IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS
(EASTERN DIVISION)

IN RE:	Chapter 11
VANTAGE TRAVEL SERVICE, INC.,	Case No. 23-11060 (JEB)
Debtor.	Document No. ____

OBJECTION OF JPMORGAN CHASE BANK, N.A. TO THE DEBTOR'S MOTION FOR AUTHORITY TO SELL SUBSTANTIALLY ALL ASSETS, INCLUDING CERTAIN EXECUTORY CONTRACTS AND PERSONALLY IDENTIFIABLE INFORMATION OF CUSTOMERS, PURSUANT TO SECTIONS 363 AND 365 OF THE BANKRUPTCY CODE, FREE AND CLEAR OF LIENS, CLAIMS, AND INTERESTS

JPMorgan Chase Bank, N.A., successor-in-interest by purchase and assumption of the deposit accounts from the Federal Deposit Insurance Corporation as Receiver for First Republic Bank, San Francisco, CA ("JPMC"), through its undersigned counsel, objects (this "Objection") to the *Debtor's Motion for Authority to Sell Substantially All Assets, Including Certain Executory Contracts and Personally Identifiable Information of Customers, Pursuant to Sections 363 and 365 of the Bankruptcy Code, Free and Clear of Liens, Claims, and Interests* [Doc. No. 3] (the "Sale Motion"), and in support hereof, respectfully states as follows:

INTRODUCTION

1. JPMC objects to the Debtor's proposed sale of the alleged "Customer Trust Funds." The sale and proposed distribution of those funds from the Debtor to the purchaser and from the purchaser to a small subset of preferred unsecured creditors of the Debtor constitutes an impermissible *sub rosa* plan in violation of the absolute priority rule and the rights of senior creditors and other unsecured creditors.

2. As a threshold matter, the nature of the Customer Trust Funds is disputed. The Debtor alleges that the Customer Trust Funds, which are maintained by the Debtor in a regular business checking account with JPMC, are not property of the bankruptcy estate, but rather funds held in trust for the benefit of the Debtor's customers. If that were true, the Debtor would not be permitted to sell the Customer Trust Funds under section 363(b) of the Bankruptcy Code. That section permits the Debtor to sell only property of the estate. However, given the lack of any facts or evidence supporting the establishment of a trust of any kind, the Customer Trust Funds should be considered property of the estate.

3. As property of the estate, the Customer Trust Funds must be sold, used, or distributed to creditors in a manner consistent with the Bankruptcy Code. The Debtor does not propose to do so. Instead, through the proposed sale, the Debtor has manufactured a means to distribute one of its largest known assets—the Customer Trust Funds—only to a small subset of preferred unsecured creditors that prepaid for their trips from and after May 11, 2023, outside of the parameters of the Bankruptcy Code and in violation of the absolute priority rule. Such premature and inequitable distribution would be to the detriment of the Debtor's secured, administrative, priority, and other non-favored general unsecured creditors. Consequently, the Sale Motion should be denied on the basis that the sale and subsequent distribution of the Customer Trust Funds pursuant to the APA constitutes an impermissible *sub rosa* chapter 11 plan.

4. The Debtor's retention of the Customer Trust Funds and adherence to the absolute priority rule are critical to JPMC. As is described in more detail below, certain of the Debtor's customers and their banks are initiating return entries of Automated Clearing House ("ACH") transactions, which are commonly referred to as chargebacks. These ACH transactions previously were originated by the Debtor and processed by JPMC (as the Debtor's originating depository

financial institution) as a means to facilitate customers' payments to the Debtor on account of reserved trips. Under applicable rules issued by the National Automated Clearing House Association ("Nacha"), JPMC must accept the return of customers' ACH debits in certain limited circumstances, even if the return is not submitted in a timely fashion. Although accepted ACH returns typically are paid from the Debtor's account, because the Debtor lacks sufficient funds in its ACH-designated bank account to cover these returns, JPMC is compelled to cover the returns with its own funds and thereafter seek reimbursement from the Debtor in accordance with the terms and provisions of the parties' banking agreements and, now, the Bankruptcy Code. This process has the effect of decreasing the Debtor's liability to its customers and increasing the Debtor's liability to JPMC.

5. As security for these ACH transaction risks, the Debtor granted to JPMC liens in and setoff rights against the Debtor's bank accounts, including the deposit account holding the Customer Trust Funds. As of the commencement of the Debtor's chapter 11 case, JPMC's unliquidated claim against the Debtor arising from its rights to reimbursement for the ACH chargebacks was secured to the extent of its liens and setoff rights against the Debtor's bank accounts. The value of those accounts, including the deposit account holding approximately $2.1 million in alleged Customer Trust Funds, eventually could be dwarfed by the amount of ACH chargebacks that JPMC may be called upon to process and return on behalf of the Debtor.

6. Through the Sale Motion, the Debtor is seeking to sell substantially all of its assets, including the Customer Trust Funds, to the purchaser free and clear of JPMC's liens and setoff rights. If the Debtor is permitted to do so, JPMC will be converted from a secured creditor as of commencement of the case to one of the Debtor's largest unsecured creditors following the sale. The result will be that certain customers that are general unsecured creditors of the Debtor will

receive a full refund of the amounts owed by the Debtor from JPMC through the ACH chargeback process under applicable Nacha rules; other general unsecured creditors that are favored by the Debtor and the purchaser will receive a full refund of the amounts owed by the Debtor through the *sub rosa* sale; and JPMC—a secured creditor as of commencement of the case—is stripped of potentially its only source of recovery. This is not a fair, reasonable, or equitable result for JPMC, nor for any of the other secured, administrative, priority, and non-favored general unsecured creditors that might have had a chance of recovery were it not for the sale of the Customer Trust Funds to the purchaser. The Sale Motion should, accordingly, be denied.

JURISDICTION

7. The United States Bankruptcy Court for the District of Massachusetts (the "Court") has jurisdiction over this chapter 11 case, the Debtor, property of the Debtor's estate, and this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

8. Venue is proper in the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

A. General Background.

9. On June 29, 2023 (the "Petition Date"), Vantage Travel Service, Inc. (the "Debtor") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"), in this Court thereby commencing the above-captioned chapter 11 case (this "Case").

10. The Debtor continues to operate its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No official committee of unsecured creditors has been appointed in this Case. The Office of the United States Trustee has moved for the

appointment of a chapter 11 trustee or, alternatively, to convert this Case to a case under chapter 7 of the Bankruptcy Code. *See* Doc. No. 162.

B. The Debtor's Business Relationship With JPMC.

11. The Debtor maintains the following seven bank accounts (collectively, the "Bank Accounts") with JPMC:[1]

a. the "Operating Account", which serves as the Debtor's operating account;

b. the "ACH Account", in which the Debtor collects the customer ACH payments;

c. the "Credit Card Account", which is used for the collection of customer credit card payments;

d. the "Payroll Account", from which the Debtor makes the payment of its payroll obligations;

e. the "Insurance Account", which is used for the collection/maintenance of customer trip insurance premiums;

f. the "Customer Refund Account", which is the account used for processing all customer refunds; and

g. the "Bond Account", which was used historically to hold small amounts of money and that the Debtor now refers to as the "trust funds" account allegedly for the maintenance of customer deposits. *See* Bank Accounts Motion ¶¶ 7-8.

12. Almost all of the revenue generated by the Debtor's business operations is received through customer payments made (i) by checks deposited by the Debtor into its existing operating account, (ii) by credit card, with the proceeds of such charges, once remitted to the Debtor by the credit card processor, being deposited into the credit card account (and then transferred to the operating account), or (iii) through wire transfers and ACH deposits made directly to the ACH Account (and then transferred to the Operating Account). Bank Accounts Motion ¶ 8. The Debtor

[1] *See Debtor's Motion for an Order Approving (A) Maintenance and Continued Use of Existing Bank Accounts and Business Forms, and (B) Limited Waiver of Section 345 Requirements With Respect to Bank Accounts* [Doc. No. 9] (the "Bank Accounts Motion") and *Declaration of Gregory DelGreco In Support Of First Day Motions* [Doc. No. 14] (the "First Day Declaration").

utilizes the Operating Account to make most payments to vendors and other creditors, to fund the Payroll Account, and to fund the Customer Refund Account. *Id.* The Debtor maintains a separate account to handle customer trip insurance premium payments, which account currently is not being used and has a zero balance. *Id.*

13. In May 2023, the Debtor allegedly re-designated the existing, unused Bond Account to serve as the "Customer Trust Funds" account for holding customer payments made on and after May 12, 2023. *See* First Day Declaration ¶ 19.

14. The Bank Accounts are governed by the *First Republic Bank Business Account Disclosure and Agreement* (the "Business Account Agreement"). As detailed in the "Security Interest" and "Setoff" sections of the Business Account Agreement, the Debtor granted to JPMC a security interest in all Bank Accounts and deposits and the right to charge or set off funds in the Bank Accounts for any obligations that the Debtor owes to JPMC. *See* Ex. A, p. 11 ("You grant us a security interest in your account, including all current and future deposits and renewals, for amounts owing to us under this agreement or under any account service agreement by any owner."); *id.*, p. 43 ("[t]o the fullest extent permitted by law, we may charge or set off funds in your account for any direct, indirect and/or acquired obligations that any owner [*defined as the client/business customer*] owes us, regardless of the source of the funds in the account.") A true and correct copy of relevant excerpts of the Business Account Agreement is attached as **Exhibit A**.[2]

15. On July 6, 2023, the Court entered an order granting the Bank Accounts Motion [Doc. No. 51] (the "Bank Accounts Order"), pursuant to which, among other terms, the Court authorized JPMC, without further order of the Court, "to continue to deduct from the appropriate

[2] A complete copy of the Business Account Agreement is available upon request.

Bank Accounts, the Bank Account Claims incurred in connection with the Bank Accounts." Bank Accounts Order ¶ 6. The term "Bank Account Claims" is defined in the Bank Accounts Order to include "any reimbursement or other payment obligations, such as overdrafts, arising under the Bank Account Agreements." *Id.*

C. The Nacha Rules And ACH Returns.

16. Nacha is an independent organization that operates the ACH Network, which is a centralized financial network in the United States through which banks and credit unions send and receive electronic payments and money transfers. Nacha has an extensive set of operating rules and regulations (the "Nacha Rules") that apply to ACH payments and define the roles and responsibilities of financial institutions that use the ACH Network. Financial institutions may receive penalties for non-compliance with the Nacha Rules, ranging from fines to suspension from the ACH Network.

17. JPMC is a participating depository bank in the ACH Network and is permitted to transmit entries on the Debtor's behalf into the ACH Network.

18. The *First Republic Bank Origination Agreement for Automated Clearing House Services Debit/Credit Origination* (the "Origination Agreement")[3] establishes the terms and conditions that govern the origination of payments through the ACH Network using JPMC as the Originating Depository Financial Institution ("ODFI"). *See* Ex. B, p. 12. Under the Origination Agreement, the Debtor instructed JPMC to originate various ACH debit entries ("Entries") against deposit accounts owned by the Debtor's customers ("Receivers") that were maintained at various

[3] A true and correct copy of the Origination Agreement, as it was contained within the *First Republic Bank Business Products Terms and Conditions*, is attached as **Exhibit B**. A complete copy of the *First Republic Bank Business Products Terms and Conditions* is available upon request.

