

## MERCHANT INTEGRATION AGREEMENT

This Merchant Integration Agreement (such agreement, together with all exhibits attached hereto, the “**Agreement**”), is effective as of date of submitted online application (the “**Effective Date**”) and is entered into by and between Rotomaire, Inc., a Delaware corporation, with offices located at 101 Crawfords Corner Road Holmdel NJ 07733 Suite 4116 (“**BANYAN**”) and Merchant, a state corporation/LLC/etc as mentioned in the online application, with an address mentioned in the online application (“**Merchant**”). Banyan and Merchant are each referred to herein as a “**Party**” and, collectively, as the “**Parties**”.

WHEREAS, Banyan provides certain services whereby it automates the provision of digital receipts to merchants’ customers vis-à-vis such customers’ financial institutions or financial technology services providers who have contracted with Banyan (such financial institutions or financial technology services providers (together with their subcontractors and service providers), the “**Fintech Customers**” and such customers, the “**End Users**”), and, together with its Data Analytics Customers, may provide associated data analysis services and information to certain of its contracted merchants and Fintech Customers (collectively, the “**Banyan Services**”);

WHEREAS, in order to perform the Banyan Services, Banyan requires certain rights in and to Merchant Data, including Consumer Receipt Data, and will act as a processor of Merchant Data, on Merchant’s behalf and instruction as set forth in this Agreement;

WHEREAS, Merchant wishes to integrate with Banyan in order to permit Banyan to make available the Banyan Services to Merchant’s End Users and, in so doing, wishes to provide to Banyan the right to use certain Merchant Data, on the terms and conditions set forth in this Agreement; and

WHEREAS, Banyan wishes to receive the Merchant Data, and to use the Merchant Data, on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, terms, and conditions set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

1. Definitions. The following terms shall have the following meanings:

- 1.1. “**Access Credentials**” means any user name, identification number, password, license or security key, security token, PIN, or other security code, method, technology, or device owned or controlled by Banyan and used, alone or in combination, to authorize the uploading of data, content, information, or materials to the Banyan Systems.
- 1.2. “**Authorized Users**” means Merchant’s employees who satisfy each of the following criteria: (a) who Merchant authorizes in writing to receive Access Credentials; (b) who have a need to know such Access Credentials in order for Merchant to perform its duties or obligations or exercise its rights under this Agreement; and (c) who have entered into a valid, binding, and enforceable non-disclosure and confidentiality agreement with the Merchant containing confidentiality obligations with respect to the Access Credentials that are at least as restrictive as those set forth in this Agreement.

- 1.3. “**Consumer Receipt**” means a receipt generated at an online or brick-and-mortar establishment owned or operated by or on behalf of Merchant or any of Merchant’s affiliates, or its or their authorized third parties, and which establishment is identified (specifically or generally by category) on **Exhibit B** (each, a “**Merchant Establishment**”), which receipt is generated following a transaction (e.g., a return or a purchase) at a Merchant Establishment by a customer, and which receipt provides information concerning a particular transaction between such customer at such Merchant Establishment, including without limitation, the following information: (a) name, address, and phone number of Merchant Establishment; (b) brand name, trademark, or service mark associated with Merchant Establishment or its goods and services and appearing generally on Merchant Establishment’s receipts; (c) the total amount of the transaction, as well as the transaction date and time; (d) an itemized list of all goods or services purchased or returned as part of the transaction, together with any applicable SKU numbers and associated prices and discounts for each such good or service; (e) the bank identification number associated with any credit card used in connection with the transaction; and (f) the last four-digits of any credit card number for any credit card used in connection with the transaction (collectively, the data in subsection (a)-(f) is referred to as the “**Consumer Receipt Data**”).
- 1.4. “**Data Analytics Customers**” means Banyan’s third party customers or partners with whom Banyan contracts who provide data analysis or analytical products or services with respect to Banyan Data, together with their subcontractors and service providers.
- 1.5. “**Data Security Laws**” means any Laws of, or issued or entered by, any federal, state, local, municipal or foreign (a) government or (b) governmental body, entity, instrumentality, agency or subdivision thereof exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority, including any court, tribunal, arbitral body, commission, administrative agency or quasi-governmental or private body exercising any regulatory or taxing authority thereunder, which govern the collection, handling, storage, distribution, Processing, use, transmission, disclosure, importing, exporting, and/or maintenance of personally identifiable information or other information or data of a private nature (including Personal Data), including, as applicable, the General Data Protection Regulation.
- 1.6. “**Harmful Code**” means any software, hardware, or other technology, device, or means, including any virus, worm, malware, or other malicious computer code, the purpose or effect of which is to permit unauthorized access to, or to destroy, disrupt, disable, distort, or otherwise harm or impede in any manner any (i) computer, software, firmware, hardware, system, or network; or (ii) any application or function of any of the foregoing or the security, integrity, confidentiality, or use of any data Processed thereby.
- 1.7. “**Law**” means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree, or other requirement of any federal, state, local, or foreign government or political subdivision thereof, or any arbitrator, court, or tribunal of competent jurisdiction.

- 1.8. “**Merchant Data**” means the data, databases, materials, content, files, and information including, without limitation, Personal Data (if any), identified on **Exhibit A** that Merchant (or any of Merchant’s Authorized Users) expressly provides to Banyan (or its Personnel) or otherwise expressly makes available to Banyan (or its Personnel), including Consumer Receipt Data, but excluding, in any event, the Banyan Data.
- 1.9. “**Merchant Systems**” means the information technology infrastructure used by, and in the possession, custody, or control of, Merchant including all computers, software, hardware, databases, electronic systems (including database management systems), and networks, whether operated directly by Merchant or through the use of third-party service providers, excluding the Banyan Systems.
- 1.10. “**Personal Data**” means information or data that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular individual and includes, without limitation, identifiers such as a real name, alias, postal address, unique personal identifier, online identifier Internet Protocol address, email address, account name, social security number, driver’s license number, passport number, or other similar identifiers, personally identifiable financial information, and other similar information about an individual and includes, without limitation, “personal information”, “PII”, “personally identifiable information,” and “nonpublic personal information” (and other similar terms) as defined under applicable data privacy and data security laws including, without limitation and as applicable, the California Consumer Privacy Act, the Gramm Leach Bliley Act, the General Data Protection Regulation and any state or federal security breach or data breach notification laws (the “**Security Breach Laws**”).
- 1.11. “**Personnel**” means a person’s or entity’s employees, officers, directors, members, agents, contractors, and representatives, and other individuals acting under the authority of or on behalf of such person or entity.
- 1.12. “**Process**” means to take any action or perform any operation or set of operations on any data, information, or other content, including to collect, receive, input, upload, download, record, reproduce, store, organize, compile, combine, log, catalog, cross-reference, manage, maintain, copy, adapt, alter, translate, or make other derivative works or improvements, process, retrieve, output, consult, use, perform, display, disseminate, transmit, submit, post, transfer, disclose, or otherwise provide or make available, or block, erase, or destroy. “**Processing**” and “**Processed**” have correlative meanings.
- 1.13. “**Banyan Data**” means each of the data, databases, materials, content, files, and information including, without limitation, Personal Data (if any), that (a) Banyan owns prior to the Effective Date; (b) Banyan acquires, authors, creates, collects, or develops during the Term independently from its duties or obligations under this Agreement, or which Banyan otherwise receives from an authorized third party; (c) Banyan, its Data Analytics Customers, or its or their Personnel create or develop, individually or jointly, using or derived from Merchant Data (alone or in combination with other data) that does not expressly identify any individual person or data subject (“**Resultant Data and Analyses**”); and (d) data and information related to the uploading and Processing of

Merchant Data by Banyan or otherwise concerning the Banyan Services that is used by Banyan in an aggregate and anonymized manner to, among other things, compile statistical and performance information related to the Banyan Services or its Processing of Merchant Data and Consumer Receipt Data (“**Service Data**”). Any derivatives, translations, modifications, enhancements, copies, or alterations of the Banyan Data, whether made by Banyan individually or jointly with others (including Merchant), shall also constitute Banyan Data.

