

VILLAGE OF LOMBARD  
REQUEST FOR BOARD OF TRUSTEES ACTION  
For Inclusion on Board Agenda

<u>          </u>	Resolution or Ordinance (Blue) <u>          </u> <i>Waiver of First Requested</i>
<u>  X  </u>	Recommendations of Boards, Commissions & Committees (Green)
<u>          </u>	Other Business (Pink)

TO: PRESIDENT AND BOARD OF TRUSTEES

FROM: Timothy Sexton, Director of Finance

DATE: June 26, 2025 (COW)(B of T) July 17, 2025

TITLE: Authorization to Sign an Agreement with Elan/Wintrust Bank for Commercial Rewards Credit Card Program

BACKGROUND/POLICY IMPLICATIONS:

The Village currently has 30 individuals with Village-issued credit cards with an average monthly spend of \$35,972 per month. The Village has a Purchase Card Policy included in the Purchasing Manual that each cardholder must follow. In 2018, the Village changed credit card companies to First National Bank of Omaha (FNBO) which at that time was the program endorsed by the Village's primary banking service provider, Wheaton Bank and Trust, a subsidiary of Wintrust.

Wheaton Bank and Trust recently informed staff that Wintrust is now partnered with Elan Financial Services to offer credit card services to its customers. Elan Financial Services, a division of U.S. Bank, provides the credit card issuing and servicing platform for Wheaton Bank & Trust. This means that while Wheaton Bank & Trust provides the customer relationship and manages the account, Elan Financial Services handles the actual credit card processing, fraud protection, and other behind-the-scenes aspects.

Staff reviewed the Commercial Rewards Card program which offers accounting integrations, cash rebates, integrated expense policies, and the ability to increase the Village's credit limits if necessary for an emergency. There are no annual account fees, see the attached fee schedule and terms/conditions for additional information. If approved, the Village will cancel the current card program with FNBO.

Staff requests Village Board recommend approval for authorized signers to enter into an agreement with Elan Financial Services for credit card services.

Review (as necessary):

Village Attorney X	_____	Date _____
Finance Director X	_____	Date _____
Village Manager X	_____	Date _____

NOTE: All materials must be submitted to and approved by the Village Manager's Office by 12:00 noon, Wednesday, prior to the Agenda Distribution.

## Fee Schedule

<i>Benefits/Services/Coverage</i>	<i>Fees/Costs*</i>
Annual/replacement card	■ None
Monthly interest charges	■ None
Commercial Rewards website	■ None
Travel Accident Insurance/Auto Rental/Emergency Travel Services	■ None
Purchase security/extended protection	■ None
Non-sufficient funds fee	■ \$15.00 per instance
Delinquency fee	■ 2.5% (minimum \$2); Assessed by second billing cycle
Expedited Card Delivery	■ \$20.00 per shipment
Cash advances (if allowed)	■ 2.5% of cash advance amount; \$2.00 minimum
Foreign transaction fee	■ 2.5% of the transaction amount
Rewards	■ 1% rebate (quarterly paid with minimum spend of \$150,000) or points (\$1 = 1 point with multipliers) *(excludes large online retailer, common wholesale warehouse, and super big box)

Elan Financial Services

CONFIDENTIAL



# Terms and Conditions

## for the Elan Charge Card

This Charge Card Agreement (“**Agreement**”) is between the entity completing the Application as “**Company**” and Elan Financial Services (“**Elan**”). Company desires to retain Elan to provide charge card and account services (the “**Program**”). If Elan approves Company’s Application, the “**Effective Date**” of this Agreement will be the date the Application was submitted by Company.

Now, therefore, for and in consideration of the mutual promises contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, Company and Elan agree to the following:

