

## TERMS AND CONDITIONS

In consideration of the covenants set forth below, Sage Payment Solutions (SPS), Harris Trust & Savings Bank ("Bank"), which is a member of Visa U.S.A. Inc. and MasterCard International Incorporated, and the undersigned merchant ("Merchant") have agreed as follows as of the date of acceptance by SPS on behalf of Bank:

### ARTICLE I – DEFINITIONS

**1.01 "Account"** means a bank account maintained by Merchant as set forth in Section 6.10 for the crediting of collected funds and the debiting of fees and charges pursuant to this Agreement.

**1.02 "ACH"** means the Automated ClearingHouse paperless entry system operated by the Federal Reserve.

**1.03 "Agreement"** means the Merchant Application, these Terms and Conditions with all exhibits and attachments, including the Schedule of Fees, and any supplementary documents indicated herein, as amended from time to time, all of which constitute the Merchant Agreement.

**1.04 "Authorization"** means a computerized function or a direct phone call to a designated number to obtain credit approval for individual Transactions from the Card Issuer.

**1.05 "AVS"** (Address Verification System) means the system that allows verification of the cardholder's Zip code and billing address while requesting authorizations for transactions or during a request for address verification only.

**1.06 "Card"** means (i) a valid credit and/or debit card in the form issued under license from Visa U.S.A. Inc., Visa International, Inc., or MasterCard International Incorporated ("Bank Card") or (ii) any other valid credit and/or debit card accepted by Merchant by agreement with Bank and SPS.

**1.07 "Card Association"** means Visa, MasterCard, or any other Card Issuers that provide Cards that are accepted by Merchant by agreement with Bank and SPS.

**1.08 "Cardholder"** means the person whose name is embossed upon the face of the Card and who purports to be the person in whose name the Card is issued.

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

**1.10 "Chargeback"** means the procedure by which, and the value of, a Sales Draft (or disputed portion thereof) returned to Bank by a Card Issuer.

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

**1.12 "Debit Card"** means a plastic card used to initiate a debit transaction, used primarily to purchase goods or services and obtain cash, for which the Cardholder's asset account is debited by the issuer.

**1.13 "Discount Fee"** means a fee charged on all Card Transactions that is payable by Merchant to SPS for processing Merchant's Card Transactions.

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

**1.15 "MasterCard"** means MasterCard International Incorporated.

**1.16 "Reserve Account"** has the meaning set forth in Section 6.06

**1.17 "Rules"** means the rules and regulations of any Card Association, as amended from time to time.

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

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

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

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

### ARTICLE II - MERCHANT REPRESENTATIONS, WARRANTIES, COVENANTS AND AGREEMENTS

**2.01 Honoring Cards.** (a) Merchant will accept, without discrimination, all valid Cards properly presented for payment for bona fide, legitimate business transactions arising out of Merchant's usual trade or business; (b) Merchant shall not establish minimum or maximum amounts for individual Card sales as a condition for accepting any Card; (c) Merchant shall not require any Cardholder to pay any part of any fee imposed upon Merchant by this Agreement, whether through any increase in price or otherwise require a customer presenting a Card to pay any charge as a condition of sale that is not also required from a customer paying cash. However, Merchant may offer discounts to customers for cash purchases. Merchant may also charge a service fee on Transactions if Merchant charges a service fee: (i) for all payment methods (check, credit card, etc.) or (ii) for a specific payment mode (telephone) and not for other payment modes (face-to-face); (d) Merchant shall not accept a Card as payment (other than to the extent permitted by this Agreement), if the person seeking to use the Card does not present the Card to permit Merchant to examine it and obtain an Imprint or otherwise use the physical Card to complete the Transaction.

**2.02 Card Acceptance.** When accepting a Card, Merchant will follow the steps provided by Bank and SPS, and will: (a) Merchant shall identify the Cardholder and determine in good faith and to the best of its ability that the Card is valid on its face; (b) Check the effective date (if any) and the expiration date of the Card, examine any card security features (such as a hologram) included on the Card; and (c) Obtain Authorization before completing any Transaction. Where Authorization is obtained, Merchant will be deemed to warrant the true identity of the customer as the Cardholder; (a) Unless the Sales Draft is electronically generated or is the result of an Internet, mail, telephone or preauthorized order, obtain an Imprint of the Card; (b) Enter a description of the goods or services sold and the price thereof (including any applicable taxes); (c) Obtain the Cardholder's signature on the Sales Draft and compare that signature to the signature on the Card; (d) Deliver a true and completed copy of the Sales Draft to the Cardholder at the time of delivery of the goods or performance of the services, or if the Sales Draft is prepared by a point-of-sale terminal, at the time of the sale; (e) Offer the Sales Draft for purchase according to Bank's and SPS's procedures and the terms of this Agreement; and (f) Legibly reproduce the Cardholder's name, account number, expiration date, and the Merchant's name and place of business if that information is not legibly imprinted on the Sales Draft. In addition, for MasterCard transactions, Merchant will legibly reproduce the name of the Card Issuer as it appears on the face of the Card.

**2.03 Authorization.** (a) Merchant will obtain a prior Authorization for all Card sales. If Merchant cannot, for any reason, obtain an electronic Authorization, Merchant will request a Voice Authorization from the designated authorization center, and will legibly print the authorization number on the Sales Draft; (b) Merchant will not obtain or attempt to obtain Authorization unless Merchant intends to submit a Transaction for the authorized amount; (c) Merchant will not divide a single Transaction between two or more Sales Drafts or two or more Cards; (d) Merchant acknowledges that an Authorization provides only that the Cardholder account has sufficient credit available to cover the amount of the current sale, that an Authorization is not a guarantee of payment, and that an Authorization will not waive any provision of this Agreement or otherwise validate a fraudulent transaction or a transaction involving the use of an expired Card.

Receiving an Authorization shall not relieve the Merchant of liability for Chargeback on any Transaction for which the Merchant did not obtain an Imprint and the Cardholder's signature; (e) Merchant will not attempt to obtain Authorization on an expired Card. Transactions will be deemed invalid on Cards that are expired, whether or not an Authorization has been obtained. If authorization is granted, Merchant shall print the authorization number, or ensure that it appears legibly in the appropriate location on the Sales Draft. If authorization is denied, Merchant shall not complete the transaction and shall follow any instructions from the authorization center.

**2.04 Retention and Retrieval of Cards.** (a) Merchant shall use its best efforts, by reasonable and peaceful means, to retain or recover a Card upon receiving such instructions when making a request for Authorization or if Merchant has reasonable grounds to believe that the Card is counterfeit, fraudulent or stolen; (b) The obligation of Merchant imposed by this section to retain or recover a Card does not authorize a breach of the peace or any injury to persons or property and Merchant will hold Bank and SPS harmless from any claim arising from any injury to person or property, or other breach of the peace in connection with the retention or recovery of a Card.

**2.05 Compliance with Law; Visa Cardholder Information Security Program, Non-Disclosure and Storage of Cardholder and Transaction Information Requirements.** Merchant confirms that it is, and shall be, in full compliance during the term of this Agreement with all laws, statutes and federal and/or state regulations, as well as rules and operating regulations and bylaws imposed by any Card Association applicable to Merchant, its business and any Card Transaction, including without limitation all state and federal consumer credit and consumer protection statutes and regulations, non-disclosure of Cardholder information and transaction documents, and other security procedures adopted by the Card Associations. Merchant hereby certifies that it (and any outside agent that it may utilize to submit transactions to Acquirer) complies with the Cardholder Information Security Program instituted by Visa and/or the Site Data Protection Program instituted by MasterCard, (collectively "CISP"). Merchant hereby agrees to pay any fines and penalties that may be assessed by the Card Associations as a result of Merchant's noncompliance with the requirements of CISP, any data breaches, or by its failure to accurately validate its compliance. The Merchant should review and/or monitor the requirements at <http://www.visa.com/cisp> in order to determine its ongoing timeframes and mandates for compliance under CISP. The foregoing is an ongoing obligation during the term of this Agreement and as this Agreement may be renewed. Merchant acknowledges and understands that Merchant may be prohibited from participating in Visa programs if it is determined that Merchant is non-compliant. The following lists certain of the current CISP requirements, all of which Merchant shall comply with, if applicable: (i) install and maintain a working network firewall to protect data accessible via the Internet; (ii) keep security patches up-to-date; (iii) encrypt stored data; (iv) encrypt data sent across networks; (v) use and regularly update anti-virus software; (vi) restrict access to data to business "need to know;" (vii) assign a unique ID to each person with computer access to data; (viii) do not use vendor supplied defaults for system passwords and other security parameters; (ix) track access data by unique ID; (x) maintain a policy that addresses information security for employees and contractors; and (xii) restrict physical access to Cardholder information.