- 1.14. “**Banyan Systems**” means the information technology infrastructure used by, and in the possession, custody, or control of, Banyan including all computers, software, hardware, databases, electronic systems (including database management systems), and networks, whether operated directly by Banyan or through the use of third-party service providers.
- 1.15. “**Security Breach**” means any act or omission that compromises or threatens to imminently compromise the security, confidentiality or integrity of a Party’s Systems, or results in the unauthorized disclosure of or access to, or threatens to imminently compromise the security, confidentiality, or integrity of (i) Access Credentials; or (ii) Merchant Data.
- 1.16. “**Term**” means the Effective Date through the Initial Term and any Renewal Term, unless earlier terminated as set forth herein.

## 2. Data Access and License Grant.

### 2.1. Access; Systems; Delivery.

2.1.1. Provision of Access Credentials by Banyan. Subject to and conditioned on Merchant’s compliance with all other terms and conditions of this Agreement, during the Term, Banyan may, in its discretion, provide Merchant or its Authorized Users with Access Credentials in order to permit Merchant or such Authorized Users to transmit or upload Merchant Data onto certain Banyan Systems. Banyan may withdraw this permission at any time, without liability, in its sole discretion for any reason or no reason. The permission granted by Banyan pursuant to this Section is personal to Merchant and may not be transferred or sublicensed, in whole or in part, by operation of law or otherwise, to any other person or entity. Merchant shall, and shall ensure its Authorized Users, hold in strict confidence any Access Credentials provided by Banyan and shall not (and shall ensure its Authorized Users do not) share, disclose, or otherwise provide such Access Credentials to any other person or entity without the prior written approval of Banyan. Merchant shall be responsible and liable for all acts and omissions of its Authorized Users as if such acts and omissions were performed by Merchant and a breach of any term or condition of this Agreement by Merchant’s Authorized Users shall constitute a breach by Merchant.

2.1.2. Delivery; Automation of Merchant Data. Merchant shall deliver the Merchant Data electronically on the frequency and in the format agreed upon by the Parties

and specified in **Exhibit A**. Merchant understands and agrees that in order to automate the provision of Merchant Data to Banyan, Merchant may need to create, develop, and/or implement certain automated procedures or processes (including, without limitation, certain software), at Merchant's sole cost and expense. Notwithstanding the foregoing, Banyan may, but is under no obligation to, make available to Merchant, via the Banyan Portal, certain manuals, guides, information sheets, or other documentation intended to facilitate Merchant's implementation of such procedures or processes (the "**Banyan Implementation Documentation**"). Merchant's right to use the Banyan Implementation Documentation shall be limited as set forth in the Terms of Use and this Agreement. Use of the Banyan Implementation Documentation is solely at Merchant's own risk. Merchant agrees that the Banyan Implementation Documentation constitutes Banyan's Confidential Information. Merchant understands and agrees that the Banyan Systems may change, be altered or otherwise be updated from time to time during the Term by Banyan or its service providers (in its or their sole discretion) and that Banyan shall not have any liability whatsoever resulting from any such changes, alterations, or modifications even if such changes, alterations, or modifications require Merchant to update its automated procedures or processes or related software (including in any manner not described in the Banyan Implementation Documentation) in order to continue to provide the Merchant Data to Banyan, which shall be at Merchant's sole cost and expense.

- 2.1.3. System Control. As between the Parties, each Party has and will retain sole control over the operation, provision, maintenance, and management of their respective Systems and shall have sole responsibility and liability with respect thereto, other than as may be expressly set forth in this Agreement. "**Systems**" means, as applicable, the Merchant Systems and the Banyan Systems.
- 2.1.4. Access to Banyan Portal. During the Term, Banyan may, but is under no obligation to, provide Merchant or its Authorized Users with use of or access to an online portal that allows Merchant and/or its Authorized Users to, among other things, view information concerning the number of Consumer Receipts processed by Banyan, which is available at [www.getbanyan.com](http://www.getbanyan.com) (the "**Banyan Portal**"). Merchant understands and agrees that, except as expressly set forth in this Agreement, its and its Authorized Users' use of and access to the Banyan Portal and any information, data, or materials (including Banyan Data) provided by way of such Banyan Portal or available therefrom, is governed by Banyan's Online Terms of Use available at [www.getbanyan.com/terms-of-use](http://www.getbanyan.com/terms-of-use) (the "**Terms of Use**").
- 2.1.5. Additional Analytic Products and Services. Merchant understands and agrees that nothing in this Agreement grants to Merchant any right to receive any data analysis products or services (including, without limitation, Resultant Data and Analyses) that may be made available from Banyan and/or its Data Analytics Customers from time to time during the Term ("**Data Analysis Services**"). In the event Merchant wishes to obtain any Data Analysis Services, it shall enter into a separate Data Analysis Service Agreement with Banyan and/or Banyan's respective Data

Analytics Customer(s) on terms to be mutually agreed upon by the Parties and/or such Data Analytics Customer.

## 2.2. License Grant.

2.2.1. License Grant to Merchant. Subject to and conditioned on Merchant's compliance with all other terms and conditions of this Agreement, Banyan hereby grants to Merchant and its Authorized Users a limited, non-exclusive, non-sublicensable, non-transferable, fully paid up, right and license during the Term, to use the Access Credentials solely as needed for Merchant to perform its duties and obligations or exercise its rights under this Agreement. The foregoing license grant expressly excludes any right to prepare derivative works of, or to otherwise modify, alter, translate, or change the Access Credentials.

2.2.2. License Grant to Banyan. Subject to the terms and conditions of this Agreement, Merchant hereby grants to Banyan:

(a) a non-exclusive, sublicensable (solely to Banyan's Personnel, Fintech Customers, and End Users), transferable (subject to Section 10.6), fully paid-up, worldwide, irrevocable (subject to termination pursuant to Section 9) right and license during the Term (and thereafter as contemplated by Section 9.3), to use, Process, reproduce, display, distribute, perform, display, and prepare derivative works of the Merchant Data for Banyan's internal business purposes and as needed for Banyan to provide and make available the Banyan Services (including digital copies of or data pertaining to Consumer Receipts) to its Fintech Customers and End Users;

(b) a non-exclusive, fully sublicensable, transferable (subject to Section 10.6), royalty-free, worldwide, perpetual, irrevocable, right and license to use, Process, reproduce, display, distribute, perform, display, and prepare derivative works of Merchant Data solely as needed for Banyan and/or its Data Analytics Customers to create, develop, use, Process, reproduce, display, distribute, perform, display, and prepare derivative works of, and otherwise commercially exploit, the Resultant Data and Analyses and Service Data for any reason or no reason, in its or their sole discretion; and

(c) a non-exclusive, sublicensable (solely to Banyan's Personnel and Fintech Customers), transferable (subject to Section 10.6), fully paid-up, worldwide, right and license during the Term to use and display any Trademarks appearing on any Consumer Receipts or identified in the Consumer Receipt Data for the sole purpose of displaying digital copies of such Consumer Receipts to associated End Users.

