This Annotated Agreement assumes a general fact scenario whereby the services of a fulfillment center vendor are retained to provide customer order processing, packaging and shipping for a company that is planning to sell a product through direct marketing channels. The specific roles of the parties, the main terms of the agreement, the channels over which the product will be marketed, the financial structure, fees, final work product and other provisions may vary widely from project to project depending on the circumstances.

Technology, business practices, production methods and applicable law are constantly evolving. Anyone viewing this or contemplating entering into an agreement of this nature should not consult with an experienced attorney for advice in preparing a contract before entering into a specific business relationship. You should not rely on this Agreement or sample provisions when preparing your own contracts.

Introduction:

The following sample Agreement assumes that the “Vendor” is a company with experience in providing fulfillment services and whose services are being retained by a company (“Merchant”) seeking to outsource its fulfillment needs due to the sales of its product via a variety of direct marketing channels. The Merchant is retaining the Vendor’s professional services on a fee-for-services basis to store, package, assemble and ship Merchant’s products in accordance with customers’ orders and Merchant’s instructions.

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<tr>
<th>FULFILLMENT SERVICES AGREEMENT</th>
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<tr>
<td>THIS AGREEMENT (&quot;Agreement&quot;), dated __________, [YEAR], is entered into between [MERCHANT], having its principal place of business at located at [STREET ADDRESS], and [FULFILLMENT VENDOR (&quot;VENDOR&quot;)], with offices located at [CALL CENTER STREET ADDRESS]. WHEREAS [MERCHANT] is engaged in the business of selling [PRODUCT] through its Television, radio, website [MERCHANT WEBSITE] (hereinafter</td>
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“Site”) and direct response marketing; and

WHEREAS [MERCHANT] desires to utilize the services of outside company [VENDOR] to complete its fulfillment and warehousing needs; and

WHEREAS [VENDOR] maintains a separate and distinct business as a fulfillment and warehouse center that is able to handle all aspects of order fulfillment, order packaging and shipping and inventory warehousing; and

WHEREAS [MERCHANT] and [VENDOR] have agreed upon the terms of their business relationship;

NOW, THEREFORE, for good and valuable considerations, the receipt and adequacy of which are hereby acknowledged, the parties, intending to be legally bound, agree as follows:

## ARTICLE 1.
### ACCEPTANCE

Subject to the terms and conditions set forth in this Agreement, [MERCHANT] hereby contracts with [VENDOR] to coordinate and/or perform the services described herein for the Term. [VENDOR] hereby accepts such appointment and agrees to coordinate and/or perform such services as provided herein for the Term.

Article 1 provides clear language acknowledging that both parties unequivocally accept all of the terms of this agreement.

## ARTICLE 2.
### NON-EXCLUSIVITY AGREEMENT

2.1 NON-EXCLUSIVITY AGREEMENT

This Agreement is a non-exclusive agreement, [MERCHANT] reserves the right to outsource its fulfillment service needs with other vendors, including but not limited to other vendors that service the

Article 2 ensures that you will be able to work with other fulfillment companies, if you choose to, while you are also working with this fulfillment company. This section also allows the fulfillment company to work with other clients at the same time they are handling your fulfillment needs as well.
same localities as [VENDOR]. [VENDOR] reserves the right to also offer services to other merchants, including but not limited to merchants that may sell, market, promote or distribute products substantially similar to [MERCHANT]’s products.

ARTICLE 3.
SERVICES

3.1 DESCRIPTION OF SERVICES

3.1.1 During the Term and any Renewal Term of this Agreement, [VENDOR] will provide or coordinate fulfillment services to [MERCHANT] in connection with the direct response sales of [MERCHANT]’s Products and Additional Products. [VENDOR] or [VENDOR]’s subcontractor(s) will provide services pursuant to the description of services set forth in Exhibit A (the “Fulfillment Services”) and the fees and pricing set forth in this Agreement. [VENDOR] will use commercially reasonable efforts to provide the Fulfillment Services within the performance standards set forth in Exhibit B (“Service Levels”).

3.1.2 Order Processing Services

[VENDOR] will receive and process Orders transmitted to [VENDOR] by [MERCHANT] by electronic communication in accordance with procedures and formats set forth in Exhibits A and B. All such Orders will include the customer shipping address, Order identification number, and any additional information mutually agreed upon by the parties. [VENDOR] will create a separate account number for each order and invoice.

Section 3.1 formally states that you are entering into a contract with the fulfillment company to handle your fulfillment needs. This section also provides that the details of exact services that you are contracting for and the fees for those services that you have arranged with the fulfillment company will be outlined in an exhibit attached to this contract.

Section 3.1.2 explains the overall process of how orders will be processed: 1) you, the merchant, will send over customer orders to the fulfillment company; 2) the fulfillment company will then process those orders by assembling the product, wrapping, packaging and shipping the product to you customers based on the exact specifications that you have agreed to (which will be outlined in the exhibits). This section also explains what the
After receipt of Orders placed by [MERCHANT]'s customers, [VENDOR] will process the orders by [assembling], wrapping, packing and shipping the Product and Additional Products in accordance with both 1) the specifications and requests of each individual customer Order and 2) in accordance with the procedures and formats set forth in Exhibit A (“Fulfillment Services”) and Exhibit B (“Service Levels”). Provided [VENDOR] has adequate inventory of Product to fulfill the Order, Orders received on any business day by ______ local time (“Cut Off Time”) will be processed on the same day. If the order is received after the Cut Off Time, then [VENDOR] will use commercially reasonable efforts to process on the same day received all orders received on any business day between Cut Off Time and ______ local time. Orders received after ______ local time and orders received other than on business days will be processed the following business day. Orders received after ______ local time will be deemed received the next business day.

3.1.3 Pre-Orders

[MERCHANT] may choose to create special promotional offers by allowing customers (of [MERCHANT]'s choosing) to place Orders for Products or Additional Products before such Products or Additional Products are made available to the general public for purchase (“Pre-Orders”). [MERCHANT] may collect Pre-Orders ___ days prior to the date that a Product is first to be made available to the general public (the “Street Date”), at which point such Pre-Orders will be forwarded in a separate batch to [VENDOR]. [VENDOR] shall process all Pre-Orders no turnaround time for order processing will be based upon what time of day the fulfillment center receives your customers’ orders (provided that you have given the fulfillment center enough of your product to process the order and that the orders are received on a business day). Also note that the term “processing” includes both the packaging and shipping to your customers.

Section 3.1 provides that the fulfillment center will help you process and fulfill pre-orders for your product if you would like to offer special sales to certain customers prior to allowing the product to be purchased by the general public.
later than Street Date minus one day, provided [VENDOR] has received the new Product from the manufacturer, distributor or [MERCHANT] in time for processing.

3.1.4 Back-Orders

[VENDOR] shall process the in-stock items of an Order immediately and will hold Orders for out of stock Products (“Back Orders”) until [VENDOR] receives new supplies of out-of-stock Products. Upon receipt of new supplies of out-of-stock orders, [VENDOR] will immediately begin processing Back Orders in the order in which they were received. [MERCHANT] may elect to have [VENDOR] hold an order that contains items on Back Order until the Order can be completely fulfilled (“Ship Complete Orders”). [MERCHANT] may inform [VENDOR] from time to time of the number of days, up to a maximum of ___ days (the “Hold Period”), that [VENDOR] is to hold such Ship Complete orders before processing the available products and holding the Back Order for the out of stock products.

3.1.5 Operations Managers; Business Manager

Each party will name a business manager who will act as primary contact for matters related to the day-to-day administration of this Agreement. The current operations managers for each party are shown in Exhibit A. At all times during the term of this Agreement, [VENDOR] shall designate, and inform [MERCHANT] of the identity of, at least one individual with the responsibility and authority to implement [VENDOR]’s obligations under this Agreement.

Section 3.1.4 outlines what the procedure will be when there are back-order for your product (meaning that the fulfillment center has received orders for your product but has run out of stock and are not able to fill the orders). This provision maintains that once new stock of your product arrives at the fulfillment center, the customer orders will be processed in the order they were received. You may also tell the fulfillment center to hold a customer order (for a certain amount of days) until all items on their order may be filled.

Section 3.1.5 provides that each party will designate a main contact person who will be able to handle questions and problems if they arise.
### 3.1.6 Operations Review Meetings

[VENDOR] and [MERCHAND] will meet at least ____ a month to review [VENDOR]'s performance of the Services and discuss current industry trends, improvements to [MERCHAND]'s supply chain, security measures and procedures, disposition of non-moving Product, Product forecasts, continuous process improvement, strategic changes recommended by [VENDOR] or [MERCHAND] and the implementation of cost savings programs. Pricing as stated on Exhibit B will be reviewed in relations to predicted forecasts, and in the event that forecasts are not being met, [VENDOR] may change its pricing to compensate for [MERCHAND]'s failure to meet the assumption.

### 3.1.7 Soft Launch

Within ____ days following the Effective Date of this Agreement, [VENDOR] shall help [MERCHAND] conduct a soft launch of a portion of the Product and, within ___ days following the Effective Date, increase the aggregate number of unique stock-keeping units ("SKU") in the product categories listed on Exhibit A attached hereto to at least ___. [VENDOR] may include in his initial SKU calculation Products produced by a manufacturer for [MERCHAND] prior to the Effective Date that is available at [VENDOR]'s warehouses upon the Effective Date. Such Product sold prior to the Effective Date, except for purposes of initial SKU calculation, will not be governed by this Agreement.

### 3.2 SERVICE LEVELS

The Service Levels define certain
minimum standards of performance which [VENDOR] agrees to maintain in rendering the Fulfillment Services. In circumstances in which this Agreement does not stipulate certain Service Levels with respect to a particular Fulfillment Service, [VENDOR] and [MERCHANT] will mutually agree in writing upon the Service Levels with respect to such Fulfillment Service, and [VENDOR] agrees to provide such Fulfillment Service in accordance with such agreed upon Service Levels. [VENDOR]'s failure to perform the Fulfillment Services in accordance with the Service Levels will be subject to the default and cure provisions set forth in Section

3.3 SPECIAL SERVICES.

[VENDOR] may from time to time during the Term request [VENDOR] to perform Fulfillment Services on its behalf not covered by this Agreement or to change any Service Level. [MERCHANT] will notify [VENDOR] in writing of its particular requirements with respect to any special services not included in this agreement or in Exhibit A. Provided that such requests are commercially reasonable and given in a timely manner, [VENDOR] agrees to comply with the amended requirements. [VENDOR] will promptly notify [MERCHANT] in writing if [VENDOR] cannot perform any additionally requested services and agrees that acquiescence with such new requirements will not be unreasonably withheld.

