



Merrick Bank

135 Crossways Park Drive North
Suite A100
Woodbury, NY 11797
Merchant Services Division
Tel (800) 328-9155 • Fax (516) 576-8741

Merchant Application and Agreement				Merchant #:			MCC:		
MERCHANT NAME (DBA OR TRADE NAME)				CORPORATE NAME (LEGAL NAME)					
LOCATION ADDRESS				CORPORATE ADDRESS					
CITY		ST	ZIP	CITY		ST	ZIP		
CONTACT NAME				FEDERAL TAX ID#					
CONTACT EMAIL				DOES THIS LOCATION CURRENTLY TAKE PAYMENT CARDS? Yes No					
BUSINESS PHONE #				REASON FOR TERMINATION:					
REASON FOR LEAVING CURRENT ACQUIRER/BANK									
TYPE OF BUSINESS:				NATURE OF BUSINESS:					
<input type="checkbox"/> Individual/Sole Proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> Corporation <input type="checkbox"/> LLC State: _____ <input type="checkbox"/> Non-Profit (Must Provide 503-C) <input type="checkbox"/> Publicly Traded <input type="checkbox"/> Government Length of time in business: _____ Years _____ Months				Retail Retail w/tip Mail/Phone Order Internet Restaurant Fast Food <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> Lodging Convenience Public Sector Petroleum Utility <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> Seasonal Sales: Yes No If so, please check high volume months J F M A M J J A S O N D					
Method of Acceptance: (Totals to equal 100%) Merchants processing less than 70% swipe transactions must complete the MO/TO Questionnaire				Monthly Payment Card Volume: \$ American Express Vol: \$ Avg. Ticket: \$ High Ticket: \$ Merchant Name to appear on consumer statement <input type="checkbox"/> DBA Name <input type="checkbox"/> Legal Name					
Credit Cards Swiped		%	MOTO:						%
Key Entered:		%	Internet:						%
Website Address:									
Product or Service being offered:				Other					
MO/TO QUESTIONNAIRE: COMPLETE THIS SECTION IF PROCESSING LESS THAN 70% CARD-PRESENT:									
What percentage of sales are to:				Business Consumer % Individual Consumer %					
Method of Marketing: <input type="checkbox"/> Newspaper Magazine <input type="checkbox"/> Television/Radio <input type="checkbox"/> Internet <input type="checkbox"/> Direct Mail, Brochure and/or Catalog <input type="checkbox"/> Outbound Telemarketing Sales <input type="checkbox"/> Other:									
Who processes the order? <input type="checkbox"/> Merchant <input type="checkbox"/> Fulfillment Center <input type="checkbox"/> Other									
Who enters credit card information into the processing system? Merchant <input type="checkbox"/> Fulfillment Center <input type="checkbox"/> Consumer <input type="checkbox"/> Other									
If credit card payment information taken over the Internet is payment channel encrypted by SSL or better? <input type="checkbox"/> Yes <input type="checkbox"/> No									
If Merchant is an e-commerce Merchant, is a Merchant Certificate utilized? <input type="checkbox"/> Yes <input type="checkbox"/> No if yes, please provide the following:									
Merchant Certificate Number		Certificate Issuer		Exp Date		Is Certificate <input type="checkbox"/> Individual <input type="checkbox"/> Shared			
Do you own the product/inventory Yes <input type="checkbox"/> No				Is the product stored at your business location? <input type="checkbox"/> Yes <input type="checkbox"/> No If No, where is it stored?					
After charge authorization, how long until product ships? days				Who ships the product <input type="checkbox"/> Merchant <input type="checkbox"/> Fulfillment Center					
Product shipped by <input type="checkbox"/> US Mail <input type="checkbox"/> Other				Delivery receipt requested? <input type="checkbox"/> Yes <input type="checkbox"/> No					
DOES MERCHANT USE AN INDEPENDENT SERVICES THAT STORES, MAINTAINS OR TRANSMITS CARDHOLDER INFORMATION:				Yes (if yes, please provide): No					
NAME:				PHONE NUMBER:					
DOES MERCHANT USE A FULFILLMENT HOUSE TO FULFILL PRODUCT:				Yes (if yes, please provide): No					
NAME:				PHONE NUMBER:					
HAVE MERCHANT OR OWNERS/PRINCIPALS EVER FILED BUSINESS BANKRUPTCY and/or PERSONAL BANKRUPTCY				Yes (if yes, please provide): No					
Explanation:									
BANK ACCOUNT INFORMATION:									
<input type="checkbox"/> Checking Account <input type="checkbox"/> Savings Account		Bank Name:		Select Funding Type: <input type="checkbox"/> Standard <input type="checkbox"/> Next Day					
*Transit # (ABA Routing)		Account # (DDA):		Contact:		Phone #:			
*By providing the above referenced information, you are authorizing Bank to initiate ACH debit and credit transactions to said account									
PRIMARY SUPPLIERS									
1) Name/Contact:				2) Name/Contact:					
Phone #:				Phone #:					
BANK DISCLOSURE: Member Bank Information: Merrick Bank, 135 Crossways Park Drive North, Suite A100, Woodbury, NY 11797 • Phone (800) 328-9155 • Fax (516) 576-8741									
Important Bank Responsibilities:									
1.) Merrick Bank is the only entity approved to extend acceptance of Visa products directly to a Merchant. 2.) Merrick Bank is responsible for educating Merchants on pertinent Visa operating regulations with which Merchants must comply. 3.) Merrick Bank, not Anovia Payments, must hold, administer and control all reserve funds derived from settlement. 4.) Merrick Bank, not the Anovia Payments, must hold, administer and control settlement funds for the Merchant. 5.) Merrick Bank must be a principal (signer) to the Merchant Application (Application together with the Terms and Conditions shall be referred to as the "Merchant Agreement").									
Merchant Information: Refer to Merchant Application									
Important Merchant Responsibilities: 1.) Complying with cardholder data security and storage requirements. 2.) Maintaining fraud and chargebacks below established thresholds. 3.) Reviewing and understanding the Merchant Agreement. 4.) Complying with Visa's operating regulations.									
The responsibilities listed above do not supersede terms of the Merchant Agreement and are provided to ensure the Merchant understands some important obligations of each party and that the Visa Member - Merrick Bank - is the ultimate authority should the Merchant have any problems.									
Merchant Name:		Address:		Phone:		Agent name:			
Merchant Signature		Title:		Date:					

