

**DATED**



**(1)**



**- and -**

**(2) OPTIMAL PAYMENTS LIMITED**

**- and -**

**(3) BARCLAYS BANK PLC**

**AGREEMENT FOR THE  
PROVISION OF MERCHANT  
ACQUISITION SERVICES**  
via a Service Provider

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**THIS AGREEMENT** is made on 28 March 2008

**BETWEEN**

- (1) **INSERT MERCHANT LEGAL ENTITY** a company registered in country (registered number registration number) whose registered office is at address ("**Merchant**");
- (2) **OPTIMAL PAYMENTS LIMITED**, a company registered in England & Wales (registered number 04239142) whose registered office is at Quern House, Mill Court, Great Shelford, Cambridge CB2 5LD ("**Service Provider**"); and
- (3) **BARCLAYS BANK PLC** (trading as "**Barclaycard Business**"), a company registered in England (registered number 1026167) whose registered office is at 1 Churchill Place, London E14 5HP ("**BB**").

**BACKGROUND**

- A BB provides certain merchant acquisition services to retailers seeking to enter into payment card transactions with customers.
- B The Service Provider provides various ancillary services relating to the processing of payment card transactions with customers made via the internet.
- C The Merchant has instructed the Service Provider to perform various services on its behalf relating to the maintenance of the Merchant's Bank Accounts and its processing of payment card transactions with consumers.
- D The Merchant now wishes to appoint BB to provide processing services to the Merchant to facilitate payment card transactions with customers via the internet.
- E The parties have therefore agreed as follows (on the terms set out in this Agreement):
  - (i) BB shall perform certain merchant acquisition services for the Merchant in respect of payment card transactions with consumers;
  - (ii) BB shall provide to the Service Provider (as the subcontractor of the Merchant) certain information relating to the processing of payment card transactions with consumers which BB would ordinarily provide directly to the Merchant.

- (iii) the Service Provider (as the subcontractor of the Merchant) shall provide to BB certain information relating to the processing of payment card transactions with consumers which the Merchant would ordinarily provide directly to BB.

## IT IS AGREED AS FOLLOWS:

### 1. DEFINITIONS

#### 1.1 In this Agreement:

**"Additional Service"** means any service which BB agrees to provide to the Merchant set out in Schedule 5;

**"Additional Service Charges"** means the charges for any Additional Service as set out in the relevant Additional Service Conditions;

**"Additional Service Conditions"** means the conditions which apply to any Additional Service provided to the Merchant by BB, which at the date of this Agreement are set out in Schedule 5;

**"Agreement Year"** means a year commencing from the Effective Date or any anniversary thereof;

**"Affiliate"** means in relation to a Party any other entity which directly or indirectly Controls, is Controlled by, or is under direct or indirect common Control with that Party from time to time;

**"Applicable Regulations"** means all legal and regulatory requirements applicable in the context of this Agreement including any rules or regulations imposed by any relevant Card Scheme, the Financial Services and Markets Act 2000 ("FSMA") and all rules, regulations, statements, codes and other requirements made under FSMA or made or imposed by the Financial Services Authority, the Data Protection Act 1998, the Consumer Credit Act 1974, together with all subordinated regulations;

**"Banking Day"** means any day (other than a Saturday or Sunday) on which banks are open for business in England;

**"BB System"** means the hardware, firmware, equipment, software and any other electronic computer and telecommunications devices and equipment used, supplied and/or developed by BB for the provision of the Services;

**"Card"** means any valid payment card, issued under any Card Scheme as formally varied in accordance with clause 17;

**"Card Account"** means the account of a Cardholder with a Card Issuer;

**"Card Issuer"** means a member of a Card Scheme who may issue Cards;

**"Cardholder"** means the person authorised by the Card Issuer to use the Card;

**"Card Not Present Payment"** means a Card Payment (including without limitation Electronic Commerce Payments) where neither the Card nor the Cardholder is physically present at the Merchant Outlet when the Card Payment is made;

**"Card Payment"** means a payment for goods and/or services provided by the Merchant or a supply of cash by the Merchant to a Cardholder which the Merchant has charged to that Cardholder's Card Account;

**"Card Scheme"** means each of VISA, MasterCard, UK Maestro and any other card scheme as formally varied in accordance with clause 17;

**"Confidential Information"** means all information or data of whatever nature obtained in connection with this Agreement which includes (but is not limited to) any information which relates to the business, assets, operations, plans, know-how, trade secrets, business affairs, personnel, intentions, product information, design rights, marketing or sales opportunities, strategies, prices, plans, proposals, customers, trading practices or suppliers of either Party or their Affiliates;

**"Control"** means that a person possesses directly or indirectly the power to direct or cause the direction of the management and policies of the other person, whether through the ownership of voting shares, by contract or otherwise and **Controls** and **Controlled** will be interpreted accordingly;

**"Destructive Code"** means any computer code:

- (i) intentionally designed to disrupt, disable, harm or otherwise impede in any manner, including aesthetic disruptions or distortions, the operation of software used as part of the BB System or any other associated hardware, software, firmware, computer system or network;

- (ii) that would disable the software used as part of the BB System or impair in any way its operation based on the elapsing of a period of time, exceeding an authorised number of copies, advancement to a particular date or other numeral;
- (iii) that would permit the Merchant or any subcontractor to access the software used as part of the BB System to cause such disablement or impairment, or which contains any other similar harmful, malicious or hidden procedures, routines or mechanisms which would cause such software programmes to cease functioning; or
- (iv) that would damage or corrupt data, storage media, programmes, equipment or communications, or otherwise interfere with operations;

**"Effective Date"** means the date of execution of this Agreement;

**"Electronic Commerce Payment"** means a Card Payment where a Cardholder provides the Payment Details over the internet using a terminal, personal computer or other device;

**"Escrow Account"** means a designated reserve account administered by the Escrow Agent;

**"Escrow Account Agreement"** means the agreement in the agreed form among BB, the Service Provider and the Escrow Agent governing the operation, control and administration of the Escrow Account and appended to Schedule 8 of this Agreement;

**"Escrow Agent"** means the organisation having administrative control over the Escrow Account;

**"Excluded Payments"** means all payments other than Card Not Present Payments;

**"Floor Limit"** means the total value of sales in sterling which the Merchant is allowed to make to a Cardholder at any one time without getting authorisation for the Card Payment from BB as may be varied by BB from time to time and as at the date of this Agreement are the amounts specified in Schedule 3;

**"Initial Term"** means the period specified in clause 13.1;

**“Located”** means located in the jurisdiction in which all of the following conditions occur:

1. the jurisdiction in which the Merchant pays taxes in relation to the trading activities which are the subject of the Services;
2. the jurisdiction in which the Merchant has a local address for correspondence (not a post office box or mail forwarding service); and
3. the jurisdiction in which the Merchant has a fixed place of business and in which the transactions which are the subject of the Services are actually processed and completed by the Merchant;

**"Losses"** means any and all losses including, claims, damages, costs, charges, expenses, liabilities, demands, proceedings and actions and any fine or penalty levied by a Card Scheme;

**"Merchant Bank Accounts"** means the bank accounts designated by the Merchant into which BB shall settle funds in respect of Card Payments under this Agreement;

**"Merchant Information"** means information and/or data relating to Card Payments, including details of refunds and chargebacks;

**"Merchant Introducer Agreement"** means the agreement entered into between BB and the Service Provider in respect of, inter alia, the introduction of the Merchant to BB dated the date hereof;

**"Merchant Outlet"** means any retail outlet now or in the future owned or operated by the Merchant;

**"Merchant Service Charges"** means the merchant service charges set out in Schedule 7, part of which shall be received by BB into the Escrow Account in its capacity as collections agent and, subject to the terms of this Agreement and the Merchant Introducer Agreement and the Escrow Account Agreement, forwarded by the Escrow Agent to the Service Provider pursuant to the terms of the Merchant Introducer Agreement in consideration for the provision by the Service Provider to the Merchant of the Service Provider Services;



**"Operating Instructions and Procedure Guides"** means the operating instructions and procedures guides which detail how Card Payments and Refunds are to be processed and which are listed in Schedule 4;

**"Parties"** means the Merchant, the Service Provider and BB and **"Party"** shall be construed accordingly;

**"Payment Details"** means the details which must be collected and recorded for a Card Payment in a format set out in Schedule 3 as formally varied in accordance with clause 17;

**"PCI DSS"** means the payment card industry data security standards stipulated by the Card Schemes details of which can be accessed via [www.visaeurope.com/acceptingvisa/datasecurity.html](http://www.visaeurope.com/acceptingvisa/datasecurity.html) and <https://sdp.mastercardintl.com/index/shtml> or such other websites as BB may notify from time to time;

**"Refund"** means a refund given in respect of a Card Payment for credit to a Cardholder's Card Account;

**"Refund Details"** means the details which must be collected and recorded for a Refund processed by the Merchant in a format set out in Schedule 3 as formally varied in accordance with clause 17;

**"Regulatory Authority"** means any regulatory authority which has responsibility for regulating the Merchant and/or BB and/or any of the Services and/or any of the Parties' other respective services or products;

**"Relationship Managers"** means representatives appointed by each of the Service Provider and BB to represent and act on each of their behalves in relation to all matters arising in connection with this Agreement;

**"Rolling Reserve"** means the total of all Rolling Reserve Sums held by BB in the Escrow Account;

**"Rolling Reserve Period"** means the period for which each Rolling Reserve Sum is held as part of the Rolling Reserve and is set out in Schedule 7;

**“Rolling Reserve Rate”** means the rate set out in Schedule 7 (which the Merchant agrees is subject to variation from time to time at the discretion of BB or, with the prior consent of BB in the event of proposed reductions in the rate/percentage, the Service Provider);

**“Rolling Reserve Sum”** means the sum calculated using the Rolling Reserve Rate and to be added to the Rolling Reserve;

**"Sales Tax"** means any sales, purchase or turnover tax as may be applicable at any time in any relevant jurisdiction, including value added tax chargeable under or pursuant to the Value Added Tax Act 1994 or the EC Sixth Directive (77/388/EEC);

**“Service Provider Services”** means the ancillary services relating to the provision of payment card processing services to be provided to the Merchant by the Service Provider, which services may be set out in this Agreement and/or the Merchant Introducer Agreement between BB and the Service Provider;