**2.06 Returns and Adjustments.** (a) Merchant's policy for the exchange or return of goods sold and the adjustment for services rendered shall be established and posted in accordance with the Rules. Merchant agrees to disclose to a Cardholder before a Card sale is made, that if merchandise is returned: (i) no refund, or less than a

full refund, will be given; (ii) returned merchandise will only be exchanged for similar merchandise and of comparable value; (iii) only a credit toward purchases will be given; or (iv) special conditions or circumstances apply to the sale (e.g., late delivery, charges, or other noncredit terms); (b) Disclosures must be made on all copies of Sales Drafts in letters approximately ¼ inches high in close proximity to the space provided for the Cardholder's signature on the Sales Draft and issued at the time of sale; (c) If Merchant does not make these disclosures, a full refund in the form of a credit to the Cardholder's Card account must be given. Merchant shall not refund cash to a Cardholder who paid for the item by Card; (d) Credits must be made to the same Card account number on which the original sale Transaction was processed.

**2.07 Merchant's Business.** (a) Merchant shall provide Bank and SPS with immediate notice of its intent to (i) transfer or sell any substantial part of its total assets, or liquidate; (ii) change the basic nature of its business, including selling any products or services not related to its current business; (iii) change fifty percent (50%) or more of the ownership or transfer control of its business; (iv) enter into any joint venture, partnership or similar business arrangement whereby any person or entity not a party to this Agreement assumes any interest in Merchant's business; or (v) alter in any way Merchant's approved monthly volume and average ticket; (b) Failure to provide notice as required above may be deemed a material breach and shall be sufficient grounds for termination of this Agreement, or, at SPS's option may result in SPS amending the terms of this Agreement, including, but not limited to, holding funds and/or altering the Merchant funding schedule if SPS and Bank deem it necessary to protect against financial loss. If any of the changes listed above occur, Bank and SPS shall have the option to re-negotiate the terms of this Agreement or provide immediate notice of termination; (c) Merchant will immediately notify SPS, with a copy to Bank, of any bankruptcy, receivership, insolvency or similar action initiated by or against Merchant or any of its principals. Merchant will include Bank and SPS on the list of creditors filed with the Bankruptcy Court, whether or not a claim exists at the time of filing; (d) Merchant must notify SPS, with a copy to Bank, in writing of any changes to the information in the Merchant Application, including but not limited to: a change to Merchant's financial condition (within 3 days), any additional location or new business, the identity of principals and/or owners, the form of business organization, type of goods and services provided, and how sales are completed. Merchant must also notify SPS in writing, with a copy to Bank, if Merchant sells or closes its business. Except for a change to the financial condition, SPS and Bank must receive all such notices 7 days before the change. Merchant will provide updated information to SPS upon request. Merchant is liable to SPS and Bank for all losses and expenses incurred by SPS and Bank arising out of Merchant's failure to report changes. SPS and Bank may immediately terminate this Agreement upon a change to the information in the Merchant Application, whether SPS and Bank independently discover such change or whether Merchant notifies SPS and Bank of such change.

**2.08 Advertising.** (a) Merchant will prominently display the promotional materials provided by Bank and SPS in its place(s) of business. Use of promotional materials and use of any trade name, trademark, service mark or logotype ("Marks") associated with Card(s) shall be limited to informing the public that Card(s) will be accepted at Merchant's place(s) of business. Merchant's use of promotional materials and Marks is subject to the direction of Bank and SPS and must be utilized in accordance with the Rules; (b) Merchant may use promotional materials and Marks during the term of this Agreement and shall immediately cease use and return any inventory to Bank or SPS upon any termination thereof; (c) Merchant shall not use any

promotional materials or Marks associated with Visa or MasterCard in any way which implies that Visa or MasterCard endorses any goods or services other than Bank Card services and Merchant shall not refer to Visa or MasterCard in stating eligibility for Merchant's products or services. Merchant shall be fully liable to Bank and/or SPS for any and all loss, cost and expenses suffered or incurred by Bank, arising out of failure to return or destroy such materials following termination.

**2.09 Merchant's Agreements and Covenants**

**1. Personal Information.** Merchant may not impose a requirement on Cardholders to provide any personal information as a condition for honoring Cards unless such information is required to provide delivery of goods or services or Merchant has reason to believe the identity of the person presenting the Card may be different from that of the Cardholder.

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

**3. Cash Advances.** (a) Merchant shall not deposit any Transaction for the purpose of obtaining or providing a cash advance either on Merchant's Card or the Card of any other party. Merchant agrees that any such deposit shall be grounds for immediate termination; (b) Merchant shall not obtain under any circumstance Authorization for, nor process a sale on, any Card Merchant is authorized to use. Processing Merchant's own Card is grounds for immediate termination.

**4. Duplicate Transactions.** Merchant shall not deposit duplicate Transactions. Merchant shall be debited for any duplicate Transactions and shall be liable for any Chargebacks, which may result therefrom.

**5. Deposit of Fraudulent Transactions.** Merchant shall not accept or deposit any fraudulent Transaction and may not under any circumstances present for processing or credit, directly or indirectly, a Transaction which originated with any other merchant or any other source. Merchant shall not deposit, under any circumstances, Transactions evidencing sales that were solicited by telemarketers. If Merchant deposits any such Transactions, this Agreement may be immediately terminated and Bank may hold funds and/or demand a Reserve Account pursuant to Section 6.06; further, Merchant may be subject to the Card Association reporting requirements set forth in Section 2.05). **Perpetrators of fraudulent transactions will be referred to law enforcement officials.**

**6. Collection of Pre-Existing Debt.** Merchant shall not present any Transaction representing the refinancing of an existing obligation of a Cardholder including, but not limited to obligations (i) previously owed to Merchant, (ii) arising from the dishonor of a Cardholder's personal check, and/or (iii) representing the collection of any other pre-existing indebtedness, including collection of delinquent accounts on behalf of third parties.

**7. Release of Cardholder Account Information.** Merchant will not, under any circumstances, disclose any Cardholder's account number or any information relating to any Cardholder's account number or any Sales Drafts or Credit Vouchers which may have been imprinted with any Card to any person other than Bank or SPS, or as required by law. Further, Merchant agrees to store any material containing Cardholder account information in a secure manner or destroy such information at the proper time in a fashion, which renders the data unreadable. Merchant acknowledges and understands the importance of compliance with Visa Security requirements, such as that which relates to transaction information, storage and disclosure.

**8. Multiple Transaction Records: Partial Consideration.** Merchant shall not prepare more than one Sales Draft for a single sale or for a single item but

shall include all items or goods and services purchased in a single Transaction in the total amount on a single Sales Draft except: (i) for purchases in separate departments of a multiple department store; (ii) for partial payment, installment payment, delayed delivery or an advance deposit; or (iii) for delayed or amended charges governed by rules for travel and entertainment merchants and transactions.

**9. Non-Imprint Transactions.** In any non-imprint transaction, as a material inducement for Bank and SPS to enter into this Agreement, Merchant acts solely at its own risk, and waives the right to dispute any Chargeback arising from a failure to produce an Imprinted draft to Bank and SPS. Merchant further assumes all other risks attendant to such non-Imprint transactions.

**10. Revocation of Authority.** Merchant shall cease the initiation of Card activity immediately upon receipt of actual or constructive notice of a Customer's termination or revocation of authorization of Merchant to do so.

**11. Identifying Numbers.** Merchant agrees that SPS may rely solely on identifying numbers provided by Merchant or Cardholder to determine the bank and account of a Customer.

**12. Regulatory Compliance.** Merchant shall be solely responsible for conforming its policies and procedures to the Rules and all applicable federal, state and local laws and regulations. Merchant agrees to consult Merchant's legal counsel regarding such compliance.

**13. Notice of Erroneous/Unauthorized Transfers.** Merchant shall regularly and promptly review all statements of account, banking statements, and other communications sent to Merchant and to immediately notify SPS if any discrepancy exists between Merchant's records and those provided by SPS, the Merchant's bank, or with respect to any transfer that Merchant believes was not authorized by Merchant or Cardholder. If Merchant fails to notify SPS in writing within fourteen (14) calendar days after the date that SPS mails or otherwise provides a statement of account or other report of activity to Merchant, Merchant will be solely responsible for all losses or other costs associated with any erroneous or unauthorized transfer. The foregoing does not limit in any way Merchant's liability for any breach of this Agreement.

**14. Notice of Agents.** Merchant shall notify SPS of its use of any third-party agent that will have access to Cardholder data.