Receiving Depository Financial Institutions ("RDFIs"). *See id.* Such Entries were made subject to the Nacha Rules. *See id.*

19. The Debtor agreed as part of the Origination Agreement to indemnify, defend, and hold harmless JPMC and certain related parties from and against any and all claims, loss, damage, expense, or liability, including JPMC's reasonable counsel expenses, as may be incurred or resulting or arising out of Debtor's direct transmission of ACH transactions (collectively, the "Indemnified Losses"). Ex. B, p. 15.

20. As a result of Entries that were originated by the Debtor via JPMC and subsequently returned or disputed by a Receiver and/or a RDFI, JPMC has incurred Indemnified Losses in the aggregate amount of at least $521,920.50 as of July 31, 2023, and such Indemnified Losses are anticipated to increase as a result of (i) Receivers and/or RDFIs returning or disputing additional Entries on and after August 1, 2023, and (ii) JPMC incurring counsel fees and expenses arising out of the Debtor's direct transmission of ACH transactions.

21. JPMC is required to comply with the Nacha Rules in processing ACH returns and disputes initiated by the Receivers and RDFIs, including honoring returns from its own corporate funds. JPMC then may seek reimbursement from the Debtor subject to the terms and provisions of the Business Account Agreement, the Origination Agreement, and, now, the Bankruptcy Code. This process has the effect of decreasing the Debtor's liability to its customers, whose prior payments to the Debtor are being refunded by RDFIs and JPMC (as the applicable ODFI) under the Nacha Rules, and increasing JPMC's currently secured claims for reimbursement or indemnification against the Debtor.

D. The Sale Motion And The APA.

22. Pursuant to the Sale Motion, the Debtor seeks Court authority, pursuant to section 363 of the Bankruptcy Code, to sell substantially all of its Assets to the Purchaser under that certain

Asset Purchase Agreement dated as of June 27, 2023 (the "APA"), free and clear of all liens, claims, and interests.[4]

23. Notably, pursuant to section 1.1(D) of the APA, the Assets include the Customer Trust Funds, which term is defined as: "[a]ll cash deposits (including cash remittances from credit card processors) for future travel booked with the Debtor that was or will be collected from the Debtor's customers in the ordinary course of business beginning on May 11, 2023 through the Closing Date . . . ." APA § 1.1(D). The Customer Trust Funds are held in the Bond Account. *See* Bank Accounts Motion ¶¶ 7-8. The Debtor has asserted that the funds in the Bond Account in the approximate amount of $2.1 million are not property of the estate. *See* Doc. No. 109, Schedule A/B, No. 77.

24. In exchange for the Assets, the Purchaser has agreed to pay the Debtor, at closing, the sum of $1,000,000, in the form of a credit bid and cash consideration, plus certain other forms of consideration. APA § 2.1. As part of the Purchase Price, the Purchaser agreed to assume "the obligation to refund those of the Customer Trust Funds actually delivered by Seller to Purchaser in accordance with Section 9.3, to the extent not applied to future travel booked through Purchaser." APA § 1.3(D).

25. Pursuant to section 9.3 of the APA, as soon as practicable after the Closing, and with respect to each customer that prepaid the Debtor for their trips from and after May 11, 2023, and whose prepetition payments are included within the Customer Trust Funds actually transferred to the Purchaser, the Purchaser is required to apply each customer's prior payment to a trip or tour operated by the Purchaser or refund each customer's prior payment to the customer. *See* APA § 9.3. Customers of the Debtor who purchased travel arrangements from the Debtor prior to May

[4] Capitalized terms used but not defined in this Objection have the meanings given in the Sale Motion or the APA, as the context requires.

11, 2023, merely have the opportunity to receive a credit if they book a new tour with the Purchaser in an amount equal to the lesser of: (i) the aggregate amount paid by the customer to the Debtor prior to May 11, 2023, for a postponed trip and (ii) 20% of the price of the postponed trip, but in any event not to exceed 20% of the price of the trip purchased from the Purchaser. *See* APA § 9.2.

26. All proceeds of the Sale are anticipated to be paid to the DIP Facility Lender and the Prepetition Secured Lender. *See* Sale Motion p. 23 ("The Debtor currently anticipates that there will be insufficient proceeds from the sale of the Assets pay all secured claims in full, let alone to fund a distribution on account of nonadministrative priority claims or general unsecured claims."); Proposed Sale Order ¶ DD.

E. The Personal Guaranty Of Henry R. Lewis.

27. In connection with the banking relationship between JPMC and the Debtor, Henry Roland Lewis ("Mr. Lewis") executed that certain Continuing Guaranty (the "Guaranty"),[5] dated October 25, 2022, for the benefit of JPMC. Pursuant to the Guaranty, Mr. Lewis absolutely and unconditionally guaranteed and promised to pay JPMC, on demand, any lawful obligations and liabilities of the Debtor, including any and all obligations of the Debtor arising from or in connection with the Origination Agreement. Guaranty ¶¶ 1-2. As part of the Guaranty, Mr. Lewis also assigned to JPMC all of his rights to any payments on account of any claims that he may have against the Debtor in any bankruptcy, reorganization, or liquidation proceeding. Guaranty ¶ 11.

[5] A true and correct copy of the Guaranty is attached as **Exhibit C**.

LEGAL ARGUMENT

I. THE PROPOSED SALE OF THE BOND ACCOUNT FUNDS IS NOT REASONABLE OR IN THE BEST INTERESTS OF CREDITORS AND SHOULD BE DENIED AS AN IMPERMISSIBLE *SUB ROSA* PLAN.

A. The Bond Account Funds Are Property Of The Estate.

28. Contrary to the Debtor's bald assertion that the funds within the Bond Account (the "Bond Account Funds") are held in trust for the benefit of customers, the Bond Account Funds are property of the Debtor's estate and should be treated as such. Section 541 of the Bankruptcy Code "defines property of the estate broadly to include all legal and equitable interests of the debtor in property as of the commencement of the case." *Cox v. Cox (In re Cox)*, 247 B.R. 556, 571 (Bankr. D. Mass. 2000); *see* 11 U.S.C. § 541. The Debtor has not presented any facts or evidence to suggest that the Bond Account Funds are anything other than property of the estate.

29. *First*, the Bond Account is a regular business checking account titled in the Debtor's name and informally subtitled as a "bond" account on the account statements. As the Debtor admits, the decision to deposit payments received by customers into the Bond Account was first made by the Debtor on or about May 12, 2023—only approximately 45 days prior to the Petition Date. *See* First Day Declaration ¶ 19. Although the Debtor may refer to the Bond Account Funds now as "Customer Trust Funds," *see id.*, no legal rationale for such change or designation has been provided by the Debtor. *See In re Goodson Steel Corp.*, 488 F.2d 776, 779 (5th Cir. 1974) ("The special payroll account was special in name only. It was not a trust or similar individualized account. Segregation under that label was for the Bankrupt's convenience only and the funds were subject to its unlimited dominion.") (citation omitted). As in *Goodson Steel Corp.*, the Bond Account Funds remain in a regular business checking account and are subject to the Debtor's "unlimited dominion" regardless of the labels that the Debtor might apply unilaterally and without legal support.

30. *Second*, the Debtor has not produced any trust instrument or other writing to suggest that the Bond Account Funds are subject to an express trust, nor has the Debtor cited any applicable state or federal statute to suggest that the Bond Account Funds are subject to a statutory trust.

31. *Third*, the Debtor does not cite any factors leading to the conclusion that a constructive trust (or similar construct) exists. Preliminarily, there is no clear statutory basis for applying constructive trusts in bankruptcy. *In re Cox*, 247 B.R. at 571. "Nowhere in the Bankruptcy Code does it say, 'property held by the debtor subject to a constructive trust is excluded from the debtor's estate.'" *Id.* (citing *XL/Datacomp v. Wilson (In re Omegas Group, Inc.*), 16 F.3d 1443, 1448 (6th Cir. 1994)). Even if the imposition of a constructive trust had the effect of excluding property from the Debtor's estate, the Debtor cannot meet the standard for creation of a constructive trust under governing Massachusetts law. "A court in equity generally may impose a constructive trust 'in order to avoid the unjust enrichment of one party at the expense of the other where the legal title to the property was obtained by fraud or in violation of a fiduciary relation.'" *Nessralla v. Peck*, 532 N.E.2d 685, 688 (Mass. 1989). The Debtor has not contended that it obtained the Bond Account Funds by fraud or in violation of a fiduciary relation.

32. For these reasons, there is no evidence that the Bond Account Funds are anything other than property of the Debtor's estate.

B. The Proposed Sale Of The Bond Account Funds Constitutes An Impermissible *Sub Rosa* Plan.

33. As property of the estate, the Bond Account Funds must be sold, used, or distributed to creditors in a manner consistent with the Bankruptcy Code. Through the Proposed Sale, however, the Debtor has manufactured a means to distribute the Bond Account Funds to certain preferred unsecured creditors outside of the parameters of the Bankruptcy Code and in violation of the absolute priority rule. Consequently, the Sale Motion should be denied on the basis that the

sale and subsequent distribution of the Bond Account Funds pursuant to the APA constitutes an impermissible *sub rosa* chapter 11 plan.

34. A *sub rosa* plan is a transaction that has the "practical effect of dictating some of the terms of any future reorganization plan." *See PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983). It has long been recognized that "[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan [including the absolute priority rule] by establishing the terms of the plan *sub rosa* in connection with a sale of assets." *Braniff*, 700 F.2d at 940; *see also Motorola, Inc. v. Off. Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 466 (2d Cir. 2007) (sales that effectively distribute the debtor's assets "are prohibited" because of "a fear that a debtor-in-possession will enter into transactions that will, in effect, 'short circuit the requirements of [C]hapter 11 for confirmation of a reorganization plan'" (quoting *Braniff*, 700 F.2d at 940); *In re Tower Auto. Inc*., 241 F.R.D. 162, 168-69 (S.D.N.Y. 2006); *In re Decora Indus*., No. 00-4459 (JJF), 2002 WL 32332749, at *8 (D. Del. May 20, 2002); *State Dep't of Taxation v. Swallen's, Inc. (In re Swallen's, Inc.)*, 269 B.R. 634, 638 (B.A.P. 6th Cir. 2001) ("At least when a party in interest objects, a bankruptcy court cannot issue orders that bypass the requirements of Chapter 11, such as disclosure statements, voting, and a confirmed plan, and proceed to a direct reorganization on the terms the court thinks best, no matter how expedient that might be"); *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 885 (Bankr. S.D.N.Y. 1990) ("A transaction which would effect a lock-up of the terms of a plan will not be permitted.").

