



MJN

# FACTORING AGREEMENT TERMS

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Effective: August 5, 2016

## A. PURPOSE AND DEFINITIONS

This FACTORING AGREEMENT TERMS along with the FACTORING AGREEMENT signed by the parties together constitute the (Agreement). The parties hereto agree that the purpose of this Agreement and the financing provided herein is commercial in nature and is not for household consumer, family or personal use. All terms not herein defined shall have the meaning set forth in the Uniform Commercial Code. When used herein, the following terms shall have the following meanings:

1. **Account Debtor:** shall have the meaning set forth in the Uniform Commercial Code as enacted in the State of Utah (UCC) and shall include any person liable on any Receivable, including without limitation, any guarantor of the Receivable and any issuer of a letter of credit or banker's acceptance.
2. **ACH:** shall mean the Automated Clearing House.
3. **ACH Fee:** shall mean, for each ACH charge incurred by Buyer, the amount set forth in this Agreement.
4. **Additional Fee Percentage:** shall be the percentage set forth in this Agreement.
5. **Adjustments:** shall mean all discounts, allowances, returns, disputes, counterclaims, offsets, defenses, rights of recoupment, rights of return, warranty claims, or short payments, asserted by or on behalf of any Account Debtor with respect to any Purchased Receivable.
6. **Advance:** shall have that meaning as set forth in Section **B.2** herein.
7. **Advance Percentage:** shall be the percentage set forth in this Agreement, which may be adjusted by Buyer, in its sole discretion.
8. **Avoidance Claim:** shall mean any claim that any payment or transfer received by Buyer from or for the account of an Account Debtor is avoidable under the Bankruptcy Code or any similar state law insolvency or receivership statute.
9. **Closed:** a Purchased Receivable is Closed upon the first to occur of, (a) receipt of full payment by Buyer from Account Debtor, or (b) the unpaid face amount of the Purchased Receivable has been charged to the Reserve pursuant to this Agreement.
10. **Collections:** shall mean all good funds received by Buyer from or on behalf of an Account Debtor with respect to Purchased Receivables.
11. **Dispute:** shall mean a claim, or defense of any kind whatsoever, whether valid or invalid, asserted by an Account Debtor that may reduce the amount collectible by Buyer from an Account Debtor. Buyer is under no obligation to investigate the merits of any Dispute.
12. **Early Termination Fee:** shall have that meaning as set forth in Section **J** herein.
13. **Event of Default:** shall have that meaning as set forth in Section **I.1** herein.
14. **Factoring Fee:** shall have that meaning as set forth in Section **C.5** herein.
15. **Factoring Fee Percentage:** shall be the percentage set forth in this Agreement.
16. **Insolvent:** shall mean with respect to an Account Debtor that such Account Debtor has filed, or has had filed against it, any bankruptcy case, or has made an assignment for the benefit of creditors.
17. **Invalid Invoice Fee:** shall be Fifteen Percent (15%) of the face amount of any Purchased Receivable which violates Seller's warranty in Section **F.1** herein.
18. **Maximum Credit:** shall be the amount set forth in this Agreement, which may be adjusted by Buyer, in its sole discretion.
19. **Misdirected Payment Fee:** shall be Fifteen Percent (15%) of the face amount of any Purchased Receivable for which Seller violates the warranty set forth in Section **C.3** herein.
20. **Missing Notation Fee:** shall be Ten Percent (10%) of the face amount of any Purchased Receivable for which Seller violates the warranty set forth in Section **B.6** herein.
21. **Monthly Minimum Fee:** shall have the meaning set forth in this Agreement.
22. **Obligations:** shall mean the responsibility to pay and perform when due all debts, liabilities, covenants, agreements, guarantees, warranties and representations of Seller to Buyer, of any and every kind and nature, whether heretofore, now or hereafter owing, arising, due or payable from Seller to Buyer; howsoever created, incurred, acquired, arising or evidenced; whether primary, secondary, direct, absolute, contingent, fixed, secured, unsecured, or otherwise; whether as principal or guarantor; acquired by assignment, liquidated or unliquidated; certain or uncertain; determined or undetermined; due or to become due; as a result of present or future advances or otherwise; joint or individual; pursuant to or caused by Seller's breach of this Agreement, or any other present or future agreement or instrument, or created by operation of law or otherwise; evidenced by a written instrument or oral; created directly between Buyer and Seller or restitution claims owed by Seller to a third party and acquired by Buyer from such third party; monetary or nonmonetary.
23. **Payment Period:** shall be sixty (60) calendar days from the date of an Advance.
24. **Purchased Receivables:** shall mean all Receivables arising out of the invoices and other agreements identified on or delivered with any Schedule of Accounts, delivered by Seller to Buyer which Buyer elects to purchase and for which Buyer makes an Advance, which have not been Closed.

25. **Receivable(s)**: shall mean accounts, chattel paper, instruments, contract rights, documents, general intangibles, letters of credit, drafts, banker's acceptances, and rights to payment, and all proceeds thereof.
26. **Reconciliation Period**: shall, unless otherwise notified by Buyer to Seller, mean a monthly calendar period.
27. **Repurchased Receivable**: shall refer to a Purchased Receivable which the Seller has become obligated to repurchase under Section D herein.
28. **Reserve**: is a bookkeeping account on the books of Buyer representing, (a) an unpaid portion of the purchase price paid for a Purchased Receivable, and (b) cash reserves on Closed Purchased Receivables which Seller has pledged to Buyer as security and Buyer has maintained to ensure Seller's performance under this Agreement.
29. **Returned Check Fee**: Seller shall pay to Buyer a fee in the amount set forth in this Agreement in the event a notice is received of a returned check for any payment processed on behalf of Seller.
30. **Schedule of Accounts**: a form acceptable to Buyer from time to time wherein Seller lists such of its Receivables which it requests that Buyer purchase under the terms of this Agreement.
31. **Serviced Account**: A Receivable that is not purchased by Buyer, but which invoice and other documentation evidencing said Receivable is forwarded by Buyer, on behalf of Seller, to the Account Debtor for payment.
32. **Serviced Account Fee**: A fee charged for the processing of a Serviced Account.
33. **Set Up Fee**: A fee collected on or before Buyer first purchases any Receivable from Seller, which is set forth in this Agreement.
34. **Wire Fee**: shall be the amount set forth in this Agreement for each wire charge incurred by Buyer.