3.4 FORECASTS.

[MERCHANT] recognizes and understands the importance of keeping [VENDOR] informed at all times of forecasted order volumes, schedule changes, fast and slow selling Products, expect with the processing of your orders. The details surrounding the service levels will be written in an exhibit and attached to this agreement. The fulfillment center will be legally bound to adhere to those service levels.

Section 3.3 allows for amendments to be made to the services contacted under this agreement to account for any special services that you may need during the course of your business with the fulfillment center. The fulfillment center agrees to assist you with any special requests provide that they are economically reasonable and that you ask for the special services in a timely manner. The special services may require incurring more fees. If the fulfillment center is unable to accommodate your requests, they will notify you in writing.

3.4 – in order for the fulfillment center to properly handle the amount of orders for your product, they will need to be kept informed of any anticipated surges or declines in orders so that they can prepare their center properly in order to meet the
Additional Products, vendor problems and all other material business issues which might have an effect on the performance by [VENDOR] of its obligations hereunder. [MERCHANT] will use commercially reasonable efforts to provide [VENDOR] with non-binding forecasts and other information, including new products, upcoming targeted marketing events, promotions and sale items, so as to assist [VENDOR] in meeting the Service Levels provided herein. [MERCHANT] will deliver to [VENDOR] revised non-binding forecasts whenever [MERCHANT] is aware of any business condition that may materially affect any item of a previous forecast furnished to [VENDOR]. If actual order volumes vary by more than ___ from forecasted levels, or if [MERCHANT] has not provided [VENDOR] with proper notice of any material issues of which it is aware at the time of forecast, [VENDOR] shall be deemed compliant with Section 3.2 with respect to any Service Levels which are directly affected by such variance or such business issues.

3.5 COLLECTION RISKS.

Notwithstanding anything contained herein to the contrary, the parties acknowledge that [VENDOR] will not be required to make any collection efforts on behalf of [MERCHANT] and will share no risk with respect to any failure of [MERCHANT] to collect monies owed on any Order.

3.6 SCHEDULES

The parties acknowledge and agree that the detailed terms and conditions of any and all projects entered into between

service levels to which you have agreed. These anticipated high and lows will be presented as forecasts, and these forecasts will also be used to anticipate how much stock of your product will need to be kept on-hand by the fulfillment center. Because the fulfillment center will be relying upon your ability to provide them with relatively accurate forecast, this section also provides that if your forecasts are very inaccurate, then the fulfillment center will not be held responsible for a their inability to meet the service levels for that forecast term.

Section 3.5 provides that the fulfillment center will play no role in collecting money that is owed to you from your customers.

Section 3.6 states that both parties acknowledge and agree that the details regarding the services provided by the fulfillment center and the levels at which
the parties shall be set forth in form and format substantially similar the schedule presented in Exhibit A (the "Original Schedule"). The parties acknowledge and agree that in addition to the terms and conditions of the Original Schedule in Exhibit A and any other comparable schedule acknowledged in writing by the parties hereto and referencing this Agreement (each a "Schedule" and collectively the "Schedules"), the general terms of this Agreement shall apply to each project contained therein, as applicable, and the overall relationship between the parties. If there is a conflict between the terms of the Schedules and this Agreement, the specific terms of the Schedules shall control.

3.7 REPORTS

The parties agree to provide each other such reports as are mutually agreed upon and set forth in each Schedule or as either party shall reasonably request during the performance of the Fulfillment Services.

3.8 Customer Support.

[MERCHANT] shall at all times have the ability to respond promptly to inquiries from [VENDOR] on behalf of Customers and shall endeavor to resolve disputes with Customers amicably. In addition, [VENDOR] reserves the right to charge [MERCHANT] reasonable fees and recover its expenses on account for Customer inquiries. Prior to imposing such fees and attempting to recover its costs, [VENDOR] shall notify [MERCHANT] of the details and nature of the problems and attempt to find mutually acceptable

those services will be performed as written on the attached exhibits are formally a part of this contract and must be adhered to. This section also includes future amendments to the exhibits/schedules or any changes to the schedules that are mutually agreed upon in writing. If there is any confusion as to which provision holds, this section provides that you should follow the details provided in the most recent exhibit/schedules as the controlling document.

Section 3.7 states that both parties can require the other party to create performance reports. The details regarding the reports – including what they should include and when they should be produced – will be detailed on the exhibits attached to this document.

Section 3.8 requires that your company have, at all time, someone who will be reachable to handle issues and questions that the fulfillment center may have regarding your product or the services they are responsible for carrying out for you under this agreement.
3.9 LOST SHIPMENTS

[VENDOR] shall assist [MERCHANT] in tracking lost Shipments and/or short Shipments by filing claims with the freight carriers, provided that, [VENDOR] shall in no case be responsible for lost or damaged shipments once a processed Product has been delivered to the freight carrier.

3.10 PRODUCT SOURCING AND RECEIVING

[MERCHANT] will provide [VENDOR] with a list of the Products it intends to produce as listed in detail in Exhibit A. The Product list shall include the replacement cost of each Product. [VENDOR] shall review the Product list and assign [VENDOR] unique identifying numbers, also known as stock-keeping unit (“SKU”) numbers, to the Product list, provided that both [VENDOR] and [MERCHANT] mutually agree upon the Products to be assigned SKU numbers. [MERCHANT] and [VENDOR] will mutually agree on how the Product is to be categorized at the time the SKU number is assigned.

3.11 RETURN POLICY

[VENDOR] agrees to accept, receive, process, unpack, disassemble, restock, and catalogue Products returned by [MERCHANT]’s customers pursuant to [MERCHANT]’s return policies. [VENDOR] and [MERCHANT] hereby acknowledge and agree that returned Products will be processed and handled under the terms and conditions detailed in Exhibit B, provided that [MERCHANT] acknowledges that [VENDOR] will not

Section 3.9 provides that the fulfillment center will help you track down any lost shipments. However, the fulfillment center will not be responsible for paying for or replacing any product that is lost or damaged during transit to your customers.

Section 3.10 requires you to create a list of all of the products that the fulfillment center will be handling. On that list, you must provide a replacement value for each product. The fulfillment center will then place a unique tagging number on each product (this number will also be used as a billing code).

Section 3.11 states that the fulfillment center will help you with handling any returned items. The terms in which items may be returned and how they will be handled after receipt from your customers will be outlined on an attached schedule. The fulfillment center will not be responsible for handling any monetary issues regarding the returns of your product. The fulfillment center will also not be held responsible for any damages to your product caused either by customer use or damages that occurred during transit to
have any responsibility to collect from nor distribute to [MERCHANDISE]’s customers monies and fees owed for the returned Product. [MERCHANDISE] agrees that all shipping charges will be the sole responsibility of [MERCHANDISE] and/or [MERCHANDISE]’s customers. [MERCHANDISE] agrees that [VENDOR] will not be responsible and will be held harmless for any returned Products that have been damaged by [MERCHANDISE]’s customers or by freight carriers during the return shipment. Both parties reserve the right, from time to time, to modify the details of the return policies, which modifications shall be effective upon signed writing by both [MERCHANDISE] and [VENDOR].

3.12 [MERCHANDISE]’S GENERAL OBLIGATIONS

[MERCHANDISE] shall be responsible for maintaining the marketing and sale for all Products during the Term. [MERCHANDISE] shall also be responsible for receiving, validating and executing the purchase transaction associated with Product orders placed by customers.

3.13 EXPORT OF MERCHANDISE

The distribution and fulfillment of Product inventory shall take place within the United States. The export of Products may be extended to Canada and such other international territories that the parties shall mutually agree during the Term, provided that the terms and conditions for the processing, shipping and handling be detailed in a written amendment to this Agreement that is signed by both parties.

ARTICLE 4.
FULFILLMENT SITE, SECURITY

and from your customer. Both parties will have the right to change how returns will be handled and processed, but any changes must be evidenced in a signed writing.

3.12 You will be required to handle all the actual marketing, sales and customer transactions regarding your product.

3.13 provides that this agreement only governs products being processed and shipped within the United States. Both parties may agree to process and ship products outside of the US, but additional terms and requirements will be needed, and you will have to agree to those terms in a signed writing.
4.1 FULFILLMENT SITE

4.1.1 The Fulfillment Services will be performed by [VENDOR] at [VENDOR]'s place of business located at [SITE LOCATION], and/or at such other business locations in as [VENDOR] may maintain from time to time, or such other location as mutually agreed by [VENDOR] and [MERCHANT]; provided, however, that [VENDOR] may out-source to a third party certain Fulfillment Services, subject to the prior written consent of [MERCHANT] and the terms of Section ___, so long as [VENDOR] remains primarily responsible for providing such out-sourced Fulfillment Services. Each Fulfillment Facility will regularly be open and in operation on the following days and during the following hours: _____ to _____.

4.1.2 [VENDOR] will operate and maintain the Fulfillment Site for the purpose of performing the services contemplated by this Agreement. [VENDOR] shall, in [VENDOR]'s reasonable discretion, select, design, operate, maintain, and staff the Fulfillment Site. [VENDOR] will use commercially reasonable efforts to employ a sufficient number of trained employees at the Fulfillment Site to provide the Fulfillment Services. [VENDOR] shall designate a national account manager to facilitate communications with [MERCHANT].

4.1.3 During the Term of this Agreement and any Renewal Term, [VENDOR] shall provide the Fulfillment Services, Monday through Friday, during [VENDOR]'s standard hours, except for regularly scheduled [VENDOR]'s corporate holidays (the "Holidays"). Upon a request of [MERCHANT] which is outside of the Forecast, [VENDOR] will

4.1 states the location of the fulfillment site where your orders will be processed. This allows the fulfillment company to outsource the actual warehousing and processing of your product to a third party, but only after your consent and requires the fulfillment center to remain responsible for the terms of this agreement even if the processing is outsourced. Also provides for hours when the facility must be open.

4.1.2 provides that the fulfillment company is responsible for maintaining the fulfillment center (including its staff) so that the center is able to properly handle your orders under the terms and details of this agreement.

4.1.3 lists the days throughout the year (the calendar) in which the fulfillment center will be required to process your orders.
provide Fulfillment Services outside of the days and times specified above at [VENDOR]'s additional fees and charges for such services as set by [VENDOR].

4.2 REMOTE FULFILLMENT SITES

Should [VENDOR] choose to have additional, remote fulfillment sites in addition to the Fulfillment Site, [VENDOR] will ensure that remote sites will be equipped with the telephone systems, computer systems, packaging supplies and various support systems be used in the delivery of Fulfillment Services. In addition to the requirements in this section, [VENDOR] agrees that all remote sites’ equipment and training will be compliant with the provisions of this Agreement, including but not limited the keeping, retention and disposal requirements and privacy/non-disclosure provision governed under Article15 of this Agreement.