35. Yet that is precisely what the Debtor now proposes. Through the Proposed Sale, the Debtor proposes to distribute one of its largest known assets—the Bond Account Funds—to a small subset of preferred general unsecured creditors that prepaid the Debtor for their trips from

and after May 11, 2023 (collectively, the "Preferred Unsecured Creditors"). Under the Debtor's construct, all Bond Account Funds will be transferred to the Purchaser. *See* APA § 1.1(D). Under the APA, the Purchaser has an obligation to provide a full refund to the Preferred Unsecured Creditors from the Bond Account Funds to the extent that such Bond Account Funds are not applied to future travel booked by such Preferred Unsecured Creditors through the Purchaser. *See id.* § 1.3(D). In effect, the Preferred Unsecured Creditors will receive the full value of their unsecured pre-petition claim against the Debtor from the Bond Account Funds (whether in the form of new travel arrangements or a refund), while other secured, administrative, priority, and general unsecured creditors potentially are left without any distribution. This is a clear attempt to evade the dictates of the absolute priority rule, and the Sale Motion, therefore, should be denied.

36. The Bankruptcy Code's priority system "constitutes a basic underpinning of business bankruptcy law," and "has long been considered fundamental to the Bankruptcy Code's operation." *Czyzewski v. Jevic Holding Corp*., 580 U.S. 451, 464-65 (2017). In a chapter 11 plan, adherence to the priorities is partly codified at section 1129(b)(2)(B) of the Bankruptcy Code as the "absolute priority rule," which provides that a bankruptcy plan "may not give 'property' to the holders of any junior claims or interests 'on account of' those claims or interests, unless all classes of senior claims either receive the full value of their claims or give their consent." *In re DBSD N. Am., Inc.*, 634 F.3d 79, 88 (2d Cir. 2011) (quoting 11 U.S.C. § 1129(b)(2)(B)). The statutory phrase "on account of" in section 1129(b)(2)(B)(ii) means "because of," denoting a "causal relationship between holding the prior claim or interest and receiving or retaining property" under the bankruptcy plan. *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 451 (1999).

37. Given their fundamental nature, the priority rules must be respected in all stages of a chapter 11 proceeding, not merely at plan confirmation. *See Jevic*, 580 U.S. at 464-65; *United States v. AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984) ("As soon as a debtor files a petition for relief, fair and equitable settlement of creditors' claims becomes a goal of the proceedings."); *cf. Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 441 (1968) (under predecessor bankruptcy statute, requirements "that plans of reorganization be both 'fair and equitable,' apply to compromises just as to other aspects of reorganizations," and this standard specifically incorporates the absolute priority rule).

38. Debtors may not disregard the priority system to reward favored creditors over the objection of senior creditors. In *Jevic*, the Supreme Court squarely rejected a "structured dismissal" that evaded the requirements of a chapter 11 plan by "g[iving] money to high-priority secured creditors and to low-priority general unsecured creditors" while "skipp[ing] certain dissenting mid-priority creditors." 580 U.S. at 454. The Supreme Court acknowledged that, by its terms, the Bankruptcy Code's priority system applies only to chapter 7 liquidations and chapter 11 plans. *Jevic*, 580 U.S. at 465. But, it noted that the priority system "has long been considered fundamental to the Bankruptcy Code's operation." *Id*. The Supreme Court thus held that "some affirmative indication of intent" was necessary before a court could conclude that "Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions" that are not permissible in liquidations and reorganizations. *Id*. *Jevic*'s holding that the priority rules may not be avoided through section 349 in a "structured dismissal" logically applies if the end run is perpetrated through section 363.

39. These principles apply to the Proposed Sale. In substance, the Proposed Sale would distribute all of the proceeds to the DIP Facility Lender and the Prepetition Secured Lender who

currently rank near the top of the priority scheme, Proposed Sale Order ¶ DD, while providing for the distribution of the Debtor's other major asset—the Bond Account Funds—to the Preferred Unsecured Creditors. *See supra* ¶ 25. But, the Proposed Sale would provide no compensation to JPMC's substantial secured claim (discussed below) or any administrative (except for the carve-out) or priority claimants, which rank above the claims of general unsecured creditors. *See* Sale Motion p. 23. Accordingly, the Proposed Sale, like the structured dismissal in *Jevic*, must be rejected because it "g[ives] money to high-priority secured creditors and to low-priority general unsecured creditors" while "skipp[ing] certain dissenting mid-priority creditors." 580 U.S. at 454. The Proposed Sale also would violate the basic bankruptcy policy by providing for payments to the Preferred Unsecured Creditors while providing nothing for the potentially thousands of other general unsecured creditors that do not fall within the preferred group. *See* Sale Motion p. 23. Such "horizontal discrimination" among similarly situated creditors is expressly forbidden in a chapter 11 plan. *See, e.g.*, *In re SunEdison, Inc.*, 575 B.R. 220, 226 (Bankr. S.D.N.Y. 2017) (citing 11 U.S.C. § 1129(b)).

40. The Court should not allow the Debtor to bypass the fundamental principles of bankruptcy law and the integrity of a plan process at this early stage of the Case.

C. The Proposed Sale Of The Bond Account Funds For Less Than The Value Of Such Funds Is Unreasonable And Should Not Be Approved.

41. Looking beyond the *sub rosa* nature of the Proposed Sale, the proposed consideration for the sale of the Debtor's assets is patently unreasonable from the estate's perspective. Specifically, the Debtor is proposing to sell approximately $2.1 million of cash to the Purchaser, among other valuable assets (including the Debtor's customer list), in exchange for approximately $1 million in the form of a credit bid and immediate cash consideration. Although the Purchase Price includes the assumption of the Assumed Obligations, including the obligation

to provide refunds to the Preferred Unsecured Creditors, the assumption of such obligation and concomitant reduction in cash consideration is unreasonable, harmful to the Debtor's estate at-large, and not in the best interests of all creditors. Either the Debtor should receive commensurate consideration for the cash being transferred to the Purchaser or the Debtor should retain the cash, so that it may be used or distributed consistent with the terms of the Bankruptcy Code for the benefit of the estate at-large and not solely for the benefit of the Preferred Unsecured Creditors.

II. UNDER SECTION 363 OF THE BANKRUPTCY CODE, THE DEBTOR CANNOT SELL PROPERTY THAT IS NOT PROPERTY OF THE ESTATE.

42. Assuming for the sake of argument that the Bond Account Funds constitute funds held in trust for the benefit of customers and not property of the estate, the Debtor is not permitted to sell such customer property under section 363 of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part: "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, ***property of the estate*** . . . ." 11 U.S.C. § 363(b)(1) (emphasis added). The Debtor has taken the position that the Debtor and its estate do not have an interest in the Bond Account Funds. *See, e.g.,* Doc. No. 109, Schedule A/B, question 77. In the event that the Court concurs with the Debtor's position (and it should not for the reasons set forth above), the Bond Account Funds cannot be sold by the Debtor under section 363(b) of the Bankruptcy Code because they would not be "property of the estate."

III. JPMC SHOULD NOT BE DEPRIVED OF ITS LIENS AND SETOFF RIGHTS.

A. JPMC Has A Lien Upon, And Rights Of Setoff And Recoupment Against, The Bank Accounts.

43. As described above, JPMC has claims against the Debtor on account of ACH payments that already were returned by JPMC to the RDFIs and, ultimately, to the Debtor's customers as required by the applicable Nacha Rules. *See supra* ¶¶ 16-21. JPMC's claims against the Debtor, including all overdrafts on the Bank Accounts, are secured to the extent of JPMC's

liens and setoff rights. *See* 11 U.S.C. § 506(a)(1). JPMC also may assert an affirmative defense of recoupment to any claim by the Debtor for the deposits.

44. *First*, JPMC has contractual security interests and statutory liens in the Bank Accounts, including all deposits therein. As detailed in the "Security Interest" section of the Business Account Agreement, the Debtor granted to JPMC a security interest in all deposits. *See* Ex. A, p. 11 ("You grant us a security interest in your account, including all current and future deposits and renewals, for amounts owing to us under this agreement or under any account service agreement by any owner."). Further, pursuant to Cal. Civ. Code § 3054(a), "[a] banker, or a savings and loan association, has a general lien, dependent on possession, upon all property in their hands belonging to a customer, for the balance due to the banker or savings and loan association from the customer in the course of the business . . . ." Cal Civ. Code § 3054(a); *see also Bromberg v. Bank of Am. Nat'l Tr. & Sav. Asso.*, 135 P.2d 689, 692 (1943) ("The right of the bank to the general lien authorized by section 3054 of the Civil Code is not to be tested by the character in which the customer becomes indebted to it, but solely by the fact that he is indebted to it in a balance due to it and accruing in the course of business.").

45. *Second*, JPMC has contractual setoff rights against the Bank Accounts. *See* Ex. A, p. 43 ("[t]o the fullest extent permitted by law, we may charge or set off funds in your account for any direct, indirect and/or acquired obligations that any owner [*defined as the client/business customer*] owes us, regardless of the source of the funds in the account."). Section 553(a) of the Bankruptcy Code provides that "[e]xcept as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the

case . . . ." 11 U.S.C. § 553(a). Section 553(a) "does not create a right of setoff, but rather preserves whatever right exists under applicable non-bankruptcy law." *Off. Comm. of Unsecured Creditors v. Mfrs. & Traders Tr. Co. (In re Bennett Funding Grp., Inc.)*, 146 F.3d 136, 138-39 (2d Cir. 1998); *Gordon v. U.S.*, 2010 WL 2541103, at *2 (S.D.N.Y. June 21, 2010). Setoff requires "mutuality" such that pre-petition claims against the debtor are set off against pre-petition debts owed to the debtor. *See In re Metropolitan Hosp*., 131 B.R. 283, 289 (E.D. Pa. 1991) ("Setoff, as a federal bankruptcy law concept, applies when a debtor and a creditor have mutual prepetition claims against one another."); *Pardo v. NYLCare Health Plans, Inc. (In re APF Co.)*, 274 B.R. 408, 421 (Bankr. D. Del. 2001) (setoff applies where a debtor and a creditor hold mutual, valid and enforceable pre-petition claims against each other). JPMC's and the Debtor's claims are mutual in that both parties' claims arise under the prepetition agreements governing the parties' banking relationship, including the Origination Agreement and the Business Account Agreement.

46. *Third*, JPMC is entitled to assert recoupment as an affirmative defense. Although the common law doctrine of recoupment is not expressly recognized in the Bankruptcy Code, it "has long been recognized as applicable in bankruptcy proceedings." *Reeves v. Columbia Gas of Ohio (In re Reeves)*, 265 B.R. 766, 770 (Bankr. N.D. Ohio 2001); *see Holyoke Nursing Home, Inc. v. Health Care Financing Admin. (In re Holyoke Nursing Home, Inc.)*, 372 F.3d 1, 3 (1st Cir. 2004) ("in essence the recoupment doctrine constitutes an equitable exception to the Bankruptcy Code § 362(a)(7) prohibition against offsetting reciprocal debts."). "Recoupment 'is the setting up of a demand *arising from the same transaction* as the plaintiff's claim or cause of action, strictly for the purpose of abatement or reduction of such claim.'" *University Medical Center v. Sullivan (In re University Medical Center)*, 973 F.2d 1065, 1079 (3d Cir. 1992) (quoting 4 Collier on Bankruptcy § 553.03, at 553-15-17) (emphasis in original). Courts "generally apply a fact-based

approach in determining whether two opposing sets of claims arose from the same integrated transaction." *Reeves*, 265 B.R. at 771. The "same transaction" analysis itself inherently embodies competing issues of equity, and the predominant consideration is whether "it would be inequitable for [a debtor] to enjoy the benefits of the same transaction without also meeting its obligations." *Slater Health Ctr. v. United States (In re Slater Health Ctr.)*, 398 F.3d 98, 104 (1st Cir. 2005) (citing *Holyoke*, 372 F.3d at 5, quoting *University Medical Center*, 973 F.2d at 1081 (internal quotation marks omitted)). Each of the Debtor's claims against JPMC for payment of deposits and JPMC's claims against the Debtor for reimbursement of ACH returns arise under the same integrated transaction governing the Debtor's banking relationship with JPMC. It would not be fair for the Debtor to enjoy the benefits of that banking relationship without also meeting its obligations to cover the costs associated with processing transactions through that banking relationship.

