as liquidated damages an amount up to, but not exceeding, 30% of any Reserve Account and/or Settlement Account funds retained by Bank at the time of termination of the Agreement. The parties agree that calculating the Bank's damages for Merchant's violation of any applicable Operating Rule, ACH Rule, Regulation E, or any other applicable law, rule or regulation, or breach of Merchant's representations and warranties regarding Merchant's compliance with all applicable Operating Rules, ACH Rules, Regulation E, or any other applicable laws, rules or regulations, would be uncertain and difficult to ascertain, that the liquidated damages described in this Paragraph are reasonably related to Bank's actual damages and are a reasonable estimate of the damages which Bank would in fact suffer in the event of Merchant's failure to comply with all applicable Operating Rules, ACH Rules, Regulation E, or any other applicable laws, rules or regulations, or Merchant's breach of Merchant's representations and warranties regarding Merchant's compliance with all applicable Operating Rules, ACH Rules, Regulation E, or any other applicable laws, rules or regulations. The parties agree that the liquidated damages set forth in this Paragraph are intended to compensate Bank for its injuries and damages suffered and are not a penalty

imposed against Merchant. The liquidated damages described above are cumulative of Bank's other remedies available under the Agreement, and are not Bank's exclusive remedy or damages. Bank may either, in the alternative, or as arising out of different breaches of the Agreement, Operating Rules, or violations of any applicable laws, rules, or regulations, seek to recover Bank's actual or other damages against Merchant, including Early Termination Fees in Paragraph 13(b)(ii).

d) After Termination. Upon termination, Merchant's rights to complete Charges and Credit Vouchers and submit them to Bank, and to use Charge form or formats, promotional material, and any other items provided by Bank, will cease. Termination of this Agreement (with or without cause) will not terminate the rights and obligations of Merchant and Bank relating to acts or omissions occurring before termination, which shall survive termination, including, without limitation, (i) any Processing Fees or other service fees owed by Merchant to Bank, (ii) any Charges processed for Merchant by Bank (whether before or after termination), (iii) Merchant's obligation to pay all Chargebacks and related fees, (iv) Merchant's obligation to pay any fines, penalties, assessments, damages, charges, loss allocations, expenses (including, without limitation, attorneys' fees, investigatory and/or remediation expenses) or other amounts imposed by Bank, the Card Networks, or any governmental or regulatory agency, or amounts claimed by third parties, (v) Merchant's defense and indemnity obligations, (vi) the Security Interest granted to Bank in this Agreement, and (vii) Merchant's obligation to pay all other amounts owed to Bank under this Agreement. Merchant's obligations with respect to any Charge or Credit Voucher shall be deemed incurred and existing on the date of such Charge or Credit Voucher.

Merchant understands that a file for terminated merchants referred to herein as "MATCH" (whether referred to by the applicable Card Network as "MATCH" or as "Consortium Merchant Negative File," or by any other name) is maintained by the Card Networks containing the names of any business (and its principals) which have been terminated for certain reasons, including fraud, depositing excessive counterfeit paper, excessive unauthorized transactions, depositing paper for others (laundering), bankruptcy, or breach of Merchant Agreement. Merchant acknowledges and agrees that Bank is required to report Merchant to the MATCH if this Agreement is terminated for any of the foregoing reasons or other reasons as may be modified by the Card Networks. Merchant agrees and consents to such reporting in the event of the termination of this Agreement for any of the foregoing reasons and agrees to defend, indemnify, and hold Bank harmless from and against any and all claims, costs, liabilities, damages, loss, and expenses (including reasonable attorneys' fees and costs) incurred by Bank in connection with or arising out of such reporting or termination of this Agreement for cause as set forth above in Paragraph 13(b)(ii)(A-X).

Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 25 will survive termination of this Agreement.

#### **14. SETTLEMENT ACCOUNT.**

Merchant must maintain a Settlement Account in Merchant's name in satisfactory condition at a depository institution under arrangements acceptable to Bank in its sole and absolute discretion. The Settlement Account will be subject to the provisions of Paragraph 16 (Security Interest).

Subject to the terms and conditions of this Agreement, including, without limitation, Paragraph 4(a)(vii), Bank agrees to provisionally credit Merchant for each Charge that Bank accepts from Merchant. Merchant agrees that Merchant Bank may debit or credit the Settlement Account for all amounts owed by Merchant in accordance with this Agreement, including, but not limited to, the amount of any Charge or Credit Voucher processed under this Agreement, Chargebacks, anticipated Chargebacks, Processing Fees and any other fees owed, fines, penalties, loss allocations, damages, expenses (including, without limitation, attorneys' fees, investigatory and/or remediation expenses), charges, assessments, registrations, certification expenses, payment obligations owed by Merchant to Bank under this Agreement (including, without limitation, indemnity obligations), and any and all or other amounts due Bank, the Card Networks, or any governmental, banking, or regulatory agency, or claimed by third parties arising out of this Agreement or involving Merchant's business, actions, omissions, or use of the services contemplated under this Agreement.

Merchant expressly authorizes Merchant Bank or its agents or designated representatives to initiate debit and credit entries and Adjustments to the Settlement Account (whether maintained at Merchant Bank or another financial institution) or the Reserve Account (described in Paragraph 15) through the ACH settlement process for all amounts due under this Agreement, including, but not limited to, the amounts described in the above paragraph. This authorization will remain in full force and effect until termination of the Agreement and after termination until the full and final payment of all obligations of Merchant due under this Agreement. Merchant agrees to be bound by all applicable terms and provisions of the ACH Rules or other applicable network(s), in effect from time to time.

Merchant acknowledges and agrees that Bank will not be liable for any delays in receipt of funds, any failure by Merchant to receive funds, or errors in debit or credit entries caused by Merchant, or third parties, including but not limited to any Card Network or any financial institution.

Merchant agrees that Bank may audit all Charge calculations and that Merchant Bank shall have the right, without notice, to make withdrawals, deposits, or other Adjustments to or from the Settlement Account for any deficiencies or overages, or to pay any amounts owed by Merchant under this Agreement.

Bank shall presume that any amounts Bank pays to or debits from Merchant are correct unless Merchant disputes these by sending Bank written notice within thirty (30) days of the date of the applicable statement containing any disputed payments or debits.

If Merchant chooses to rent or lease processing equipment from Processor or utilizes software provided by Processor for use in processing transactions, Merchant agrees to pay Bank: (1) a pre-determined monthly rental fee; (2) any initial upfront costs as required; and (3) all applicable taxes for such Card processing equipment or software utilization.

If, for any reason whatsoever, the Settlement Account is closed, Bank's ability to initiate debit or credit entries to the Settlement Account is blocked, or debit or credit entries initiated by Bank to the Settlement Account are rejected, Merchant Bank or Processor may terminate this Agreement and suspend processing of all Transactions, effective immediately, unless Merchant cures the breach, within one (1) Business Day of Bank's notification to Merchant of its inability to access the Settlement Account, by unblocking access to the Settlement Account or otherwise opens or provides access to another Settlement Account that is acceptable to Bank, in its sole and absolute discretion. **If Merchant takes any action, whether during the term of this Agreement or after termination, to close the Settlement Account, or block or reject any debit, credit, or other entries initiated by Bank to the Settlement Account for payment of any obligations of Merchant owed under this Agreement, Merchant expressly waives and foregoes any and all right funds or property maintained at Bank, until such time as the breach is cured by unblocking access to the Settlement Account or otherwise, a new Settlement Account is opened, and/or all of Merchant's payment obligations owed to Bank under this Agreement are paid in full. Notwithstanding the foregoing, Merchant acknowledges and agrees that it shall not have legal title, a possessory or equitable interest in any funds that have not been settled or that are otherwise maintained in the Reserve Account, and that Bank may identify, sequester, or transfer to itself (including its own bank account(s)) any or all of the Reserve Account or any other funds or property maintained at Bank that Bank believes is needed to pay any of Merchant's obligations, and Bank may hold and use such amount for its own benefit and protection.** The aforementioned rights and remedies are not intended to be Bank's exclusive rights or remedies, all of which are expressly reserved, and all rights and remedies are intended to be cumulative with all other rights and remedies of Bank under this Agreement and applicable law.

