

## MERCHANT CARD PROCESSING AGREEMENT

While all terms in the Merchant Agreement are important, here is a summary of some sections on which we occasionally receive questions. These are common clauses in merchant processing agreements throughout our industry.

- The introductory paragraphs explain that **the Merchant Agreement consists of other documents** in addition to this Merchant Processing Agreement.
- **We can amend** your Merchant Agreement by providing you with 15 days' notice or, under certain circumstances, with less than 15 days' notice (see section 10).
- Unless confirmed otherwise on your application, **the initial term** of this Merchant Agreement is three years. If you terminate early without cause, you may be required to pay an early termination fee (see section 11).
- The proceeds you receive from transactions are **provisional credits**. We can charge or debit your settlement account to recover these provisional credits. We can also debit your Settlement Account to recover other amounts that you may owe us (see Section 12).
- **If you dispute** any charge or funding, you must notify us within 30 days of the date of the statement (see section 12.5).
- In some circumstances, we may require you to establish a **reserve account** with us so we can mitigate risks. Section 13 explains how that reserve account will be funded and how we may use money in that account.
- Our **processing fees** are set out in detail in the Merchant Application. **We may change these fees**, but will notify you before doing so (see Section 16).
- This agreement contains an **arbitration clause** (see Section 20.2).
- This agreement is a **complete and final agreement between us**. It supersedes any previous negotiations we may have had on the services and products. (Section 21).

This Merchant Card Processing Agreement ("MPA") is for merchant card payment processing services among the merchant ("Merchant") that signed the Application for Merchant Card Processing ("Merchant Application"), Merchant Bank, and Processor. The Merchant Application and the MPA are part of the "Merchant Agreement" as defined below. Processor and Merchant Bank are hereinafter collectively referred to as the "Bank". Subject to the requirements of the Operating Rules, Processor and Merchant Bank reserve the right to allocate Bank's duties and obligations amongst themselves as they agree appropriate in their sole discretion, and Merchant Bank or Processor may jointly or individually assert or exercise any rights or remedies provided to Bank hereunder. For clarity, any rights, remedies, benefits, limitations of liability and disclaimers of, or other provisions applicable to, "Bank" apply to Merchant Bank and Processor individually. If Merchant wishes to address any act or omission by, or make or bring any claim or action against, Bank relating to this Merchant Agreement, it shall first discuss such issue with Processor prior to making or bringing any claim or action against Merchant Bank (in which case Processor shall address the issue as agreed with Merchant Bank).

If elected by Merchant on the Merchant Application, Processor will settle American Express® Card and Discover® Network transactions in accordance with the terms set forth in the Merchant Application and in doing so, Processor does not represent or indicate in any way that Merchant Bank sponsors Processor into the American Express Network and Discover Network. Merchant Bank does not sponsor Processor into the American Express Network and Discover Network, is not providing or agreeing to provide Merchant any services hereunder with respect to American Express Card and Discover Network Card transactions, does not determine or approve or agree upon any fees, charges, pricing, or any other terms and conditions, relating to American Express Card and Discover Network Card transactions, and has no responsibility or liability to Merchant for American Express Card and Discover Network Card transactions. Nor does Merchant Bank provide or agree to provide Merchant any services hereunder or have any responsibility or liability to Merchant with respect to any PIN-based debit or stored value or electronic benefit transfer transactions (except only to the extent, if any, required under Visa's or MasterCard's Operating Rules or mandatory provisions of applicable law), or any PayPal transactions, JCB, Carte Blanche, or other Card type transactions (other than Visa and MasterCard Credit and non-PIN based debit/stored value /electronic benefit transactions, including any such transactions made with Diner's International Cards which also carry the MasterCard Mark and are processed as MasterCard transactions), any CrossCheck or other Check Services transactions, merchant gift or loyalty card transactions, or any other services specified in the Merchant Application as covered in whole or in part by this Agreement but as not being provided by Merchant Bank. No reference to Bank or Merchant Bank herein shall be deemed to create any obligations or liability of Merchant Bank with respect to American Express Card or American Express Network transactions and Discover Network Cards or Discover Network Card transactions, or to any of the other types of Cards, transactions or services referred to above or in the Merchant Application as not being provided by Merchant Bank.

The appendices, addenda (including but not limited to the ACH Addendum, and Petro Addendum if applicable), schedules, Operating Guide, Fee Schedule and ACH Terms and Conditions that accompany this MPA, as amended from time to time as provided herein, are part of the terms and conditions of this MPA, as are the Merchant Application and the Operating Rules, and are hereinafter individually and collectively referred to as the "Merchant Agreement."

**Capitalized terms used in this Merchant Agreement which are not defined herein shall have the meaning given to them in the Merchant Application or the Operating Guide, which can be found at <http://www.tsys.com/documents.html>, and which is incorporated by reference into this Agreement and may be amended from time to time by Bank upon notice to Merchant.**

According to the processing services selected by Merchant on the Merchant Application and, in accordance with the terms of this Merchant Agreement and applicable Operating Rules,

Merchant agrees to participate in the Bank's Card processing program by honoring Cards in accordance with this Merchant Agreement; and to submit Transaction Receipts, Credit Transaction Receipts and other electronic data to Bank for the Card Program services provided by Bank.

With respect to Visa Transactions:

Merchant Bank is responsible for providing settlement funds directly to Merchant, and Processor shall not have access to or hold settlement funds.

With respect to MasterCard Transactions:

a) For purposes of the Merchant Agreement and performance of the Merchant Agreement by Processor, (i) Processor is the exclusive agent of Merchant Bank; (ii) Merchant Bank is at all times and entirely responsible for, and in control of, Processor's performance; and (iii) Merchant Bank must approve, in advance, any fee to or obligation of the Merchant arising from or related to performance of the Merchant Agreement.

b) The Merchant Agreement is not effective and may not be modified in any respect without the express written consent of Merchant Bank.

c) Processor may not have access, directly or indirectly, to any account for funds or funds due to a Merchant and/or funds withheld from a Merchant for Chargebacks arising from, or related to, performance of the Merchant Agreement. Merchant Bank may not assign or otherwise transfer an obligation to pay or reimburse a Merchant arising from, or related to, performance of the Merchant Agreement to Processor.

d) Processor may not subcontract, sublicense, assign, license, franchise, or in any manner extend or transfer to any third party, any right or obligation of Processor set forth in the Merchant Agreement.

**1. MERCHANT'S APPLICATION AND INFORMATION.** By completing the Merchant Application, Merchant applies for the Card Program services covered by the Merchant Application and the Merchant Agreement. In their sole and absolute discretion, Processor and/or Merchant Bank may accept or reject Merchant's Merchant Application. Merchant may present Transactions to Bank only for the activities and in the volumes described on the Merchant Application, including the percentage of Mail/Phone Order and Electronic Commerce Transactions. The earlier date of the presentation of the first Transaction, including any test Transaction, by Merchant to Bank or the date Bank approves the Merchant Application signifies the effective date of the Merchant Agreement. By either Merchant's signature on the Merchant Application or Merchant's processing a Transaction (including a test Transaction) with Bank, Merchant affirmatively accepts and agrees to be bound by the Merchant Agreement.

## 2. MERCHANT'S GENERAL DUTIES.

**2.1 General.** Merchant will comply with the Merchant Agreement (including the terms of the Operating Guide) for submitting and processing Transactions with Bank. Bank is responsible to Merchant for processing Transactions under the Operating Rules for the Card Program services to which Merchant subscribes, which may vary among Card types.

**2.2 Merchant's Responsibility for Acts of Others.** Merchant, and not Bank, is responsible for any advice from, acts of, as well as omissions, acts of fraud or acts of misconduct by, Merchant's employees, processors, consultants, advisors, contractors, Merchant Servicers, Agents, officers and directors. Merchant, and not Bank, is responsible for the use, unauthorized use or misuse of Merchant's equipment, POS Equipment, or software.

**2.3 Electronic and Paperless Notices and Disclosures.** Merchant consents to receiving electronically rather than in paper form all written notices, disclosures and other documents ("Documents") which are to be provided by Bank to Merchant under the Merchant Agreement. Bank will notify Merchant that a Document is available at Processor's web site with a link to that specific page of the web site containing the Document. Merchant agrees that such notification may be sent to Merchant at the e-mail address provided as part of the Merchant Application.

By Merchant affirmatively checking the box to consent to receive paperless delivery of IRS Notices on the Merchant Application, Merchant acknowledges that it has reviewed and received the Consent to Paperless Delivery of IRS Notices, located at <http://www.tsys.com/documents.html> and that Merchant consents and agrees to receive IRS notifications by paperless delivery.

Merchant understands and acknowledges that access to the Internet and e-mail are required for Merchant to access Documents electronically or by paperless delivery and Merchant confirms that Merchant has such access. Merchant understands that there are costs related to accessing Documents electronically or by paperless delivery and Merchant agrees that Merchant is responsible for these related access costs.

At any time, and without giving Merchant advance notice, Merchant Bank and/or Processor may elect not to send a Document electronically or by paperless delivery, in which case a paper copy of the Document will be sent to Merchant at Merchant's last known address, as provided by Merchant, or such Document shall otherwise be provided as provided for herein.

## 3. PROCEDURES FOR CARD TRANSACTIONS.

### 3.1 Honoring Cards.

(a) Limited Acceptance. If appropriately indicated herein, Merchant shall be a Limited Acceptance Merchant, which means that Merchant has elected to accept only certain Visa and MasterCard card types as indicated on the Merchant Application, or via later notification. The Visa or MasterCard Credit acceptance option on the Merchant Application refers to Visa Credit and Business transactions, and is what MasterCard refers to as "Other Card" transactions. Notwithstanding anything to the contrary in the Application, Merchant can elect (i) to accept only Visa or MasterCard non-PIN based debit/stored value/electronic benefit transactions (sometimes referred to as "signature debit" transactions, whether or not an actual signature is required), or (ii) to accept only Visa or MasterCard Credit transactions, or (iii) to accept all Visa or MasterCard Credit and signature debit transactions; **provided,**

however, that a Merchant who accepts any Visa or MasterCard Card types must accept all valid Visa or MasterCard Card types issued by a non-U.S. issuer. Merchant is not required to accept Card brands other than Visa or MasterCard in order to accept Visa or MasterCard Cards (except that transactions using Diner's International Cards which also carry the MasterCard Mark must be accepted if Merchant accepts MasterCard Card transactions of the same type). Bank has no obligation other than those expressly provided under the Operating Rules and applicable law as they may relate to Limited Acceptance. Bank's obligations do not include policing card types at the point of sale. Merchant will be solely responsible for the implementation of its decision for limited acceptance including but not limited to policing the card type(s) of transactions at the point of sale submitted for processing by Bank. Should Merchant submit a transaction for processing for a card type it has indicated it does not wish to accept, Bank may process that transaction and Merchant will pay the applicable fees, charges, and assessments associated with that transaction. Merchant will comply with any applicable laws and Operating Rules for the card type processed.