**2.10 Representations and Warranties of Merchant.** Merchant represents and warrants to Bank and SPS at the time of execution and during the term of this Agreement that: (a) All information contained in the Merchant Application or any other documents delivered to Bank and/or SPS in connection therewith is true and complete and properly reflects Merchant's business, financial condition and principal partners, owners or officers; (b) Merchant has the power to execute, deliver and perform this Agreement, and this Agreement is duly authorized, and does not and will not violate any provisions of federal or state law or regulation, or conflict with any other agreement to which Merchant is subject; (c) Merchant has all licenses, if any, required to conduct its business and is qualified to do business in every jurisdiction where it is required to do so; (d) There is no action, suit or proceeding now pending or to Merchant's knowledge, threatened by or against or affecting Merchant which would substantially impair its right to carry on its business as now conducted or adversely affect its financial condition or operations; (e) Each Sales Draft presented to Bank for collection is genuine and is not the result of any fraudulent transaction or telemarketing sale or is not being deposited on behalf of any business other than Merchant. Further, Merchant warrants that each Sales Draft is the result of a bona fide Card Transaction for the purchase of goods or services by the Cardholder in the total amount stated on the Sales Draft; (f) Merchant has

performed or will perform all of its obligations to the Cardholder in connection with the Card Transaction evidenced thereby; (g) Merchant has complied with Bank's and SPS's procedures for accepting Cards, and the Card Transaction does not involve any element of credit or debit for any purpose other than as set forth in this Agreement and shall not be subject to any defense, dispute, offset or counter claim which may be raised by any Cardholder under the Rules, the Consumer Credit Protection Act (15 USC 1601) or other relevant state or federal statutes or regulations; (h) Any Credit Voucher which it issues represents a bona fide refund or adjustment on a Card sale by Merchant with respect to which a Sales Draft has been accepted; (i) Unless Merchant notifies SPS in writing (either on the Merchant Application or otherwise), **no other processing relationship exists** between Merchant and another bankcard processing institution, for this, or any other business run or owned by Merchant. (j) With respect to all Card Transactions that Merchant requests SPS and Bank to originate, Merchant continuously represents and warrants to Bank and SPS that:

(i) Each Cardholder has authorized the debiting and/or crediting of its account;

(ii) Each entry is for an amount the Cardholder has agreed to; and

(iii) Each entry is in all other respects properly authorized.

**2.11 Guarantors.** As a primary inducement to Bank and SPS to enter into this Agreement, the undersigned Guarantor(s), by signing this Agreement, jointly and severally, unconditionally and irrevocably, guarantee the continuing full and faithful performance and payment by Merchant of each of its duties and obligations to Bank and SPS pursuant to this Agreement, as it now exists or amended from time to time, with or without notice. Guarantor(s) understands further that Bank and SPS may proceed directly against Guarantor(s) without first exhausting its remedies against any other person or entity responsible therefore to it or any security held by Bank and SPS or Merchant. This guarantee will not be discharged or affected by the death of the undersigned, will bind all heirs, administrators, representatives and assigns and may be enforced by or for the benefit of any successor of Bank or SPS. Guarantor(s) understand that the inducement to Bank and SPS to enter into this Agreement is consideration for the guaranty, and that this guaranty remains in full force and affect even if the Guarantor(s) receive no additional benefit from the guarantee.

**2.12 Monthly Volume and Average Ticket.** Merchant represents that the Estimated monthly volume of Sales Transactions ("Monthly Volume") and the estimated average Sales Transaction dollar amount ("Average Ticket Amount") appearing on the Merchant Application are each good faith estimates and that there is a reasonable basis for each such estimate. Merchant acknowledges that any actual Monthly Volume or any actual Average Ticket Amount in excess of such estimates will cause SPS and/or Bank to review Merchant's file and that such review may result in the delay of transmission of funds and possible interruption of service. Bank may withhold the payment of any amounts otherwise payable hereunder and may terminate this Agreement if the actual Monthly Volume and/or Average Ticket Amount materially exceeds such estimates.

### **ARTICLE III - PRESENTMENT, PAYMENT, CHARGEBACK; RESERVE ACCOUNTS; TYPES OF TRANSACTIONS**

**3.01 Acceptance.** Bank and SPS shall accept from Merchant all valid Sales Drafts deposited by Merchant and shall present the same to the appropriate Card Issuers for collection against Cardholder accounts. All presentment and assignment of Sales Drafts, collection therefore and re-assignment or rejection of such Sales Drafts are subject to the terms of this Agreement and the Rules. Bank shall only **provisionally** credit the value of collected Sales Drafts to the Account and reserves the

right to adjust amounts collected to reflect the value of Chargebacks, fees, penalties, late submission charges and items for which Bank did not receive final payment. Settlement of funds will be in United States Dollars. Bank and SPS may refuse to accept any Sales Draft or revoke its prior acceptance of a Sales Draft in the following circumstances: (a) the Transaction giving rise to the Sales Draft was not made in compliance with all terms and conditions of this Agreement; (b) the Cardholder disputes his liability to Bank for any reason, including but not limited to those Chargeback rights enumerated in the Rules; or (c) the Transaction giving rise to the Sales Draft was not directly between Merchant and the Cardholder. Merchant will pay Bank and SPS, as appropriate, any amount previously credited to Merchant for a Sales Draft not accepted or later revoked by Bank and SPS.

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

**3.03 Transmission Method.** If Merchant utilizes electronic authorization and/or data capture services, Merchant will enter the data related to a sales or credit transaction into a computer terminal or magnetic stripe reading terminal no later than the close of business on the date the transaction is completed. If Merchant provides its own electronic terminal or similar device, such terminals must meet SPS's and Bank's requirements for processing transactions. Information regarding a sales or credit transaction transmitted with a computer or magnetic stripe reading terminal will be transmitted by Merchant to SPS or its agent(s) in the form SPS from time to time specifies, or as required magnetic stripe reading terminal will be transmitted by Merchant to under the Rules. If Bank and SPS request a copy of a Sales Draft, credit voucher or other transaction evidence, Merchant will provide it within 3 business days following the request. The means of transmission indicated in the Merchant Application shall be the exclusive means utilized by Merchant until Merchant has provided SPS with at least 30 days prior written notice, with a copy to Bank, of Merchant's intention to change the means of such delivery or otherwise to alter in any material respect Merchant medium of transmission of data to SPS.

**3.04 Prohibited Payments.** Bank and SPS shall have the sole right to receive payment of any Sales Draft presented by Merchant and paid by Bank unless and until there is a Chargeback. Unless specifically authorized in writing by Bank, Merchant shall not make or attempt to make any collections from Cardholders on any Transaction and shall hold any funds or property recovered in trust for Bank and shall promptly deliver to Bank any payment Merchant receives, in whole or in part of the amount of any accepted Transaction, together with the Cardholder's name and account number and any correspondence accompanying the payment.

**3.05 Chargebacks.** (a) Simultaneously with each Cardholder Transaction, a contingent and unmaturing claim for Chargeback accrues against Merchant in favor of SPS and Bank for that SPS or Bank is required, or has the right, to pay to MasterCard or Visa with respect to any fees, discounts, customer credits and adjustments, charges, fines, assessments, penalties or other items which may be charged back to Merchant by SPS and Bank. Merchant agrees that it is fully liable to Bank and SPS for all Chargebacks, and that Bank and SPS are

authorized to offset from incoming transactions and to debit via ACH the Account, the Reserve Account, or any other account held at any other financial institution in the amount of any Chargeback. Merchant agrees to accept for chargeback any sale for which the Cardholder disputes the validity of the sale according to the Rules; or SPS and Bank determine that Merchant has in any way failed to comply with the Rules or SPS's procedures, including but not limited to the following: (i) The Sales Draft is illegible, not signed by the Cardholder or has not been presented to Bank within the required time-frames; (ii) The Sales Draft does not contain the Imprint of a valid, un-expired Card; (iii) A valid Authorization number has not been correctly and legibly recorded on the Sales Draft; (iv) The Sales Draft is a duplicate of a prior Transaction or is the result of two or more Transactions generated on one credit card for a single sale; (v) The Cardholder alleges that he or she did not participate in the sale, authorize the use of the Card, receive goods or services purchased, or receive a required credit adjustment, or disputes the quality of the goods or services purchased; (vi) The price of goods or services on the Sales Draft differs from the amount which Merchant presents for payment; (vii) The Transaction results from an Internet, mail, phone or preauthorized order and the Cardholder disputes entering into or authorizing the Transaction or the Transaction has been made on an expired or non-existing account number; (viii) SPS and Bank believe, within their sole discretion, that Merchant has violated any provision of this Agreement; (ix) SPS determines that the transaction record is fraudulent or that the Transaction is not bona fide or is subject to any claim of illegality, cancellation, rescission, avoidance or offset for any reason whatsoever, including without limitation negligence, fraud or dishonesty on the part of Merchant or Merchant's agents or employees; (x) Merchant fails to provide a Sales Draft or legible copy thereof to Bank and SPS in accordance with this Agreement. Merchant acknowledges that SPS and Bank shall have full recourse to charge back the amount of a Card sale for which the Cardholder disputes that he/she did not authorize the charge if (i) the Imprint of the Card or (ii) the signature of the Cardholder was not obtained by Merchant; (xi) Merchant shall not initiate a Transaction in an attempt to collect a Chargeback; (b) **Guarantors are personally liable for all Chargebacks. In the event Merchant sells its business, and the new owner incurs Chargebacks, the original Merchant and all guarantors will continue to be held personally liable for the Chargebacks and any other liabilities of the new owner(s).**

**3.06 Processing Limits.** SPS and Bank may impose a cap on the dollar amount of Sales Drafts that it will process for Merchant. This limit may be changed by SPS and Bank from time to time, upon notice to Merchant. Such notice may be given orally or in writing. If the cap is decreased, oral notice will be confirmed in writing. If Merchant exceeds the established limit, SPS and Bank may suspend processing, hold the funds over the cap, and/or return all Sales Drafts evidencing funds over the cap to Merchant.