Notwithstanding anything to the contrary in this Agreement, (i) Banyan may freely disclose Merchant Data (including as modified by Banyan) to Banyan's Fintech Customers and its and their End Users as needed to provide the Banyan Services, provided such Merchant Data pertains to an End User who has contracted with a Fintech Customer and who has consented to receive or otherwise not opted out from receiving digital Consumer Receipts vis-à-vis the Banyan Services; (ii) Banyan may freely disclose Merchant Data (including as modified by Banyan) to Banyan's Data Analytics Customers

for the purpose contemplated by Section 2.2.2(b) above; and (iii) Banyan may freely disclose, publish, make available, license, or otherwise provide Banyan Data to third parties for any reason or no reason, in Banyan's sole discretion.

2.2.3. Exclusivity. During the Term, Merchant agrees not to disclose, provide, or make available any Consumer Receipt Data to any financial institution or financial technology services provider for the purposes of providing digital receipts or related transaction data to Merchant's consumers.

### 3. Restrictions on Use and Access.

3.1. General Restrictions. Except as expressly permitted pursuant to this Agreement or any other agreement entered into between the Parties, neither Party shall, nor shall such Party authorize any person or entity to, access or use the other Party's Systems, data, information, content, materials, or intellectual property, or upload data, information, content, files, or materials to the other Party's Systems.

3.2. Specific Restrictions on Banyan. Without limiting the generality of Section 3.1, except as this Agreement expressly permits, as otherwise expressly agreed upon by the Parties (including pursuant to the Terms of Use), or to the extent the following restrictions are prohibited per applicable Law, Banyan shall not, directly or indirectly:

3.2.1. use the Merchant Data for any purpose other than as expressly permitted under this Agreement;

3.2.2. rent, lease, lend, sell, sublicense, distribute, publish, transfer, or otherwise make available any of the Merchant Data to any person or entity;

3.2.3. attempt to derive or gain unauthorized access to the Merchant Systems, in whole or in part;

3.2.4. bypass or breach any security device or protection used by the Merchant Systems;

3.2.5. damage, destroy, disrupt, disable, impair, interfere with, or otherwise impede or harm in any manner the Merchant Systems, in whole or in part;

3.2.6. access or use the Merchant Data in any manner or for any purpose that Banyan knows to infringe, misappropriate, or otherwise violate any intellectual property right or other right of any third party, or that Banyan knows violates any applicable Law; or

3.2.7. otherwise access or use the Merchant Data beyond the scope of the authorization granted by Merchant under this Agreement or otherwise expressly in writing.

3.3. Specific Restrictions on Merchant. Without limiting the generality of Section 3.1, except as this Agreement expressly permits or to the extent the following restrictions are prohibited per applicable Law, Merchant shall not, directly or indirectly:

- 3.3.1. use the Access Credentials for any purpose other than as expressly permitted under this Agreement;
  - 3.3.2. rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer, or otherwise make available any of the Access Credentials to any person or entity;
  - 3.3.3. bypass or breach any security device or protection used by the Banyan Systems or access or use the Banyan Systems in any unauthorized manner;
  - 3.3.4. input, upload, transmit, or otherwise provide to or through the Banyan Systems, any information or materials that are unlawful or injurious, or contain, transmit, or activate any Harmful Code;
  - 3.3.5. damage, destroy, disrupt, disable, impair, interfere with, or otherwise impede or harm in any manner the Banyan Systems, in whole or in part;
  - 3.3.6. access or use the Banyan Systems or Access Credentials in any manner or for any purpose that infringes, misappropriates, or otherwise violates any intellectual property right or other right of any third party, or that violates any applicable Law;
  - 3.3.7. access or use the Banyan Systems for purposes of competitive analysis, the development, provision, or use of a competing software service or product or any other purpose that is to Banyan's detriment or commercial disadvantage; or
  - 3.3.8. otherwise access or use the Access Credentials or Banyan Systems beyond the scope of the authorization granted by Banyan under this Agreement or otherwise expressly in writing.
- 3.4. Corrective Action. If a Party becomes aware of any actual or threatened activity prohibited by Section 3.1, 3.2, or 3.3 (as applicable to such Party), such Party shall, and shall use reasonable efforts to cause its Authorized Users and or Personnel to, immediately: (a) take reasonable and lawful measures within their respective control that are necessary to stop the activity or threatened activity and to mitigate its effects (including, where applicable, by discontinuing and preventing any unauthorized access to or use of the other Party's Systems, Access Credentials, data, materials, and/or information, and permanently erasing from their Systems and destroying any data to which any of them have gained unauthorized access); and (b) notify the other Party of any such actual or threatened activity.
4. Payment and Fees.
- 4.1. Fees. Unless payment terms are expressly agreed upon by the Parties and set forth in **Exhibit C**, Merchant Data shall be provided to Banyan free of charge and without payment or royalty of any kind. If payment terms are expressly agreed upon by the Parties and set forth in **Exhibit C**, Banyan agrees that it shall pay Merchant all undisputed fees ("**Fees**") set forth in **Exhibit C** without offset or deduction. All such payments shall be in US dollars on or before the due date set forth in **Exhibit C**.



- 4.2. Taxes. All Fees (if any) payable by Banyan under this Agreement are exclusive of taxes and similar assessments. Banyan is responsible for all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any federal, state, or local governmental or regulatory authority on any amounts payable by Banyan hereunder, other than any taxes imposed on Merchant's income.
- 4.3. Fee Disputes. In the event any Fees are disputed between the Parties, the Parties agree to reasonably cooperate with one another in good faith to resolve such dispute.
5. Intellectual Property.
- 5.1. Ownership of Banyan Data. Merchant acknowledges that, as between the Parties, Banyan owns all rights, title, and interest including, without limitation, intellectual property rights, in and to the Banyan Data (excluding any underlying Merchant Data) and the Access Credentials. To the extent Merchant has or acquires any rights, title, or interests including, without limitation, intellectual property rights, in and to such Banyan Data or Access Credentials, to the fullest extent permitted per applicable Law, Merchant hereby assigns, transfers, and conveys to Banyan, for no additional consideration, all rights, title, and interests including, without limitation, intellectual property rights, in and to such Banyan Data and Access Credentials immediately and automatically upon such Banyan Data and/or Access Credentials coming into existence or upon Merchant's acquisition of any such rights; provided, however, that Merchant shall retain all of its rights, title, and interests including, without limitation, intellectual property rights, in and to the Merchant Data (subject to the limited rights licensed to Banyan hereunder). To the extent such assignment is invalid or unenforceable for any reason, Merchant hereby grants to Banyan a non-exclusive, fully paid up, perpetual, irrevocable, fully sublicensable, fully transferable, worldwide right and license to make, use, have made, offer for sale, sell, import, export, advertise, market, promote, reproduce, distribute, display, perform, prepare derivative works of, and otherwise commercially exploit such Banyan Data and Access Credentials (excluding Merchant Data), for any reason or no reason, in Banyan's sole discretion.
- 5.2. Ownership of Merchant Data. Banyan acknowledges that, as between the Parties, Merchant owns all rights, title, and interest including, without limitation, intellectual property rights, in and to the Merchant Data, all rights in which (other than those expressly granted to Banyan hereunder) are reserved by Merchant.
- 5.3. Reservation of Rights. Each Party reserves all rights not expressly granted to the other Party in this Agreement. Except for the limited rights and licenses expressly granted under this Agreement, nothing in this Agreement grants, by implication, waiver, estoppel, or otherwise, to any Party or any third party any intellectual property rights or rights in any data, information, content, or materials.
6. Confidentiality and Data Security.
- 6.1. Confidential Information. The Merchant understands and agrees that, as between the Parties, the Banyan Data and Access Credentials (excluding any underlying Merchant