(b) Discover. If Merchant has chosen to accept Discover Card Transactions in the Merchant Application, Merchant must accept Discover Cards at all Merchant establishments, including in payment for purchases of goods and services, for charitable contributions and for Cash Over Transactions (subject to the terms of the Operating Guide), when properly presented for payment by a Cardholder. Subject to this Section, a Merchant must create a Transaction Receipt for each Discover Card Transaction and deliver at least one copy of the Transaction Receipt to the Cardholder. A Merchant may issue a Cash Over (subject to the terms of the Operating Guide) in connection with a Discover Card Transaction. Merchant must deliver a single Authorization Request for the aggregate total of the goods/services purchase amount and the Cash Over amount. In addition, the Transaction Receipt must include both the purchase amount and the Cash Over amount.

(c) PayPal™. If Merchant has chosen to accept PayPal Payment Card Transactions in the Merchant Application, Merchant must accept PayPal Payment Cards at all Merchant establishments, including in payment for purchases of goods and services and for charitable contributions when properly presented for payment by a Cardholder. Subject to this Section, a Merchant must create a Transaction Receipt for each PayPal Card Transaction and deliver at least one copy of the Transaction Receipt to the Cardholder.

(d) American Express. If Merchant has chosen to accept American Express® Cards in the Merchant Application, Merchant must accept American Express Cards as payment for goods and services (other than those goods and services prohibited under Section 7 of the Operating Guide) sold, or (if applicable) for charitable contributions made, at all of its establishments, except as expressly permitted by state statute. Merchant is jointly and severally liable for the obligations of Merchant's establishments under the Merchant Agreement. In the event Merchant's American Express annual charge volume exceeds \$1,000,000 in a rolling twelve month period or is greater than \$100,000 in any three consecutive months, Merchant will be considered a High CV Merchant by American Express and will be required to enter into a direct merchant card acceptance agreement with American Express. Upon any conversion to a direct agreement with American Express, Merchant will be bound by American Express' then current Card Acceptance Agreement and to any pricing and fees set by American Express. Merchant has the right to opt-out of acceptance of American Express Cards at any time without affecting Merchant's rights to accept other card types. If Merchant elects to receive messages from American Express regarding products, services and resources available to it, as indicated on the Merchant Application, Merchant agrees messages may be sent by American Express to the phone numbers, fax numbers or email addresses provided by Merchant. If a wireless number is provided, Merchant agrees communications may be sent via SMS or text in addition to automated calls. Merchant may opt out of receiving messages by contacting Processor.

**3.2 Operating Procedures for Transactions.** In accepting Cards for the purchase of Merchant's goods and services, Merchant shall comply with the requirements of the Merchant Agreement, including but not limited to the Operating Rules and the Operating Guide, as the same are revised from time to time.

### 3.3 Submission of Valid Transactions.

(a) Merchant will submit to Bank a Transaction only if the Transaction is made or approved by the Cardholder who is issued the Card used for the Transaction. Merchant will not submit directly or indirectly: (i) any Transaction that Merchant knows or should have known to be fraudulent or not authorized by the Cardholder; (ii) any Transaction that results from a transaction outside of Merchant's normal course of business, as described on the Merchant Application; or (iii) any Transaction containing the account of a Card issued to Merchant or any account numbers issued to Merchant's business owners, family members, principals or employees for Transactions that do not represent a purchase of goods or services from Merchant or a credit transaction related to a purchase of goods or services from Merchant.

(b) If at any time the volume of Transactions substantially exceeds or decreases from the projected annual volume stated on the Application, or if at any time Bank suspects fraud, money laundering or violations of the Operating Rules, Bank may, in its sole and absolute discretion and in addition to other remedies that the Bank may have: (i) refuse to process the excessive or suspect Transactions; (ii) process the Transactions and retain the funds received from processing until such time as the excess or suspect Transactions are found to be valid or invalid and processed in accordance with the Operating Rules; (iii) suspend processing and/or terminate the Agreement; or (iv) amend the Merchant Agreement to protect the interests of Bank.

### 3.4 Payments to Merchant for Valid Transactions.

(a) Bank will provide provisional credit to Merchant for each undisputed and valid Transaction which Merchant submits to Bank by crediting Merchant's Settlement Account, provided Bank has received settlement for the valid Transaction through the Interchange procedures specified by the Card Association applicable to the Card used for the Transaction (Bank does not provide payment for all Card types for which Authorization services are provided). Bank is not obligated to provide provisional credit to Merchant for

Transactions submitted that are not valid Transactions, and may suspend or discontinue any provisional credit in Merchant Bank's and/or Processor's sole and absolute discretion, including for any reason that would justify termination of this Merchant Agreement. Each provisional credit from Bank to Merchant will be subject to adjustment, including revocation, upon Bank's further review and verification. **Provisional credit to Merchant for a Transaction disputed by a Cardholder for any reason is not final.**

(b) Bank may deduct from any payment to Merchant the amount of any Credit Transaction Receipt processed for Merchant, any Chargeback to Merchant, any amount to be deposited in the Reserve Account and any Processing Fees and amounts sufficient to reimburse Bank for the amount of any Card Association fines or charges due from Merchant or for any current or future obligation of the Merchant that arises under the Merchant Agreement. Merchant must immediately pay Bank the amount by which a Credit Transaction Receipt processed on any day exceeds valid Transactions submitted on that day. Without limiting Bank's remedies, Bank may obtain the amount due by deducting it from the Settlement Account, Reserve Account or other accounts of or funds due Merchant.

(c) Merchant acknowledges that all payments and credits provided to Merchant are provisional and subject to suspension, to Chargebacks and to adjustments in accordance with the Merchant Agreement, including, but not limited to the Operating Rules and the Operating Guide.

**3.5 Retrieval Requests.** If Merchant deposits Transactions with Bank through magnetic tape, electronic transmission, or electronic data capture terminal, upon the request of a Card Association or Bank, Merchant shall respond to all Retrieval Requests within the time frames specified in the applicable Operating Rules. If Merchant does not respond or responds late to a Retrieval Request, Merchant may be without recourse as Chargebacks for "non receipt of requested item" in most cases, cannot be reversed. Bank is not obligated to provide provisional credit to Merchant for any Retrieval Request and may suspend or discontinue any provisional credit in its sole and absolute discretion.

### 3.6 Equipment; Supplies; Displays.

Important Note: Merchant acknowledges and agrees that Merchant Bank and its affiliates have no duty, obligation or liability whatsoever for: (1) the POS Equipment, herein; (2) any actions or omissions of Processor with respect to the POS Equipment; (3) failure of merchant to perform routine maintenance and updates to the POS Equipment; (4) any failure of merchant to adhere to standard security requirements as it relates to the POS Equipment; or (5) any claims or disputes arising out of the foregoing.

(a) At Merchant's request, Processor will supply Merchant with point-of sale equipment, including, but not limited to a terminal, router or other compatible or ancillary equipment, hardware or device (collectively "POS Equipment") that Merchant may need to process and submit Transactions. Processor will use good faith efforts to program or configure the POS Equipment to operate at the Merchant Outlets in compliance with the Operating Rules; however, Processor makes no representations or warranties that Processor's programming of the POS Equipment furnished by Processor will operate in compliance with the Operating Rules. If Processor supplies Merchant with POS Equipment or other equipment, then Merchant must return such equipment upon termination of this Agreement. It is understood by the parties that if Processor has not provided free use equipment, Sections 3.6(a)-(d) do not apply.

(b) The individual providing the terminal to Merchant is an employee of Processor, unless otherwise identified as an independent sales contractor. Merchant acknowledges and understands that POS Equipment may be supplied to Merchant that is the property of Processor and is being provided to Merchant for free use subject to the following conditions and requirements:

(i) Merchant shall be liable for a \$495 fee for non-return of Processor supplied POS Equipment if Merchant terminates or ceases processing under the terms of this Agreement before the expiration of the initial or renewal term of this Merchant Agreement and fails to return the POS Equipment within ten days of termination or of ceasing processing.

(ii) Merchant shall be liable for a \$450 fee for non-return of Encryption Exchange POS Equipment if applicable;

(iii) Merchant will be liable for any damages to the POS Equipment from the misuse or negligent use of the POS Equipment;

(iv) Merchant will be liable for any reasonable monthly fee as determined by Processor for paper or other supplies provided by Processor for use with the POS Equipment;

(v) Processor, at its absolute and sole discretion, may allow for one terminal exchange at no charge, but may charge additional fees for subsequent exchanges; and,

(vi) The POS Equipment that is the property of Processor is provided "AS-IS" and that Processor makes no warranty as to this POS Equipment's fitness for any particular purpose (or any other Warranty) and disclaims any liability resulting from the POS Equipment or Merchant's use of the POS Equipment.

(c) All Processor and third party POS Equipment and services provided or procured by Processor under this Merchant Agreement are provided "AS-IS," but Processor will, at Merchant's expense, use reasonable commercial efforts to assist Merchant in enforcing any warranty offered by the third party supplier of such POS Equipment or services.

(d) Merchant acknowledges that Processor or a third party is supplying the POS Equipment and that Merchant Bank shall have no responsibility or liability for the POS Equipment supplied to Merchant.

(e) Merchant will use only the forms for Transactions and electronic processing formats provided or approved in advance by Bank. Bank may change the forms from time to time, and, upon notification, Merchant will comply with any changes. Merchant will use

Transaction forms or materials provided by Bank only for Transactions which Merchant submits to Bank.

(f) Merchant may not (i) indicate or imply that the Card Associations or Bank endorses any Merchant goods or services, (ii) refer to a Card Association or Bank in stating eligibility for Merchant's products, services or membership, or (iii) use any marks, symbols or logos owned by any Card Association or Bank for any purpose other than those permitted in the Operating Rules or the Operating Guide, provided that any use of Bank's marks, symbols or logos shall be in accordance with and subject to any branding guidelines provided by Bank. Merchant acknowledges that Merchant Bank and Processor shall remain the sole and exclusive owners of their respective intellectual property and Confidential Information (defined below). Except to the extent expressly provided herein, no rights to Bank's intellectual property or Confidential Information are granted hereunder, and all rights therein are expressly reserved.

**3.7 Europay/MasterCard/Visa ("EMV") Chip Card Compliance.** Merchant agrees that if Merchant does not use POS Equipment that has been certified EMV chip card compliant and enabled or when a lost or stolen chip and PIN card is used at an EMV enabled terminal capable of processing chip and signature only, Merchant may be liable for payment of any transactions submitted for chargeback by the applicable EMV chip card issuer(s) due to lost, stolen and never-received-issue fraud claims.