**B. PURCHASE AND SALE OF RECEIVABLES**

1. **Acceptance of Receivables**: Seller shall offer to sell to Buyer as absolute owner, with full recourse, all of Seller's Receivables. Seller shall list its Receivables on a Schedule of Accounts, and at least weekly, transmit to Buyer the Schedule of Accounts along with the original invoice if required by the Account Debtor or in the Buyer's discretion, rate confirmation if applicable, original signed Bill of Lading, and other such documentation which support and evidence the Receivables as the Account Debtor may require and Buyer may request. For each Receivable submitted to Buyer for purchase, Seller shall notify Buyer of the following: (a) whether Seller has received an advance directly from the Account Debtor relating to the Receivable; (b) whether the Receivable relates to truck ordered not used fees, detention fees, or charges and fees other than line haul charges; and (c) whether there is a Dispute relating to the Receivable. Seller appoints Buyer to act as its sole factor, and agrees not to factor receivables through any other company during the Term of this Agreement. Buyer shall have no obligation to purchase any Receivable from Seller.
2. **Advance**: For each Receivable Buyer elects to purchase from Seller, Buyer may, in its sole discretion, advance monies against the purchase price of said Receivable, in an amount up to the Advance Percentage multiplied by the face amount of the Receivable, or a lesser amount as Buyer, in its sole discretion determines, said payment referred to herein as the Advance. Buyer may deduct and set off from an Advance all of its fees and costs which are due and payable relating to any Receivable. These fees and costs include, but are not limited to, Factoring Fees, ACH Fees, Wire Fees, Returned Check Fees, Repurchased Receivables, Adjustments and other fees and costs comprising Seller's Obligations under this Agreement. The purchase price of any Purchased Receivable shall be the sum of the Advance plus the Reserve established by Buyer for said Receivable. The aggregate amount of all outstanding Advances shall not at any time exceed the Maximum Credit. Seller shall not request and Buyer shall not make an Advance that would cause the resulting total of all Advances to exceed the forgoing limitation, and Seller will immediately repay to Buyer the amount of such excess Advances.
3. **ACH Authorization**: In order to facilitate the purchase of Receivables and satisfy any of the Obligations under this Agreement, Seller irrevocably authorizes Buyer to initiate debits or credits through the ACH or any other wire transfer system in effect.
4. **Effectiveness of Sale to Buyer**: Effective upon Buyer's payment of an Advance, and in consideration of the covenants of this Agreement, Seller will have absolutely sold, transferred and assigned to Buyer, all of Seller's right, title and interest in and to each Purchased Receivable and all proceeds thereof.
5. **Establishment of a Reserve**: For each Purchased Receivable that has not been Closed, Buyer shall set aside in the Reserve an amount equal to the difference between 100% of the face amount of the Purchased Receivable and the Advance. The Reserve shall not be a segregated fund. Buyer's maintenance of the Reserve shall not vest the Seller with any right, title, or interest therein as it is understood that the Reserve is set up as security to pay the Obligations of Seller. Buyer may change the percentage of the Reserve amount at any time in its sole discretion without notice to Seller. Funds in the Reserve shall be released upon Buyer's discretion.
6. **Missing Notation Fee**: Each invoice submitted by Seller to Buyer, which evidences a Purchased Receivable, shall bear a notice, in form satisfactory to Buyer, that it has been sold and assigned to and is payable only to Buyer. Seller's failure to include such notice on the invoice shall result in the payment of the Missing Notation Fee as liquidated damages, as such damages shall be difficult to calculate or ascertain.
7. **Serviced Account**: Any Account that is not purchased by Buyer shall be deemed a Serviced Account and shall, at Buyer's option, either be (i) returned to Seller, or (ii) forwarded by Buyer to the respective Account Debtor for payment.

When Buyer generates an invoice for a Serviced Account on behalf of Seller and forwards the invoice to the Account Debtor or back to Seller, Seller shall pay Buyer a Serviced Account Fee for each invoice so generated, with said fee being charged to Seller's Reserve Account or deducted from future funding proceeds. Purchaser is under no obligation to collect or otherwise manage a Serviced Account.