Principal Information			
Principal/Beneficial Owner #1 Name			
Title:_____ First:_____ Middle Init:_____ Last:_____ SSN:_____ % Ownership _____			
Home Address:_____ City:_____ State:_____ Zip: _____ Date of Birth: _____			
Home Phone:_____ DL#/State*:_____ Email Address:_____			
Principal/Beneficial Owner #2 Name			
Title:_____ First:_____ Middle Init:_____ Last:_____ SSN:_____ % Ownership _____			
Home Address:_____ City:_____ State:_____ Zip: _____ Date of Birth: _____			
Home Phone:_____ DL#/State*:_____ Email Address:_____			
Principal/Beneficial Owner #3 Name			
Title:_____ First:_____ Middle Init:_____ Last:_____ SSN:_____ % Ownership _____			
Home Address:_____ City:_____ State:_____ Zip: _____ Date of Birth: _____			
Home Phone:_____ DL#/State*:_____ Email Address:_____			
Principal/Beneficial Owner #4 Name			
Title:_____ First:_____ Middle Init:_____ Last:_____ SSN:_____ % Ownership _____			
Home Address:_____ City:_____ State:_____ Zip: _____ Date of Birth: _____			
Home Phone:_____ DL#/State*:_____ Email Address:_____			
Controlling Position/Beneficial Owner Name			
Title:_____ First:_____ Middle Init:_____ Last:_____ SSN:_____ Controlling Interest <input type="checkbox"/> Yes <input type="checkbox"/> No			
Home Address:_____ City:_____ State:_____ Zip: _____ Date of Birth: _____			
Home Phone:_____ DL#/State*:_____ Email Address:_____			
CERTIFICATION OF BENEFICIAL OWNER(S)			
To help the government fight financial crime, Federal regulation requires certain financial institutions to obtain, verify, and record information about the beneficial owners of legal entity customers. Legal entities can be abused to disguise involvement in terrorist financing, money laundering, tax evasion, corruption, fraud, and other financial crimes. Requiring the disclosure of key individuals who own or control a legal entity (i.e., the beneficial owners) helps law enforcement investigate and prosecute these crimes.			
By signing below, I attest that I have accurately provided the name, address, date of birth and Social Security Number (SSN) for the following individuals (i.e. the beneficial owners):			
(i) Each individual, if any, who owns directly or indirectly, 25 percent or more of the equity interests of the legal entity customer (e.g., each natural person that owns 25 percent or more of the shares of a corporation); and			
(ii) An individual with significant responsibility for managing the legal entity customer (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer).			
The number of individuals that satisfy this definition of “beneficial owner” may vary. Under section (i), depending on the factual circumstances, up to four individuals (but as few as zero) may need to be identified. Regardless of the number of individuals identified under section (i), you must provide the identifying information of one individual under section (ii). It is possible that in some circumstances the same individual might be identified under both sections (e.g., the President of Acme, Inc. who also holds a 30% equity interest). Thus, a completed form will contain the identifying information of at least one individual (under section (iii)), and up to five individuals (i.e., one individual under section (ii) and four 25 percent equity holders under section (i)).			
I, the undersigned _____, certify that all of the information furnished above with regard to information for each individual, if any, who directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of the legal entity listed above is complete and accurate.			
Signature:_____		Date: _____	
CONTINUING PERSONAL GUARANTY PROVISION – PERSONAL GUARANTOR (Capitalized terms not defined in this Guaranty section have the meanings set forth below in the Terms and Conditions section)			
By signing below, each individual or entity (“Guarantor”) jointly and severally (if there is more than one Guarantor) and unconditionally guarantees to Anovia Payments and BANK the prompt payment and full and complete performance of all obligations of the Merchant identified above under the Merchant Agreement, as amended from time to time, including, without limitation, all promises and covenants of the Merchant, and all amounts payable by the Merchant under the Merchant Agreement, including, without limitation, charges, interest, costs and other expenses, such as attorney’s fees and court costs. This means, among other things, that Anovia Payments or BANK can demand performance or payment from any Guarantor if the Merchant fails to perform any obligation or pay what the Merchant owes under the Agreement. Each Guarantor agrees that his or her liability under this guaranty will not be limited or canceled because: (i) the Merchant Agreement cannot be enforced against the Merchant for any reason, including, without limitation, bankruptcy proceedings; (2) either Anovia Payments or BANK agrees to changes or modifications to the Merchant Agreement, with or without notice to Guarantor; (3) Anovia Payments or BANK releases any other Guarantor or the Merchant from any obligation under the Merchant Agreement; (4) any law, regulation, or order of any public authority affects the rights of either Anovia Payments, Merchant, or BANK under the Merchant Agreement; and/or (5) anything else happens that may affect the rights of either Anovia Payments -or BANK against the Merchant or any other Guarantor. Each Guarantor further agrees that (a) Anovia Payments and BANK each may delay enforcing any of its rights under this guaranty without losing such rights and hereby waives any applicable Statue of Limitations; (b) Anovia Payments and BANK each can demand payment from such Guarantor without first seeking payment from the Merchant or any other Guarantor or from any security held by the BANK; and (c) such Guarantor will pay all court costs, attorney’s fees and collection costs incurred by either Anovia Payments or the BANK in connection with the enforcement of the Merchant Agreement or this Guaranty, whether or not there is a lawsuit, and such additional fees and costs as may be directed by a court. If the Merchant is a corporation or limited liability company, this Guaranty must be executed by a principal or affiliate of Merchant.			
Principal #1:		Principal #2:	
Print Name:	Date:	Print Name:	Date:
CORPORATE RESOLUTION: (Capitalized terms not defined in this Resolution section have the meanings set forth below in the Terms and Conditions section)			
1. _____, the duly elected qualified and acting _____ of _____, a _____ (the “Company”), do hereby certify as follows: <div>Corporate Secretary**Office TitleLegal Corporate Name of Co.Incorporation Status</div>			
The following resolutions were duly adopted by the board of directors/managing member(s)/general partners (circle one) of the Company: WHEREAS, the Company desires to enter into a Merchant Agreement (the “Merchant Agreement”) with Merrick Bank Corporation, a Utah industrial loan corporation (“Bank”) and Anovia Payments, a State & Incorporation Status company (Anovia Payments), a copy of which Merchant Agreement is attached hereto as Exhibit “A”; WHEREAS, pursuant to the terms of the Merchant Agreement, Bank and Anovia Payments will provide certain credit card financing and processing for VISA, Discover, MASTERCARD, and/or American Express credit card purchases made by the Company’s customers; WHEREAS, pursuant to the terms of the Merchant Agreement, (a) the Company may be required to establish a Reserve Account (as defined in the Merchant Agreement) and (b) Bank may require the Company to direct certain funds relating to credit card purchases to such Reserve Account; WHEREAS, pursuant to the terms of the Merchant Agreement, Bank may require the Company to execute instruments evidencing Bank’s security interest in the Operating Account (as defined in the Merchant Agreement) and Reserve Account; and WHEREAS, pursuant to the terms of the Merchant Agreement, the Company is required to comply with strict requirements concerning the processing of credit card transactions and the sale of the Company’s products. NOW, THEREFORE, BE IT RESOLVED, that the Merchant Agreement by and among the Company, Bank and Anovia Payments pursuant to which Bank and Anovia Payments will act as the Company’s exclusive provider of credit card financing and processing services, is hereby approved and adopted in the form attached to these resolutions, together with such additions, changes or modifications as may be deemed necessary, advisable or appropriate by the officer(s) executing or causing the same to be completed; and RESOLVED FURTHER, tht in connection with the Merchant Agreement, the appropriate officer(s) of the Company is/are hereby authorized to establish (a) an Operating Account into which funds from credit card sales by the Company will be directed, and (b) if necessary, a Reserve Account into which funds from credit card sales by the Company may be directed by Bank in accordance with the provisions of the Merchant Agreement; RESOLVED FURTHER, that the Company hereby grants Bank a security interest in the funds held by the Company in the Operating Account and Reserve Account, and the appropriate officer(s) of the Company is/are hereby authorized to execute all documents reasonable required by Bank to perfect such security interests; RESOLVED FURTHER, that the appropriate officer(s) of the Company is/are hereby authorized to enter into such additional agreements, and take such additional actions as may be reasonably required by Bank or Anovia Payments in connection with the Merchant Agreement; and RESOLVED FURTHER, that the Secretary/managing member/general partner (circle one) of the Company is hereby authorized to deliver to Bank and Anovia Payments a Certificate (i) identifying the officers of the Company, (ii) verifying the signatures of such officers, and (iii) certifying a copy of these resolutions, and Bank and Anovia Payments are hereby authorized to rely on such Certificate until formally advised by a like certificate of any changes therein, and is hereby authorized to rely on any such additional certificates.			
2. Each person listed below (an “Officer”) (i) holds the office in the Company indicated opposite his or her name on the date hereof, (ii) the signature appearing opposite his or her name is the genuine signature of each such officer, (iii) each such Officer, acting individually, is authorized to execute and deliver the Merchant Agreement and each of the agreements and documents contemplated by the Merchant Agreement (collectively, the “Transaction Documents”) on behalf of the Company, and (iv) each such Officer, acting individually, is authorized to perform the Company’s obligations under the Transaction Documents on behalf of the Company.			
3. NAME: _____		OFFICER: _____	SIGNATURE: _____
NAME: _____		OFFICER: _____	SIGNATURE: _____
IN WITNESS WHEREOF, I have executed this Certificate this _____ day of _____ 20 _____. Sign: _____			
Name: TITLE: Corporate Secretary** or Print Officer Title			

OwnPurchaseService

Equipment / Service Description

Quantity

One Time Cost

VAR/Service Name

Version

One Time Cost

Monthly

Per Item

Per Batch

Additional Options: Connection Type:

☐ IP

☐ Dial Up

Auto Close:

☐ Yes

☐ No

Auto Close Time:

Tips:

☐ Yes

☐ No

Internal PIN Pad:

Notes:

SCHEDULE A: DISCOUNT RATES & FEES:

* CARD FEES:

Visa, MasterCard, and Discover

TIERED: ☐

%

Per Auth

Qualified Rate

Mid Qualified Rate

Non Qualified Rate

Signature Debit Rate

INTERCHANGE (COST) PLUS: ☐

%

Per Auth

Visa, MC, Discover Processor Fees

NON QUAL SURCHARGE: ☐

%

Per Auth

Downgrade Surcharge

American Express OptBlueSM

Discount Rate (Cost) Plus

%

Per Auth

American Express Processor Fees

PIN Debit and EBT

PIN Debit: ☐ No ☐ Yes

Monthly

PIN Debit Auth Fee:

Per Auth

EBT: ☐ No ☐ Yes

FNS#

EBT Per Auth

**OTHER FEES:

Chargeback Fee:

Retrieval Request Fee:

Voice Authorization Fee:

NSF Fee:

1099 Fee

Monthly Minimum

Annual Fee

Monthly Fee

AVS Fee

Capture (batch) Fee

Other

You have the option of accepting MasterCard credit cards, Visa credit cards, credit cards issued by Discover®, American Express payment cards, MasterCard signature debit cards (MasterMoney Cards) or Visa signature debit cards (Check Cards), or debit cards issued by Discover. You may elect to accept any or all of these card types for payment. If you do not specifically indicate otherwise, your application will be processed to accept ALL MasterCard, Discover, Visa, and American Express card types.

Elected MasterCard, Visa, Discover, or American Express card types **NOT** to accept:

American Express OptBlueSM

☐ By checking this box, Merchant opts out of receiving future commercial marketing communications from American Express.

Note that you may continue to receive marketing communications while American Express updates its records to reflect your choice. Opting out of commercial marketing communications will not preclude you from receiving important transactional or relationship messages from American Express.

American Express Direct

CAP #

Existing SE #

Processor Authorization Fee: \$

SITE INSPECTION:

Merchant:

Owns

Rents

(Landlord):

Building Type:

Shopping Center

Industrial Building

Office Building

Residence

Area Zoned:

Commercial

Industrial

Residential

Square

0-500

501-2500

Footage:

2501-5000

5001-10000+

*By signing below, inspector is certifying he/she has visited the location and information provided is true and correct.

Signature: Siddharth John

Based upon ISO's review, does Merchant have the appropriate facilities, equipment, inventory, personnel and license or permit to operate their business?

☐ Yes

☐ No

Comments:

IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT

To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account.

What this means for you:

When you open an account, we will ask for your name, address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.

MERCHANT APPLICATION AND AGREEMENT ACCEPTANCE

(Capitalized terms not defined in the Application have the meaning set forth in the attached Terms and Conditions. Terms and Conditions can also be found at <https://go.nmi.com/legal/merchant-account/terms>). The Application together with the Terms and Conditions constitutes the "Merchant Agreement".

