**DATED THE DAY OF XVXV**

**XXXXXXX KENYA LIMITED**

**-to-**

**GGGGGGGGG LIMITED**

**AGREEMENT**

**- for -**

**ATM SERVICES**

**DRAWN BY :**

**XXXXXXXXXTHIS AGREEMENT** is made the day of XVXV

**BETWEEN:**

**GGGGGG LIMITED**, a company incorporated in Kenya with its registered office at (the “**Customer**”) of the first part; **AND**

**XXXXXX``````````````````````` KENYA LIMITED**, a company incorporated in Kenya with its registered office at (“**Facilitating Bank**”) of the other.

**IT IS AGREED** as follows:

# **Interpretation**

## In this Agreement (which expression includes the schedules and any attachments hereto) the following words and phrases shall, unless the context otherwise requires, have the following meanings:

**Agreement** means this Agreement, including any schedules and attachments hereto which are expressly incorporated by reference and made a part hereof.

**ATM** means any one of the 4 (four) Automatic Teller Machines located on the Premises and which shall be designated to issue authorised payments to Cardholders.

**Cardholder** means an individual or company authorised to receive payments from the Customer through the Payment System.

**Charges** means the amounts charged for the Services as set out in the Charges Schedule (Schedule A).

**Host Banking System**  means the banking system software owned by or licensed to the Facilitating Bank, which will be interfaced with the Payment Software and ATMs to create the Payment System.

**Master Corporate Account**  means the Customer’s account held at the Facilitating Bank from which payments will be made to Cardholders.

**Operation Specification**  means the specification of the Services as set out in the Operation Specification Schedule (Schedule C).

**Payment Software** means the financial switch software supporting the Payment System.

**Payment System** means the infrastructure comprising the Host Banking System, the Payment Software and 4 (four) ATMs located on the Premises and designated as follows to issue authorised payments to Cardholders: Three (3) for casual staff and One (1) for farmers.

**Premises** means the premises designated by the Customer as the site for installation of the ATMs.

**Project Manager** means the representative designated by each party and authorised to make and communicate decisions relating to the Services and this Agreement.

**Project Plan** means the project plan for the provision of the Services set out in the Project Plan section of the Services Schedule (as amended from time to time pursuant to this Agreement).

**Services** means the activities to be undertaken by the Facilitating Bank pursuant to the terms of this Agreement, including but not limited to operation, maintenance and management of the Payment System as more particularly described in the Services Schedule (Schedule B).

**Third Party Supplier** means any party contracted by the Facilitating Bank in connection with the provision of goods or services necessary to support the Services and/or the Payment System, including ATM installation and maintenance, cash reloading communications and card production.

## In this Agreement, unless the context otherwise requires, any reference to:

(a) the singular includes the plural and vice versa;

(b) a person includes reference to a body corporate or other legal entity;

(c) any written law includes that law as amended or re-enacted from time to time;

(d) any agreement or other document includes that agreement or other document as varied or replaced from time to time;

(e) a clause is to the relevant clause of this agreement;

(f) any party includes that party’s successors and assigns.

## Clause headings are inserted for convenience only and shall be ignored in construing this agreement.

# **Services**

## The Facilitating Bank will ensure the installation of the Payment System at the Premises, and otherwise perform the Services, so that:

### the Payment Software performs in accordance with the Operation Specification;

### the Payment Software interfaces with the Facilitating Bank’s Host Banking System and the ATMs as per the Operation Specification;

### the ATMs’ functionality is as per the Operation Specification.

## Once installation is completed, the Facilitating Bank will:

### contract, coordinate and manage all Third Party Suppliers associated with the installation and maintenance of the Payment System, including, but not limited to:

i. procuring and purchasing 4 (four) ATMs in accordance with the requirements of the Payment System (which number may be increased or reduced from time to time in accordance to Clause 13 of this Agreement) and designated to issue payments as follows: Three (3) for casual staff and One (1) for farmers;

ii. coordinating third-party cash handlers, to ensure that the ATMs are stocked with cash sufficient to issue all payments due to Cardholders;

iii. causing the initial set of ATM cards agreed upon by the parties to be produced and delivered to the Customer together with the relevant PIN numbers for each card.

