

## NEPTUNE MERCHANDISING PROGRAMS – U.S.

The terms herein are incorporated into, form part of, and govern the merchandising program (each a “**Program**”) Letter of Commitment (“**LOC**”) between Client and CB Neptune Holdings, L.L.C. (“**Neptune**”).

**1. Program Description.** Neptune shall provide the Program as set forth in the LOC. Each Program shall incorporate the materials supplied to Neptune by Client (together with all advertising, copy, art, mechanicals, final film, and other materials provided to Neptune or otherwise approved by Client, collectively, “**Client Materials**”). Client shall be responsible for the submission of all Client Materials (including any changes thereto) as indicated in the LOC and Client hereby licenses Neptune the right to use all such Client Materials as contemplated hereby. Neptune reserves the right to reject any Client Materials for any reason, including, without limitation, subject matter, form, size, wording, illustration, typography, and content.

### **2. Price and Payment.**

(a) Client shall pay to Neptune for each LOC the total program fee set forth in such LOC in accordance with Section 2(b) below.

(b) Should Neptune, in its discretion, extend credit to Client, the total program fee will be invoiced as follows: for Programs contracted more than four (4) weeks prior to the start date of the Program, approximately four (4) weeks prior to the start date of the Program or each wave of the Program as applicable or, for Programs contracted four (4) weeks or less prior to the start date of the Program, immediately following the completion of the Program, or each wave of the Program as applicable, and each such invoice submitted to Client pursuant to the LOC is due and payable within thirty (30) days of the invoice date, or as otherwise negotiated and agreed to in writing between the parties. Should Neptune, in its discretion, decline to extend or revoke the extension of credit to Client, a deposit invoice equal to one hundred percent (100%) of the estimated total program fee set forth in the LOC shall be required and shall be payable by Client within fifteen (15) days of the invoice date or prior to the Program start date, whichever date is earlier. Additional charges will be invoiced upon completion of the Program, or each wave of the Program as applicable, and shall be payable within thirty (30) days of the invoice date. All amounts due for each Program are exclusive of all applicable taxes. Client shall be responsible for all federal, state, municipal and other taxes imposed on all services performed by Neptune.

(c) Neptune shall issue to Client a credit toward future Programs placed with Neptune if the rate of installation (as calculated below) (1) is less than eighty percent (80%) of the stores set forth in the LOC for a Program executed in a Walmart store (2) for all other Programs is less than ninety percent (90%) of the stores set forth in the LOC. The rate of installation is a percentage calculated by dividing the sum of (i) the number of stores in which the Program is successfully installed plus (ii) the number of stores Neptune is unable to install the Program in due to retail access issues outside the control of Neptune, by the number of stores the Program was to be installed as set forth in the LOC and multiplying such number by one hundred (100). Retail access issues outside the control of Neptune are: (i) Client’s product is not in distribution or is out of stock; (ii) remodeling or resetting of stores; (iii) store closed or not open yet; and (iv) Client directive not to install as such issues may be updated from time to time by Neptune. The amount of the credit toward future Programs placed with Neptune shall be Client’s sole remedy and shall equal the installation rate per store (as set forth on the LOC) multiplied by the number of additional stores needed in the numerator of the rate of installation calculation above to make the rate of installation equal eighty percent (80%) for all Walmart Programs and ninety percent (90%) for all other Programs.

(d) Neptune shall not be responsible to Client if it is turned away from or is refused permission to complete the services at any of the selected stores, for any reason outside of Neptune’s control (e.g., store manager refuses to allow entry). Notwithstanding anything to the contrary herein, Client shall be responsible for paying a charge equal to the actual time incurred in store, in fifteen (15) minute increments, by Neptune personnel.

(e) Client shall be responsible for payment of all amounts due to Neptune under each LOC, whether such LOC is executed by Client directly or by an agency or third-party compiler acting as agent for Client (an “**Agency**”). Mailing of invoices to any Agency or acceptance of payment from an Agency are solely for the convenience of Client, and Client shall remain liable for its obligations to Neptune until such time as Neptune has been paid in full all amounts due to it under the LOC. If applicable, unless Client either includes the relevant purchase order number in the space indicated in the signed LOC returned to Neptune, or provides the purchase order number to Neptune in writing no later than eight (8) weeks prior to the Program start date, Client agrees to pay the full total Program fee without submitting to Neptune a purchase order in connection therewith.

(f) Neptune shall have the right to charge, and Client agrees to pay, interest on past due balances at the rate of the lesser of one- and one-half percent (1.5%) per month or the maximum amount permitted by law. Client shall be responsible for all of Neptune’s costs of collection of past due amounts (including without limitation reasonable attorneys’ fees).