By executing this Merchant Application on behalf of the merchant described above ("Merchant"), the undersigned individual(s) represent(s), warrant(s), and acknowledge(s) that: (1) All information contained in this Merchant Application ("Application") is true, correct and complete as of the date of this Application, (ii) If the Merchant is a corporation, limited liability company, or partnership, the individual(s) executing this Application have the requisite legal power and authority to complete and submit this Application on behalf of the Merchant and to make and provide the acknowledgments, authorizations and agreements set forth herein on behalf of the Merchant and individually; (iii) The information contained in this Application is provided for the purpose of obtaining, or maintaining, a merchant account for the Merchant with the Member Bank ("BANK") and BANK will rely on the information provided herein in its approved process and in settling the applicable Discount Rate, Approved Average Ticket, and Approved Monthly Card Volume; (iv) BANK is authorized to investigate, either through its own agents or through credit bureaus/agencies, the credit of the Merchant and each person listed on this Application; (v) BANK will determine all rates, fees and charges and notify Merchant of the approved fees and by Merchant's submission and acceptance of Merchant's first settled transaction, Merchant agrees to pay such approved fees; (vi) The Merchant Agreement will not take effect until Merchant has been approved by BANK and a merchant number has been issued to merchant; and (vii) The undersigned has received, read, understood the Terms and Conditions, which are incorporated herein by reference thereto, and agrees to be bound by its terms. Merchant acknowledges that if this Application is being submitted to Merrick Bank as the Member Bank, Anovia Payments may also be a party to this Merchant Agreement. In such case, Merchant acknowledges that Anovia Payments will rely on the representations and warranties set forth in this application for Merchant Agreement and unless otherwise specified or prohibited by Association of applicable law, Anovia Payments will have all the rights of BANK under this Application and Agreement.

MERCHANT:

Principal #1

Print Name:

Principal #2

Print Name:

Date:

Date:

Date:

BANK:

By:

Name and Title

Anovia Payments

By: Siddharth John

Name and Title:

Date:

Date:

TERMS AND CONDITIONS

As provided by the Merchant Application, Merchant, Anovia Payments, LLC ("ISO") and Merrick Bank Corporation ("Bank") have agreed to be bound by these terms and conditions. Bank and ISO are collectively referred to herein as the "Provider" and, subject to the requirements of the Network Rules, ISO and Bank allocate the duties and obligations allocated to Provider as they deem appropriate in their sole discretion and may jointly or individually assert or exercise the rights or remedies provided to Provider hereunder. Bank, ISO and Merchant agree as follows:

ARTICLE I – DEFINITIONS

In addition to terms otherwise defined in this Agreement, capitalized terms shall have the meaning ascribed to them in this Article I.

- 1.1** "Account" means a commercial checking or demand deposit account maintained by Merchant for the crediting of collected funds and the debiting of fees and charges under this Agreement.
- 1.2** "ACH" means the Automated Clearing House paperless entry system controlled by the Federal Reserve Board.
- 1.3** "Agreement" or "Merchant Agreement" means the Merchant Application, the Guaranty and these Terms and Conditions, and any supplementary documents referenced herein, and schedules, exhibits and amendments to the foregoing.
- 1.4** "American Express" means the Cards bearing the Marks of, and Card Network operated by, American Express Travel Related Services Company, Inc. or its affiliates.
- 1.5** "Authorization" means a computerized function or a direct phone call to a designated number to examine individual Transactions to obtain approval from the Card Issuer to charge the Card for the amount of the sale in accordance with the terms of this Agreement and the Network Rules.
- 1.6** "Bank" has the meaning set forth on the Merchant Application.
- 1.7** "Card" means (i) a valid credit card or debit card in the form issued under license from a Card Network. ("Bank Card"); or (ii) any other valid credit card or debit card or other payment device approved by Bank and accepted by Merchant.
- 1.8** "Card Issuer" means the financial institution or company which has provided a Card to a Cardholder.
- 1.9** "Card Network" means Visa U.S.A., Inc., MasterCard International, Inc., American Express Travel Related Services Company, Inc., DFS Services LLC (the owner of Discover) and their affiliates, or any other payment networks approved by Bank that provide Cards accepted by Merchant.
- 1.10** "Card Not Present" or "CNP" means that an Imprint of the Card is not obtained at the point-of-sale.
- 1.11** "Cardholder" (sometimes referred to as "Card Member" in certain Card Network materials) shall mean any person authorized to use the Cards or the accounts established in connection with the Cards.
- 1.12** "Cardholder Information" means any non-public, sensitive information about a Cardholder or related to a Card, including, but not limited to, any combination of Cardholder name plus the Cardholder's social security number, driver's license or other identification number, or credit or debit card number, or other bank account number.
- 1.13** "Chargeback" means the procedure by which a Transaction (or disputed portion thereof) is returned to Provider by a Card Issuer for any reason, including, but not limited to, cases where such item does not comply with the applicable Network Rules.
- 1.14** "Cash Over" means a Transaction using a Discover Card whereby the Cardholder elects to receive additional cash in excess of the purchase price, all as provided by Network Rules of Discover.
- 1.15** "Credit Voucher" means a document executed by a Merchant evidencing any refund or price adjustment relating to Cards to be credited to a Cardholder account.
- 1.16** "Discover Card" means a Card bearing the Discover Marks and accepted as part of the DFS Services Network.
- 1.17** "Guarantor" has the meaning set forth on the Merchant Application.
- 1.18** "Guaranty" has the meaning set forth in Section 5.26 of this Agreement.
- 1.19** "Imprint" means (i) an impression on a Transaction Record manually obtained from a Card through the use of an imprinter, or (ii) the electronic equivalent obtained by swiping a Card through a terminal and electronically capturing Card data and printing a Transaction Record.
- 1.20** "ISO" has the meaning set forth on the Merchant Application.
- 1.21** "Merchant" has the meaning set forth on the Merchant Application.
- 1.22** "Merchant Application" has the meaning set forth on the Merchant Application.
- 1.23** "Network Rules" means the rules, regulations, releases, interpretations and other requirements (whether contractual or otherwise) imposed or adopted by any Card Networks and related authorities, including without limitation, those of the PCI Security Standards Council, LLC and the National Automated Clearing House Association (including, with respect to EBT, the Quest Operating Rules and with respect to PIN debit cards, the rules, regulations, policies and procedures of the applicable debit network).
- 1.24** "Provider" as provided by the introductory paragraph to these Terms and Conditions, means ISO and Bank together.
- 1.25** "Transaction" means any sale of products or services, or credit for such, from a Merchant for which the Cardholder makes payment

through the use of any Card and which is presented to Provider for collection.

- 1.26** **“Transaction Record”** means evidence of a purchase, rental or lease of goods or services by a Cardholder from, and other payments to, Merchant using a Card, including preauthorized orders and Recurring Transactions (unless the context requires otherwise), regardless of whether the form of such evidence is in paper or electronic form or otherwise.
- 1.27** **“Voice Authorization”** means a direct phone call to a designated number to obtain credit approval on a Transaction from the Card Issuer, whether by voice or voice-activated systems.

ARTICLE II - CARD ACCEPTANCE

- 2.1** **Honoring Cards.** Merchant will accept all valid Cards when properly presented by Cardholders in payment for goods or services, subject to applicable Network Rules requiring Merchant to elect whether it will accept credit only, debit only or both debit and credit cards. Merchant’s election is set forth in the Merchant Application. Except to the extent explicitly provided by the Network Rules, Merchant may not establish minimum or maximum amounts for Card sales as a condition for accepting any Card. Merchant may, subject to applicable Law and the Network Rules, (i) impose a surcharge, under certain conditions and with proper disclosure to a Cardholder who elects to use a Card in lieu of payment by cash, check or other method of payment, or (ii) offer cash discounts to Cardholders making payment by cash or check. Merchant shall not engage in any acceptance practice that discriminates against or discourages the use of a Card Network’s Cards in favor of any other Card Network’s Cards, or favor any particular Card Issuer over any other Card Issuers. Note, many states prohibit or limit cases where Merchant may surcharge a Cardholder or offer cash discounts and the Card Networks impose restrictions on surcharging and cash discounting. Merchant must comply with all applicable Law and the Network Rules before Merchant begins to surcharge Cardholders or offer any cash discount. Provider shall not be liable for any acts or omissions of Merchant in violation of applicable Laws or Network Rules. Merchant may not engage in a Transaction (other than a mail, internet, telephone order, or preauthorized sale to the extent permitted under this Agreement) if (i) the person seeking to charge the purchase to his or her Card account does not present the Card to permit Merchant to compare the signature on the Card to the signature on the Transaction Record; or (ii) the Merchant does not obtain an Imprint or otherwise use the physical Card to complete the Transaction.
- 2.2** **Merchant’s General Duties.** Merchant will comply with Agreement for submitting and processing Transactions. 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, point of sale equipment, or software. Merchant agrees that if Merchant does not use point of sale equipment that has been certified EMV (Europay/MasterCard/Visa) 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.
- 2.3** **Advertising.** Subject to the Network Rules, Merchant will prominently display the promotional materials provided by Provider in its place(s) of business. Merchant’s use of promotional materials and use of any trade name, trademark, service mark or logo type (collectively, the “Marks”) associated with a Card is limited to informing the public that the Card will be accepted at Merchant’s place(s) of business. During the term of this Agreement, Merchant may use promotional materials and Marks pursuant to and in strict compliance with the terms of this Agreement and the Network Rules. Upon notification by any Card Network or Provider, or upon termination of this Agreement, Merchant shall discontinue the use of such Card Network’s Marks and return any inventory or promotional materials to Provider. Merchant may not use any promotional materials or Marks associated with the Card Network in any way which suggests or implies that a Card Network endorses any goods or services other than Card payment services. Merchant’s website, if any, must prominently display the name of the Merchant and the name that will appear on the Cardholder statement.
- 2.4** **Card Acceptance.** Merchant has the option of accepting MasterCard credit cards, Visa credit cards, credit cards issued by Discover, American Express payment cards, MasterCard signature debit cards (MasterMoney Cards) or Visa signature debit cards (check cards), or debit cards issued by Discover. Merchant may elect to accept any or all of these card types for payment. If Merchant do not specifically indicate otherwise on the Merchant Application the application will be processed to accept ALL MasterCard, Discover, Visa and American Express card types. When accepting a Card, Merchant will follow the steps and guidelines set forth in the Network Rules or otherwise provided by Provider from time to time for accepting Cards and in particular, will: (a) determine in good faith and to the best of its ability that the Card is valid on its face; (b) obtain Authorization from the Card Issuer to charge the Cardholder’s account; (c) comply with the additional terms set forth in in this Agreement with respect to Telephone Orders, Mail Orders, Internet, Preauthorized Orders and Installment Orders and with respect to any Card Not Present Transactions; (d) document the approved Transaction in accordance with this Agreement and the Network Rules; and (e) deliver a true and completed copy of the Transaction Record to the Cardholder at the time the goods are delivered or services performed or, if the Transaction Record is prepared by a point-of-sale terminal, at the time of the sale. Except to the extent otherwise provided for in this Agreement, each Transaction Record must contain