Data) constitute Banyan's or its licensors' confidential information and is a special, valuable, and unique asset to Banyan or its licensors; and Banyan understand and agrees that, as between the Parties, the Merchant Data constitutes Merchant's confidential information and is a special, valuable and unique asset to Merchant (collectively, and together with any other data, information, content, or materials expressly described as being confidential in this Agreement, the "**Confidential Information**"). For itself and on behalf of its Authorized Users and Personnel, as applicable, each Party hereby agrees to the following:

- 6.1.1. Except as expressly permitted in this Agreement or otherwise in writing between the Parties, such Party will not (and will ensure its Authorized Users and Personnel, as applicable, do not) disclose the other Party's Confidential Information, in whole or in part, to any third party.
- 6.1.2. Neither Party shall use the other Party's Confidential Information except as expressly permitted pursuant to this Agreement or otherwise as agreed between the Parties in writing;
- 6.1.3. Each Party shall use the same degree of care to protect the other Party's Confidential Information as it would use with respect to its own information of like importance which it does not desire to have published or disseminated but in any event no less than reasonable care;
- 6.1.4. If a Party faces legal action or is subject to legal proceedings requiring disclosure of the other Party's Confidential Information, then, prior to disclosing any such Confidential Information, such Party shall promptly notify the other Party and, upon the other Party's request, shall cooperate with the other Party in contesting such request or, as a last resort, obtaining a protective order with respect to such Confidential Information;
- 6.1.5. Except as expressly set forth in this Agreement, no license under any patents, copyrights, mask rights or other intellectual or proprietary rights is granted or conveyed to a Party in the other Party's Confidential Information; and
- 6.1.6. Notwithstanding any other provision of this Agreement, neither Party shall export or re-export any of the other Party's Confidential Information acquired under this Agreement or any commodities using such Confidential Information to any country to which the United States government forbids export or, at the time of export, requires an export license or approval, without first obtaining such license or approval and approval by the other Party.

6.2. Data Security. The Parties hereby agree as follows with respect to data security and data privacy:

- 6.2.1. Compliance with Data Security Laws. Each Party agrees to (and to ensure that its Personnel and Authorized Users, as applicable) abide by, any and all applicable Laws, including, but not limited to, any and all applicable Data Security Laws, and all revisions or amendments thereto (whether existing prior to the effective date or

effective thereafter). This Section 6.2.1 does not relieve, remove, or replace a party's obligations under any applicable Data Security Laws.

6.2.2. Risk of Loss. Merchant shall be solely liable for the unauthorized collection of or access to or disclosure, distribution, Processing, use or transmission of Merchant Data in its possession, custody or control (including, without limitation, on any Merchant Systems) and/or in the possession, custody or control of any of its Personnel or Authorized Users. Likewise, Merchant shall be solely liable for any unauthorized collection, access to or disclosure, distribution, or Processing of Merchant Data during the transmission of same to the Banyan Systems, unless such unauthorized collection, access, disclosure, distribution, or Processing was directly the result of Banyan's gross negligence or more culpable conduct.

6.2.3. Protection of Merchant Data. Banyan shall, taking into account the state of technological development and the cost of implementation, implement administrative, technical, organizational, and physical safeguards appropriate to its size, complexity and scope of activities, the nature of the Processed Merchant Data, and the harm that might result from the unauthorized or unlawful Processing of such data (or accidental loss, destruction, or damage), which safeguards are intended to protect Merchant Data from unauthorized use, access, Processing, or disclosure and/or accidental loss, damage, or destruction and, notwithstanding the generality of the foregoing, shall use reasonable measures to (a) ensure the security, integrity, availability and confidentiality of Merchant Data (except as otherwise expressly set forth in this Agreement); (b) protect against anticipated threats or hazards to the security or integrity of Merchant Data or Banyan Systems; (c) maintain a comprehensive information security program to protect Merchant Data from unauthorized access, use, modification, publication, theft, disclosure or transmission, and (d) conduct risk assessments, penetration tests and vulnerability analyses and promptly implement appropriate safeguards and take appropriate measures to mitigate any risks evident from such testing or scans.

6.2.4. Role of the Parties. The Parties agree that for purposes of applicable Data Security Laws, Merchant shall be deemed a controller and Banyan a processor. With respect to any Personal Data comprising the Merchant Data Processed by Banyan, Banyan agrees that it shall Process such Personal Data only on the documented written instructions of Merchant (including as set forth in this Agreement), unless Banyan is otherwise required by applicable Laws to otherwise Process such Personal Data. **Exhibit A** sets forth the scope, nature, and purpose of Processing by Banyan, the duration of the Processing, and types of Personal Data and categories of data subject related to such Personal Data.

6.2.5. Assistance. Each Party shall reasonably assist the other Party, at the requesting Party's cost, in responding to any request from a data subject and in ensuring compliance with the requesting Party's obligations under the Data Security Laws with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators. Each Party shall notify the other Party without undue delay on becoming aware of a Security Breach. Banyan will

maintain complete and accurate records and information necessary to demonstrate its compliance with Section 6.2.3 and will make such information or records available to Merchant upon Merchant's reasonable request. Such information or records shall constitute Banyan's Confidential Information.

6.2.6. Sub-Processors. Merchant agrees that Banyan's Data Analytics Customers, service providers, and Fintech Customers identified on **Exhibit D** shall be third-party processors of Merchant Data (including Personal Data comprising Merchant Data) under this Agreement, and Merchant consents to Banyan appointing such third parties as sub-processors of Merchant Data. Upon written notice to Merchant, Banyan may, in its sole discretion, update **Exhibit D** at any time to include additional Data Analytics Customers, service providers, or Fintech Customers. Merchant may, within 20 days of such notice, object to the appointment of such Data Analytics Customer, service provider, or Fintech Customer via written notice to Banyan. If such an objection is made, Banyan and Merchant will work together to resolve such objection. If such objection cannot be resolved within 20 days of Banyan's receipt of the notice of objection, Merchant may terminate this Agreement upon written notice to Banyan. Banyan confirms that it has entered or (as the case may be) will enter with the third-party processors into written agreements that Banyan undertakes reflect and will continue to reflect the requirements of the Data Security Laws. As between the Parties, Banyan shall remain fully liable for all acts or omissions of any third-party processor appointed by it pursuant to this Section.