4.3 SITE SECURITY

4.3.1 [VENDOR] hereby represents and warrants to [MERCHANT] that [VENDOR]'s Fulfillment Site is protected by premises alarm systems governing human entry/exit points; motion detectors are in place in the ship staging and finished goods holding areas; photo I.D. or other security badges are required to be displayed by all staff, visitors and employees of any outside firm performing audit or inventory services; employees use controlled access to the premises, and full-time 24-hour security guards are on duty who monitor exterior perimeter and surrounding acreage as well as random Fulfillment Site locations.

4.3.2 [VENDOR] certifies that all

4.2 allows for the fulfillment company to process your orders outside of their main fulfillment center, provided that all of the terms and conditions and details of service are maintained by the remote fulfillment centers.

Section 4.3 provides security requirements that the fulfillment center must agree to abide by during the course of this agreement.
remote fulfillment sites located apart from the main Fulfillment Site listed in section 4.1 will maintain the utmost security standards in accordance with the provisions of Section 4.3.1. In addition to the provisions provided in Section 6.7, [VENDOR] acknowledges and accepts all risk of loss or damage to Products and/or Additional Products accepted into inventory at any [VENDOR] remote fulfillment facility.

ARTICLE 5
FULFILMENT FEES, PAYMENT

5.1 FULFILMENT FEES

During the period commencing on the Effective Date and ending ____ months after the date [VENDOR] becomes Fully Operational, [MERCHANT] will pay [VENDOR] fees for the Fulfillment Services provided hereunder (the "Fulfillment Fees") at the rates set forth in Exhibit C. Any adjustments to the Fulfillment Fees must be accomplished in writing with the express, prior consent of both parties. The parties agree to negotiate in good faith with respect to any adjustment of the Fulfillment Fees.

5.2 SPECIAL SERVICES FEES.

If [MERCHANT] requests that [VENDOR] provide any Special Services, [MERCHANT] will pay [VENDOR] such amount with respect to such Special Services as will be agreed between the parties, which amount may include charges for setting up the required Special Service as well as the performance of the Special Service (the "Special Service Fees").

5.3 SHIPPING COSTS.

4.3.2 requires that remote fulfillment centers must also maintain the same security requirements as the main fulfillment center.

5.1 states that you agree to pay the agreed upon fees for the fulfillment services based on the details of your arrangement as detailed in the attached exhibits.

5.2 states that you agree to pay additional fees for any special services that you request outside of fees detailed in the exhibits.
5.3.1 All UPS, U.S.P.S., common carrier and other delivery service shipping costs, including but not limited to insurance, brokerage fees, taxes and other similar expenses related to the shipping to [VENDOR] of Products and the shipping by [VENDOR] of Products to customers in accordance with the Specifications and Service Levels are the sole responsibility of [MERCHANT]. To the extent practicable, [VENDOR] will cause all shipping charges to be billed directly to [MERCHANT] by the carrier. If through [VENDOR]'s buying power [VENDOR] can effectively reduce [MERCHANT]'s freight expense, then upon the mutual written agreement of the parties, [VENDOR] will prepay and bill the freight to [MERCHANT].

5.3.2 Postage and freight rates anticipated to apply to the performance of any Fulfillment Services project shall be determined by [VENDOR] for each project and shall be communicated in writing to [MERCHANT] prior to the start of Fulfillment Services on each project. [VENDOR] reserves the right to increase these rates for ground shipping, contained in the Original Schedule, at any time upon ____ days notice to reflect actual increases in costs. Any increase in these rates shall be substantiated in writing by [VENDOR]. [VENDOR] considers all postage and freight information to be Confidential Information. National carrier premium service rates, including but not limited to United States Postal Service Priority Mail, United Parcel Service, One, Two and Three day service and Federal Express shall be billed to [MERCHANT] at cost. [MERCHANT] reserves the right, in its sole discretion, to require [VENDOR] to use, or to operate under separate arrangements with, carriers with whom [MERCHANT] or [MERCHANT]'s affiliates have separately negotiated

5.3.1 states that you will be responsible for all shipping costs. If the fulfillment center is able to help you purchase reduced freight rates, then they will agree to help you negotiate rates for your shipping needs. Any negotiated rates will be agreed to in writing.

5.3.2 The fulfillment center will anticipate the shipping rates for your products and they shall let you know what the anticipated rates are in writing prior to the start of their services. The fulfillment center will have the right to increase any rates for shipping above what is agreed to in this contract, but they must give you proper notice, in writing, before they implement any increases. The rates at which they bill you are considered confidential information. The fulfillment center agrees to charge you only at cost for any shipping accomplished with a national carrier (such as the US Postal Service). Rather than rely on the fulfillment center to negotiate your shipping rates and arrangements, you may require the fulfillment center to use a carrier that you have specifically negotiated with if you would prefer.
postage and freight rates, in lieu of [VENDOR] rates.

5.3.3 [MERCHANT] expressly reserves the right to negotiate Bill of Lading terms and conditions with all freight carriers. All bills of lading, either negotiated by [MERCHANT] or [VENDOR] used to transport [MERCHANT]’s Products will reflect the terms and conditions of the Agreement.

5.4 PAYMENT TERMS.

On a ____ basis, [VENDOR] will provide to [MERCHANT] an invoice (in hard copy form) indicating all Fulfillment Fees and Special Service Fees incurred during such week. The invoice will indicate all shipping fees and other shipping and handling charges incurred with respect to shipments of Products during such _____. All invoices and other charges payable hereunder will be paid solely in United States Dollars. If conversion from other currencies is required for any purpose, the mid-market, midday rate as posted by Reuters will apply. All invoices will be due and payable in full within ____ days after receipt, except invoices for shipping fees and other shipping and handling charges, which will be due and payable in full within ____ days after receipt. Any amounts disputed in good faith by [MERCHANT] and the reasons therefore will be reported to [VENDOR] within ____ days after receipt of the applicable invoice, and [MERCHANT] and [VENDOR] agree to work diligently to resolve the dispute within ____ days of the receipt of the notice of dispute from [MERCHANT]. Invoices that are not paid within ____ days, other than those for which a dispute has been reported by [MERCHANT], shall be assessed a late payment charge at the rate of ____% per month on the unpaid balance.

5.3.3 You reserve the right to negotiate the terms of carriage for your product, including the risk of loss provisions on the bill of lading, with the carrier directly. Any bills of lading that are signed between the fulfillment center and the carrier of your product must reflect the terms of this agreement.

5.4 establishes the way payment will be handled for the fulfillment services as well as any special services and shipping fees. This section also explains how good faith disputes over fees will be handled. You may be required to pay interest on unpaid invoices.
ARTICLE 6
PRODUCT, INVENTORY, RISK OF LOSS

6.1 PRODUCT

[VENDOR] will provide the Fulfillment Services for all Products, goods and services offered by [MERCHAND] which are listed and described in detail in Exhibit A. All terms and conditions herein apply to the Products and the Related Products. Parties agree that changes, additions and modifications to the Products and Additional Products lists governed by this Agreement must be accomplished in writing with the express, prior consent of both parties. The parties agree to negotiate in good faith with respect to any adjustments of the Products. If Additional Products (other than any usual and customary updates, upgrades, new versions, extensions or evolutionary developments to the Products as would typically be expected to occur in products and services such as the Products) are introduced during the Term of this Agreement, [MERCHAND] shall provide reasonable advance notice of and information about such Additional Products to [VENDOR] to enable [VENDOR] to inform and train its employees as necessary and appropriate to provide quality Fulfillment Services with respect to such Additional Products. The provision of any Fulfillment Services for such Additional Products by [VENDOR] may require an adjustment of the fees set forth on Exhibit C annexed hereto, but only if the Additional Products designated by [MERCHAND] are of a nature so as to require materially more (or materially different and more expensive) resources from [VENDOR] in order for [VENDOR] to
to provide quality Fulfillment Services meeting the performance metrics set forth in this Agreement.

6.2 INVENTORY REQUIREMENTS.

The parties will establish inventory management procedures on a product-by-product basis. [VENDOR] will preserve and maintain Products and Additional Products received for [MERCHANT] in good and marketable condition as detailed in Exhibit B (“Service Levels”). At least ___ Business Day(s) prior to the expected delivery of Products and/or Additional Products to [VENDOR], [MERCHANT] will supply [VENDOR] with a copy of the purchase order by which [MERCHANT] ordered such Products and/or Additional Products, or all requisite details of the purchase order to permit [VENDOR] to identify [MERCHANT]'s Products and/or Additional Products. [VENDOR] will provide to [MERCHANT] a monthly report (in hard copy form) that sets forth an accurate accounting of Products and Additional Products held in inventory by [VENDOR]. [VENDOR] will keep complete and accurate records in sufficient detail to permit [MERCHANT] to confirm the inventory of Products and Additional Products held by [VENDOR]. [MERCHANT] will have the right to audit such records during normal business hours upon reasonable prior written notice to [VENDOR].

6.3 INVENTORY SHIPMENTS.

For inbound shipments of Products and/or Additional Products, [MERCHANT] will advise its manufacturers that motor carriers must contact [VENDOR] at least ___ Business Day(s) prior to delivery and make a
delivery appointment prior to arrival. [VENDOR] will use commercially reasonable efforts to promptly notify [MERCHANT] in writing if any of its vendors fails to contact [VENDOR] prior to delivery. Inbound shipments arriving at [VENDOR]'s warehouse without ___ Business Day/(s) prior notice may be delayed depending on the space and manpower available at Fulfillment Facility at the time of arrival. Each inbound shipment must have a packing slip and each carton must be marked with the order number.

### 6.4 PROBLEM PRODUCTS.

[VENDOR] will comply with [MERCHANT]'s written instruction regarding handling and disposing of Products with manufacturing defects or other defects, issues, functionality issues or other liability concerns that are unsuitable for shipment to [MERCHANT]'s customers (“Problem Products”) and will submit a report of Problem Products within ___ Business Days of having become aware of their status as Problem Products. [VENDOR] will not include Problem Products in the inventory of items available for shipment to customers. [MERCHANT] acknowledges that Problem Products cannot be stored indefinitely and that all Problem Products will be removed within ___ days of [VENDOR] notifying [MERCHANT] of all specific details relevant to the classification of the Products as Problem Products. [VENDOR] has the right to dispose of Problem Products by returning the Problem Products to [MERCHANT] on a freight collect basis (provided [MERCHANT] has not provided [VENDOR] with other directions within the earlier of the ___ day period or the date of shipment) or taking any other actions which are reasonable under the

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6.4 – There may be times where your product arrives with manufacturer defects, or has been damaged or contaminated by the carrier prior to arrival at the fulfillment center. In those instances, this provision governs what will happen to those products (deemed “Problem Products”) in order to make sure they are not sent out to customers and to determine how they should be disposed. The fulfillment center agrees to never ship out products to customers that they know have defects or problems. If the fulfillment center ships out a product that is already known to have defects or problems, then the fulfillment center agrees to correct the situation by paying for the return shipment of that problem product and providing the customer with a defect-free, fully functioning product free of charge or by otherwise following your specific instructions on the situation.
circumstances. [VENDOR] acknowledges that [MERCHANT] will not be held responsible for fees, including but not limited to Fulfillment Fees, packing and supply fees, carrier fees, postage, merchandise return fees, for any known Problem Product that [VENDOR] ships to a customer. [VENDOR] agrees to cure any willful and/or negligently shipped known Problem Products by providing customers with a fully functioning, defect-free non-Problem Product, providing for return shipment of the known Problem Product, or by following [MERCHANT]’s instructions at the time of shipment of the known Problem Product. [VENDOR] agrees to cure willful and/or negligently shipped known Problem Products without cost to [MERCHANT]. [VENDOR] agrees to bear the risk of loss or further damage to shipments of known Problem Products.