the following information: (i) Merchant's legal name and/or registered trade name, Merchant's location, and the Merchant's merchant identification number designated by the Provider; (ii) the truncated version of the Card number as provided in the Network Rules; (iii) a brief description of the goods or services involved in the Transaction; (iv) the selling price, together with applicable taxes, other charges or gratuities, and the total amount of the Transaction; (v) signature of the Cardholder or authorized user as described in this Agreement, date of the Transaction and the Transaction approval number; (vi) any additional requirements of the Card Networks that may be applicable to specific merchant or transaction types, as amended from time to time; and (vii) such additional information which may from time to time be required by Provider, the Card Networks, or Card Issuers. Merchant will not transmit a Transaction Record to Provider until such time as: (i) the Transaction is completed; (ii) the goods or services have been shipped or provided, except as set forth in this Agreement and the Network Rules; or (iii) a Cardholder consent is obtained for a Recurring Transaction in accordance with terms of this Agreement and the Network Rules.

- 2.5 Authorization.** Merchant will obtain an Authorization for all Transactions using a means approved by Provider. If Merchant cannot, for any reason, obtain an electronic Authorization through the use of a terminal, Merchant will request a Voice Authorization from Provider's designated authorization center and will legibly print the authorization number on the Transaction Record. Provider will charge Merchant a \$0.95 Voice Authorization Fee for each Voice Authorization that is initiated. The Voice Authorization Fee is only charged when a Transaction is called into an 800 number of the Card Issuer for authorization. Merchant will not obtain or attempt to obtain Authorization from Provider's authorization center unless Merchant intends to submit to Provider a Transaction for the authorized amount if Authorization for the Transaction is given. Merchant may not divide a single Transaction between two or more Transaction Records on a single Card to avoid Authorization limits that may be set by the Card Issuer. Merchant acknowledges that an Authorization provides only that the Cardholder account has sufficient credit available to cover the amount of the current sale and that an Authorization is not a guarantee that the Transaction will not be subject to dispute or Chargeback and does not warranty the Cardholder's identity. Merchant may not attempt to obtain an authorization by successively decreasing the sale amount. Provider may refuse to process any Transaction Record presented by Merchant: (a) unless a proper authorization number or approval code has been recorded on the Transaction Record; (b) if Provider determines that the Transaction Record is or is likely to become uncollectible from the Cardholder to which the Transaction would otherwise be charged; or (c) if Provider has reason to believe that the Transaction Record was prepared in violation of any provision of this Agreement or the Network Rules. Merchant will use, and may not circumvent, fraud identification tools requested by Provider, including address verification system processing and CVV2 processing, and acknowledges that the use of these tools may prevent Merchant from accepting certain Cards as payment. Merchant acknowledges that its use of fraud identification tools may not prevent fraudulent Card usage, and agrees that any fraudulent Transaction may ultimately result in a Chargeback, for which Merchant retains full liability under this Agreement.
- 2.6 Retention and Retrieval of Cards.** Merchant will use its best efforts, by reasonable and peaceful means, to retain or recover a Card when receiving such instructions when making a request for Authorization or if Merchant has reasonable grounds to believe the Card is counterfeit, fraudulent or stolen. Merchant's obligations under this section do not authorize a breach of the peace or any injury to persons or property, and Merchant will hold Provider harmless from any claim arising from any injury to person or property or other breach of the peace in connection with the retention or recovery of a Card.
- 2.7 Multiple Transaction Records; Partial Consideration.** Merchant may not prepare more than one Transaction Record for a single sale or for a single item, but will include all goods and services purchased in a single Transaction in the total amount on a single Transaction Record except under the following circumstances: (a) for purchases in separate departments of a multiple department store; (b) for partial payment, installment payment, delayed delivery or an advance deposit; or (c) for delayed or amended charges governed by Network Rules for travel and entertainment merchants and related Transactions.
- 2.8 Telephone Orders, Mail Orders, Internet, Preauthorized Orders and Installment Orders.** Unless Merchant has been approved by Provider to accept mail, internet or telephone orders, Merchant warrants that it is a walk-in trade business, located in a retail business place where the public moves in and out freely in order to purchase merchandise or obtain services. If Merchant is not approved by Provider for Card Not Present Transactions and Provider determines Merchant has accepted unapproved Card Transactions which are placed by telephone, generated through telephone solicitation, mail order, internet sales or other means that does not create a Transaction Record that bears the Card Imprint and Cardholder's signature, this Agreement may be immediately terminated by Provider and the value of all Transaction Records collected from the first day of processing may be charged back to Merchant and all funds therefrom held as provided in Article IV of this Agreement. Unless approved by Provider, this Agreement does not contemplate regular acceptance of Cards for sales accepted by mail, internet or telephone nor through preauthorized orders. Regardless of whether Merchant has been approved by Provider for Card Not Present Transactions, Merchant assumes all responsibility for identification of the Cardholder and the validity of the Card information for Card Not Present Transactions. Merchant agrees to identify separately any high-risk transactions Merchant submits. The high-risk transactions include, but are not limited to, any under Merchant Category Code 5967 – Direct Marketing – Inbound Telemarketing Merchants.

- 2.9 Lodging and Vehicle Rental Transactions.** For lodging and vehicle rental Transactions, Merchant must estimate and obtain Authorization for the amount of the Transaction based upon the Cardholder's intended length of stay or rental. Additional Authorization must be obtained and recorded for charges actually incurred in excess of the estimated amount. Regardless of the terms and conditions of any written preauthorization form, the Transaction Record amount for any lodging or vehicle rental Transaction must include only that portion of the sale, including any applicable taxes, evidencing a bona fide rental of real or personal property by Merchant to the Cardholder and may not include any consequential charges. Nothing contained herein is intended to restrict Merchant from enforcing the terms and conditions of its preauthorization form through means other than a Transaction.
- 2.10 Returns and Adjustments; Credit Vouchers.** Merchant's policy for the exchange or return of goods sold and the adjustment for services rendered will be established and posted in accordance with the Network Rules of the applicable Card Networks. Merchant will disclose, if applicable, to a Cardholder before a Transaction is made, that if merchandise is returned: (a) no refund, or less than a full refund, will be given; (b) returned merchandise will only be exchanged for similar merchandise of comparable value; (c) only a credit toward purchases will be given; or (d) special conditions or circumstances apply to the sale (e.g., late delivery, delivery charges, or other non-credit terms). If Merchant does not make these disclosures, a full refund in the form of a credit to the Cardholder's Card account must be given. Disclosures must be made on all copies of Transaction Records or invoices in letters approximately 1/4" high in close proximity to the space provided for the Cardholder's signature or on an invoice issued at the time of the sale or on an invoice being presented for the Cardholder's signature. Any change in Merchant's return or cancellation policy must be submitted in writing to Provider not less than fourteen (14) days prior to the change. Provider may refuse to process any Transaction Record made subject to a revised return or cancellation policy of which Provider has not been notified as required herein.
- 2.11 Cash Payments.** Merchant may not receive any payments from a Cardholder for charges included in any Transaction resulting from the use of any Card nor receive any payment from a Cardholder to prepare and present a Transaction for the purpose of effecting a deposit to the Cardholder's account.
- 2.12 Cash Advances; Scrip Purchases.** Unless otherwise approved in advance by Provider, Merchant may not deposit any Transaction for the purpose of obtaining or providing a cash advance either on Merchant's Card or the Card of any other party and may not accept any Card at a scrip terminal, and either action will be grounds for Provider's immediate termination of this Agreement.
- 2.13 Duplicate Transactions.** Merchant may not deposit duplicate Transactions. Provider may debit Merchant for any adjustments for duplicate Transactions and Merchant is liable for any Chargebacks resulting therefrom.
- 2.14 Deposit of Fraudulent Transactions.** Merchant may not accept or deposit any fraudulent or unauthorized Transactions and may not under any circumstances present for processing or credit, directly or indirectly, a Transaction which originated with any other merchant or any other source other than Transactions arising from bona fide purchases from Merchant for the goods and services for which Merchant has been approved under this Agreement. If Merchant deposits any such fraudulent or unauthorized Transaction, Provider may: (a) immediately terminate this Agreement; (b) withhold funds and demand an escrow as provided in this Agreement; or (c) report Merchant to the applicable Card Network. Merchant's employees' and agents' actions are chargeable to Merchant under this Agreement.
- 2.15 Collection of Pre-Existing Debt.** Merchant may not prepare and present to Provider any Transaction representing the refinancing of an existing Cardholder obligation, including, but not limited to, obligations: (a) previously owed to Merchant; (b) arising from the dishonor of a Cardholder's personal check or relating to a Chargeback; or (c) representing the collection of any other pre-existing indebtedness, including collection of delinquent accounts on behalf of third parties.
- 2.16 Data Security/Personal Cardholder Information.** Except as otherwise provided by the Network Rules, Merchant may not, as a condition of sale, impose a requirement on Cardholders to provide any personal information as a condition for honoring Cards unless such information is required to provide delivery of goods or services or Merchant has reason to believe the identity of the person presenting the Card may be different than that of the Cardholder. Merchant will not, under any circumstances, release, sell or otherwise disclose any Cardholder Information to any person other than Provider or the applicable Card Network, except as expressly authorized in writing by the Cardholder, or as required by Law or the Network Rules.
- (a) Safeguards. Merchant will maintain appropriate administrative, technical and physical safeguards for all Cardholder Information. These safeguards will (i) ensure the confidentiality of Cardholder Information; (ii) protect against any anticipated threats or hazards to the security or integrity of Cardholder Information; (iii) protect against unauthorized access to or use of Cardholder Information that could result in substantial harm or inconvenience to any Cardholder; and (iv) properly dispose of all Cardholder Information to ensure no unauthorized access to Cardholder Information. Merchant will maintain all such safeguards applicable to Merchant in accordance with applicable Law and the Network Rules.
- (b) Compliance with Card Network Rules. Merchant represents, warrants and covenants that it is and will remain throughout the Term of this Agreement in compliance with (i) Network Rules related to data security, data integrity and the safeguarding of Cardholder Information, including the Payment Card Industry Data Security Standard ("PCI"), Discover Information Security Compliance ("DISC"), MasterCard's Site Data Protection Program ("SDP"), the American Express Data Security Requirements ("DSR"), and Visa's Customer