6.2.7. Transfer of Data. The Parties agree to comply with the Standard Contractual Clauses set forth on **Exhibit E** in the event Merchant wishes to transfer Personal Data comprising Merchant Data to Banyan outside of the European Economic Area, in which case Merchant shall be deemed a data exporter, and Banyan, a data importer. In the event the Standard Contractual Clauses are applicable between the Parties, the Parties agree that, to the extent there is any conflict between such Standard Contractual Clauses and any term or condition in the main body of this Agreement, the Standard Contractual Clauses shall govern and control.

6.3. Destruction of Access Credentials. Merchant shall, and shall cause its Authorized Users to, permanently destroy, erase, and/or delete the Access Credentials promptly following the termination or expiration of this Agreement for any reason.

6.4. Survival. The provisions in this Section 6 shall survive termination or expiration of this Agreement for any reason (a) with respect to any trade secrets comprising the data or Confidential Information, for so long as such trade secrets are protected as such per applicable Laws; (b) with respect to Personal Data, for so long as such is protectable or protected or as otherwise required per applicable Law; and (c) with respect to any other Confidential Information or data not falling within (a) or (b) for (i) a period of five (5) years from termination or expiration of this Agreement; or (ii) the longest time permitted per applicable Law, whichever is shorter.

7. Representations and Warranties; Disclaimer.

- 7.1. Representations and Warranties. Each Party represents and warrants to the other Party that: (a) it is duly organized, validly existing, and in good standing as a corporation or other entity under the Laws of the jurisdiction of its incorporation or other organization; (b) it has the full corporate or organizational right, power, and authority to enter into and perform its obligations and grant the rights, licenses, consents, and authorizations it grants or is required to grant under this Agreement; (c) the execution of this Agreement by its representative whose signature is set forth at the end of this Agreement has been duly authorized by all necessary corporate or organizational action of such Party; and (d) when executed and delivered by both Parties, this Agreement will constitute the legal, valid, and binding obligation of such Party, enforceable against such Party in accordance with its terms. Merchant further represents and warrants that (w) it has and will have all necessary rights, permissions, authorizations, and consents necessary to grant to Banyan the rights granted in this Agreement and to permit Banyan to exercise its rights and perform its duties and obligations under this Agreement; (x) Merchant's provision of Merchant Data to Banyan will comply with all applicable Laws and that there is a lawful basis under applicable Data Security Laws to provide the Merchant Data to Banyan; (y) the Merchant Data will be free from Harmful Code; and (z) the Merchant Data and Merchant's Trademarks, and Banyan's use thereof as contemplated by this Agreement, does not and will not infringe upon, misappropriate, or otherwise violate the rights including, without limitation, intellectual property rights, of any person or entity.
- 7.2. DISCLAIMER. EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN THIS AGREEMENT, TO THE FULLEST EXTENT PERMITTED PER APPLICABLE LAW, EACH PARTY SPECIFICALLY DISCLAIMS ALL WARRANTIES, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE, OR TRADE PRACTICE CONCERNING ANY AND ALL DATA OR ANY OTHER SUBJECT MATTER OF THIS AGREEMENT. WITHOUT LIMITING THE FOREGOING. EXCEPT TO THE EXTENT REQUIRED PER APPLICABLE LAW, BANYAN SHALL HAVE NO OBLIGATION TO BACK UP ANY MERCHANT DATA.
- 7.3. LIMITATION OF LIABILITY. TO THE FULLEST EXTENT PERMITTED PER APPLICABLE LAW, IN NO EVENT SHALL BANYAN BE LIABLE TO MERCHANT OR TO ANY THIRD PARTY FOR ANY LOSS OF USE, REVENUE, OR PROFIT, LOSS OF PRODUCTION, USE, BUSINESS, REVENUE, OR PROFIT OR DIMINUTION IN VALUE, IMPAIRMENT, INABILITY TO USE OR LOSS, INTERRUPTION OR DELAY OF THE SERVICES, LOSS, DAMAGE, CORRUPTION, OR RECOVERY OF DATA, LOSS OF GOODWILL OR REPUTATION, BREACH OF DATA OR SYSTEM SECURITY, OR FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, OR PUNITIVE DAMAGES WHETHER ARISING OUT OF BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGE WAS FORESEEABLE AND WHETHER OR NOT BANYAN HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER

REMEDY OF ITS ESSENTIAL PURPOSE. TO THE FULLEST EXTENT PERMITTED PER APPLICABLE LAW, IN NO EVENT SHALL BANYAN'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, EXCEED THE AGGREGATE AMOUNTS PAID TO MERCHANT PURSUANT TO THIS AGREEMENT (IF ANY) OR \$100.00, WHICHEVER IS GREATER. MERCHANT UNDERSTANDS AND AGREES THAT, TO THE FULLEST EXTENT PERMITTED PER APPLICABLE LAW, MERCHANT SHALL HAVE EXCLUSIVE LIABILITY, AND BANYAN SHALL HAVE NO LIABILITY WHATSOEVER, ARISING OUT OF (A) ANY ERRORS OR INACCURACIES IN MERCHANT DATA NOT DIRECTLY CAUSED BY THE GROSS NEGLIGENCE OR MORE CULPABLE CONDUCT OF BANYAN OR ITS PERSONNEL; (B) MERCHANT'S COLLECTION, HANDLING, PROCESSING, TRANSMISSION, OR DISCLOSURE OF MERCHANT DATA TO BANYAN; (C) ANY SECURITY BREACH OF MERCHANT SYSTEMS NOT DIRECTLY CAUSED BY THE ACTIONS OF BANYAN; AND/OR (D) MERCHANT'S INABILITY TO UPLOAD, TRANSMIT, OR PROVIDE BANYAN WITH MERCHANT DATA.

8. Indemnification. Merchant, on its behalf and on behalf of its permitted successors, permitted assigns, and its and their respective Authorized Users and Personnel ("**Merchant Parties**"), hereby agrees to indemnify, defend and hold harmless Banyan, its successors, assigns and affiliates, and its and their respective Personnel, as well as Banyan's Fintech Customers, End Users, and Data Analytics Customers ("**Banyan Parties**") from and against any and all losses, damages, liabilities, actions, judgments, settlements, costs, fees (including actual attorney's costs and fees), penalties, causes of action, and claims arising out of or under or resulting from or relating to any claim or assertion by any person or entity against any Banyan Party arising from or under or resulting from or relating to (i) Merchant's or any Authorized User's breach or violation of any applicable Laws, including any applicable Data Security Laws and/or Security Breach Laws; (ii) Merchant's or its Authorized Users' breach of this Agreement; (iii) any Security Breach, including, but not limited to, any suspected or actual unauthorized access, damage or disclosure of Personal Data transmitted, uploaded, or provided to the Banyan Systems prior to the time such Merchant Data passes through the firewalls of the Banyan Systems; (iv) the acts or omissions of any Authorized User or Personnel of Merchant; and/or (v) any claim that the Merchant Data or an Banyan Party's use or Processing thereof in accordance with this Agreement infringes upon, misappropriates, or violates the rights including, without limitation, intellectual property rights or rights of privacy, of any person or entity.