**“Services”** means the card processing services offered by BB under the terms of this Agreement;

**"Standard Conditions"** means the standard conditions set out in Schedule 1;

**"Territory"** means the jurisdiction in which the Merchant is legally incorporated;

1.2 In this Agreement, unless the context otherwise requires:

1.2.1 references to this Agreement or any other document include references to this Agreement, its recitals and its schedules as varied, supplemented and/or replaced in any manner from time to time;

1.2.2 in the event of any conflict between the recitals and clauses of this Agreement and any Additional Service Conditions, the recitals and clauses shall prevail

1.2.3 in the event of any conflict or inconsistency between the clauses of this Agreement and the provisions of Schedule 2, the provisions of Schedule 2 shall prevail;

- 1.2.4 references to any Party shall, where relevant, be deemed to be references to or to include, as appropriate, their respective lawful successors, assigns or transferees;
- 1.2.5 references to recitals, clauses, schedules and sub-divisions of them are references to the recitals and clauses, and schedules to, this Agreement and sub-divisions of them respectively;
- 1.2.6 references to any enactment shall be deemed to include references to such enactment as re-enacted, amended or extended and any subordinate legislation made from time to time under it;
- 1.2.7 references to a "person" include any individual, company, corporation, firm, partnership, joint venture, association, organisation, institution, trust or agency, whether or not having a separate legal personality;
- 1.2.8 references to the one gender include all genders and references to the singular shall include the plural and vice versa;
- 1.2.9 headings are inserted for convenience only and shall be ignored in construing this Agreement;
- 1.2.10 references to "company" shall have the meaning given to it by the Companies Act 1985;
- 1.2.11 references to "regulation" include any present or future regulation, rule, directive, requirement, request or guideline (whether or not having the force of law) of any agency, authority, central bank or governmental department or any self-regulatory or other national or supra-national authority; and
- 1.2.12 any phrase introduced by the terms "including" or "include" or any similar expression are illustrative and do not limit the sense of the words preceding those terms and shall be deemed to be followed by the words "without limitation".

## **2. BB OBLIGATIONS**

- 2.1 BB will provide the Services to the Merchant in accordance with the terms of this Agreement.

2.2 The Services provided by BB will include:

2.2.1 processing of Payment Details and Refund Details;

2.2.2 authorisation of Card Payments;

2.2.3 settlement of Card Payments and Refunds; and

2.2.4 certain ancillary or incidental services required to facilitate the processing and settlement of Card Payments and Refunds.

BB agrees that in providing the Services it will act in accordance with the terms of the Standard Conditions.

2.3 BB will provide any Additional Services in accordance with the Additional Service Conditions.

2.4 BB will settle Card Payments as follows:

2.4.1 in accordance with the timescales set out in Schedule 7, the amount of all valid Card Payments less:

2.4.1.1 the value of any Chargebacks, Refunds, fines (including those imposed by Card Schemes) and other ad hoc charges;

2.4.1.2 the Merchant Service Charges and other fees; and

2.4.1.3 the Rolling Reserve Sum;

2.4.2 on expiry of the Rolling Reserve Period, the Rolling Reserve Sums retained by BB in the Escrow Account in relation to such Card Payment under clause 2.4.1.3 above.

2.5 The Services and Additional Services may be formally varied in accordance with the variation procedure set out in clause 17.

### **3. THE MERCHANT'S OBLIGATIONS**

3.1 The Merchant agrees that it will comply with the terms of this Agreement and acknowledges that all Card Payments and Refunds will be submitted in accordance with the Standard Conditions and any Operating Instructions and Procedure Guides.

BB reserves the right in addition to any other rights or remedies it may have against the Merchant, to withhold settlement of any sums due to the Merchant from BB if the Merchant fails to comply with any of the terms of this Agreement.

- 3.2 The Merchant agrees that, in relation to any Additional Services supplied to it by BB, the Merchant will comply with the relevant Additional Service Conditions.
- 3.3 The Merchant acknowledges that it will not accept Card Payments in respect of any Excluded Payments.
- 3.4 If requested by the Service Provider, the Merchant will execute a direct debit in favour of the Service Provider from a UK bank account on such terms as the Service Provider will specify from time to time to allow the Service Provider to collect:
  - 3.4.1 any sums due in respect of Chargebacks that cannot be set-off against any balance held by BB other than the Rolling Reserve as set out in Schedule 7. Such direct debit shall allow the Service Provider to collect any sums due in respect of Chargebacks on the first Banking Day on which the Service Provider may take such direct debit in accordance with the terms of the executed direct debit (or any time thereafter); or
  - 3.4.2 any other payments due from the Merchant under this Agreement from time to time. Such direct debit shall allow the Service Provider to collect any such payments on the first Banking Day on which the Service Provider may take such direct debit in accordance with the terms of the executed direct debit (or any time thereafter).
- 3.5 The Merchant authorises BB (or any duly authorised representative of BB) to:
  - 3.5.1 provide to the Service Provider the Merchant Information which BB would ordinarily provide to the Merchant in accordance with this Agreement;
  - 3.5.2 discuss and resolve chargeback queries with the Service Provider which would ordinarily be dealt with by the Merchant under this Agreement; and
  - 3.5.3 require the Merchant to supply complete and accurate copies of the Merchant's books and records to BB to confirm that the Merchant is complying with its obligations under this Agreement. In addition, the Merchant, the Service Provider and BB shall co-operate to arrange meetings

between the Merchant and BB during normal office hours and on reasonable notice (given to both the Service Provider and the Merchant) in the event BB request any such meeting.

3.6 The Merchant authorises the Service Provider to:

3.6.1 provide to BB the Merchant Information which the Merchant would ordinarily provide to BB under this Agreement;

3.6.2 discuss and resolve chargeback queries which would ordinarily be dealt with by the Merchant under this Agreement; and

3.6.3 pay the Merchant Service Charges to BB.

For the avoidance of doubt, the Merchant acknowledges that BB shall be entitled to rely on any decision and/or action which may be taken by the Service Provider in relation to clauses 3.6.1 and 3.6.2 above as though they are the decisions and/or actions of the Merchant.

3.7 The Merchant shall be obliged to promptly inform both the Service Provider and BB if it becomes subject to Card Scheme fines or an excessive Chargeback programme with another bank or card processor.

3.8 The Merchant undertakes to the other parties to this Agreement that it is Located in the Territory.

3.9 The Merchant hereby undertakes to the other parties to this Agreement that it acknowledges and agrees to the terms of the Escrow Account Agreement (as set out in Schedule 8) and irrevocably and unconditionally agrees to act in accordance with the instructions therein.

#### 4. THE SERVICE PROVIDER'S OBLIGATIONS

4.1 The Service Provider hereby acknowledges and agrees that the provisions of this Agreement and the Merchant Introducer Agreement (together the “**Relevant Agreements**”) will govern the performance of any Affiliate of the Service Provider (including without limitation Optimal Payments Inc) which is involved in the provision of the services contemplated by the Relevant Agreements (including without limitation the Service Provider Services) (“**Relevant Affiliate**”). In the event

that any Affiliate is so involved, the Service Provider hereby undertakes to BB and the Merchant to use its best endeavours to (i) procure that the Relevant Affiliate acknowledges and agrees with the provisions of the Relevant Agreements and (ii) ensure that the Relevant Affiliate complies strictly with all provisions of the Relevant Agreements which relate to such Affiliate as if it were the Service Provider (including without limitation carrying out any obligation of such Affiliate to the standard and within the timescale with which the Service Provider would itself comply (“ **Affiliate Performance Standard** ”)). The Service Provider hereby indemnifies BB and the Merchant fully and effectively against any and all Losses which BB and/or the Merchant may sustain or incur or which may be brought or established against it by any person and which in any case arises out of or in relation to or by reason of the failure of the Relevant Affiliate to agree with and/or comply with the provisions of the Relevant Agreements (including without limitation failing to carry out any obligation of such Affiliate to the Affiliate Performance Standard).

## 5. CHARGES

5.1 In consideration of the supply of the Services and the Service Provider Services the Merchant will pay the charges to BB and to the Service Provider, including the Merchant Service Charges and any applicable Additional Service Charges, (plus any relevant Sales Tax) specified in Schedule 7 by (at the option of BB, having taken reasonable account of the views of the Service Provider):

5.1.1 deducting such charges from settlement; or

5.1.2 direct debit in accordance with clause 3.4.

5.2 Subject to clause 5.3 below, the charges specified in Schedule 7 will apply for the Initial Term of this Agreement.

5.3 BB or the Service Provider (but only to the extent that the Service Provider’s decision does not decrease or otherwise negatively affect BB’s element of the Merchant Service Charges) may change the rate or basis of the Merchant Service Charges in the following circumstances:

5.3.1 in the event that there is a change in the fees levied on BB by any of the Card Schemes or through a change to any of the Card Scheme rules; or

5.3.2 the volume and profile (by transaction type and amount) of Card Payments processed by BB differs from the projections set out in Schedule 3.

Whichever of BB or the Service Provider makes such change will inform the other, and the Service Provider will inform the Merchant of any changes in writing at least 30 Banking Days before the Merchant Service Charges are changed.

5.4 In the event that the Agreement continues beyond the Initial Term:

5.4.1 BB or the Service Provider (but only to the extent that the Service Provider's decision does not affect BB's element of the Merchant Service Charges) may increase the level of charges in line with changes in the UK Retail Prices Index on each anniversary of the Commencement Date. Whichever of BB or the Service Provider makes such change will inform the other, and the Service Provider will inform the Merchant of any changes in writing at least 30 Banking Days before the Merchant Service Charges are changed; and

5.4.2 BB may propose a further revision to the level of charges to the Service Provider and the Service Provider shall discuss such proposed revisions with the Merchant. If the Parties cannot agree a revision in the level of charges by good faith negotiations between the Service Provider and a representative of the Merchant (which shall take place following reasonable consultations with BB and in addition to those meetings provided for in clause 12.7), it shall be escalated to senior management level within 30 Banking Days of a written request. If a revision to the level of charges is not resolved within 30 Banking Days from the date of escalation to senior management level, then BB may terminate this Agreement on 30 days' written notice to the Merchant and the Service Provider.

5.5 Each amount stated as payable by the Merchant under this Agreement is expressed exclusive of Sales Tax. If any Sales Tax is properly chargeable under this Agreement, the Merchant will pay the amount of that Sales Tax against issue of a proper Sales Tax invoice by BB or the Service Provider.