Information Security Program ("CISP"), in effect and as may be amended, supplemented or replaced from time to time, and (ii) any data security guidelines or operating guide that Provider may provide to Merchant, as the same may be amended, supplemented or replaced from time to time. Merchant will cause all of its service providers, subcontractors and agents to comply with PCI, SDP, DISC, DSR and CISP requirements and any data security guidelines or operating guide provided by Provider at all times. Merchant will report any non-compliance immediately to Provider. To accomplish the foregoing, Merchant will encrypt all debit, credit or stored value card numbers whether in storage, transport or backup and will not store data security codes on its systems, network or software.

(c) Annual Certification. Merchant will provide an annual certification to Provider if requested by Provider (in a form acceptable to Provider) certifying compliance with the data security provisions of this Agreement, including compliance with applicable Card Network requirements such as PCI, SDP, DSR and CISP. Merchant will provide annual certifications for Merchant's service providers, subcontractors and agents.

(d) Information Use Limitations. Merchant may not sell, disclose, or otherwise make Cardholder Information available, in whole or in part, in a manner not provided for in this Agreement, without Provider's prior written consent. Merchant may, however, disclose Cardholder Information to its service providers, subcontractors and agents who have a need to know such information to provide the services described in this Agreement, provided that those individuals or entities have assumed confidentiality obligations in accordance with this Agreement, or when such disclosure is required by legal process or applicable Law, and Merchant and its relevant service provider, subcontractor, or agent have entered into a written agreement containing Merchant's and such individual's or entity's agreement to the foregoing data security provisions, including compliance with the Network Rules.

(e) Response to Unauthorized Access. Merchant will notify Provider within twenty four (24) hours after it becomes aware of any actual or potential breach in security resulting in an unauthorized access to Cardholder Information. Merchant will provide any assistance that Provider, Card Issuer, regulators, governmental authority or any Card Network deems necessary to contain and control the incident to prevent further unauthorized access to or use of Cardholder Information. Such assistance may include, but not be limited to, preserving records and other evidence and compiling information to enable Provider and the issuing bank(s) or the Card Network to investigate the incident and provide assistance and cooperation to: (a) file suspicious activity reports (as applicable); (b) notify their regulators (as applicable); and (c) notify the affected Cardholder (as required). Unless the unauthorized access was due to Provider's acts or omissions, Merchant will bear the cost of notifying affected Cardholder.

(f) Miscellaneous. Merchant may not make a claim against Provider or hold Provider liable for the acts or omissions of other merchants, service providers, Card Issuers, Card Network, financial institutions or others that do not have a written contractual relationship with Provider or over which Provider has no control. These provisions supplement, augment and are in addition to obligations of indemnification, audit, confidentiality and other similar provisions contained in this Agreement. This Section and each of its subsections will survive this Agreement's termination. Merchant may not store in any system or in any manner discretionary Card read data including without limitation CVV2 data, PIN data, address verification data or any other information prohibited by Network Rules. Merchant agrees that Provider may disclose to any Card Network information regarding Merchant and Merchant's Transactions to any Card Network, and that such Card Network may use such information to perform its responsibilities in connection with its duties as a Card Network, promote the Card Network, perform analytics and create reports, and for any other lawful business purposes, including commercial marketing communications purposes within the parameters of Card Network Card acceptance, and transactional or relationship communications from a Card Network. A Card Network may use the information about Merchant obtained in this Agreement at the time of setup to screen and/or monitor Merchant in connection with the Card Network marketing and administrative purposes. Merchant agrees it may receive messages from a Card Network, including important information about Card Network products, services, and resources available to its business. These messages may be sent to the mailing address, phone numbers, email addresses or fax numbers of Merchant. Merchant may be contacted at its wireless telephone number and the communications sent may include autodialed short message service (SMS or "text") messages or automated or prerecorded calls. Merchant agrees that it may be sent fax communications.

(g) ISO acknowledges that it will maintain compliance with all applicable PCI DSS requirements.

2.17 Compliance with Laws and Network Rules. Merchant will comply with and conduct its Card activities in accordance with all applicable local, state, and federal statutes, regulations, ordinances, rules and other binding law, as the same may be enacted or amended from time to time (collectively, "Laws") as well as all Network Rules. Merchant may not: (a) accept Cardholder payments for previous Card charges incurred at the Merchant location; (b) require a Cardholder to complete a postcard or similar device that includes the Cardholder's account number, card expiration date, signature, or any other card account data in plain view when mailed; (c) add any tax to transactions, unless applicable Law expressly requires that Merchant be permitted to impose a tax (any tax amount, if allowed, must be included in the transaction amount and not collected separately); (d) enter into interchange any Transaction Record for a Transaction that was previously the subject of a Chargeback to Provider and subsequently returned to Merchant, irrespective of Cardholder approval (Merchant may pursue payment from the Cardholder outside the Card Network system); (e) request or use an account number for any purpose other than as payment for its goods or services; (f) disburse funds in the form of travelers cheques,

if the sole purpose is to allow the Cardholder to make a cash purchase of goods or services from Merchant; (g) disburse funds in the form of cash, unless: (i) Merchant is a lodging or cruise line merchant disbursing cash to a Cardholder, (ii) Merchant is dispensing funds in the form of travelers cheques, Cards, or foreign currency, or (iii) Merchant is participating in the Card Network cash back or Cash Over service; (h) accept a Card for manual cash disbursement; (i) accept a Card to collect or refinance existing debt that has been deemed uncollectible by Merchant providing the associated goods or services; (j) enter into a Transaction that represents collection of a dishonored check; or (k) accept a Card for an unlawful Internet gambling transaction. Merchant will pay all Card Network fines, fees, penalties and all other assessments or indebtedness levied by Card Network to Provider which are attributable, at Provider's discretion, to Merchant's Transaction processing or business. The Card Network may require that Bank limits Merchant's participation in the applicable Card Network and/or terminate this Agreement.

2.18 Merchant's Business. Merchant will notify Provider immediately if it intends to (a) transfer or sell any substantial part of its total assets, or liquidate; (b) change the basic nature of its business, including selling any products or services not related to its current business; (c) change ownership or transfer control of its business; (d) enter into any joint venture, partnership or similar business arrangement whereby any person or entity not a party to this Agreement assumes any interest in Merchant or Merchant's business; (e) alter in any way Merchant's approved monthly volume, average, or maximum ticket; (f) changes its return policies or to another fulfillment house different from those identified in Merchant Application; or (g) changes to its Account. Merchant will notify Provider promptly in writing if it becomes subject to any voluntary or involuntary bankruptcy or insolvency petition or proceeding. Merchant's failure to provide notice as required above may be deemed a material breach and will be sufficient grounds for termination of the Agreement and for Provider's exercise of all its rights and remedies provided by this Agreement. If any change listed above occurs, Provider may immediately terminate this Agreement.

2.19 Merchant's Representations and Warranties. Merchant represents and warrants that: (a) all information contained in the Merchant Application or any other documents delivered to Provider in connection therewith is true and complete and properly reflects Merchant's business, financial condition and principals, partners, owners or officers (as applicable); (b) Merchant has power to execute, deliver and perform this Agreement, and this Agreement is duly authorized, and will not violate any provisions of Law, or conflict with any other agreement to which Merchant is subject; (c) Merchant holds all licenses, if any, required to conduct its business and is qualified to do business in every jurisdiction where it is required to do so; and (d) there is no action, suit or proceeding at law or in equity now pending or, to Merchant's knowledge, threatened by or against or affecting Merchant which would substantially impair its right to carry on its business as now conducted or adversely affect its financial condition or operations.