iv. causing subsequent card to be produced, issued, maintained, cancelled and replaced at the Customer’s expense, as required for use by all Cardholders authorised to use the Payment System;

v. crediting Cardholders’ ATM cards according to the authorisation, security and reconciliation procedures established in agreement with the Facilitating Bank and the Customer; and

vi. maintaining the hardware, networks and equipment so as to operate at a standard reasonably comparable to national standards.

### establish and maintain the Master Corporate Account in accordance with normal banking procedures;

### promptly authorise credit onto each ATM card against cash held in the Master Corporate Account;

### reconcile the Master Corporate Account with all Cardholder rosters and ATM transactions on a daily basis; and

### monitor and manage the Master Corporate Account according to the authorisation, security and reconciliation procedures agreed with the Customer.

## The Facilitating Bank will provide the Services diligently, with reasonable kill and care and using suitably skilled and appropriately experienced personnel.

# **Obligations of Customer**

## The Customer will:

### undertake, at its own expense, all civil and other work requested by the Facilitating Bank to prepare the site for installation and operation of the Payment System, including but not limited to, establishment of communication links between the ATMs and the Payment Software;

### request the Facilitating Bank to introduce to them to any Third Party Supplier and the Customer shall enter into appropriate Service Level Agreements with the Third Party Suppliers contracted by the Facilitating Bank to enable the Customer perform its obligation under 3.1.1 above. For the purpose of this sub-clause, the Customer agrees and confirms that with regard to some of the obligations placed on the Facilitating Bank under the Agreement, the same shall be carried out through the Third Party Suppliers with whom the Customer shall have entered or is about to enter into appropriate Service Level Agreements and that the Facilitating Bank shall be deemed to have performed its obligations thereunder and the Customer shall have no claim whatsoever against the Facilitating Bank with regard to the same.

### be responsible for the external cleaning and dusting of the ATMs and shall at all material times ensure that the same are kept in the environmental conditions recommended by the manufacturer of the machines, and which shall be supplied by the Facilitating Bank.

### within reasonable time (not exceeding two (2) hours), in the event of any malfunction or breakdown of the ATMs at any of the sites, inform the agent and or agents of the Facilitating Bank responsible for monitoring the performance of the ATMs and thereafter inform the Facilitating Bank who shall in turn inform the relevant Third Party Supplier to ensure that the malfunction and/or breakdown is rectified within reasonable time.

### provide, at its own expense, for the security and safety of the Premises, the Cardholders and any third parties on the Premises, and of the ATMs against vandalisation and/ or any damage whatsoever to the ATMs and shall indemnify and keep indemnified the Facilitating Bank against any and all losses or costs relating such vandalisation and/ or damage to the ATMs or the Premises thereto;

### ensure that the Master Corporate Accounts have sufficient funds at all times to issue all payments due to Cardholders;

### ensure that the Cardholders’ records are promptly supplied to the Facilitating Bank and updated on an ongoing basis;

### ensure that the daily payment instructions are promptly supplied to the Facilitating Bank within its working hours as provided hereinunder to facilitate crediting of ATM Cardholders accounts in time:

Mon- Fri 9am to 4 pm

Sat 9am to 1pm

### pass electronic files as appropriate to the Facilitating Bank to facilitate crediting of ATM cards;

### reconcile records and accounts according to the authorisation, security and reconciliation procedures agreed with the Facilitating Bank;

### notify the Facilitating Bank of any errors or inconsistencies within 7 (seven) days of the date of the subject transaction; and

### maintain throughout the term of this Agreement with an insurer of good repute indemnity insurance covering its obligations and liabilities under this Agreement.