#### **15. ADDITIONAL COLLATERAL SECURITY; RESERVE ACCOUNT.**

As a condition for providing Card Program services, Merchant may be required to provide additional collateral security for Merchant's obligations hereunder, which additional collateral security shall be of a kind, and in amounts, satisfactory to Bank in Bank's sole and absolute discretion, and which shall be in addition to all other collateral provided for in Paragraph 16 hereof. Such additional collateral security may include, for example, (A) a letter of credit, if issued in an amount and on terms acceptable to Bank by a letter of credit issuing bank acceptable to Bank, or (B) the pledge to Bank of a certificate of deposit owned by Merchant in amount satisfactory to Bank and provided all agreements (including agreements of third parties) in form and substance satisfactory to Bank, and all filings and/or other actions necessary in order to perfect in Bank a continuing first priority security interest therein on terms acceptable to Bank, are entered into, made, and/or taken as the case may be.

Bank may require that all or any part of the additional collateral take the form of a Reserve Account, established as hereinafter set forth in this Paragraph 15, at any time when: (i) the Agreement, or the provisions of Card Program services hereunder, shall have terminated for any reason, or any party hereto shall have given notice of termination thereof, or (ii) there shall have occurred an event which entitles Bank to terminate this Agreement or the provision of Card Program services hereunder or which, with the giving of notice and/or the passage of time would entitle Bank to terminate this Agreement or the provision of Card Program services hereunder, and Merchant has not provided alternative additional collateral security of a kind, and in amounts satisfactory to Bank as set forth above in this Paragraph, or (iii) neither (i) nor (ii) above in this Paragraph is applicable, but Bank has determined, for any reason in its sole and absolute discretion, that additional collateral security is required, has requested that Merchant provide same, and Merchant has failed to provide alternative additional collateral security of a kind, and in amounts satisfactory to Bank as set forth above in this Paragraph. Any Reserve Account that is

established shall be subject to the terms and conditions of Paragraph 16 and all other terms and conditions of this Agreement relating to the "Reserve Account."

Whenever Bank requires that additional collateral security take the form of a Reserve Account, the following provisions of this Paragraph 15 shall apply:

Reserve Account During Term of Agreement

- i. Merchant may be required to deposit, or Merchant Bank may deposit by deducting from any payment due to Merchant or from any funds in the Settlement Account or any other deposit account of Merchant, into an account maintained by Merchant Bank (or at another approved depository institution) (the "Reserve Account"), initially or at any time in the future as requested by Bank, sums sufficient to satisfy Merchant's current and/or future obligations, including, but not limited to, Chargebacks, anticipated Chargebacks, Credit Vouchers, Processing Fees and any other fees owed, fines, penalties, loss allocations, damages, expenses (including, without limitation, attorneys' fees, investigatory and/or remediation expenses), charges, assessments, registrations, certification expenses, payment obligations owed by Merchant to Bank under this Agreement (including, without limitation, indemnity obligations), and any and all or other amounts due Bank, the Card Networks, or any governmental, banking, or regulatory agency, or claimed by third parties, arising out of this Agreement or involving Merchant's business, actions, omissions, or use of the services contemplated under this Agreement, in such amount as determined by Bank in its sole and absolute discretion.
- ii. The Reserve Account will be separate from the Settlement Account. Merchant shall have no right of withdrawal from the Reserve Account. The Reserve Account shall be under the sole control of Merchant Bank. Any and all earnings, including interest, from deposits of the Merchant to the Reserve Account shall be the sole property of the Bank.

Reserve Account Deposits and Additions

- i. At any time (whether during an Initial or Renewal Term or after termination) in Bank's sole and absolute discretion, Bank may (i) designate the minimum balance required to be deposited in the Reserve Account, (ii) require that the amount on deposit in the Reserve Account be increased, (iii) require that the Merchant deposit, or Merchant Bank may deposit for Merchant into the Reserve Account, a percentage of, or a fixed amount from, each Charge processed, or (iv) otherwise determine the amount to be deposited in the Reserve Account. Bank at its sole and absolute discretion may require that each month Merchant deposit, or Merchant Bank may deposit by deducting from any payment due to Merchant, from any funds in the Settlement Account, or any other deposit account of Merchant, sums into the Reserve Account no later than the twentieth (20th) day of the month. Bank shall notify the Merchant as to the amount of the funds to be deposited each month.
- ii. Without limiting any of Bank's rights or remedies set forth in the above paragraph or elsewhere in this Agreement, if Bank has reason to believe, in its sole and absolute discretion, that Merchant may be liable to customers or Bank for Chargebacks, anticipated Chargebacks, or any other reason or amounts exceeding the balance of the Reserve Account, Bank may (i) immediately place in the Reserve Account up to 100% of amounts due to Merchant (including for provisional credits or Charges) and/or stop processing Charges for Merchant until such time as the extent of Merchant's obligations to Bank, or Merchant's liability for Chargebacks or other amounts, or Merchant's liability to its customers is known, and Bank no longer deems itself insecure, and/or (ii) demand from Merchant an amount that, in Bank's judgment, is needed to ensure payment of Merchant's obligations and liabilities owed under this Agreement. In addition to all of its other rights and remedies under this Agreement, Merchant's failure to pay any amount requested or otherwise fund the Reserve Account with an amount acceptable to Bank, within one (1) Business Day after Bank's request, will permit Bank to immediately terminate this Agreement and suspend processing of Charges for Merchant without advance notice.
- iii. Merchant acknowledges and agrees that the Reserve Account may contain both funds deposited by the Merchant and funds of other merchants of the Bank. **Merchant acknowledges and agrees that, until such time as all of the amounts owed by Merchant and its obligations are paid to Bank in full, all funds in the Reserve Account shall be considered to be held by Bank for Bank's sole interest, benefit, and protection, shall be considered to be the property of Bank, and shall not be considered to be held for the benefit of Merchant or be considered to be an asset for or property of Merchant.** The aforementioned rights and remedies are not intended to be Bank's exclusive rights or remedies, all of which are expressly reserved, and all rights and remedies are intended to be cumulative with all other rights and remedies of Bank under this Agreement and applicable law.

- iv. Merchant further acknowledges and agrees that the Reserve Account is not required to be an interest bearing account and that, if any interest accrues, such accrued interest is the sole property of Bank and not Merchant.

Replenishment of Reserve Account Deficiencies. Whenever the balance in the Reserve Account is less than the minimum balance required, or is otherwise deficient, Merchant Bank may, without prior notice, deposit the deficiency into the Reserve Account by reducing any payment to Merchant required by this Agreement or deduct the deficiency from the Settlement Account or any other deposit account of Merchant with another depository institution (including accounts of Merchant's Principals, Guarantor(s), and general partners if Merchant is a partnership) and deposit it into the Reserve Account. Merchant authorizes deductions from all of its bank accounts about which Bank obtains account information, regardless of the timing, reason, or manner in which Bank obtained such account information, by ACH entry, sight draft, preauthorized check, reverse wire, or otherwise as Bank deems appropriate under the circumstances, without giving prior notice to the Merchant. In addition to, and without limiting the Bank's foregoing rights, Merchant will deposit any deficiency into the Reserve Account within one (1) Business Day after receiving Bank's oral or written request. Without limiting and in addition to Bank's other remedies, Merchant's failure to deposit any deficiency on time will permit Bank, without advance notice, to suspend or cease processing additional Charges and Credit Vouchers. Bank will give Merchant written notice of any suspension or cessation of processing.