6.5 REJECTION OF INVENTORY.

[VENDOR] reserves the right to refuse, without liability of any kind, acceptance of Products and/or Additional Products which, because of its condition, might cause, in [VENDOR]’s sole reasonable judgment, infestation, contamination or damage to the warehouse facility or to other goods in the custody of [VENDOR]. [VENDOR] also reserves the right to refuse, without liability of any kind, acceptance of Products and/or Additional Products which may be deemed illegal goods, contain illegal materials are manufactured illegally or may violate any local, state or federal law, treaty or trade agreement. [VENDOR] will notify [MERCHANT] of its refusal to accept any such Products and the reason for its refusal within ___ hours of such refusal. If [VENDOR] believes that any Products have caused or may cause damage to its warehouse facility or to any other goods in

6.5 – the fulfillment center may refuse, at any time, any product that may contaminate or damage its facility or its other customers’ products. The center may also refuse goods that it knows to be illegal, constructed of illegal materials, or will cause the center to be in violation of any law or treaty. The center will not be liable for any costs or delays due to their rejection of such inventory. Further, the fulfillment center may dispose of such inventory as it sees fit and may charge you disposal fees.
the custody of [VENDOR] or has characteristics which make its storage illegal, [VENDOR], after giving reasonable notice to [MERCHANT], may dispose of the Products in any lawful manner, will incur no liability by reason of such disposal and [MERCHANT] will pay [VENDOR] any costs incurred by [VENDOR] in connection with such disposal.

6.6 TITLE TO INVENTORY.

All Products in the possession of [VENDOR] will be and remain the exclusive property of [MERCHANT], and [VENDOR] acknowledges and agrees that it will acquire no right, title or interest in or to any Products and/or Additional Products by reason of this Agreement, except for as provided in Section ___. Except in the course of carrying out its Fulfillment Services hereunder, [VENDOR] will not transfer, assign, exchange, lease, encumber, pledge, create a security interest in or otherwise dispose of the Products and will not subject the Products to attachment, levy or seizure by or on behalf of any creditor of [VENDOR]. [MERCHANT] may file any financing statements(s) with respect to the Products in the possession of [VENDOR]. To protect [MERCHANT] and ensure that [MERCHANT] will maintain proper title to all of [MERCHANT]’s Products while they held at [VENDOR]’s facility and processed by [VENDOR] under the terms of this Agreement, [VENDOR] acknowledges and agrees to allow [MERCHANT] to file a Uniform Commercial Code Financial Statement (UCC-1) with ____ State’s Secretary of State Office (or equivalent state records office). [VENDOR] acknowledges that the UCC-1 form will provide public notice of [MERCHANT]’s interest in all Products and Additional Products. If requested by [MERCHANT], [VENDOR] acknowledges and agrees to

6.6 – You will remain the owner and holder of title to the products while they are in the fulfillment company’s possession. Fulfillment center may not transfer or otherwise convey or use your product except to complete its fulfillment duties under this contract. The fulfillment center may not use your product as collateral for its own benefit. In order to further protect your rights to the product, you may opt to file a UCC-1 financial statement, and the fulfillment company agrees to cooperate with you in order to help you properly file those forms.
assist and cooperate with [MERCHANT] in good faith to allow [MERCHANT] to properly file UCC-1 in all applicable jurisdictions.

6.7 RISK OF LOSS.

6.7.1 [VENDOR] acknowledges that [MERCHANT] shall retain all rights and title to all Inventory and packaging materials which [MERCHANT] causes to be delivered to [VENDOR] under this Agreement. [MERCHANT] reserves the right to physically inspect or remove any and all Products from [VENDOR]'s possession and control.

6.7.2 RISK OF LOSS

All risk of loss and damage to Products from any cause prior to receipt by [VENDOR] into, and from and after the removal by common carrier from, the inventory at [VENDOR]'s Fulfillment Site or any remote fulfillment site will be borne by [MERCHANT] or its customer, if applicable). [VENDOR] will bear the risk of loss and damage to Products from any cause after receipt by [VENDOR] into the inventory at [VENDOR]'s Fulfillment Site, including but not limited to the temporary loss of title to [VENDOR]'s creditors, loss due to theft, damage by any third party, destruction or damage due to improper storage or facility collapse or damage from negligent facility construction while in the care of [VENDOR]. [VENDOR] agrees to make [MERCHANT] a named beneficiary to any and all insurance contracts insuring the Fulfillment Site and [VENDOR]'s company.

6.8 INSPECTION OF INVENTORY.

During the Term, [MERCHANT], during normal business hours and on at
least _____ hours prior telephonic or electronic notice, will have access to [VENDOR]'s warehouse for the purpose of conducting a physical inventory of the Products and verifying security measures and proper processing. [VENDOR] will maintain actual perpetual inventory records for all Products in its possession.

6.9 EXCESS INVENTORY

As used in this Agreement, the term "Excess Inventory" shall refer to any Products or Additional Products, whether raw material or finished good items, held on hand by [VENDOR] in excess of forecasts and actual Product sales, as identified to [MERCHABENT] by [VENDOR] at the end of the Term of this Agreement. At the end of the Term of the Agreement the parties choose not to renewal the Agreement, then within ____ days after the end of the Term, [VENDOR] will provide to [MERCHANT] a calculation of Excess Inventory, if any, for the Term and an invoice for the fee, if any, to be paid by [MERCHANT] for such Excess Inventory (the "Excess Inventory Fee") which continues to be warehoused by [VENDOR] after the Term. Unless [VENDOR] instructs [MERCHANT] otherwise, within ____ of the date of [VENDOR]'s Excess Inventory calculation and Excess Inventory Fee invoice, [MERCHANT] shall provide to [VENDOR] a [MERCHANT] Order for all items reflected in the Excess Inventory calculation,. If Orders for all Excess Inventory are received by [VENDOR], then all Excess Inventory will be shipped to [MERCHANT] or [MERCHANT]'s designated location as directed by [MERCHANT] in a [MERCHANT] Order and at [MERCHANT]'s sole expense. [VENDOR] will invoice [MERCHANT] the Excess Inventory Fee for each item of Excess Inventory, where the Excess

conditions of your products and how they are stored during normal business hours as long as you provide proper notice.

6.9 – due to limited special concerns for all of the fulfillment centers’ customers’ products, the fulfillment center may charge you for your products that remain in their facility at the end/termination of this agreement. You will be provided a certain number of days after the termination of the agreement to remove your product; afterwards the fulfillment center may begin to charge you for storage and additional management fees.
Inventory Fee shall be calculated as ____. In addition, [VENDOR] will continue to accumulate an invoice [MERCHANT] for the Inventory Management Fee for each item of Excess Inventory remaining at the Fulfillment Site until such items are shipped to [MERCHANT] or [MERCHANT]'s designated location. Risk of loss in such Excess Inventory will transfer to [MERCHANT] as specified in Section 6.7, and [MERCHANT] shall pay to [VENDOR] all invoiced amounts for such Excess Inventory.

6.10 DISCONTINUED INVENTORY

As used in this Agreement, the term "Discontinue Inventory" shall refer to any Products or Additional Products, raw material or finished good item for which [MERCHANT] has no forecasted usage based on the most recent Forecast or which has been designated in writing to [VENDOR] as "Discontinued Inventory" by [MERCHANT]. [MERCHANT] and [VENDOR] will review Discontinued Inventory on a _____ basis. [MERCHANT] will instruct [VENDOR] as to the disposition of Discontinued Inventory. [VENDOR] will invoice [MERCHANT] for Discontinued Inventory in the amount of ____. Within ____days, [VENDOR] will provide to [MERCHANT] a listing of Discontinued Inventory on hand at [VENDOR] for the prior month. Within ____ days of receipt of such Discontinued Inventory listing, [MERCHANT] will generate a [MERCHANT] Order to [VENDOR] for all Products or Additional Products or items reflected in the Discontinued Inventory listing. All Discontinued Inventory will be shipped to [MERCHANT] or [MERCHANT]'s designated location as directed by [MERCHANT] and at [MERCHANT]'s sole expense. [VENDOR] will invoice

6.10 You may choose to discontinue any product (or any part of any product) at any time. You will provide instructions to the fulfillment center on how to handle the disposition of your discontinued product. Fulfillment center may charge you additional fees for taking care of and shipping your discontinued product.
[MERCHAND] for each item of Discontinued Inventory shipped in the amount of the Product Cost plus the Inventory Management Fee, plus any other costs incurred and fees accumulated by [VENDOR], including without limitation any fees for any Fulfillment Services performed on such Products and/or Additional Products. Risk of loss in such Discontinued Inventory will transfer to [MERCHAND] as specified in Section 6.7, and [MERCHAND] shall pay to [VENDOR] all invoiced amounts for such Discontinued Inventory. Unless designated in writing by [MERCHAND] as Discontinued Inventory, those Products or Additional Products ordered by [VENDOR] in excess of the applicable Forecast shall not be considered Discontinued Inventory.

6.11 SCRAPPED INVENTORY

[MERCHAND] may elect to scrap any Products or Additional Products in [VENDOR]'s inventory, including without limitation Excess Inventory and/or Discontinued Inventory, by providing to [VENDOR] written notice of such election. If [MERCHAND] elects to scrap any Excess Inventory or Discontinued Inventory, [MERCHAND] must provide to [VENDOR], in writing, a listing of such inventory to be scrapped. Upon receipt of an inventory scrap listing from [MERCHAND], [VENDOR] shall send such Products and/or Additional Products to a third party vendor, as designated by [MERCHAND] in writing, who will be responsible for the disposal, trade or sale of such products. In no event shall [VENDOR] be responsible for scrapping Products or Additional Products, and [MERCHAND] shall manage the collection of any funds from such third party vendor(s) for the sale or disposal of.

6.11 You may choose to scrap any of your products at any time as long as you provide written notice of your intention to scrap and dispose of the products. The fulfillment center will not be responsible for the disposal of scrapped product.
scrapped Products and/or Additional Products. Risk of loss in any Products or Additional Products designated to be scrapped by [MERCHANT] will transfer to [MERCHANT] as specified in Section 6.7 above, and [MERCHANT] shall pay to [VENDOR] all invoiced amounts for such Products or Additional Products.