## The Customer having already entered into or about to enter into appropriate Service Level Agreements with the relevant Third Party Suppliers hereby agrees and confirms that it shall be responsible for the following activities after the initial set of ATM cards have been supplied to it by the Facilitating Bank:

### Issuance of the ATM cards to the Cardholders together with the relevant PIN numbers.

### Ensure the safety and security of the ATM cards and the PIN numbers and that the same shall be kept under separate custody and at no time will a single person be allowed to handle both. Any loss arising out of such mishandling will be at the sole risk and responsibility of the Customer and the Customer shall indemnify and keep indemnified the Facilitating Bank from any liability arising therefrom.

### Requisition directly from the relevant Third Party Supplier and collection from the Third Party Supplier of any replacement or additional cards that may be required at any given time and their issuance to the Cardholders together with the relevant PIN numbers against proper acknowledgment by the individual Cardholders.

### Provision of statements of account to the Cardholders as and when required by the Cardholders.

### Re-pinning of cards in the event the PIN Number are lost , stolen or forgotten and shall place appropriate measures for hotting cards, stopping cards or cancelling cards at its own cost. At all material times the Customer shall indemnify and keep indemnified the Facilitating Bank against any liability for any losses that may arise as a result of this.

# **Compensation**

In exchange for the Services, the Customer shall pay the Charges as set out in the Charges Schedule.

# **Term**

This Agreement shall continue in full force and effect for five (5) years from the date of execution. This Agreement may be renewed or extended beyond the initial term of 5 years by written agreement between the parties but, if no such agreement is reached by the fifth anniversary of the date hereof, this Agreement shall lapse and be of no further force and effect except in respect of any claims the parties may have against one another for breach of the terms hereof arising prior to the expiry of this Agreement.

# **Dispute resolution procedure**

## The Customer and the Facilitating Bank will endeavour to resolve any dispute which arises between the parties as to this Agreement through good faith negotiations, as follows:

### the Project Managers will attempt to resolve the matter within fourteen (14) days of the matter being referred to them, or any other period agreed upon by the parties;

### if the matter is not resolved by those persons within fourteen (14) days of the matter being referred to them, or any other period agreed upon by the parties, the matter will be referred to the Customer’s Chief Executive Officer (or comparable officer) and the Facilitating Bank’s Chief Executive Officer (or comparable officer).

## In the highly unlikely event that those persons are unable to resolve the matter within fourteen days of the matter being referred to them, or any other period agreed upon, such matter will be resolved exclusively by arbitration as provided in Section 6.3.

## Any controversy or claim, whether based on contract, tort or other legal theory (including, bpt not limited to, any claim of fraud or misrepresentation), arising out or relating to this Agreement, including its interpretation, performance, breach of or termination not resolved by good faith negotiations, as provided in Section 6.1, shall be resolved exclusively by arbitration in accordance with the following provisions.

## The arbitration shall be conducted under the provisions of the Rules of the Chartered Institute of Arbitrators (Kenya Branch) (and where any matter or thing is not covered by the Rules the provisions of the Arbitration Act 1995, Laws of Kenya shall apply).

## The arbitration shall be conducted by a panel composed of three arbitrators (“Arbitrators”), one selected by the Customer, a second selected by the Facilitating Bank and the third arbitrator decided by the mutual agreement of both parties or, failing agreement within 14 days of the notification by either party to the other of the existence of a dispute or claim, to be appointed by the Chairman for the time being of The Chartered Institute of Arbitrators, Kenya Branch, on the application of either party.

## The Arbitrators will be bound by the provisions of this Agreement. Prior to their appointment, the selected Arbitrators shall be made aware of the terms of this Agreement. Following their appointment, the Arbitrators shall set forth the schedule and timing of the arbitration proceedings.

## The Arbitrators shall have the right to assess the costs of the arbitration and costs incurred by either party against the losing party or in such manner a they deem just. The award rendered by the Arbitrators shall be final and binding.