## **6. TRANSMISSION OF PAYMENT DETAILS AND REFUND DETAILS**

6.1 The Service Provider acknowledges that the Merchant Information is sensitive and confidential in nature.



- 6.2 BB will specify the basis upon which data relating to Card Payments and Refunds will be submitted by the Merchant (or the Service Provider on behalf of the Merchant) to BB. This will include but not be limited to the format of the relevant data.
- 6.3 The Merchant and the Service Provider and any Relevant Affiliate jointly warrant and undertake that in relation to all data which the Merchant (or the Service Provider on behalf of the Merchant) transmits to BB:
- 6.3.1 they will apply such security standards to protect the data equivalent to those accepted as being industry standard or as may be otherwise agreed with BB from time to time; and
- 6.3.2 they have used and will use best endeavours (including use of the most up to date version of an industry standard proprietary virus checking system) to ensure that no Destructive Code is, or has been or will be coded or introduced to the data sent by the Merchant (or the Service Provider on behalf of the Merchant) to BB.
- 6.4 If Destructive Code is contained in or affects data sent by the Merchant (or the Service Provider on behalf of the Merchant) to BB, the Merchant and/or the Service Provider will immediately notify BB and shall take all reasonable steps to remedy the problem and to prevent recurrence. If this problem arises as a result of an act or omission of the Merchant (or the Service Provider on behalf of the Merchant) or its agents or sub-contractors then the Merchant and the Service Provider shall be jointly and severally liable for any costs incurred in complying with this clause.

## 7. CHARGEBACKS

- 7.1 The Merchant acknowledges that in certain circumstances stipulated by the Card Scheme rules and set out in the Standard Conditions a Card Issuer may refuse to settle a Card Payment or may seek to obtain a reimbursement of a Card Payment which has already been settled (which in each such circumstance shall be defined as a "**Chargeback**"). This provision also extends to a transaction which does not constitute a Card Payment but which the Merchant (or the Service Provider on behalf of the Merchant) has submitted to BB for processing as a Card Payment.

- 7.2 The Merchant agrees that where BB receives a Chargeback from a Card Issuer BB or the Service Provider may debit such amount from the Merchant.
- 7.3 BB agrees that in respect of each Chargeback it will take all reasonable steps to ensure that the Card Issuer has charged back the Card Payment in accordance with Card Scheme rules and will provide reasonable assistance to the Merchant (or the Service Provider on behalf of the Merchant) in respect of any Card Payment where the Merchant or Service Provider disputes the validity of the Chargeback.

## **8. WARRANTIES**

- 8.1 The Merchant, the Service Provider, any Relevant Affiliate and BB warrant to each other that throughout the term of this Agreement it will comply with the Applicable Regulations.
- 8.2 BB warrants to the Merchant and the Service Provider that it is duly organised, validly existing and in good standing under the laws of England and Wales and is authorised to enter into this Agreement and perform its obligations hereunder.
- 8.3 The Merchant warrants to BB and the Service Provider that it is duly organised, validly existing and in good standing under the laws of the Territory and is authorised to enter into this Agreement and perform its obligations hereunder.
- 8.4 The Service Provider and any Relevant Affiliate each warrants to BB and the Merchant that it is duly organised, validly existing and in good standing under the laws of England or under the laws of the jurisdiction in which it is organised, if any Relevant Affiliate is not organised under the laws of England, and is authorised to enter into this Agreement and perform its obligations hereunder.
- 8.5 The Merchant, Service Provider, any Relevant Affiliate and BB each warrant to the other that:
- 8.5.1 if relevant, the person signing this Agreement on its behalf is duly authorised;
- 8.5.2 there are no actions, suits or proceedings or regulatory investigations pending or, to that Party's knowledge, threatened against or affecting that Party before any court or administrative body or arbitration tribunal that might reasonably be expected to affect the ability of that Party to meet and carry out its obligations under this Agreement; and

- 8.5.3 neither the execution of this Agreement by it, nor performance by it of the terms hereof, violate or will violate any agreement or laws by which it is or may be affected and this Agreement is enforceable against it in accordance with its terms.
- 8.6 The Merchant warrants in respect of all of its activities:
- 8.6.1 that the provision of such services will not breach any applicable laws or regulations in any jurisdiction from and to which the services will be provided or in any jurisdiction which is otherwise involved.
- 8.7 The Merchant warrants to BB that:
- 8.7.1 it will not vary the services unless independent legal advice is obtained to confirm that the varied services will not breach any applicable laws or regulations in any jurisdiction from and to which the services will be provided or in any jurisdiction which is otherwise involved.
- 8.8 The Service Provider and any Relevant Affiliate each hereby warrants to BB and the Merchant that it has in place, and will remain in place for the entire term of this Agreement, sufficient disaster recovery and business continuity systems to enable it to continue all services provided by it pursuant to the Relevant Agreements (including without limitation the Service Provider Services (as defined in the Service Provider Agreement)) in the event of the failure of any part of its business, systems or processes.

## **9. CONFIDENTIALITY**

- 9.1 Any Confidential Information disclosed by one Party to another Party in the performance of this Agreement will be treated by the recipient as confidential and shall not be used by the recipient for any purpose other than the performance of this Agreement nor shall the recipient, subject to clauses 9.1.5 and 9.2.5, disclose the Confidential Information to any third party without the prior written consent of the disclosing Party, provided that the provisions of this clause 9 shall not apply to information or data:
- 9.1.1 which at the date of its disclosure is or at any time becomes public knowledge in any way without breach of this Agreement by the recipient;

9.1.2 which the recipient can show:

9.1.2.1 was in its possession or known to it by being in its use or being recorded in its files or computers or other recording media prior to receipt from the disclosing Party and was not acquired by the recipient directly or indirectly from the disclosing Party; or

9.1.2.2 was developed by or for the recipient at any time independently of the information disclosed to it by the disclosing Party;

9.1.3 which is here after disclosed or made available to the recipient from a source other than the disclosing Party without breach by the recipient, or such source of any obligation of confidentiality or non-use towards the disclosing Party;

9.1.4 which is disclosed by the recipient with the prior written approval of the disclosing Party; or

9.1.5 which the Parties agree is not to be treated as confidential.

9.2 Each Party undertakes in relation to the other Party's Confidential Information:

9.2.1 to maintain the same in confidence and use it only for the purposes set out in this Agreement and for no other purpose;

9.2.2 to keep the same separate from other documents and information held by that Party and clearly mark the Confidential Information as such;

9.2.3 not to copy reproduce or reduce to writing any part thereof except as may be reasonably necessary for the Agreement and that any copies, reproductions or reductions to writing, including e-mail or other electronic communications, so made shall be the property of the disclosing Party;

9.2.4 not to disclose the same to its employees or to third parties except in confidence to such of its employees, directors, professional advisers, consultants or subcontractors (and in respect of the Merchant's Confidential Information where BB is the recipient, to such of the employees, directors or professional advisers or consultants of any Affiliate of BB) who need to know the same provided that such employees, directors and professional

advisers or consultants are bound by obligations of confidence in respect of confidential information by their contracts of employment or service or otherwise no less onerous than the terms of this clause 9; and

9.2.5 to apply thereto no lesser security measures and degree of care than those which the receiving Party applies to its own confidential or proprietary information and the receiving Party warrants that the security measures and care which it applies to its own confidential or proprietary information are in accordance with good industry standard.

9.3 Notwithstanding the foregoing, the recipient shall be entitled to make any disclosure required by an applicable law or order of a court of competent jurisdiction or stock exchange or government department or agency or Card Scheme of the other Party's Confidential Information, provided that the recipient shall inform the disclosing Party prior to such disclosure to the extent it is able and it is reasonable in the circumstances.

9.4 If requested in writing by the disclosing Party, the receiving Party will immediately:

9.4.1 return all Confidential Information supplied by the disclosing Party to the receiving Party;

9.4.2 expunge all Confidential Information of the disclosing Party from any computer, word processor or other similar device into which such Confidential Information may have been programmed;

9.4.3 destroy or permanently erase all copies made by it of the Confidential Information supplied by the disclosing Party and procure that anyone to whom it has supplied copies destroys or permanently erases such copies and any further copies made by them; and

9.4.4 confirm in writing (under oath if the disclosing Party so requires) that the receiving Party has complied with this clause 9.3.

9.5 All Confidential Information is and will remain the property of the disclosing Party and all intellectual property rights in the Confidential Information of the disclosing Party will be and remain vested in the disclosing Party and it grants no licence to the receiving Party to use any of the intellectual property rights in the Confidential Information except as may be provided for in this clause.

## **10. COMPLIANCE AND REGULATORY ISSUES**

- 10.1 Each Party and any Relevant Affiliate shall, in performing its functions and obligations under this Agreement, comply with the Applicable Regulations.
- 10.2 No Party nor any Relevant Affiliate shall be obliged to take, or refrain from taking, any action if, and to the extent that, to do so would result in a breach of relevant regulatory or legal requirements, provided that (if permitted by such applicable law or regulation) such notice as is reasonably practicable shall be given to another Party to this Agreement of the notifying Party's or the Relevant Affiliate's inability to take, or refrain from taking, such action without there being a breach of relevant regulatory or legal requirements.
- 10.3 Each Party and any Relevant Affiliate shall provide the other promptly with such information in relation to it and its compliance with legal or regulatory matters as such other Party or Relevant Affiliate shall reasonably require for the purposes of satisfying its own legal or regulatory obligations.

## **11. LIABILITY AND INDEMNITY**

- 11.1 The Merchant shall indemnify BB and keep BB indemnified fully and effectively against any and all Losses which BB may sustain or incur or which may be brought or established against it by any person and which in any case arises out of or in relation to or by reason of the negligence or fraud or wilful default of or breach of this Agreement by:
- 11.1.1 the Merchant;
- 11.1.2 the Service Provider; or
- 11.1.3 the agents, employees or sub-contractors of the Merchant or the Service Provider in connection with the Services.
- 11.2 The Merchant shall indemnify the Service Provider and keep the Service Provider indemnified fully and effectively against any and all Losses which the Service Provider may sustain or incur or which may be brought or established against it by any person and which in any case arises out of or in relation to or by reason of the negligence or fraud or wilful default of or breach of this Agreement by the Merchant or its agents, employees or sub-contractors.

11.3 Except in respect of death or personal injury resulting from its negligence or fraud (in respect of which no limit shall apply);

11.3.1 BB shall have no liability to the Merchant for any indirect or consequential loss or damage;

11.3.2 BB shall have no liability to the Merchant for any : (a) loss of goodwill; (b) loss of business; (c) losses and profits; or (d) loss of data;

11.3.3 the total aggregate liability of BB and its Affiliates to the Merchant under this Agreement shall be a maximum sum in each Agreement Year equal to the level of Merchant Service Charges recovered by BB during the previous Agreement Year (or, in the absence of a previously completed Agreement Year, during the completed months in the Agreement Year in question grossed up so as to represent a completed Agreement Year) during the term of this Agreement;

whether arising from negligence, breach of this Agreement or otherwise, and whether or not it has been made aware of the likelihood of any such loss or damage.