**4. MERCHANT'S WARRANTIES.** Upon signing the Merchant Application, and each time Merchant submits a Transaction, Merchant represents and warrants that:

4.1 Merchant has abided by the Merchant Agreement, and all applicable laws, the Operating Rules and the Operating Guide;

4.2 Each statement made on the Merchant Application was true as of the date Merchant signed the Merchant Application agreeing to be bound by the Merchant Agreement;

4.3 There have been no materially adverse changes in information provided in the Merchant Application or in Merchant's financial condition, or management;

4.4 Merchant does not do business under a trade name or style not previously disclosed in writing, and there has been no change in the nature of Merchant's business or the product lines that Merchant sells not previously disclosed;

4.5 The Transaction is genuine and arises from a bona fide sale of merchandise or services by Merchant, represents a valid obligation for the amount shown on the Transaction Receipt and does not involve the use of the Card for any other purpose;

4.6 Merchant has title to the Transaction and Transaction Receipt, there are no liens or other encumbrances on it, and Merchant has the authority to convey the Transaction for processing;

4.7 The Transaction is not subject to any dispute, set-off or counterclaim;

4.8 The Transaction has not been previously presented for processing unless allowed by the Operating Rules or the Operating Guide;

4.9 Each statement on the Transaction Receipt is true, and Merchant has no knowledge of facts that would impair the validity or collectability of the amount of the Transaction;

4.10 The person who executes the Merchant Application on behalf of Merchant has the full power and authority to execute the Merchant Application and to enter into the Merchant Agreement;

4.11 The Merchant Agreement is the legal, valid, and binding obligation of Merchant enforceable against Merchant in accordance with its terms;

4.12 Merchant shall submit Transactions only in accordance with the information contained in the Merchant Application and the Merchant Agreement;

4.13 Merchant has the power and authority to authorize the automatic funds transfer provided for in the Merchant Agreement;

4.14 The Settlement Account is owned and controlled by Merchant and is a valid account for processing debit and credit transactions under the Merchant Agreement;

4.15 Merchant is not (i) a Sanctioned Person, (ii) located in or operating under a license issued by a jurisdiction whose government has been identified by the U.S. Department of State as a sponsor of international terrorism under 22 U.S.C. 2371 or 50 U.S.C. App. 2405(j), (iii) located in or operating under a license issued by a jurisdiction that has been designated as non-cooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the U.S. is a member, or (iv) located in or operating under a license issued by a jurisdiction that has been designated by the U.S. Secretary of Treasury pursuant to 31 U.S.C. 5318A as warranting special measures due to money laundering concerns; and

4.16 Merchant will immediately notify Merchant Bank and Processor in writing of any material changes to any information provided herein including but not limited to a change in Merchant's legal entity, location, business type, or the types of goods and services offered for sale by Merchant.

## 5. CONFIDENTIALITY; DATA SECURITY.

5.1 **Confidentiality.** Merchant will treat as confidential: (i) the terms of the Merchant Agreement; (ii) all information or data, of whatever nature, relating to Bank (including its operations, policies, procedures, accounts and personnel) accessed or used by or disclosed to Merchant in connection with the Merchant Agreement; (iii) Processor's IRS W-9 form; and (iv) all information or data that is proprietary to a third party (including Bank's customers and contractors) and that Bank is obligated to treat as confidential, accessed or used by or disclosed to Merchant in connection with the Merchant Agreement (individually and collectively, "Confidential Information"). Merchant shall not use or disclose Confidential Information without Bank's prior written consent. Merchant may only disclose Confidential Information to Merchant employees who have a need to know such information in connection with Merchant's performance hereunder and who are bound to confidentiality restrictions no less restrictive than those herein. Merchant shall exercise at least the same

degree of care to maintain the confidentiality of Confidential Information that it uses for its own similar information, but in no event less than a reasonable degree of care. The foregoing obligations shall not apply to any information that (x) is received from any third party source that is properly authorized to disclose it without restriction, (y) is or becomes generally known to the public by publication or some other means other than a breach by Merchant or its employees of any agreement or confidentiality obligations, or (z) is required by law to be divulged, provided that the request is proper and the disclosure does not exceed that which is required. In the case of (z), Merchant will provide prior notice thereof and cooperate with Bank to limit disclosure. Upon Bank's request, and upon termination or expiration of the Merchant Agreement, Merchant shall return or, only if requested by Bank, destroy all Confidential Information in its possession or control. Merchant acknowledges that a breach of this Section 5 may cause Bank irreparable injury and that Bank may have no adequate remedy at law. Accordingly, Bank may seek provisional or injunctive relief in addition to any other rights or remedies.

5.2 **Transaction Receipts.** Merchant will retain in a secure and confidential manner original or complete and legible copies of each Transaction Receipt, and each Credit Transaction Receipt required to be provided to Cardholders, for such period as required by law or the Operating Rules. Merchant shall render all materials containing Cardholder Account Numbers unreadable prior to discarding. Merchant is responsible for ascertaining whether applicable law requires copies retained by Merchant to truncate card numbers and suppress expiration dates, and for complying with all such laws.

5.3 **Storage.** Merchant will store Transaction Receipts and Credit Transaction Receipts in an area limited to selected and authorized personnel, and when record-retention requirements have been met, Merchant will destroy the records so that the same are rendered unreadable.

5.4 **Merchant Servicers and Agents.** Merchant must notify Bank and receive Bank's approval prior to engaging any Merchant Servicer or Agent in connection with Merchant's acceptance of Cards or the submission of Transactions to Bank. Merchant shall provide Merchant Bank and Processor at least sixty days advance written notice of Merchant's election to use a Merchant Servicer or Agent. Merchant Bank and/or Processor may individually approve or deny the use of a Merchant Servicer or Agent in their sole and absolute discretion and at any time. If a Merchant Servicer or Agent is required to certify, register, or act in any fashion pursuant to the Operating Rules or Operating Guide, Merchant shall cause such Merchant Servicer or Agent to cooperate with Merchant Bank in completing any steps required for registration and/or certification and/or action. Merchant is solely responsible for any and all applicable fees, costs, expenses and liabilities associated with such registration and/or certification and/or action. Bank shall in no event be liable to Merchant or any third party for any actions or inactions of any Merchant Servicer or Agent used by Merchant, and Merchant hereby expressly assumes all such liability.

Merchant will immediately notify Bank if Merchant decides to use electronic authorization or data capture terminals provided by any entity other than Bank or its authorized designee ("Third Party Terminals") to process Transactions, including leasing a terminal from a third party. If Merchant elects to use Third Party Terminals: (a) the third party providing the terminals will be Merchant's Merchant Servicer in the delivery of Transactions to Bank; and (b) Merchant assumes full responsibility and liability for any failure of that third party to comply with the Operating Rules, Operating Guide, applicable laws, rules or regulations or the Merchant Agreement. Bank will not be responsible for any losses or additional fees incurred by Merchant as a result of any error by a third party agent or a malfunction in a Third Party Terminal.

The use of a Merchant Servicer or Agent or software or systems provided by a Merchant Servicer or Agent that has connectivity to the Internet poses an increased risk, and Merchant assumes all liability for such increased risks. If Merchant utilizes software or hardware with a connection to the Internet such hardware or software interacts in any capacity with the provision of services contemplated pursuant to this Merchant Agreement, Merchant is solely liable without limitation for any and all consequences of such interaction.

5.5 **Security.** Merchant agrees and shall ensure that Merchant Servicers and Agents utilized by Merchant provide the same levels of security as those required of Merchant, and that such Merchant Servicers and Agents transmit data in accordance with: (a) the required format(s) of the Card Associations; (b) the Operating Rules; and (c) the requirements of Bank. Merchant must have a written contract between Merchant and its Agent or between Merchant and the Merchant Servicer that stipulates adherence to the provisions of such information security requirements. Merchant's written contract with any such third party must contain provisions obligating the third party to comply with applicable law, with CISP and SDP and DISC and PCIDSS, PA-DSS, PIN and PED security requirements if applicable, and all other Card Association requirements pertaining to confidentiality and security and integrity of Cardholder and Card transaction data, with all rules prohibiting storage of certain Card transaction data, and with all other applicable Operating Rules. Merchant will only allow Merchant Servicers or Agents to have access to cardholder data for the purposes that are authorized by the Operating Rules. Any fees, fines or penalties from noncompliance will be passed to the Merchant. Merchants processing less than 1 million annual Visa transactions and using third parties for POS application, terminal installation and integration must engage Payment Card Industry (PCI) Qualified Integrator Reseller (QIR) professionals to install, integrate, and support point-of-sale applications and terminal installation and integration. Merchant shall indemnify and hold Merchant Bank and Processor harmless against losses or damages arising from the acts or omissions of Merchant Servicers or Agents engaged by Merchant.

5.6 **Loss or Theft.** Merchant must immediately notify Merchant Bank and Processor of any suspected or confirmed loss or theft of materials or records that contain Cardholder Account Numbers or Card Transaction information. In the event of a suspected or confirmed loss or theft Merchant shall provide immediate access to all facilities, systems, procedures, equipment, and documents as may be deemed appropriate by Bank or its designated representatives, regulators or auditors for inspection, audit, and copying as deemed

appropriate by both Merchant Bank and Processor in their individual sole discretion. Merchant shall be responsible for all costs associated with such inspection, audit, and copying however such costs may occur.

5.7 Merchant authorizes Bank to release its name and address to any third party whom the Bank determines needs to know such information in order for Bank to perform the Card Program services under this Merchant Agreement and who has requested such information.

5.8 Merchant will not: (a) provide Cardholder Account Numbers, personal Cardholder information or Transaction information to anyone except Bank, the Card Associations, or Merchant's Merchant Servicers or Agents for the purpose of assisting Merchant in completing Card Transactions, or as specifically required by law; (b) retain or store Card Magnetic Stripe, CVV, CVV2, CVC2 or CID data (including Track Data) subsequent to Authorization for a Transaction; (c) sell, purchase, provide or exchange Card Account Number information to any third party without the Cardholder's consent, or to any entity other than Merchant's Merchant Servicers or Agents, Bank, the Card Associations, or in response to valid legal process or subpoena; or (d) release any Cardholder information over the telephone under any circumstances.

5.9 Merchant may not in any event, including its failure, including bankruptcy, insolvency, or other suspension of business operations, sell, transfer, or disclose any materials that contain Cardholder Account Numbers, personal information or Transaction information to third parties. In the event that Merchant's business fails or ceases to exist, Merchant is required to return to Bank all such information or provide proof of destruction of this information to Bank.

5.10 Merchant agrees to establish security procedures to protect Cardholder information and comply with the Visa Cardholder Information Security Program (CISP), MasterCard's Site Data Protection (SDP) Program, Discover Information Security Compliance (DISC), American Express Data Security Requirements, the Payment Card Industry (PCI) Data Security Standards, and applicable laws pertaining to the privacy and security of personal information (including, without limitation, and to the extent applicable, those of non-U.S. governmental authorities). Detailed information about PCI DSS can be found at the PCI DSS Council's Website: [www.pcisecuritystandards.org](http://www.pcisecuritystandards.org). The Card Associations or Bank, and the respective representatives, may inspect the premises of Merchant or any Merchant Servicer or Agent engaged by Merchant for compliance with security requirements. Merchant acknowledges that any failure to comply with security requirements may result in the imposition of restrictions on Merchant or the permanent prohibition of Merchant's participation in Card acceptance programs by the Card Associations. Merchant shall indemnify and hold Bank harmless against any losses or damages arising from Merchant's failure to comply with security procedures and any losses or damages arising from or related to Merchant's acts or omissions that result in a breach of data security, including but not limited to Merchant's non-participation in any breach security program Processor may offer.