1. **DEFINITIONS.** “**Account**” means a charge card, regardless of the medium, issued pursuant to this Agreement. “**Billing Cycle**” means the period of time from the date a Statement is generated until the next Statement is generated. “**Charge**” means any transaction posted to an Account that has a debit value. “**Card Network**” means, as applicable, one of the following Card Networks whose marks are contained on the cards issued under this Agreement: Visa U.S.A. Inc., Visa International, Inc., MasterCard International Incorporated or such other national card network with respect to which Elan becomes an issuer during the term of this Agreement. “**Identification Information**” means legal names, physical street addresses, taxpayer identification numbers, dates of birth or other information or documentation required by Elan to confirm the identity of any entity or person. “**Intellectual Property**” or “**Intellectual Property Rights**” means any patent rights, inventions, design rights, copyrights, database rights, trade secrets, trade names, trademarks, service marks, moral rights, know-how and any other similar rights or intangible assets recognized under any laws or international conventions, and in any country or jurisdiction in the world, as intellectual creations to which rights of ownership accrue, and all registrations, applications, disclosures, renewals, extensions, continuations or reissues of the foregoing now or hereafter in force. “**Obligations**” means all Charges, fees, and any other activity posted to an Account. “**Participant**” means any entity wholly or majority owned or controlled (which is at least 51% or more of voting rights) by Company that Company authorizes and Elan approves for participation in the Program through execution of a Participant Agreement. “**Statement**” means, with respect to one or more Accounts, a periodic listing of all Obligations and payments posted to such Accounts.
2. **PRODUCTS AND SERVICES.** Elan operates the Program pursuant to which it issues Accounts that can be used to make Charges at participating merchants and agrees to provide Company access to the Program. Elan agrees to provide Company access to its online portal that allows Company to, among other things, review and pay Statements, establish and modify spend controls, and obtain various reports in connection with the Program.
3. **FEES AND BILLING.**
  - 3.1. **Fees.** Elan may charge Company the fees set forth in Schedule 1 of this Agreement. Failure of Elan to apply any fee or charge set forth in this Agreement, at any time, does not preclude Elan from ever applying such fee or charge.
  - 3.2. **Billing.** Company will receive an electronic Statement at the end of Company’s Billing Cycle. Company shall pay Elan the amount due as directed on the Statement. Company shall pay Elan using an electronic payment method approved by Elan. Company shall notify Elan of all disputes regarding Charges or billings for the Program within 60 days of the Statement date, identifying the specific items and the basis for such dispute. All disputes must be submitted in accordance with the Card Network operating rules and regulations. If the amount shown on a Statement as owing under an Account (other than those subject to a bona fide dispute) has not been paid in full by the issuance of the next Statement, the Account is delinquent and Elan may suspend the Account. Elan may recover any reasonable legal fees and other collection expenses. If an Account is used for Charges in a currency other than the billing currency, the amount shown on the Statement for that Charge will be shown as a single amount that is the aggregate of (i) the amount of the Charge converted at the applicable exchange rate and (ii) the “Foreign Transaction Fee” on such amount as set forth in Schedule 1. Due to fluctuations in foreign exchange rates, a credit may not be in the same amount as the original Charge.
4. **LIABILITY.** Company shall only be permitted to request the issuance of Accounts in the name of the following parties: (i) in Company’s or Participant’s own name, (ii) in the name of any Company or Participant employee, (iii) in the name of any individual that is acting directly or indirectly as an independent contractor of Company or Participant, and (iv) in the name of any other individual provided on a temporary basis and so long as such individual has a bona fide connection to Company or Participant (i.e. a temporary card issued to an employee candidate). Company shall not request the issuance of Accounts for its subsidiaries (or employees of such subsidiaries) that are not Participants. Elan may refuse to issue an Account to any party that cannot satisfy Elan’s regulatory requirements referenced in Section 16 herein.

Except as expressly provided in this Agreement, Company is liable for all billed transactions and other Charges made by Company, its Participants, and its Account holders, including for (i) any Account holder misuse of an Account; and (ii) Charges declined or approved as a result of inaccurate merchant category codes used by a merchant.
5. **FINANCIAL INFORMATION AND CREDIT.** Company shall deliver to Elan its fiscal year-end financial statements as soon as available, but not later than 120 days following the end of Company’s fiscal year. Upon request by Elan, Company shall deliver additional information regarding its business, operations, affairs, and financial condition, including reviews or audits of fiscal year-end financials performed by certified public accountants and Company prepared quarterly financial statements. Elan at its sole discretion will set credit limits or controls associated with this Program and may, without prior notice to Company, modify such limits or controls. Elan will endeavor to promptly provide notice to Company of any decrease in a credit limit. Company shall make a payment to Elan within ten days of such notice sufficient to reduce the Obligations to an amount equal to, or less than, the revised credit limit.
6. **SECURITY AND CONFIDENTIALITY.**
  - 6.1. Either party may receive or otherwise have access to Secured Information. “**Secured Information**” means information regarding Accounts, passwords, personal identification numbers, and other sensitive information or Confidential Information of either party. Each party shall maintain an information security program designed to (i) ensure the security, integrity and confidentiality of Secured Information; (ii) protect against any anticipated threats or hazards to the security or integrity of such Secured Information; (iii) protect against unauthorized