## Upon rendering an award or a decision, the Arbitrators shall set forth in writing the basis of such award or decision. Notwithstanding anything to the contrary, each party retains the right to request that a court of competent jurisdiction vacate the Arbitrators’ award or decision on the grounds of the Arbitrators’ failure to abide by the provisions of this Agreement or the provisions of the Arbitration Act 1995, Laws of Kenya.

## Judgement on the award or any other final or interim decision rendered by the Arbitrators may be entered, registered, or filed for enforcement purposes in any court having jurisdiction thereof.

## The Customer shall be responsible to its Cardholders for any card or cash disputes and in this regard shall put in place appropriate dispute resolution mechanisms to solve the disputes. At all times the Customer shall keep the Facilitating Bank indemnified against all such claims by the Cardholders.

# **Limitation on liability**

## The total aggregate liability of the Facilitating Bank arising out of or in connection with this Agreement, including for all actual direct damages, is limited to the aggregate of the Charges for the calendar year in which such liability may arise. The following provisions set out the Facilitating Bank’s entire liability (including any liability for the acts and omissions of its employees agents and sub-contractors) to the Customer in respect of:

### any breach of its contractual obligations arising under this Agreement; and

### any representation statement or tortuous act or omission including negligence arising under or in connection with this Agreement.

## Subject to clause 7.1 above, the Facilitating Bank shall not be liable for any loss of cash or funds due to fraud, forgery, security breach or inaccuracies in the Cardholder records or for any special, incidental, consequential, punitive or indirect damages including but not limited to lost profits or savings, loss of use, or re-procurement costs, even if the Facilitating Bank has been informed of their possibility.

## The Facilitating Bank shall not be liable to any other party for any costs, claims, damages or expenses arising from the performance or non-performance of any service provided by a Third Party Supplier or for any failure by any Third Party Supplier to adhere to the terms and conditions of agreements between any party and such Third Party Supplier.

## This Clause 7 survives any termination or expiration of this Agreement.

# **Termination**

## Subject to the Dispute Resolution Procedure set forth in Clause 6 above, this Agreement may be terminated in whole by any party in the following circumstances:

### upon six (6) months’ written notice;

### if:

(i) the Facilitating Bank fails to provide service of a standard reasonably comparable to national ATM service standards for a period of thirty (30) consecutive days; or

(ii) if the Facilitating Bank commits any material breach of any term of this Agreement and which (in the case of a breach capable of being remedied) shall not have been remedied within Thirty (30) days of a written request by the Customer to remedy the same; or

(iii) the Customer, for a period of seven (7) consecutive days, fails to maintain sufficient credit in the Master Corporate Account to make payments to Cardholders.

### with immediate effect from the date of service on the other of written notice if a resolution is passed or an order is made for the winding up of any other party (otherwise than for the purpose of solvent amalgamation or reconstruction) or the other becomes subject to an administration order or a receiver is appointed over or an encumbrancer takes possession of any of any other party’s property or the Premises;

### with immediate effect from the date of service on the other party of written notice if any other party ceases to carry on business.

## Termination of this Agreement shall not prevent a party from making a claim for loss or damage (but not for consequential losses) arising from such termination including rights in respect of any antecedent breach of this Agreement by a party.

## If this Agreement is terminated by the Customer for a reason other than that listed in clause 8.1(b)(i), the Customer will be liable to pay an amount by way of agreed liquidated damages as provided under the Liquidated Damages Section of the Charges Schedule.

# **Confidentiality**

## The Facilitating Bank hereto undertakes to the Customer to keep confidential all information (written or oral) concerning the business and affairs of the Customer that it shall have obtained or received as a result of the discussions leading up to or the entering into of this Agreement save that which is:

### trivial or obvious;

### already in its possession other than as a result of a breach of this clause; or

### in the public domain other than as a result of a breach of this clause.

## The Facilitating Bank hereto undertakes to the Customer to take all such steps as shall from time to time be necessary to ensure compliance with the provisions of clause 9.1 above by its employees agents and sub-contractors.