9. Term and Termination.

- 9.1. Term. This Agreement shall be effective as of the Effective Date and shall remain in full force and effect for a period of one (1) year thereafter, unless earlier terminated as set

forth herein (the “**Initial Term**”). This Agreement shall automatically renew for successive one (1) year periods, unless earlier terminated as set forth herein (each such period a “**Renewal Term**”) unless either Party provides the other with written notice of an intent to terminate the Agreement thirty (30) days prior to the expiration of the then-current Initial Term or Renewal Term.

9.2. Early Termination. Either Party may terminate this Agreement upon notice to the other Party in the event such other Party materially breaches this Agreement and such breach is incapable of being cured or, if capable of being cured, is not cured within thirty (30) days of the non-breaching Party providing notice of such breach to the other Party. Banyan may terminate this Agreement for any reason or no reason at any time upon thirty (30) days’ prior written notice to Merchant.

9.3. Effect of Termination. Upon expiration or termination of this Agreement for any reason, all non-perpetual rights and licenses granted by any Party hereunder shall automatically terminate and be revoked (except to the extent such rights and licenses must continue in effect in order for a Party to exercise any surviving rights or perform any surviving duties or obligations under this Agreement). Banyan will, at the written direction of Merchant, delete or return any Personal Data comprising the Merchant Data (and copies thereof) to the Merchant on termination of the Agreement, unless required by applicable Law to retain or store such Personal Data. Notwithstanding the foregoing or anything else to the contrary in this Agreement, in the event an End User has consented to or not opted out of the receipt of digital receipts vis-à-vis a Fintech Customer, Banyan may continue to use, access, and provide any corresponding Merchant Data to such Fintech Customer and/or associated End User after any termination or expiration of this Agreement for so long as such End User continues to wish to receive the Banyan Services and such Fintech Customer is a party to a valid and binding service agreement with Banyan.

9.4. Survival. Those terms which by their terms or nature should survive termination or expiration of this Agreement shall so survive including, without limitation, Sections 1, 2.2.2(b), 5, 6, 7, 8, 9.3, 9.4, and 10.

## 10. Miscellaneous.

10.1. Further Assurances. On a Party’s reasonable request, the other Party shall, at the requesting Party’s sole cost and expense, execute and deliver all such documents and instruments, and take all such further actions, as may be necessary to give full effect to this Agreement.

10.2. Relationship of the Parties. The relationship between the Parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture, or other form of joint enterprise, employment, or fiduciary relationship between the Parties, and neither Party shall have authority to contract for or bind the other Party in any manner whatsoever.

10.3. Notices. Except as otherwise expressly set forth in the Agreement, any notice, request, consent, claim, demand, waiver, or other communications under this Agreement shall have legal effect only if in writing and addressed to a Party as follows (or to such other address or such other person that such Party may designate from time to time in accordance with this Section:

If to Banyan:

Attn: Jehan Luth  
101 Crawfords Corner Road  
Holmdel NJ 07733 Suite 4116  
jehan.luth@getbanyan.com

If to Merchant:

Refer to online application attached in Exhibit

Notices sent in accordance with this Section will be deemed effectively given: (a) when received, if delivered by hand, with signed confirmation of receipt; (b) when received, if sent by a nationally recognized overnight courier, signature required; (c) when sent, if by facsimile or email, if sent during the addressee's normal business hours, and on the next business day, if sent after the addressee's normal business hours; and (d) on the fifth (5<sup>th</sup>) day after the date mailed by certified or registered mail, return receipt requested, postage prepaid.

10.4. Headings. The headings in this Agreement are for reference only and do not affect the interpretation of this Agreement.

10.5. Entire Agreement. This Agreement, together with the Terms of Use, constitutes the sole and entire agreement of the Parties with respect to the subject matter of this Agreement and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect to such subject matter.

10.6. Assignment. Merchant shall not assign or otherwise transfer any of its rights, or delegate or otherwise transfer any of its obligations or performance under this Agreement, in each case whether voluntarily, involuntarily, by operation of Law, or otherwise, without Banyan's prior written consent. For purposes of the preceding sentence, and without limiting its generality, any merger, consolidation, or reorganization involving Merchant (regardless of whether Merchant is a surviving or disappearing entity) will be deemed to be a transfer of rights, obligations, or performance under this Agreement for which Banyan's prior written consent is required. No assignment, delegation, or transfer will relieve Merchant of any of its obligations or performance under this Agreement. Any purported assignment, delegation, or transfer in violation of this Section is void. This Agreement is binding upon and inures to the benefit of the Parties hereto and their respective successors and permitted assigns. This



Agreement and the rights granted to Banyan hereunder is and are freely assignable by Banyan.

- 10.7. No Third-Party Beneficiaries. Except for the Banyan Parties' rights pursuant to Section 8 and the rights of any of Banyan's sublicensees, this Agreement is for the sole benefit of the Parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other person or entity any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.
- 10.8. Amendment and Modification; Waiver. No amendment to or modification of or rescission, termination, or discharge of this Agreement is effective unless it is in writing and signed by an authorized representative of each Party. No waiver by any Party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the Party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power, or privilege arising from this Agreement will operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.
- 10.9. Severability. If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal, or unenforceable, the Parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.
- 10.10. Governing Law; Submission to Jurisdiction. This Agreement is governed by and construed in accordance with the internal laws of the Commonwealth of Pennsylvania without giving effect to any choice or conflict of law provision or rule that would require or permit the application of the laws of any jurisdiction other than those of the Commonwealth of Pennsylvania. Any legal suit, action, or proceeding arising out of or related to this Agreement or the licenses granted hereunder will be instituted exclusively in the federal courts of the United States or the courts of the Commonwealth of Pennsylvania in each case located in the city and County of Philadelphia, and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding. Service of process, summons, notice, or other document by mail to such Party's address set forth herein shall be effective service of process for any suit, action, or other proceeding brought in any such court.
- 10.11. Waiver of Jury Trial. Each Party irrevocably and unconditionally waives any right it may have to a trial by jury in respect of any legal action arising out of or relating to this Agreement or the transactions contemplated hereby.

10.12. Equitable Relief. Each Party acknowledges and agrees that a breach or threatened breach by the other Party of any of such other Party's obligations under Sections 3 or Section 6 would cause such Party irreparable harm for which monetary damages would not be an adequate remedy and that, in the event of such breach or threatened breach, such non-breaching Party will be entitled to equitable relief, including a restraining order, an injunction, specific performance, and any other relief that may be available from any court, without any requirement to post a bond or other security, or to prove actual damages or that monetary damages are not an adequate remedy. Such remedies are not exclusive and are in addition to all other remedies that may be available at law, in equity, or otherwise.

10.13. Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

[signature page follows]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement by submitting the online Merchant Application.

**Exhibit A**

**Merchant Data**

Merchant Data shall comprise the following:

- Consumer Receipt Data for transactions at Merchant Establishments; and
- Basket Level/Product Level details as legally required on a receipt

Merchant Data shall be made available to Banyan in the following format: API JSON.