- access to or use of such Secured Information that could reasonably result in harm to the person or entity that is the owner, user or subject of the Secured Information; and (iv) ensure the proper disposal of such Secured Information. Each party shall secure and protect the other's Secured Information using at least the same degree of care as it uses to secure and protect its own Secured Information, but no less than a reasonable degree of care as determined by the nature of this Agreement and the highest industry standards to prevent the unauthorized use, disclosure, or duplication of Secured Information. At a minimum, Company will install and maintain commercially reasonable cybersecurity defenses against any feature, routine, or device that is intended or designed to (i) disrupt the operation of any Elan owned or licensed software or system including any timeout functionality; (ii) cause any Elan owned or licensed materials, software, or system to be destroyed, altered, erased, damaged or otherwise made inoperable; or (iii) permit any person or entity to destroy, alter, erase, damage or otherwise render inoperable any Elan owned or licensed materials, software, or system, including, but not limited to, any cyber-attacks such as any computer virus, trap door, back door, time bomb, malicious program or mechanism. Furthermore, Company will perform routine hygiene on their systems to ensure appropriate use of software locks, routine password checking and CPU serial number checking.
- 6.2. Each party may have access to, and each party may provide to the other party, information the owner of such information regards as confidential or proprietary. "**Confidential Information**" includes information of a commercial, proprietary, or technical nature, whether now in existence or hereafter created. Confidential Information includes, but is not limited to, the following: (i) information marked as "confidential" or similarly marked, or information a party should, in the exercise of reasonable judgment, recognize as confidential; (ii) Intellectual Property of each party; (iii) Identification Information; (iv) the business, financial, or technical information of each party and its respective affiliates; (v) each party's business objectives, financial results, technological developments and other similar proprietary information and materials; and (vi) notes, memoranda, analyses, compilations, studies and other documents, whether prepared by either party or for either party, which contain or otherwise reflect Confidential Information. Confidential Information does not include information that (i) is already rightfully known to the recipient at the time it obtains Confidential Information from the disclosing party; (ii) is or becomes generally available to the public other than as a result of disclosure in breach of this Agreement or any other confidentiality obligations between the parties; (iii) is received on a non-confidential basis from a third party reasonably believed to be authorized to disclose such information without restriction and without breach of this Agreement; (iv) is contained in, or is capable of being discovered through examination of, publicly available records or materials; or (v) is developed by Elan or Company without the use of any proprietary, non-public information provided by the other party.
- 6.3. Elan may (i) use and disclose Company's Confidential Information to the extent necessary to maintain compliance with Card Network operating rules and regulations, applicable law or regulatory authorities; or (ii) use and disclose non-identifying data to any entity or third party to the extent such data is aggregated, summarized, or otherwise presented in a manner that does not directly or indirectly identify such data as attributable to Company, its affiliates, or Account holders. Portions of Company's Account and transaction data are captured by third parties, including, but not limited to, the Card Network, third-party service providers, merchants, and merchant processors during the course of normal business operations. All such third parties shall not be considered an agent of Elan for purposes of this Section 6. In the event the recipient receives notice of any order by a court or governmental agency to disclose any Confidential Information of the disclosing party, the recipient shall promptly notify the disclosing party so the disclosing party may seek an appropriate protective order. Notwithstanding the foregoing, Elan may be prohibited by applicable law or a governmental agency from disclosing a request for Confidential Information and under such circumstances Elan is excused from notifying Company of any disclosure of Confidential Information. Each party shall disclose Confidential Information only to the extent required by applicable law or regulatory authority.
- 6.4. Each party shall hold Confidential Information in confidence and disclose Confidential Information only to those employees, agents, subcontractors or individual contractors whose duties reasonably require access to such information. Each party must protect Confidential Information using at least the same degree of care as it uses to protect its own Confidential Information, but in no event less than a reasonable degree of care, to prevent the unauthorized use, disclosure, or duplication (except as required for backup systems) of such Confidential Information. Each party shall cause its agents, employees, subcontractors and independent contractors, to maintain Confidential Information in confidence and disclose such Confidential Information only for the purpose of performing its obligations, or exercising or enforcing its rights, under this Agreement, or as otherwise expressly permitted by this Agreement.
- 6.5. Upon termination of this Agreement, each party shall immediately, upon election of the disclosing party, return or destroy all Confidential Information in its direct or indirect possession or control that belongs to the disclosing party; provided, that Elan may retain particular transaction data with respect to the Accounts as is necessary to perform its billing functions and to maintain compliance with the Card Network operating rules and regulations. Upon written request, the recipient will provide the disclosing party written certification of destruction of Confidential Information. Any Confidential Information maintained in an electronic format shall be returned to the disclosing party in an industry standard format or, at the option of the disclosing party, deleted and removed from all computers, electronic databases and other media. Each party may retain one archived copy of Confidential Information solely for compliance purposes and subject to the terms of this Agreement.
- 6.6. Company shall not make any "case study," testimonial, press release, or other public announcement regarding this Agreement or any activities performed hereunder, unless required to do so by applicable law. Company and its affiliates shall obtain the prior written approval of Elan's Media Relations department for any press release that Company seeks to release that contains Elan's identity. Company shall provide Elan at least 15 business days to review and respond to any such request for approval.