(g) All terms and pricing provided herein by Neptune to Client in this Agreement shall contemplate 100% on time payment by Client to Neptune. At any time should Client fail to maintain 100% on time payment to Neptune in accordance with the terms of this Agreement, Neptune reserves the right to either terminate or modify the pricing terms of this Agreement.

**3. Cancellation and/or Changes.** Either party may cancel this LOC in whole or in part upon providing advance written notice to the other party. Neptune will charge Client, and Client agrees to pay, the following charges in the event of full or partial cancellation of stores and/or changes in the requirements of this LOC.

(a) For each cancelled store, a charge equal to a percentage of the estimated service charge applicable to that store, as well as reimbursement of all costs incurred (i.e. administrative and mailing costs) as per the following schedule: cancellation greater than four (4) full weeks prior to the Program start date = twenty-five percent (25%) per cancelled store; cancellation less than four (4) full weeks prior to

the Program start date = fifty percent (50%) per cancelled store; cancellation less than three (3) full working days prior to the Program start date = eighty percent (80%) per cancelled store; and cancellation after Program has commenced = one hundred percent (100%) per cancelled store.

(b) Client agrees to pay Neptune reasonable charges in the event Client requests that any changes be made to the details of the Program as set forth in the LOC for such project. Charges will be assessed by Neptune in its reasonable discretion and will be based on the nature of the change and the timing of requested changes. Neptune shall not be responsible for implementing any changes that it deems unreasonable, or not reasonably feasible, in light of the timing of the Program and the requested change.

#### **4. Limitation of Liability.**

(a) If placement of a Program is delayed, impracticable, or unduly burdensome because of fire, flood, war, riot, accident, strikes, acts of God, interruption of or delay in transportation, changes in laws or regulations, or any other causes beyond Neptune's reasonable control, but Neptune offers to provide Client alternate Program placement with retailers within the same general geographic area within eight (8) weeks after the original scheduled programs date, Client shall remain liable for the full Program Fees and Other Fees. Neptune shall credit Client for fifty percent (50%) of the full Program Fee for any areas where Neptune does not provide alternate Program placement, but Client shall remain liable for payment of the remaining fifty percent (50%) of the full Program Fee.

(b) In no event shall Neptune's liability arising out of or under this LOC exceed the amount previously paid to Neptune by Client in respect of this LOC. Neptune shall not, under any circumstances, be responsible for any indirect, consequential, incidental or special damages, including, without limitation, loss of profits, business interruption, loss of goodwill or punitive damages, regardless of cause.

#### **5. Representations and Warranties.**

(a) Each of Neptune and Client represents, warrants and covenants to the other that: (i) it has the full corporate right, power and authority to enter into this LOC, to grant the licenses granted hereunder and to perform the acts required of it hereunder; (ii) its execution of this LOC, and its performance of its obligations and duties hereunder, do not and will not violate any agreement to which it is a party or by which it is otherwise bound; and (iii) when executed and delivered by it, this LOC will constitute the legal, valid and binding obligation of such party, enforceable against such party in accordance with its terms.

(b) Client further represents, warrants and covenants to Neptune that: (i) Client owns or has the appropriate license to use any and all Client Materials provided to Neptune hereunder; (ii) Client, the Client Materials, and the distribution of Client Materials as contemplated by each LOC will not violate the provisions of any law, regulation, ordinance or ruling of any court, governmental body or agency, including without limitation those relating to adulteration, advertising with respect to Client's products, misbranding, promotion allowance, labeling, safety or distribution, or any other laws or regulations or ordinances; (iii) any and all product samples distributed in connection with Client Materials, including without limitation, micro-fragrance, and the packaging and labeling thereof, are and will be in compliance with all applicable laws, regulations, ordinances and rulings of any court, government body or agency; and (iv) no part of Client Materials contains or will contain any defamatory or libelous matter, nor will Client Materials, in any way, infringe upon or violate any copyright, trademark, patent, right of privacy or any other rights (statutory, proprietary, or otherwise).

**6. Indemnification.** Client shall indemnify, defend and hold Neptune and its affiliates and their respective directors, shareholders, officers, employees and other representatives harmless from and against any and all liabilities, losses, damages, costs and expenses (including without limitation reasonable attorneys' fees) (collectively "**Liabilities**") which Neptune or such indemnitees shall incur by reason of any claim, suit, proceeding, investigation or action by any governmental authority or other third party against or involving Neptune or such indemnitees based upon, or arising out of, any breach or alleged breach by Client of the LOC, any Liabilities resulting from the performance of the Program but excluding such Liabilities to the extent arising from Neptune's willful misconduct, the contents of any Client Materials, the manufacture, marketing, use, distribution or purchase of Client's products, any merchandise, displays, furnishings or materials supplied, offered or sold by Client.