THIS SECTION ONLY APPLICABLE FOR MERCHANTS WHO ARE outsourcING FULFILLMENT FOR DIGITAL PRODUCTS

ARTICLE 7
GRANT OF LICENSE

7.1 [MERCHANT]’S PRODUCT.

Subject to the terms and conditions of this Agreement, [MERCHANT] hereby grants to [VENDOR] (a) a non-exclusive, non-transferable, worldwide, irrevocable, fully-paid license (without the right to sublicense) to use the Product and Additional Products owned by [MERCHANT] and, to the extent sublicensing is permitted under any applicable licenses, licensed to [MERCHANT], to the extent sublicensing is permitted under any applicable licenses, licensed to [MERCHANT], solely to perform Fulfillment Services for [MERCHANT] and its Affiliates in accordance with this Agreement. Notwithstanding the foregoing, [VENDOR] will have no right to use, ship, sell, provide, copy or disseminate Product or Additional Products for or on behalf of any Third Party. Except as set forth in this Agreement, [MERCHANT] reserves all other rights in the Product and Additional Products.

7.2 IMPROVEMENTS.

Article 7 is only applicable for products that may be fulfilled digitally and may not require a tangible processing of orders. Article 7, both 7.1 and 7.2, grants a limited license to the fulfillment company to use the Product (in this case, the digital software) for the purposes of completing the company’s fulfillment needs. You will remain the sole owner of the digital products or software, even though the fulfillment company is licensed to use it for your benefit. Section 7.2 extends the license allowances to any improvements made to the digital product or software.
Subject to the terms and conditions of this Agreement, each party hereby grants to the other party a non-exclusive, non-transferable, worldwide, irrevocable, fully paid license to use, without the right to sublicense, solely for its internal business purposes, any Improvements created during the Term. Every ___ months during the Term, each party will provide to the other party (a) a report which sets forth in reasonable detail all Improvements made or developed by or on behalf of such party during such ____ period, and (b) all supporting documentation related thereto.

ARTICLE 8
REPRESENTATIONS, WARRANTIES

8.1 [MERCHAND] AND [VENDOR].

[MERCHAND] and [VENDOR] each hereby represents and warrants to the other as follows: (a) It has the full authority and legal right to carry out the terms of this Agreement; (b) The terms of this Agreement will not violate the terms of any agreement, contract or other instrument to which it is a party and no consent or authorization of any other Third Party is required in order to enter into and carry out the terms of this Agreement; (c) It has taken all corporate and other action necessary to authorize the execution and delivery of this Agreement; and (d) This Agreement is a legal, valid and binding obligation of [MERCHAND] and [VENDOR] as the case may be, enforceable against it in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws of general application relating to or affecting the enforcement of the rights of creditors or by equitable principles, whether enforcement is sought in equity or
8.2 PRODUCT WARRANTIES

[MERCHANT] agrees to make commercially reasonable efforts to request that suppliers or manufacturers warrant that all Products delivered to [VENDOR] hereunder: (i) shall, at the time of delivery, be new Products; (ii) shall be free from any design defects or defects in workmanship or materials; (iii) shall conform to all of the technical specifications for such Products and shall perform in the manner for which such Products were designed; (iv) vest good and valid title to such Products which is free and clear of all liens, security interests, encumbrances, burdens and other claims; and (v) and all intellectual property rights embodied or contained therein shall and do not infringe upon or violate any intellectual property right, including without limitation copyright, trademark, service mark, patent, patent application, trade dress, trade name, trade secret, mark work, mask right or any other proprietary right of any third parties. [MERCHANT] shall also pass through to [VENDOR] all representations and warranties provided by the suppliers and manufactures to [MERCHANT] regarding the Products, or any other equipment or materials provided by the suppliers and/or manufacturers.

8.3 VENDOR WARRANTIES

With the knowledge that [MERCHANT is relying thereon in entering into this Agreement and any Schedule, [VENDOR] hereby represents, warrants and covenants as follows:

1. [VENDOR] is a corporation duly organized, validly existing, and in good standing under the laws of the State of ________.
2. This Agreement and any and all
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<td><strong>Schedules constitute the legal, valid, and binding obligation of [VENDOR], enforceable against [VENDOR] in accordance with its terms except as enforcement may be limited by any applicable bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally and except as enforcement may be limited by general principles of equity. As of the Effective Date, [VENDOR] has taken all corporate action necessary for the authorization, execution and delivery of this Agreement and any Schedule, and for the performance by [VENDOR] of its obligations under this Agreement and any Schedule.</strong></td>
<td><strong>this agreement by the fulfillment company will violate any law or contract with a third party, 4) that the fulfillment company does not have to ask any third party for consent in order to execute under this contract, 5) the fulfillment center has been designed and maintained in a way that allows the fulfillment company to execute under this contract, 6) the fulfillment company will abide by all laws, including applicable marketing and advertising laws, at all times while executing its duties under this contract, and 7) at the time of signing the contract, the fulfillment company is not in default under any third party agreement.</strong></td>
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<td><strong>3. Neither the execution and delivery of this Agreement (including the Original Schedule) nor the consummation or performance of any obligations hereunder shall, directly or indirectly (with or without notice or lapse of time) in any material respect, contravene, conflict with, or result in a violation or breach of any provision of, or give any person the right to declare a default or exercise any remedy under, or to accelerate the maturity or performance of, or to cancel, terminate, or modify, any material contract to which [VENDOR] is a party.</strong></td>
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<td><strong>4. [VENDOR] is not and shall not be required to give any notice to or obtain any consent from any person in connection with the execution and delivery of this Agreement and the Original Schedule or the consummation or</strong></td>
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performance of any of its obligations hereunder.

5. [VENDOR]'s facilities utilized to provide the Fulfillment Services have been designed or will be modified to ensure continuous operation and use prior to, during and after the calendar year ____, and to operate during such time periods so that [MERCHANT] will not experience any loss of information or assets, loss or damage to Products, interruption in service, or invalid and/or incorrect reporting or results.

6. [VENDOR] is, to its knowledge, and, at all times during the performance of Fulfillment Services under this Agreement and any Schedules hereunder, will remain in material compliance with all applicable laws, rules and regulations, including, but not limited to, the laws, rules and regulations of the Federal Trade Commission and the Direct Marketing Association, including by way of illustration and not limitation, the Mail Order Rule and Telemarketing Rule, if applicable.

7. [VENDOR] is not currently in default under any material contract or agreement.

8.4 DISCLAIMER.

Except as expressly set forth in this Agreement, neither party makes any representation and extends no warranty of any kind, either express or implied, including warranties as to merchantability or fitness for a particular purpose.

ARTICLE 9

8.4 the warranties provided in the section above are an exhaustive list.
# INDEMNIFICATION

## 9.1 INDEMNITY BY [MERCHANT]

[MERCHANT] will defend, indemnify and hold harmless [VENDOR] and its respective directors, officers, employees, agents, distributors, customers, assignees and licensees (each a "[VENDOR] Party") from and against any and all costs, claims, harm, damages, liabilities, losses and expenses (including, without limitation all reasonable attorneys' fees, professional fees and disbursements) of any and every nature and kind whatsoever (collectively, "Damages") actually incurred, suffered or sustained by any [VENDOR] Party arising from, or otherwise attributable to, [MERCHANT]'s breach of or non-compliance with, any of its representations, warranties, covenants and agreements contained in or arising under the terms of this Agreement except to the extent that such Damages result from the gross negligence or willful misconduct of a [VENDOR] Party.

## 9.2 INDEMNITY BY [VENDOR]

[VENDOR] will defend, indemnify and hold harmless [MERCHANT] and its respective directors, officers, employees, agents, distributors, customers, assignees and licensees (each an "[MERCHANT] Party") from and against any and all Damages actually incurred, suffered or sustained by any [MERCHANT] Party arising from, or otherwise attributable to, [VENDOR]'s breach of or non-compliance with, any of its representations, warranties, covenants and agreements contained in or arising under the terms of this Agreement except to the extent that such Damages result from the gross negligence or willful misconduct of a [MERCHANT] Party.

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9.1 You promise to indemnify the fulfillment company for any claims brought against the fulfillment company due to damages or costs caused by your breach of this agreement. This does not include breaches caused by the gross negligence or willful misconduct by the fulfillment company.

9.2 Fulfillment company promises to indemnify your corporation for any claims brought against it due to the fulfillment company’s negligence or willful acts or omissions or breach of this contract by any employee or former employee of the fulfillment company. This does not include breaches due to the gross negligence or willful conduct of any member of your company.
9.3 INDEMNIFICATION PROCEDURES.

No party will be required to indemnify another pursuant hereto unless the party seeking indemnification (the "Indemnitee") will, with reasonable promptness, provide the other party (the "Indemnitor") with copies of any claims or other documents received and will otherwise make available to the Indemnitor all material relevant information. The Indemnitor will have the right to defend any such claim at its expense, with counsel of its choosing, and the Indemnitee will have the right, at its expense, using counsel of its choosing, to join in the defense of any such claim. The Indemnitee's failure to give prompt notice or to provide copies of documents or to furnish relevant data will not constitute a defense in whole or in part to any claim by the Indemnitee against the Indemnitor except to the extent that such failure by the Indemnitee will result in a material prejudice to the Indemnitor. Except as hereinafter provided, neither party will settle or compromise any such claim unless it first obtains the written consent of the other, which will not be unreasonably withheld. The foregoing notwithstanding, if suit has been instituted against the Indemnitee and the Indemnitor has failed, after the lapse of a reasonable time after written notice of such suit, to take action to defend the same, the Indemnitee will have the right to defend the claim (without limiting the right of the Indemnitor to participate in the defense) and to charge the Indemnitor with the reasonable cost of any such defense, including reasonable attorneys' fees, and the Indemnitee will have the right, after notifying but without consulting the Indemnitor, to settle or compromise such claim on any terms reasonably approved by the Indemnitee. Fees of attorneys and other professionals and related costs will be
payable as incurred. Neither party will have any liability to the other party under this Section or otherwise except to the extent of any Damages in excess of any insurance proceeds which are actually paid.

**ARTICLE 10**

**TAXES**

**10.1 TAXES**

[VENDOR] will have no responsibility for payment or collection of any sales tax or other tax directly attributed to the sales transacted between [MERCHANT] and its customers for the sale and purchase of [MERCHANT]’s Products and Additional Products (“Customer Sales Transactions”). [MERCHANT] will be responsible for the collection and payment of all taxes associated and directly attributable with Customer Sales Transactions, and agrees to complete the preparation and filing of all sales tax documentation and comply with all sales tax laws. [MERCHANT] shall indemnify and hold [VENDOR] harmless from and against any and all claims, suits, actions, debts, damages, costs, charges and expenses, including court costs and attorneys' fees, incurred by [VENDOR] due to [MERCHANT]'s failure to properly file and pay applicable sales, use and tangible personal property taxes.