47. Accordingly, JPMC has claims against the Debtor that are secured by contractual and statutory liens, security interests, and rights to setoff against the Bank Accounts and deposits therein, including the Bond Account and the Bond Account Funds. JPMC also has an affirmative defense of recoupment that may be asserted in response to any claims by the Debtor for payment of deposits.

B. The Bond Account Funds Cannot Be Sold Free And Clear Of JPMC's Liens Or Its Affirmative Defense Of Recoupment.

48. On the present record, the Court cannot find, as is suggested in paragraph J of the Proposed Sale Order, that the Debtor may sell the Assets free and clear of all Encumbrances. *See* Proposed Sale Order ¶ J. To the contrary, the Debtor did not even attempt to provide a legal or factual basis in the Sale Motion for such a finding.

49. Pursuant to section 363(f) of the Bankruptcy Code, the Assets may be sold free and clear of any interest in such property of an entity other than the estate only if one of the conditions described in section 363(f)(1)-(5) is met. With respect to JPMC's liens, the Debtor has not demonstrated that any of those conditions is satisfied. *First*, the Debtor does not cite any applicable nonbankruptcy law that permits the sale free and clear of JPMC's liens. 11 U.S.C. § 363(f)(1). *Second*, JPMC has not consented to the Proposed Sale. *Id.* § 363(f)(2). *Third*, the proposed purchase price of the Assets is substantially less than the value of all liens on the Assets. *Id.* § 363(f)(3). *Fourth*, the Debtor has not raised any bona fide dispute regarding the validity of JPMC's liens. *Id.* § 363(f)(4). *Fifth*, the Debtor has not demonstrated that JPMC could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of its liens. *Id.* § 363(f)(5). Indeed, this subsection has been found to not apply to liens, but only other types of interests in property. *In re Canonigo*, 276 B.R. 257 (Bankr. N.D. Cal. 2002).

50. Additionally, the right of recoupment is a defense and not an "interest," as that term is defined in section 363(f) of the Bankruptcy Code. *Folger Adam Sec., Inc. v. DeMatteis/MacGregor, J.V.*, 209 F.3d. 252, 261 (3d Cir. 2000). Therefore, such defense cannot be extinguished by a "free and clear" sale under section 363(f) of the Bankruptcy Code. *Id.*

51. Because the Debtor has failed to satisfy its burden of proof that it is entitled to sell the Assets free and clear of JPMC's liens and its affirmative defense of recoupment under section 363(f), the Proposed Sale Order must clarify that the sale is subject to JPMC's liens and affirmative defense of recoupment.

C. JPMC Should Be Permitted To Exercise Its Setoff Rights Prior To Any Sale Of The Bond Account Funds.

52. Funds in the Bond Account are not cash that belongs to the Debtor, as the depositor. Rather, it is well-established that deposits in a bank account in a debtor's name are debts owed by

the bank to the debtor. *See, e.g., Strumpf*, 516 U.S. at 21 ("[A] bank account … consists of nothing more or less than a promise to pay, from the bank to the depositor …."); *Bank of Marin v. England*, 385 U.S. 99, 101 (1966) ("The relationship of bank and depositor is that of a debtor and creditor, founded upon contract."). To transfer the Deposit Account Funds to the Purchaser, the Debtor must first receive payment on its debt owed by JPMC on account of the relevant deposits. The Debtor's claim to the deposits, however, is subject to JPMC's affirmative defenses, including setoff and recoupment.

53. The Court previously authorized JPMC to exercise its setoff rights. Pursuant to the Bank Accounts Order, the Court authorized JPMC, without further order of the Court, "to continue to deduct from the appropriate Bank Accounts, the Bank Account Claims incurred in connection with the Bank Accounts." Bank Accounts Order ¶ 6. The term "Bank Account Claims" is defined in the Bank Accounts Order to include "any reimbursement or other payment obligations, such as overdrafts, arising under the Bank Account Agreements." *Id.* Payment obligations to JPMC include the Indemnified Losses and the overdrafts caused thereby. *See supra* ¶¶ 16-21. Accordingly, to the extent that the Court is inclined to approve the Proposed Sale of the Bond Account Funds, the Proposed Sale Order should acknowledge the authority previously granted to JPMC to deduct the Bank Account Claims from the Bank Accounts, including the Bond Account, prior to consummation of the Proposed Sale, and confirm that such Bank Account Claims include the Indemnified Losses and the overdrafts caused thereby.

IV. THE SALE ORDER SHOULD NOT DICTATE DISTRIBUTION OF SALE PROCEEDS WHEN PARTIES' UNDERLYING RIGHTS TO SALE PROCEEDS REMAIN IN DISPUTE.

54. Distribution of the sale proceeds to particular creditors upon closing of the sale is premature and should be removed from the Proposed Sale Order pending a final determination of parties' rights to receive the proceeds.

55. Paragraph DD of the Proposed Sale Order currently provides that proceeds of the Sale must be distributed, first, to the DIP Facility Lender, second, to the Prepetition Secured Party (provided that the Challenge Period Termination Date has passed), and, third, to the Debtor's estate. Proposed Sale Order ¶ DD.

56. Among other potential issues, the proposed distribution is contrary to JPMC's rights vis-à-vis Mr. Lewis, in his capacity as DIP Facility Lender and Prepetition Secured Party. Pursuant to paragraph 11 of the Guaranty between JPMC and Mr. Lewis, Mr. Lewis assigned to JPMC all of his rights to any payments on account of any claims that he may have against the Debtor in any bankruptcy, reorganization, or liquidation proceeding. Guaranty ¶ 11. Accordingly, any payments to Mr. Lewis on account of his claims against the Debtor, either in his capacity as a DIP Facility Lender or Prepetition Secured Party, must be made to JPMC.

57. Pending a final determination of all parties' rights to distributions of sale proceeds, language directing distribution of sale proceeds to particular creditors upon closing of the Sale should be removed from the Proposed Sale Order, and such proceeds should be held by the Debtor pending further order of the Court.

CONCLUSION

58. The Sale Motion should be denied on the basis that the Proposed Sale and subsequent distribution of the Bond Account Funds, which should be considered property of the estate, to a small subset of favored general unsecured creditors pursuant to the APA constitutes an impermissible *sub rosa* chapter 11 plan that violates the absolute priority rule and the rights of senior creditors and other non-favored general unsecured creditors. *See supra* ¶¶ 33-40. If the Bond Account Funds are not property of the estate, the Debtor may not sell the Bond Account Funds because section 363(b) only permits the Debtor to sell property of the estate. *See id.* ¶ 42.

In the event that the Court is inclined to grant the Sale Motion, the Proposed Sale should be conditioned upon: (a) either (i) a carve-out of the Bond Account Funds from the Assets sold to the Purchaser or (ii) an acknowledgement of the authority previously granted to JPMC to deduct the Bank Account Claims from the Bank Accounts, including the Bond Account, prior to consummation of the Proposed Sale, and confirmation that such Bank Account Claims include the Indemnified Losses and the overdrafts caused thereby, *see id.* ¶¶ 52-53, and (b) all sale proceeds being held by the Debtor pending further order of the Court regarding appropriate distributions thereof, rather than being distributed immediately to disputed creditors, including the Prepetition Secured Lender, *see id.* ¶¶ 54-57.

59. At a minimum, to the extent that JPMC already has returned money to a customer through an ACH chargeback and that customer also is a Preferred Unsecured Creditor, such customer's alleged "Customer Trust Funds" should not be transferred to the Purchaser for purposes of providing that Preferred Unsecured Creditor a refund or a new trip. That would result in a double recovery for the Preferred Unsecured Creditor, first, through an ACH chargeback, and, second, through a refund from the Purchaser required under the terms of the APA. No creditor is deserving of a double recovery under any circumstances, but particularly while most creditors likely will receive no recovery.

RESERVATION OF RIGHTS

60. JPMC hereby reserves the right to file such other and further objections to the Sale Motion and does not waive and hereby expressly preserves all other rights, remedies, and arguments afforded to JPMC by the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules of the United States Bankruptcy Court for the District of Massachusetts, and any applicable state and Federal statutes.

WHEREFORE, JPMC respectfully requests that the Court enter an order denying the relief requested Sale Motion or otherwise granting relief in favor of JPMC as may be appropriate.

Dated: August 3, 2023

Respectfully submitted,

REED SMITH LLP

By: */s/ David A. Casale*

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Counsel to JP Morgan Chase Bank, N.A., successor-in-interest by purchase and assumption of the deposit accounts from the Federal Deposit Insurance Corporation as Receiver for First Republic Bank, San Francisco, CA

CERTIFICATE OF SERVICE

I, David A. Casale, an individual eighteen years of age or older, hereby certify that on the date set forth below, I caused the foregoing document (with exhibits) to be served on all parties receiving notice and service in this case through the Court's CM/ECF electronic filing service, which served the same on the parties receiving notice via the CM/ECF system.

Dated: August 3, 2023

Respectfully submitted,

REED SMITH LLP

By: */s/ David A. Casale*

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EXHIBIT A

Relevant Excerpts from Business Account Agreement

(Attached)

Business Account Disclosure and Agreement

Effective March 1, 2023



First Republic Bank

It's a privilege to serve you®

Thank you for banking with us. These terms, your signature card, our service fee schedule and any applicable rate disclosures that you receive when you open your account, represent our agreement with you and contain important information about your account. Please read them carefully. By signing our signature card, requesting an account or maintaining an account, you acknowledge that you have reviewed, understand and agree to be governed by these terms. PLEASE PAY PARTICULAR ATTENTION TO THE "DISPUTE RESOLUTION" WHICH CONTAINS A JUDICIAL REFERENCE/JURY TRIAL WAIVER PROVISION.

Other Agreements

Certain services we offer, such as those relating to wire transfers, ACH origination and remote deposit capture, are performed under additional agreements. When there is an additional agreement that applies to a service you are using, both that agreement and the terms in this Agreement will apply to your account and our services. Certain provisions of your other agreements with us may supersede some of the terms of this agreement, to the extent that they are inconsistent.

Terms

In this booklet, the words "you," "your" and "client" refer to the owners and authorized signers of an account; "we," "us," "our" and "Bank" refer to First Republic Bank. Our "business days" are Monday through Friday, excluding holidays. Unless otherwise specified, the times indicated are local time in the state where your account is maintained.