11.4 Each Party agrees that the limitations and exclusions set out in this Agreement are reasonable having regard to the circumstances. If any provision of this clause 11 shall be or shall be found by the Court or otherwise held to be unlawful or invalid then, to the extent of such unlawfulness or invalidity, such provision shall not apply but the remainder of such provision shall remain enforceable to the greatest extent permissible by law.

11.5 No provisions of this clause 11 will limit BB' or the Service Provider's right to recover for:

11.5.1 any regulatory losses, fines, expenses or other losses arising from a breach by the Merchant of this Agreement or any law or regulation; or

11.5.2 any fine or penalty levied by a Card Scheme.

## **12. FINANCIAL INFORMATION AND PERFORMANCE REVIEWS**

12.1 The Merchant shall provide to the Service Provider (and the Merchant shall provide in respect of each Affiliate which directly or indirectly Controls it) from time to time

financial and/or other information as BB or the Service Provider may reasonably request relating to the current financial position of that Party and shall provide such information that is available to it as requested by BB or the Service Provider within 30 Banking Days of such request provided always that such Party would not be prohibited from disclosing or not first require disclosure to shareholders under the provisions of UK companies law, the Regulations of the London Stock Exchange or any other relevant corporate governance procedures or standard or any other relevant laws. In the event that BB requests any such information (or any additional information which the Service Provider can obtain from the Merchant) from the Service Provider, the Service Provider shall promptly provide copies of such information to BB.

12.2 The Merchant warrants and represents that any information provided to BB and/or the Service Provider in accordance with clause 12.1 will be accurate to the best of its knowledge and belief.

12.3 Failure to provide information requested by BB or the Service Provider under clause 12.1 will constitute a material breach of this Agreement falling within clause 13.3.

12.4 In the event that the Merchant fails to provide information under clause 12.1, or the financial information requested by BB or the Service Provider indicates a deterioration in the financial condition of the Merchant or increased risk exposure to BB or the Service Provider in BB' or the Service Provider's reasonable opinion, BB or the Service Provider may (without prejudice to any other rights BB or the Service Provider may have) request the Merchant to:

12.4.1 provide security to BB in respect of the potential exposure of BB or the Service Provider to liability arising from the Merchant failing to perform its obligations under this Agreement; or

12.4.2 agree to defer payment of sums due to the Merchant under clause 2.3 for an agreed period.

12.5 In the event that (i) the Merchant and (ii) BB and the Service Provider (acting together) are unable to agree a satisfactory arrangement under clause 12.4, BB may via the Service Provider:

12.5.1 amend any deferred settlement period to adequately cover such risk; and/or



12.5.2 terminate this Agreement by giving not less than three months' notice to the Merchant and the Service Provider.

12.6 In the event that the financial condition and risk profile of the Merchant improves, in the reasonable opinion of BB, then BB (acting in good faith) will return security (or part thereof) or reduce the deferment period (or part thereof).

12.7 The Service Provider shall appoint a Relationship Manager.

12.8 The Relationship Manager shall review the relationship every three months, or at such other times as the Service Provider considers prudent, during which it may review any or all of the following:

12.8.1 the Services; and

12.8.2 such other items which the Parties may wish to discuss and review, from time to time.

### **13. TERM AND TERMINATION**

13.1 This Agreement shall continue in full force and effect for a fixed term of one year ("Initial Term") commencing on the date of this Agreement and following the termination of such fixed term shall be terminable by any Party giving not less than three months' written notice to the other.

13.2 Notwithstanding the terms of the Additional Service Conditions, any party may terminate any Additional Service by giving the other Parties not less than three months' written notice. In the event of termination of any Additional Service any continuing rights and obligations shall remain in effect as set out in the Additional Service Conditions.

13.3 Without prejudice to any other rights or remedies which any Party may have at law or in equity, a Party not in breach or directly affected by the events set out in this clause 13.3 may terminate this Agreement by written notice to the other Parties, such notice taking effect subject as hereinafter provided, on or after the occurrence of any of the following events:

13.3.1 any material breach by another Party or any Relevant Affiliate of its obligations under this Agreement and, where such breach is capable of

remedy, it is not remedied to the reasonable satisfaction of the Party giving notice of such breach within 30 days of the date of that notice;

- 13.3.2 any Party and/or any Relevant Affiliate commits the same or a substantially similar breach of its obligations under this Agreement more than two times within any period of two consecutive months;
- 13.3.3 any breach by another Party of its obligations under this Agreement which shall not have been remedied to the reasonable satisfaction of the Party giving notice of such breach within 90 days of the date of that notice;
- 13.3.4 an application being made for, or any meeting of the directors or members resolves to make an application for, an administration order or the purported appointment of, or the filing at court or issue of any notice of intention to appoint, an administrator in relation to any Party or any Relevant Affiliate;
- 13.3.5 a petition being presented, a meeting being convened or an effective resolution being passed otherwise than with the prior written consent of another Party as part of a solvent reconstruction or amalgamation for the winding up;
- 13.3.6 possession being taken of, or a receiver, sequestrator or similar officer being appointed in respect of, the whole or any part of the assets or undertaking of another Party or any Relevant Affiliate;
- 13.3.7 a distress, execution or other legal process being levied against any of the assets of another Party or any Relevant Affiliate and not being discharged or paid out in full within three days;
- 13.3.8 another Party or any Relevant Affiliate suspending or threatening to suspend payment of its debts as they fall due or being unable to pay its debts, whether within the meaning of section 123 of the Insolvency Act 1986 or otherwise;
- 13.3.9 the directors of another Party or any Relevant Affiliate making a proposal that it enter into a voluntary arrangement (within the meaning of Section 1 of Insolvency Act 1986);
- 13.3.10 another Party or any Relevant Affiliate ceasing or threatening to cease to carry on all or a substantial part of its business or operations, or selling,

transferring or otherwise disposing of the whole or a substantial part of its undertaking or assets, either by a single transaction or by a number of transactions;

13.3.11 the performance by another Party or any Relevant Affiliate of this Agreement or any provision hereof which is not severable becoming impossible or unlawful under the provisions of any of the Applicable Regulations existing now or hereafter; or

13.3.12 the occurrence of any event in any other jurisdiction analogous to any of the foregoing described in 13.3.4 to 13.3.9 above.

13.4 Without prejudice to any other rights or remedies which BB may have at law or in equity, BB may terminate this Agreement by written notice to the others, such notice taking effect subject as hereinafter provided, only on or after the occurrence of any of the following events:

13.4.1 if the Merchant Introducer Agreement expires or is terminated; or

13.4.2 if the Escrow Account Agreement expires or is terminated.

13.5 In the event of the termination of this Agreement for any reason:

13.5.1 the Rolling Reserve Rate may immediately increase to 100% and the Rolling Reserve Period shall immediately become unlimited as to time;

13.5.2 the Merchant and/or the Service Provider and/or any Relevant Affiliate will ensure that any outstanding Payment shall be submitted to BB within three Banking Days of the termination of this Agreement;

13.5.3 the Merchant and/or the Service Provider will return to BB any property which has been supplied to the Merchant by BB; and

13.5.4 the rights and obligations set out in clauses 3, 4, 9, 10, 11, 13, 5.5, 15, 16, 17 and 20 and Standard Condition 4 shall remain in effect.

## **14. FORCE MAJEURE**

14.1 No Party nor any Relevant Affiliate shall be liable for any failure, interruption or delay in the performance of its obligations under this Agreement, to the extent that

such delay or failure is due to any cause beyond its reasonable control, such as, but not limited to, fire, third party strikes, floods, storms, war, invasion of armed forces, blockade, insurrection, third party lock outs or other third party industrial disputes, governmental regulations or orders subject to the affected Party or Relevant Affiliate promptly notifying the other Parties in writing of the cause of the delay or non-performance and the likely duration of the delay or non-performance.

- 14.2 Each Party and any Relevant Affiliate shall make all reasonable efforts to minimise the effect of any such force majeure upon the performance and fulfilment of this Agreement and shall meet as soon as possible and in any event within 48 hours from the date of notice of any force majeure to agree upon any action to avoid delays.
- 14.3 In the event that a delay or failure shall occur for a period of 30 consecutive days then any Party may terminate the Agreement by serving written notice on the other Parties, and the Parties' respective duties to each other shall continue as in any other termination of this Agreement.
- 14.4 Nothing in this clause shall be construed so as to absolve any Party or any Relevant Affiliate from making any payments (except in respect of settlement sums due from BB to the Merchant) or from procuring due performance of any relevant payment obligations under this Agreement.

## **15. ASSIGNMENT AND APPOINTMENT OF AGENTS AND SUB-CONTRACTORS**

- 15.1 This Agreement is not assignable:
- 15.1.1 by the Merchant other than with the prior written consent of BB;
- 15.1.2 by the Service Provider other than to an Affiliate of the Service Provider with the prior written consent of BB such consent not to be unreasonably withheld.
- 15.2 Neither the Merchant nor the Service Provider nor any Relevant Affiliate may (without the prior written consent of BB, such consent not to be unreasonably withheld) charge, sub-contract, pledge, transfer, dispose of, encumber or otherwise deal with the legal, beneficial or other interest arising in respect of any of its rights or obligations under this Agreement.

- 15.3 In the event that BB approves any agent or sub-contractor (including those approved agents and sub-contractors listed in Schedule 6) then the Merchant and the Service Provider shall be jointly responsible for ensuring that such agent or sub-contractor observes the relevant terms of this Agreement and if required by BB, shall ensure that such agent or sub-contractor enters into a direct agreement with BB on terms to be provided by BB and shall remain liable for any actions (or failure to act) of the relevant agent or sub-contractor.
- 15.4 The Merchant, the Service Provider and any Relevant Affiliate acknowledge that BB may assign its rights or transfer its obligations under this Agreement and may use agents or sub-contractors to perform its obligations under this Agreement.