5.11 Processor acknowledges that it will maintain compliance with all applicable PCI DSS requirements.

5.12 Federal regulations enacted pursuant to the USA PATRIOT Act and other applicable laws require financial institutions with which Processor has relationships to verify the identity of every person who seeks to open an account with a financial institution. As a result of Merchant's status as an account holder with Merchant Bank, Merchant shall provide documentary verification of Merchant's identity, such as a driver's license or passport for an individual and certified copy of organization documents for an entity in manner acceptable to Bank. Bank reserves the right to verify Merchant's identity through other non-documentary methods as Bank deems appropriate in its sole discretion. Bank may retain a copy of any document it obtains to verify Merchant's identity with the financial institution.

## 6. OPERATING RULES.

6.1 Merchant must comply with the Operating Rules, as the same may be amended from time to time. The Operating Rules may change with little or no advance notice to Merchant and Merchant will be bound by all such changes. If Merchant objects to any change in the Operating Rules, it must immediately stop accepting new Transactions for Cards governed by the change. The Operating Rules will govern in the event that there is any inconsistency between the Merchant Agreement and the Operating Rules. However, nothing in the Merchant Agreement shall be construed to impose on Merchant a requirement (including a requirement under the Operating Rules) which is prohibited by mandatory provisions of applicable law (i.e., where the applicability of such provisions of law to the Merchant Agreement, and of the law's prohibition to the particular requirement which otherwise would be imposed on Merchant hereunder, cannot lawfully be waived by agreement), but the requirement hereunder shall be construed to continue in effect and to be imposed on Merchant in all respects and at all times to the fullest extent possible without violating the law's prohibition, with only those particular applications of the requirement which would violate the law's prohibition deemed severed from the provisions hereof.

6.2 Operating Rules of the Debit Networks may differ among them with respect to the Transactions they allow. Bank, at its discretion, may require that the most restrictive requirements of one Debit Network apply to all of Merchant's On-line Debit Card Transactions, regardless of Card type.

## 7. MERCHANT'S BUSINESS; OTHER PROCESSORS.

7.1 **Compliance With Laws.** Merchant will comply with all Requirements of Law and regulations, including but not limited to laws and regulations regarding anti-money laundering compliance, in completing Transactions, submitting them to Bank, performing its obligations under the Merchant Agreement, and otherwise conducting its business.

7.2 **Change in Name or Business.** Merchant will give Merchant Bank and Processor at least thirty days' prior written notice before any change in Merchant's name or location, any change in ownership or management of Merchant's business, any sale, assignment, rental, lease or transfer of ownership of any location that accepts Cards, or any material change in information concerning Merchant in the Merchant Application, and material

change in the type or nature of the business carried out by Merchant or otherwise required to be provided to Bank.

7.3 **Other Processors.** To the extent permitted by applicable law, Merchant agrees that it will not participate in a Card Program with another financial institution or processor without Bank's written approval.

## 8. CREDIT REPORTS AND OTHER INFORMATION.

8.1 **Reports About Merchant.** From time to time, Bank may obtain credit and other information on Merchant, owners and officers of Merchant, and any and all personal guarantors of Merchant, from others (such as customers and suppliers of Merchant, lenders and credit reporting agencies), and furnish information on Merchant's relationship with Bank and Bank's experience with Merchant to others seeking the information.

8.2 **Reports from Merchant.** Merchant will provide Bank with updated business and financial information concerning Merchant, including financial statements, tax returns, evidence of required licenses and other information and documents Bank may reasonably request from time to time. Merchant shall further provide Bank such information as it may request for the making of insurance claim, regulatory or other filings related to Merchant's activity pursuant to this Agreement. All material marked "confidential" which Bank receives from Merchant will be used only by Bank or Card Association in performing the Card Program services under this Merchant Agreement or related services and reporting. Bank and any Card Association, regulator, auditor or any other entity having authority may audit Merchant's records relating to this Merchant Agreement. Merchant shall provide all documentation, information or other inspection rights requested by Bank's regulators or auditors or otherwise to enable Bank to meet Requirements of Law. Without limiting the generality of the foregoing, Merchant understands and agrees that if, at the time of signing this Merchant Agreement Merchant is undergoing a forensic investigation, Merchant must notify Bank and fully cooperate with the investigation until it is completed.

8.3 **Information.** Merchant authorizes Bank to release and use information collected in connection with Bank's provision of services to the Merchant contemplated in the Merchant Agreement, to third parties that provide services to Bank or Merchant or to any third party that requests and has a reason to know such information, including but not limited to the Card Associations, and any third party having regulatory control over the parties.

## 9. ASSIGNMENT; BANKRUPTCY.

9.1 **Assignment.** The Merchant Agreement is binding upon the successors and assigns of Bank and Merchant. Merchant will not assign or transfer (including by merger, change of control or operation of law) the Merchant Agreement (in whole or in part) to another person or entity without Bank's prior written consent and any purported assignment made without Bank's consent will be void.

### 9.2 Bankruptcy.

(a) Merchant will notify Bank immediately if any bankruptcy, insolvency or similar petition is filed by or against Merchant. Merchant acknowledges that this Merchant Agreement constitutes an executory contract to extend financial accommodations as defined in 11 U.S.C. §365(c)(2) and that the Merchant Agreement cannot be assumed or assigned in the event of bankruptcy. Merchant and Bank agree that in the event of Merchant's bankruptcy, Bank shall be entitled to suspend further performance under this Merchant Agreement.

(b) Merchant acknowledges and agrees that in the event of a bankruptcy proceeding, Merchant must establish a Reserve Account or maintain a previously established and then current Reserve Account in amounts required by Bank and in accordance with any Reserve Account provision specified in this Merchant Agreement. Bank will have the right to setoff against the Reserve Account for any and all obligations which Merchant may owe Bank, without regard as to whether the obligations relate to Transactions initiated or created before or after the filing of the bankruptcy petition.

## 10. AMENDMENTS; WAIVERS.

10.1 **Amendments.** Unless otherwise provided for in this Merchant Agreement, Bank may amend this Merchant Agreement at any time by providing Merchant with fifteen days' prior notice by: (a) sending Merchant written notice of such amendment, or (b) posting such amendment to the Processor web site and providing Merchant with electronic notice as provided in Section 2.3. Merchant acknowledges and agrees that notices hereunder, whether electronic or paper, may be provided to Merchant in the form of messages attached to Merchant's monthly billing statements to the extent permitted by applicable Laws and Operating Rules. The amendment will become effective unless Bank receives Merchant's notice terminating this Merchant Agreement before the effective date. Bank may amend this Merchant Agreement upon less than fifteen days' prior notice if Bank reasonably determines immediate modification is required by Requirements of Law, Operating Rules or any adverse change in Merchant's financial condition. Amendments submitted by Merchant will bind Bank only if in writing and approved and signed by Bank's authorized officer(s).

10.2 **Waivers.** Bank's failure to enforce this Merchant Agreement will not waive Bank's rights under this Merchant Agreement. Waivers of any provision of this Merchant Agreement must be in writing and signed by Bank. A waiver in one instance will not apply to other occasions unless that intent is clear from the signed waiver.

## 11. TERM; TERMINATION.

11.1 **Term/Renewal.** The initial term of this Merchant Agreement shall be for the term of three years (the "Initial Term") commencing on the earlier date of the presentation of the first Transaction, including any test Transaction, by Merchant to Bank or the date Bank approves the Merchant Application. By either Merchant's signature on the Merchant Application or Merchant's processing a Transaction with Bank, Merchant confirms acceptance of the Merchant Agreement. At the expiration of the Initial Term, this Merchant Agreement will automatically renew for successive one year periods (each a "Renewal Term") and collectively with the Initial Term the "Term") unless a party provides the other

parties with notice of its intent not to renew the Merchant Agreement at least ninety days prior to the expiration of the then current term.

#### 11.2 Termination.

(a) **Termination without Cause.** Merchant Bank or Processor or Merchant Bank's or Processor's designated representative may terminate the Merchant Agreement as to all Card types or individually specified Card types, without cause, upon thirty days advance written notice.

(b) **Termination for Cause by Bank.** Merchant Bank or Processor or Merchant Bank's or Processor's designated representative may terminate the Merchant Agreement in its sole and absolute discretion, effective immediately, upon written, electronic or oral notice, except as otherwise stated in the Merchant Agreement, to Merchant if Merchant Bank or Processor reasonably determines that any of the following conditions exists:

(i) Merchant has violated any provision of the Merchant Agreement.

(ii) There is a material adverse change in Merchant's financial condition, material change in Merchant's processing activity, processing activity inconsistent with the Merchant Application, or Merchant Bank or Processor determines in its sole discretion that Merchant's processing activity could result in a loss to Bank.

(iii) A petition in bankruptcy has been filed by or against Merchant, Merchant is generally unable to pay its debts as they become due, a receiver, custodian, trustee, liquidator or similar official is appointed for a substantial portion of Merchant's business, there is a general assignment for the benefit creditors, or the business terminates.

(iv) Any information which Merchant provided to Bank, including Merchant Application information, was false, incomplete or misleading when received, or has materially changed since Merchant provided such information.

(v) At any time during the term of the Merchant Agreement, Merchant has had a monthly ratio of Chargebacks to Transactions exceeding one percent, or Chargebacks are in excess of three percent of any monthly dollar amount of Transactions.

(vi) There is an overdraft for three days or more in the Settlement Account, or overdrafts in the Settlement Account are otherwise excessive.

(vii) Merchant or any of Merchant's officers or employees has been involved in processing Transactions with Bank or other parties arising from fraudulent or otherwise unauthorized transactions.

(viii) Merchant is or will be unable or unwilling to perform its obligations under the Merchant Agreement or any applicable laws.

(ix) Merchant has failed to pay Bank any amount when due.

(x) Merchant has failed to promptly perform or discharge any obligation under the Merchant Agreement, the Settlement Account or the Reserve Account.

(xi) Any of Merchant's representations or warranties made in connection with the Merchant Agreement was not true or accurate when given.

(xii) Merchant has defaulted on any agreement it has with Bank.

(xiii) Bank is served with legal demand, order or process seeking to attach or garnish any of the provisional credits arising out of or relating to the Merchant Agreement, Merchant's funds or property in Bank's possession,

(xiv) The Operating Rules are amended in any way so that the continued existence of the Merchant Agreement would cause Bank to be in breach of such Operating Rules.