## 7. DEFAULT.

- 7.1. Company shall be in default upon the occurrence of any of the following events (each a "**Company Default**") (i) any failure to make a payment on any Account; (ii) a breach of any of its representations, warranties, covenants or other obligations under this Agreement; (iii) any default of any other agreement between Elan and any of Company, a Participant, or Company's affiliate that has not been cured in the time specified in the applicable agreement; (iv) the filing of a bankruptcy or insolvency proceeding, the appointment of a receiver or trustee for benefit of creditors, or the entry into an arrangement with its creditors by Company, a Participant or any guarantor of Company's obligations hereunder (a "**Guarantor**"); (v) a Guarantor's merger, amalgamation or sale or transfer of all or substantially all of its assets, in each case without consent of Elan; or (vi) a Guarantor, if any, revokes its guaranty of Company's obligations.
- 7.2. Elan shall be in default upon the occurrence of any of the following events (each a "**Elan Default**") (i) any of Elan's representations or warranties fail to be true and correct at any time during this Agreement; (ii) Elan breaches any obligations or covenants set forth in this Agreement; or (iii) the filing of a bankruptcy or insolvency proceeding, the appointment of a receiver or trustee for benefit of creditors, or the entry into an arrangement with its creditors by Elan.
- 7.3. Company shall cure any Company Default, arising under Section 7.1(i) within five days after the payment became delinquent. Company shall cure any Company Default, arising under Section 7.1(ii) or (iii), within 30 days after notice of a Company Default. Notwithstanding the