## **16. SEVERABILITY**

- 16.1 If any of the provisions of this Agreement is found by a court or any other competent authority to be void or unenforceable, such provision shall be deemed to be deleted from this Agreement and the remaining provisions of this Agreement shall remain and continue in full force and effect.
- 16.2 Notwithstanding the foregoing, the Parties shall thereupon negotiate in good faith in order to agree the terms of a mutually satisfactory position to be substituted for the provision so found to be void or unenforceable.
- 16.3 In case such a new provision cannot be found, the invalidity or unenforceability of one or more provisions of this Agreement will not affect the validity of this Agreement as a whole, unless the invalid provision was of such essential importance to this Agreement that it is to be reasonably assumed that the Parties would not have contracted this Agreement without the invalid provision.

## **17. VARIATION**

- 17.1 Subject to clauses 5.2 and 17.2, and subject to variation of the Floor Limits by BB, no variation or addition to this Agreement or any Additional Service Conditions and no waiver of any provision shall be valid unless in writing signed by a duly authorised officer of the Merchant, the Service Provider and the relevant BB contact (details of which are set out in clause 23.2). In the event of a variation or addition, all the terms of this Agreement shall apply to such variation or addition except as may otherwise be expressly provided.

17.2 BB may change the terms of this Agreement and any Operating Instructions and Procedure Guides in the event that such change is required by an amendment or addition to Card Scheme rules. BB will provide as much notice as possible to the Merchant and the Service Provider of the change.

17.3 In the event that a change made under the terms of clause 17.2 requires the Merchant or the Service Provider to alter its systems or leads to increased costs to the Merchant or the Service Provider, the Merchant or the Service Provider may terminate this Agreement by providing three months' written notice to BB.

## **18. FURTHER ASSURANCE**

Each Party and any Relevant Affiliate shall at its own cost, from time to time on request, do or procure the doing of all such acts and/or the execution of all such documents in a form reasonably satisfactory to the other Parties which such other Parties may reasonably consider necessary to give full effect to this Agreement and securing to it the full benefit of the rights, powers and remedies conferred upon it in this Agreement.

## **19. NO AGENCY OR PARTNERSHIP**

19.1 No Party nor any Relevant Affiliate will act as, or represent itself as, agent of the other except as authorised in writing by the other or for any other purpose for which it is deemed the agent of the other by statute and in any such case such Party or such Relevant Affiliate shall forthwith transmit to the other any notice received in its capacity as agent of the other.

19.2 This Agreement shall not create a partnership between the Parties or any Relevant Affiliate.

## **20. ENTIRE AGREEMENT**

20.1 This Agreement (together with any documents referred to in this Agreement and any Additional Service Conditions including the Operating Instructions and Procedure Guides) contains the entire agreement and understanding of the Parties and supersedes all prior agreements, understandings or arrangements (both oral and written) relating to the subject matter of this Agreement.

20.2 Each of the Parties acknowledges and agrees that:

20.2.1 it does not enter into this Agreement and the documents referred to in this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made, given or agreed to by any person (whether a Party to this Agreement or not) except those expressly set out or referred to in this Agreement and the documents referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be a claim for breach of contract under this Agreement; and

20.2.2 this clause 20.2 shall not apply to any statement, representation or warranty made fraudulently or to any provision of this Agreement which was induced by, or otherwise entered into as a result of, fraud, for which the remedies shall be all those available under the law governing this Agreement.

## **21. NO WAIVER**

No forbearance or indulgence by any Party in enforcing any term or condition of this Agreement shall prejudice or restrict that Party's rights or powers under this Agreement and no waiver of any breach shall operate as a waiver of any subsequent or continuing breach.

## **22. COUNTERPARTS**

This Agreement may be executed in counterparts, each of which, when taken together, shall constitute one and the same document.

## **23. NOTICES**

23.1 Any notice or other communication to be given under or in connection with this Agreement shall be made electronically by mail in the first instance with a copy sent in writing and addressed as provided in clause 23.2 by special delivery post or first class mail (and the recipient shall be taken to have received such notice at noon on the second Banking Day after posting, excluding the day of despatch), by hand (and the recipient shall be taken to have received such notice within 24 hours of delivery) or by fax (and the recipient shall be taken to have received such notice 24 hours following the time of transmission if within normal business hours of the addressee and, if not, at noon on the following Banking Day subject to production of a

transmission report from the machine sending the fax indicating that the fax was sent in its entirety to the fax number of the recipient).

- 23.2 The relevant addressee, address and fax number of each Party for the purposes of this Agreement are:

**Name of the Party: BB**

Contact: Relationship Manager

Details: Barclaycard Business  
Barclays Bank Plc  
1234 Pavilion Drive  
Northampton  
NN4 7SG

Fax: As notified

Email: As notified

**Name of the Party: Service Provider**

Contact: Relationship Manager

Details: Optimal Payments Ltd  
Quern House  
Mill Court  
Great Shelford  
Cambridge  
CB2 5LD

Fax: As notified

Email: As notified

**Name of the Party: Merchant**

Contact: As provided in the Merchant's application

Details: As provided in the Merchant's application

Fax: As provided in the Merchant's application

- 23.3 A Party may give notice of a change to its name, relevant addressee or address for the purposes of this clause provided that such notification shall only be effective on:

23.3.1 the date specified in the notification as the date on which the change is to take place, or



23.3.2 if no date is specified or the date specified is less than five clear working days after the date on which notice is given, the fifth working day after notice of any such change has been given.

## **24. RIGHTS OF THIRD PARTIES**

24.1 Subject to clause 24.2, the Parties to this Agreement do not intend that by virtue of the Contracts (Rights of Third Parties) Act 1999 any of the terms of this Agreement should be enforceable by a person who is not a party to it.

24.2 Any Affiliate of BB may enforce any term of this Agreement.

## **25. SET-OFF**

25.1 BB may retain or set-off any amount owed to it by the Merchant against any amount due from BB to the Merchant but the Merchant shall not be entitled to retain or set-off any amount due to BB by it.

25.2 BB may retain or withhold any amount owed to the Merchant by BB where BB believes:

25.2.1 that such amount relates to any goods or services purchased by a Cardholder by making a Card Payment which will not be delivered to the Cardholder or performed by the Merchant in accordance with the contract between the Cardholder and the Merchant;

25.2.2 any of the circumstances set out in clauses 13.3.3 to 13.3.11 have occurred or are likely to occur in respect of the Merchant.

## **26. GOVERNING LAW**

26.1 This Agreement (together with all documents to be entered into pursuant to it which are not expressed to be governed by another law) shall be governed by, and construed and take effect in accordance with, English law.

26.2 The courts of England and Wales shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of or in connection with this Agreement (including claims for set-off or counterclaim) or the legal relationships established by this Agreement.

In witness of which this Agreement has been duly signed by the Parties.

## **SCHEDULE 1**

### **Standard Conditions**

#### **1. ACCEPTANCE OF CARDS**

- 1.1 All Cards must be accepted as payment.
- 1.2 No minimum limit may be set on the amount of Card Payments.
- 1.3 Except for differences in price permitted by these Standard Conditions all purchases with a Card must be treated in the same way as cash purchases.
- 1.4 Any Card Payments made using Visa Debit, Visa Electron, Solo and Maestro (and any other Card specified by BB from time to time) must be for the same amount as any equivalent cash purchase. For other types of Cards a surcharge may be made but this must not exceed the amount of the Merchant Service Charges applicable to that Card Payment.
- 1.5 Only Payment Details relating to Card Payments between the Merchant and a Cardholder may be sent to BB under this Agreement.
- 1.6 If BB becomes aware or reasonably believes that:
  - 1.6.1 a Card Payment is not genuine;
  - 1.6.2 a Card Payment was for an illegal transaction;
  - 1.6.3 a Card Payment was for a payment by a Cardholder to another person or for cash given to a Cardholder by another person;
  - 1.6.4 a Card Payment was for an Excluded Payment; or
  - 1.6.5 the payment does not fall within the definition of Card Payment

BB via the Service Provider may withhold the amount of that Card Payment until it is satisfied that the Merchant is entitled to receive payment.

#### **2. AUTHORISATION**

- 2.1 Authorisation must be obtained through BB for all Card Payments above the Floor Limit and, where BB specifies, for certain Card Payments below the Floor Limit.

- 2.2 If authorisation is obtained but the Card Payment does not proceed immediately the authorisation must be cancelled.
- 2.3 The Card Issuer may still make a Chargeback in respect of a Card Payment which has been authorised. In particular the Card Issuer may make a Chargeback in respect of Card Not Present Payments if the Cardholder denies making the Card Payment.

### **3. PAYMENT DETAILS**

- 3.1 All Payment Details and Refund Details must be sent to BB in accordance with the Operating Instructions and Procedure Guides.
- 3.2 Submission of Payment Details is confirmation that the goods and/or services have been supplied to the Cardholder and that the Merchant has not broken any obligations to the Cardholder.
- 3.3 All Payment Details (whether in electronic or paper form) must be kept in a secure manner which will prevent unauthorised access or disclosure to any unauthorised person.
- 3.4 In order to maintain card security BB may require the Merchant not to keep certain details relating to a Card.
- 3.5 To ensure the Merchant is complying with the requirements of condition 3.3 BB via the Service Provider may request details of the security systems applied by the Merchant or may carry out an inspection or audit of the Merchant's systems, including any relevant computer systems. In the event that BB wishes to carry out an inspection BB will give advance notice to the Merchant specifying the date and nature of the inspection.
- 3.6 The Merchant agrees and acknowledges that the Card Schemes require it to comply with PCI DSS. To achieve compliance with PCI DSS the Merchant:
  - 3.6.1 will provide the Service Provider with a nominated point of contact responsible for liaising with the Service Provider on BB's behalf regarding progress in achieving compliance with PCI DSS;
  - 3.6.2 will produce a project plan detailing key milestones and remedial work to be taken to achieve compliance with PCI DSS as soon as reasonably practicable

and will provide the Service Provider with evidence of the high level project plan and remedial work to be undertaken;

3.6.3 will continue to progress toward achieving compliance with PCI DSS and will provide the Service Provider with monthly updates on progress generally and progress against the project plan produced further to clause 3.6.2;

3.6.4 fully comply with PCI DSS from 1 June 2007 or such other date as stipulated by the Card Schemes, and the Merchant agrees and acknowledges that BB will amend its Operating Instructions and Procedure Guides to detail PCI DSS compliance requirements.

3.7 If so requested by BB, copies of the information provided to the Service Provider pursuant to paragraph 3.6 will be provided by the Service Provider to BB. If the Merchant reasonably believes that it will be unable to meet any of the requirements as set out in clause 3.6 of this Schedule 2 it will notify the Service Provider as soon as reasonably practicable and the Service Provider will work with the Merchant and liaise with BB which will in turn liaise with the Card Schemes as reasonably necessary to try and negotiate a settlement with the Card Schemes to extend the deadline for the Merchant complying with DSS.