### **3.07 Types of Transactions**

**(1) Telephone, Mail, Preauthorized, and Installments Orders: Internet Transactions.** (a) Unless Merchant has received prior written authorization by Bank and SPS to accept Internet, mail and phone orders, Merchant warrants that it is a walk-in trade business, located in a retail business place. If Merchant is found to be accepting mail order, telephone order, or Internet Transactions without such prior written consent, this Agreement will be immediately terminated and the value of all Sales Drafts collected from the first day of processing may be charged back to Merchant and all funds therefrom shall be held pursuant to Section 3; (b) If authorized to accept payment by Internet, mail, phone or preauthorized order, the Sales Draft may be completed without the Cardholder's signature or an Imprint, but in such case Merchant shall

create a Sales Draft containing Cardholder data, the expiration number of the credit card, an Authorization number, the sale amount and the letters "MO", "TO" or "PO", as appropriate. (c) for approved MO/TO and Internet Merchants, AVS is required. AVS is not a guarantee of payment, and the use of AVS will not waive any provision of this Agreement or otherwise validate a fraudulent Transaction; (d) unless approved in writing by SPS and Bank, **Merchant shall not process sales prior to delivery of product or service.** Violation could result in immediate termination; (e) Merchant should obtain SPS's and Bank's consent to process Internet Transactions, and should process such Transactions only if the Transactions have been encrypted by a third party vendor acceptable to SPS and Bank. Merchant is liable for all Chargebacks and losses related to Internet Transactions whether or not: (i) Internet Transactions have been encrypted, and (ii) Merchant has obtained SPS's and Bank's consent to engage in such Transactions. Encryption is not a guarantee of payment, and will not waive any provision of this Agreement or otherwise validate a fraudulent Transaction. Merchant understands that transactions processed via the Internet are high risk and subject to a higher incidence of Chargebacks. All communication costs related to Internet Transactions are Merchant's responsibility. SPS will not manage the Internet telecommunications link and it is Merchant's responsibility to manage that link. All Internet Transactions will be settled by Bank into a depository institution of the United States in U.S. currency. Bank and/or SPS are under no obligation to approve telephone, mail, Internet or preauthorized orders and reserves the right to withdraw permission for such Transactions at any time.

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

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

**(4) Multiple Sales Drafts.** Merchant will include a description and total amount of goods and services purchased in a single sales transaction on a single Sales Draft or transaction record unless: (i) partial payment is entered on the Sales Draft or transaction record and the balance of the transaction is paid in cash or by check at the time of transaction; or (ii) a Sales Draft represents an advance deposit in a Card transaction completed in accordance with this Agreement and the Rules.

**(5) Debit Cards.** Merchant may honor at the locations set forth on the Merchant Processing Agreement debit cards ("Debit Card") serviced by the electronic funds transfer networks in connection with the sales ("Debit Card Sale") of merchandise or services to

the holders of such Debit Cards ("Debit Cardholders"). Bank and/or SPS agree to accept from Merchant via electronic transmission documents evidencing such Debit Card Sales ("Sales Transmittal") and Adjustment Drafts (as defined below).

**(a) General; Designated Account.** Merchant agrees to honor all valid Debit Cards, which are properly presented by Debit Cardholders in payment for goods or services. Debit Cardholders will be entitled to the same services and return privileges Merchant extends to cash customers, and Merchant will not impose any special conditions in connection with Debit Card Sales. Merchant's Designated Account will be used in order to facilitate payment of amounts due. All credits and debits in connection with Debit Card Sales will be made to the Designated Account.

**(b) Compliance; Authorization; Other Requirements.** Merchant agrees to comply (and assume all liability for failure to comply) with the operating rules and regulations of the Networks as amended from time to time ("Network Rules"). Every Debit Card Sale must be immediately electronically authorized as directed by Bank and/or SPS ("Authorization"). When Authorization is obtained, Merchant will electronically print the authorization number on the Sales Transmittal. Merchant will comply with all applicable federal, state and local laws, rules and regulations, including without limitation the Electronic Fund Transfer Act and Regulation E of the Board of Governors of the Federal Reserve System ("Rules"). Without limiting the generality of the foregoing, Merchant agrees that: (i) for each Debit Card Sale, the Debit Cardholder must enter his Personal Identification Number ("PIN") through a PIN pad located at the point of sale ("POS"); (ii) each PIN pad will be situated to permit Debit Cardholders to input their PINs without revealing them to other persons, including Merchant's personnel; (iii) Merchant will instruct personnel (A) that they may not ask any Debit Cardholder to disclose the PIN and (B) in the event that any of Merchant's personnel nevertheless becomes aware of any Debit Cardholder's PIN, such personnel will not use such PIN or create or maintain any record of such PIN, and will not disclose such PIN to any other person; (iv) the PIN message must be encrypted from the PIN pad to the POS terminal and from the POS terminal to the Network and back so that the PIN message will not be in the clear at any point in the transaction; (v) Merchant will comply with any other requirements relating to PIN security as required by Bank or by any Network; (vi) for each Debit Card Sale a transaction receipt in conformity with Regulation E will be made available to the Debit Cardholder; (vii) Merchant may not establish a minimum or maximum transaction amount as a condition for use of a Debit Card; (viii) Merchant may not charge any Debit Cardholder for the use of any Debit Card in connection with a Debit Card Sale, unless the Network Rules applicable to such Debit Card permit such a charge to be made; (ix) Merchant may not collect tax as a separate cash transaction; and (x) POS terminals, including hardware and software, must be certified for use by Bank and by all of the Networks. POS terminals must include encrypted PIN pads which allow entry of up to sixteen character PINs, printers and a keyboard lock function. Merchants are responsible for compliance with all Network Rules regarding the use of POS terminals, regardless of whether such POS terminals are obtained through Bank or through SPS.

1. **Credit Referrals.** Merchant will promptly initiate a refund to the customer (which may be made in cash, by an Adjustment Draft or with a check or cashier's check, as permitted by the Network Rules) whenever Merchant determines that a Debit Card Sale should be canceled or reversed.

2. **Error Resolution.** Merchant will cooperate with Bank and SPS, to resolve any alleged errors relating to Debit

Card Sales. Merchant will maintain adequate records to assist in error resolution; records will be maintained for two years or the period required by the Network Rules, whichever is greater. Merchant will permit and will pay all expenses of periodic examination and audit of functions at such frequency, as SPS deems appropriate. Audits will meet SPS's standards, and the results will be made available to SPS.

3. **Certain Prohibited Transactions.** Merchant will not accept cash, checks or other negotiable items from any Debit Cardholder and forward a credit through any network (i.e., as a purported payment or deposit to an account maintained by the Debit Cardholder). Merchant will not forward through any network any transaction or initiate any reversal of a transaction that did not originate between Merchant and the Debit Cardholder.

4. **Prevention of Fraud.** Merchant will fully cooperate with SPS and Bank in the event that Bank or SPS determines that there is a substantial risk of fraud arising from Merchant's access to the network. Merchant will take whatever actions Bank or SPS reasonably deem necessary in order to protect SPS and/or the Bank. Neither SPS, Bank nor any of their respective personnel will have any liability to Merchant for any action taken in good faith.

5. **Display of Network Trademark(s); Protection of Trade Secrets.** In order to inform Debit Cardholders that Debit Card Sales may be transacted at Merchant's locations, Merchant will prominently display the trademark and/or service mark of each network at each location and will display signage of each network at the entrance, near all POS terminals and on the window of such location. All uses by you of any trademark and/or service mark will comply with the applicable Network Rules. You acknowledge and agree that in displaying any such trademark and/or service mark, you will be acting under SPS's and/or Bank's control and subject to approval by the applicable network. You will not be deemed, under any circumstances, a licensee or sublicensee of any trademark or service mark of any network, nor will you otherwise be deemed to have or to acquire any right, title or interest in trademarks or service marks.