- foregoing, a Company Default under Section 16 and a Company Default arising under Sections 7.1 (iv) – (vi) shall not be entitled to notice or the right to cure and Elan may immediately terminate the Agreement as a result of any such default. Elan shall cure any Elan Default arising under Section 7.2(i) or (ii) within 30 days after notice of an Elan Default. Elan shall not be entitled to cure an Elan Default under Section 7.2(iii).
- 7.4. Upon the occurrence of a Company Default, after the notice and cure period have run, if any, without cure, in addition to any other remedies at equity or law, Elan may: (i) immediately terminate this Agreement or suspend or cancel any Accounts; (ii) retain and will not be required to pay Company any rebates or other amounts due pursuant to this Agreement (other than a return of prefunded amounts not applied to outstanding obligations); and (iii) demand and recover payment of any damages directly related to any Company Default, including any fees or losses sustained by Elan, and any reasonable court and legal costs incurred by Elan. If Company violates its obligations under Section 6 (Security and Confidentiality) or Section 9 (Intellectual Property), in the addition to the foregoing, Elan shall be entitled to injunctive relief in its favor and to specific performance without proof of actual damages and without the requirement of the posting of any bond or similar security, because Elan's remedies at law may be inadequate to protect Elan against immediate and irreparable harm caused by any anticipated or actual breach of such obligations, and because damages resulting from such a breach may be difficult to ascertain.
- 7.5. Upon the occurrence of an Elan Default, after the notice and cure period have run, if any, without cure, in addition to any other remedies at equity or law, Company may: (i) immediately terminate this Agreement; and (ii) demand and recover payment of any damages directly related to any Elan Default.
8. **TERM, TERMINATION AND SUSPENSION.** This Agreement will remain in effect for five years measured from the first day of the month following the Effective Date (the “**Agreement Term**”). This Agreement will automatically extend at the end of the Agreement Term for successive one-year periods, unless either party provides at least 180 days written notice of termination prior to the expiration of the then current term. During the Agreement Term or any successive term thereafter neither Company nor Elan may terminate this Agreement, except by mutual consent or as otherwise provided under this Agreement.
- 8.1. In addition to any rights arising under Section 7.4, Elan may terminate this Agreement at any time for any reason by providing upon thirty (30) days' prior written notice.
- 8.2. Elan may immediately (i) suspend or cancel any Account if Elan is unable to verify the identity of the Account holder or owner of the Account, based on the Identification Information submitted to Elan, or if Elan is unable to verify providing services to an Account holder or Participant does not pose a risk to Elan of violating any applicable law, statute, or regulation; and (ii) terminate this Agreement if Elan, in its sole discretion, determines provision of services under this Agreement is counter to any existing, new, or amended law, regulation, regulatory interpretation, anticipated regulatory interpretation, or any enforcement of existing, new, or amended law, regulation, regulatory interpretation, or anticipated regulatory interpretation.
- 8.3. The following provisions shall survive termination of this Agreement: Section 3 (Fees and Billing); Section 6 (Security and Confidentiality); Section 7 (Default); Section 9 (Intellectual Property); Section 11 (Indemnification); Section 12 (Limitation of Liability); Section 13 (Notices); Section 15 (Governing Law); Section 26 (Set-Off); and Section 28 (Waiver of Jury Trial). Without limiting or affecting the foregoing, any provision of this Agreement that expressly or by implication is intended to come into or continue in force on or after termination of this Agreement shall survive termination and shall remain in full force and effect.
9. **INTELLECTUAL PROPERTY.**
- 9.1. Elan, or its affiliates, is the owner or licensee of any and all Intellectual Property or other proprietary right associated with Elan products and services including, but not limited to, the Program, related materials, and derivatives. Company shall not use, copy, redistribute, publish, or retransmit any portion of Elan products or Intellectual Property without the express written consent of Elan. Company shall not change or delete any proprietary notices contained on or in any written or electronic materials supplied by or through Elan. Nothing in this provision grants any ownership right to Company. Elan remains the sole owner of any and all its Intellectual Property.
- 9.2. Subject to Company's compliance with this Section 9, Elan grants Company and any Participant a non-exclusive, non-transferrable license to use and access Accounts on Elan's or its third-party licensor's software. Elan or its third-party licensors may, from time to time, provide updates of the software. The updates replace the software initially licensed to Company and do not constitute an additional license to use the software. Company shall permit Elan reasonable access to any records, systems, or operations to ensure Company is in compliance with the license granted in this Section 9.
- 9.3. Elan, or its third-party licensors, retains all rights, title, and ownership of the Accounts (but not the Account data) and software, any documentation provided with the Accounts or software, and any works derived from the software that contain all or part of the software or Elan or its third-party licensors' Intellectual Property. Elan asserts the Accounts and software is protected by copyright and may be protected by patent, trademark, or other proprietary rights and laws of the United States or other jurisdictions. Any property rights not granted in this Section 9 are reserved by Elan or its third-party licensors. Company and Participant may not (i) reverse engineer, decompile, or disassemble the software or bypass or disable any copy protection or encryption; (ii) reformat or make derivative works from the software; (iii) transmit all or any part of the software by any means, media, or manner that would present the risk of unauthorized access, except as provided by Elan; (iv) disclose part or all of the software to any third parties, except as explicitly authorized by Elan; (v) use all or part of the software to advise, consult, or otherwise assist any third parties except as explicitly authorized by Elan; and (vi) otherwise use the software in any manner that would compete in any way with Elan's business.
10. **REPRESENTATIONS AND WARRANTIES.** Each party respectively represents and warrants, at all times during this Agreement, that (i) this Agreement is valid, binding, and enforceable against itself; (ii) entry into this Agreement and the performance of the obligations hereunder are within such party's powers; have been authorized by all necessary action; do not require action by or approval of any governmental or regulatory body, agency, or official; and do not constitute a breach of any material agreement of such party; (iii) entry into this Agreement and the performance of the obligations hereunder will not cause a material breach of any duty arising in law or equity; (iv) the transaction contemplated by this Agreement is within the scope of the normal course of business, and does not require further authorization for such party to be bound by this Agreement; (v) it possesses the financial capacity to perform all of its obligations under this Agreement; and (vi) it shall comply with all requirements of this Agreement and all applicable laws, rules, regulations, and requirements of governmental authorities related to the Program. Company represents and warrants, at all times during this Agreement, that (i) the material information provided by Company to Elan is true, complete, and accurate; (ii) Company shall use Accounts, and shall instruct its Account holders to use Accounts, solely for business purposes; (iii) the consent of no third party, including, without limitation, a lender, is required with respect to its entry into this Agreement, or if any such third party consent or approval is required, Company has obtained any and all such consents or approvals; (iv) Company shall comply with, and shall cause its affiliates, Participants and Account holders to