**C. COLLECTIONS, CHARGES, AND REMITTANCES**

1. **Accounting:** Seller shall immediately upon sale of Receivables to Buyer, make proper entries on its books and records disclosing the sale thereof to Buyer. Buyer shall prepare and send to Seller, or post online, within 15 days from the close of business for each calendar month, an accounting of the transactions for that calendar month, including the amount of all Purchased Receivables, all Collections, Adjustments, Factoring Fees, and other fees and charges. The accounting shall be deemed correct and become a statement of Seller's account unless Seller makes written objection to Buyer within thirty (30) days after the date Buyer mails or posts online the accounting to Seller.
2. **Audit Fees:** Upon request Seller shall periodically furnish Buyer with statements showing Seller's financial condition and the results of Seller's operations. Buyer, or its designee, may at any time, inspect the Collateral, and have access to, audit, and make extracts from, all of Seller's records, files and books of account, and Buyer may charge Seller's account with the reasonable costs, fees or expenses incurred in connection therewith (Audit Fees), the reasonableness of said charges solely determined by Buyer. All Audit Fees shall become immediately due and payable to Buyer when they are incurred.
3. **Collections:** All Collections will go directly to Buyer and Buyer shall apply all Collections to Seller's Obligations hereunder in such order and manner as Buyer may determine in its sole discretion. Seller will hold in trust and safekeeping, as the sole property of Buyer, and immediately turn over to Buyer, in identical form received, any payment on a Purchased Receivable, or Receivable assigned to Buyer under this Agreement, that comes into Seller's possession. In the event Seller comes into possession of a remittance comprising payments of both a Purchased Receivable and a Receivable which has not been purchased by Buyer, Seller shall hold same in accordance with the provisions set forth above and immediately turn same over to Buyer, in identical form received. Upon collection of such item and provided there is no Event of Default, Buyer shall remit to Seller its portion thereof. Seller's failure to comply with its duties under this Section shall result in the imposition of the Misdirected Payment Fee as liquidated damages, as such damages shall be difficult to calculate or ascertain. Seller agrees to indemnify and save Buyer harmless from and against any and all claims, loss, costs and expenses caused by or arising out of the Receivables or any attempt by Buyer to collect same or resolve any Dispute. Any monies received by Buyer from an unknown origin will be held until Buyer can determine its proper disposition.
4. **Crediting of Payments:** For purposes of determining availability under this Agreement, payments on Purchased Receivables and other payments with respect to the collateral and Obligations will be credited to the Purchased Receivables of Seller upon the date of Buyer's receipt of advice from Buyer's bank that such payments have been credited to Buyer's account or in the case of payments received directly in kind by Buyer, upon the date of Buyer's deposit thereof at Buyer's bank, subject in either case to final payment and collection. Solely for the purpose of calculating fees under this Agreement, payments on Purchased Receivables and other payments with respect to collateral and Obligations shall be deemed received by Buyer three (3) business days after the date of Buyer's receipt of advice from Buyer's bank that such payments have been credited to Buyer's account or in the case of payments received directly in kind by Buyer, three (3) business days after the date of Buyer's deposit thereof at Buyer's bank, subject in either case to final payment and collection.
5. **Factoring Fee:** For each Purchased Receivable, Seller shall pay to Buyer a factoring fee (Factoring Fee) equal to the sum of: (a) an amount equal to the Factoring Fee Percentage multiplied by the face value of the Purchased Receivable; and (b) if the Purchased Receivable is not paid in full within thirty (30) days from the date it is first purchase by Buyer, for each fifteen (15) day period or partial fifteen day period thereafter, an amount equal to the Additional Fee Percentage multiplied by the face value of the Purchased Receivable, until it is paid in full, repurchased by Seller or written off by Buyer. Notwithstanding the preceding, if the Factoring Fee is less than the Minimum Factoring Fee, then Seller shall pay to Buyer the Minimum Factoring Fee in place of the Factoring Fee for said Purchased Receivable.
6. **Invalid Invoice Fee:** Seller shall pay Buyer the Invalid Invoice Fee immediately upon its accrual.
7. **Misdirected Payment Fee:** Seller shall pay Buyer the Misdirected Payment Fee immediately upon its accrual.
8. **Missing Notation Fee:** Seller shall pay Buyer the Missing Notation Fee immediately upon its accrual.
9. **Monthly Minimum Fee:** Buyer would not have entered into this Agreement and agreed to provide Seller with the factoring arrangements hereunder unless Seller guaranteed Buyer that the Factoring Fees paid to Buyer in each month would equal or exceed the Monthly Minimum Fee. In the event the Factoring Fees paid during any month is less than the Monthly Minimum Fee, then Seller shall pay to Buyer the amount of any deficiency (the Supplemental Fee), which shall be in addition to any other fees payable under this Agreement. The Supplemental Fee, if any, for any month shall be calculated and due and payable on the first business day of the succeeding month and shall be payable for each month during the current Term of this Agreement regardless of whether this Agreement is terminated prior to the expiration of the then current Term.

**D. SELLER'S AGREEMENT TO REPURCHASE**

Seller agrees to pay to Buyer upon demand, and repurchase in the full face amount, or any unpaid portion thereof, any Purchased Receivable:

1. Which remains unpaid for the Payment Period; or
2. With respect to which there has been any breach of warranty or representation set forth in Section F herein or any breach of any covenant contained in this Agreement; or
3. With respect to which the Account Debtor asserts any Dispute, regardless of merit.

**E. POWER OF ATTORNEY**

Seller grants to Buyer an irrevocable power of attorney coupled with an interest authorizing and permitting Buyer (acting through any of its employees, attorneys or agents) at any time, at its option but without obligation, with or without notice to Seller, and at Seller's sole expense, to do any or all of the following, in Seller's name or otherwise: (a) Execute on behalf of Seller any document that Buyer may, in its sole discretion, deem advisable in order to perfect, maintain or improve Buyer's security interests in the Collateral or other real or personal property intended to constitute Collateral, or in order to exercise a right of Seller or Buyer, or in order to fully consummate all the transactions contemplated under this Agreement, and all other present and future agreements; (b) At any time after the occurrence of an Event of Default, execute on behalf of Seller any document exercising, transferring or assigning any option to purchase, sell or otherwise dispose of or to lease (as lessor or lessee) any real or personal property; (c) Execute on behalf of Seller, any invoices relating to any Receivable, any draft against any Account Debtor and any notice to any Account Debtor, any proof of claim in bankruptcy, voting rights in any bankruptcy case, any Notice of Lien, claim of mechanic's, material man's or other lien, or assignment of satisfaction of mechanic's, material man's or other lien; (d) Take control in any manner of any cash or non-cash items of payment or proceeds of Collateral; endorse the name of Seller upon any instruments, notes, acceptances, checks, drafts, money orders, bills of lading, freight bills, chattel paper or other documents, evidence of payment or Collateral that may come into Buyer's possession; (e) Upon the occurrence of any Event of Default, to receive and open all mail addressed to Seller; and, in the exercise of such right, Buyer shall have the right, in the name of Seller, to notify the Post Office authorities to change the address for the delivery of mail addressed to Seller to such other address as Buyer may designate including, but not limited to, Buyer's own address; Buyer shall turn over to Seller all of such mail not relating to the Collateral; such right to redirect mail granted to Buyer is irrevocable and Seller shall not have the right to notify the Post Office to change the address for delivery after Buyer has exercised such right; (f) Upon the occurrence of any Event of Default, to direct any financial institution which is a participant with Buyer in extensions of credit to or for the benefit of Seller, or which is the institution with which any deposit account is maintained, to pay to Buyer all monies on deposit by Seller with said financial institution which are payable by said financial institution to Seller, regardless of any loss of interest, charge or penalty as a result of payment before maturity; (g) Endorse all checks and other forms of remittances received by Buyer "Pay to the Order of MJN Services, Inc.", or in such other manner as Buyer may designate; (h) Pay, contest or settle any lien, charge, encumbrance, security interest and adverse claim in or to any of the Collateral, or any judgment based thereon, or otherwise take any action to terminate or discharge the same; (i) Grant extensions of time to pay, compromise claims and settle Receivables and the like for less than face value and execute all releases and other documents in connection therewith; (j) Pay any sums required on account of Seller's taxes or to secure the release of any liens therefore, or both; (k) Settle and adjust, and give releases of, any insurance claim that relates to any of the Collateral and obtain payment therefore, and make all determinations and decisions with respect to any such policy of insurance and endorse Seller's name on any check, draft, instrument or other item of payment or the proceeds of such policies of insurance; (l) Instruct any accountant or other third party having custody or control of any books or records belonging to, or relating to, Seller to give Buyer the same rights of access and other rights, with respect thereto as Buyer has under Section F.2.i of this Agreement; and (m) Take any action or pay any sum required of Seller pursuant to this Agreement, and any other present or future agreements. Any and all sums paid and any and all costs, expenses, liabilities, obligations and attorneys' fees incurred by Buyer with respect to the foregoing shall be added to and become part of the Obligations and shall be payable on demand. In no event shall Buyer's rights under the foregoing power of attorney or any of Buyer's other rights under this Agreement be deemed to indicate that Buyer is in control of the business management of properties of Seller.