#### **4. CHARGEBACKS**

4.1 The Card Issuer may charge back card payments (and BB may debit such amount from the Merchant) in any of the following circumstances:

4.1.1 if the Card Payment or the way in which it was carried out has broken this Agreement;

4.1.2 if the details collected in respect of a Card Payment have or the way in which they have been sent to BB has broken this Agreement;

4.1.3 if the Merchant cannot provide evidence that the genuine Card holder has authorised the Card Payment, or if the evidence does not comply with the Operating Instructions and Procedure Guides;

4.1.4 if the Card is included in a card recall bulletin which the Merchant must check prior to processing a Card Payment for an amount under the Floor Limit;

- 4.1.5 if the Cardholder denies authorising a Card Not Present Payment;
  - 4.1.6 in any other circumstances where the Operating Instructions and Procedure Guides stipulate that a Chargeback can be made; and/or
  - 4.1.7 if the Merchant has not yet supplied the goods or services referred to in the Payment Details and any of the events listed in clause 13.3.4 to 13.3.12 takes place or BB reasonably believes that they are likely to take place in relation to such Merchant.
- 4.2 Where a Card Payment is charged back BB does not have any responsibility to deal with the Cardholder or to try to obtain payment.
- 4.3 If a Card Payment has been charged back the relevant Payment Details must not be re-submitted unless BB gives its consent.
- 4.4 If the Merchant has received new Payment Details from the Cardholder, it may submit such Payment Details without BB's consent.

## **5. PROMOTIONAL MATERIAL**

- 5.1 Depending on the type of outlets operated by the Merchant, promotional material supplied by BB indicating that Cards are accepted must be displayed.
- 5.2 Any material which mentions BB or which uses any other name or make associated with the Cards or Card Schemes cannot be used unless BB first gives its written approval.

## **6. CARDHOLDER DISPUTES AND PREVENTING FRAUD**

The Merchant and the Service Provider must give all reasonable help to detect, prevent and investigate fraud. This includes:

- 6.1 assisting in any claim made against BB in relation to a Card Payment; and
- 6.2 assisting any investigations made by any authorities into a Card Payment.

## **7. CARDHOLDER LISTS AND SECURITY OF INFORMATION**

The Merchant shall not compile or use any lists of Cardholders or Card numbers using Payment Details other than for the purposes of sending Payment Details or Refund Details to BB.

## **SCHEDULE 2**

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### **SCHEDULE 3**

#### **Floor Limits, Payment Details, Refund Details, Projections**

## **SCHEDULE 4**

### **Operating Instructions and Procedures Guides**

(supplied under separate cover)

## **SCHEDULE 5**

### **Additional Services**

## **SCHEDULE 6**

### **Approved Agents and Sub-contractors**

## SCHEDULE 7A

### Fees, Reserves, and Remittances

Account Name			
Account Number		Currency Code	<b>USD</b>

#### Fees

In accordance with section 5 of the Agreement for the provision of merchant acquisition services, the following fees shall be charged:

Setup Fee	upon activation of account
Monthly Fee	per month
Discount Fee	% of gross Card Payments
Transaction Fee	per transaction request, including approvals, declines, credits, and voids
Chargeback Fee	per chargeback item received
Remittance Fee	per remittance

#### Reserves

In accordance with clause 2.4 of the Agreement for the provision of merchant acquisition services, the following Reserves shall be established:

Fixed Reserve	The amount of the fixed reserve shall be <b>0.00</b> .
Rolling Reserve	The rolling reserve rate shall be <b>7.50%</b> of gross Card Payments. The rolling reserve period shall be <b>6</b> months. Following month <b>7</b> of operation (and every month thereafter) the reserves generated from the first month of operation (and every month thereafter) shall be forwarded to the Merchant.

#### Remittances

In accordance with clause 2.4 of the Agreement for the provision of merchant acquisition services, the following Remittance terms shall be applied:

Remittances	Remittances shall be paid every <b>2 days, 5</b> calendar days in arrears.
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#### Declaration

I, the undersigned representative of the Merchant, accept all of the above terms

Signature		Date	
Name		Position	

## SCHEDULE 7B

### Fees, Reserves, and Remittances

Account Name			
Account Number		Currency Code	

#### Fees

In accordance with section 5 of the Agreement for the provision of merchant acquisition services, the following fees shall be charged:

Setup Fee	upon activation of account
Monthly Fee	per month
Discount Fee	% of gross Card Payments
Transaction Fee	per transaction request, including approvals, declines, credits, and voids
Chargeback Fee	per chargeback item received
Remittance Fee	per remittance

#### Reserves

In accordance with clause 2.4 of the Agreement for the provision of merchant acquisition services, the following Reserves shall be established:

Fixed Reserve	The amount of the fixed reserve shall be <b>0.00</b> .
Rolling Reserve	The rolling reserve rate shall be <b>7.50%</b> of gross Card Payments. The rolling reserve period shall be <b>6</b> months. Following month <b>7</b> of operation (and every month thereafter) the reserves generated from the first month of operation (and every month thereafter) shall be forwarded to the Merchant.

#### Remittances

In accordance with clause 2.4 of the Agreement for the provision of merchant acquisition services, the following Remittance terms shall be applied:

Remittances	Remittances shall be paid every <b>2 days, 5</b> calendar days in arrears.
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#### Declaration

I, the undersigned representative of the Merchant, accept all of the above terms

Signature		Date	
Name		Position	

## SCHEDULE 8

### Escrow Account Agreement

#### WHEREAS:

- (A) Optimal Payments Ltd (“**Service Provider**”) has established working relationships with a number of merchants for the provision of credit card processing services.
- (B) Service Provider will facilitate the processing of credit/debit cards of the merchants’ customers utilising Acquiring Bank approved bureaux card processing services.
- (C) Subject to the terms of the tri-partite agreements for merchant acquiring services between each merchant, the Service Provider and the Acquiring Bank (“**Merchant Agreement**”) and the bi-partite agreement between Service Provider and the Acquiring Bank (“**Introducer Agreement**”), Service Provider will introduce merchants to the Acquiring Bank.
- (D) The Acquiring Bank will offer the merchants direct merchant acquiring services through Service Provider as set out in each Merchant Agreement.
- (E) The Acquiring Bank shall pay funds into the Holding Accounts and fees due to the Acquiring Bank shall be paid by Service Provider from the Holding Accounts in accordance with the terms of this Letter.
- (F) The Acquiring Bank and the Service Provider have agreed to appoint the Escrow Agent as escrow agent and the Escrow Agent has agreed to accept such appointment subject to the terms and conditions hereinafter contained.

#### IT IS HEREBY AGREED as follows:

#### DEFINITIONS:

“**Acquiring Bank**” is Barclays Bank PLC.

“**Affiliate**” means, in relation to a party, any other entity which directly or indirectly controls, is controlled by or is under direct or indirect common control with that party from time to time.

“**Chargeback**” shall have the meaning given to it in clause 7.1 of the Merchant Agreement.

“**Client**” shall mean each of the merchant entities which have signed a Merchant Agreement with the Service Provider and the Acquiring Bank.

“**Client Payment Funds**” shall mean that part of the Holding Funds remaining after the deduction of service fees and commissions due to the Acquiring Bank, the Rolling Reserve Sum, Chargebacks, Refunds, Original Credit Transactions, Registration Fees, fines, penalties and any other amounts due and payable to the Recipients or third parties and due to the Client subject to the terms of this letter and the Merchant Agreement.

“**Escrow Agent Fee**” shall mean the fee to be paid by the Service Provider to the Escrow Agent in consideration for the services provided under this Letter and as detailed in Schedule 2 Part 1;

“**GBP**” shall mean Great British Pounds;

**“Holding Accounts”** shall mean the accounts, one for each denominated currency, opened by and under the control of the Escrow Agent used for the purpose of this Letter and into which the Acquiring Bank shall deposit funds prior to their distribution by the Escrow Agent.

**“Holding Funds”** shall mean funds remitted by the Acquiring Bank to the Holding Accounts in accordance with clause 3 and Schedule 2 prior to their distribution by the Escrow Agent in accordance with the terms hereof.

**“Merchant Balance Report”** shall mean the report to be provided monthly by Service Provider to the Acquiring Bank and to the Escrow Agent by e-mail, specifying the balance of Client Payment Funds, Rolling Reserve and security deposits, if any, in each of the Holding Accounts and Rolling Reserve Account, according to the books and records of Service Provider.

**“Merchant Payment Report”** shall mean the report to be provided daily by Service Provider to the Acquiring Bank and to the Escrow Agent by e-mail, specifying the Client Payment Funds that have been approved by Service Provider for payment to Clients out of the Holding Accounts.

**“Notified Account”** shall mean the account(s) set out in Schedule 1 for each Recipient as amended from time to time in writing by a Recipient in respect of its Notified Account.

**“Original Credit Transaction”** shall mean winnings paid back on to Visa debit and/or credit cards.

**“Payable Balance Report”** shall mean the report to be provided each Friday (or the following Working Day if any such Friday is not a Working Day) by Service Provider to the Acquiring Bank and to the Escrow Agent by e-mail, specifying the balance in each of the Holding Accounts and the Rolling Reserve Account, according to the books and records of Service Provider.

**“Recipient”** shall mean any one of the signatories of this document.

**“Recipients”** shall be collectively every Recipient.

**“Refund”** shall have the meaning given to it in the Merchant Agreement.

**“Registration Fees”** shall mean all registration fees payable in respect of transactions processed by the Acquiring Bank (including but not limited to the annual MasterCard registration fees and the one-off internet authentication fee) as defined in Schedule 2.

**“Rolling Reserve”** shall mean the total of all Rolling Reserve Sums held at any one time in the Rolling Reserve Account, which shall be subject to a charge in favour of the Acquiring Bank and held on trust for, and for the sole benefit of, the Acquiring Bank in the event of a Rolling Reserve Event.

**“Rolling Reserve Account”** shall mean the account opened by and under the control of the Escrow Agent used for the purpose of this Letter and into which the Escrow Agent shall pay the Rolling Reserve Sums.

**“Rolling Reserve Event”** shall mean (1) any default by the Client of the terms of the Merchant Agreement and/or (2) the occurrence of an event of termination under clause 13 of the Merchant Agreement and/or (3) the termination of the Merchant Agreement without the prior written consent of the Acquiring Bank.