Deductions from Reserve Account. If funds are not available in the Settlement Account, or if Bank determines, in its sole and absolute discretion that Merchant may be liable to Merchant's customers or Bank for Chargebacks, anticipated Chargebacks, or for any reason or amount, Bank, without prior notice to Merchant, may deduct from the Reserve Account any amount sufficient to pay for such obligation of Merchant, including, but not limited to, Chargebacks, anticipated Chargebacks, Credit Vouchers, Processing Fees and any other fees owed, fines, penalties, loss allocations, damages, expenses (including, without limitation, attorneys' fees, investigatory and/or remediation expenses), charges, assessments, registrations, certification expenses, payment obligations owed by Merchant to Bank under this Agreement (including, without limitation, indemnity obligations), and any and all or other amounts due Bank, the Card Networks, or any governmental, banking, or regulatory agency, or claimed by third parties, arising out of this Agreement or involving Merchant's business, actions, omissions, or use of the services contemplated under this Agreement. **Notwithstanding any of the foregoing, as an additional and cumulative right under this Agreement, if Bank reasonably believes that Merchant will in the near future owe any such amounts under this Agreement, including for Chargebacks, anticipated Chargebacks, fines, fees, or any other item described above in this section, Bank may also identify, sequester, or transfer to itself (including its own bank account(s)) any portion of the Reserve Account that Bank believes is needed to pay such obligation, and Bank may hold and use such amount for its own benefit and protection (as opposed to any such amount of the Reserve Account being held for Merchant's benefit or the benefit of any third party).** The aforementioned rights and remedies are not intended to be exclusive and are intended to be cumulative of all of Bank's other rights and remedies under this Agreement and applicable law.

Reserve Account After Agreement Terminates. Merchant Bank may continue to hold or deposit funds in the Reserve Account after termination of this Agreement, regardless of whether termination is by Merchant or Bank, or the reason for termination. Upon termination of the Agreement by Merchant or Bank, Bank may retain sufficient funds to satisfy any and all Chargebacks, anticipated Chargebacks, Credit Vouchers, Processing Fees, and any other fees owed, fines, penalties, loss allocations, damages, expenses (including, without limitation, attorneys' fees, investigatory and/or remediation expenses), charges, assessments, registrations, certification expenses, payment obligations owed by Merchant to Bank under this Agreement (including, without limitation, indemnity obligations), and any and all or other amounts due Bank, the Card Networks, or any governmental, banking, or regulatory agency, or claimed by third parties, arising out of this Agreement or involving Merchant's business, actions, omissions, or use of the services contemplated under this Agreement. **Notwithstanding any of the foregoing, as an additional and cumulative right under this Agreement, if Bank reasonably believes that due to the circumstances of the termination of the Agreement, the amount of Chargebacks, anticipated Chargebacks, fines, fees, or any other item described above in this section, may equal or exceed the amount held in the Reserve Account, Bank may also identify, sequester, or transfer to itself (including its own bank account(s)) any portion of the Reserve Account or other funds held by Bank that Bank believes is needed to pay such obligation, and Bank may hold and use such amount for its own benefit and protection (as opposed to any such amount of the Reserve Account being held for Merchant's benefit or the benefit of any third party).** If no funds have been deposited into the Reserve Account before termination of the Agreement, Bank, at Bank's sole option, may notify Merchant to deposit funds into the Reserve Account (in an amount identified by Bank in its sole and absolute discretion) upon termination of this Agreement. All provisions which apply to a pre-termination Reserve Account will apply after termination, including replenishment of deficiencies. The Reserve Account will be held by Bank or its designated agent for a period of not less than three hundred and sixty-five (365) days from the date of the last Card Transaction processed under the Agreement,

plus the period of any warranty, guarantee, and/or return policy on goods and/or services sold, or until such time as Bank determines, in its sole and absolute discretion, that the release of Reserve Account funds to Merchant is prudent, in the best interest of Bank, and commercially reasonable and that all of Merchant's payment obligations to Bank under this Agreement are fully resolved. Upon expiration of this period, except as set forth to the contrary above, Bank will return the balance in the Reserve Account to Merchant after Bank reasonably determines that the risk of Chargebacks, anticipated Chargebacks, and any other amounts potentially owed by Merchant under the Agreement has ended and after deducting all amounts that Merchant owes to Bank under this Agreement or any other agreement.

## **16. SECURITY INTEREST.**

### Merchant's Grant of Security Interest.

- i. To secure Merchant's performance of its obligations under this Agreement, and any other agreement with Bank, Merchant grants Bank a security interest in each Charge and its proceeds, the Settlement Account, the Reserve Account and any other deposit account of Merchant with a financial institution, whether now existing or established in the future, and in the proceeds of all those accounts, any funds due Merchant from Bank, any of Merchant's property held by Bank, and any inventory with respect to which a Charge has occurred but has not yet been fulfilled (collectively, the "Secured Assets"). Pursuant to Article 9 of the Uniform Commercial Code, as amended from time to time, Bank has control over and may direct the disposition of the Secured Assets without further notice, demand, or consent of the Merchant. The security interests granted under this Agreement will continue after this Agreement terminates, until Merchant satisfies all of its payment and other obligations to Bank.
- ii. Furthermore, and with respect to any security interests granted herein, Bank will have all rights afforded under the Uniform Commercial Code, as the same may, from time to time, be in effect in the State of Arizona; provided, however, in the event that, by reason of mandatory provisions of law, any or all of the attachment, perfection, or priority of the security interests granted herein is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State of Arizona, then Bank will have all rights afforded under the Uniform Commercial Code as in effect from time to time in such other jurisdiction for purposes of the provisions relating to such attachment, perfection or priority of the security interests, as well as any other applicable law.

Perfection of Security Interest. Upon request of Bank, Merchant will execute and deliver to Bank such documents, in form satisfactory to Bank, as Bank may reasonably request in order to perfect Bank's security interest in the Secured Assets, and will pay all costs and expenses associated with filing the same or this Agreement in all public filing offices, where filing is deemed by Bank to be necessary or desirable. Merchant shall cooperate with Bank in obtaining any control agreement or similar agreement with a depository bank necessary to perfect the security interests granted herein. Bank is authorized to file financing statements relating to the Secured Assets where authorized by law. In addition, Merchant agrees that its signature on the Application will be considered Merchant's signature agreeing to any control agreement as defined in Article 9 of the Uniform Commercial Code among Merchant, Bank and any other financial institution under which Bank, Merchant, and any other financial institution agree to the disposition of the Secured Assets. Merchant further appoints Bank as its attorney-in-fact to execute such documents as is necessary or desirable to accomplish perfection of any security interests. This appointment is coupled with an interest, and shall be irrevocable as long as Merchant owes any amount to Bank. In addition to the security interest in the Secured Assets, Bank shall have a contractual right of setoff against the Secured Assets.

## **17. CUSTOMER CLAIMS.**

To the extent that Bank has paid or may pay a Chargeback or Credit Voucher, Merchant will be obligated to reimburse Bank for any sums Bank pays. If Merchant does not reimburse Bank, Bank will have all of the rights and remedies of Cardholders, including, without limitation, the Cardholders' rights under 11 U.S.C. §507(a)(6). Bank may assert any claim on behalf of a Cardholder individually, or on behalf of all Cardholders as a class.

## **18. PROCESSING FEES.**

Merchant will pay Processing Fees in the amount specified in the FEE SCHEDULE attached to the Application or as otherwise provided for in this Agreement or an Addendum thereto, as any of them may be amended from time to time. Bank may increase the Processing Fees by giving Merchant thirty (30) days advance written notice effective for Charges and Credit Vouchers submitted on and after the effective date of the change.

Bank will not be required to provide the Merchant with thirty (30) days' notice of an increase in Processing Fees in the event that any Card Network, or any other entity having such authority, increases the Processing Fees and the effective date for implementation of the increase in the Processing Fees is less than thirty (30) days. In such cases, the Bank shall make reasonable efforts including, but not limited to, written correspondence, notification on statements, website notification, email, fax or direct contact via the telephone or otherwise, to provide reasonable notification to Merchant. However, failure to provide advance notice of the increase in Processing Fees will not affect Merchant's obligation to pay the increased Processing Fees. The increase(s) in Processing Fees shall be effective on the date specified by Bank. Merchant's submission of any Charge to Bank after receiving notice of a change in the Processing Fees shall constitute Merchant's agreement to the new Processing Fees.