2.20 Merchant's Covenants. Merchants covenants that: (a) each Transaction Record presented to Provider for collection is genuine and is not the result of any fraudulent activity, or a Transaction prohibited by a Card Network, or is not being deposited on behalf of any business other than Merchant as authorized by this Agreement; (b) each Transaction Record is the result of a bona fide purchase of goods or services from Merchant by the Cardholder in the total amount stated on the Transaction Record; (c) Merchant will perform all of its obligations to the Cardholder in connection with the Transaction evidenced thereby; (d) Merchant will comply with Provider's procedures for accepting Cards, and the Transaction itself will not involve any element of credit for any other purposes other than as set forth in this Agreement, and will not be subject to any defense, dispute, offset or counterclaim which may be raised by any Cardholder under the Network Rules, the Consumer Credit Protection Act (15 USC §1601) or other Law; and any Credit Voucher which Merchant issues represents a bona fide refund or adjustment on a Transaction by Merchant with respect to which a Transaction Record has been accepted by Provider.

2.21 Third Parties. Merchant may desire to use a third-party service provider to assist Merchant with its Transactions. Merchant shall not utilize any such third parties unless Merchant has disclosed such use to Provider previously in writing, and unless such third party is fully compliant with all Laws and Network Rules. Any third party used by Merchant must be registered with the Card Network prior to the performance of any contracted services on behalf of Merchant. Further, as between the parties to the Agreement, Merchant will be bound by the acts and omissions of any third-party service provider and Merchant will be responsible for compliance by such third-party service provider with all Laws and Network Rules. Merchant will indemnify and hold harmless Provider from and against any loss, cost, or expense incurred in connection with or by reason of Merchant's use of any third parties, including third-party service providers. Provider is not responsible for any third-party service provider used by Merchant, nor is Provider required to process any Transaction which Provider receives from Merchant or its service providers in any format not approved by Provider. Provider has no responsibility for, and shall have no liability to Merchant in connection with, any hardware, software or services Merchant receives subject to a direct agreement (including any sale, warranty or end-user license agreement) between Merchant and a third party.

2.22 Recourse. Merchant acknowledges that ISO performs the services contemplated by this Agreement and ISO is responsible to Merchant for any failure to perform such services in accordance with the terms of this Agreement. While Bank satisfies settlement files pursuant to instructions provided by ISO, Bank is not responsible for independently verifying the accuracy of such settlement files. Accordingly, to the greatest extent permitted by the Network Rules, Merchant's sole recourse for any failure by Provider under this Agreement is against ISO (and not Bank).

- 2.23 Pre-Authorized Transactions.** If Merchant agrees to accept a pre-authorized order, the Cardholder shall execute and deliver to Merchant a written request for such pre-authorization which will be retained by Merchant and made available upon request to Provider. Merchant will not deliver goods or perform services covered by a pre-authorization after receiving specific notification that the pre-authorization is cancelled or that the card covering the pre-authorization is not to be honored.
- 2.24 Pre-Authorization Health Care Transactions.** If Merchant is a "Health Care Merchant" as indicated on the Merchant Application and accepts a pre-authorized health care Transaction(s) from a Cardholder, Merchant agrees to comply with any requirements in the Network Rules related to such Transactions.
- 2.25 Recurring Transactions.** If Merchant agrees to accept a recurring transaction from a Cardholder for the purchase of goods or services which are delivered or performed periodically (a "Recurring Transaction"), the Cardholder shall complete and deliver to Merchant an order form containing a written request for such goods or services to be charged to the Cardholder's account, the frequency of the recurring charges and the duration of time for which such Cardholder's permission is granted. In the event a Recurring Transaction is renewed, the Cardholder shall complete and deliver to Merchant a subsequent order form for continuation of such goods or services to be charged to the Cardholder's account. A Recurring Transaction may not include partial payments made to Merchant for goods or services purchased in a single Transaction, nor may it be used for periodic payments of goods or services on which Merchant assesses additional finance charges. A copy of the order form must be retained for the duration of the recurring charges and provided in response to Provider's request. In addition, Merchant must record, retain, and promptly produce upon request the "ship to address" and address verification service code (where applicable) for each transaction. Merchant must not complete an initial or subsequent Recurring Transaction after receiving a cancellation notice from the Cardholder, the Card Issuer, Provider or other party or a response that the Card is not to be honored.
- 2.26 Limited Acceptance.**
- (a) If appropriately indicated on the Merchant Application, 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 Merchant 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), (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 Cards of Card Networks 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). Provider has no obligation other than those expressly provided under the Network Rules and applicable Law as they may relate to limited acceptance. Provider'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 Network type(s) of transactions at the point-of-sale submitted for processing by Provider. Should Merchant submit a Transaction for processing for a card type it has indicated it does not wish to accept, Provider 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 Network Rules and other applicable rules and regulations for the Card Network type processed.
- (b) If Merchant has chosen to accept Discover Cards 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 Network Rules and other applicable rules and regulations), when properly presented for payment by a Cardholder. Subject to this section, Merchant must create a Transaction Record for each Discover Card Transaction and deliver at least one copy of the Transaction Record to the Cardholder. A Merchant may issue a Cash Over (subject to the terms of the Network Rules) 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 Record must include both the purchase amount and the Cash Over amount.

ARTICLE III - PRESENTMENT, PAYMENT, CHARGEBACK

- 3.1 Acceptance.** Provider will accept from Merchant all Transaction Records deposited by Merchant under the terms of this Agreement and will present the same to the appropriate Card Issuers for collection against Cardholder accounts. Merchant must transmit Transaction Records and Credit Vouchers to Provider or its processing vendor on the same or next business day immediately following the day that such Transaction Records and Credit Vouchers have been originated. All presentment and assignment of Transaction Records, collection therefor and reassignment or rejection of such Transaction Records are subject to the terms of this Agreement and the Network Rules. Provider will only provisionally credit the value of collected Transaction Records to Merchant's Account and reserves the right to adjust

amounts collected to reflect the value of Chargebacks (actual and anticipated), fees, penalties, late submission charges, reserve deposits, negative Transaction Record batch deposits and items for which Provider did not receive final payment.

- 3.2 Endorsement.** By presenting Transaction Records to Provider for collection and payment, Merchant agrees to sell and assign all its right, title and interest in each Transaction Record completed in conformity with Provider's acceptance procedures. Merchant's presentment of Transaction Records to Provider constitutes an endorsement by Merchant to Provider of such Transaction Records. Provider may supply such endorsement on Merchant's behalf.
- 3.3 Prohibited Payments.** Provider may receive payment of any Transaction Record presented by Merchant and paid by Provider unless and until there is a Chargeback. Unless specifically authorized in writing by Provider, Merchant may not collect or attempt to collect any Transaction Record, including Chargebacks, and will hold in trust for Provider and promptly deliver in kind to Provider any payment Merchant receives, in whole or in part, of the amount of any accepted Transaction, together with the Cardholder's name and account number and any corresponding accompanying payment.
- 3.4 Retention of Records/Retrieval Requests.** Merchant will retain legible images or copies of all Transaction Records and card transaction drafts or sales records for a period of at least five years from the date of each Transaction (or for such period of time as required by the Card Networks). Provider will send Merchant any retrieval request that Provider cannot satisfy with the information Provider has on file concerning the Transaction. Merchant must provide all Transaction Records, sales records or other transaction records requested by Provider within seven business days after Provider sends notice. If Merchant does not respond or responds late to a retrieval request, Merchant may be without recourse for Chargebacks for 'non receipt of requested item' which in most cases cannot be referenced. Provider 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. Merchant may be charged a \$10.00 Retrieval Request Fee for each retrieval request.
- 3.5 Chargebacks.** Merchant will accept responsibility for all Chargebacks related to Merchant's Transactions. Accordingly, Merchant will be liable to Provider in the amount of any Transaction disputed by the Cardholder or Card Issuer for any reason under the Network Rules. Merchant authorizes Provider to offset from funds due to Merchant or to debit the Account or, if applicable, the Reserve Account for the amount of all Chargebacks. Merchant agrees to fully cooperate with Provider in complying with the Network Rules regarding all Chargebacks. Merchant may not initiate a sale Transaction in an attempt to collect a Chargeback. Merchant will pay the current published fees for each Chargeback as listed on the Merchant Application and any other fines, fees, or assessments imposed by any Card Network or Card Issuer. A Chargeback fee of \$25.00 will be billed to the Merchant by Provider for each Chargeback occurrence.
- 3.6 Reserve Account.** Notwithstanding anything to the contrary in this Agreement and in addition to any other legal rights or remedies available to Provider, Bank may establish (without notice to Merchant) and Merchant agrees to fund and/or allow Provider to fund from the Account or by way of offset of funds otherwise due to Merchant, a non-interest bearing reserve account (the "Reserve Account") in an amount determined by Bank in its sole discretion. Such Reserve Account may be funded by all or any combination of the following, as determined by Bank: (i) one or more debits to Merchant's Account or any other accounts held by Bank or any of its affiliates in Merchant's name or on Merchant's behalf; (ii) one or more deductions or offsets to any payments otherwise due to Merchant; (iii) Merchant's delivery to Bank of a letter of credit; (iv) if Bank so agrees, Merchant's pledge to Bank of a freely transferable and negotiable certificate of deposit; or (v) Bank's demand of other security or increase of any discount rate, transaction fees or other fees. Any such letter of credit or certificate of deposit shall be issued by a financial institution reasonably acceptable to Bank. The Reserve Account may be established at any time or for any reason. Specific examples of reasons include, but are not limited to: (a) Merchant engages in any Transaction processing that creates an overcharge to a Cardholder by duplicating Transactions; (b) any activity designed by Merchant to circumvent a "call center" message when attempting to process a Transaction; (c) Merchant breaches this Agreement, violates any representation, covenant or warranty herein, or violates any Network Rule or Law; (d) the Merchant Application is in any way inaccurate or becomes inaccurate subsequent to Provider's approval of the Merchant Application; (e) Merchant changes its type of business without Provider's prior written approval; (f) fraud, Merchant processes an unauthorized charge, or other action that violates Provider's applicable risk management standards or is likely to cause a loss; (g) Merchant has Chargebacks exceeding one percent (1%) of the total number of transactions completed by Merchant in any thirty (30) calendar day period; (h) excessive numbers of requests from Cardholders or Card Issuers to retrieve documentation; (i) Merchant's financial stability is in question or Merchant ceases doing business; or (j) Merchant terminates this Agreement. Once the Reserve Account is established, collected funds will be placed in the Reserve Account by Bank. Before releasing funds after this Agreement is terminated, Merchant will pay any equipment cancellation fees and any outstanding charges, losses or amounts, and Chargebacks for which Merchant has provided indemnification under this Agreement. Further, Bank may require Merchant to deposit additional amounts based upon Merchant's processing history and/or anticipated risk of loss to Bank into the Reserve Account. Once established, unless Bank determines otherwise at its sole discretion, the Reserve Account will remain in place for the later of (i) twelve (12) months, or (ii) such period thereafter during which Cardholder disputes may remain valid under the Network Rules. **The provisions of this Agreement relating to account debits and credits apply to the Reserve Account and survive this Agreement's termination until Bank terminates the Reserve Account. Any**