Our Relationship

Unless otherwise expressly agreed in writing, our relationship with you will be that of debtor and creditor. That is, we owe you the amount of your deposit. No fiduciary, quasi-fiduciary or other special relationship exists between you and us. We owe you a duty of ordinary care. Any internal policies or procedures that we may maintain in excess of reasonable commercial standards and general banking usage are solely for our own benefit and shall not impose a higher standard of care than otherwise would apply in their absence. There are no third-party beneficiaries to this agreement.

Governing Laws and Rules

To the extent this agreement is subject to the laws of any state, it will be subject to, and construed in accordance with, the laws of the State of California, without regard to its conflict of law provisions. If you are a resident of another state and/or your account is maintained in another state, some of the laws of that state (e.g., involving escheat, Legal Process (defined here as including any garnishment, levy, execution, attachment, tax withholding order, restraining order, subpoena, warrant, injunction, government agency request for information,

forfeiture or other similar legal process), setoffs, and privacy) also may apply.

Unless otherwise provided in this agreement, your accounts and services also will be subject to applicable clearinghouse, Federal Reserve Bank, funds-transfer system, image exchange and correspondent bank rules ("Rules"). You agree that we do not have to notify you of a change in the Rules, except to the extent required by law. If there is any inconsistency between the terms of this agreement and the Rules, the terms of this agreement shall supersede the Rules, unless otherwise provided in the Rules.

Privacy Policy

First Republic's Privacy Policy describes our policies and practices with respect to the collection, protection, use and sharing of personal information. The type of personal information we collect depends on the First Republic products or services you use or have applied to use. Please refer to our Privacy Policy or view our Privacy Policy at https://www.firstrepublic.com/privacy/policy.

Business Accounts

Your account is designed to be used for a business purpose only. You may not use your account primarily for personal, family or household purposes.

Disclosure of Account Information

We may disclose information regarding your account with our affiliates, as permitted by applicable law, and with our service providers we believe to be necessary or appropriate, consistent with applicable laws.

We engage service providers to deliver services to you on our behalf, such as bill payment, money transfers, check processing, wiring services and payment solutions; and to assist us with technology support, operational support, and other forms of assistance. We contractually bind our service providers to protect the confidentiality and security of your account information we share with them. Please refer to our Privacy Policy or view our Privacy Policy at https://www.firstrepublic.com/privacy/policy.

General Data Protection Regulation (GDPR)

Definitions

Capitalized terms used but not defined have the meaning given in the Agreement.

"Data Protection Law" means any law, rule, regulation, decree, statute, or other enactment, order, mandate or resolution, applicable to Bank or client, relating to data security, data protection and/or privacy, including Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to processing of personal data and the free movement of that data ("GDPR"), and any implementing, derivative or related legislation, rule, regulation, and regulatory guidance, as amended, extended, repealed and replaced, or re-enacted.

Indemnification

Except as otherwise set forth in this agreement, you agree to indemnify, defend and hold us harmless from all claims, actions, proceedings, fines, costs and expenses (including, without limitation, attorney fees) related to or arising out of: (a) your actions or omissions in connection with your accounts or our services, or (b) our actions or omissions, provided that they are taken/omitted in accordance with this Agreement or your instructions and are not the result of our gross negligence, fraud or intentional misconduct. This provision shall survive the termination of this agreement.

Security Interest

You grant us a security interest in your account, including all current and future deposits and renewals, for amounts owing to us under this agreement or under any account service agreement by any owner. This provision does not apply to IRA or tax-qualified retirement accounts or where otherwise prohibited by law.

Electronic Communications

At our option, any Communication (defined below), including such Communications otherwise required to be written or in writing, may be in the form of an electronic record and be executed using electronic signatures. Any Communication may be executed in one or more counterparts, each of which may be executed on paper or electronically. An electronic or other copy of a signed Communication shall be considered as effective as an original. Communications may be sent electronically by us (i) by sending the Communication to the recipient's Authorized Email Address (defined below), or (ii) by posting the Communication on a website and sending a notice to the recipient's postal address or Authorized Email Address. In the absence of actual notice of non-delivery received by us, Communications sent electronically pursuant to this paragraph shall be effective when sent and shall constitute notice of the Communication. For the avoidance of doubt, the authorization under this paragraph may include, without limitation, use or acceptance by us of a manually signed paper Communication that has been converted into electronic form (for example, through being scanned into a PDF), or an electronically signed Communication converted into another format for transmission, delivery and/or retention. As used in this paragraph, the term "Communications" means any notices, disclosures, authorizations, agreements, account statements, tax forms and reports, acknowledgements and other documents that we are required or otherwise elect to provide or make available to you, or that you submit, execute or agree to in connection with your relationship with us. As used in this paragraph, "Authorized Email Address" means any email address you have provided to us.

Telephone and Electronic Communication Monitoring

In accordance with applicable laws, we may monitor or record telephone conversations and electronic communications for quality control and fraud prevention purposes. Please

jurisdiction of residence or jurisdiction where your account(s) are maintained. If we are not fully reimbursed for our record research, photocopying and handling costs by the party that served the process, we may charge such costs to your account, in addition to our minimum legal process fee. To the extent allowed by law, you agree to reimburse us for any cost or expense, including attorney fees, which we incur in responding to legal process related to your accounts, and we may deduct these fees and expenses from any of your accounts without prior notice to you.

We may hold and turn over funds or other property to the court or creditor as directed by the legal process, subject to any security interest we may have in the funds or other property. We may not pay interest on any funds we hold or set aside in response to legal process. If we hold or turn over funds, we may without any liability to you return checks and other items unpaid and refuse to permit withdrawals from your account. If the legal process applies to a time deposit account, we may charge the applicable early withdrawal penalty for funds taken from the time deposit.

You agree that we may honor legal process that is served personally, by mail, email or facsimile transmission at any of our Offices (including locations other than where the funds, records or property sought is held), even if the law requires personal delivery at the Office where your account or records are maintained or at another Office designated by us for that purpose. You acknowledge that, subject to applicable law, accounts opened with trust or fiduciary designations may be subject to levies and other legal process against your property unless our records clearly reflect the existence of an express written trust or court order, or applicable law provides otherwise.

Setoff

To the fullest extent permitted by law, we may charge or set off funds in your account for any direct, indirect and/or acquired obligations that any owner owes us, regardless of the source of the funds in the account. This provision does not apply to IRA or tax-qualified retirement accounts, to consumer credit card obligations, or where otherwise prohibited by law.

Termination/Closing Your Account

Any authorized signer(s) may close your account at any time, with or without cause. We are not required to provide notice of such closure to the other authorized signers on the account. We may automatically close your account if the account balance is zero.

We may close your account and/or terminate your account relationship with us at any time in our sole discretion, with or without cause, by giving oral, electronic or written notice to any of you. We need not disclose the reason to you. If the funds are not withdrawn, we may send a check for the collected account balance to any of you at the last address we have on file for the account. Thereafter, the funds will stop earning interest (even if the check is returned or remains uncashed for any reason).

EXHIBIT B

Relevant Excerpts from Origination Agreement

(Attached)

Business Products

Terms and Conditions

Effective February 1, 2023



First Republic Bank

It's a privilege to serve you®

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telephone conversations and electronic communications for quality, control and fraud prevention purposes.

Product-Specific Terms and Conditions

The terms and conditions below apply only to the specific service discussed in the section. If there is any conflict here with a product-specific term and the more general terms in the first part of this booklet, the product-specific terms in the following sections will control.

Automated Clearing House (ACH) Services

Origination Agreement for Automated Clearing House Services – Debit/Credit Origination — This section of the Agreement sets forth the terms and conditions that govern the origination of payments using the ACH Network ("Entries") using us as the Originating Depository Financial Institution ("ODFI"). This Agreement applies to your Accounts as defined above. Capitalized terms not defined in this Agreement are defined in the Rules.

You ("Originator") desire to originate Entries through us for the payment of funds ("Debit Entries") from the deposit accounts of Receivers maintained at Receiving Depository Financial Institutions ("RDFIs") or originate Entries through us for the deposit of funds ("Credit Entries") to the Accounts of Receivers maintained at RDFIs. We are a Participating Depository Bank in the ACH Network and may transmit entries on your behalf into the ACH Network and are willing to serve as an ODFI to process pre-authorized credit and debit Entries.

Rules — Entries using the ACH Network are subject to the rules, operating regulations, guidelines and practices established by NACHA (the "Rules"). The Rules are incorporated by reference into this Agreement. We will provide a copy of the current Rules upon request. We will use commercially reasonable efforts to provide you with any changes to the Rules. Nevertheless, you shall remain responsible under this Agreement to comply with the current Rules at all times. If a Rule directly conflicts with terms of this Agreement, the Rule shall control unless we notify you to the contrary.

Originator Authorization — For every Entry you deliver to us, you authorize us to initiate and transmit and to credit or debit, as applicable, the amount of each such Entry to the Account or to the Receiver's Account, as applicable.

Your Warranties — In addition to other Warranties, you make the following Warranties in connection with ACH transactions:

Warranties Regarding Credit Entries — You warrant that: (a) You authorize us to initiate and transmit Credit Entries and to debit the Account. The Receiver has authorized you to initiate and transmit Entries to the Receiver's Account (each a "Credit Authorization") and the Authorization (whether it authorizes a single Entry or recurring Entries) is in writing, signed or similarly authenticated by the Receiver, and has not been revoked or ter-

minated. (b) All information contained in each Entry is correct. (c) Each Entry is timely. (d) Each Entry is to your employee for the payment of salary or wages: (i) you will furnish a detailed statement of earnings to the Receiver no later than the day the Receiver's Account is due to be credited, and (ii) our standard processing of such entry pursuant to the terms of this Agreement and the Rules will not violate any employment or other law. (e) Each entry complies with U.S. law, applicable state law, this Agreement and the Rules.

Warranties Regarding Debit Entries — You warrant that: (a) The Receiver has authorized you to initiate and transmit each Entry to the Receiver's Account (each a "Debit Authorization") and the Authorization (whether it authorizes a single Entry or recurring Entries) is in writing, signed or similarly authenticated by the Receiver, and has not been revoked or terminated. (b) The information contained in each Entry is correct. (c) The Entry is for an amount, which on the settlement date will be due to you from the Receiver, is for a sum specified by the Receiver to be paid to you, or is to correct a previously transmitted erroneous Credit Entry. (d) Each entry complies with U.S. law, applicable state law, this Agreement and the Rules.

Our Warranties — With respect to each Entry, you make to us all of those warranties we are required to make under the Rules.

Notification of Change (NOC) — A Notification of Change is created by the RDFI to notify the ODFI and its Originator that a posted Entry or Prenotification Entry contains invalid or erroneous information and should be updated. You as the Originator must make the changes specified in the NOC by the later of (i) six banking days after receipt of that notice or (ii) prior to initiating another Entry to that same Receiver's account. You as the Originator may not initiate a new entry to the Receiver until the requested changes have been made.

If you as Originator fail to correct the invalid or erroneous information stated in the NOC and you do initiate a subsequent Entry to that same Receiver's account, this is a potential violation of the Rules. If the RDFI then files a "Rules Violation" against you as the Originator (through us as the ODFI), it could result in a proceeding and an escalating level of fines and penalties assessed against you. Failure to correct the invalid NOC could also result in our revoking your authority to create Entries.