comply with, (A) the terms and conditions of any applicable Account holder Agreement or End User License Agreement that governs the use of an Account (collectively, the “**End User Agreements**”) (which Elan may amend from time to time without notice to the Account holder, but Elan will provide Account holders with notice of any material change to the End User Agreements), (B) Card Network operating rules and regulations; and (C) any applicable automated clearinghouse operating rules or regulations, including, without limitation, the National Automated Clearing House Association Operating Rules, Guidelines of the Canadian Payments Association (Payments Canada) operating rules and guidelines (if applicable), or any related or successor operating rules; and (v) Company will not, in connection with the services contemplated by this Agreement or in connection with any other business transactions involving Elan, receive compensation, make, offer, or promise to make any payment or transfer anything of value, directly or indirectly if such compensation, payment, or transfer would have the purpose or effect of public or commercial bribery, acceptance of or acquiescence in extortion, kickbacks, or other unlawful or improper means of obtaining business, in breach of any applicable laws, statutes, regulations, and codes relating to anti-kickback, anti-bribery, and anti-corruption. This paragraph shall not, however, prohibit normal and customary business entertainment of nominal value or the giving of business mementos of nominal value.

Company represents that it or its Participants has received any and all necessary consents from Account holders prior to providing Elan with any Account holder Identification Information. Elan or its third party service provider may desire to send communications, including autodialed, pre-recorded or artificial voice messages, SMS text messages, and/or other electronic messages to Account holders related to servicing Company's Accounts. Examples of such communications include reminding Account holders that a payment has not been received by Elan, or to provide other information related to the Account holder's Account such as potential or actual fraud, identity theft, data security alerts or other transactional messages (collectively, “**Transactional Messages**”). By requesting an Account to be established for an Account holder, Company represents and warrants to Elan that it (or its Participants) has obtained such Account holder's express consent to receive Transactional Messages from Elan or its third party service provider to the telephone number(s) (landline or wireless) or email addresses provided by Company or such Account holder to Elan in connection with establishing the Account for the Account holder, whether or not such messages result in charges imposed by a communications provider.

**Except as expressly provided herein, Elan makes no warranties, express or implied, in law or in fact, including, without limitation, the implied warranties of fitness for a particular purpose and of merchantability, either to Company or to any other party, in connection with this Agreement, or with respect to software products provided or made available to Company for its use by Elan, in connection with this Agreement.**

11. **INDEMNIFICATION.** Each party (the “**Indemnifying Party**”) agrees to indemnify and hold harmless the other party and its agents, officers, directors, employees, contractors and subcontractors (collectively, the “**Indemnified Parties**”) from any third-party claims, actions, demands, damages, injuries, injunctions, suits, fines, penalties, costs, and expenses and liability whatsoever (including reasonable legal fees), arising out of (i) the infringement by Indemnifying Party of any Intellectual Property or other property or contract right of any Indemnified Party; (ii) the violation of any law, rule, regulation or authority by Indemnifying Party or any third party using the Program through the Indemnifying Party; (iii) any gross negligence or intentional misconduct of Indemnifying Party or any party using the Program through the Indemnifying Party, including, but not limited to, transmission of incorrect, illegible, duplicate, or fraudulent data; or (iv) any Company Default or Elan Default, as applicable. The Indemnified Party shall notify the Indemnifying Party of any claim that is asserted and each action or suit that is filed or served, and provide the Indemnifying Party with a copy of any written documentation received in relation with the claim, for which the Indemnified Party is seeking indemnification pursuant to this Section 11, provided, however, that failure to give such notice shall not relieve the Indemnifying Party of its indemnification obligations. The Indemnifying Party may thereafter assume control of such claim, *provided that* the Indemnified Party shall have the right to participate in the defense or settlement of such claim. The Indemnified Party may employ counsel at its own expense to assist with any such claim; however, if such counsel is necessary because of a conflict of interest of either the Indemnifying Party or its counsel or because the Indemnifying Party does not assume control, the Indemnifying Party shall bear the expense of such counsel. The Indemnifying Party may not settle any claim, admit to any liability, or consent to any judgment with respect thereto without the consent of the Indemnified Party (which consent may not be unreasonably withheld, delayed or rejected).
12. **LIMITATION OF LIABILITY.** Elan and its affiliates are not liable for any consequential, special, indirect, or punitive damages of any nature (including lost profits) regardless of whether such parties have been advised of the possibility of such damages. Elan is not liable for any damages under the Program that exceed the fees Elan collected during the 12 months immediately preceding the alleged liability.
13. **NOTICES.** All notifications, consents or approval given or required under this Agreement must be in writing. The parties will deemed a notice received (i) two days after the date of mailing if sent by overnight, registered, or certified mail, return receipt requested, or (ii) one day after the date of mailing if sent by a national overnight courier service. Any other written notice is deemed received upon receipt, which in the case of email communications shall occur upon the sender's receipt of (i) a non-automated acknowledgement from the intended recipient or (ii) the first business day after an automated acknowledgement from the intended recipient such as by the “return receipt requested” function. Notices shall be sent to the following addresses: to Elan at Elan Financial Services, Corporate Payment Systems, Mail Code EP-MN-L29C, 200 S. 6<sup>th</sup> St., Minneapolis, MN 55402, U.S.A. Attn: CPS Contract Manager (or in the case of email, to LegalNotices@elancard.com) and to Company at the address (or email address) stated in the Application. Either party may change its notification address at any time by written notice to the other.
14. **ASSIGNMENT AND TRANSFER.** Company shall not assign or otherwise transfer or delegate its rights, obligations, or duties under this Agreement without Elan's prior written approval at its sole discretion. For the purposes of this provision, “transfer” refers to a merger, acquisition, consolidation, divestiture, change in control, asset transfer, amalgamation, proceeding under bankruptcy laws, or any other transfer, reorganization, or sale (in whole or in part) of Company. To the fullest extent not prohibited by applicable law, Company will notify Elan in advance of any material change (and if prohibited, within 15 days after such change) to any information provided to Elan concerning Company's primary business, legal organization (e.g., partnership, corporation, etc.) or any change resulting from a transfer as described above. Company shall promptly provide any information requested by Elan associated with the request for approval.
15. **GOVERNING LAW AND VENUE.** The laws of the state of Minnesota and applicable federal laws and regulations of the United States, apply to any dispute arising out of this Agreement, its subject matter or its formation. The parties shall exclusively bring any dispute or claim arising out of or related to this Agreement before a state or federal court in the city of Minneapolis, Minnesota. Each party irrevocably waives any objection it may now or hereafter have as to the venue of any such dispute or claim brought in such a court or that such court is an inconvenient forum.