Processing Fees and other service charges or amounts owed by Merchant to Bank, including for Chargebacks, anticipated Chargebacks, Credit Vouchers, Processing Fees, and any other fees owed, fines, penalties, loss allocations, damages, expenses (including, without limitation, attorneys' fees, investigatory and/or remediation expenses), charges, assessments, registrations, certification expenses, payment obligations owed by Merchant to Bank under this Agreement (including, without limitation, indemnity obligations), and any and all or other amounts due Bank, the Card Networks, or any governmental, banking, or regulatory agency, or claimed by third parties, arising out of this Agreement or involving Merchant's business, actions, omissions, or use of the services contemplated under this Agreement, may be deducted by Merchant Bank from amounts due Merchant, or from the Settlement Account or from the Reserve Account without prior notice needed to Merchant. Merchant will pay the amounts due by the next Business Day if sufficient funds are not available in the Settlement Account. **If there are not sufficient funds in the Settlement Account or Reserve Account, Bank cannot access either the Settlement Account or Reserve Account for any reason, or Merchant does not pay the amounts due by the next Business Day, in addition to all other rights and remedies under this Agreement, Bank may collect any and all amounts due by Merchant by debiting or deducting funds from any other bank account(s) of Merchant about which Bank obtains account information, regardless of the timing, reason, or manner in which Bank obtained information about the other bank account(s) for Merchant (including, but not limited to, bank account(s) that Merchant identifies to Bank or bank account(s) for Merchant that Bank identifies through its own lawful research or investigation), and/or by setting off against any amounts that Bank owes Merchant, without any obligation to give prior notice to Merchant.** Merchant shall provide Bank the information necessary to collect all amounts owed by Merchant under this Agreement or the Operating Rules or applicable laws, rules, and regulations. Merchant will be responsible for any and all attorneys' fees and other costs and expenses Bank may incur in collecting any fees or other amounts Merchant owes to Bank.

- i. In the FEE SCHEDULE, "Discount" refers to a percentage of the gross dollar bankcard sales processed by Merchant. "Per Item" refers to a fee per bankcard transaction processed by Merchant. "Interchange" refers to the fees assessed by the Card Networks on all bankcard sales that are paid to the bankcard issuing financial institution. "Assessments" refers to the fees assessed and retained by the Card Networks on all bankcard sales. "Fees" or "Processing Fees" refers to all the foregoing and, in addition, to amounts charged for any other purposes or services as described in the Application.
- ii. The Visa, MasterCard, and Discover interchange fees and assessments are based on the current interchange rates and assessments set by Visa, MasterCard, and Discover Network. Any increases in these interchange fees and assessments will be passed through to Merchant either as part of the separately stated interchange fees and assessments, or an increase in any percentage-based or per item processing fee. Merchant acknowledges that whenever Merchant's transactions fail to qualify for any reduced interchange fees, Bank will process such transactions at the applicable interchange fees as set by the applicable Card Network, and Merchant will pay Bank the corresponding increased interchange fees (or as an increase in any percentage-based or per item processing fee based on the corresponding interchange fees). Merchant acknowledges that the fees specified as "qualified" or "mid-qualified" in the Application, as they may be updated or amended from time to time, are basic fees which will apply only to Card transactions which exactly meet certain processing criteria or "qualify" or (in the case of "mid-qualified") partially qualify for those basic fees according to the Rules. Criteria for determining qualification will include, but not be limited to, whether a Card transaction is: (1) hand entered (the required data is not electronically captured by a point-of-sale device reading the information encoded in or on a Card); (2) voice authorized; (3) not authorized; (4) transmitted for processing within twenty-four (24) hours of the Card transaction; or (5) deemed "Non-Qualifying" by the Rules, such as, but not limited to, Card transactions involving foreign Cards or Cards issued as business, commercial, purchasing, or government Cards. In the event that Card transactions submitted to Bank for processing only partially qualify or do not at all qualify for the qualified discount rate quoted in accordance with the Application and/or the Operating Rules, Merchant may be assessed, and agrees to pay, an additional Non-

Qualified or Mid-Qualified Surcharge as set forth on the Application (or, if not set forth therein, or if set forth therein at a rate or in an amount less than that specified in the Operating Rules) as set forth in the Operating Rules.

- iii. Initial Discount. Merchant understands that initial discount rates assessed by Bank are based on Merchant's projected sales volume, average transaction amount, and card Acceptance practices.
  - a. If Merchant's actual sales volume and average transaction amount are less than Merchant's projected sales volume and average transaction amount, Bank reserves the right to adjust discount rates to reflect Merchant's actual sales volume and average transaction amount with 30 days advanced written notice.
- iv. Processing fees shall include PCI Non-Compliance fees for each month Merchant fails to achieve PCI Compliance as specified herein. Bank shall determine in its sole and absolute discretion, whether Merchant has achieved PCI Compliance on the first business day of each month. At a minimum, to be PCI Compliant, Merchant must have a completed PCI DSS SAQ uploaded to Processor through the PCI Toolkit in the Merchant Portal or otherwise delivered the PCI DSS SAQ to Processor in the manner required for Notice pursuant to Paragraph 20 of this Agreement. To be deemed PCI Compliant for any month, Processor must have received Merchant's PCI DSS SAQ prior to the first business day of the month. Merchant acknowledges and agrees that it is Merchant's responsibility to update their PCI DSS SAQ annually, and that an expired PCI DSS SAQ shall not satisfy Merchant's PCI Compliance obligation. Merchant shall be charged a PCI Non-Compliance fee of \$19.99 for each and every month in which it fails to achieve PCI Compliance as set forth in this paragraph.

#### **19. INDEMNIFICATION; LIMITATION OF LIABILITY; WARRANTY.**

Indemnification. Merchant agrees to defend and indemnify Bank, including each of their officers, directors, employees, and agents, against and to hold them harmless from any and all claims, demands, losses, damages, liabilities, and expenses (including attorneys' fees, costs, and investigation expenses) arising out of or relating in any way to any act or omission of Merchant, Merchant's employees, Merchant's designated representatives, contractors, agents, Merchant Affiliates, or Merchant Servicers in connection with or arising out of this Agreement or Merchant's business activities, the duties to be performed by Merchant pursuant to this Agreement, any Charges which Merchant submits to Bank, Merchant's violation of the Operating Rules, ACH Rules, or any applicable law, rule or regulation, investigations of Merchant by any Card Network, or governmental or regulatory agency, and claims by Cardholders or other third parties relating in any way to Merchant. Without limiting the generality of the foregoing, in the event that Bank shall be made a party to any litigation, proceeding, arbitration, bankruptcy proceeding, or other legal process (collectively "Actions") commenced by any third party (including, without limitation any regulatory or governmental agency), Merchant shall defend, indemnify, and hold Bank harmless from and with respect to the Actions, and shall pay all losses, demand, damages, liabilities, costs, expenses, and attorneys' fees (including any costs or expert witness fees) incurred or paid in connection with the Action, together with any judgments rendered or settlements reached. In addition to and without limiting the foregoing, Merchant shall also indemnify, defend, and hold harmless Bank for any hacking, infiltration, or compromise of Merchant's systems or the systems of Merchant Affiliates or Merchant Servicers, designated representatives, or other agents. The indemnity obligations in this Paragraph survive termination of the Agreement, and are in addition to all other indemnification obligations of Merchant stated elsewhere in this Agreement.