ACH Data Security Requirements and Protected Information — The Rules require Originators to establish, implement and, as appropriate, update security policies, procedures and systems related to the initiation, processing and storage of Entries and certain Nonpublic Personal Information about consumers that you use to create an Entry or that is contained in an Entry. Your policies and procedures must protect the confidentiality and integrity of Nonpublic Personal Information, protect against anticipated threats or hazards to the security or integrity of it, and protect against its unauthorized use.

Notice Regarding Credit Entries — All Credit Entries that are defined as "funds transfers" under the California version of the Uniform Commercial Code may be transmitted through the ACH.

Prenotifications — Prior to the initiation of the first Entry to a Receiver, you may send a notification (each a "Prenotification") through us to the RDFI providing notice that you intend to initiate entries to the Receiver's Account in accordance with the Receiver's Authorization. Except as otherwise provided in the Rules, you may initiate Entries to a Receiver's Account no sooner than six business days following the Prenotification Entry. If within six business days, the RDFI notifies us that it will not accept your Entries, you shall not initiate such Entries. If within six business days, the RDFI notifies us that the institution requires certain changes to the Entries, you shall not initiate Entries unless the requested changes have been made.

Your Covenants — You will: (a) Retain a copy of each Credit Authorization and Debit Authorization (each an "Authorization") and records of all Entries for a period of three years from the later of: (i) the date of termination or revocation of the Authorization, if any, or (ii) the date the Entry was transmitted. (b) Provide each Receiver with an electronic or hard copy of the Receiver's Authorization. (c) If the amount of a Debit Entry to be initiated to a consumer Account differs from the amount of the immediately preceding Debit Entry relating to the same Authorization, or from a pre-authorized amount, you shall send the Receiver written notification of the amount of the Entry and the date on or after which the Entry will be debited at least 10 calendar days prior to the date on which the Entry is scheduled to be initiated. If you inform the Receiver of their right to receive notification concerning a change in the amount of a Debit Entry, Receiver may choose to receive notice only if the amount of the Entry falls outside of a specified range or if the Entry differs from the most recent Entry by more than an agreed-upon amount. (d) If you change the date on or after which Entries to be initiated by you are scheduled to be debited to Receiver's Account, you shall send to Receiver written notification of the new date on or after which Entries initiated are scheduled to be debited to Receiver's Account no less than seven calendar days before the first Entry to be affected by the change is scheduled to be debited to Receiver's Account.

You also agree to provide us with at least 30 days' advance written notice of: (a) any material (20% or greater) change in your ownership; (b) any material change in the type, location, scope or nature of your business; or (c) any anticipated (20% or greater) increase in the amount or volume of your ACH transactions over the preceding calendar quarter (if applicable).

On-Us Debit and Credit Entries — If you deliver an Entry and the Receiver's Account is held by us, that Entry will be an On-Us Entry, and may not be processed through the ACH Network. For each On-Us entry, you are deemed to make to us all warranties we would be required to make to the RDFI if the Entry were not an On-Us Entry.

Returns and Chargebacks — We are under no obligation to process an Entry or otherwise perform under this Agreement if you do not have sufficient collected funds to cover an Entry or fees. Debit Entries processed against a Receiver's Account, if paid, shall be deposited to the Account. To the extent permitted by applicable law, you shall have the right to withdraw funds

collected on a Debit Entry only after and only to the extent that we have received a settlement for such Entry, which settlement has become final. You authorize us to debit or charge back to the Account the amount of any Entry returned unpaid, or charged back, or any adjustment received with respect to an Entry or any On-Us Debit Entry. If an Entry is rejected, returned unpaid or charged back, we shall only provide notice to you as required under the Rules. You are solely responsible for resubmitting any returned or rejected Entry. If a returned or rejected Entry is a Credit Entry for sums owed to the Receiver, you shall be totally and solely responsible for ensuring Receiver receives the monies owed, whether by another Entry or other means.

Direct Transmission — If we approve you to transmit ACH transactions to the Bank via direct transmission, your use of direct transmission constitutes your agreement to the following terms:

You agree to ensure the integrity and confidentiality of ACH transaction files throughout the course of transmission, including when such files are under the control of your service providers. In addition to other indemnifications, you agree to indemnify, defend and hold harmless us and our subsidiaries, and their officers, directors, employees, clients, agents, successors and assigns from and against any and all claims, loss, damage, expense or liability, including our reasonable counsel expenses, as may be incurred or resulting or arising out of your direct transmission of ACH transactions. Your liability pursuant to this Agreement may exceed the amount of ACH transactions actually transmitted.

Tax Payment Service — If we approve you for the Tax Payment Service, you appoint us to act as your agent to make tax payments and deposits on your behalf. You must agree in writing regarding the specific taxes that are to be paid. Upon our request, you agree to execute such additional enrollment forms and authorizations as we may request. You authorize us to release Account and tax payment information to any taxing authority in performing the tax payment service and to confirm payments. Tax payments are made through ACH and will be subject to the "Funds Transfer Services" section of this Agreement.

***Accuracy* —** You are solely responsible for determining the amount of any taxes due and transmitting payment information in accordance with our procedures. We will have no responsibility for (a) determining the correctness of any tax computation or payment; (b) questioning the timing or amount of any payment; (c) determining or questioning the correctness of any report or information submitted by you (even if it appears incorrect on its face); or (d) any penalty which may be imposed if you instruct us to make a payment after our cutoff hour or the date the tax payment is due.

***Funds Awaiting Distribution* —** When we receive your Order to make a tax payment, we will charge your Account for the amount of the payment(s). The funds will be held by us as a noninterest bearing deposit liability to you, but will not be held in trust. Until we make your tax payment, your funds will be subject to offset for any debts owed to us.

Your Duty to Pay Taxes — You assume the risk of any failure to transmit the data to us in a timely and correct manner. Any interruption of the Service, regardless of the reason, will not relieve you of your obligation to make a tax payment or report. You are responsible for promptly making required tax payments by another means in the event there is an interruption in the Service.

No Tax Advice — You acknowledge that our employees are not authorized or permitted to give tax advice to you. You agree not to seek or place any reliance upon tax advice from us or our employees.

ACH Prefunding for Credit Origination — If we require you to Prefund ACH transactions, the following requirements apply for any and all employees, consultants or third parties at your company that may prepare ACH files.

- ACH payment transactions (or batch of transactions) must be received by us by 5:00 p.m. Pacific Time, at least two business days prior to the settlement date.
- When you initiate an ACH Prefunding batch, the Corporate Digital Banking system will verify availability of funds in your account. Available (collected) funds must be in your account before you release your batch to the Bank or your ACH transactions will not be processed. Since holds on deposited checks may limit funds availability, you agree to adequately prefund your batch via wire transfer, account transfer, loan advance or cash deposit.
- Funds will be debited from your deposit account immediately after the ACH Prefunding batch is released, regardless of the settlement date. If funds are not available, the Corporate Digital Banking system will not process the batch. In the event a batch is not processed, there is no direct notification process from us to you; however, you may view the status of the batch in the Corporate Digital Banking system.
- Prefunding can only be used to originate ACH credit batches for payments (i.e., direct deposit of payroll, trade payments, etc.).
- The deposit account used for settlement cannot be a Sub-Account in a Zero or Managed Balance Account relationship or Corporate Sweep relationship.
- Your ACH batch will not be processed if the above conditions are not met.
- We are under no obligation to contact you if a nonsufficient or uncollected funds condition exists.

ACH Block Service — If you instruct us to block incoming ACH debit and/or credit Entries, we will block such qualified ACH Entries from posting to the business accounts you enrolled in the Service. We will return all blocked transactions to the originating bank.

You are solely responsible for (a) enrolling business accounts and (b) providing us with information to initiate, amend and terminate the Service in accordance with our procedures. Our processing of nonconforming information will not be considered a waiver of any requirements of this Agreement, and we may discontinue processing nonconforming information without prior notice.

Bill Center

The Bill Center Service is available to First Republic Bank business entity clients through Corporate Digital Banking. Bill Center is not available to consumer clients. Bill Center is a set of services, features and functionalities that enable you to make digital payments to third parties, and/or receive payments from third parties through Corporate Digital Banking using selected account(s) at the Bank. Bill.com is the Service Provider for the Service. We use Bill.com to facilitate payables and receivables transactions. Bill.com is a money services business and a licensed money transmitter, and the provider of money transmission services for Bill Center.

For the full list of services, requirement and fees please refer to the full Bill Center Terms and Conditions at **https://www.firstrepublic.com/engage/corporate-online-master-agreement**

Biller and Payment Solutions (BPS)

You may use the Service to:

- Initiate single or recurring ACH entries to debit consumer accounts based on authorizations you obtain via your website ("WEB Entries"), via telephone ("TEL Entries") or via written consent ("PPD Entries") and/or

- Collect and transfer information to the entity you identify to us as your merchant processor ("Merchant Processor") regarding single or recurring charges to consumer credit or debit cards, based on authorizations you obtain via your website ("Charge Transactions"). The term "Service Transactions" includes WEB Entries, TEL Entries, PPD Entries and Charge Transactions.

We will generally collect Service Transaction information from your website at least once each business day for processing against the designated consumer accounts or cards. Service Transaction information collected until 7:00 p.m. Eastern Time will be processed on the same business day. Service Transaction information collected after 7:00 p.m. Eastern Time will be processed on the following business day. Business days are Monday through Friday excluding weekends and holidays. You agree to make Service Transaction information available to us in accordance with the requirements we specify from time to time. WEB Entries, TEL Entries and PPD Entries will be processed by us as the Originating Depository Financial Institution. Charge Transaction information will be delivered to your Merchant Processor for processing. If a Charge Transaction is rejected or cannot be obtained by the Merchant Processor for any reason,

EXHIBIT C

Guaranty

(Attached)

FIRST REPUBLIC BANK
It's a privilege to serve you®

CONTINUING GUARANTY

This CONTINUING GUARANTY is made by and between **First Republic Bank** ("Lender"), and Henry Roland Lewis ("Guarantor").

1. **Guaranty of Payment and Performance.** For valuable consideration and to induce Lender to grant credit or other financial accommodations to Vantage Travel Service Inc. ("Company"), Guarantor, as primary obligor and not merely as surety, absolutely and unconditionally guarantees and promises to pay Lender or order, on demand, in lawful money of the United States, any and all indebtedness (as hereinafter defined) of Company to Lender under any existing or future agreement with Lender, and also absolutely and unconditionally guarantees the due performance by Company of all its obligations under all existing and future agreements with Lender.

2. **Indebtedness.** The word "indebtedness" is used herein in its most comprehensive sense to include any and all obligations and liabilities of Company, whether due or not due, absolute or contingent, liquidated or nonliquidated, determined or undetermined arising from or in connection with the First Republic Bank Origination Agreement for Automated Clearing House Services Debit/Credit Origination, executed by Company and Lender ("Origination Agreement"), whether Company may be liable individually or jointly with others, or whether recovery upon such indebtedness may be or hereafter become barred or otherwise unenforceable.

3. **Continuing Guaranty.** This Guaranty is, as to each Guarantor, a continuing guaranty, which shall remain effective without reaffirmation until it has been terminated by Lender at the time of the termination of and payment in full of all obligations due by Company under the Origination Agreement. This Guaranty shall not be impaired by any modification, supplement, extension or amendment of the Origination Agreement, or by any modification, release or other alteration of any of the indebtedness hereby guaranteed or of any security therefore, including without limitation, pursuant to a bankruptcy or reorganization proceeding in connection with Company.