balance remaining after Chargeback rights have expired and all of Bank's other anticipated expenses, losses and damages have been paid will be disbursed to Merchant.

- 3.7** **Insufficient Funds Fee.** A fee of \$25.00 will be charged to Merchant for each unsuccessful debit of Merchant's Account.

ARTICLE IV - TERMINATION AND EFFECT OF TERMINATION

- 4.1** **Term.** This Agreement will be effective once Provider accepts it and, unless otherwise terminated, will continue for _____ years (the "Initial Term") with automatic one (1) year renewal terms thereafter (each a "Renewal Term," and together with the Initial Term, the "Term") unless and until Merchant provides written notice of non-renewal to Provider not less than _____ days before the end of the then-current Term.
- 4.2** **Termination.**
- (a) **Without Cause.** Provider may terminate this Agreement, without cause, upon thirty (30) days' advance written notice to Merchant.
- (b) **For Cause.** Provider may terminate this Agreement in its sole discretion, effective immediately, upon written or verbal notice, or by closing Merchant's point-of-sale terminal, if Provider reasonably determines that any of the following conditions exists: (i) Merchant has violated any provision of this Agreement or Provider is otherwise entitled to terminate this Agreement pursuant to any provision of this Agreement; (ii) there is a material adverse change in Merchant's financial condition; (iii) if any case or proceeding is commenced by or against Merchant, its affiliates or principals under any Law dealing with insolvency, bankruptcy, receivership or other debt relief; any information which Merchant provided to Provider, including in the Merchant Application, was false, incomplete or misleading when received; (v) at any time during the Term, Merchant has had a monthly ratio of Chargebacks to total Transactions exceeding Card Network requirements or one percent (1%), or Chargebacks exceed three percent (3%) of any monthly dollar amount of total Transactions; (vi) an overdraft in the Account exists for more than three (3) days; (vii) Merchant or any of Merchant's officers or employees has been involved in processing Transactions arising from fraudulent or otherwise unauthorized transactions; (viii) Merchant is or will be unable or unwilling to perform its obligations under this Agreement or applicable Law; or the Network Rules (ix) Merchant has failed to timely pay Provider any amount due; (x) Merchant has failed to promptly perform or discharge any obligation under its Account or the Reserve Account; (xi) any of Merchant's representations or warranties made in connection with this Agreement was not true or accurate when given; (xii) Merchant has defaulted on any agreement it has with Provider; (xiii) Provider is served with legal process seeking to attach or garnish any of Merchant's funds or property in Provider's possession, and Merchant does not satisfy or appeal the legal process within fifteen (15) days of such service; (xiv) any Network Rules are amended in any way so that the continued existence of this Agreement would cause Provider to be in breach of those rules; (xv) any guaranty supporting Merchant's obligations is revoked, withdrawn, terminated or altered in any way; (xvi) if any circumstances arise regarding Merchant or its business that create harm or loss of goodwill to any Card Network; (xvii) termination is necessary to prevent loss to Provider or Card Issuers; (xviii) Merchant's type of business indicated on the Merchant Application or as conducted by Merchant could endanger Bank's safety or soundness; (xix) Merchant's owner, officer, Guarantor, or corporate entity has a separate relationship with Bank and that relationship is terminated, (xx) Merchant appears on any Card Network's security reporting; or (xxi) Provider's security for repayment becomes impaired.
- 4.3** **Effect of Bankruptcy.** Any account or security held by Provider will not be subject to any preference, claim or stay by reason of bankruptcy or similar Law. The parties expressly agree that the acquisition of Transactions hereunder is a financial accommodation and if Merchant becomes a debtor in any bankruptcy or similar proceeding, this Agreement may not be assumed or enforced by any other person and Provider will be excused from performance hereunder.
- 4.4** **Effect of Termination; Early Termination Fee.** If this Agreement is terminated, regardless of cause, Provider may withhold and discontinue the disbursement for all Cards and other Transactions in the process of being collected and deposited. If the Agreement is terminated for cause, Merchant acknowledges that Provider may be required to report Merchant's business name and the names and other identification of its principals to various Card Network and industry databases, including the Terminated Merchant File and the Merchant Alert to Control High Risk Merchants File ("MATCH"). **Merchant expressly agrees and consents to such reporting if Merchant is terminated for any reason requiring listing on the MATCH file.** Merchant waives and will hold harmless Provider from any claims that Merchant may raise as a result of Provider's MATCH file reporting. Upon termination of the Agreement, Merchant will immediately cease requesting Authorizations. If Merchant obtains any Authorization after termination, the fact that any Authorization was requested or obtained will not reinstate this Agreement. Further, Merchant will return all Provider property, forms, or equipment. All obligations for Transactions prior to termination (including payment for Chargebacks and Provider's expenses relating to Chargebacks) survive termination. Provider is not liable to Merchant for damages (including prospective sales or profits) due to termination. Following termination, Merchant will, upon request, provide Provider with all original and electronic copies of Transaction Records and Credit Vouchers, if any, that have been retained by Merchant as of the date of termination. Upon termination, any amounts due to Provider will accelerate and be immediately due and payable, without any notice, declaration or other act whatsoever by Provider.

Merchant will not be required to pay any early termination fee if this Agreement is terminated by Merchant prior to the completion of the Term. If this Agreement is terminated before completion of the Term by Provider due to a material uncured breach by Merchant, Merchant will pay Provider an early termination fee of the greater of \$_____ or the value determined by multiplying (a) the number of months remaining from the date of termination to the end of the current Term, by the average monthly processing fees paid by Merchant to Provider, plus Provider's costs, collection fees and attorneys' fees incurred in connection with Merchant's termination of this Agreement. Merchant agrees that these damages are not a penalty but are a reasonable computation of the financial harm caused by the early termination of this Agreement.

ARTICLE V - MISCELLANEOUS

- 5.1 Account Monitoring.** Merchant acknowledges that Provider will monitor Merchant's Transaction activity. In addition to Provider's right to fund a Reserve Account as set forth in Section 3.05, Provider may upon reasonable grounds suspend disbursement of Merchant's funds for any reasonable period of time required to investigate suspicious or unusual Transaction activity. Provider will make good faith efforts to notify Merchant promptly following such suspension. Provider is not liable to Merchant for any loss, either direct or indirect, which Merchant may attribute to any suspension of funds disbursement.
- 5.2 Forms.** Merchant will use only the forms or modes of transmission of Transaction Records and Credit Vouchers that are provided or approved in advance by Provider, and Merchant may not use such forms other than in connection with Transactions.
- 5.3 Indemnification.** Merchant will defend, indemnify and hold Provider and its officers, directors, members, shareholders, partners, employees, agents, subcontractors and representatives harmless from and against any and all fines, penalties, claims, damages, expenses, liabilities or fees of any nature whatsoever, including attorneys' fees and costs (collectively, "Damages"), asserted against or incurred by Provider arising out of, relating to or resulting from, either directly or indirectly: (a) a breach of the security of the system safeguarding Cardholder Information resulting in unauthorized access to Cardholder Information; (b) a breach of any representation, warranty or term of this Agreement, including, but not limited to, the data security provisions by Merchant, or any service provider, subcontractor or agent of Merchant; (c) the negligence, gross negligence or willful misconduct of Merchant in the performance of its obligations under this Agreement, including, but not limited to, the data security provisions; (d) any violation of applicable Law or Network Rules by Merchant; and (e) all third-party claims arising from the foregoing. Notwithstanding the preceding, Merchant is not liable to Provider if Damages are caused by, related to or arise out of Provider's gross negligence or willful misconduct, or Provider's breach of this Agreement. Merchant will promptly reimburse Provider for any assessments, fines, fees or penalties imposed by any Card Network in connection with this Agreement, including the data security provisions, and authorizes Bank to deduct any such sums from the Account, the Reserve Account or amount to otherwise be cleared and settled with Merchant.
- 5.4 Records.** In addition to any records Merchant routinely furnishes to Provider under this Agreement, Merchant will preserve Transaction Records and Credit Vouchers and any written authorization of the Cardholder for the longer of the following: (a) two years after the Transaction is completed, (b) the period required by Law or the Network Rules, (c) if a dispute is pending, until such dispute is resolved.
- 5.5 Requests for Copies.** Immediately after Merchant receives the request by Provider, Merchant will provide to Provider either the original or a legible copy (in a size comparable to the actual Transaction Record) of the paper Transaction Record and any other documentary evidence available to Merchant that Provider reasonably requests to meet Provider's obligations under Law (including its obligations under the Fair Credit Billing Act) or otherwise to respond to questions concerning Cardholder accounts.
- 5.6 Exclusivity.** Merchant agrees that during the Term, Merchant will not enter into an agreement with any other entity that provides processing services similar to those provided by Provider and that Provider shall be Merchant's exclusive provider of all Card processing services as set forth in this Agreement.
- 5.7 Fees and Charges.** Merchant will pay to Provider the fees and charges set forth on the Merchant Application including any additional charges applied to Transactions that fail to meet Card Network requirements for the lowest interchange levels. The fees and charges will either be debited from the Account through ACH or withheld from daily payments to Merchant for such amounts and for any other fees, charges or adjustments incurred by Merchant and associated with processing services. Provider may change fees, including adding fees for additional services utilized by Merchant, upon fifteen (15) days' written notice to Merchant.
- 5.8 Security Interest.** This Agreement constitutes a security agreement under the Texas Commercial Code. To secure payment of Merchant's obligations under this Agreement, Merchant grants to Provider a security interest in all now existing or hereafter acquired: (a) Transactions, Transaction Records, Credit Vouchers and other items submitted to Provider for processing by or for Merchant; (b) accounts receivable and payment rights relating to or arising from this Agreement, including all amounts due Merchant (including any rights to receive credits or payments hereunder); (c) accounts maintained with Bank or any institution other than Bank, including without limitation the Account and the Reserve Account, in the name of or for the benefit of, Merchant or any Guarantor of Merchant's obligations under this Agreement; (d) deposits, regardless of source, to Merchant's or any Guarantor's accounts with Bank or any institution other than Bank, including the Account and the Reserve Account; (e) all deposits and all other property and funds deposited