**F. SELLER'S WARRANTIES, REPRESENTATIONS AND COVENANTS**

1. **Receivables, Warranties, Representations and Covenants:** To induce Buyer to buy Receivables and to render its services to Seller, and with full knowledge that the truth and accuracy of the following are being relied upon by the Buyer in determining whether to accept Receivables as Purchased Receivables, Seller represents, warrants, covenants and agrees, with respect to each Schedule of Accounts delivered to Buyer and each Receivable described therein, that: Seller is the absolute owner of each Receivable set forth in the Schedule of Accounts and has full legal right to sell, transfer and assign such Receivables;
  - a. The correct face amount of each Receivable is as set forth in the Schedule of Accounts and is not in Dispute;

- b. The payment of each Receivable is not contingent upon the fulfillment of any obligation or contract, past or future, and any and all obligations required of the Seller have been fulfilled as of the date of the Schedule of Accounts;
  - c. Each Receivable set forth on the Schedule of Accounts is based on the actual sale and delivery of goods and/or services actually rendered on terms not to exceed thirty (30) days, does not represent a sale to a parent, subsidiary or affiliate of Seller, is presently due and owing to Seller, is not past due or in default, has not been previously sold, assigned, transferred, or pledged, is not a consignment sale or bill and hold transaction, and is free of any and all liens, security interests and encumbrances other than liens, security interests or encumbrances in favor of Buyer or any other division of or affiliate of Buyer;
  - d. There are no defenses, offsets, or counterclaims against any of the Purchased Receivables, and no agreement has been made under which the Account Debtor may claim any deduction or discount, except as otherwise stated in the Schedule of Accounts;
  - e. Seller has disclosed to Buyer any and all advances received by Seller directly from the Account Debtor, relating to each Receivable set forth in the Schedule of Accounts;
  - f. At the time that Buyer makes an Advance relating to a Receivable, the Account Debtors set forth in the Schedule of Accounts, are then not insolvent and Seller has no knowledge that the Account Debtors are insolvent or may become insolvent within the Payment Period;
  - g. Seller shall not take or permit any action to countermand notification to Account Debtors of Buyer's ownership of Purchased Receivables;
  - h. Seller's failure to comply with the warranty in this Section shall result in the imposition of the Invalid Invoice Fee, as liquidated damages as such damages shall be difficult to calculate or ascertain.
- 2. Additional Warranties Representations and Covenants:** In addition to the foregoing warranties, representations and covenants, to induce Buyer to buy Receivables and to render its services to Seller, Seller hereby represents, warrants, covenants and agrees that:
- a. Seller will not assign, transfer, sell or grant any security interest in any Collateral to any other party, without Buyer's prior written consent;
  - b. The Seller's name, form of organization, place of business and the place where the records concerning all receivables herein referred to are kept is set forth at the beginning of this Agreement, and Seller will give Buyer thirty (30) days advance notice in writing if such name, organization, place of business or record keeping is to be changed or a new place of business or record keeping is to be added and shall execute any documents necessary to perfect Buyer's interest in Purchased Receivables and the Collateral;
  - c. Seller shall pay its entire gross payroll to employees, and all federal and state taxes, as and when due, including, without limitation, all payroll and withholding taxes and state sales taxes. Upon Buyer's request, Seller agrees to complete, sign and file with the IRS Form 8821, directing the IRS to notify Buyer of any unpaid liens, tax liabilities or other amounts due by Seller to the IRS. Seller authorizes Buyer to pay any funds owing Seller directly to the IRS in satisfaction of monies owed the IRS by Seller;
  - d. Seller has not, as of the time Seller delivers to Buyer a Schedule of Accounts, or as of the time Seller accepts any Advance from Buyer, filed a voluntary petition for relief under the United States Bankruptcy Code or had filed against it an involuntary petition for relief;
  - e. Seller, if a limited liability company or a corporation is duly organized and or incorporated, and at all times in good standing under the laws of the State Seller was organized or incorporated in, and is duly qualified in all States where such qualification is required;
  - f. Seller is duly authorized to enter into this Agreement and to grant the security interest in the Collateral;
  - g. Seller is now, and at all times hereafter, the sole and lawful owner of the Collateral, and with the security interest granted to Buyer, the Collateral shall be free and clear of any claims, liens, encumbrances or other interests therein;
  - h. All documents, reports, or other writings submitted to Buyer in connection with this Agreement shall be true and correct;
  - i. Unless otherwise stated in a separate writing to Buyer, Seller's address set forth in this Agreement is Seller's chief place of business and chief executive office and the location of all of Seller's books and records, and the Collateral. Seller has disclosed to Buyer the locations of all of Seller's other places of business as well as all trade names or styles, trademarks, divisions or other names under which Seller conducts business. Seller shall provide immediate access to Buyer to its business premises or any location where any of the Collateral is stored, in order to inspect the Seller's business operations, the Collateral, or any books, records or computer data which relates to or contains any information concerning the Collateral;
  - j. Seller has all required licenses to operate its businesses and transacts business only under its trade names or trade styles disclosed to Buyer;
  - k. There are no felonies, liens or judgments against Seller, its owners, members or shareholders;
  - l. There is no fact which Seller has not disclosed to Buyer in writing which could materially adversely affect the Collateral, or business or financial condition of the Seller, or which are necessary to disclose in order to keep the foregoing representations from being misleading;
  - m. Seller is not in violation of any federal, state or local law;

- n. Seller shall within five (5) business days notify Buyer in writing of any issue which may materially affect the Collateral or Seller's business;
- o. Seller shall not sell any of the Collateral or its assets outside the ordinary course of its business;
- p. Any change in control or ownership of Seller shall require Buyer's written consent.