#### **(c) Returns and Adjustments.**

1. Merchant will attempt to settle in good faith any dispute between it and a Debit Cardholder involving a Debit Card Sale. Merchant will establish a fair, consistent policy for the exchange and return of merchandise and for the adjustment of amounts due on Debit Card Sales.

2. Merchant will not make any cash refunds or payments for returns or adjustments on Debit Card Sales but will instead complete a form provided or approved by Bank ("Adjustment Draft"). The Sales Transmittal for any Debit Card Sale for which no refund or return will be accepted by Merchant must be clearly and conspicuously marked (including on the Debit Cardholder's copy) as "final sale" or "no return" and must comply with Network requirements.

#### **(d) Presentation of Sales Transmittals and Adjustment Drafts.**

1. Merchant will electronically transmit to Bank all Sales Transmittals or Adjustment Drafts in a manner acceptable to Bank. Merchant will make a good faith effort to electronically transmit data within one banking business day after the transaction date. Merchant will not extend the time of payment for or extend credit for any part of a Debit Card Sale. Merchant represents and warrants that the electronic transmission of each Sales Transmittal and Adjustment Draft will evidence a true record of the Debit Card Sale transaction reflected on the document.

2. Bank will process Debit Card Sales transmitted by you, and Bank will promptly credit, debit or charge, as applicable, the appropriate amount to the designated account. Within a reasonable time after the end of each calendar month, Bank will calculate the applicable amount of fees and other charges owed by Merchant,

and Bank will debit the Designated Account in the amount of such fees and other charges. The amount of such fees to be paid by Merchant are set forth on **Pricing Schedule A** of this Agreement. Such fees may be amended at any time by Bank and/or SPS upon written notice to Merchant.

3. Bank may refuse to accept or may revoke its acceptance of any Sales Transmittal or Adjustment Draft, and Bank may debit, charge or credit the Designated Account in the corresponding amount, if: (i) the Debit Card was completed without prior Authorization; (ii) the Sales Transmittal or Adjustment Draft involved circumstances constituting a breach of any agreement, representation, or warranty of you; (iii) the Debit Card Sale was in violation of applicable law, rules or regulations; (iv) the Debit Cardholder is Merchant, any partner or of shareholder in Merchant, or any affiliate, spouse or immediate family member of any of them; (v) the Debit Card Sale was not made in connection with the sale of goods or services by you.

4. Bank may refuse or revoke the acceptance of any Sales Transmittal or Adjustment of Sales Transmittal upon the occurrence of any of the following events, and Bank may charge, debit or credit the Designated Account in the corresponding amount if: (i) Merchant defaults in paying when due any obligation to Bank or SPS; (ii) any material adverse change in Merchant's financial condition occurs; (iii) any deposit account at Bank or any of Merchant's property in the possession of Bank is garnished or attached; (iv) Merchant assigns its assets generally for the benefit of creditors; (v) a proceeding is commenced by or against it under any bankruptcy, insolvency or similar law seeking an order to adjudicate it a bankrupt or insolvent or other relief, or seeking appointment of a receiver or similar official for Merchant or for any substantial part of your assets. Merchant will notify Bank and/or SPS in writing immediately upon becoming aware that any such event has occurred or is likely to occur.

5. Bank will notify you promptly of all Adjustment Drafts. Additionally, Bank will advise you on each debit, charge and credit processed to the Designated Account.

6. Merchant authorizes Bank to charge debits arising from this Agreement against any credit due you, whether or not such charges create overdrafts or a debit balance in the Designated Account. You agree to pay Bank or SPS, as applicable, the full amount of any such overdraft or debit balance or to replenish the Designated Account in an amount sufficient to permit the amount of the charge to be made, as applicable, promptly upon request.

7. You further authorize Bank to suspend in a segregated account amounts which otherwise would be credited to the Designated Account if Bank or SPS reasonably believe that the Sales Transmittals submitted by Merchant are fraudulent. Bank or SPS will notify you of the suspension of such amounts within a reasonable time; provided, however, that such notice will not be required if the appropriate law enforcement agency has been notified of the suspected fraud.

**(e) Limitation; Claims and Collections.**

A. Merchant will not accept any Debit Card in payment for any legal services or for expenses related to the defense of any crime (other than a traffic violation), any domestic relations matter where services or expenses are furnished a person whose name is not embossed on the Debit Card or any bankruptcy, insolvency, or other proceeding affecting the creditors of any Debit Cardholder. Merchant will not present to Bank for processing a transaction that does not represent a sale of goods or service directly between Debit Cardholder and it.

B. Merchant will notify Bank and/or SPS promptly of all claims and defenses asserted or alleged by any Debit Cardholder with respect to any Debit Card Sale.

**(f) Indemnity.** Merchant will indemnify Bank, and SPS, from and against any and all liabilities, losses, costs, claims, demands, actions and causes of

action of any kind (including without limitation, reasonable attorneys' fees) that may be suffered or incurred by Bank, or SPS, caused by, resulting from, or in connection with any of the following: (i) any dispute between Merchant and a Debit Cardholder with respect to the alleged or actual failure by Merchant to process a transaction as requested by such Debit Cardholder or to provide physical security at or near any terminals or other premises of Merchant, (ii) the transmission or disclosure of any information by or through SPS, (iii) the transmission of any incorrect or incomplete information to a customer of any Network member through the Network regarding account maintained by such customer, or the disclosure through such Network to any party of information relating to any such account; and (iv) Merchant's failure to comply with the provisions of this Agreement and applicable laws and regulations, including without limitation disputes resulting from Merchant's failure to provide a Sales Transmittal in accordance with the terms of this Schedule. Merchant further agrees to indemnify and hold Bank and/or SPS harmless from all claims, liability and expenses arising or resulting from any dispute or claim made against Bank and/or SPS by any third party.

**(g) Records; Confidentiality.** A. Bank and/or SPS may examine and verify at any reasonable time and upon reasonable notice, all of Merchant's records pertaining to Debit Card Sales.

B. Merchant will preserve copies of all Sales Transmittals and Adjustment Drafts for the longer of (i) two years from the transaction dates of such items, or (ii) that period of time required by the applicable Network. You are liable for failure to so preserve Sales Transmittals and Adjustment Drafts. Upon the request of Bank, you will deliver to Bank, not later than ten business days after a request is made, a copy of any Sales Transmittal or Adjustment Draft. If you do not provide a copy within ten days, Bank is authorized to debit the Designated Account for the amount of the Sales Transmittal or Adjustment Draft.

C. Without the applicable Debit Cardholder's consent you will not sell, purchase, provide or exchange Debit Card account name or number information in any form to any third party except to Bank, to your agents for business purposes, to the Networks (with respect to Debit Card Sales pursuant to the applicable Network's Debit Cards) or pursuant to government request.

**(h) Representations and Warranties.** Each transmittal of any Sales Transmittal constitutes your representation and warranty that: (i) the Debit Cardholder indebtedness arises from a bona fide Debit Card Sale in the total amount stated; (ii) you have performed all of your obligations to Debit Cardholder; (iii) you have complied with all Rules; (iv) the Debit Card Sale does not involve the use of a Debit Card for any purpose other than the purchase of goods or services from you and does not involve the Debit Cardholder's obtaining cash from you unless allowed by the applicable Network and agreed in writing with Bank; and (v) each Debit Card Sale, and each Sales Transmittal, comply with the terms of this Schedule.

**ARTICLE IV – GATEWAY PROGRAMMING**

**4.01 Applicability to this Agreement.** In addition to all the other provisions of this Agreement, the provisions of this Article IV shall apply if Merchant has elected to utilize an electronic commerce payment system offered by SPS.

**4.02 Electronic Payment System.** So long as Merchant is current in its obligations to SPS and is not otherwise in breach of his Agreement, SPS shall provide Merchant the use of its Internet-based electronic payment system.

**4.03 Programming of Web Site.** While SPS provides specific API's or programming scripts to Merchant or Merchant's Web site programmer(s), Merchant acknowledges that such sample programming scripts are insufficient in and of themselves to allow Merchant's Web site to function with an authorized SPS Secure Payment Gateway. Programming of Merchant's Web

site and its functionality are the sole responsibility of Merchant.

**4.04 Merchant's Programming Agent.** Merchant has the sole responsibility to select and employ any competent programming agent to accomplish the programming required to make Merchant's Web site function correctly with an authorized SPS Secure Payment Gateway.

**4.05 Fees Subject to Fluctuation.** All fees for the electronic commerce payment system offered by SPS are based on the number of monthly transactions processed by the Merchant. The amount of these fees will therefore fluctuate based on Merchant's Transaction volume. Thus, notwithstanding anything to the contrary herein, the provisions of this Agreement which require notice prior to a change in fees shall not apply to any transactions or services covered by this Article 4.