**ARTICLE 11**

**TERM OF AGREEMENT, RENEWAL**

**11.1 TERM**

The term of this Agreement will commence as of the date hereof and will continue for a period of ____ years thereafter, unless terminated earlier in

10.1 The fulfillment company has no responsibility to pay taxes associated with the customer transactions of your product and the sale, marketing, shipping or manufacturing of your product. You agree to handle these taxes and to file your taxes properly, including sales taxes. You also agree to indemnify the fulfillment company for any problems caused to them due to your failure to properly file and pay all taxes that you are responsible for paying.

11.1 Establishes the Term of the agreement.
accordance with the provisions of Section 12 (the "Term").

11.2 RENEWAL

[MERCHANT] shall have the option of extending the Term for three additional ____ provided herein, such option to be effected by [MERCHANT] providing written notice to [VENDOR] of its intent to extend the Term no later than _____ days prior to the Expiration Date or, after the Expiration Date and during an Additional Term, by providing such written notice ____ prior to the expiration date of the Additional Term, as applicable.

ARTICLE 12
TERMINATION

12.1 TERMINATION BY [MERCHANT].

[MERCHANT], at its option and without any prejudice to any other rights it may have, may, by providing written notice, terminate this Agreement pursuant to or upon the occurrence of any of the following events:

(a) The failure of [VENDOR] to perform any material term, condition or covenant contained in this Agreement on its part to be performed or observed, including by not limited to [VENDOR]’s duties under the Exhibits and Schedules including Fulfillment Services and Service levels, where such failure continues for a period of ____ days after written notice of the failure to [VENDOR];

(b) The ___ day anniversary of the event causing the delay or failure due to reasons of Force Majeure if not cured to the reasonable satisfaction of [MERCHANT] prior to such anniversary;

(c) The filing of a voluntary or involuntary petition for bankruptcy, insolvency proceeding, liquidation or

11.2 You may renew the terms of the agreement by providing written, timely notice prior to the end of the Term.

12.1 Establishes provisions that allow you to terminate the agreement. You may terminate if: 1) the fulfillment company breaches the agreement and fails to cure the breach after a set amount of days, 2) there is a disaster outside of the company’s control, but it is not corrected within a certain amount of time, 3) the filing of bankruptcy or 4) a change in control in either party.
assignment for the benefit of creditors by or against [VENDOR] or the placement in the hands of a receiver, liquidator or trustee of a substantial portion the assets of [VENDOR]; or
(d) A Change in Control.

12.2 TERMINATION BY [VENDOR].
[VENDOR], at its option and without any prejudice to any other rights it may have, may, by providing written notice, terminate this Agreement upon the occurrence of any of the following events:
(a) The failure of [MERCHANT] to cure a breach of any of its payment obligations under this Agreement during the ____ day period following receipt of written notice of such breach;
(b) The failure of [MERCHANT] to perform any material term, condition or covenant contained in this Agreement on its part to be performed or observed (other than a payment obligation), where such failure continues for a period of ____ days after written notice of the failure to [MERCHANT]; or
(c) The filing of a voluntary or involuntary petition for bankruptcy, insolvency proceeding, liquidation or assignment for the benefit of creditors by or against [MERCHANT], or the placement in the hands of a receiver, liquidator or trustee of a substantial portion of [MERCHANT]'s assets.

12.3 EFFECTS OF TERMINATION OR EXPIRATION.
12.3.1 Upon the termination of this Agreement by [VENDOR] under Section 12.2 [VENDOR] will be entitled to all amounts owing to it under this Agreement.
12.3.2 Upon receipt of notice of the termination of this Agreement by [MERCHANT] pursuant to Section 12.1, 12.2 The fulfillment company can terminate the agreement if: 1) you fail to pay them for their services within a specified time period, 2) you breach the contract and fail to cure the breach within a certain amount of time, or 3) the filing of bankruptcy.
12.3.2 If you choose to terminate the
[VENDOR] hereby (i) agrees to continue to provide the Fulfillment Services described in this Agreement to the extent requested by [MERCHANT] for a period of up to ___ days (except to the extent [VENDOR] is unable to perform such services for reasons due to Force Majeure) and to complete all Orders received by [VENDOR] prior to the receipt of notice of termination.

12.3.3 Except as reasonably necessary for [MERCHANT] to exercise its rights, within ___ days following the expiration or termination of this Agreement, each party will return to the other party, or destroy, upon the written request of the other party, any and all Confidential Information of the other party in its possession.

12.3.4 Expiration or termination of this Agreement will not relieve the parties of any obligation accruing prior to such expiration or termination.

12.4 TERMINATION ABSOLUTE

Each party understands that the rights of termination hereunder are absolute. Neither party shall incur any liability whatsoever for any damage, loss or expenses of any kind suffered or incurred by the other (or for any compensation to the other) arising from or incident to any termination or expiration of this Agreement by such party which complies with the terms of the Agreement whether or not such party is aware of such damage, loss or expense.

ARTICLE 13
INSURANCE

13.1 [MERCHANT] [MERCHANT] will, at its sole cost agreement, the fulfillment company will continue to provide fulfillment services for a period of time after termination and agrees to complete all orders that were received prior to the date of termination.

12.3.3 Upon termination, both parties will destroy, at the written request of the other party, all confidential information.

12.3.4 Termination will not relieve any party from the duties it had accrued prior to termination.

12.4 Termination is absolute. Once a party chooses to terminate the agreement under the conditions of this contract, the termination is final. Termination, if accomplished under the terms of this section, will not be considered a breach of the agreement. Neither party has rights to sue for damages or losses due to termination as long as the termination was accomplished under the provisions in this contract.
and expense maintain in force the following policies of insurance during the Term, with each such policy naming [VENDOR] as an additional insured hereunder, providing that it will be the primary insurance with respect to the coverage provided hereunder and being underwritten insurance carriers reasonably acceptable to [VENDOR]:

(a) A policy of comprehensive general liability insurance (including, without limitation, product liability) insuring against claims of personal injury or property damage arising out of any Products or the use of any Products, with such policy having a minimum combined liability limit of not less than ____; and

(b) One or more policies of liability insurance insuring against advertising liability or trademark or service mark, patent or copyright infringement, with such policy or policies having a minimum combined liability limit of not less than ____.

### 13.2 [VENDOR]

[VENDOR] will, at its sole cost and expense maintain in force the following policies of insurance during the Term, with each such policy naming [MERCHANT] as an additional insured and being underwritten by insurance carriers reasonably acceptable to [MERCHANT]:

(a) During the term of this Agreement, [VENDOR] will maintain, with a financially sound insurance company having an A.M. Best rating of A or better;

(b) Commercial general liability insurance with a combined single limit of $2 million per occurrence for bodily injury, including death and property damage;

(c) Umbrella excess liability insurance with a combined single limit of $5 million per occurrence for bodily injury, including death, and property damage;

### 13.1 Establishes what insurance you must purchase and retain for the duration of this agreement.

### 13.2 Establishes what insurance the fulfillment company must purchase and retain for the duration of this agreement.
(d) Worker’s compensation, occupational disease, employer’s liability with limits of not less than $500,000 per accident for bodily injury and $500,000 per employee for bodily injury by disease, disability benefit and similar employee benefit insurance required under the laws of the states where [VENDOR] will perform the Fulfillment Services provided for hereunder;

(e) Fidelity insurance with limits no less than $1 million per occurrence;

(f) [VENDOR] will furnish [MERCHANT] with certificates of insurance evidencing this coverage upon written request.

ARTICLE 14.
LIMITATIONS TO LIABILITY

IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES INCURRED OR SUFFERED BY THE OTHER PARTY, INCLUDING WITHOUT LIMITATION, LOST REVENUE, LOSS OF INCOME, OR LOSS OF BUSINESS ADVANTAGE, EVEN IF THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

ARTICLE 15.
CONFIDENTIALITY, RECORDS,

15.1 OWNERSHIP AND DISTRIBUTION OF RECORDS

15.1.1 All records, accounts, Customer Data and Confidential Information developed and maintain by [VENDOR] in regards to the marketing, sales and distribution of [MERCHANT]’s Products, including Customers’ information (including but not limited to

Article 14 – if there is a breach, in all cases, neither you nor the fulfillment company will be able to sue the other party to collect for losses to income, revenue loss, monetary losses due to lost business advantage. Even if you notify the other party that you may suffer those types of harm in case of breach, you will still not be able to collect for those losses.

15.1 and 15.1.2 Provides that all records, customer data and confidential information developed and maintained by the fulfillment company, including electronic records, for the purposes of marketing and selling your products will be solely owned by your company. The fulfillment company promises not to share or sell or distribute
Customers’ personally identifying information), all accounts and records regarding [VENDOR]’s Services for [MERCHANT], and all records, recordings, data and accounts captured or created by both [MERCHANT]’s and [VENDOR]’s Fulfillment facility’s equipments, remotes fulfillment centers’ equipment and all telecommunication equipment (both via telephone, the Internet and any other telecommunications technologies) are the sole and exclusive property of [MERCHANT].

15.1.2 MERCHANT] owns the rights to all electronic information (electronic data, electronic information systems, electronic databases, etc.) and all supporting documentation created as part of this Agreement. All accounts, records and Confidential Information governed by this Agreement may not be shared, sold, rented, distributed or revealed to any third party without the express written consent of [MERCHANT]. Accounts, records, Customer Data, Confidential Information may be shared with [VENDOR]’s parent, subsidiaries and joint ventures only for the explicit purpose of coordinating Fulfillment Services provided under this Agreement. Accounts, records and Confidential Information may not be shared, rented, sold, distributed or otherwise used by [VENDOR], nor [VENDOR]’s parent, subsidiaries and joint ventures, for any purpose other than [VENDOR]’s Services, including use in developing marketing tools or in promoting additional products and services offered by [VENDOR], its parents, subsidiaries and joint ventures, without the express written consent of [MERCHANT]. To ensure customer satisfaction and alleviate customer privacy concerns, [MERCHANT] retains the right to revoke the authorized sale, rental, distribution or use of accounts, the records, data and information without your company’s prior consent. Your company retains the right to revoke any authorized distribution, sale or sharing of the records, data or information.
records or Confidential Information at any time based on [MERCHAND]’s sole discretion.

15.1.3 Except as required in the performance of its obligations under this Agreement or with the prior written authorization of [MERCHAND], [VENDOR] shall not directly or indirectly use, disclose, disseminate or otherwise reveal any Customer Data nor Confidential Information and shall maintain Customer Data and Confidential Information in confidence for a period of five (5) years from the date of termination or expiration of this Agreement, for whatever reason.