**G. DISPUTES, ADJUSTMENTS**

Seller shall immediately notify Buyer in each instance, of the return, rejection, loss of or damage to merchandise represented by any Receivable, or of any Dispute related to or set off against a Receivable, or of any request for extension of time to pay or request for credit or adjustment, or of any merchandise or services covered thereby or tending in any way to diminish the sum certain payable thereon. In the event any Dispute is asserted by any Account Debtor, Seller shall, subject to Buyer's approval, resolve such Disputes at no cost to Buyer and advise Buyer of an Adjustment, which shall become immediately due and payable to Buyer. Until the disputed Purchased Receivable is repurchased by Seller and the full amount of the Purchased Receivable is paid, Buyer shall remain the absolute owner of any Purchased Receivable which is subject to Adjustment, or repurchase under Section **D** hereof, and any rejected, returned, or recovered personal property, with the right to take possession thereof at any time. At Buyer's option, Seller authorizes Buyer to function as sole cargo claim manager of any and all cargo claims incurred during this Agreement, and to administer and settle such claims as Buyer deems appropriate in connection with goods or services sold by Seller.

**H. SECURITY INTEREST**

As security and collateral for the Obligations, Seller hereby grants Buyer a continuing security interest in, and assigns to Buyer, all of Seller's right, title and interest in, all now owned and after acquired Accounts, Equipment, Inventory, Financial Assets, Chattel Paper, Electronic Chattel Paper, Letters of Credit, Letters of Credit Rights, General Intangibles, Real Property, Investment Property, Deposit Accounts, Documents, Instruments, Supporting Obligations, Commercial Tort Claims, the Reserve, motor vehicles, all books, records, files and computer data relating to the foregoing, and all proceeds (including insurance proceeds) of the foregoing (the Collateral). Seller hereby authorizes Buyer to file any document it deems necessary to perfect its security interest in the Collateral, including but not limited to UCC-1 financing statements and any applicable amendments or continuation statements. Seller shall perform all acts requested by Buyer to perfect and maintain Buyer's security interest and other rights in the Collateral. Seller agrees to keep the Collateral insured against risk and casualty in an amount equal to its value.

**I. DEFAULT AND REMEDIES UPON DEFAULT**

1. **Events of Default:** If any one or more of the following events shall occur, any event shall constitute an Event of Default by Seller: (a) Any warranty, representation, statement, report or certificate made or delivered to Buyer by Seller or any of Seller's officers, members, employees or agents now or hereafter is incorrect, false, untrue or misleading in any respect whatever; (b) Seller shall fail to perform or comply with or otherwise shall breach, any other term or condition contained in this Agreement, or any other agreement whether now or hereafter existing between Buyer and Seller; (c) Seller shall fail to pay or perform any other Obligation when due; (d) A material impairment of the prospect of payment or performance of the Obligations or a material impairment of the value of the Collateral or any impairment in the priority of Buyer's security interests; (e) Any event shall arise which may result or actually result in the acceleration of the maturity of the indebtedness of Seller to Others under any loan or other agreement or undertaking now or hereafter existing; (f) Seller shall fail promptly to perform or comply with any term or condition of any agreement now or hereafter existing with any third party resulting in an actual or potential material adverse effect on Seller's business; (g) Any levy, assessment, attachment, seizure, lien or encumbrance for any cause or reason whatsoever, upon all or any part of the Collateral or any other asset of Seller (unless discharged by payment, release or fully bonded against not more than ten (10) days after such event has occurred); (h) Dissolution, termination of existence, insolvency or business failure of Seller, or appointment of a receiver, trustee or custodian, for all or any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding by or against Seller under any reorganization, bankruptcy, insolvency, arrangement, readjustment of debt, dissolution or liquidation law or statute of any jurisdiction, now or hereafter in effect; or entry of a court order which enjoins, restrains or in any way prevents Seller from conducting all or any part of its business; or failure to pay any foreign, federal, state or local tax or other debt of Seller; (i) A notice of lien, levy or assessment is filed of record with respect to any of Seller's assets by the United States or any department, agency or instrumentality thereof, or by any state, county, municipal or other governmental agency, or if any taxes or debts now or hereafter owing to anyone or more of them becomes a lien, whether choate or otherwise, upon all or any of the Collateral or any other assets of Seller (other than a lien for real property taxes which are not yet due and payable); (j) Death or insolvency or incompetency of any guarantor of any or all of the Obligations; appointment of a conservator or guardian of the person of any such guarantor; appointment of a conservator, guardian, trustee, custodian or receiver of all or any part of the assets, property or estate of, any such guarantor; revocation or termination of, or limitation of liability upon, any guaranty of any or

all of the Obligations; or commencement of proceedings by or against any guarantor or surety for Seller under any bankruptcy or insolvency law; (k) Seller makes any payment on account of any indebtedness or obligation which has been subordinated to the Obligations or if any person who has subordinated such indebtedness or obligation terminates or in any way limits his subordination agreement; (l) Seller shall generally not pay its debts as they become due or shall enter into any agreement (whether written or oral), or offer to enter into any such agreement, with all or a significant number of its creditors regarding any moratorium or other indulgence with respect to its debts or the participation of such creditors or their representatives in the supervision, management or control of the business of Seller; (m) Seller shall conceal, remove or permit to be concealed or removed any part of its property, with intent to hinder, delay or defraud its creditors, or make or suffer any transfer of any of its property which may be fraudulent under any bankruptcy, fraudulent conveyance or similar law, or shall make any transfer of its property to or for the benefit of any creditor at a time when other creditors similarly situated have not been paid; (n) any change in ownership or control of Seller; or (o) Buyer at any time, acting in good faith and in a commercially reasonable manner, deems itself insecure.