(xv) Any Guaranty supporting Merchant's obligations is revoked, withdrawn or terminated or altered in any way.

(xvi) Any governmental entity initiates proceedings against Merchant, or Bank reasonably believes that a governmental entity may do so.

(xvii) If any circumstances arise regarding Merchant or its business that create harm or loss of goodwill to Bank or any Card Association.

(c) **Termination for Cause by Merchant.** Merchant may terminate the Merchant Agreement in the event of a material breach of the terms of the Merchant Agreement by Bank, provided Merchant gives Bank written notice of any alleged breach and such breach remains uncured for a period of thirty days following receipt of written notice by the Bank.

#### (d) Damages for Early Termination.

(i) Bank and Merchant acknowledge and agree that in addition to all other remedies available to Bank under the Merchant Agreement or as otherwise available in law or equity, if the Merchant Agreement is terminated prior to the expiration of the applicable Term of the Merchant Agreement for any reason other than for a material, uncured breach by Bank, Merchant agrees to pay Bank damages (the "Damages") determined by adding an account closure fee as follows: (1) \$250 for Merchants with less than twelve months remaining from the date of termination to the end of the then current Term, or; (2) \$500 for Merchants with more than twelve months remaining, or such portion of the foregoing as may be permitted by applicable law.

(ii) Merchant agrees that such Damages shall also be due to Bank if Merchant discontinues submitting Transactions for processing during the Term for a period of ninety (90) consecutive days, and is not designated on the Merchant Application, or by notice to Bank, as a seasonal merchant or as otherwise agreed to by Bank.

(iii) Merchant acknowledges and agrees that the Damages are not a penalty but rather are a reasonable computation of the financial harm caused by the termination of the Merchant Agreement by Merchant.

(e) Merchant Bank's or Processor's rights of termination under the Merchant Agreement are cumulative. A specific right of termination shall not limit any other right of Bank to terminate the Merchant Agreement expressed elsewhere in the Merchant Agreement. Notice of termination may be given orally or in writing, if given orally, shall be confirmed in writing, except as otherwise stated in the Merchant Agreement.

(f) Upon termination, Merchant's rights to complete Transactions and submit them to Bank, and to use Transaction form or formats, promotional material and any other items provided by Bank, will cease. Termination of the Merchant Agreement will not terminate the rights and obligations of Merchant and Bank relating to acts or omissions occurring before termination, including for example, any Processing Fees or other service fees owed to Bank, any Transactions processed for Merchant by Bank (whether before or after termination), Merchant's Chargeback and indemnity obligations, and the Security Interest granted to Bank in the Merchant Agreement.

(g) It is understood that a file for terminated merchants referred to as Member Alert to Control High-Risk Merchants ("MATCH"), formerly known as the Terminated Merchant File ("TMF") is managed and maintained by MasterCard and utilized by the Card Associations and acquiring banks to identify the names of any business (and its principals) that have been terminated for certain reasons, including fraud, depositing excessive counterfeit paper, excessive unauthorized transactions, excessive chargebacks, depositing paper for others (laundering), bankruptcy or breach of a Merchant Agreement. Merchant acknowledges that Merchant Bank or Processor is required to report Merchant to the MATCH (and/or on the Consortium Merchant Negative File (the CMNF) published by Discover® Network) if the Merchant Agreement is terminated for any of the foregoing reasons or other reasons as may be modified by the Card Associations. Merchant agrees and consents to such reporting in the event of the termination of the Merchant Agreement for any of the foregoing reasons.

(h) Sections 2.3, 3, 4, 5, 6, 7, 8.1, 9.1, 10.2, 11, 12, 13, 14, 15, 16.3, 16.4, 17, 18, 19, 20 and 22 will survive termination of the Merchant Agreement.

## 12. SETTLEMENT ACCOUNT.

**12.1 Settlement Account Required.** Merchant must maintain a Settlement Account in Merchant's name in satisfactory condition at a depository institution under arrangements acceptable to Bank. The Settlement Account will be subject to the provisions of Section 14 of this Merchant Agreement.

**12.2 Minimum Balance.** Merchant agrees to maintain a minimum balance of funds in the Settlement Account as Bank may specify to Merchant in writing from time to time.

**12.3 Provisional Credits.** Subject to the terms and conditions of the Merchant Agreement, Bank agrees to provisionally credit Merchant for each Transaction that Bank accepts from Merchant. Merchant agrees that Bank may charge or debit the Settlement Account for the amount of any Transaction processed under the Merchant Agreement, or any agreement Bank may have with any Merchant Affiliate, that results in a Chargeback, or for any Credit Transaction Receipt or other reimbursement or Processing Fees or other Merchant obligation to which Bank may be entitled under the Merchant Agreement.

**12.4 Audits and Adjustments.** Merchant agrees that Bank may audit all Transaction calculations and that Bank shall have the right, without notice, to make withdrawals, deposits, or other adjustments to or from the Settlement Account for any deficiencies or overages.

**12.5 Errors and Disputes.** Bank shall be entitled to presume that any amounts the Bank pays to or debits from Merchant are correct unless Merchant disputes these by sending Bank written notice within thirty days of the date of the applicable statement containing any disputed payments or debits.

**12.6 POS Equipment.** If Merchant chooses to rent or lease POS Equipment from Processor or utilizes software provided by Processor for use in processing Transactions, Merchant agrees to pay Processor: (a) a pre-determined monthly rental fee; (b) any initial upfront costs as required; and (c) all applicable taxes for such POS Equipment or software utilization.

**12.7 Settlement Account Closure.** If the Settlement Account is closed, Bank or its designated representative may terminate the Merchant Agreement, effective immediately, upon written or oral notice (with written confirmation in the event of oral notice) unless Merchant opens another Settlement Account acceptable to Bank. Merchant may change the Settlement Account upon prior written approval by Bank, which approval will not be unreasonably withheld.

**12.8 ACH Authorization.** Merchant authorizes Bank or its agents or designated representatives to initiate debit and credit entries and adjustments to the Settlement Account or the Reserve Account (described in **Section 13** of the MPA) through the ACH settlement process for amounts due under the Merchant Agreement. This authorization will remain in full force and effect until termination of the Merchant Agreement and the full and final payment of all obligations of Merchant due under the Merchant Agreement. Merchant acknowledges and agrees that Bank will not be liable for any delays in receipt of funds, any failure by Merchant to receive funds, or errors in debit or credit entries caused by Merchant, or third parties, including but not limited to any Card Association or any financial institution.

## 13. ADDITIONAL COLLATERAL SECURITY; RESERVE ACCOUNT.

As a condition for providing Card Program services, Merchant may be required to provide additional collateral security for Merchant's obligations hereunder, which additional collateral security shall be of a kind, and in amounts, satisfactory to Bank in Bank's sole discretion, and which shall be in addition to all other collateral provided for in Section 14 hereof. Such additional collateral security may include, for example, (a) suspension of all of or any portion of any provisional credit(s) arising or relating to the Merchant Agreement; (b) Merchant funds or property that Bank has possession or control; (c) a letter of credit, if issued in an amount and on terms acceptable to Bank by a letter of credit issuing bank acceptable to Bank, or (d) the pledge to Bank of a certificate of deposit owned by Merchant in amount satisfactory to Bank and provided all agreements (including agreements of third parties) in form and substance satisfactory to Bank and all filings and/or other actions necessary in order to perfect in Bank a continuing first priority security interest therein on terms acceptable to Bank, are entered into, made and/or taken as the case may be. Bank may require that all or any part of the additional collateral be deposited in a Reserve Account, set forth in this

Section 13, at any time when: (i) the Merchant Agreement, or the provision of Card Program services hereunder, shall have terminated for any reason or any party hereto shall have given notice of termination thereof, or (ii) there shall have occurred an event which entitles Bank to terminate the Merchant Agreement or the provision of Card Program services hereunder or which, with the giving of notice and/or the passage of time would entitle Bank to terminate the Merchant Agreement or the provision of Card Program services hereunder, and Merchant has not provided alternative additional collateral security of a kind, and in amounts, satisfactory to Bank as set forth above in this Section, or (iii) neither (i) nor (ii) above in this Section is applicable, but Bank has determined that additional collateral security is required, either (a) immediately without demand to Merchant in order to mitigate any risk, loss or damage to Bank, cardholder/consumer or Card Association or (b) Bank has requested that Merchant provide same, and Merchant has failed to provide alternative additional collateral security of a kind, and in amounts satisfactory to Bank as set forth above in this Section. Any additional collateral deposited in the Reserve Account shall be subject to the terms and conditions of Section 14 and all other terms and conditions of the Merchant Agreement relating to the "Reserve Account". Whenever Bank requires that additional collateral security be deposited in a Reserve Account, the following provisions of this Section 13 shall apply:

#### 13.1 Reserve During Term of Merchant Agreement.

(a) Merchant may be required to deposit, or Merchant Bank may deposit by deducting from any provisional credit or payment due to Merchant or from any funds in the Settlement Account or any other deposit account of Merchant, into an account maintained by Merchant Bank (or at another approved depository institution) (the "Reserve Account"), initially or at any time in the future as requested by Bank, sums sufficient to satisfy Merchant's current and/or future obligations as determined by Bank in its sole and absolute discretion.

(b) The Reserve Account will be separate from the Settlement Account. Merchant shall have no right of withdrawal from the Reserve Account. The Reserve Account shall be under the sole control of Merchant Bank, and Processor shall not have access to or hold funds in the Reserve Account. Any and all earnings from deposits of Merchant to the Reserve Account shall be the sole property of the Bank.

#### 13.2 Reserve Account Deposits.

(a) At any time in Bank's sole and absolute discretion, Bank may (i) designate the minimum balance required to be deposited in the Reserve Account, (ii) require that the amount on deposit in the Reserve Account be increased, (iii) require that Merchant deposit, or Merchant Bank may deposit for Merchant into the Reserve Account a percentage of, or a fixed amount from each Transaction processed, or (iv) otherwise determine the amount to be deposited in the Reserve Account. Bank at its sole and absolute discretion may require that each month Merchant deposit, or Merchant Bank may deposit by deducting from any provisional credit or payment due to Merchant or from any funds in the Settlement Account or any other deposit account of Merchant sums into the Reserve Account no later than the twentieth day of the month. Bank shall notify Merchant as to the amount of the funds to be deposited each month.

(b) Merchant acknowledges and agrees that the Reserve Account may contain both funds deposited by Merchant and funds of other merchants of the Bank.

**13.3 Deductions from Reserve Account.** If funds are not available in the Settlement Account, Bank without prior notice to Merchant may deduct from any provisional credits or payment due to Merchant that are maintained in the Reserve Account any current or future obligation of Merchant to Bank under the Merchant Agreement, including all Processing Fees, Chargebacks, Credit Transaction Receipts, Damages, and any and all additional fees and obligations under the terms of the Merchant Agreement, and sums sufficient to reimburse Bank for the amount of any fines, penalty amounts and charges due the Card Associations.