Merchant Data shall be uploaded to the Banyan Systems on a near real-time basis.

Additional information concerning Processing of Personal Data comprising Merchant Data:

**Exhibit B**

**Merchant Establishments**

Merchant Establishments shall comprise of the names and lists mentioned in the merchant application form

**Exhibit C**  
**Payment Terms**

**Exhibit D**  
Merchant Application

## Exhibit E

### STANDARD CONTRACTUAL CLAUSES

#### **Data transfer agreement**

between

\_ (name)

\_ (address and country of establishment)

hereinafter “data exporter”)

and

\_ (name)

\_ (address and country of establishment)

hereinafter “data importer”

each a “party”; together “the parties”.

#### **Definitions**

For the purposes of the clauses:

- (a) “personal data”, “special categories of data/sensitive data”, “process/processing”, “controller”, “processor”, “data subject” and “supervisory authority/authority” shall have the same meaning as in Directive 95/46/EC of 24 October 1995 (whereby “the authority” shall mean the competent data protection authority in the territory in which the data exporter is established);
- (b) “the data exporter” shall mean the controller who transfers the personal data;
- (c) “the data importer” shall mean the controller who agrees to receive from the data exporter personal data for further processing in accordance with the terms of these clauses and who is not subject to a third country’s system ensuring adequate protection;
- (d) “clauses” shall mean these contractual clauses, which are a free-standing document that does not incorporate commercial business terms established by the parties under separate commercial arrangements.

The details of the transfer (as well as the personal data covered) are specified in Annex B, which forms an integral part of the clauses.

#### **I. Obligations of the data exporter**

The data exporter warrants and undertakes that:



- (a) The personal data have been collected, processed and transferred in accordance with the laws applicable to the data exporter.
- (b) It has used reasonable efforts to determine that the data importer is able to satisfy its legal obligations under these clauses.
- (c) It will provide the data importer, when so requested, with copies of relevant data protection laws or references to them (where relevant, and not including legal advice) of the country in which the data exporter is established.
- (d) It will respond to enquiries from data subjects and the authority concerning processing of the personal data by the data importer, unless the parties have agreed that the data importer will so respond, in which case the data exporter will still respond to the extent reasonably possible and with the information reasonably available to it if the data importer is unwilling or unable to respond. Responses will be made within a reasonable time.
- (e) It will make available, upon request, a copy of the clauses to data subjects who are third party beneficiaries under clause III, unless the clauses contain confidential information, in which case it may remove such information. Where information is removed, the data exporter shall inform data subjects in writing of the reason for removal and of their right to draw the removal to the attention of the authority. However, the data exporter shall abide by a decision of the authority regarding access to the full text of the clauses by data subjects, as long as data subjects have agreed to respect the confidentiality of the confidential information removed. The data exporter shall also provide a copy of the clauses to the authority where required.

## **II. Obligations of the data importer**

The data importer warrants and undertakes that:

- (a) It will have in place appropriate technical and organisational measures to protect the personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, and which provide a level of security appropriate to the risk represented by the processing and the nature of the data to be protected.
- (b) It will have in place procedures so that any third party it authorises to have access to the personal data, including processors, will respect and maintain the confidentiality and security of the personal data. Any person acting under the authority of the data importer, including a data processor, shall be obligated to process the personal data only on instructions from the data importer. This provision does not apply to persons authorised or required by law or regulation to have access to the personal data.
- (c) It has no reason to believe, at the time of entering into these clauses, in the existence of any local laws that would have a substantial adverse effect on the guarantees provided for under these clauses, and it will inform the data exporter (which will pass such notification on to the authority where required) if it becomes aware of any such laws.

- (d) It will process the personal data for purposes described in Annex B, and has the legal authority to give the warranties and fulfil the undertakings set out in these clauses.
- (e) It will identify to the data exporter a contact point within its organisation authorised to respond to enquiries concerning processing of the personal data, and will cooperate in good faith with the data exporter, the data subject and the authority concerning all such enquiries within a reasonable time. In case of legal dissolution of the data exporter, or if the parties have so agreed, the data importer will assume responsibility for compliance with the provisions of clause I(e).
- (f) At the request of the data exporter, it will provide the data exporter with evidence of financial resources sufficient to fulfil its responsibilities under clause III (which may include insurance coverage).
- (g) Upon reasonable request of the data exporter, it will submit its data processing facilities, data files and documentation needed for processing to reviewing, auditing and/or certifying by the data exporter (or any independent or impartial inspection agents or auditors, selected by the data exporter and not reasonably objected to by the data importer) to ascertain compliance with the warranties and undertakings in these clauses, with reasonable notice and during regular business hours. The request will be subject to any necessary consent or approval from a regulatory or supervisory authority within the country of the data importer, which consent or approval the data importer will attempt to obtain in a timely fashion.
- (h) It will process the personal data, at its option, in accordance with:
- (i) the data protection laws of the country in which the data exporter is established, or
  - (ii) the relevant provisions (1) of any Commission decision pursuant to Article 25(6) of Directive 95/46/EC, where the data importer complies with the relevant provisions of such an authorisation or decision and is based in a country to which such an authorisation or decision pertains, but is not covered by such authorisation or decision for the purposes of the transfer(s) of the personal data (2), or
  - (iii) the data processing principles set forth in Annex A.
- Data importer to indicate which option it selects:
- Initials of data importer: \_;
- (i) It will not disclose or transfer the personal data to a third party data controller located outside the European Economic Area (EEA) unless it notifies the data exporter about the transfer and
- (i) the third party data controller processes the personal data in accordance with a Commission decision finding that a third country provides adequate protection, or
  - (ii) the third party data controller becomes a signatory to these clauses or another data transfer agreement approved by a competent authority in the EU, or

- (iii) data subjects have been given the opportunity to object, after having been informed of the purposes of the transfer, the categories of recipients and the fact that the countries to which data is exported may have different data protection standards, or
- (iv) with regard to onward transfers of sensitive data, data subjects have given their unambiguous consent to the onward transfer

### **III. Liability and third party rights**

- (a) Each party shall be liable to the other parties for damages it causes by any breach of these clauses. Liability as between the parties is limited to actual damage suffered. Punitive damages (i.e. damages intended to punish a party for its outrageous conduct) are specifically excluded. Each party shall be liable to data subjects for damages it causes by any breach of third party rights under these clauses. This does not affect the liability of the data exporter under its data protection law.
- (b) The parties agree that a data subject shall have the right to enforce as a third party beneficiary this clause and clauses I(b), I(d), I(e), II(a), II(c), II(d), II(e), II(h), II(i), III(a), V, VI(d) and VII against the data importer or the data exporter, for their respective breach of their contractual obligations, with regard to his personal data, and accept jurisdiction for this purpose in the data exporter's country of establishment. In cases involving allegations of breach by the data importer, the data subject must first request the data exporter to take appropriate action to enforce his rights against the data importer; if the data exporter does not take such action within a reasonable period (which under normal circumstances would be one month), the data subject may then enforce his rights against the data importer directly. A data subject is entitled to proceed directly against a data exporter that has failed to use reasonable efforts to determine that the data importer is able to satisfy its legal obligations under these clauses (the data exporter shall have the burden to prove that it took reasonable efforts).