Limitation of Liability. Bank will not accept responsibility for errors, acts, or failure to act by others, including but not limited to, agents, third party suppliers of software, equipment or services; or, banks, communication common carriers, data processors, or clearinghouses through which transactions may be passed, originated, and/or authorized. Bank will not be responsible for any loss, liability, or delay caused by fires, earthquakes, war, civil disturbances, power surges or failures, acts of governments, acts of terrorism, labor disputes, failures in communication networks, legal constraints, or other events beyond the reasonable control of Bank. In addition, Bank will also not be responsible to Merchant or any of Merchant's customers for (i) any loss or liability resulting from the denial of credit to any person or Merchant's retention of any Card or any attempt to do so, (ii) any loss caused by a Card Transaction downgrade resulting from defective or faulty POS Equipment or other equipment, even if such equipment is owned by Bank, (iii) the unavailability of services caused by the termination of contracts with computer hardware vendors, processors, or installers, whether terminated by Bank or any other person for any reason, or (iv) interruption or termination of any services caused for any reason. Bank undertakes no duties to Merchant other than the duties expressly provided for in this Agreement, and any and all other or additional duties that may be imposed upon Bank in law or equity are hereby irrevocably waived and released to the maximum extent permitted by law. In any event, Bank's cumulative liability to Merchant, whether arising in contract, tort (including, without limitation, negligence and strict liability) or otherwise, shall not exceed the lesser of \$10,000, or an amount equal to the aggregate of monthly net Processing Fees paid by Merchant in the three (3) month period prior to the month that the incident giving rise to liability occurred.



**IN NO EVENT SHALL BANK BE LIABLE TO MERCHANT OR ANY THIRD PARTY FOR SPECIAL, INCIDENTAL, INDIRECT, CONSEQUENTIAL, OR EXEMPLARY DAMAGES OR FOR ANY INTERRUPTION OR LOSS OF USE, DATA, BUSINESS, OR PROFITS, WHETHER OR NOT SUCH LOSS 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.**

**BANK SPECIFICALLY DISCLAIMS ALL WARRANTIES, AND MERCHANT ACKNOWLEDGES THAT BANK HAS PROVIDED NOWARRANTIES OF ANY KIND, EXPRESSED OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE SERVICES PROVIDED HEREUNDER. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, BANK DOES NOT GUARANTEE OR WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE, AND BANK MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE SERVICES OR ANY EQUIPMENT IT PROVIDES HEREUNDER. IF THERE ARE ERRORS, OMISSIONS, INTERRUPTIONS, OR DELAYS RESULTING FROM BANK'S PERFORMANCE OR ANY FAILURE TO PERFORM, BANK'S LIABILITY SHALL BE LIMITED TO CORRECTING SUCH ERRORS, IF COMMERCIALY REASONABLE.**

Merchant, and not the Bank, is solely responsible for any advice from, and acts, omissions, or misconduct by Merchant's employees, processors, consultants, advisors, Merchant Affiliates, Merchant Servicers, contractors, agents, officers, and directors. Merchant, and not Bank, is responsible for the use, unauthorized use, or misuse of Merchant's equipment, POS Equipment, or software.

## **20. NOTICES.**

Except to the extent oral or electronic notice is explicitly authorized herein, each notice required by this Agreement will be in writing and will be effective when delivered, addressed to Merchant Bank at the address designated on the Application, to Processor at the address designated on the Application, and to Merchant at Merchant's address designated in the Application, or at such other address as any party may provide by written notice to the other parties. Any address Merchant designates will also be the address to which Bank mails Merchant's statements, if a mailed statement is required. Otherwise, merchant statements are made available to Merchant by Processor through Processor's website. Delivery by facsimile transmission will be considered effective when the sender receives electronic confirmation of the transmission.

## **21. GOVERNING LAW; JURISDICTION; VENUE; JURY TRIAL WAIVER.**

This Agreement is made by Merchant and Processor in Maricopa County, Arizona, and by Merchant Bank in Irvine, California, and the Agreement, as well as all claims related to, arising out of, or involving this Agreement (including all exhibits and amendments) or Merchant's business activities, are governed by, and construed under, the laws of the State of Arizona without regard for the principles of conflicts of law. All performances due and transactions undertaken by Merchant or Processor pursuant to this Agreement shall be deemed to be due or have occurred in Maricopa County, Arizona, and Merchant's entry into this Agreement, and any Guarantor's entry into a Continuing Guaranty relating to this Agreement, shall be conclusively deemed to be a transaction of business in Maricopa County, Arizona. In the event any party to this Agreement, any third-party beneficiary, or Guarantor commences legal action with respect to claims related to, arising out of, or involving this Agreement or Merchant's business activities, each of them (i) agree that any such action shall only be commenced in a court of competent jurisdiction in Maricopa County, Arizona, and in no other county or state; (ii) consent and submit to exclusive personal jurisdiction and venue in such a court; and (iii) irrevocably and unconditionally waive any defense of lack of personal jurisdiction or venue in any such proceeding. **TO THE EXTENT PERMITTED BY APPLICABLE LAW, MERCHANT AND PROVIDER WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDINGS ARISING OUT OF OR RELATING TO THIS AGREEMENT, AND EACH AGREES THAT ANY SUCH ACTIONS OR PROCEEDINGS WILL BE TRIED BY A JUDGE WITHOUT A JURY.** The prevailing party in any claim or action described in this Paragraph shall be entitled to an award of its reasonable in-house and outside counsel attorneys' fees and costs.

**22. ATTORNEY FEES.**

Merchant and/or Guarantor(s) will be liable for, and will indemnify and reimburse Bank for all in-house and outside counsel attorneys' fees and other costs and expenses paid (including expert witness fees and investigation costs) or incurred by Bank in the enforcement of this Agreement, in matters relating to this Agreement, in collecting any amounts due from Merchant to Bank, or arising from any breach by Merchant of this Agreement, or any other wrongdoing by Merchant or Guarantor(s). This liability and indemnity obligation survives termination of the Agreement and is in addition to all other like obligations of Merchant in this Agreement.

**23. ADDENDUM.**

The following Addenda are made a part of this Agreement: CARD NOT PRESENT (CNP) ADDENDUM; SPECIAL SERVICES ADDENDUM; MERCHANT USE AND DISCLOSURE OF BIN INFORMATION ADDENDUM. The applicability of these Addenda depends upon the Merchant's business, and the Card Program services requested by Merchant. In its sole and absolute discretion (except as otherwise set forth in the Merchant Use and Disclosure of BIN Information Addendum), Bank may accept or reject Merchant's request for services provided in the Addenda. Merchant understands and agrees that any attached Addendum is considered a part of the Agreement, and Merchant will comply with the terms therein. In the event of conflict between the provisions of this Agreement and the provisions of an Addendum, the provisions of the Addendum will control.

**24. FINAL AGREEMENT; SEVERABILITY; EFFECTIVE DATE.**

This Agreement, including the Application, all exhibits, addenda, amendments, and schedules, is the complete and final agreement between Merchant and Bank for the Card Program services covered by this Agreement, and supersedes all prior or contemporaneous negotiations, stipulations, or agreements. Merchant agrees and represents that no promise, representation, or agreement, which is not expressed in this Agreement, has been made to it in executing this Agreement, and Merchant is not relying upon any statement or representation of any agent of Bank not contained in this Agreement. If any provision of this Agreement is invalid, inoperative, or unenforceable, the other provisions remain effective. This Agreement becomes effective when the Application is signed and approved by Bank.