# **Intellectual property rights indemnity**

## The Facilitating Bank will indemnify and hold harmless the Customer against any damages (including costs) that may be awarded or agreed to be paid to any third party in respect of any claim or action that the normal operation possession or use of the Host Banking System by the Customer infringes the patent copyright registered design or trade mark rights of said third party (an “Intellectual Property Infringement”) provided that the Customer:

### gives notice to the Facilitating Bank of any Intellectual Property Infringement forthwith upon becoming aware of the same;

### gives the Facilitating Bank the sole conduct of the defence to any claim or action in respect of an Intellectual Property Infringement and does not at any time admit liability or otherwise settle or compromise or attempt to settle or compromise the said claim or action except upon the express instructions of the Company; and

### acts in accordance with the reasonable instructions of the Facilitating Bank and gives to the Facilitating Bank such assistance as it shall reasonably require in respect of the conduct of the said defence including without prejudice to the generality of the foregoing the filing of all pleadings and other court process and the provision of all relevant documents.

## The Facilitating Bank shall reimburse the Customer its reasonable costs incurred in complying with the provisions of clause 17.1 above.

## In the event of an Intellectual Property Infringement the Facilitating Bank shall be entitled at its own expense and option either to:

### procure the right for the Licensee to continue using the Licensed Program Materials; or

### make such alterations modifications or adjustments to the Licensed Program Materials so that they become non-infringing without incurring a material diminution in performance or function; or

### replace the Licensed Program Materials with non-infringing substitutes provided that such substitutes do not entail a material diminution in performance or function.

## If the Facilitating Bank in its reasonable judgement is not able to exercise any of the options set out at clauses 10.1, 10.2 or 10.3 above within Seven (7) days of the date it received notice of the Intellectual Property Infringement then the Customer without prejudice to any other rights or remedies it may have hereunder or at law shall be entitled to terminate this Agreement by thirty (30) days’ notice upon the Company.

# **Force Majeure**

## No party shall be liable to the other(s) for any delay or non-performance of its obligations under this Agreement arising from any cause or causes beyond its reasonable control including, without limitation, any of the following: act of God, governmental act, war, fire, strike, lock-out, go-slow or other industrial action taken by employees, flood, explosion or civil commotion.

## In the event of a party being so delayed or prevented from performing its obligations, such party shall:

### give notice in writing of such delay or prevention to the other parties as soon as reasonably possible stating the commencement date and extent of such delay or prevention, the cause thereof and its estimated duration;

### use all reasonable endeavours to mitigate the effects of such delay or prevention upon the performance of its obligations under this Agreement; and

### resume performance of its obligations as soon as reasonably possible after the removal of the cause of the delay or prevention.

## If either party is prevented from performing its obligations by an event of force majeure for thirty (30) consecutive days, any other party may terminate this Agreement by notice to the affected party. Neither party shall have any liability to the other in respect of the termination of this agreement as a result of an event of force majeure

# **No waiver of rights**

The failure to exercise or delay in exercising a right or remedy provided by Agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. No single or partial exercise of a right or remedy provided by this Agreement or by law prevents the further exercise of the right or remedy or the exercise of another right or remedy. The rights and remedies provided by this Agreement are cumulative and not exclusive of any rights or remedies provided by law.

# **Severability**

If any of the provisions of this Agreement is found by an arbitrator, court or other competent authority to be void or unenforceable, such provision shall be deemed to be deleted from this Agreement and the remaining provisions of this Agreement shall continue in full force and effect. Notwithstanding the foregoing, the parties shall thereupon negotiate in good faith in order to agree the terms of a mutually satisfactory provision to be substituted for the provision so found to be void or unenforceable.

# **Entire Agreement**

This Agreement constitutes the entire agreement between the parties about its subject matter and any previous agreements, undertakings, representations, warranties and negotiations (“prior representations”) on that subject cease to have any effect. Each party confirms that it has not relied upon any prior representations and waives any rights which it may have in respect of such reliance if it in fact occurred.