**13.4 Replenishment of Reserve Account Deficiencies.** Whenever the balance in the Reserve Account is less than the minimum balance required, or is otherwise deficient, Merchant Bank may, without prior notice, deposit the deficiency into the Reserve Account by reducing any payment to Merchant required by the Merchant Agreement or deduct the deficiency from the Merchant's or Merchant's Affiliate's Settlement Account or any other deposit account of Merchant or Merchant Affiliate with another depository institution (including accounts of general partners if Merchant is a partnership) and deposit it into the Reserve Account. Merchant authorizes deductions from its accounts by ACH entry, sight draft, preauthorized check, reverse wire, or otherwise as Bank deems appropriate under the circumstances. In addition, Merchant will deposit any deficiency into the Reserve Account within one Business Day after receiving Bank's oral or written request. Without limiting Bank's remedies, Merchant's failure to deposit any deficiency on time will permit Bank, without advance notice, to suspend or cease processing additional Transaction Receipts and Credit Transaction Receipts. Bank will give Merchant written notice of any suspension or cessation of processing.

**13.5 Additions to Reserve Account.** If Bank has reason to believe that Merchant may be liable to customers or to Bank for Chargebacks exceeding the balance in the Reserve Account, Merchant Bank may: (a) immediately place in the Reserve Account provisional credits or payments due to Merchant and/or stop processing transactions for Merchant until such time as the extent of Merchant's obligations to Bank, or Merchant's liability for Chargebacks, or Merchant's liability to customers are known, and Bank no longer deems itself insecure, and/or (b) demand from Merchant an amount that in Bank's judgment is needed to ensure payment of Merchant's obligations and liabilities. Merchant's failure to pay any amount will permit Merchant Bank or Processor or its designated representative to terminate the Merchant Agreement immediately without advance notice.

**13.6 Reserve Account After Merchant Agreement Terminates.** Merchant Bank may continue to hold or deposit funds in the Reserve Account after termination of the Merchant Agreement, regardless of whether termination is by Merchant or Bank. Upon termination of the Merchant Agreement by Merchant or Bank, Bank may retain sufficient

funds to satisfy any and all Processing Fees, Chargebacks, Credit Transaction Receipts, Damages, and any and all additional fees, and sums sufficient to reimburse Bank for the amount of any fines, penalty amounts and charges due the Card Associations or other obligations or liabilities arising under the terms of the Merchant Agreement. If no funds have been deposited into the Reserve Account before termination, Bank, at Bank's option, may notify Merchant to deposit funds into the Reserve Account upon termination of the Merchant Agreement. All provisions which apply to a pre-termination Reserve Account will apply after termination, including replenishment of deficiencies. The funds will be held by Bank or its designated agent for a period of not less than one hundred eighty days from the date of the last Transaction, including, but not limited to a chargeback transaction, processed under the Merchant Agreement, plus the period of any warranty, guarantee, and/or return policy on goods and/or services sold. Bank will return the balance in the Reserve Account to Merchant after Bank reasonably determines that the risk of Chargebacks, Processing Fees or Merchant's liabilities or obligations under the Merchant Agreement has ended and after deducting all amounts that Merchant owes to Bank under the Merchant Agreement or any other agreement.

## 14. SECURITY INTEREST.

### 14.1 Merchant's Grant of Security Interest.

(a) To secure Merchant's performance of its obligations under this Merchant Agreement, and any other agreement with Bank, Merchant grants Bank a security interest in each Transaction and its proceeds, provisional credits, the Settlement Account, the Reserve Account and any other deposit account of Merchant with a financial institution, whether now existing or established in the future, and in the proceeds of all those accounts, any funds due to Merchant from Bank and any of Merchant's property held by Bank. Bank may enforce these security interests without notice or demand. The security interests granted under this Merchant Agreement will continue after the Merchant Agreement terminates, until Merchant satisfies all its obligations to Bank.

(b) Furthermore, and with respect to any security interests granted herein, Bank will have all rights afforded under the Uniform Commercial Code, as the same may, from time to time, be in effect in the State of Colorado; provided, however, in the event that, by reason of mandatory provisions of law, any or all of the attachment, perfection or priority of the security interests granted herein is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State of Colorado, then Bank will have all rights afforded under the Uniform Commercial Code as in effect from time to time in such other jurisdiction for purposes of the provisions relating to such attachment, perfection or priority of the security interests, as well as any other applicable law.

**14.2 Perfection of Security Interest.** Upon request of Bank, Merchant will execute one or more financing statements or other documents to evidence the security interests granted to Bank under this Section 14. Merchant shall cooperate with Bank in obtaining any control agreement or similar agreement with a depository bank necessary to perfect the security interests granted herein. In addition, Merchant agrees that its signature on the Merchant Application will be considered Merchant's signature agreeing to any control agreement as defined in Article 9 of the Uniform Commercial Code among Merchant, Bank and any other financial institution under which Bank, Merchant and any other financial institution agree to the disposition of funds in the Settlement Account, the Reserve Account or any other deposit account without further consent by Merchant.

**15. CUSTOMER CLAIMS.** To the extent that Bank has paid or may pay a Chargeback or Credit Transaction Receipt, Merchant will be obligated to reimburse Bank for any sums Bank pays. If Merchant does not reimburse Bank, Bank will have all of the rights and remedies of Cardholders, including the Cardholders' rights under 11 U.S.C. §507(a)(6). Bank may assert any claim on behalf of a Cardholder individually or on behalf of all Cardholders as a class.

## 16. PROCESSING FEES.

**16.1 Fee Schedule.** Merchant will pay Processing Fees in the amount specified in the Fee Schedule attached to the Merchant Application or as otherwise provided for in this Merchant Agreement or an Addendum thereto. Monthly recurring Processing Fees will be assessed upon approval of the Merchant Application. Bank may increase the Processing Fees, including, without limitation, introducing new products or services, by giving Merchant fifteen days advance written notice effective for Transactions submitted on and after the effective date of the change.

**16.2 Card Association Actions.** Bank will not be required to provide Merchant with fifteen days' notice of an increase in Processing Fees in the event that any Card Association, or any other entity having such authority increases the Processing Fees and the effective date for implementation of the increase in the Processing Fees is less than fifteen days. In such cases, Bank shall make reasonable efforts including, but not limited to, written correspondence, notification on statements, website notification, email, fax and direct contact via the telephone or otherwise, to provide reasonable notification to Merchant. However, failure to provide advance notice of the increase in Processing Fees will not affect Merchant's obligation to pay the increased Processing Fees. The increase(s) in Processing Fees shall be effective on the date specified by Bank.

**16.3 Government and Regulatory Actions.** Bank will not be required to provide Merchant with fifteen days' notice for any increase in Processing Fees resulting from any fine, charge, fee or cost incurred in connection with any state, federal or other regulatory action, change in laws or regulations or escheatment of Merchant's funds. Bank shall make reasonable efforts including, but not limited to, written correspondence, notification on statements, website notification, email, fax and direct contact via the telephone or otherwise to provide reasonable notification to Merchant. However, failure to provide advance notice of the increase in Processing Fees as a result of any government or other regulatory actions will not affect Merchant's obligation to pay the increased Processing Fees. The increase(s) in the Processing Fees shall be effective on the date specified by Bank.



**16.4 Payment.** Processing Fees and other service charges, obligations or liabilities owed by Merchant to Bank under the Merchant Agreement may be deducted by Merchant Bank from amounts due Merchant, or from the Settlement Account or from the Reserve Account. Merchant will pay the amounts due by the next Business Day if sufficient funds are not available in the Settlement Account.

**17. INDEMNIFICATION; LIMITATION OF LIABILITY; WARRANTY.**

**17.1 Indemnification.** Merchant shall indemnify Bank, including their respective officers, directors, employees, and agents, against and hold them harmless from any and all claims, demands, settlements, losses, damages, liabilities, costs and expenses of any kind (including reasonable attorney's fees) of any party arising from or based upon any act or omission of Merchant, Merchant's employees, Merchant's designated representatives or agents, Merchant Servicers or Merchant's Agent(s) in connection with or arising out of this Merchant Agreement, the duties to be performed by Merchant pursuant to the Merchant Agreement, any Transactions which Merchant submits to Bank (including Chargebacks), or Merchant's violation of the Operating Rules, Operating Guide or any Requirements of Law. In the event that Bank is made a party to any litigation, proceeding, arbitration, bankruptcy proceeding, or other legal process (collectively "Actions") commenced by any third party, Merchant shall protect and hold Bank harmless from and with respect to the Actions and shall indemnify such party from and against all costs, expenses, and attorney's fees, including in-house legal fees, incurred or paid in connection with the Action, together with any judgments, settlements, losses, damages or other liabilities. Merchant shall indemnify, defend, and hold harmless Bank from and against any hacking, infiltration, or compromise of Merchant's systems or the systems of Merchant, Merchant Servicers or Merchant's Agent(s), designated representatives, or other agents.

**17.2 Limitation of Liability.** Bank will not accept responsibility for errors, acts, or failure to act by others, including but not limited to, Merchant Servicers, Agents, third party suppliers of software, equipment or services; or, banks, communication common carriers, data processors or clearinghouses through which transactions may be passed, originated and/or authorized. Bank will not be responsible for any loss, liability or delay caused by fires, earthquakes, war, civil disturbances, power surges or failures, acts of governments, acts of terrorism, labor disputes, failures in communication networks, legal constraints or other events beyond the control of Bank. Bank undertakes no duties to Merchant other than the duties expressly provided for in the Merchant Agreement, and any and all other or additional duties that may be imposed upon Bank in law or equity are hereby irrevocably waived and released to the maximum extent permitted by law. In any event, to the maximum extent permitted by applicable law, Bank's cumulative liability to Merchant, whether arising in contract, tort (including, without limitation, negligence and strict liability) or otherwise, shall not exceed the lesser of \$10,000 or, the amount equal to the aggregate of monthly net Processing Fees paid by Merchant in the three month period prior to the month that the incident giving rise to liability occurred.

**TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL BANK BE LIABLE FOR SPECIAL, INCIDENTAL, INDIRECT, CONSEQUENTIAL OR EXEMPLARY DAMAGES OR FOR ANY INTERRUPTION OR LOSS OF USE, DATA, BUSINESS OR PROFITS, WHETHER OR NOT SUCH LOSS OR DAMAGES WERE FORESEEABLE OR BANK WAS ADVISED OF THE POSSIBILITY THEREOF AND REGARDLESS OF WHETHER ANY LIMITED REMEDY HEREIN FAILS OF ITS ESSENTIAL PURPOSE.**

**TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, BANK SPECIFICALLY DISCLAIMS ALL WARRANTIES OF ANY KIND, EXPRESSED OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OF ANY INTELLECTUAL PROPERTY RIGHT WITH RESPECT TO THE SERVICES PROVIDED HEREUNDER. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, BANK DOES NOT GUARANTEE OR WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE.**

**18. NOTICES.** Each notice required by the Merchant Agreement will be in writing (hard copy or electronic), except as otherwise stated in the Merchant Agreement, and will be effective when delivered, (a) to Merchant Bank at the address designated on the Merchant Application, and the return address on Merchant's Card processing statements, (b) to Processor at the address designated on the Merchant Application and (c) to Merchant at Merchant's address to which Bank mails Merchant's statements or at the electronic mail address provided by Merchant in the Merchant Application, or at such other address as any party may provide by written notice to the other parties. Any address Merchant designates may also be the address to which Bank mails Merchant's statements. Delivery by facsimile transmission or electronic mail will be considered effective when the sender receives electronic confirmation of the transmission.