4. **Joint and Several Obligations.** The obligations hereunder are joint and several as to each and every Guarantor, and are independent of Company's obligations. A separate action or actions may be brought against Guarantor, or any one of them, whether action is brought against Company or whether Company is joined in any such action or actions. Each Guarantor agrees that any releases which may be given by Lender to any one or more of the Guarantor shall not release him, her or it from this Guaranty.

5. **Authorization.** Guarantor authorizes Lender, without notice or demand and without affecting its liability hereunder, from time to time to (a) renew, compromise, extend, accelerate or otherwise change the time for payment of, or otherwise change the terms of the indebtedness or any part thereof, including any increase or decrease in the rate of interest thereon; (b) take and hold security for the payment of this Guaranty or the indebtedness guaranteed, and exchange, enforce, waive and release any such security; (c) apply such security and direct the order or manner of sale thereof as Lender in its sole discretion may determine; (d) accept or discharge (in whole or in part) additional guarantors; and (e) assign, without notice, this Guaranty in whole or in part and/or Lender's rights hereunder to anyone at any time.

6. **Waivers.** Guarantor waives any right to require Lender to (a) proceed against Company; (b) proceed against or exhaust any security held from any person or marshalling of assets or liens; (c) proceed against any other Guarantor; or (d) pursue any other remedy available to Lender. Guarantor waives any defense arising by reason of any disability or other defense of Company or by reason of the cessation from any cause whatsoever of the liability of Company. Guarantor waives all presentments, demands for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, notices of default or demand, notices of acceptance of and reliance on this Guaranty and of the existence, creation, or incurring of new or additional indebtedness, notices of renewal, extension or modification of the indebtedness, notice of any and all favorable and unfavorable information, whether financial or other, about Company, heretofore, now, or hereafter learned or acquired by Lender and all other notices to which Guarantor or any of them might otherwise be entitled, and the right to a jury trial in any action hereunder or arising out of Lender's transactions with Company. Guarantor hereby waives any and all suretyship defenses now or hereafter available to it under the California Civil Code or the Commercial Code, including, without limitation, (i) California Civil Code Sections 2799, 2808, 2809, 2810, 2815, 2819, 2820, 2821, 2822, 2838, 2839, 2845, 2846, 2847, 2848, 2849, 2850, 2899 and 3433; (ii) Chapter 2 of Title 14 of the California Civil Code; or (iii) California Commercial Code Section 3605. Guarantor waives the benefit of any statute of limitations affecting its liability

hereunder or the enforcement hereof. Guarantor acknowledges that the waivers provided herein are made with Guarantor's full knowledge of the significance and consequence of such waivers, and that Lender is relying on such waivers.

7. Subrogation; Subordination. So long as any indebtedness of Company to Lender remains outstanding, Guarantor waives and agrees not to assert any right of subrogation, indemnity or contribution, all right to enforce any remedy Lender may have against Company or any other person, and any right to participate in security now or hereafter held by Lender, including, without limitation, any such right set forth in California Civil Code Sections 1845, 2848 or 2849. Any and all present and future debts and obligations of Company to each Guarantor are hereby postponed in favor of and subordinated to the full payment and performance of all indebtedness of Company to Lender. Any amounts received on such indebtedness or obligations owed to Guarantor shall be held by Guarantor as trustee and paid over to Lender without affecting Guarantor's liability under this Guaranty.

8. Financial Condition. Guarantor assumes the responsibility to keep informed of the financial status of Company and of any circumstance which may affect Guarantor's obligations or Company's, and Guarantor recognizes and agrees that Lender is not obligated to keep Guarantor informed of any such circumstances. Where Company is a corporation, partnership or limited liability company it is not necessary for Lender to inquire into the powers of Company of the officers, directors, partners, manager or agents acting or purporting to act on its behalf, and any indebtedness made or created in reliance upon the professed exercise of such powers shall be guaranteed hereunder. Guarantor agrees that by executing this Guaranty it assumes all risks of bankruptcy or reorganization cases or proceedings in connection with Company.

9. Other Financial Information. Guarantor shall deliver to Lender, or cause to be delivered to Lender, financial information regarding Guarantor, if any, set forth in Exhibit A and such other financial information regarding Guarantor as Lender may reasonably request from time to time. Lender may review such financial information at any time, notwithstanding any measurement or validation period set forth in the covenants listed in Exhibit A.

10. Collateral. Guarantor's performance of any and all obligations of Guarantor to Lender no matter how or when arising, whether absolute or contingent, whether due or to become due, and whether under this Guaranty or otherwise are secured by all monies or deposits of any Guarantor at any time in Lender's possession. Lender shall have the right to enforce such security interests and the right to offset against such security without notice or demand.

11. Claims in Bankruptcy. Guarantor shall file all claims against Company in any bankruptcy, reorganization or liquidation proceeding and shall assign to Lender such claims and all of its rights related thereto. If Guarantor fails to do so at Lender's request, Lender is authorized, and is hereby irrevocably granted Company's power of attorney, to file claims on Guarantor's behalf and to file an assignment of such claims with the bankruptcy court or liquidating entity. Guarantor hereby assigns to Lender all of Guarantor's rights to any payments on any such claims.

12. Revival. If Lender is required to reimburse to Company or any person any amount previously paid or recovered on account of the indebtedness as a preference, fraudulent transfer or because of any bankruptcy proceeding or similar proceeding, Guarantor's obligations shall be reinstated and revived.

13. Waiver of Jury Trial. GUARANTOR IRREVOCABLY WAIVES ALL RIGHTS TO A JURY TRIAL IN ANY ACTION, SUIT, OR PROCEEDING OF ANY KIND DIRECTLY OR INDIRECTLY ARISING OUT OF OR IN ANY WAY RELATING TO THE INDEBTEDNESS OR THIS GUARANTY, ANY OR ALL OF THE REAL AND PERSONAL PROPERTY COLLATERAL SECURING THE INDEBTEDNESS OR THIS GUARANTY, OR ANY OF THE TRANSACTIONS WHICH ARE CONTEMPLATED BY THE FINANCING DOCUMENTS OR THIS GUARANTY. THIS WAIVER IS INTENDED TO APPLY, TO THE FULLEST EXTENT PERMITTED BY LAW, TO ANY AND ALL DISPUTES AND CONTROVERSIES THAT ARISE OUT OF OR IN ANY WAY RELATE TO ANY OR ALL OF THE MATTERS DESCRIBED IN THE PRECEDING SENTENCE, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS OF ANY KIND. THIS GUARANTY MAY BE FILED WITH ANY COURT OF COMPETENT JURISDICTION AS GUARANTOR'S WRITTEN CONSENT TO WAIVER OF A JURY TRIAL.

14. Miscellaneous.

(a) Guarantor agrees to pay attorneys' fees and all other costs and expenses which may be incurred by Lender in the enforcement or interpretation of Lender's rights under this Guaranty in any state, federal or bankruptcy proceeding.

(b) Any married person who signs this Guaranty hereby expressly agrees that recourse may be had against his/her separate property for all his/her obligations under this Guaranty.

(c) This Guaranty contains the entire guaranty agreement between Guarantor and Lender, and supersedes all prior agreements and negotiations whether oral or written pertaining to the subject matter of this Guaranty. No modification or amendment of this Guaranty shall be effective unless it is in writing and executed by Guarantor and Lender.

(d) The death of any Guarantor shall not terminate this Guaranty as to such deceased or as to any other Guarantor. This Guaranty shall be binding upon the heirs, executors, administrators, successors and assigns of each Guarantor and shall inure to the benefit of Lender's successors and assigns. Guarantor may not assign its rights or obligations hereunder.

(e) In all cases where there is more than one Company named herein, or when this Guaranty is executed by more than one Guarantor, the "Company" and the word "Guarantor," respectively, shall mean all and any one or more of them.

(f) All acts and transactions hereunder and the rights and obligations of the parties hereto shall be governed construed and interpreted in accordance with the laws of the State of California.

(g) All notices to be provided under this Guaranty must be in writing and delivered to the addresses provided below.

(h) All rights and powers of Lender under this Guaranty and under any other agreement between Guarantor and Lender shall be cumulative and in addition to all right, power and remedies given to Lender at law.

(i) Headings in this Guaranty are for convenience of reference and shall not be used to interpret or define the provisions of this Guaranty.

(j) Each Guarantor declares that he, she or it understands the contents of this Guaranty and has had an opportunity to consult with an attorney regarding the form and content of this Guaranty.

IN WITNESS WHEREOF, this Guaranty dated 10/25/2022 for reference purposes only, is executed by the undersigned Guarantor.

GUARANTOR

DocuSigned by:
5012DA1790F04D3...

Henry Roland Lewis

Guarantor's Address
101 E Camino Real
Apt. 841
Boca Raton, FL 33432-6176

GUARANTOR

Guarantor's Address

Lender's Address
First Republic Bank
111 Pine Street
San Francisco, California 94111

Exhibit A

COVENANTS

This Exhibit A is an integral part of the Guaranty between the Lender and Guarantor, and the following terms are incorporated in and made a part of the Agreement to which this Exhibit A is attached:

1. **Financial Covenants.**

   1.1 Not Applicable

2. **Reporting Covenants.**

   2.1 Not Applicable

3. **Additional Covenants.**

   3.1 Not Applicable

DocuSign

Certificate Of Completion

Envelope Id: A57D74A949884AFCBF3C7BF919B1C27C
Status: Completed
Subject: Complete with DocuSign: Henry Roland Lewis - ACH Guaranty.pdf
DocumentType:
Business/Trust Name:
Loan #:
TIN:
Deferral Start Date:
Deferral End Date:
Deferred Amount:
Source Envelope:
Document Pages: 4
Signatures: 1
Certificate Pages: 9
Initials: 0
AutoNav: Enabled
EnvelopeId Stamping: Enabled
Time Zone: (UTC-08:00) Pacific Time (US & Canada)

Envelope Originator:
Alex Guinta
111 Pine Street
San Francisco, CA 94111
aguinta@firstrepublic.com
IP Address: 173.252.134.86

Record Tracking

Status: Original
10/26/2022 11:19:46 AM
Holder: Alex Guinta
aguinta@firstrepublic.com
Location: DocuSign

Signer Events	Signature	Timestamp
HANK LEWIS hlewis@commonwealthboston.com Security Level: Email, Account Authentication (None)	DocuSigned by: 5012DA1790F04D3	Sent: 10/26/2022 11:19:54 AM Viewed: 10/26/2022 12:26:23 PM Signed: 10/26/2022 12:26:31 PM
	Signature Adoption: Drawn on Device Using IP Address: 73.119.124.134 Signed using mobile	

Electronic Record and Signature Disclosure:
Accepted: 10/26/2022 12:26:23 PM
ID: 9b489241-e90e-43eb-a531-9cdf74331ceb

In Person Signer Events	Signature	Timestamp
Editor Delivery Events	**Status**	**Timestamp**
Agent Delivery Events	**Status**	**Timestamp**
Intermediary Delivery Events	**Status**	**Timestamp**
Certified Delivery Events	**Status**	**Timestamp**
Carbon Copy Events	**Status**	**Timestamp**
Witness Events	**Signature**	**Timestamp**
Notary Events	**Signature**	**Timestamp**

Envelope Summary Events	Status	Timestamps
Envelope Sent	Hashed/Encrypted	10/26/2022 11:19:54 AM
Certified Delivered	Security Checked	10/26/2022 12:26:23 PM
Signing Complete	Security Checked	10/26/2022 12:26:31 PM
Completed	Security Checked	10/26/2022 12:26:31 PM

Payment Events	Status	Timestamps
Electronic Record and Signature Disclosure		

E-SIGN CONSENT AND AGREEMENT TO USE ELECTRONIC RECORDS AND SIGNATURES

As part of your relationship with us, we are required by law to give you certain information in writing, which means you are entitled to receive it on paper. We may provide this information, and other documents, to you electronically instead, with your prior consent. We also need your general consent to use electronic records and signatures in our relationship with you. Please read the information below carefully and if you can access this information electronically to your satisfaction and agree to the terms and conditions provided herein, please confirm your agreement by consenting to this E-SIGN Consent to Use Electronic Records and Signatures (this "E-Consent").