2. **Remedies:** Upon the occurrence of any Event of Default, and at any time thereafter, Buyer, at its option, and without notice or demand of any kind (all of which are hereby expressly waived by Seller) may do any one or more of the following: (a) Cease advancing money or extending credit to or for the benefit of Seller under this Agreement, and any other document or agreement; (b) Accelerate and declare all or any part of the Obligations to be immediately due, payable, and performable, notwithstanding any deferred or installment payments allowed by any instrument evidencing or relating to any Obligation; (c) Take possession of any or all of the Collateral wherever it may be found, and for that purpose Seller hereby authorizes Buyer without judicial process to enter onto any of the Seller's premises, without hindrance to search for, take possession of, keep, store, or remove any of the Collateral and remain on such premises or cause a custodian to remain thereon in exclusive control therefore without charge for so long as Buyer deems necessary in order to complete the enforcement of its rights under this Agreement or any other agreement; provided, however, that should Buyer seek to take possession of any or all of the Collateral by Court process or through a receiver, Seller hereby irrevocably waives: (i) any bond and any surety or security relating thereto required by any statute, court rule or otherwise as an incident to such possession; (ii) any demand for possession prior to the commencement of any suit or action to recover possession thereof; and (iii) any requirement that Buyer retain possession of and not dispose of any such Collateral until after trial or final judgment; (d) Require Seller to assemble any or all of the Collateral and make it available to Buyer at a place or places to be designated by Buyer which is reasonably convenient to Buyer and Seller, and to remove the Collateral to such locations as Buyer may deem advisable; (e) place a receiver in exclusive control of Seller's business and/or any or all of the Collateral, in order to assist Buyer in enforcing its rights and remedies; (f) Sell, ship, reclaim, lease or otherwise dispose of all or any portion of the Collateral in its condition at the time Buyer obtains possession or after further manufacturing, processing or repair; at anyone or more public and/or private sale(s) (including execution sales); in lots or in bulk; for cash, exchange for other property or on credit; and to adjourn any such sale from time to time, without notice other than oral announcement at the time scheduled for sale. Buyer shall have the right to conduct such disposition on Seller's premises without charge for such time or times as Buyer deems fit, or on Buyer's premises, or elsewhere and the Collateral need not be located at the place of disposition. Buyer may directly or through any affiliated company purchase or lease any Collateral at any such public disposition and, if permissible under applicable law, at any private disposition. Any sale or other disposition of Collateral shall not relieve Seller of any liability Seller may have if any Collateral is defective as to title or physical condition at the time of sale; (g) Demand payment of, and collect any Accounts, Instruments, Chattel Paper, Supporting Obligations and General Intangibles comprising part or all of the Collateral; or (h) Demand and receive possession of any of Seller's federal and state income tax returns and the books, records and accounts utilized in the preparation thereof or referring thereto. Any and all attorneys' fees, expenses, costs, liabilities and obligations incurred by Buyer with respect to the foregoing shall be added to and become part of the Obligations, shall be due on demand, and shall bear interest at a rate equal to 18% per annum or the highest rate allowed by law, whichever is greater.
3. **Application of Proceeds:** The proceeds received by Buyer from the disposition of or collection of any of the Collateral shall be applied to such extent and in such manner as Buyer shall determine, in its sole discretion. If any deficiency shall arise, Seller shall remain liable to Buyer therefore. In the event that, as a result of the disposition of any of the Collateral, Buyer directly or indirectly enters into a credit transaction with any third party, Buyer shall have the option, exercisable at any time, in its sole discretion, of either reducing the Obligations by the principal amount of such credit transaction or deferring the reduction thereof until the actual receipt by Buyer of good funds therefore from such third party.
4. **Online Access:** Upon an Event of Default, all of Seller's rights and access to any online internet services that Buyer makes available to Seller shall be provisional pending Seller's curing of all such Events of Default. During such period of time, Buyer may limit or terminate Seller's access to online services. Seller acknowledges that the information Buyer makes available to Seller through online internet access, both before and after an Event of Default, constitutes and satisfies any duty to respond to a request for accounting or request regarding a statement of account that is referenced in the UCC.
5. **Standards of Commercial Reasonableness:** After an Event of Default, the parties acknowledge that it shall be presumed commercially reasonable and Buyer shall have no duty to undertake to collect any Account, including those in which Buyer receives information from an Account Debtor that a Dispute exists. Furthermore, in the event Buyer



undertakes to collect or enforce an obligation of an Account Debtor or any other person obligated on the Collateral and ascertains that the possibility of collection is outweighed by the likely costs and expenses that will be incurred, Buyer may at any such time cease any further collection efforts and such action shall be considered commercially reasonable. Before Seller may, under any circumstances, seek to hold Buyer responsible for taking any commercially unreasonable action, Seller shall first notify Buyer in writing, of all of the reasons why Seller believes Buyer has acted in any commercially unreasonable manner and advise Buyer of the action that Seller believes Buyer should take.

6. **Remedies Cumulative:** In addition to the rights and remedies set forth in this Agreement, Buyer shall have all the other rights and remedies accorded a secured party under the UCC and under any and all other applicable laws and in any other instrument or agreement now or hereafter entered into between Buyer and Seller and all of such rights and remedies are cumulative and none is exclusive. Exercise or partial exercise by Buyer of one or more of its rights or remedies shall not be deemed an election, nor bar Buyer from subsequent exercise or partial exercise of any other rights or remedies. The failure or delay of Buyer to exercise any rights or remedies shall not operate as a waiver thereof, but all rights and remedies shall continue in full force and effect until all of the Obligations have been fully paid and performed.

#### **J. EFFECTIVENESS, TERM**

This Agreement shall only become effective upon execution and delivery by Seller and acceptance by Buyer and, unless earlier terminated as provided in this Agreement, shall continue in full force and effect for the Initial Term set forth in the Factoring Agreement made a part of this Agreement and shall be deemed automatically renewed for successive twelve (12) month periods. Unless earlier terminated as provided in this Agreement, all Obligations shall be due and payable in full at the expiration of the last renewal term. This Agreement may be terminated prior to the end of the Initial Term or any renewal term (each, a Term) as follows: (a) Seller may terminate this Agreement at the end of the Term without payment of an Early Termination Fee, provided Seller gives at least thirty (30) days written notice prior to the end of the Initial Term or any renewal term; (b) Seller may terminate this Agreement at any time after giving Buyer at least thirty (30) days prior written notice and paying Buyer an Early Termination Fee equal to one half of one percent (0.50%) of the Maximum Credit multiplied by the number of months remaining in the then-current Term (the Early Termination Fee). Any partial month remaining in such Term shall constitute a full month for the purpose of calculating the Early Termination Fee. Any such termination shall be effective upon payment to Buyer in full of all Obligations, including the Early Termination Fee; and (c) Buyer may terminate this Agreement without notice for any reason. Upon any such termination, all Obligations shall be immediately due and payable in full. If Buyer terminates this Agreement following the occurrence of an Event of Default under 1.1, then in addition to all of the Obligations, the Early Termination Fee shall also be due and payable in full. In recognition of the Buyer's right to have its attorneys' fees and other expenses incurred in connection with this Agreement secured by the Collateral, notwithstanding payment in full of all Obligations by Seller, Buyer shall not be required to record any terminations or satisfactions of any of Buyer's liens on the Collateral unless and until Seller has executed and delivered to Buyer a general release in a form acceptable to Buyer. Seller understands that this Section constitutes a waiver of its rights under Section 9-315 of the UCC. Notwithstanding the foregoing, any termination of this Agreement shall not affect Buyer's security interest in the Collateral and Buyer's ownership of the Purchased Receivables, and this Agreement shall continue to be effective, and Buyer's rights and remedies hereunder shall survive such termination, until all transactions entered into and Obligations incurred hereunder or in connection herewith have been completed and satisfied in full.