**19. COLORADO LAW; JURISDICTION; VENUE.** Merchant's offer to enter into this Merchant Agreement is made in Broomfield, Colorado; this Merchant Agreement shall be performed by Merchant in Broomfield, Colorado and governed by Colorado law, excluding its conflict of laws rules. Merchant and Guarantor agree to bring any claim or action relating to the Merchant Agreement in binding arbitration as set forth in Section 20.2 below. Any matters not otherwise subject to arbitration (such as, by way of example only, injunctive relief, action to recover any monetary losses or damages from unpaid obligations of the Merchant under the Merchant Agreement, or claims to enforce an arbitration award), shall be brought in the state or federal courts located in Broomfield County, Colorado. All parties irrevocably and unconditionally submit to the jurisdiction of such courts with respect to any such action. In the event that Bank is required to resolve a dispute with Merchant that requires any action under this provision, Merchant hereby agrees and consents to receive service of process by certified mail.

**20. ATTORNEY FEES; ARBITRATION.**

**20.1 Attorney Fees.** Merchant and/or Guarantor will be liable for and will indemnify and reimburse Bank for all attorneys' fees, including in-house legal fees, and other costs and expenses paid or incurred by Bank in the enforcement of this Merchant Agreement or in matters relating to this Merchant Agreement, or arising from any breach by Merchant of this Merchant Agreement, or any other wrongdoing by Merchant or Guarantor. In the event Bank must engage in any recovery or collection efforts to collect any amounts due from Merchant to Bank, Merchant will reimburse Bank for all fees and expenses incurred in such collection, plus reasonable administrative fees and expenses.

**20.2 Arbitration.** Merchant, Bank and any Guarantor will settle any dispute or controversy concerning or relating to this Merchant Agreement through binding arbitration before a single arbitrator, held at Denver or Broomfield, Colorado in accordance with the provisions of the Federal Arbitration Act or any successor statute. In interpreting the Merchant Agreement, which the arbitrator must do, the arbitrator shall be limited from revising, altering, or amending any term of the Merchant Agreement without the express written consent of the Bank and Merchant. Claims hereunder will be arbitrated on an individual basis and, as such, the arbitrator's authority is limited to claims between the Bank and Merchant (and any Guarantor) alone. Merchant and Bank expressly agree that the arbitrator may not consolidate or join more than one person's or party's claims, and may not otherwise preside over any form of a consolidated or class proceeding or over claims brought in a purported representative capacity on behalf of the general public, other merchants or other persons or entities similarly situated. Furthermore, the arbitrator may award relief (including monetary, injunctive and declaratory relief) only in favor of the individual party seeking relief and only to the extent necessary to provide relief necessitated by that party's individual claim(s).

In the event that Bank is required to engage in any recovery or collection efforts to collect any outstanding payment due and owing from Merchant and any Personal Guarantor under the Merchant Agreement and Guaranty and Merchant and/or any Personal Guarantor does not unconditionally proceed with arbitration in accordance with this Section 20.2 within 10 days after Bank sends a written demand for arbitration, Bank shall be entitled (but not obligated) to initiate litigation in any state or federal court located in Denver or Broomfield County, Colorado to recover any amount due and owing from Merchant to Bank.

**21. FINAL AGREEMENT.** This Merchant Agreement and all applicable Addenda attached hereto, is the complete and final agreement between Merchant and Bank for the Card Program services covered by this Merchant Agreement and supersedes all prior or contemporaneous negotiations, stipulations or agreements between them with respect thereto. In the event of any conflict or inconsistency between this Merchant Agreement and any other agreement between Processor or any of its affiliates and Merchant Bank or any of its affiliates (but not Merchant), such other agreement shall control with respect to such conflict or inconsistency. If any provision of this Merchant Agreement is invalid or unenforceable, the other provisions remain effective.

**22. CONTINUING GUARANTY.**

**22.1** As a primary inducement to Bank to enter into the Merchant Agreement, and to approve the Merchant Application of Merchant, the Guarantor(s), individually and severally, who signed on the Guarantor signature line(s) on the Merchant Application, agree to be bound by all terms and provisions of the Merchant Agreement to the same extent and in the same manner as Merchant, and unconditionally and irrevocably, personally guarantee the continuing full and faithful performance and payment by Merchant of each and all of Merchant's duties and obligations to Bank under the Merchant Agreement or any other agreement currently in effect or in the future entered into between Merchant or its principals and Bank, as such agreements now exist or are amended from time to time, with or without notice to Guarantor(s).

**22.2** Merchant and Guarantor(s) further agree to be bound by the terms and provisions of any Merchant Agreement between Bank and any Merchant Affiliate, regardless of whether such agreement currently exists or is executed, amended or supplement at some future date. Merchant and Guarantor(s) unconditionally and irrevocably guarantee the full payment and performance of each and all duties and obligations owed to Bank by Merchant Affiliate pursuant to any Merchant Agreement. The provisions of Section 22.3 apply to the guarantee by Merchant and Guarantor(s) of the Merchant Affiliate's obligations to Bank under any Merchant Card Processing Agreement.

**22.3** Guarantor(s) understands that Bank, without notice to Guarantor(s), may from time to time renew or extend the Merchant Agreement, modify rates, limits, charges and fees, or modify the amount or type of services provided to Merchant all of which may increase the Guarantor's obligations under this Guaranty. Guarantor(s) further understands that Bank may proceed directly against Guarantor(s) without first exhausting Bank's remedies against Merchant, any other person or entity responsible to Bank or any security held by Bank. This Guaranty is a continuing guaranty and will not be discharged or affected by the release or discharge of Merchant or the death of the Guarantor(s). This Guaranty will bind all heirs, administrators, and representatives of the Guarantor(s) and may be enforced by or for the benefit of any successor of Bank. To the fullest extent permissible under applicable law, Guarantor(s) waives any and all rights of subrogation, reimbursement or indemnity derived from Merchant, all other rights and defenses available to Merchant, and all other rights and defenses available to Guarantor(s). This Guaranty may not be otherwise revoked, suspended, withdrawn or terminated without the express written consent of Bank.

**23. PRODUCTS AND SERVICES.**

*Important Note: Merchant acknowledges and agrees that Merchant Bank and its affiliates have no obligation or liability whatsoever for: (1) the Products and Services described herein, (2) any actions or omissions of Processor with respect to these Products and Services, or (3) any claims or disputes arising out of the foregoing.*

**23.1** If Merchant elects to receive any of the ancillary Products and Services listed on the Merchant Application (including but not limited to the Guardian Suite (and its related products), Payment Acceptance Applications (WebPASS, Multi-PASS, and/or Hosted

Payments), and TransLink Insights either in various packages or on a product by product basis, Merchant agrees to the following terms applicable to the relevant software licenses (collectively, the "Licensed Software"). Use of the Licensed Software is limited to Merchant's internal business purposes. Title to and ownership of the Licensed Software remains with Processor and its suppliers. Merchant may not (a) alter or modify the Licensed Software, (b) reverse engineer, decompile, disassemble, or in any way attempt to derive the source code for the Licensed Software, or (c) transfer the Licensed Software to any third party or make the Licensed Software available to any third party as part of any time-sharing or service bureau arrangement. Merchant will not export or re-export the Licensed Software without the appropriate United States or foreign government licenses. All express and implied warranties regarding the Licensed Software by Processor and its suppliers to Merchant are disclaimed. For U.S. Government End Users: The Licensed Software is a "commercial item," as that term is defined at 48 C.F.R. 2.101 (OCT 1995), and more specifically is "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R. 12.212 (SEPT 1995). Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4 (JUNE 1995), the Licensed Software is provided to U.S. Government end users (a) only as a commercial end item, and (b) with only those rights as are granted to all other end users pursuant to the terms and conditions herein. The Licensed Software is only offered on terminals capable of supporting it.

**23.2 TransLink Insights.** Merchant understands and agrees that these products and services are offered by Oto Analytics, Inc. d/b/a Womply ("Womply"), and not by Merchant Bank or Processor. Processor, Merchant Bank, and their affiliates are in no way responsible for the actions, inactions, performance or nonperformance of Womply, or for disputes or resolving disputes of any kind arising from the products and services provided by Womply. Merchant understands and agrees that Merchant's access to the products and services hereunder are subject to Womply's acceptance of Merchant as a customer, and Merchant's agreement to Womply's End User License Agreement. Merchant hereby authorizes Processor and/or Womply to contact Merchant via phone, email, facsimile, or mail in regards to the products and services hereunder.

#### **24. TMS EQUIPMENT AGREEMENT.**

*Important Note: Merchant agrees Merchant Bank is not a party to the TMS Equipment Agreement and has no responsibility under it. Merchant acknowledges and agrees that Merchant Bank and its affiliates have no obligation or liability whatsoever for: (1) products or services provided under the TMS Equipment Agreement, or (2) any actions or omissions of TSYS Merchant Solutions, LLC ("TMS") with respect to the TMS Equipment Agreement. Merchant agrees that any claims or disputes arising out of the foregoing will be resolved without involving Merchant Bank and that Merchant Bank is entitled to rely on Merchant's agreements in this Section 24.*

THIS TMS Equipment Agreement ("EQUIPMENT AGREEMENT"), by and between TMS, and "Merchant," the name of which is set forth in the Agreement, as defined herein, shall become effective as of the date Merchant Application ("Effective Date"). WHEREAS, TMS and Merchant shall hereinafter be referred to as the "Parties"; and WHEREAS Merchant desires to purchase or rent equipment from TMS in order to accept and process specified credit card transactions.