16. **COMPLIANCE WITH APPLICABLE STATUTES AND REGULATIONS.** The parties will maintain compliance with all statutes and regulations applicable to the products and services contemplated under this Agreement, including all economic sanctions laws, anti-money laundering laws, and trade restrictions imposed by the United States, United Nations, European Union or Canada, and Elan policies related thereto. Elan may require Identification Information for Company, its affiliates, its Participants, and any authorized signers, beneficial owners, Account holders or directors of Company and its affiliates and Participants. Company shall promptly provide any such required Identification Information to Elan.
17. **FORCE MAJEURE AND EXCUSABLE DELAY.**
- 17.1. Except for payment obligations under this Agreement, neither party is responsible for performance delays or failures resulting from acts of God, acts of civil or military authority, fire, flood, strikes, war, epidemics, shortage of power, telecommunications or Internet service interruptions or other acts or causes reasonably beyond the control of that party. The party suffering the force majeure event will (i) implement its applicable disaster recovery plan to the extent appropriate, and practicable; (ii) give the other party prompt notice of the occurrence of a force majeure event; (iii) use diligent efforts to re-commence performance as promptly as commercially practicable pursuant to its disaster recovery plan; and (iv) provide periodic updates to the other party regarding its efforts to re-commence performance, until performance has re-commenced in accordance with this Agreement.
- 17.2. Either party may terminate this Agreement, upon written notice to the other, if the non-terminating party is unable to perform a material portion of its obligations, as a direct result of a force majeure event, for more than 30 consecutive days. Delay in either party's performance is excused to the extent its performance is delayed solely due to an act or omission of the other party.
18. **CHANGE IN TERMS OF THIS AGREEMENT.** Elan may change the terms and conditions of this Agreement at any time upon written notice to Company. If permitted by applicable law, the changes will apply to existing Account balances as well as future transactions. If Company refuses to accept the changes, Company must notify Elan, in writing and within 30 days from the date of the notice, that it refuses to accept the changes and elects to terminate this Agreement. Should Company terminate this Agreement pursuant to this Section 18, all Obligations will immediately become due and payable by Company to Elan, according to the terms of this Agreement. A Company request to Elan to take an action that is not covered by the terms of the Agreement may be honored by Elan in its sole discretion. Elan's compliance with any such requests on one or more occasions shall not establish a course of dealing or conduct upon which Company may rely or bind Elan.
19. **SEVERABILITY.** Should any provision of this Agreement be declared invalid for any reason, such declaration will not affect the validity of any other provision of this Agreement, which will remain in full force and effect, as if this Agreement had been executed with the invalid provision eliminated. The parties shall use their commercially reasonable efforts to agree upon a valid substitute provision in accordance with the purpose of this Agreement and the parties' intent.
20. **NO WAIVER.** No failure or delay, by either party to exercise any right, power, or privilege provided under this Agreement or by applicable law, will operate as a waiver thereof; nor will any single or partial exercise of any such right, power, or privilege preclude any future exercise of any other right, power, or privilege.
21. **RELATIONSHIP OF THE PARTIES.** The relationship between the parties is that of independent contractors. Nothing contained in this Agreement creates an agency, partnership, joint venture, or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party has authority to contract for or bind the other party in any manner whatsoever.
22. **RELATIONSHIP BETWEEN ELAN AND THIRD PARTY SERVICE PROVIDERS.** Elan may enter into agreements with third parties, for the purpose of marketing and advertising Elan's products and services and providing other services to Elan. Elan may compensate the third parties based on revenue generated instead of a flat fee for such services. The products or services provided to Company pursuant to this Agreement may include products or services subject to such compensation paid to third parties. To the extent Company was referred to Elan by such third party, Company authorizes Elan to release Company's Confidential Information to such third party (and its agents) for purposes of communicating or computing any revenue or fees that may be due from Elan to such third party.
23. **RELATIONSHIP WITH TRAVELBANK.** Company may elect to engage the services of Elan's affiliate Travelator, Inc. d/b/a TravelBank ("TravelBank"). If Company engages the services of TravelBank, Company authorizes and directs Elan on an ongoing basis to (i) deliver Data to TravelBank to facilitate such services and (ii) speak with representatives of TravelBank about the Data generally. For the purposes of this paragraph, "Data" means Company's transaction data related to and maintained under the Agreement. Elan has the right to suspend or terminate delivery of the Data at any time, including during the continuance of any default under the Agreement or in the event such Data transmission or delivery would violate applicable law. In the event Company no longer desires to have its Data released to TravelBank, Company shall affirmatively notify Elan in writing of such desire.
24. **DELEGATION.** Elan may delegate duties herein to one or more third parties without Company approval or consent, so long as, Elan remains responsible for the conduct of and payment to such third parties.
25. **NO THIRD PARTY BENEFICIARIES OR CLAIMS.** Except as stated in this Agreement, and with reference to any successors or assigns, any services provided under this Agreement are for the sole and exclusive benefit of Company and Participants, if any, and nothing in this Agreement will be deemed to create any third party beneficiary rights in any person or entity not party to this Agreement.
26. **SET-OFF.** Elan may set-off any amounts Company owes to Elan pursuant to this Agreement or any other agreement between the parties or their affiliates against any amounts due to Company by Elan or its affiliates.
27. **INCORPORATION.** The following are incorporated into this Agreement by reference as if set out at length:
- 27.1. Schedule 1 – Fees.
- 27.2. Schedule 2 – Rebates.
28. **WAIVER OF JURY TRIAL.** Company and Elan hereby waive all rights to trial by jury in any proceeding relating to this Agreement.