**4.06 Technical Support.** Merchant shall be solely responsible for all technical support for Web site-related issues.

**4.07 Shut Downs.** SPS reserves the right, from time to time, without prior notice, to shut down and restart the authorized SPS Proprietary Secure Payment Gateway service for maintenance and/or software upgrades for any time periods that may be deemed absolutely necessary. Any and all efforts will be made to keep this service shut down as short as possible.

**4.08 Disclaimer.** With respect to the electronic commerce payment system offered by SPS pursuant to this Article IV and without limiting the foregoing, SPS specifically disclaims any warranty (i) that the service will be uninterrupted or error-free, (ii) that defects will be corrected, (iii) that security methods employed will be sufficient, or (iv) the service will be correct, accurate or reliable.

**ARTICLE V - TERMINATION AND EFFECT OF TERMINATION**

**5.01 Term: Termination.** (a) This Agreement shall become effective if and when accepted by Bank ("Effective Date"). The initial term of this Agreement shall be for a period of 3 years from the date Merchant presented a signed agreement to SPS ("Initial Term") and will renew for additional successive 2 year terms ("Renewal Term") unless terminated as set forth below; (b) This Agreement may be terminated by any party effective at the end of the Initial or any Renewal Term by providing written notice to the other parties of its intent not to renew no less than ninety (90) days prior to the expiration of the then-current term. Additionally, this Agreement may be terminated: (i) by SPS and Bank at any time with or without cause, and without prior notice, and (ii) by Merchant in the event of a material breach of the terms of this Agreement by SPS and Bank, provided Merchant provides SPS and Bank written notice of the alleged breach and the breach remains uncured for a period of 30 days following receipt of written notice by the breaching party. Bank and SPS's rights of termination provided throughout this Agreement are cumulative. A specific right of termination enumerated in this Agreement shall not limit any other right of Bank and SPS to terminate this Agreement expressed elsewhere in the Agreement. Notice of termination must be given in writing by Merchant. Notice of termination by SPS and Bank may be given orally or in writing, but if given orally will be confirmed in writing; (c) Upon early termination of this Agreement by Merchant, or by SPS should Merchant breach any of the terms of this Agreement, during the Initial Term or any Renewal Term, Merchant shall pay to SPS an early termination fee equal to the lesser of (i) Twenty-Five Dollars (\$25.00) for every month remaining in any such term and (ii) the maximum allowed by applicable law (collectively, "Early Termination Fee"), as well as any fees which SPS may be assessed due to Merchant's breach of this Agreement and/or early termination. Merchant will not owe the Early Termination Fee if Merchant elects not to renew the Agreement upon the expiration of the then current term by providing written notice in accordance with this paragraph. All rights and

obligations of the parties existing as of the effective time of termination will survive termination; (d) Within SPS's and Bank's sole discretion, if Merchant's or any of its principals' business or personal credit deteriorates, if any significant circumstances exist that would create harm or loss to the goodwill of a Card Association system, or if any case or proceeding is commenced by or against Merchant under any federal or state law dealing with insolvency, bankruptcy, receivership or other debt relief, this Agreement shall simultaneously therewith automatically terminate, and any amounts due to Bank and SPS shall accelerate and become immediately due and payable, without the necessity of any notice, declaration or other act whatsoever by Bank and SPS. Merchant agrees to notify SPS and/or Bank immediately of any bankruptcy, receivership, insolvency or similar action initiated by or against Merchant.

**5.02 Effect of Termination.** (a) In the event of termination for any reason, Merchant expressly authorizes Bank and SPS to withhold and discontinue the disbursement for all Cards and other payment transactions of Merchant in the process of being collected and deposited; (b) Collected funds will be placed in the Reserve Account (defined below) until Merchant pays any equipment and processing cancellation fees and any outstanding charges, losses or amounts for which Merchant is liable under this Agreement. Further, Bank reserves the right to require Merchant to deposit additional amounts based upon Merchant's processing history and/or anticipated risk of loss to Bank into the Reserve Account. The Reserve Account shall be maintained a minimum of 270 days after the termination date and for any reasonable period thereafter, during which Cardholder disputes may remain valid under the Rules. The provisions of this Agreement relating to the debiting and crediting of the Account shall be applied to the Reserve Account and shall survive termination of this Agreement until Bank terminates the Reserve Account. Any balance remaining after Chargeback rights have expired and all other expenses, losses and damages have been paid will be disbursed to Merchant; (c) Merchant expressly acknowledges that MATCH™ (formerly known as the Combined Terminated Merchant File or "CTMF") is a file maintained by MasterCard and accessed by Visa containing the business name and the names and identification of principals of Merchant which have been terminated for one or more of the reasons specified in the Rules. Such reasons include, but are not limited to: fraud, counterfeit paper, unauthorized transactions, excessive Chargebacks or highly suspect activity. Merchant acknowledges that SPS and Bank are required to report the business name of the Merchant and the names and identification of its principals to MATCH when Merchant is terminated for such reasons. Merchant consents to such reporting to the Card Associations by Bank and SPS. Further, Merchant waives and will hold harmless Bank and SPS from any claims that Merchant may raise because of such reporting; (d) Upon termination for any reason, Merchant will immediately cease requesting Authorizations and will cease transmitting Sales Drafts to Bank and SPS. In the event Merchant obtains any Authorization after termination, Merchant expressly acknowledges and agrees that the fact that any Authorization was requested or obtained shall not operate to reinstate this Agreement; (e) Following termination, Merchant shall upon request provide Bank and SPS with all original and microfilm copies of Sales Drafts and Credit Vouchers to be retained as of the date of termination.

## **ARTICLE VI - ACCOUNTS; SECURITY INTERESTS; INDEMNIFICATION**

**6.01 Accounting Monitoring.** (a) Merchant acknowledges that SPS will monitor Merchant's daily deposit activity. The deposit activity must remain consistent to the "approved" monthly volume and average ticket amount approved on the Merchant Application. If the Merchant should exceed the "approved" monthly volume, Merchant acknowledges

that additional documentation could be required. Merchant agrees that SPS may not process volumes over the "approved" monthly volume, and that Merchant is subject to a twenty-five dollar (\$25) per item fee and a 5% fee on all monies processed over "approved" monthly volume. Merchant agrees that SPS and Bank may suspend, within their sole discretion, the disbursement of Merchant's funds for any reasonable period of time required to investigate suspicious or unusual deposit activity. SPS and Bank will make good faith efforts to notify Merchant immediately. SPS and Bank shall have no liability for any losses, either direct or indirect, which Merchant may attribute to any suspension of funds disbursement; (b) In the event of **unusual** Transactions that have been "suspended" and cannot be verified as valid sales or have been verified as Cardholder disputes, Merchant agrees that a security processing fee not to exceed **110%** of the unusual Transaction(s) may be assessed; (c) Merchant's presentation to SPS and Bank of Excessive Activity will be a breach of this Agreement and cause for immediate termination of this Agreement. "Excessive Activity" refers to any two consecutive calendar months during which a Merchant or Merchant location has a minimum of 15 Chargebacks and a ratio of Chargeback Transactions to total sales Transactions of at least 1% or a ratio of chargeback dollar volume to sales dollar volume of at least 2.5%. Merchant authorizes, upon the occurrence of Excessive Activity, Bank and SPS to take additional actions as either of them may deem necessary, including, but not limited to, suspension of processing privileges, increase of any fees that may be charged to Merchant and/or creation or maintenance of a Reserve Account in accordance with this Agreement.

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

**6.03 Records.** In addition to any records routinely furnished to SPS and Bank under this Agreement, Merchant shall preserve a paper or microfilm copy of all actual paper Sales Drafts and Credit Vouchers and, if a mail, phone order or preauthorized order is involved, the Cardholder's signed authorization for the Transaction, for at least 3 years after the date Merchant presents the Transaction.

**6.04 Requests for Copies.** Within 3 days of receipt of any written or verbal request by Bank and SPS, Merchant shall provide either the actual paper Sales Draft or a legible copy thereof (in size comparable to the actual Sales Draft) and any other documentary evidence available to Merchant and reasonably requested by Bank or SPS to meet Bank's obligations under law (including its obligations under the Fair Credit Billing Act) or otherwise to respond to questions concerning Cardholder accounts.

**6.05 Compliance with Law.** Merchant shall comply with all laws applicable to Merchant, Merchant's business and any Card Transaction, including without limitation all Rules, state and federal consumer credit and consumer protection laws.