# **Modifications**

This agreement shall not be modified or cancelled, unless such modification or cancellation shall be expressly agreed in writing by both parties to this Agreement.

# **Notices**

Any notice or communication under or in connection with this agreement shall be in writing shall be delivered by hand or sent by post, telex or fax to the addresses given below or such other address as the recipient may have notified to the other parties in writing. In the absence of evidence of earlier receipt, any notice or communication shall be deemed to have been received, if delivered by hand, at the time of delivery or, if sent by post, four days after posting or, if sent by telex or fax, on the completion of transmission.

For the Customer:

Address:

Telex:

Fax:

For the Facilitating Bank:

Address:

Telex:

Fax:

# **Governing law**

The construction, validity and performance of this Agreement shall be governed by Kenyan law.

**IN WITNESS** this Agreement has been duly executed on the date and year first hereinabove indicated.

Signed by )

duly authorised on behalf of **HHHHHH LIMITED** in the )

presence of: )

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)

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Signed by )

duly authorised on behalf of **GGGGGGGG BANK KENYA LIMITED** in the )

presence of: )

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**SCHEDULE A**

**CHARGES**

**Part 1 — Charges (Clause 4)**

The Customer will pay to the Facilitating Bank a fixed monthly fee of KShs. 250,000 for the Services. This amount will: (a) include all electronic transactions fees incurred in payments to Cardholders; (b) exclude all taxes; and (iii) exclude any other specific bank charges set out and agreed with the Facilitating Bank.

The charge for services is subject to an annual inflationary increment of Five (5) percent per annum. The parties hereby agree that should the Annual Inflation figures released by the Central Bank of Kenya be higher than the aforesaid rate, then the rate as indicated by the Central Bank of Kenya shall prevail. For any increments added to the service charges other than the annual inflationary increment, the Customer shall have the right to request that the Facilitating Bank provide an auditor’s certificate confirming that the costs have increased by the percentage of the increment.

**Part 2 — Customer Liquidated Damages (Clause 8.3)**

The Customer will pay to the Facilitating Bank KShsUYYYYY per month per ATM installed for every month remaining on the Agreement (from the date of termination up to expiration of the Agreement).

**Manner of Payments by the Customer**

Unless otherwise stated expressly in this Agreement, the Facilitating Bank will debit the Master Corporate Account (or any other of the Customer’s accounts held by the Facilitating Bank) on the last business day of each month to settle all fees and reimbursements due to the Facilitating Bank at such time under this Agreement. All payments shall be made in Kenya Shillings and are non-refundable.

**SCHEDULE B**

**SERVICES**

The Facilitating Bank shall provide the following Services over the term of this Agreement:

ATM vendor selection

Supervision of the vendor on ATM installation

Confirmation of ATM switch functionality

Monitoring of ATMs

Card issuing and canceling per customer files/instructions, including hot carding (marking stolen cards on instruction from the Customer)

Crediting of cards per Facilitating Bank authorisation of Master Corporate Accounts as per electronic files sent by the Customer

Management of associated vendors, including:

ATMs

Cash management

Communications

Cards

PIN issuing

**SCHEDULE C**

**OPERATIONAL SPECIFICATION**

Customer prepares wage payment instructions on site

Customer authorises these payments on site

Customer sends payment instruction through their corporate payments software to the Facilitating Bank

Facilitating Bank passes this instruction on to the financial switch, which in turn enquires electronically from the Facilitating Bank if the appropriate Master Corporate Account (worker or farmer) has sufficient funds to make these credits

If the answer is “no” then the request is denied and the Customer is informed immediately

If the answer is “yes” then the Master Corporate Account is debited with the total amount and the individual cards as requested are all credited with their appropriate amounts.

At that point any worker or farmer with and ATM card can draw funds off their ATM card via the ATMs on site.

One specific ATM will sit for farmers as it will carry higher denomination notes.

The Customer and the Facilitating Bank will perform daily reconciliations on this process to ensure that the system is crediting the right amounts and also to ensure correct values withdrawn off ATMs.