**25. CONTINUING GUARANTY.**

- a. As a primary inducement to Bank to enter into this Agreement, and to approve the Application of Merchant, the Guarantor(s), personally, jointly, and severally, who signed on the Guarantor signature line(s) on the Application, agree to be bound by all terms and provisions of this Agreement to the same extent and in the same manner as Merchant, and unconditionally and irrevocably, personally guarantee the continuing full and faithful performance and payment by Merchant of each and all of Merchant's duties and obligations to Bank under this Agreement or any other agreement currently in effect or in the future entered into between Merchant or its Principals and Bank, as such agreements now exist or are amended from time to time, with or without notice to Guarantor(s).
- b. Merchant and Guarantor(s) further agree to be bound by the terms and provisions of any Merchant Card Processing Agreement between Bank and any Merchant Affiliate (as that term is defined in this Agreement), regardless of whether such agreement currently exists or is executed, amended, or supplement at some future date. Merchant and Guarantor(s), jointly and severally, unconditionally, personally, and irrevocably guarantee the full payment and performance of each and all duties and obligations owed to Bank by Merchant Affiliate pursuant to any Merchant Card Processing Agreement. The provisions of Paragraph 25 apply to the guarantee by Merchant and Guarantor(s) of the Merchant Affiliate's obligations to Bank under any Merchant Card Processing Agreement.
- c. Guarantor(s) understands that Bank, without notice to Guarantor(s), may from time to time renew or extend the Agreement, modify rates, limits, charges and fees, or modify the amount or type of services provided to Merchant all of which may increase the Guarantor's obligations under this Guaranty. Guarantor(s) further understands that Bank may proceed directly against Guarantor(s) without first exhausting Bank's remedies against the Merchant, any other person or entity responsible to Bank, or any security held by Bank. This Guaranty is a continuing guaranty and will not be discharged or affected by the release or discharge of Merchant or the death of the Guarantor(s). This Guaranty will bind all heirs, administrators, and representatives of the Guarantor(s) and may be enforced by or for the benefit of any successor of Bank. To the fullest extent permissible under applicable law, Guarantor(s) waives any and all



rights of subrogation, reimbursement, or indemnity derived from Merchant, all other rights and defenses available to Merchant, and all other rights and defenses available to Guarantor(s). Guarantor(s) understand that the inducement to Bank to enter into this Agreement is consideration for the guaranty, and that this guaranty remains in full force and effect even if the Guarantor(s) receive no additional benefit from the guaranty.

**PLEASE REVIEW SPECIAL SERVICES ADDENDUM AND CARD NOT PRESENT ADDENDUM AND MERCHANT USE AND DISCLOSURE OF BIN ADDENDUM TO FOLLOW.**

## **SPECIAL SERVICES ADDENDUM**

This Special Services Addendum is made a part of the terms and conditions of the Merchant Card Processing Agreement (the "Agreement") and the Application for processing services that Merchant signed (the "Application"). Under the Agreement, Merchant has agreed to comply with all terms and conditions of the Addendum. This Addendum describes additional requirements that Merchant is to follow for the special card processing services referred to herein. Requirements set forth herein are in addition to requirements set forth in the Agreement, the Operating Rules. All capitalized terms used in this Addendum and not otherwise defined herein shall have the meanings assigned to them in the Agreement or Application.

### **DEFINITIONS:**

"Account Funding Transaction" - Use of a Card to fund another account, such as a prepaid Card account.

"Advance Payment Service" - A Visa service that allows a Cardholder to use his or her Card for a partial or complete advance payment for recreational services or activities provided by an Advance Payment Service Merchant.

"Advance Payment Service Merchant" - A non-T&E Merchant participating in the Advance Payment Service, whose primary function is to provide recreational services to tourism and travel.

"Advance Payment Service Transaction" - A Transaction completed by an Advance Payment Service Merchant.

"Car Rental Company" - A merchant whose primary business is the rental of passenger vehicles.

"Central Reservations Service" - An entity that acts as a reservations resource for lodging establishments located in close proximity to each other.

"CPS/Small Ticket" - A Visa-offered service designed to meet the special Card Acceptance and operating procedures of certain Merchants involving small dollar transactions.

"Dynamic Currency Conversion" - A conversion of currency in which goods or services are normally priced into a different currency, as agreed upon by the Cardholder and Merchant.

"Small Ticket Payment Service" - A Visa service that permits certain Merchants (e.g., certain local commuter passenger transportation, taxicabs and limousines, bus lines, toll and bridge fees, restaurants, fast food restaurants, news dealers, newsstands, laundries—family, commercial, dry cleaners, quick copy, reproduction, and blueprinting services, parking lots and garages, car washes, motion picture theaters and video tape rental stores) to process Card Transactions using special procedures as outlined in the Visa Operating Rules.

"Lodging Merchant" - A merchant that sells overnight accommodations intended for a limited period of time.

"No Signature Required Service" - A Visa Point of Sale service that permits certain No Signature Required Merchants (e.g., certain local commuter passenger transportation, taxicabs and limousines, bus lines, toll and bridge fees, restaurants, fast food restaurants, news dealers, newsstands, cigar stores/stands, laundries—family, commercial, dry cleaners, quick copy, reproduction, and blueprinting services, parking lots and garages, car washes, motion picture theaters, and video tape rental stores; or certain convenience stores, filling stations—automotive gasoline, and drug stores, pharmacies, and U.S. Postal Service) to process Card Transactions under \$25 using special procedures as outlined in the Visa Operating Rules.

"Priority Check-Out Service" - A Visa service provided that allows a Cardholder to authorize the use of the Cardholder's Card for payment of the total obligation to the Lodging Merchant with or without prior knowledge of the total amount, by signing a completed Priority Check-Out Agreement.

"Priority Check-Out Agreement" - A written agreement that, when bearing the Cardholder's signature, authorizes a Lodging Merchant participating in Visa's Priority Check-Out Service to deposit a Charge without the Cardholder's signature for the total amount of the Cardholder's obligation.

"Supermarket Incentive Program" - A Visa program that permits certain supermarket merchants to qualify for reduced interchange reimbursement fees.

"T&E Advance Deposit Service" - A Visa service that a Lodging Merchant or Car Rental Company provides to a Cardholder, allowing use of a Visa Card to pay an advance deposit required to reserve accommodations or a vehicle.

"T&E Merchant" - A merchant whose primary function is the provision of travel related services.



"Telephone Service Transaction" - A Card Transaction in which a Cardholder uses a Visa Card to purchase a telephone call.

"Visa Cash Back Service" - A Visa service whereby cash is obtained from a qualified Merchant through the use of a Visa Check Card II in conjunction with, and processed as, a PIN-based transaction.

## **SPECIAL SERVICES TERMS AND CONDITIONS**

**Advanced Payment Service.** A Merchant participating in the Advance Payment Service must comply with all applicable Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding "Advance Payment Service Transactions – U.S. Region." The copy of the transaction receipt mailed to the Cardholder, along with the written confirmation and cancellation policy, must have the card expiration date and all but the last four digits of the card number suppressed). In event of cancellation, the copy of the credit transaction receipt mailed to the Cardholder must have the Card expiration date and all but the last 4 digits of the Card account number suppressed.

**Reservation Service.** If Merchant provides lodging (hotel, motel, resort, or inn) or car rentals only for "Specialized Vehicles" (e.g., a unique class of vehicle not in the Merchant's main rental fleet and not constituting more than five percent (5%) of Merchant's rental fleet), Merchant may use certain Card types specified by Bank to guarantee a reservation by obtaining the name of Cardholder, the Card account number and expiration date, and the Cardholder's address if written confirmation is requested, and by complying with all applicable Operating Rules, including without limitation, the procedures and requirements set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding Car Rentals and hotel guaranteed reservations. A written confirmation or the written confirmation of a cancellation provided the Cardholder, should suppress the card expiration date and all but the last four digits of the card number to the extent such suppression is required by applicable law.

**T&E Advance Deposit Service.** Merchants shall comply with the Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding T&E and advance deposit transactions. The copy of the Charge (reflecting the advance deposit) mailed (together with the Merchant's cancellation policy) to the Cardholder must have the card expiration date and all but the last four digits of the card number suppressed. In the event of cancellation, in the copy of the credit transaction receipt mailed to the Cardholder, the card expiration date and all but the last four digits of the card number must be suppressed. In addition to all other defense and indemnity obligations contained in this Addendum or otherwise in the Agreement, Merchant shall defend, indemnify, and hold harmless Bank and any Card Network from any loss, damage, claim, or suit (including reasonable attorneys' fees and costs) arising from use of a Card for a Deposit. This indemnification obligation survives termination of this Addendum and the Agreement.