**6.06 Security Interests, Reserve Account, Recoupment and Set-Off.** (a) This Agreement is a security agreement under the Uniform Commercial Code. Merchant grants to Bank and SPS a security interest in and lien upon: (i) the Account (as set forth in Section 6.10) and all funds at any time in the Account, whatever the source of such funds, (ii) the Reserve Account (as defined below) and all funds at any time in the Reserve Account, whatever the source of such funds, (iii) future Sales Drafts, and (iv) all Merchant's rights relating to this Agreement including, without limitation, all rights to receive any payments or credits under this Agreement (collectively, the "Secured Assets"). Upon request of Bank and SPS, Merchant will execute one or more financing statements or other documents to

evidence this security interest. Merchant authorizes SPS and Bank and appoints SPS and Bank its attorney in fact to sign its name to any financing statement used for the perfection of any security interest or lien granted in this Agreement. Merchant represents and warrants that no other party has a security interest in the Secured Assets. These security interests and liens will secure all of Merchant's obligations under this Agreement and any other agreements between Merchant, SPS and Bank including, but not limited to, Merchant's obligation to pay any amounts due to Bank and SPS. With respect to such security interests and liens, Bank and SPS will have all rights afforded under the Uniform Commercial Code, any other applicable law and in equity. Merchant will obtain from Bank and SPS written consent prior to granting a security interest of any kind in the Secured Assets to a third party; (b) SPS will establish and maintain a non-interest bearing account ("Reserve Account") in the name of either Bank or Merchant at any federally insured financial institution, with sums provided by Merchant that are sufficient to satisfy Merchant's current or future obligations as determined by Bank and SPS: (i) Bank and SPS shall have the right to initiate a debit to the Account or any other account at any institution to establish or maintain funds in the Reserve Account. Bank or SPS may deposit into the Reserve Account funds they would otherwise be obligated to pay Merchant, for the purpose of establishing or maintaining the Reserve Account in accordance with this Section, if they determine such action is reasonably necessary to protect their interests; (ii) Bank, on its own behalf or at SPS's request, may, without notice to Merchant, apply deposits in the Reserve Account against any outstanding amounts Merchant owes under this Agreement or any other agreement between Merchant and Bank or SPS. Also, SPS or Bank may exercise their rights under this Agreement to collect any amounts due to Bank or SPS including, without limitation, rights of set-off and recoupment. Merchant shall have no right to withdraw funds or debit the Reserve Account. In the event of a bankruptcy proceeding, Bank and SPS may exercise their rights under this Agreement to debit the Reserve Account for amounts due Bank and SPS regardless of the pre-petition or post-petition nature of the amount due Bank and/or SPS. In the event of a bankruptcy proceeding, Merchant also agrees that it will not contest any Motion for Relief from the Automatic Stay, which Bank and SPS may file to debit the Reserve Account. Funds in the Reserve Account will remain in the Reserve Account for a minimum of 270 days following termination. Bank will have sole control of the Reserve Account. In the event of a bankruptcy proceeding, Bank and SPS do not consent to the assumption of this Agreement. Nevertheless if this Agreement is assumed Merchant agrees that, in order to establish adequate assurance of future performance within the meaning of 11 U.S.C. Sec. 365, as amended from time to time, Merchant must establish or maintain a Reserve Account in an amount satisfactory to Bank and SPS; (c) Bank and SPS have the right of recoupment and set-off. This means that they may offset any outstanding/uncollected amounts owed to them from: (i) any amounts they would otherwise be obligated to deposit into the Account, and (ii) any other amounts SPS and Bank may owe Merchant under this Agreement or any other agreement; (d) The rights conferred upon Bank and SPS in this Section are not intended to be exclusive of each other or of any other rights and remedies of Bank and SPS under this Agreement, at law or in equity. Rather, each and every right of Bank and SPS at law or in equity will be cumulative and concurrent and in addition to every other right.

**6.07 Third Parties.** (a) Merchant may be using special services or software provided by a third party to assist Merchant in processing Transactions, including authorizations and settlements, or accounting functions. Merchant is responsible for ensuring compliance with the requirements of any third party in using their

products. This includes making sure Merchant has and complies with any software updates. SPS and Bank have no responsibility for any transaction until that point in time SPS receives data about the transaction; (b) Merchant will notify SPS immediately if Merchant decides to use electronic authorization or data capture terminals or software provided by any entity other than SPS or its authorized designee ("third party terminals") to process transactions. If Merchant elects to use third party software or terminals, Merchant agrees (i) the third party providing the software or terminals will be Merchant's agent in the delivery of Transactions to Bank via Visa Net or a similar data processing system or network; and (ii) to assume full responsibility and liability for any failure of that third party to comply with the Rules or this Agreement. Neither Bank nor SPS will be responsible for any losses or additional fees incurred by Merchant as a result of any error by a third party agent or a malfunction in a third party's software or terminal.

**6.08 Modifications to Agreement.** This Agreement is subject to amendment to conform to the Rules. From time to time, SPS and Bank may amend any provision of this Agreement, including, without limitation, those relating to the discount rate or to other fees and charges payable by Merchant by mailing written notice to Merchant of the amendment, and the amendment shall become effective unless Bank and SPS receive Merchant's notice of termination of this Agreement within 7 days. Amendments due to changes in either Card Association's fees, interchange, assessments, Rules or any law or judicial decision may become effective on such shorter period of time as SPS and Bank may specify if necessary to comply with the applicable Rule, law or decision.

**6.09 Limitation of Liability; Indemnity.** (a) The liability, if any, of Bank and SPS under this Agreement whether to Merchant or to any other party, whatever the basis of the liability, shall not exceed in the aggregate the difference between (i) the amount of fees paid by Merchant to SPS and Bank during the month in which the transaction out of which the liability arose occurred, and (ii) assessments, Chargebacks, and any offsets authorized under this Agreement against such fees which arose during such month. In the event more than one month is involved, the aggregate amount of SPS and Bank's liability shall not exceed the lowest amount determined in accord with the foregoing calculation for any one month involved. In no event will Bank, SPS, nor their officers, agents, directors, or employees be liable for any indirect, special, or consequential damages; (b) Merchant hereby agrees to indemnify and hold Bank, SPS and their employees and agents harmless from any claim relating to a dispute between Merchant and a Cardholder, any Sales Draft paid for as may be made by anyone by way of defense, dispute, offset, counterclaim or affirmative action, or for any damages of, or losses that either Bank or SPS may incur as a result of Merchant's breach of this Agreement. Further, Merchant shall reimburse Bank or SPS, as the case may be, for all expenses and costs, including attorney's fees, with regard thereto; (c) SPS and Bank will perform all services in accordance with this Agreement. SPS makes no other warranty, express or implied, regarding the services, and nothing contained in the Agreement will constitute such a warranty. **SPS disclaims all implied warranties, including those of merchantability and fitness for a particular purpose.** No party will be liable to the other parties for any failure or delay in its performance of this Agreement if such failure or delay arises out of causes beyond the control and without the fault or negligence of such party. If any of the Entries that are on SPS's system belonging to Company are subpoenaed by legal process or otherwise, SPS shall use reasonable efforts to notify Company. If Company does not respond in a timely manner, and/or thirty (30) days elapses from SPS's receipt of subpoena, SPS may produce records in accordance with the subpoena.

**6.10 Account.** (a) Merchant will establish and maintain an Account at Bank or at any federally insured financial institution reasonably approved by Bank in the United States. Merchant will maintain sufficient funds in the Account to satisfy all obligations, including fees, contemplated by this Agreement. Merchant irrevocably authorizes SPS and/or Bank to debit the Account for Chargebacks, fees and any other penalties or amounts owed under this Agreement. Merchant must obtain prior written consent from Bank and SPS to change the Account. If Merchant does not get that consent, SPS or Bank may immediately terminate the Agreement and may take other action necessary, as determined by them within their sole discretion; (b) Bank will deposit all Sales Drafts to the Account subject to Section 3.01 of this Agreement. Merchant authorizes Bank and SPS to initiate reversal or adjustment entries and initiate or suspend such entries as may be necessary to grant Merchant conditional credit for any entry; (c) Bank, in its sole discretion, may grant Merchant provisional credit for Transaction amounts in the process of collection, subject to receipt of final payment by Bank and SPS and subject to all Chargebacks and other amounts owed to Bank and SPS under this Agreement; (d) Promptly examine all statements relating to the Account, and immediately notify SPS in writing of any errors. Merchant's written notice must include: (i) Merchant name and account number, (ii) the dollar amount of the asserted error, (iii) a description of the asserted error, and (iv) an explanation of why Merchant believes an error exists and the cause of it, if known. That written notice must be received by SPS within 30 days after Merchant received the periodic statement containing the asserted error. Merchant may not make any claim against Bank or SPS for any loss or expense relating to any asserted error for 60 days immediately following receipt of Merchant's written notice. During that 60 day period, SPS and Bank will be entitled to investigate the asserted error, and Merchant will not incur any cost or expense in connection with the asserted error without notifying SPS; (e) Merchant will indemnify and hold SPS and Bank harmless for any action they take against the Account pursuant to this Section. Merchant will also indemnify and hold harmless the institution at which Merchant maintains the Account for acting in accordance with any instruction from Bank or SPS regarding the Account. This section will survive termination of this Agreement; (f) Merchant authorizes Bank and SPS to initiate debit/credit entries to the Account, as the Account may be changed from time to time, and to any other account maintained by Merchant at any institution that is a receiving bank of ACH, all in accordance with this Agreement. In the event Merchant changes the Account, Merchant will notify SPS, with a copy to Bank, and this authorization will be effective until both: (1) SPS and Bank have received written notification from Merchant terminating this authorization, and (2) all obligations of Merchant to SPS and Bank have been paid in full. Merchant will provide to SPS and Bank a voided Account check, and will fill in the Account numbers on the Merchant Application.