NOW THEREFORE, in consideration of the mutual promises made herein, and other valuable consideration, receipt and sufficiency of which are hereby acknowledged, the Parties do hereby agree as follows:

24.1 TMS agrees to sell or rent to Merchant and Merchant agrees to buy or rent from TMS the equipment described in the Merchant Application or as added from time to time via Merchant's request through Processor's customer service center. TMS owns all right, title and interest in all EQUIPMENT rented or sold to MERCHANT hereunder, provided that such right, title and interest will transfer to MERCHANT in the event MERCHANT purchases the EQUIPMENT. The individual sales representative selling or renting the EQUIPMENT to MERCHANT is an employee of TMS. Merchant's payment for equipment or delivery of the equipment to Merchant will constitute Merchant's acceptance of the applicable following terms and conditions. Payment for equipment and any related fees shall be due and payable on the Effective Date of this EQUIPMENT AGREEMENT if purchasing equipment, monthly if renting, or upon an otherwise agreed upon date or payment schedule. Merchant agrees to pay the fee(s) set out in the Agreement and as added from time to time. Merchant is responsible for all sales, use, excise and other taxes, including penalties and interest, that may result from this transaction. The fees set forth in the Merchant Application related to this EQUIPMENT AGREEMENT are exclusive of any and all applicable taxes or assessments, whether designated as sales taxes, use taxes, ad valorem taxes, GST/HST taxes, VAT taxes or by some other name or designation, and including any interest or penalties thereon, which may be levied or assessed by any governmental or taxing jurisdiction in connection with the performance of services or provision of materials to Merchant by TMS. In the event of the payment of or for any such tax, assessment or expense by TMS, Merchant shall in turn pay TMS for such items. Merchant hereby authorizes TMS to debit payment from the Merchant's designated account established under the Agreement for items ordered herein if payment does not accompany order.

24.2 Upon payment by Merchant to TMS of the entire purchase amount required herein, TMS shall sell, transfer and assign the purchased equipment to Merchant for Merchant's use and benefit. All risks or expenses of loss, damage, or repair to the equipment shall be borne by Merchant upon such transfer of title.

24.3 If Merchant is renting equipment, Merchant agrees to pay Processor a monthly rental fee ("Rental Fee") for the equipment until such time said equipment is returned to TMS, which will be debited monthly from the Merchant's Settlement Account established under the Agreement or billed separately to merchant if the Merchant's Settlement Account no longer exists. MERCHANT may return the EQUIPMENT to TMS at any time during the AGREEMENT, at which time MERCHANT will no longer be responsible for future payments of the RENTAL FEE. If Merchant is purchasing the equipment via multiple payments and terminates the EQUIPMENT AGREEMENT prior to completing the monthly purchase payments, then Merchant agrees to immediately pay the remainder of the purchase

price or, if Merchant returns the equipment under the conditions specified herein, Merchant agrees to pay TMS's then current RENTAL FEE for the length of time Merchant had the use of the equipment.

24.4 Merchant agrees to pay the Rental Fee on a per month basis as rental for the EQUIPMENT. TMS may amend the Rental Fee on thirty (30) days written notice to Merchant. Submission by Merchant of a Transaction after such notice period shall be evidence that Merchant has received the amended Rental Fee and has agreed to such amended Rental Fee. Merchant is supplied with monthly reports by Processor regarding the equipment. It is Merchant's sole responsibility to report any error or discrepancies detected by Merchant in writing to TMS within ninety (90) days following the end of the monthly reporting period. After such period, Merchant will be deemed to have accepted the monthly reports as delivered.

24.5 The Parties agree to each of the terms and conditions set forth herein and acknowledge that such provisions are binding upon each of them, their successors, heirs and assigns.

24.6 Merchant understands that a telephone jack and other equipment may be required for its phone system to be compatible with equipment at Merchant's expense.

24.7 Upon expiration or termination of the EQUIPMENT AGREEMENT, Merchant agrees to remove the rental equipment from its locations and deliver it to TMS at Merchant's cost in the same condition as when the rental equipment was installed, normal wear and tear excepted. The Parties agree that the rental equipment is and will remain personal property of TMS.

24.8 Merchant hereby assumes the entire risk of loss, damage or destruction of the equipment from any cause whatsoever, until the delivery of the rental equipment to TMS. If the rental equipment is damaged, lost, or not returned to TMS, Merchant shall, at the option of TMS, repair the rental equipment at Merchant's expense or pay TMS the current replacement cost of the rental equipment.

24.9 Merchant hereby grants to TMS the right, during normal business hours, to enter any location under Merchant's control for the purpose of inspecting, repairing, or replacing rental equipment.

24.10 Merchant shall and does hereby agree to indemnify and hold TMS, its agents, employees, successors and assigns harmless from any and all liability, damages or loss (including attorney fees and costs) arising out of the ownership, selection, possession, leasing or renting, operation (regardless of where, how and by whom operated), control, use, condition (including, but not limited to, latent and other defects, whether or not discoverable by TMS) maintenance, delivery and return of the equipment. This indemnification and the obligations contained herein shall survive termination or expiration of EQUIPMENT AGREEMENT.

24.11 Merchant shall keep rental equipment insured against all risks for not less than replacement costs of rental equipment, naming TMS as an additional insured as its interest may appear.

24.12 If this EQUIPMENT AGREEMENT is terminated, TMS shall have the right to enter Merchant's locations for the purpose of recovering rental equipment.

24.13 Neither Merchant nor any third party is authorized to make any alterations, repairs or changes including programming changes to rental equipment. Any personal property attached to rental equipment shall become part of the equipment. TMS will provide maintenance service to rental equipment during the term of the EQUIPMENT AGREEMENT. Merchant shall not allow any other person or entity to maintain or tamper with rental equipment without the express written consent of TMS.

24.14 Merchant's rights and remedies hereunder are exclusive and in lieu of all other rights and remedies. TMS shall not otherwise be liable for any error, omission, delay, loss of data or records or disclosure of confidential information which may occur as a result of, or in any way be connected with, any use of equipment or services provided by TMS pursuant to this or any other agreement. In any event, TMS's liability to Merchant, whether arising in contract, tort (including, without limitation, negligence and strict liability) or otherwise, shall not exceed the lesser of the direct loss to Merchant or an amount equal to the aggregate of monthly RENTAL FEES paid to TMS by Merchant in the six-month period prior to the incident giving rise to liability. IN NO EVENT SHALL TMS BE LIABLE FOR SPECIAL, INCIDENTAL, INDIRECT, CONSEQUENTIAL OR EXEMPLARY DAMAGES OR FOR ANY INTERRUPTION OR LOSS OF USE, DATA, BUSINESS OR PROFITS, WHETHER OR NOT SUCH LOSSES OR DAMAGES WERE FORESEEABLE OR TMS WAS ADVISED OF THE POSSIBILITY THEREOF AND REGARDLESS OF WHETHER ANY LIMITED REMEDY HEREIN FAILS OF ITS ESSENTIAL PURPOSE. TMS is not responsible for any loss or damages whatsoever sustained by Merchant arising as a result of any acts of God, strikes, flood, weather, shortages of parts or supplies or other events beyond its reasonable control.

24.15 TMS, NOT BEING THE MANUFACTURER OF THE EQUIPMENT, MAKES NO EXPRESS OR IMPLIED WARRANTY OF ANY KIND WHATSOEVER WITH RESPECT TO THE EQUIPMENT INCLUDING BUT NOT LIMITED TO: THE MERCHANTABILITY OF THE EQUIPMENT OR ITS FITNESS FOR ANY PARTICULAR PURPOSE; THE DESIGN OR CONDITION OF THE EQUIPMENT; THE QUALITY OR CAPACITY OF THE EQUIPMENT; THE WORKMANSHIP OF THE EQUIPMENT; COMPLIANCE OF THE EQUIPMENT WITH REQUIREMENTS OF ANY LAW, RULE, SPECIFICATION OF CONTRACT PERTAINING THERETO; THE ABSENCE OF ANY INFRINGEMENT OF ANY PATENT, TRADEMARK OR COPYRIGHT; THE ABSENCE OF LATENT OR OTHER DEFECTS, WHETHER OR NOT DISCOVERABLE; THE ABSENCE OF ANY OBLIGATION BASED ON STRICT LIABILITY IN TORT. UPON SALE OF THE EQUIPMENT TO MERCHANT, TMS HEREBY ASSIGNS, TO THE EXTENT POSSIBLE, ALL WARRANTIES AND RIGHTS OF TMS WITH RESPECT TO THE EQUIPMENT PROVIDED BY THE MANUFACTURER OF THE EQUIPMENT. TMS DOES NOT MAKE ANY EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES OF ANY KIND WITH RESPECT TO THE MANUFACTURER'S WARRANTY.



24.16 Except as expressly provided herein, Merchant may not assign its rights or delegate its responsibilities regarding rental equipment under this EQUIPMENT AGREEMENT without the prior written consent of TMS, which will not be unreasonably withheld.

24.17 The Parties acknowledge and agree that this EQUIPMENT AGREEMENT was, and shall be deemed to have been, made and delivered in Broomfield County, Colorado. The laws of the State of Colorado, without giving effect to its conflicts of law principles, shall govern all matters (whether in contract, statute, tort or otherwise characterized) arising out of or relating to this EQUIPMENT AGREEMENT, including, without limitation, the validity, interpretation, construction, performance and enforcement of the EQUIPMENT AGREEMENT. The Parties agree that, in the event of any dispute regarding, arising out of or relating to this EQUIPMENT AGREEMENT, the courts of the State of Colorado shall have and be vested with personal jurisdiction over the Parties. The Parties further agree that any and all actions, claims, suits or proceedings arising out of or relating (directly or indirectly) to this EQUIPMENT AGREEMENT shall be filed and litigated only in courts located in Broomfield County, Colorado, and such courts shall have exclusive jurisdiction over any action, claims, suit or proceeding arising out of or relating (directly or indirectly) to this EQUIPMENT AGREEMENT. If Merchant brings legal action against TMS for any reason, Merchant shall commence the action within one (1) year of the date the error or the incident giving rise to such action occurred.

24.18 No delay or failure by either Party to exercise any right under EQUIPMENT AGREEMENT, and no partial or single exercise of that right, shall constitute a waiver of fact or any other right, unless expressly provided herein.

24.19 Neither Party shall be responsible for the costs incurred by the other for negotiating or implementing this EQUIPMENT AGREEMENT and Merchant shall be responsible for installation of the equipment.

24.20 The obligations of all Parties hereto incurred prior to the effective date of termination of EQUIPMENT AGREEMENT shall survive such termination.

24.21 In the event that any portion of EQUIPMENT AGREEMENT shall be held invalid or unenforceable for any reason, it is agreed that any invalidity or unenforceability shall not affect the remainder of the same and the remaining provisions shall remain in full force and effect, and any court of competent jurisdiction may so modify any objectionable provision of the same so as to render it valid, reasonable and enforceable.

24.22 This EQUIPMENT AGREEMENT may only be amended or modified by a subsequent written agreement by and between the Parties hereto.

24.23 Merchant hereby represents that the entering into of this EQUIPMENT AGREEMENT has been duly authorized by Merchant and that this EQUIPMENT AGREEMENT constitutes a legal, valid and binding obligation of Merchant, and is enforceable against Merchant in accordance with its terms.

24.24 This EQUIPMENT AGREEMENT constitutes the entire understandings of the Parties as to the subject matter contained herein and supersedes all prior contracts, agreements and negotiations whether oral or written.