**7. Confidentiality.** Each party shall keep the terms of the LOC confidential and shall not disclose any of such terms other than to such party's respective officers, directors, employees, affiliates, contractors or advisors with a need to know such terms in order for such party to perform its obligations hereunder and who represent personally that they agree to keep such terms confidential, except as required to be disclosed by law, regulation, proceeding, order or investigation of any court or governmental authority or agency (provided that, to the extent permissible, reasonable prior notice is provided to the other party prior to disclosure). If a third party (e.g., advertising agency or other promotional services company) is authorized by Client to place Client's Programs, then Neptune and Client are authorized to provide to such agency or company only such information (rates, schedules, terms and conditions) as reasonably necessary to ensure successful placement of that Program and compliance with the LOC, provided such third party agrees to keep such information confidential.

#### **8. General.**

(a) Neptune shall retain sole and exclusive title to, and all rights in, all intellectual property related to the services to be performed under the LOC (except for Client Materials), including, but not limited to, any know-how related to such services or Neptune products, and all data and information used, collected and/or generated in connection with the Program.

(b) Neptune shall instruct its field force to perform the Program in accordance with the placement instructions. Due to the nature of the in-store environment and the scope of the services to be provided, Neptune, however, cannot guarantee the performance of the services. Neptune makes no warranties or representations, either express or implied, as to fitness, merchantability, performance, or any other matters of any kind or nature, except as expressly set forth herein. A waiver by either party hereto of any default or breach by the other of any provision hereof shall not be considered a waiver of any subsequent default or breach of the same or of any other provisions hereof.

The failure of either party to object to or to take affirmative action with respect to any conduct of the other which is in violation of the LOC shall not be construed as a waiver thereof, or of any future breach or subsequent wrongful conduct.

(c) This LOC constitutes the entire agreement between Neptune and Client concerning the subject matter hereof and supersedes all prior and contemporaneous agreements, representations, and understandings, whether written or oral, between the parties with respect to the subject matter hereof. This LOC may be modified or amended only in a writing signed by authorized representatives for each party.

(d) The parties acknowledge that Neptune is an independent contractor and that nothing under this LOC shall be deemed to have created a joint venture, joint employer relationship or partnership.

(e) This LOC shall be governed by, construed, and enforced in all respects in accordance with the laws of the State of New York, without regard to its conflicts of laws principles. Any claim of any nature related to or arising out of any LOC or other program commitment or to any services shall be exclusively submitted to arbitration in accordance with the then current International Institute for Conflict Prevention and Resolution Rules for Non-Administered Arbitrations by, for any claims for \$1,000,000 or less, a sole arbitrator, and for any claims in excess of \$1,000,000, three arbitrators of whom each party will appoint one and these two shall select the third. The arbitration shall be conducted in the State of New York, County of New York and a complete record shall be maintained of all proceedings. An appeal may be taken under the CPR Arbitration Appeal Procedure from any final award of an arbitral panel in any arbitration arising out of or related to this agreement that is conducted in accordance with the requirements of such Appeal Procedure. Unless otherwise agreed by the parties and the appeal tribunal, the appeal shall be conducted at the place of the original arbitration. Arbitration on an individual basis shall be the exclusive remedy for any claims that might otherwise be brought on a class, representative or collective basis. Accordingly, Client may not participate as a class or collective action representative, or as a member of any class, representative or collective action, and will not be entitled to a recovery in a class, representative or collective action in any forum. Any disputes concerning the validity of this class, representative or collective action waiver will be decided by a court of competent jurisdiction located in the State of New York and County of New York, not by an arbitrator, which shall be the only exception to this commitment to exclusively arbitrate.

(f) No provision of any LOC shall be nullified or affected in any manner as a result of any reorganization or by any change to any other form of business organization of Client. In the event of any merger, consolidation, or sale of all or substantially all of the assets of Client (each a "**Transaction**"), Client agrees that it will fully assign each LOC to the other party to such Transaction. Client agrees that it will provide Neptune with at least thirty (30) days prior written notice of any such Transaction.

(g) No action of any kind arising out of or related to the performance of any LOC or otherwise may be brought by either party more than twelve (12) months after the same has accrued, except an action for non-payment of any amounts for which Client is responsible under the LOC or indemnification which may be commenced within the period provided by statute. In addition, all disputes which include claims for credit must be made known by Client to Neptune in writing within one hundred twenty (120) days of the invoice date. Such disputes shall not be reason to withhold payment when due, except that the specific and reasonable amount disputed may be withheld in good faith until such time as the dispute has been reviewed and resolved. Any such dispute not disclosed to Neptune in writing within one hundred twenty (120) days from the invoice date shall be deemed waived by Client and such invoice shall be deemed an account stated.

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