**Central Reservation Service:** After application to and approval by Merchant Bank (which shall be in Merchant Bank's sole and absolute discretion), and performance of a site inspection, Merchant may participate in the Central Reservation Service. Merchant shall comply with all applicable Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding "Central Reservation Service—U.S. Region."

**Priority Check-Out Service.** Any lodging merchant participating in the Central Reservation Service or T&E Advance Deposit Service participating in the Priority Check-Out Service, must comply with all applicable Operating Rules including without limitation those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding "Priority Check-Out Service." The merchant must ask the Cardholder to complete, sign, and return a Priority Check-Out Agreement which provides for at least the following: (a) The Card account number; (b) Merchant name, location, and telephone number, (c) The departure date of the Cardholder; (d) The Cardholder name and room number; (e) A statement authorizing Merchant to charge the Cardholder Account for the amount of the bill without the Cardholder's signature on the Charge; (f) The Cardholder's signature on the Priority Check-Out Agreement; and (g) A provision allowing the Cardholder to request from Merchant specific billing receipts, including the name and address where Merchant should mail the receipts. The transaction receipt copy to be mailed to the Cardholder with the itemized bill and (if requested) signed Priority Check-Out Agreement, should have the card expiration date and all but the last four digits of the card number suppressed.

**Account Funding Transactions.** Merchant must comply with all applicable Operating Rules including without limitation those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding "Account Funding Transactions."

**CPS/Small Ticket.** A qualified merchant (refer to Visa Core Rules and Visa Product and Service Rules, "CPS/Small Ticket—U.S. Region") that participates in this service must comply with all applicable Operating Rules, including without

limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding “CPS/Small Ticket—U.S. Region.”

Dynamic Currency Conversion. A Merchant that offers Dynamic Currency Conversion services must comply with all applicable Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding “Dynamic Currency Conversion.” Merchant must not misrepresent, either explicitly or implicitly, that its Dynamic Currency Conversion service is a Visa service. The copy of the transaction receipt provided to the Cardholder must have the card expiration date and all but the last four digits of the card number suppressed.

Small Ticket Payment Service. A qualifying Merchant (refer to Visa Core Rules and Visa Product and Service Rules regarding Small Ticket Transactions) may participate in the Small Ticket Payment Service on qualifying transactions subject to the requirements set forth in the Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding Small Ticket Transactions.

Preauthorized Health Care. Participating Health Care Merchants must comply with all applicable Operating Rules including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding “Preauthorized Health Care Transactions—U.S. Region.”

CPS/Supermarket Incentive Program. A merchant location may participate in the CPS/Supermarket Incentive Program, provided Merchant is assigned a Merchant Category Code of 5411 and meets the criteria and requirements set forth in the Operating Rules, including without limitation those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding “CPS/Supermarket—U.S. Region.”

Telephone Service Transactions. A telephone service Merchant must comply with all applicable Operating Rules including without limitation those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding “Telephone Service Transactions.”

Visa Cash-Back Service. A qualified Merchant may offer this service provided Merchant meets the conditions and complies with the requirements set forth in the Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding “Cash-Back Services.”

No Signature Required Service. A qualifying Merchant may participate in the No Signature Required Service subject to the requirements set forth in the Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding “No Signature Required Transactions (NSR).”

Health Care Eligibility Service. A Health Care Merchant that participates in the Health Care Eligibility service must comply with the Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding Health Care transactions.

Visa ReadyLink. Participating Merchants must comply with the applicable Operating Rules, including without limitation, those referred to in the Visa Core Rules and Visa Product and Service Rules regarding “Visa Ready Link Acquirer Requirements – U.S. Region” and “Visa ReadyLink Acquirer Requirements for Load Partners – U.S. Region.”

Proximity/Contactless Payment Terminal Transactions. Participating Merchants must comply with the applicable Rules, including without limitation, those set forth in the Visa Core Rules and Visa Product and Service Rules regarding “Proximity Payment-Only Terminal Requirements.”

Fleet Service Merchants. Participating Merchants must comply with all applicable Operating Rules, including without limitation, those set forth in the Visa Core Rules and Visa Product and Service Rules regarding Fleet Cards and Fleet Service.

## **CARD NOT PRESENT (CNP) ADDENDUM**

This CARD NOT PRESENT (CNP) ADDENDUM is made a part of the terms and conditions of the Merchant Card Processing Agreement (the "Agreement") and the Application for processing services signed by Merchant (the "Application"). Under the Agreement, Merchant has agreed to comply with all terms and conditions of the Addendum. The following terms and conditions describe the procedures for CNP transactions. All capitalized terms used in this Addendum and not otherwise defined herein shall have the meanings assigned to them in the Agreement or Application. Requirements set forth herein are in addition to requirements set forth in the Agreement, the Operating Guide, and the Operating Rules.

### **ADDITIONAL DEFINITIONS.**

"Verified by Visa" - A Visa-approved method that is the global authentication standard for Electronic Commerce Transactions.

"Authentication Request" - A request for Cardholder authentication from a Merchant utilizing Verified by Visa to a Card Issuer.

"Deferred Payment Transaction" - A CNP Transaction for which the Cardholder is billed once no more than 90 days after the first shipment of merchandise.

"Electronic Commerce Transaction" - A Card Transaction conducted over the Internet or other network.

"Order Form" - A document bearing the Cardholders signature, either written or electronic, authorizing goods or services to be charged to his or her account. An Order Form may be: (a) a mail order form, (b) a Recurring Transaction form, (c) a Preauthorized Health Care Transaction form, or (d) an e-mail or other electronic record that meets the requirements of applicable law.

"Permanent Establishment" - a fixed place of business through which an Electronic Commerce or Mail Order/Phone Order Merchant conducts its business, regardless of its Website or server locations.

### **ACCEPTANCE OF CARD NOT PRESENT (CNP) CHARGE TRANSACTIONS.**

Merchant may accept Card Not Present (CNP) transactions and related Charges ("CNP Transactions") based upon the description of Merchant's business ("Business") on the Application and as authorized by the Bank. Bank reserves the right to terminate CNP Transactions in the event that there is any material change in the Business, including any material change in the customers, products, management, or employees of the Business.

Merchant agrees that, except as expressly permitted by the Operating Rules, no CNP Transactions shall be submitted for processing prior to shipping of the product purchased, and/or the implementation of the service offered.

Merchant understands and agrees that CNP Transactions:

- i. do not require the Cardholder's signature on the Charge, sales draft, or sales slip (with exception of Order Forms authorizing a Recurring Transaction);
- ii. require the Merchant to obtain the valid Expiration Date for each card used for a CNP Transaction; and
- iii. require the Expiration Date of the Card be submitted as part of the Authorization process.

Merchant understands and agrees that Authorizations for CNP Transactions are subject to Chargeback and such Authorizations do not guarantee the validity or collectability of the Card Transaction. Merchant agrees to take reasonable additional steps to verify the identity of the authorized Cardholder on these types of transactions, especially when merchandise is shipped to a third party. Merchant acknowledges and agrees that the receipt of an Authorization Code indicating approval does not guarantee Merchant against Chargebacks. Merchant is encouraged to use (when not prohibited under applicable law) fraud reduction systems offered by the Card Networks, such as AVS and CVV2/CVC2 in CNP Transactions.

Generally, in order to satisfy a retrieval request for CNP Transactions, the following transaction receipt information must be provided by Merchant: (1) the Cardholder Account number, (2) the Card expiration date, (3) the Cardholder name, (4) the transaction date, (5) the Transaction amount, (6) the Authorization Code, (7) Merchant's Name, (8) Merchant's location, (9) a description of the goods or services, (10) the "ship to" address, and (11) the AVS response code (if AVS was used).



## **ELECTRONIC COMMERCE TRANSACTIONS.**

If Bank authorizes Merchant to accept Electronic Commerce Transactions, Merchant agrees to comply with all the provisions of the Operating Rules pertaining to Electronic Commerce Transactions.