In this E-Consent:

- "We," "us," "our," or "First Republic" means First Republic Bank and/or its subsidiaries.
- You" and "your" means the person giving this consent.
- "Authorized Email Address" means any email address provided to us by you, or by your authorized representative, as your email address or the email address of your authorized representative.
- "Communications" means any notices, disclosures, authorizations, agreements, account statements, tax forms and reports, acknowledgements and other documents that we are required, or we otherwise elect, to provide or make available to you, or that you submit, execute or agree to in connection with your relationship with us.
- "Current Version" means a version of software that is currently being supported by its publisher.
- "Tax Documents" means any tax forms or reports.

1. Consent to Electronic Delivery	By accepting this E-Consent, any Communications may, at our option, be sent to you in the form of an electronic record and may be executed using electronic signatures. Your consent under this E-Consent shall apply to all Communications we may provide with respect to any and all accounts, products or services you elect to receive from us now or in the future, unless and until you withdraw your consent to this E-Consent as described below. Your consent applies to all accounts you own or are authorized to administer, or for which you are designated as an authorized signer or beneficiary. We may call you or send you text messages at the phone number(s) reflected in our records. You consent to our leaving prerecorded/artificial voice messages and using an automatic

	telephone dialing system to call or text your mobile/cellular telephone number. Our calls and text messages to your mobile/cellular telephone numbers could result in charges to you. We may provide you with any Communication on paper, in our sole discretion, even though you have authorized electronic delivery. You must provide such Communications to us on paper unless we notify you how to deliver the notice to us electronically.
2. Electronic Records and Signatures Agreement	You agree that, notwithstanding any other provision in any agreement between you and us, whether now existing or entered into in the future, that: a. An electronic or other copy of a signed Communication shall be considered as effective as an original. b. At our option, any Communication may be in the form of an electronic record and may be executed using electronic signatures. c. Communications may be sent electronically by us (i) by sending the Communication to the recipient's Authorized Email Address, or (ii) by posting the Communication on a website and sending a notice to the recipient's postal address or Authorized Email Address. d. In the absence of actual notice of non-delivery received by us, Communications sent electronically pursuant to this paragraph shall be effective when sent and shall constitute notice of the Communication. e. We may, at our option, use or accept manually signed paper Communications which have been converted into electronic form (such as scanned into PDF format), or an electronically signed Communication converted into another format, for transmission, delivery and/or retention. If any promissory note issued to us, as lender, is electronically executed by you or your authorized representative ("Electronic Note"), you agree that we (and any person to whom we later transfer the Electronic Note), shall have the right to convert the Electronic Note at any time into a paper-based Note ("Paper-Based Note"), which will be an effective, enforceable and valid original written instrument. You also agree that (1) the execution of the Electronic Note will be deemed issuance and delivery of the Paper-Based Note, and (2) the printing of the representation of the electronic signature(s) upon the Paper-Based Note will be deemed the original signature(s) on the Paper-Based Note and will serve to

	indicate the signer's present intention to authenticate the Paper-Based Note. f. It is intended that this E-Consent (together with the definition of "Communication" as used in this E-Consent) is and will be deemed integrated into, and form a part of, all agreements between you and us, whether now existing or entered into in the future.
3. Tax Documents	You consent to electronic delivery of any Tax Documents. Each of the following applies to the electronic delivery of Tax Documents: a. You are not required to receive Tax Documents electronically. b. Your election to receive Tax Documents electronically allows us to electronically deliver any Tax Document which we are legally permitted to provide to you now or in the future until you withdraw your consent. c. You may receive a paper copy of any Tax Document by requesting a paper copy, as provided herein. Requesting a paper copy of a tax document will not be treated as a withdrawal of your consent to this E-Consent. d. You may withdraw your consent to this E-Consent at any time through the procedures provided herein. You may also change your preferences regarding electronic delivery of Tax Documents from time to time without withdrawing your consent to this E-Consent. Withdrawal of consent to receive Tax Documents electronically will not include Tax Documents previously provided electronically; such Tax Documents may continue to be provided online for the applicable posting period. We will confirm your withdrawal request and the date on which it takes effect in writing (either electronically or on paper). If you withdraw your consent, we will send you paper copies of any additional Tax Documents we are required to provide. e. The delivery of Tax Documents electronically may be terminated at any time by us. Further, we may make certain Tax Documents available electronically only for a limited time. Currently, such period of time for most Tax Documents is from January 31st or February 15th, as applicable, of the relevant year until October 15 of such year. Certain Tax Documents may be available electronically for a longer time. Certain Tax Documents that are provided electronically may have to be printed out and attached to a federal, state or local income tax return.

	f. If you need to update any information relevant to electronic delivery of Tax Documents, you may do so, as provided herein. g. We will notify you when each Tax Document is available by mail or electronically. We will notify you if any Tax Document cannot be delivered electronically. h. A description of the hardware, software and operating system required to access, print, and retain Tax Documents are set forth herein.
4. Hardware, Software, and Operating Systems Requirements	In order to access, view and retain electronic Communications, you must have an active email address and have access to the following: 1. a Current Version of Microsoft Internet Explorer, Google Chrome, Mozilla Firefox or Apple Safari, 2. a connection to the Internet, 3. a Current Version of a program that accurately reads and displays PDF files, and 4. a computer and an operating system capable of supporting all of the above. You will also need a printer if you wish to print out and retain records on paper, and electronic storage if you wish to retain records in electronic form. In some cases, you may also need a specific brand or type of device that can support a particular software application, including an application intended for particular mobile or handheld devices using a Current Version of Apple iOS® or Android™. From time to time, we may offer services or features that require that your Internet browser be configured in a particular way, such as permitting the use of JavaScript or cookies. If we detect that your Internet browser is not properly configured, we will provide you with a notice and advice on how to update your configuration. We reserve the right to discontinue support of a Current Version of software if, in our sole opinion, it suffers from a security flaw or other flaw that makes it unsuitable for use. If our hardware or software requirements change, and that change would create a material risk that you would not be able to access or retain electronic Communications, we will give you notice of the revised hardware or software requirements. Continuing to use this service after receiving notice of the change is reaffirmation of your consent.

5. Change in E-Mail Address or Mobile Phone Number	You represent that any e-mail address and/or mobile number(s) you provide to us belongs to you or to a person who has the authority to act for the applicable account, product or service with us, or, where relevant, to make transactions against such account, product or service. It is important that you keep us informed of your correct e-mail address and mobile number(s). To let us know of a change in your e-mail address and/or mobile number(s) where we should send Communications electronically to you, send an e-mail message to us at eSignatures@firstrepublic.com and in the body of your request state: your previous e-mail address and/or mobile number(s), as appropriate, and your new e-mail address and mobile number(s). We may request additional information from you to verify your identity before changing your e-mail address and/or mobile number(s) we have on record.
6. Getting Paper Copies	You may request a paper copy of any electronic Communication we sent you. You may receive a paper copy of any Communication at no charge if your request is made within a reasonable time after we first provided the Communication to you. You acknowledge that we may charge a reasonable service fee, with prior notice to you, for the delivery of paper copies of Communications made outside of this period. To request a paper copy of any electronic Communication we previously provided to you, please email us at eSignatures@firstrepublic.com. In the body of the request, please provide us with (a) your Authorized E-Mail Address, (b) your full name, (c) US Postal address, (d) mobile number, and (e) which Communications you wish us to send to you. Requesting a paper copy of any Communication will not be treated as a withdrawal of your consent to this E-Consent.
7. Withdrawing Your Consent	You may withdraw your consent to receive electronic Communications at any time, and receive paper Communications instead. To inform us that you no longer wish to receive Communications electronically, please email at eSignatures@firstrepublic.com. In the body of the email, please provide us with (a) your Authorized E-Mail Address you had provided us, (b) your full name, (c) US Postal Address, (d) mobile number, and (e) the account numbers you wish to be covered by your withdrawal.
8. Consequences of Withdrawing Your Consent	If you elect to receive required Communications only in paper format, it may delay your transaction because of the time required to transmit paper between you and First Republic. Additionally, depending on the nature of the account, product or service we provide you, you may lose a discount or incur service fees, or the withdrawal may result in a

	termination or conversion of "digital only" accounts and services into a different or related account or service. Please refer to your account documents, or other related document from us, for additional information. Any withdrawal of your consent to receive Communications electronically will be effective only after we have a reasonable period of time to process your withdrawal. Your withdrawal does not apply to any Communication that was provided or executed electronically before the date on which your withdrawal of consent takes effect.
9. Indemnity	You agree to indemnify and hold us harmless from and against all claims, demands, proceedings, suits and actions and all liabilities, losses, expenses and costs, including attorneys' fees and expenses, resulting from your failure to comply with the terms of this E-Consent, including without limitation, your failure to keep First Republic informed of your correct e-mail address.
10. Termination/ Changes	We reserve the right, in our sole discretion, to discontinue providing you with electronic Communications, or to terminate or change the terms and conditions of this E-Consent. This may include amending, adding to, or eliminating provisions of this E-Consent. We will provide you with notice of any such termination or change, as required by law.
11. Acknowledging Your Consent to this E-Consent	By consenting to this E-Consent, you are confirming to us that: a. You have read, understand and agree to be bound by, and electronically signing, the terms and conditions contained in this E-Consent; b. You consent to receive Communications electronically and execute Communications using electronic signatures and records; c. You are able to download and review files in HTML and PDF format, and you have Internet access and can send and receive e-mails with links to websites; d. Your consent to receive Communications electronically and to use electronic records and signatures does not automatically expire and is not limited as to duration; e. You are authorized to provide consent on behalf of all co-applicants for, and co-owners of, any of your accounts with First Republic;

	f. Communications contain important information and you agree to review all Communications in a timely manner; and g. First Republic and its agents will not be liable for any loss, liability, cost, expense, or claim for acting upon this E-Consent or arising from your use of the accounts, products or services provided pursuant to this E-Consent.

We recommend that you print, download or otherwise retain a copy of this E-Consent for your future reference.