**“Rolling Reserve Period”** shall mean the period for which each Rolling Reserve Sum in relation to each Client is held as part of the Rolling Reserve as notified by the Acquiring Bank from time to time.



**“Rolling Reserve Rate”** shall mean the percentage rate used to calculate the Rolling Reserve Sum for each Client and as notified from time to time by the Acquiring Bank in accordance with clause 4.4.

**“Rolling Reserve Sum”** shall be the sum calculated using the Rolling Reserve Rate of Total Processed Funds for a particular period, which shall be held as Rolling Reserve for the Rolling Reserve Period on trust for, and for the sole benefit of, the Acquiring Bank in the event of a Rolling Reserve Event.

**“Service Provider Revenue Sweep Report”** shall mean the report to be provided monthly by Service Provider to the Acquiring Bank and the Escrow Agent by e-mail, specifying the amount of the prior month’s fees payable to Service Provider from the Holding Accounts.

**“Total Processed Funds”** shall mean the total of all transactions processed being debit and credit card transactions.

**“Working Day”** means a day on which banks are open for normal banking business in London and in the main financial centre for the currency in question.

## **GENERAL:**

We are writing to confirm irrevocably the terms on which the funds deposited by the Acquiring Bank into the Holding Accounts and Rolling Reserve Accounts are to be held by the Escrow Agent, subject to the terms of this Letter and in particular clause 4.3, on trust for the Recipients (who are also the signatories to this Letter) and the Client.

The Escrow Agent is requested and required to acknowledge and accept these terms by countersigning this Letter and returning a signed copy to each of the Recipients and retaining one copy for itself.

## **1. ESCROW AGENCY ACCOUNTS:**

- 1.1. You shall maintain the Holding Accounts each as a separately designated interest bearing account with the wording “Escrow Agent re BARCLAYCARD BUSINESS AND OPTIMAL PAYMENTS LTD HOLDING ACCOUNTS” for receipt of all Holding Funds to be deposited by the Acquiring Bank hereunder.
- 1.2. You shall maintain the Rolling Reserve Account as a separately designated interest bearing account with the wording “Escrow Agent re BARCLAYCARD BUSINESS ROLLING RESERVE ACCOUNT” for receipt of all Rolling Reserve Sums to be transferred from the Holding Account as set out in clause 4.1 below.
- 1.3. If so requested in writing at any time by either Service Provider or the Acquiring Bank or the Client, the Escrow Agent will procure and deliver to each a written acknowledgement that the Holding Accounts and the Rolling Reserve Account (including the Client Payment Funds) contain trust funds which are held by you on trust for the relevant Recipient(s) and/or the Client (as appropriate). For the avoidance of doubt, any such written acknowledgement shall state that the contents of the Rolling Reserve Account shall be held subject to the terms of clause 4.3.

## **2. HOLD AGAINST INSTRUCTIONS**

- 2.1. You shall pay and/or hold the contents of the Holding Accounts and the Rolling Reserve Account (including the Client Payment Funds or any part of them) on trust for the relevant Recipient(s) and/or the Client (as appropriate) in the manner specified in these instructions on the basis of your continuing compliance with the provisions set out herein for release of funds. For the avoidance of doubt, the Rolling Reserve shall be paid and/or held subject to the terms of clauses 2.2 and 4 and payments to the Client and Service Provider shall be made in accordance with the Merchant Payment Report and the Service Provider Revenue Sweep Report, respectively.
- 2.2. Without limiting the provisions of clause 2.1, you shall, immediately upon service at any time by the Acquiring Bank on you of notice of the occurrence of a Rolling Reserve Event, unconditionally and irrevocably release from the Rolling Reserve Account and pay into the Acquiring Bank's Notified Account(s) for the sole benefit of the Acquiring Bank such amount(s) of the Rolling Reserve as shall equal the Acquiring Bank's loss(es) resulting at any time from such Rolling Reserve Event. For the avoidance of doubt, the payment of any part of the Rolling Reserve from the Rolling Reserve Account to the Acquiring Bank on one or more occasions shall not remove or dilute this ongoing obligation.
- 2.3. The terms of this Letter may not be varied unless such variation is in writing and signed by the Recipients.
- 2.4. It is further agreed that the Service Provider shall have no claim against the Escrow Agent in relation to any payments made by the Escrow Agent in accordance with the provisions of this clause 2. In the event that the Escrow Agent releases a sum to the Acquiring Bank from the Rolling Reserve Account following receipt of a notice of the occurrence of a Rolling Reserve Event as detailed in clause 2.2, and it is subsequently agreed that the event in question was not a Rolling Reserve Event, then the Acquiring Bank agrees to indemnify the Escrow Agent in relation to any claims the Service Provider may make against the Escrow Agent to recover such sums.

## **3. CREDITS TO HOLDING ACCOUNTS**

- 3.1. From time to time, at least weekly, the Acquiring Bank will arrange for funds to be transferred by SWIFT payment to the Holding Accounts.
- 3.2. The Funds received into the Holding Account will comprise the amounts detailed in Part 2 of Schedule 2.
- 3.3. The Escrow Agent shall transfer the Rolling Reserve Sum from the Holding Accounts into the Rolling Reserve Account as detailed in clause 4.1. The funds remaining in the Holding Account following transfer of the Rolling Reserve Sum shall be the Holding Funds.

## **4. ROLLING RESERVE**

- 4.1. You will arrange for each Rolling Reserve Sum to be transferred into the Rolling Reserve Account on a monthly basis and, for the first month for each Client, on a weekly basis, to be

held as the Rolling Reserve for the Rolling Reserve Period in accordance with the terms of clause 2.2. You hereby undertake to the Acquiring Bank that the full amount of the Rolling Reserve will be held in the Rolling Reserve Account at all times (a) during the term of this Letter and (b) for a period of 6 months plus one Working Day following the date of the last transfer of a Rolling Reserve Sum from the Holding Account into the Rolling Reserve Account (i.e. in the event the Client is no longer utilizing the services of the Service Provider). You also undertake to the Acquiring Bank that, other than as set out in the preceding sentence, no Rolling Reserve funds shall be released to the Client in any month until that month's Rolling Reserve Sum has been deposited into the Rolling Reserve Account.

4.2 You hereby undertake to Acquiring Bank to grant to Acquiring Bank a charge, in the form agreed between You and the Acquiring Bank (but at no cost to You) such agreement not to be unreasonably withheld or delayed by You) and as attached at schedule 3, over the Rolling Reserve and/or the Rolling Reserve Account. Acquiring Bank agrees to pay Escrow Agent's reasonable legal fees incurred in relation thereto.

4.3 You hereby undertake to the Acquiring Bank that you will hold all funds in the Holding Accounts and Rolling Reserve Account which are payable to the Acquiring Bank (including without limitation the Rolling Reserve and all fees, charges and expenses) strictly on trust solely and absolutely for the Acquiring Bank. The Acquiring Bank hereby acknowledges and agrees that such trust shall be extinguished in relation to any Rolling Reserve Sum when such Rolling Reserve Sum is released from the Rolling Reserve to Client upon the expiry of the Rolling Reserve Period in respect of such Rolling Reserve Sum.

4.4 Each Recipient hereby acknowledges and agrees that the Acquiring Bank may vary the Rolling Reserve Rate applied to any Client at any time by giving each Recipient (other than the Acquiring Bank) and the Client written notice of such variation at least 30 days prior to such variation taking effect.

## **5. CREDITS TO NOTIFIED ACCOUNTS AND NECESSARY DEBITS FROM THE HOLDING ACCOUNTS**

5.1. From time to time (but no more frequently than once every 10 Working Days) upon receipt by Escrow Agent of a Merchant Balance Report or Payable Balance Report, Escrow Agent shall reconcile the Holdings Accounts and Rolling Reserve Account balances with such reports, and advise Service Provider within two Working Days of any discrepancies between such reports and the corresponding balances in the Holdings Accounts and Rolling Reserve Account.

5.2. The balances of Client Payment Funds and Rolling Reserve shall be established on the basis that, to the extent that deductions have not been made prior to the Holding Funds being deposited into the Holding Accounts by the Acquiring Bank, You undertake to the Recipients to ensure that the deductions listed within Schedule 2 Part 3 are made from the Holding Accounts on the 10<sup>th</sup> day of each month (and where that day shall not be a Working Day then on the first following Working Day) strictly in the order set out within Schedule 2 Part 3.

5.3. The Acquiring Bank shall provide monthly statements to Service Provider in relation to the items described in clauses 5.3.1 through 5.3.2, together with such supporting documentation as is reasonably requested by Service Provider. Service Provider will arrange payment of such amounts from the Holding Account within 10 days (and where that day shall not be a Working Day then on the first following Working Day) of the relevant month end by Direct Debit, subject to the Acquiring Bank's compliance with the requirements set forth in the preceding sentence.

5.3.1. Acquiring Bank MDR fee for Visa, MasterCard transactions, Visa Debit, UK Maestro and/or Solo card transaction processing fees;

5.3.2. Fee(s) per Chargeback (dependant upon the currency of the relevant transaction).

5.4. Subject to your performance of your obligations hereunder, You will be entitled to the Escrow Agent Fee, free of any deduction, set off or counterclaim and You shall be under no obligation to repay any or part of the Escrow Agent's Fee for any reason including in the event of a Chargeback. For the avoidance of doubt, the foregoing shall not limit any rights or remedies otherwise available to the Service Provider or the Acquiring Bank under this Letter.

5.5. Service Provider shall pay all bank charges incurred in connection with the operation of the Holding Accounts and any SWIFT fees pursuant to clauses 3, 4, and 5 and will be the sole beneficiary of any interest earned on the funds held in the Holding Accounts.

5.6. It is the obligation of each Recipient to provide all necessary details (and any changes as notified to you from time to time) of the Notified Account to which payments to them are made pursuant to clause 5. The Notified Accounts of the Recipients at the date of this Letter are set out in Schedule 1.

5.7. Service Provider shall maintain all necessary information (including Anti Money Laundering information from time to time required by law) for all Clients.

## **6 CHARGEBACKS**

If You are notified of a Chargeback (the "Chargeback Notice"), which has not previously been deducted by the Acquiring Bank, then You will immediately release an amount equivalent to the Chargebacks in the Chargeback Notice from the Holding Accounts to the Acquiring Bank from sums in the Holding Accounts.

## **7 INTEREST**

The Escrow Agent will pay to the Service Provider, on a monthly basis, any interest received on the Holding Accounts and the Rolling Reserve Account.