15.1.4 Vendor Obligation

[VENDOR] shall use the same care and discretion to protect Customer Data and Confidential Information of the [MERCHAND] as [VENDOR] uses to protect its own Customer Data and Confidential Information, but not less than a reasonable standard of care. [VENDOR] shall restrict use of the [MERCHAND]’s Customer Data and Confidential Information to its employees, and to those consultants who have been pre-approved in writing by [MERCHAND], who have a need to know the Confidential Information and who have a written agreement with [VENDOR] sufficient to comply with this Agreement.

15.1.3 Nothing contained in this Section shall in any way restrict [MERCHAND]’s rights to use, disclose, or otherwise dispose of any information which:

(a) At the time of disclosure by [MERCHAND], the data or information was already in the possession by [VENDOR], provided such information

15.1.3 and 15.1.4 The fulfillment company agrees to keep all confidential information and data in confidence for five years after the termination of this contract. Fulfillment company will only show the confidential information with employees and consultants who have been pre-approved by your corporation and who have signed a written agreement.

15.1.3 Nothing in the contract shall be read to allow the fulfillment company to disclose confidential information or data except in certain cases: 1) where fulfillment company already had the information and it wasn’t provided by your company; 2) the information can be discovered through valid, independent means, or 3) is
had not been previously furnished to [VENDOR by [MERCHANT]]. This section expressly excludes any disclosures obtained by [VENDOR] without the express consent by [MERCHANT] but are later then authorized for disclosure by [MERCHANT] to [VENDOR].

(b) Is independently made available to [VENDOR] by an unrelated and independent third party whose disclosure does not constitute a breach of any duty of confidentiality owed to [MERCHANT];

(c) Is compelled to be disclosed pursuant to a court order, provided that Discloser shall first have the opportunity to request an appropriate protective order.

15.1.4 Nothing in this Agreement shall be construed as granting any rights or licenses in any Confidential Information to any person or entity.

15.1.5 [VENDOR] and [MERCHANT] agree that the terms of this Section 15 are reasonable and necessary to protect their respective business interests and that the other party would suffer irreparable harm from a breach of this Section 15. Thus, in addition to any other rights or remedies, all of which shall be deemed cumulative, [VENDOR] and [MERCHANT] and/or their respective affiliates, as applicable, regardless of arbitration or dispute resolution clauses in this Agreement, shall be entitled to obtain injunctive relief to enforce the terms of this Section 15.

15.2 DISPOSAL OF RECORDS

15.2.1 For purposes of this Agreement “Disposal” shall include the discarding or abandonment of consumer compelled to be disclosed by court order

15.2.1 Definition of “disposal.”
information, as well as the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored.

15.2.2 At the request of [MERCHANDISE] and to ensure adequate customer privacy, [VENDOR] will utilize technologies and methodologies that render Customer Data unusable, unreadable or indecipherable to unauthorized individuals, including but not limited to encryption technologies. [MERCHANDISE] may establish a timetable requiring [VENDOR] to dispose of certain Accounts and Records (to be determined by [MERCHANDISE]) on an ongoing and scheduled basis. [VENDOR] agrees to take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal of Consumer Data and to conduct disposal practices that are reasonable and appropriate to prevent the unauthorized access to – or use of – information in a consumer report. If [VENDOR] is personally unable to properly dispose of Customer Data, then [VENDOR] will take reasonable steps to select and retain a service provider that is capable of properly disposing of the consumer information at issue; notify the service provider that such information is consumer information; and enter into a contract that requires the service provider to dispose of such information in accordance with Federal Regulations.

15.2.3 [VENDOR] agrees to utilize proper record destruction and encryption technologies for both Hard Copy Records and Electronic Records. Under this agreement, Hard Copy Records include but are not limited to paper printouts, printer and facsimile ribbons, and drums. Under this agreement, Electronic Records include but are not limited to, bits and bytes

15.2.2 Details the fulfillment company’s requirements for proper disposal of all records and confidential information – including electronic records and information.

15.2.3 and 15.2.4 Details the fulfillment company’s requirements for proper disposal of all records and confidential information – including electronic records, data and information. Fulfillment company promises to abide by all local and federal laws governing disposal of records.
contained on hard drives, disks, memory devices, phones, mobile computing devices, and networking equipment. [VENDOR] agrees to utilize proper record destruction and encryption technologies for both Hard Copy Records and Electronic Records, including but not limited to the burning, pulverizing, or shredding of papers containing Customer Data information so that the information cannot be read or reconstructed; destroying or erasing electronic files or media containing Consumer Data information so that the information cannot be read or reconstructed; conducting due diligence and hiring a document destruction contractor to dispose of material specifically identified as Consumer information consistent with Federal Regulations. Due diligence may include reviewing an independent audit of a disposal company’s operations and/or its compliance with Federal Regulations; obtaining information about the disposal company from several references; requiring that the disposal company be certified by a recognized trade association; reviewing and evaluating the disposal company’s information security policies or procedure.

15.2.4 For Hard Copy Records, [VENDOR] agrees that all Hard Copy Records must be physically destroyed so that all information, especially Customer Data, cannot be read or re-constructed and maintains that redaction is not an adequate method of Hard Copy Record disposal. [VENDOR] agrees to utilize any and all technologies and methods require to ensure the proper disposal of all Electronic Records, including by not limited to the true cleaning of hard drives through the process of overwriting data, a hexadecimal pattern followed by a third pass, the actual cleaning of disks by removal and destruction of disks surface, and
destruction of information through the brute force physical destruction of electronic medium that creates or retains the Electronic Records.

Upon termination or expiration of this Agreement for any reason whatsoever, [MERCHAND] and [VENDOR] shall leave with or return to the other all documents, records, notebooks, computer files, and similar repositories or materials containing Confidential Information of the other party and such other party's affiliates, including any and all copies thereof.

15.3 RECORDS POLICY IN THE EVENT OF MERGER

It is possible that [VENDOR] could merge with or be acquired by another company. If such an acquisition occurs, the successor company would have access to the accounts and records maintained by [VENDOR], including Customer Data. Upon merger, the successor company will continue to be bound by all of the covenants and clauses of this Agreement unless and until it is amended in writing.

15.4 AUDIT.

The Books and Records shall be available for inspection and copying by any qualified representative or agent of a party or its affiliates, at the expense of that party, subject to the following terms and conditions: (a) such examination shall take place at the principal place of business or the location where the Books and Records are regularly maintained, during normal business hours and only to the extent necessary to verify inventory levels and payment amounts; (b) the party demanding the audit shall give the other party at least seven (7) business days' written notice.

15.3 If the fulfillment company merges with another company, the successor company agrees to be bound by the records policy in this contract.

15.4 An audit of the company’s books and records is allowed provided that proper notice is given and that both parties agree to keep the other party’s Confidential information disclosed.
prior to any such examination; (c) both parties shall keep each party's Confidential Information disclosed to it during the examination confidential in accordance with each party's obligations set forth in Section 15; and (d) a party may not conduct more than ____ such inspections during any ____ month period during the term of this Agreement.

ARTICLE 16
DISPUTE RESOLUTION;
ARBITRATION

16.1 MEDIATION

If there is any controversy, dispute or claim arising out of or relating to interpretation or breach of this Agreement, the parties will endeavor to settle it promptly. If such a dispute cannot be resolved, the parties will promptly initiate and participate in good faith mediation of the dispute, with the mediator to be selected jointly by the parties or, if the parties cannot agree upon a mediator, by a mediator to be selected jointly by two mediators selected by the parties.

16.2 ARBITRATION

Any disputes or controversy arising out of this Agreement, which cannot be solved during mediation, as provided in Section 16.1, shall be resolved by arbitration and settled by arbitration in accordance with the Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes. The parties shall each select an arbitrator sufficiently knowledgeable in the areas of law necessary to arbitrate the controversy, and the two (2) arbitrators selected will select a third arbitrator (collectively, the "Arbitration Panel"). The Arbitration Panel

16.1 If there is any dispute that arises out of this contract, the parties agree to first submit the dispute to mediation.

16.2 If the dispute cannot be settled by mediation, then the parties agree that the disputes will be handled in arbitration instead of by trial. Each party will handle their own expenses; each party will choose one arbitrator and the two arbitrators will choose a third.
shall arbitrate the controversy by majority decision. The United States Arbitration Act, 9 U.S.C., shall govern the arbitration, and any court having jurisdiction thereof may enter judgment upon the majority decision rendered by the Arbitration Panel. The Arbitration Panel is not empowered to award damages in excess of actual damages, including punitive damages. The Arbitration Panel shall determine issues for resolution but may not limit, expand or otherwise modify the terms of the Agreement. The Arbitration Panel is not empowered to act or make any award other than an award based solely on the rights and obligations of the parties prior to any termination of this Agreement. Each party shall bear its own costs and expenses of the arbitration, except that the parties will share equally the compensation and expenses of the Arbitration Panel. This requirement for arbitration does not constitute a waiver of any right of termination under this Agreement. A request to a court for interim measures shall not waive the obligation to arbitrate. The parties, their representatives, other participants and the Arbitration Panel shall hold in confidence the existence, content and result of the arbitration.

16.2 BINDING; ALLOWANCES FOR INJUNCTIVE RELIEF

The dispute resolution provision and agreement to arbitrate shall be the binding and exclusive means to resolve all disputes arising under the Agreement. Provided, however, that the dispute resolution procedures shall not limit either party's recourse to courts of competent jurisdiction for injunctive or equitable relief that may be necessary to protect the rights and property of such party or maintain the status quo before, during or after the pendency of the process set forth

16.2 Arbitration is binding for both parties. Arbitration will not limit the party’s ability to seek equitable relief, particularly in the form of an injunction.
in the dispute resolution.

16.3 LOCATION

Should disputes or controversy arising out of this Agreement result in arbitration, all parties agree that arbitration proceedings will be held in [CITY], [STATE].

### ARTICLE 17
**GENERAL TERMS**

17.1 **FORCE MAJEURE.**

17.1.1 Neither [VENDOR] nor [MERCHANT] shall be liable for failures or delays in delivery or in performance due to causes beyond its reasonable control, including but not limited to acts of God or civil or military authority, epidemics, war, riot, strikes or labor stoppages. In the event of any such delay or failure, the party affected shall promptly notify the other party in writing and use all commercially reasonable efforts to overcome the event or circumstance causing the delay or failure as soon as practicable.

17.1.2 In the event of any delay or failure by [VENDOR] pursuant to this Section 17.1, during such delay or failure [MERCHANT] may take any steps deemed reasonably necessary by [MERCHANT] to secure the services of a Third Party to replace the services previously provided by [VENDOR]. [MERCHANT] and [VENDOR] acknowledge and agree that such services may continue for a reasonable period of time beyond the failure or delay.