#### **K. PARTICIPATIONS, ASSIGNMENTS**

Seller understands that Buyer may from time to time transfer and assign its rights under this Agreement to one or more assignees. Seller hereby consents to these transfers and assignments by Buyer to one or more assignees. Seller hereby consents that any such assignee may exercise the rights of the Buyer hereunder. Seller further hereby consents and acknowledges that any and all defenses, claims or counterclaims that it may have against the Buyer shall be limited to, and may only be brought against Buyer and may not extend to any assignee, including, but not limited to, the funding obligations. Seller and Buyer intend that any and all direct or indirect assignees of the Buyer of the type set forth above shall be the third party beneficiaries of this Agreement.

#### **L. GENERAL**

1. **Notices:** Any Written Notice to be given under this Agreement will be in writing addressed to the respective party at the address set forth in this Agreement and will be personally served, telecopied, e-mailed, or sent by United Parcel Service, Federal Express or United States mail, and will be deemed to have been given: (a) if delivered in person, when delivered; (b) if delivered by telecopy or e-mail, on the date of transmission if transmitted on a business day before 4:00 p.m. (Mountain Time) or, if not, on the next succeeding business day; (c) if delivered by United Parcel Service or Federal Express, when delivered; or (d) if by U.S. Mail, four (4) business days after depositing in the United States mail, with postage prepaid and properly addressed. If there is more than one Seller, notice to any shall constitute notice to all; if Seller is a corporation, partnership or limited liability company, the service upon any member of the Board of Directors,



general partner, managing member, officer, employee or agent shall constitute service upon Seller.

2. **Payment in Full Checks:** Seller authorizes Buyer to accept, endorse and deposit on behalf of Seller any checks tendered by an Account Debtor "in full payment" of its obligation to Seller. Seller shall not assert against Buyer any claim arising there from, irrespective of whether such action by Buyer affects an accord and satisfaction of Seller's claims, under Section 3-311 of the UCC.
3. **Indemnity:** Seller hereby indemnifies and holds Buyer and its affiliates, and their respective employees, attorneys and agents (each, an Indemnified Person), harmless from and against any and all suits, actions, proceedings, claims, damage, losses, liabilities and expenses of any kind or nature whatsoever (including attorney's fees and disbursements and other costs of investigation or defense, including those incurred upon any appeal) which may be instituted or asserted against or incurred by any such Indemnified Person as the result of any financial accommodation having been extended, suspended or terminated under this Agreement or any other agreement or with respect to the execution, delivery, enforcement, performance and administration of, or in any other way arising out of or relating to this Agreement or any other agreement, and any actions or failures to act with respect to any of the foregoing. No Indemnified Person shall be responsible or liable to Seller or any other party for indirect, punitive, exemplary or consequential damages which may be alleged as a result of any financial accommodation having been extended, suspended or terminated under this Agreement or any other agreement or as a result of any other transaction contemplated hereunder or there under.
4. **Attorneys' Fees and Costs:** Seller shall forthwith pay to Buyer the amount of all actual attorneys' fees and all filing, recording, publication, collection, search and other costs incurred by Buyer under and pursuant to this Agreement, or any other present or future agreement, or in connection with any transaction contemplated hereby or thereby, or with respect to the Collateral or the defense or enforcement of Buyer's interests (whether or not Buyer files a lawsuit against Seller), including, without limitation, charges of auditors, set-up charges, bank charges, and all office and other expenses and costs. Without limiting the generality of the foregoing, Seller shall, with respect to each and all of the foregoing, pay all actual attorneys' fees and costs Buyer incurs in order to: obtain legal advice; enforce or seek to enforce any of its rights; prosecute action against, or defend actions by Account Debtors; commence, intervene in, respond to, or defend any action or proceeding; initiate any complaint to be relieved of the effect of the automatic stay in bankruptcy in order to commence or continue any foreclosure or other disposition of the Collateral; file or prosecute a claim or right in any action or proceeding, including, but not limited to, any probate claim, bankruptcy claim, third-party claim, secured creditor claim or reclamation complaint, examine, audit, count, test, copy, or otherwise inspect any of the Collateral or any of Seller's books and records; or protect, obtain possession of, lease, dispose of, or otherwise enforce any security interest in or lien on the Collateral or represent Buyer in any litigation with respect to Seller's affairs. In the event Buyer brings any lawsuit against Seller predicated on a breach of this Agreement, or in any manner relates to this Agreement, Buyer shall be entitled to recover its costs and attorney's fees, including, but not limited to, attorneys' fees and costs incurred in the enforcement of, execution upon or defense of any order, decree, award or judgment. All attorneys' fees and costs to which Buyer may be entitled pursuant to this Section shall immediately become part of Seller's Obligations and shall be due on demand.
5. **Limited Liability:** Buyer shall have no liability hereunder for any losses or damages (including indirect, special or consequential damages) that result from, any malfunction, failure or interruption of any communications facilities including the Internet, labor difficulties or any other cause beyond Buyer's control. Damages arising from accounting errors with respect to Seller's account with Buyer shall be limited to a refund to Seller for the amount of the error.
6. **Benefit of Agreement:** The provisions of this Agreement shall be binding upon and inure to the benefit of the respective successors, assigns, heirs, beneficiaries and representatives of the parties hereto; provided, however, that Seller may not assign or transfer any of its rights under this Agreement without the prior written consent of Buyer, and any prohibited assignment shall be void. No consent by Buyer to any assignment shall relieve Seller or any guarantor from their liability for the Obligations. Without limiting the generality of the foregoing, all rights and benefits of Buyer under this Agreement may be exercised by any institution with which Buyer maintains any rediscount, factoring or other relationship and by any other person or entity designated by Buyer.
7. **Joint and Several Liability:** The liability of each Seller shall be joint and several and the compromise of any claim with, or the release of, any Seller shall not constitute a compromise with, or a release of, any other Seller.
8. **General Waivers:** The failure of Buyer at any time or times hereafter to require Seller strictly to comply with any of the provisions, warranties, terms or conditions of this Agreement or any other present or future instrument or agreement between Seller and Buyer shall not waive or diminish any right of Buyer thereafter to demand and receive strict compliance therewith and with any other provision warranty, term and condition; and any waiver of any default shall not waive or affect any other default, whether prior or subsequent thereto and whether of the same or of a different type. None of the provisions, warranties, terms or conditions of this Agreement or other instrument or agreement now or hereafter executed by Seller and delivered to Buyer shall be deemed to have been waived by any act or knowledge of Buyer or its agents or employees, but only by a specific written waiver signed by an officer of Buyer and delivered to Seller. Seller waives any and all notices or demands which Seller might be entitled to receive with respect to this Agreement, or any other agreement by virtue of any applicable law. Seller hereby waives demand, protest, notice of protest and notice of default or dishonor, notice of payment and nonpayment, release, compromise, settlement, extension or renewal of any commercial paper, instrument, Account, general intangible, document or guaranty at any time held by Buyer on which