**Schedule 1 – Fees**

<b>FEES</b>	
<b>Description</b>	<b>Fee</b>
<b>Annual Account Fee</b>	\$0.00
<b>Cash Advance Transaction Fee</b>	2.5% (minimum \$2.00)
<b>Delinquency Fee</b> A charge will be imposed on each Delinquency Assessment Date* for Past Due Amounts**	2.5% of the Past Due Amount (minimum \$2.00)
<b>Expedited Card Delivery Fee</b>	\$20.00, per delivery
<b>Foreign Transaction Fee</b>	2.5%
<b>Logo Setup Fee</b>	\$300.00
<b>Non-Sufficient Funds Fee</b>	\$15.00, per occurrence
<b>Statements</b> Paper Statement fee Statement copy fee	\$12.00 annually, per Account \$5.00 per copy

\*The "Delinquency Assessment Dates" for a particular Amount Due set forth in a Statement are (i) the last day of the second Billing Cycle (with the first Billing Cycle starting on the date of the applicable Statement), and (ii) for the third and each subsequent Billing Cycle the assessment date is (A) the last day of the Billing Cycle if the Billing Cycle is weekly or bi-weekly or (B) the 14th day of the Billing Cycle if the Billing Cycle is monthly.

\*\*The "Past Due Amount" is the portion of the Amount Due set forth in a Statement that is not paid by the applicable Delinquency Assessment Date.