17.2 **INDEPENDENT CONTRACTOR.**

Each party hereto is an independent contractor, and nothing

16.3 To prevent you having to travel great distances to settle your dispute through arbitration; you may choose the location of all arbitration hearings in advance.

17.1 Neither party is at fault for breach due to a disaster not within their control.

17.1.2 If there is a delay due to any reason that qualifies as Force Majeure, you may hire a third party to complete your fulfillment needs.

17.2 Fulfillment company is considered an independent contractor and not a part of
contained herein will be deemed to create between the parties the relationship of partners or joint ventures, and no party will have any power to obligate any other party in any manner whatsoever, except as expressly provided herein.

17.3 ASSIGNMENT.

Except as expressly provided hereunder, neither this Agreement nor any rights or obligations hereunder may be assigned or otherwise transferred by either party without the prior written consent of the other party (which consent will not be unreasonably withheld); provided, however, that [MERCHAND] may assign this Agreement and its rights and obligations hereunder without the consent of [VENDOR] (a) in connection with the transfer or sale to a Third Party of all or substantially all of the business of [MERCHAND] to which this Agreement relates, whether by merger, sale of stock, sale of assets or otherwise, or (b) to an Affiliate, provided, that such Third Party or Affiliate expressly agrees to be bound by all of the terms and conditions of this Agreement; provided, however, that in no event shall the assignment of its rights and obligations under this Agreement to any of its Affiliates relieve [MERCHAND] of any obligations or liability hereunder. Subject to the foregoing, this Agreement will be binding upon and inure to the benefit of the parties hereto and their permitted successors and assigns. Except as otherwise specifically provided herein, this Agreement does not create, and will not be construed as creating, any rights enforceable by any Third Party.

17.4 NOTICES.

All notices, request, demands, waivers, consents and other

17.3 This agreement cannot be assigned to third parties, with the following exceptions: 1) your corporation may assign to a third party who acquires all of the assets dealing with the Product or 2) you may assign to an affiliate that expressly agrees to terms of this contract

17.4 Provides where official notices should be sent and how they should be sent.
communications hereunder will be in writing, will be delivered either in person, by telegraphic, facsimile or other electronic means, by overnight air courier or by mail, and will be deemed to have been duly given and to have become effective (a) upon receipt if delivered in person or by telegraphic, facsimile or other electronic means calculated to arrive on any business day prior to 5:00 p.m., local time, (b) one business day after having been delivered to an air courier for overnight delivery, or (c) three business days after having been deposited in the mails as certified or registered mail, return receipt requested, all fees prepaid, directed to the parties or their assignees at the following addresses (or at such other address as will be given in writing by a party hereto):

If to [MERCHAND]:

If to [VENDORS]:

17.5 REMEDIES NOT EXCLUSIVE.

Except as specifically provided for elsewhere in this Agreement, no remedy conferred by any of the specific provisions of this Agreement is intended to be exclusive of any other remedy, and each and every remedy will be cumulative and will be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute or otherwise. The election of any one or more remedies by a party will not constitute a

17.5 Except where provided, no remedy conferred under a specific provision is mean to exclude a party from seeking other remedies. Choosing one remedy will not be considered a waiver of the party’s rights to other remedies.
waiver of the right to pursue other available remedies.

17.6 COUNTERPARTS; FACSIMILE SIGNATURES.

This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. Any party may execute this Agreement by delivery of a facsimile signature, which signature will have the same force and effect as an original signature. Any party, which delivers a facsimile signature, will promptly thereafter deliver an originally executed signature to the other party(ies); provided, however, that the failure to deliver an original signature page will not affect the validity of any signature delivered by facsimile.

17.7 GOVERNING LAW; VENUE.

This Agreement will be governed by and construed, interpreted and enforced under the laws of the State of _______. Subject to Section 16.5, all actions and proceedings arising in any manner out of or from this Agreement will be litigated only in courts in ___________, and each party hereby consents and submits to the jurisdiction of any local, state or federal court located within said county and state, hereby irrevocably waiving any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding relating to this Agreement in said county and state and further irrevocably waiving any claim that said county and state is not a convenient forum of any such suit, action or proceeding.

17.8 GENERAL.
This Agreement contains the entire understanding between the parties concerning the subject matter of this Agreement and supersedes all prior understandings and agreements, whether oral or written, between them representing the subject matter hereof. This Agreement may be modified only by an agreement in writing signed by all parties hereto. If any of the provisions of this Agreement are determined to be illegal, invalid or otherwise unenforceable, in whole or in part, they will be deemed severable from, and will in no way affect the validity or enforceability of, the remaining provisions of this Agreement. Captions and section headings used herein are for convenience only and are not a part of this Agreement and will not be used in construing it.

17.9 CONFLICTS, BILL OF LADING

No bill of lading may purport to incorporate any terms that are in addition to or inconsistent with this Agreement, and, should a form of bill of lading having preprinted terms be utilized, none of the preprinted terms of that bill will have any contractual significance.

17.10 GOVERNMENT ACTIONS

[MERCHANT] hereby agrees to promptly provide [VENDOR] copies of all complaints or inquiries received by it from any governmental agency that in any way relate to or have a potential effect on the Fulfillment Services provided hereunder. In the event [VENDOR] is required as a result of any such action, to change the manner in which it does business in any material respect, [VENDOR] shall have the option to terminate as soon as practicable the availability of such Fulfillment Services hereunder. [VENDOR] hereby agrees that it will promptly forward to [MERCHANT]

17.8 This agreement represents all of the negotiations and understandings of both parties. There are no other documents that came before this document that represent a valid contract or meeting of the minds between parties. If one clause in this agreement is stricken, the rest of the agreement will still be valid and enforceable.

17.9 All bill of ladings used by carriers to ship your products must conform to the terms of this agreement. Preprinted terms on a bill of lading will not have any contractual significance under this agreement.

17.10 Both parties agree to properly inform the other in a timely fashion of any government developments that may affect this agreement including and suits or complaints filed by any governmental agency.
copies of all written complaints or written inquiries addressed to [VENDOR] from any governmental agency in any way relating to or having a potential effect on the Fulfillment Services provided hereunder.

17.11 TIME IS OF THE ESSENCE

Time is of the essence with respect to all provisions of this Agreement that specify a time for performance, including but not limited to Schedules and Exhibits and Fulfillment Service timelines and forecasts; provided, however, that the foregoing shall not be construed to limit or deprive a party of the benefits of any grace or use period allowed in this Agreement.

ARTICLE 18
DEFINITIONS

18. DEFINITIONS. As used in this Agreement, the terms set forth below have the following meanings:

18.1 “AFFILIATE” means any corporation or other entity that controls, is controlled by, or is under common control with, a party. A corporation or other entity will be regarded as in control of another corporation or entity if it owns or directly or indirectly controls more than 50% of the voting securities or other ownership interest of the other corporation or entity.

18.2 “BUSINESS DAY” means any day other than a Saturday or Sunday on which banks are not authorized or required to close in San Diego County, California.

18.3 "CHANGE IN CONTROL" means (a) a sale, lease or other disposition of all or substantially all of the assets of [VENDOR] or [VENDOR]’s parent, to any

17.11 The timeliness of the execution of each and of all the provisions in this agreement, including the requirements under the schedules and exhibits, is very important to both parties.
Third Party, (b) a merger, reverse merger, consolidation or reorganization of [VENDOR] into a Third Party unless, immediately following any such transaction, the Persons who were the stockholders of [VENDOR], as applicable, immediately prior to such transaction, together with their Affiliates, possess, directly or indirectly, at least 50% of the voting power of the surviving entity in the merger, reverse merger, consolidation or reorganization, (c) the acquisition by a Third Party of securities of [VENDOR] or representing fifty percent (50%) or more of the combined voting power of the then-outstanding securities of [VENDPOR], or (d) the individuals who at the beginning of any period of two (2) consecutive years constitute the Board of Directors of [VENDOR] cease for any reason during such period to constitute at least a majority of the Board of Directors of [VENDOR].

18.4 “CONFIDENTIAL INFORMATION” means private, confidential, trade secret or other proprietary information (whether or not embodied or contained in some tangible form) relating to any actual or anticipated business of [MERCHANT] or [VENDOR], as applicable, and their respective affiliates, or any information which, if kept secret, will provide the party disclosing such Confidential Information (in each case a "Discloser") an actual or potential economic advantage over others in the relevant trade or industry or in pertaining to Customer Data. As defined herein, Confidential Information includes, without limitation, formulae, compilations, computer programs and files, devices, methods, techniques, know-how, inventions, research and development, business data (including cost data), strategies, methods, prospects, plans and opportunities, customer lists, Customers’ Data, marketing plans, specifications,
financial information, invention disclosures, patent applications (whether abandoned or not), techniques, products and services of the Discloser and identified orally or in writing by the Discloser as confidential, proprietary or trade secret information. Confidential Information further includes any information or material received in confidence by the Discloser from a third party, and/or information held in confidence by a third party and made available to the party receiving Confidential Information (in each case a "Recipient").

18.5 CUSTOMER DATA: For purposes of this agreement, the term “Customer Data” refers to information about an individual customer that can be used to distinguish, directly or indirectly, unique identity, contact, or locate a single individual or can be used in combination with other information to identify a single individual, including, but not limited to: full name, credit card information (including account number, cardholder name, service code, expiration date, security code, access code, PIN number or password), date of birth, birthplace, gender, zip code, country, state, city of residence, mother’s maiden name or biometric information.

18.6 "CONTROLLED AFFILIATE" means an Affiliate of [MERCHANT] that is majority-owned by [MERCHANT] or as to which [MERCHANT] is expressly authorized to select the manufacturer of products or the provider of fulfillment services for such Affiliate.

18.7 "PRODUCTS” means the products set forth on Exhibit A, as amended from time to time upon the mutual written agreement of the parties.

18.8 "FULFILLMENT SERVICES" means
(a) the picking, packaging and shipping of all orders for Products, and (b) the performance of the related services, all as set forth on Exhibits B, each as amended from time to time upon the mutual written agreement of the parties.

18.9 "FULLY OPERATIONAL" means, with respect to [VENDOR], that [VENDOR] is meeting its performance obligations under this Agreement, including the Service Levels, the Specifications all at a volume per day which meets the forecast levels provided by [MERCHANT].

18.10 "IMPROVEMENTS" means all improvements, enhancements, modifications, alterations, translations or derivative works of the Products and/or Additional Products made or developed by or on behalf of [MERCHANT] during the Term.

18.11 "Cut-Off Time" means, unless otherwise stated, _____ local time at the relevant Facility.

18.12 "Order" means an order for delivery of specified Products to a specified place or residence transmitted by [MERCHANT] to [VENDOR].

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first set forth above.

[MERCHANT]
By:________________________________
Name: _____________________________
Title: ______________________________

[VENDOR]
By:________________________________
Name: _____________________________
Title: ______________________________