**6.11 Fees and Other Amounts Owed.** (a) Merchant shall pay the fees and charges as set forth on the Schedule of Fees, attached hereto, the provisions of which are incorporated herein by reference. Unless otherwise noted, merchant shall pay all fees monthly, with the exception of the discount fee, which shall be paid either monthly or daily, as determined by SPS in its sole discretion. Merchant may choose, however, to pay the discount fee on a daily basis by notice to SPS. The Account will be debited through ACH for such amounts and for any other fees, charges or adjustments incurred by Merchant and associated with processing services. Merchant is also obligated to pay all taxes and other charges imposed by any governmental authority on the services provided under this Agreement. Bank and SPS shall have the right to change fees, including adding fees for additional services utilized by Merchant, in

accordance with Section 6.11; (b) Merchant will immediately pay SPS and Bank any amount incurred by SPS attributable to this Agreement or any other agreement between Merchant and SPS or any subsidiary or affiliate of SPS, including but not limited to equipment fees, Chargebacks, fines imposed by a third party, non-sufficient fund fees, and ACH debits that overdraw the Account, Reserve Account, or are otherwise dishonored. Merchant authorizes SPS and Bank to debit via ACH the Account, Reserve Account, any other account Merchant has with SPS, an affiliate or subsidiary of SPS, Bank or at any other financial institution for any amount Merchant owes under this Agreement or under any other contract, note, guaranty, or dealing of any kind now existing or later entered into between Merchant and SPS or any subsidiary or affiliate, whether Merchant's obligation is direct, indirect, primary, secondary, fixed, contingent, joint or several. In the event such ACH does not fully reimburse SPS and Bank for the amount owed, Merchant will immediately pay SPS and Bank such amount.

**6.12 Costs.** Merchant will be liable for and will indemnify and reimburse SPS and Bank for all costs paid or incurred by SPS or Bank in the enforcement of this Agreement, including but not limited to attorneys' and investigators' fees, or in collecting any amounts due from Merchant or resulting from any breach by Merchant of this Agreement.

## **ARTICLE VII- MISCELLANEOUS**

**7.01 Waiver.** Failure by Bank or SPS to enforce one or more of the provisions of this Agreement shall not constitute a waiver of the right to enforce the same or other provision in the future. The waiving party must sign all waivers.

**7.02 Notices.** All notices and other communications required or permitted under this Agreement shall be deemed delivered when mailed by Merchant via overnight carrier or certified mail, and when mailed by SPS/Bank, by first class mail, postage prepaid, addressed as follows:

(a) **Sage Payment Solutions**  
3841 Green Hills Drive, Suite #210  
Nashville, TN 37215  
Attn: Business Development

(b) **Harris Trust & Savings Bank**  
111 W. Monroe  
Chicago, IL 60603  
Attn: Customer Service

(c) If to Merchant, at the address provided as the billing address and to the contact listed on the Merchant Application.

**7.03 Choice of Law; Jurisdiction.** This Agreement shall be governed and construed under the laws of the **State of Virginia**. All claims or controversies between the parties related to this Agreement, which are not otherwise settled by agreement of parties, will be submitted to and decided by arbitration held in the State of Virginia in accordance with the rules of the American Arbitration Association.

**7.04 Entire Agreement; Assignability.** This Agreement, including the Merchant Application, these Terms and Conditions and any supplementary documents indicated herein, expresses the entire understanding of the parties with respect to its subject matter and except as provided herein, may be modified only in writing executed by all parties. Notwithstanding the foregoing, SPS may, in its discretion, increase the rates that it charges for an account, upon notice to the merchant, if SPS, in its sole discretion, believes the risk on such account to be greater than that it originally accepted. This Agreement may be assigned by SPS and Bank, but may not be assigned by Merchant, directly or by operation of law, without the prior written consent of Bank and SPS. In the event, for whatever reason, Merchant Application does not meet standard underwriting criteria, and satisfies only sub-standard underwriting criteria, Merchant acknowledges this completed Application will be forwarded to an

alternative Member processor for their review and approval. Further, Merchant acknowledges that the programs, rates and terms of the alternative Member processor may change. Upon approval of this Merchant Agreement by an alternative Member, Merchant agrees to and acknowledges acceptance of the new terms and conditions set forth by the alternate Member processor. Such acceptance will be evidenced by utilization of the Network for the first sale Transaction. If Merchant nevertheless assigns this Agreement without such consent, the Agreement will be binding on the assignee. This Agreement shall be binding upon and inure to the benefit of the parties' respective heirs, personal representatives, successors and assigns. If Merchant sells its business and the new owners incur Chargebacks, the original owner and all original guarantors will be held personally liable for all charge backs and any other liabilities of the new owners.

**7.05 Credit and Financial Inquiries: Additional Locations: Inspections.** (a) Merchant authorizes Bank and SPS to make, at any time, any credit inquiries which either may consider necessary to accept or review acceptance of this Agreement or investigate Merchant's deposit or Card acceptance subsequent to acceptance of this Agreement. Such inquiries shall include, but are not limited to, a credit check of the business including its proprietor, partners, principal owners or officers. If requested to do so by Bank or SPS, Merchant shall provide the written consent of any person for which an inquiry has been or is to be made if such person has not executed this Agreement and will provide any financial statements, income tax and business tax returns and

other financial information as Bank or SPS may consider necessary to perform initial or periodic reviews of Merchant's financial stability and business practices; (b) Merchant may honor Cards only at locations approved by SPS and Bank. Additional locations may be added, subject to SPS and Bank's approval. Either Merchant or SPS may delete any location by providing notice as provided in this Agreement; (c) Merchant agrees to permit Bank or SPS at any time from time to time, to inspect locations to confirm that Merchant has or is adhering to the terms of this Agreement and is maintaining the proper facilities, equipment, inventory, records and license or permit (where necessary) to conduct its business. However, nothing in this paragraph shall be deemed to waive Merchant's obligation to comply in all respects with the terms of this Agreement; (d) Representatives of Bank or SPS may, during normal business hours, inspect, audit and make copies of Merchant's books, accounts, records and files pertaining to any Card Transaction.

**7.06 Marketing of Non-Bankcard Services by SPS.** From time to time, SPS may offer to Merchant certain additional products and services which may or may not be related to the processing of credit card Transactions. In the event of such offers, Merchant shall indicate its desire to SPS to decline such offers or be deemed to have accepted the offers and be liable for payment therefore.

**7.07 Attorneys' Fees.** Merchant will be liable for and will indemnify and reimburse bank and/or SPS for all attorneys' fees and other costs and expenses paid or incurred by Bank and/or SPS in the enforcement of this

Agreement, or in collecting any amounts due from merchant to Bank and/or SPS or resulting from any breach by Merchant of this Agreement.

**7.08 Signature.** Merchant represents and warrants that the person executing this Agreement is duly authorized to bind Merchant to all provisions of this Agreement, and that such person is authorized to execute any documents and to take any action on behalf of Merchant, which may be required by SPS now or in the future. Merchant will execute a separate Entity Certification, as set out below, if requested to do so by SPS and Bank. Merchant acknowledges that if Merchant has not signed below, Merchant agrees that Merchant's first transmission of transactions to SPS constitutes Merchant's acceptance of this Agreement.

**7.09 General.** If any provision of this Agreement is illegal or unenforceable, the invalidity of that provision will not affect any of the remaining provisions and this Agreement will be construed as if the illegal provision is not contained in the Agreement. Merchant is responsible for its employees' actions while in its employ. The parties do not intend to confer any benefits on any person or entity other than Merchant, Bank and SPS. Sections 3.02, 3.05, 5.01, 5.02 and the entirety of Article 6 will survive termination of this Agreement. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same instrument. A facsimile signature will be binding and legal in all respects as if it were an original signature to this Agreement.