## **8 ESCROW AGENT OBLIGATIONS (GENERAL)**

The Escrow Agent shall:

8.1 Subject to the provisions of clause 4.3, at all times act as the nominee and bare trustee of the Recipients and the Client in respect of the management of the Holding Accounts and Rolling Reserve Account and, to the extent compliant with this Letter, act solely on all instructions received from the Service Provider as provided in this Letter (save as provided in clause 2.3), which instructions shall be valid only when communicated to You by Service Provider when acting strictly in accordance with the terms of this Letter;

8.2 Monitor the receipt of the funds to the Holding Accounts at least once each Working Day and notify the Recipients in the event of the non-receipt of any funds;

8.3 Allocate the appropriate amounts in the Holding Accounts as Rolling Reserve in accordance with the Rolling Reserve requirements and the terms of this Letter;

- 8.4 Prepare and provide the Recipients and the Client with a weekly report setting out the following information:-
- 8.4.1 total of funds received from the Acquiring Bank which are credited to the Holding Accounts;
  - 8.4.2 total funds allocated as Rolling Reserve and the periods which the funds relate to;
  - 8.4.3 value of funds paid (together with reason for payment) to each Recipient and the Client, the Escrow Agent and/or any third party;
  - 8.4.4 unpaid funds in the Holding Accounts broken down by proposed Recipient with proposed payment release dates;
  - 8.4.5 details of any Chargeback, Refund or Original Credit Transaction paid from the Holding Accounts together with details of any related fees paid;
  - 8.4.6 current balance of the Holding Accounts; and
  - 8.4.7 any other credits or debits to the Holding Accounts including without limitation fines, penalties and bank charges and bank interest.
- 8.5 Make payments to Clients as follows:
- 8.5.1 Service Provider shall initiate the payment process by sending an e-mail to Escrow Agent, addressed to Service Provider's primary point of contact (or back-up point of contact, if Service Provider has been advised that the primary point of contact is unavailable for any reason), in which Service Provider shall request Escrow Agent's authorization for the requested payments as set forth in a payment report attached to such e-mail, which shall include a list of all Clients to be paid and the applicable payment amounts;
  - 8.5.2 Escrow Agent shall approve and process payments to Clients in accordance with the instructions sent by Service Provider, and send Service Provider an e-mail confirming Escrow Agent's authorization for such payments, where reasonably practical, on the same Working Day the e-mail described in Section 8.5.1 is received by Escrow Agent, provided that such e-mail is received no later than [insert cut-off time, including time zone], and on the following Working Day if such e-mail is received after [cut-off time].
- 8.6 Make available to Service Provider a dedicated point of contact, [insert availability parameters], and a back-up point of contact who shall be available in the event that the primary point of contact cannot be reached, and immediately provide Service Provider a new point of contact if either the primary point of contact or back-up point of contact ceases to perform such function for any reason (e.g., reassignment, termination of employment, illness, or death). Escrow Agent shall make available to Service Provider complete contact details for each primary point of contact and back-up point of contact (which shall include, at a minimum, telephone number, e-mail address, and cell phone number), and shall immediately notify Service Provider of any changes in such information.
- 8.7 Electronically transfer, at the request of Service Provider, any and all sums to which Service Provider is entitled under this Agreement into another Acquiring Bank

account of Service Provider's choosing that is managed by Escrow Agent within the timeframes set forth in Section 8.5.2. Service Provider shall bear all costs associated with opening and maintaining such accounts, and shall own all interest earned by such accounts.

## **9. LIABILITY**

The Escrow Agent shall not be liable for any mistake of fact or error of judgment or any other act done or omitted to be done by it in good faith in reliance on instructions received from the Recipients as set out in clause 8.1, provided that this exclusion shall not extend to the Escrow Agent's or its employees', agents' or sub-contractors' fraud, or clear negligence

## **10. INDEMNITY**

Acquiring Bank and Service Provider jointly agree to indemnify the Escrow Agent, and to hold the Escrow Agent harmless against any direct loss, liability or expense incurred by it (including any reasonable legal or other third party professional adviser fees) and arising directly under the terms of this Letter or by the Escrow Agent carrying out its duties hereunder or from the execution by the Acquiring Bank or the Service Provider of a Merchant Agreement or Introducer Agreement, without wilful misconduct, fraud or negligence on the part of the Escrow Agent or its employees, agents or sub-contractors.

## **11. DURATION/TERMINATION**

- 11.1 This letter and the obligations of the parties hereunder shall remain in force as set out in clause 11.2 unless terminated under clause 12 (the "**Term**").
- 11.2 Subject to clause 12 and the following sentence, this Letter will terminate and the rights and obligations under it will cease automatically on the date which is 6 months plus one week following the date of a notice served upon the Escrow Agent by the Service Provider regarding the last allocation of a Rolling Reserve Sum in the Holding Accounts as Rolling Reserve. Notwithstanding the previous sentence, this Letter will not terminate earlier than 6 months plus one week following the date of termination of the Merchant Agreements such date shall be notified to the Escrow Agent in writing.

## **12. TERMINATION PAYMENT**

Subject to the prior payment of all fees (including the Escrow Agent Fee), commissions, expenses, charges, Chargebacks, Refunds, Original Credit Transactions, Rolling Reserves and other amounts due to any Recipient (including without limitation the Acquiring Bank and/or Service Provider) or any third party as well as any fines or penalties due to be paid (whether or not to a Recipient), the Escrow Agent shall pay the balance of the Holding Accounts (if any) to the appropriate beneficiaries on the date of termination of this Letter.

## **13. REPLACEMENT OF ESCROW AGENT**

With the consent of the Acquiring Bank, Service Provider may for convenience, and without any breach on the part of the Escrow Agent, at any time during the Term of this Letter, upon not less than 30 days prior written notice, cause the replacement of the Escrow Agent. In such event, Service Provider shall procure that the new escrow agent sign a letter in the same terms as those contained herein and shall reimburse both the Acquiring Bank and the Escrow Agent all of the reasonable expenses incurred by them in connection with such replacement; provided, however, that both the Acquiring Bank and the Escrow Agent shall use commercially reasonable efforts to notify Service Provider prior to incurring any expense in connection with any such replacement, and follow reasonable requests made by Service Provider, if any, that are intended to reduce any such expenses.

#### **14. GOVERNING LAW**

This letter shall be governed by and construed in accordance with the laws of England and Wales, and any dispute shall be resolved before the courts in England and Wales.

#### **15. INDEPENDENT ESCROW AGENT**

The Recipients acknowledge that the Escrow Agent is an independent third party and nothing herein shall be deemed to create a partnership between the Recipients and no Recipient shall have the authority or capacity to bind the other.

#### **16. ACQUIRING BANK AND SERVICE PROVIDER COVENANTS**

Acquiring Bank and Service Provider undertake to Escrow Agent to act towards it in good faith and in accordance with generally-accepted professional standards and immediately to notify the Escrow Agent of any event of which they become aware which the Escrow Agent might consider to impact upon its business or reputation or that of any holding subsidiary or associate company.

#### **17. CONFIDENTIALITY**

17.1 In clause 17, "Confidential Information" means all confidential information disclosed (whether in writing, orally or by another means and whether directly or indirectly) by one party ("Disclosing Party") to the other ("Receiving Party") whether before or after the date of this Agreement including, but not limited to any of the Disclosing Party's other operations, processes, plans or intentions, product information, know-how, design rights, trade secrets, market opportunities and business affairs.

17.2 During the term of this Agreement and after termination or expiry of this Agreement for any reason the Receiving Party:

17.2.1 shall not use Confidential Information for a purpose other than the performance of its obligations under this Agreement;

- 17.2.2 shall not disclose Confidential Information to any person except with the prior written consent of the Disclosing Party or in accordance with clauses 17.3 and 17.4;
- 17.2.3 shall make every effort to prevent the use or disclosure of Confidential Information.
- 17.3 During the term of this Agreement the Receiving Party may disclose Confidential Information to any of its sub-contractors, customers, professional advisors or consultants and its and their respective directors, other officers and employees (each a "Recipient") to the extent that disclosure is necessary for the purposes of this Agreement.
- 17.4 Before disclosure of Confidential Information to a Recipient, the Receiving Party shall ensure that such Recipient is bound by an obligation of confidence in respect of Confidential Information by its contract of employment or service or otherwise no less onerous than the terms of this clause 17.
- 17.5 Clauses 17.2 to 17.4 do not apply to Confidential Information which:
  - 17.5.1 is at the Commencement Date or becomes at any time after that date publicly known other than by the Receiving Party's or Recipient's breach of this Agreement;
  - 17.5.2 can be shown by the Receiving Party to the Disclosing Party's reasonable satisfaction to have been known by the Receiving Party before disclosure by the Disclosing Party to the Receiving Party;
  - 17.5.3 is or becomes available to the Receiving Party otherwise than pursuant to this Agreement and free of any restrictions as to its use or disclosure; and
  - 17.5.4 is required to be disclosed by law.

## **18. ASSIGNMENT**

- 18.1 This Agreement is not assignable by the Escrow Agent or the Service Provider without the prior written consent of the Acquiring Bank, such consent not to be unreasonably withheld, except that the Service Provider may assign this Agreement to an Affiliate of the Service Provider without such consent.
- 18.2 Each of the Service Provider and the Escrow Agent acknowledges that the Acquiring Bank may assign its rights or transfer its obligations under this Agreement and may use agents or sub-contractors to perform its obligations under this Agreement.

## **19. ENFORCEMENT OF OBLIGATIONS**

- 19.1 The rights which each of the Recipients has under this Letter shall not be prejudiced or restricted by any indulgence or forbearance extended to another. No waiver by any Recipient in respect of a breach shall operate as a waiver in respect of any subsequent breach.
- 19.2 This Letter shall not be varied or cancelled, unless the variation or cancellation is expressly agreed in writing by the Recipients.



## **20. NOTICES**

- 20.1 Any notice to be given pursuant to the terms of this Letter must be given in writing to the party due to receive such notice, at its registered office from time to time
- 20.2 A notice may only be served on a Recipient by sending it by courier or by hand addressed to the Recipient at its address pursuant to paragraph

## **21. COUNTERPARTS**

This Letter may be signed in any number of counterparts, each of which when taken together shall constitute the whole agreement.

)  
**SIGNED by** ♦ )  
For and on behalf of )  


)  
**SIGNED by** ♦ )  
For and on behalf of )  
Optimal Payments Limited )

)  
**SIGNED by** ♦ )  
For and on behalf of )  
Barclays Bank plc )