### **IV. Law applicable to the clauses**

These clauses shall be governed by the law of the country in which the data exporter is established, with the exception of the laws and regulations relating to processing of the personal data by the data importer under clause II(h), which shall apply only if so selected by the data importer under that clause.

### **V. Resolution of disputes with data subjects or the authority**

- (a) In the event of a dispute or claim brought by a data subject or the authority concerning the processing of the personal data against either or both of the parties, the parties will inform each other about any such disputes or claims, and will cooperate with a view to settling them amicably in a timely fashion.

- (b) The parties agree to respond to any generally available non-binding mediation procedure initiated by a data subject or by the authority. If they do participate in the proceedings, the parties may elect to do so remotely (such as by telephone or other electronic means). The parties also agree to consider participating in any other arbitration, mediation or other dispute resolution proceedings developed for data protection disputes.
- (c) Each party shall abide by a decision of a competent court of the data exporter's country of establishment or of the authority which is final and against which no further appeal is possible.

## **VI. Termination**

- (a) In the event that the data importer is in breach of its obligations under these clauses, then the data exporter may temporarily suspend the transfer of personal data to the data importer until the breach is repaired or the contract is terminated.
- (b) In the event that:
  - (i) the transfer of personal data to the data importer has been temporarily suspended by the data exporter for longer than one month pursuant to paragraph (a);
  - (ii) compliance by the data importer with these clauses would put it in breach of its legal or regulatory obligations in the country of import;
  - (iii) the data importer is in substantial or persistent breach of any warranties or undertakings given by it under these clauses;
  - (iv) a final decision against which no further appeal is possible of a competent court of the data exporter's country of establishment or of the authority rules that there has been a breach of the clauses by the data importer or the data exporter; or
  - (v) a petition is presented for the administration or winding up of the data importer, whether in its personal or business capacity, which petition is not dismissed within the applicable period for such dismissal under applicable law; a winding up order is made; a receiver is appointed over any of its assets; a trustee in bankruptcy is appointed, if the data importer is an individual; a company voluntary arrangement is commenced by it; or any equivalent event in any jurisdiction occurs

then the data exporter, without prejudice to any other rights which it may have against the data importer, shall be entitled to terminate these clauses, in which case the authority shall be informed where required. In cases covered by (i), (ii), or (iv) above the data importer may also terminate these clauses.

- (c) Either party may terminate these clauses if (i) any Commission positive adequacy decision under Article 25(6) of Directive 95/46/EC (or any superseding text) is issued in relation to the country (or a sector thereof) to which the data is transferred and processed by the data importer, or (ii) Directive 95/46/EC (or any superseding text) becomes directly applicable in such country.

(d)The parties agree that the termination of these clauses at any time, in any circumstances and for whatever reason (except for termination under clause VI(c)) does not exempt them from the obligations and/or conditions under the clauses as regards the processing of the personal data transferred.

**VII. Variation of these clauses**

The parties may not modify these clauses except to update any information in Annex B, in which case they will inform the authority where required. This does not preclude the parties from adding additional commercial clauses where required.

**VIII. Description of the Transfer**

The details of the transfer and of the personal data are specified in Annex B. The parties agree that Annex B may contain confidential business information which they will not disclose to third parties, except as required by law or in response to a competent regulatory or government agency, or as required under clause I(e). The parties may execute additional annexes to cover additional transfers, which will be submitted to the authority where required. Annex B may, in the alternative, be drafted to cover multiple transfers.

Dated: \_

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FOR DATA IMPORTER

FOR DATA EXPORTER

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## ANNEX A

### DATA PROCESSING PRINCIPLES

1. Purpose limitation: Personal data may be processed and subsequently used or further communicated only for purposes described in Annex B or subsequently authorised by the data subject.
2. Data quality and proportionality: Personal data must be accurate and, where necessary, kept up to date. The personal data must be adequate, relevant and not excessive in relation to the purposes for which they are transferred and further processed.
3. Transparency: Data subjects must be provided with information necessary to ensure fair processing (such as information about the purposes of processing and about the transfer), unless such information has already been given by the data exporter.
4. Security and confidentiality: Technical and organisational security measures must be taken by the data controller that are appropriate to the risks, such as against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, presented by the processing. Any person acting under the authority of the data controller, including a processor, must not process the data except on instructions from the data controller.
5. Rights of access, rectification, deletion and objection: As provided in Article 12 of Directive 95/46/EC, data subjects must, whether directly or via a third party, be provided with the personal information about them that an organisation holds, except for requests which are manifestly abusive, based on unreasonable intervals or their number or repetitive or systematic nature, or for which access need not be granted under the law of the country of the data exporter. Provided that the authority has given its prior approval, access need also not be granted when doing so would be likely to seriously harm the interests of the data importer or other organisations dealing with the data importer and such interests are not overridden by the interests for fundamental rights and freedoms of the data subject. The sources of the personal data need not be identified when this is not possible by reasonable efforts, or where the rights of persons other than the individual would be violated. Data subjects must be able to have the personal information about them rectified, amended, or deleted where it is inaccurate or processed against these principles. If there are compelling grounds to doubt the legitimacy of the request, the organisation may require further justifications before proceeding to rectification, amendment or deletion. Notification of any rectification, amendment or deletion to third parties to whom the data have been disclosed need not be made when this involves a disproportionate effort. A data subject must also be able to object to the processing of the personal data relating to him if there are compelling legitimate grounds relating to his particular situation. The burden of proof for any refusal rests on the data importer, and the data subject may always challenge a refusal before the authority.
6. Sensitive data: The data importer shall take such additional measures (e.g. relating to security) as are necessary to protect such sensitive data in accordance with its obligations under clause II.

7.Data used for marketing purposes: Where data are processed for the purposes of direct marketing, effective procedures should exist allowing the data subject at any time to “opt-out” from having his data used for such purposes.

8.Automated decisions: For purposes hereof “automated decision” shall mean a decision by the data exporter or the data importer which produces legal effects concerning a data subject or significantly affects a data subject and which is based solely on automated processing of personal data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc. The data importer shall not make any automated decisions concerning data subjects, except when:

(a)(i) such decisions are made by the data importer in entering into or performing a contract with the data subject, and

(ii) (the data subject is given an opportunity to discuss the results of a relevant automated decision with a representative of the parties making such decision or otherwise to make representations to that parties.

or

(b) where otherwise provided by the law of the data exporter.

## ANNEX B

### DESCRIPTION OF THE TRANSFER

(To be completed by the parties)

**Data subjects**

The personal data transferred concern the following categories of data subjects:

.....  
.....  
.....

**Purposes of the transfer(s)**

The transfer is made for the following purposes:

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.....  
.....

**Categories of data**

The personal data transferred concern the following categories of data:

.....  
.....  
.....

**Recipients**

The personal data transferred may be disclosed only to the following recipients or categories of recipients:

.....  
.....  
.....

**Sensitive data** (if appropriate)

The personal data transferred concern the following categories of sensitive data:

.....  
.....  
.....

**Data protection registration information of data exporter** (where applicable)

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.....

**Additional useful information** (storage limits and other relevant information)

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**Contact points for data protection enquiries**

**Data importer**

**Data exporter**

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