Merchant shall at all times maintain a secure site for the transmission of data relating to the processing of Electronic Commerce Transactions. Merchant shall be responsible for ensuring, obtaining, and maintaining site security for the encryption of all data, and for any and all storage of data both in electronic and physical form.

Each Electronic Commerce Transaction must be identified as such when submitted by Merchant by using the appropriate Electronic Commerce Transaction indicator values specified by the Card Networks.

Merchant may not submit a request for Authorization for an Electronic Commerce Transaction that has failed a 3-D Secure authentication request.

Merchant shall display on Merchant's website in a prominent manner: (1) the address of the Merchant's Permanent Establishment, including Merchant's country of domicile, located on the same screen view as the checkout screen used to present the total purchase amount, or within the sequence of web pages the Cardholder accesses during the checkout process; (2) a complete and accurate description of the goods or services offered; (3) Merchant's merchandise return and refund policy clearly displayed on either the checkout screen, or on a separate screen that allows the purchaser to click an acceptance button; (4) Merchant's consumer data privacy policy and the method of transaction security used to secure Cardholder account data during the ordering and payment process; (5) a customer service contact, including electronic mail address or telephone number; (6) transaction currency; (7) export restrictions (if known); (8) Merchant's delivery/fulfillment policy.

Merchant shall provide Cardholders a secure transaction method, such as Secure Socket Layer or Verified by Visa.

Each website operated by Merchant must display the marks of the Card Networks for the Card types which are accepted by the Merchant, as specified in the Operating Rules.

Merchant cannot refuse to complete an Electronic Commerce Transaction using a MasterCard-branded Card solely because the Cardholder does not have a digital certificate or other secured protocol.

Merchant agrees to include, in addition to the other data required under the Operating Rules, the following data on a transaction receipt completed for an Electronic Commerce Transaction: (1) Merchant's name most recognizable to the Cardholder, such as: Merchant "doing business as" name or Merchant's "universal resource locator" (URL), or Merchant name used in the Visa Net Clearing Record. (2) Customer service contact information including telephone country code and area code. If Merchant delivers goods or services internationally, Merchant must list both local and internationally accessible telephone numbers. (3) Terms and conditions of sale, if restricted. (4) The exact date any free trial period ends, if offered. (5) Cancellation policies. (6) Merchant's online address. (7) A unique transaction identification number.

For receipts completed by Internet Payment Service Providers, Payment Service Providers, or Payment Facilitators, see additional requirements set forth in the Operating Rules.

Merchant will provide a completed copy of the transaction record to the Cardholder at the time the purchased goods are delivered or services performed. Merchant may deliver the transaction receipt in either of the following formats: (1) electronic (e.g., e-mail or fax) or (2) paper (e.g., hand-written or terminal generated). Merchant may not transmit the Cardholder Account number or card expiration date to the Cardholder over the Internet or on the transaction receipt.

## **INSTALLMENT BILLING TRANSACTIONS.**

If Merchant is so permitted by Bank, Merchant may offer Cardholders involved in Electronic Commerce Transactions or mail order/telephone order transactions an Installment Billing Transaction option. If Merchant offers an Installment Billing Option, Merchant must comply with the requirements set forth in the Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Services Rules regarding "Installment Billing Transaction-U.S. Region."

**DEFERRED PAYMENT TRANSACTIONS.**

Merchant shall comply with all applicable Operating Rules, including without limitation those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding "Deferred Payments Transaction Merchant Requirements – U.S. Region."

**RECURRING TRANSACTIONS.**

Merchant must complete a Recurring Charge in accordance with the requirements set forth in the Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding "Recurring Transactions."

**DELAYED DELIVERY TRANSACTIONS.**

Merchant must comply with the requirements set forth in the Operating Rules, including without limitation, those set forth or referred to in the Visa Core Rules and Visa Product and Service Rules regarding "Delayed Delivery Transaction Merchant Requirements."

**MASTERCARD DIRECT MAIL CARDHOLDER SOLICITATION MERCHANT.**

Merchant, if a Direct Mail Cardholder Solicitation Merchant (as defined in the MasterCard Operating Rules), acknowledges that the trademark "MasterCard" and the corresponding logotype are the property of MasterCard International Incorporated.

Merchant shall not infringe upon the mark or logo, nor otherwise use the mark or logo in such a manner as to create the impression Merchant's goods or services are sponsored, produced, affiliated with, offered, or sold by MasterCard. Merchant shall not use the mark or logo on its stationery, letterhead, envelopes, or the like nor in its solicitation; provided, however, that Merchant may use one of the mark or logo in close proximity to the payment or enrollment space in the solicitation in a size not to exceed 1 1/4 inches in horizontal length if a logo is employed, or, if a mark is used, in type not to exceed the size of the type used in the major portion of the text on the same page; provided further that the legend, "Accepted for Payment" must accompany the mark or logo used and must be the equivalent size of the mark or logo. In no case, however, shall Merchant use any of the logo on the front or first page of its solicitation. One truthful statement that Merchant is directing or limiting its offer to MasterCard Cardholders may appear in the body of the solicitation, other than in close proximity to the payment or enrollment space, subject to the limitation that: (i) only the word mark may be used; the word mark may not: (a) exceed in type size the size of any other type on the same page, (b) differ in color from the type used in the text (as differentiated from the titles) on the same page, (c) be as large or as prominent as the name of Merchant, (d) be the first item appearing on any page, nor (e) in any other way be the most prominent element of the page; (ii) Merchant's name and/or logo must appear prominently on the same page as the mark; and (iii) the following disclaimer must appear in close proximity to the mark on the same page and in an equal size and type of print: "MasterCard International Incorporated is not affiliated in any way with Merchant and has not endorsed or sponsored this offer."

Merchant further agrees to submit its first direct mail solicitation(s), prior to mailing, to the MasterCard Law Department, to be reviewed only for compliance with MasterCard's trademark rules and shall furthermore not distribute in any manner such solicitations until Merchant shall have obtained MasterCard's written approval of the manner in which it uses MasterCard mark and logo on such solicitations. Merchant shall likewise, upon request, submit to the Corporation any amended solicitations prior to mailing.

**DELEGATION OF DUTIES**

Card Program duties may, from time to time, be delegated to and among the Processor's business units without giving notice to Merchant; provided, however, Bank will remain responsible for any obligation owed by Bank under the Agreement.

**SUSPENSION AND TERMINATION.**

Should Merchant, at any time, fail to agree or comply with this Addendum or the Agreement, Bank shall have the right to immediately and without prior notice suspend and/or terminate CNP Transactions and/or the Agreement.

Bank may provide BIN information or other product-identifying data to the Merchant or its Merchant Servicer solely for purposes of identifying Visa or MasterCard Card product types at the point of sale. Bank must provide this Visa BIN information to any Merchant requesting it for the permitted purpose. Bank must provide a complete list of the BINs that apply to Debit MasterCard Cards to Merchants upon any form of reasonable request.

A U.S. Merchant or its Merchant Servicer that receives BIN information or other product-identifying data from Bank must not use such information for any reason other than to identify Visa or MasterCard Card product types at the point of sale and to implement Acceptance practices permitted by the Visa or MasterCard Operating Rules (including, without limitation, "Discount Offer – U.S. Region and U.S. Territories" in the Visa Core Rules and Visa Product and Service Rules; and "Discrimination" in the MasterCard Rules manual) based on such information, unless authorized by Visa or MasterCard, as applicable.

A U.S. Merchant or its Merchant Servicer must not disclose BIN information or other product-identifying data to any third party without prior written permission from Visa or MasterCard, as applicable.

If Merchant provides BIN or other product data information to a Merchant Servicer, Merchant must:

- i. Ensure that the Merchant Servicer complies with the substance of these "Merchant Use and Disclosure of BIN Information" requirements.
- ii. Include the substance of these requirements in Merchant's agreement or contract with its Merchant Servicer.