Seller is or may in any way be liable, and notice of any action taken by Buyer unless expressly required by this Agreement. Seller hereby ratifies and confirms whatever Buyer may do pursuant to this Agreement and agrees that Buyer shall not be liable for the safekeeping of the Collateral or any loss or damage thereto, or diminution the value thereof, from any cause whatsoever, any act or omission of any carrier, warehouseman, bailee, forwarding agent or other person, or any act of commission or any omission by Buyer or its officers, employees, agents, or attorneys, or any of its or their errors of judgment or mistakes of fact or of law.

- 9. Section Headings; Construction:** Section headings are used herein for convenience only. Seller acknowledges that the same may not describe completely the subject matter of the applicable Section, and the same shall not be used in any manner to construe, limit, define or interpret any term or provision hereof. This Agreement has been fully reviewed and negotiated between the parties and no uncertainty or ambiguity in any term or provision of this Agreement shall be construed strictly against Buyer or Seller under any rule of construction or otherwise.
- 10. Limitation of Actions:** Seller agrees that any claim or cause of action by Seller against Buyer, its directors, officers, employees, agents, accountants or attorneys, based upon, arising from, or relating to this Agreement, or any other present or future agreement, or any other transaction contemplated hereby or thereby or relating hereto or thereto, or any other matter, cause or thing whatsoever, occurred, done, omitted or suffered to be done by Buyer, its directors, officers, employees, agents, accountants, or attorneys, relating in any way to Seller, shall be barred unless asserted by Seller by the commencement of an action or proceeding in a court of competent jurisdiction by the filing of a complaint within six (6) months after the first act, occurrence or omission upon which such claim or cause of action, or any part thereof, is based, and the service of a summons and complaint on an officer of Buyer, or on any other person authorized to accept service on behalf of Buyer, within thirty (30) days thereafter. Seller agrees that such six-month period provided herein shall not be waived, tolled, or extended except by the written consent of Buyer, in its sole and absolute discretion. This provision shall survive any termination, however arising, of this Agreement and any other present or future agreement.
- 11. Severability:** Should any provision, clause or condition of this Agreement be held by any court of competent jurisdiction to be void, invalid, inoperative, or otherwise unenforceable, such defect shall not affect any other provision, clause or condition, and the remainder of this Agreement shall be effective as though such defective provision, clause or condition had not been a part hereof.
- 12. Integration:** This Agreement and such other written agreements, documents and instruments as may be executed in connection herewith shall be construed together and constitute the entire, only and complete agreement between Seller and Buyer, and all representations, warranties, agreements, and undertakings heretofore or contemporaneously made, which are not set forth herein or therein, are superseded hereby.
- 13. Amendment:** The terms and provisions of this Agreement may not be waived, altered, modified or amended except in a writing executed by Seller and a duly authorized officer of Buyer.
- 14. Time of Essence:** Time is of the essence in the performance by Seller of each and every obligation under this Agreement.
- 15. Governing Law; Jurisdiction; Venue:** This Agreement and all acts and transactions hereunder and there under and all rights and obligations of Buyer and Seller shall be governed, construed and interpreted in accordance with the laws of the State of Utah. Seller: (i) agrees that all actions or proceedings relating directly or indirectly to this Agreement or any of the Obligations shall be litigated in courts located within the State of Utah, Utah County, or such other court as Buyer may elect, in its sole discretion; (ii) consents to the jurisdiction and venue of any such court, irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement, and consents to service of process in any such action or proceeding by personal delivery or any other method permitted by law; and (iii) waives any and all rights Seller may have to object to the jurisdiction of any such court, or to, transfer or change the venue of any such action or proceeding.
- 16. Counterparts:** This Agreement may be executed in any number of counterparts and by different parties on separate counterparts and when executed and delivered are one Agreement.
- 17. Waiver of Right to Jury Trial, Judicial Reference:** BUYER AND SELLER HEREBY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL IN ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, ANY OTHER PRESENT OR FUTURE INSTRUMENT OR AGREEMENT BETWEEN BUYER AND SELLER, AND ANY CONDUCT, ACTS OR OMISSIONS OF BUYER OR SELLER OR ANY OF THEIR DIRECTORS, MEMBERS, PARTNERS, OFFICERS, EMPLOYEES, AGENTS, ATTORNEYS OR ANY OTHER PERSONS AFFILIATED WITH BUYER OR SELLER. BUYER AND SELLER ACKNOWLEDGE THAT THIS WAIVER IS A MATERIAL INDUCEMENT TO ENTER INTO A BUSINESS RELATIONSHIP, THAT EACH HAS ALREADY RELIED ON THE WAIVER IN ENTERING INTO THIS AGREEMENT AND THAT EACH WILL CONTINUE TO RELY ON THE WAIVER IN THEIR RELATED FUTURE DEALINGS.

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