by Merchant or withheld by Bank, including funds and property withheld as the result of security monitoring; and (f) proceeds of the foregoing. If Provider reasonably determines that Merchant has breached any obligation under this Agreement, or that proceeds of Merchant's future Transactions are unlikely to cover anticipated Chargebacks, credits, fees and adjustments, as reasonably determined by Provider (whether because this Agreement has been terminated or for any other reason), Provider may setoff or otherwise exercise its security interest without notice or demand by immediately withdrawing from or freezing any account or otherwise exercising its rights under this Agreement or those rights available under the Network Rules, applicable Laws, including the Texas Uniform Commercial Code, or in equity. In addition to the collateral pledged above, Provider may require Merchant to furnish such other and different security as Provider deems appropriate in its sole discretion to secure Merchant's obligations under this Agreement. Bank may fully or partially prohibit withdrawal by Merchant of funds from Merchant's Account with Bank or financial institutions other than Bank, pending Bank's determination from time to time to exercise its rights as a secured party against such accounts in partial or full payment of Merchant's obligations to Bank. Merchant will execute any documents and take any actions required to comply with and perfect any security interest under this paragraph, at Merchant's cost. Merchant represents and warrants that no other party has a security interest or lien in any of the collateral pledged above, and Merchant will obtain Bank's written consent before it grants a lien or security interest in that pledged collateral to any other person. Merchant shall not assign to any third party any payments due to it under this Agreement, and all indebtedness arising from Transactions will be for bona fide sales of goods and services (or both) at its business locations and free of liens, claims, and encumbrances other than ordinary sales taxes; provided, however, that Merchant may sell and assign future Transaction receivables to Provider, its affiliated entities and/or any other cash advance funding source that partners with Provider or its affiliated entities, without consent from any Card Network. Notwithstanding the foregoing, Provider prohibits Merchant from selling or assigning future Transaction receivables to any third party without Provider's prior written consent.

- 5.9 Modifications to Agreement.** From time to time Provider may amend any provision or provisions of this Agreement, including, without limitation, those relating to the discount rate or to other fees and charges payable by Merchant by providing written notice to Merchant of the amendment at least fifteen (15) days prior to the effective date of the amendment, and the amendment will become effective unless Provider receives Merchant's written notice of termination of this Agreement before such effective date. Merchant acknowledges and agrees that notices hereunder, whether electronic or paper, may be provided to Merchant in the form of messages attached to the Merchant's monthly billing statements to the extent permitted by applicable Laws and the Network Rules. In accordance with this section, Merchant may be notified of an updated Merchant Agreement that can be found at <https://go.nmi.com/legal/merchant-account/terms>. Merchant continues to submit Transaction Records to Provider or otherwise continues to process Transactions with Provider after such fifteen (15) day period (even if notice of objection was provided to Provider), then Merchant shall be deemed to have accepted and agreed to such amendment. In addition, Merchant acknowledges and agrees that this Agreement is subject to amendment by Provider to conform to the Network Rules and Law and that amendments required due to changes in either the Network Rules, Law or judicial decision may become effective on such shorter period of time as Provider may specify if necessary to comply with the applicable Network Rule, Law or decision. As a matter of clarification, Merchant may not terminate this Agreement if Provider amends the Agreement as necessary to comply with applicable Network Rules, Law or a judicial decision.
- 5.10 Warranty Disclaimer.** PROVIDER MAKES NO WARRANTIES REGARDING THE USE, OPERATION OR PERFORMANCE OR NON-PERFORMANCE OF SOFTWARE AND SYSTEMS UTILIZED FOR THIS AGREEMENT, WHETHER EXPRESS OR IMPLIED, AND PROVIDER EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.
- 5.11 Limitation of Liability.** Provider's liability with respect to any Transaction may not exceed the amount of the Transaction Record in connection with that Transaction less any applicable fees and charges. **In no event will Provider or its agents, officers, directors or employees be liable to Merchant for any indirect, incidental, exemplary, punitive, special or consequential damages whatsoever, including, but not limited to, lost profits.** Merchant waives all claims against Provider for any loss, claim, demand, penalty, action, delay, cost or expense (including reasonable attorneys' fees) of any kind unless Merchant provides written notice to Provider of the occurrence that gave rise to the alleged liability within thirty (30) days after Merchant knew or should have known of the occurrence. Merchant will indemnify and hold Provider harmless from any claim relating to any Transaction Record paid for by Provider as may be made by anyone by way of defense, dispute, offset, counterclaim or affirmative action, or for any damages of or losses that Provider may incur as a result of Merchant's breach of this Agreement. Further, Merchant will reimburse Provider for all expenses and costs, including attorneys' fees, with regard thereto. Merchant acknowledges that the fees for the services provided to Merchant by Provider are very small in relation to the funds advanced to Merchant for Transactions and consequently Provider's willingness to provide these services is based on the liability limitations contained in this Agreement. Therefore, in addition to greater limitations on Provider's liability that may be provided elsewhere (including the per Transaction Record limitation above), any liability of Provider under this Agreement, whether to Merchant or any other party, whatever the basis of the liability, will not exceed, in the aggregate, an amount equal to the lesser of (a) the fees paid by Merchant to Provider during the last three (3) months, exclusive of fees and variable costs incurred by Provider to process Transactions, such as interchange costs, assessments and fees imposed by a third party or (b) **fifty thousand dollars (\$50,000).**

- 5.12 Waiver.** Provider's failure by Provider to enforce one or more of the provisions of this Agreement will not constitute a waiver of the right to enforce the same or other provision in the future.
- 5.13 Written Notices.**
- (a) All notices or other communications required to be given by a party hereunder shall be in writing and shall be effective and deemed delivered immediately when hand delivered, sent via facsimile and the sender obtains a fax confirmation receipt, or upon mailing if sent by first class mail, postage prepaid, addressed as follows:
 - (i) If to Bank: At the facsimile number or address provided at the top of the Merchant Application.
 - (ii) If to ISO: At the facsimile number or address provided at the top of the Merchant Application.
 - (iii) If to Merchant: At the facsimile number or address provided as the billing address on record for the Merchant.
 - (b) In addition, by accessing and using the services of Provider pursuant to this Agreement, Merchant hereby consents and agrees that all communications, billing statements, amendments to such services or this Agreement, notices, and other disclosures or information regarding such services or Merchant's access to and use of such services (collectively, "Disclosures") may be sent to Merchant electronically and shall be effective and deemed delivered (1) if sent via e-mail, (2) by providing access to a web site that Provider designates in an e-mail notice Provider sends to Merchant at the time the information is available, or (3) to the extent permissible by applicable law, by providing access to a website that Provider will generally designate in advance for such purpose. If Merchant wants a paper copy, Merchant can print a copy of the Disclosure or download the information for Merchant's records. This consent applies to all future Disclosures sent to Merchant in connection with the services provided by Provider or this Agreement.
 - (c) By consent, Merchant agrees that electronic Disclosures have the same meaning and effect as if Provider provided paper Disclosures to Merchant. When Provider sends Merchant an email or other electronic notification alerting Merchant that the Disclosure is available electronically and/or makes it available online, that shall have the same meaning and effect as if Provider provided a paper Disclosure to Merchant, whether or not Merchant chooses to view or print or download the Disclosure.
- 5.14 Choice of Law; Jurisdiction;** Texas law governs this Agreement. Any claim or cause of action arising out of this Agreement against Provider must be initiated and maintained exclusively in the state or federal courts located in Dallas County, Texas.
- 5.15 Attorneys Fees.** Merchant will be liable for and will indemnify and reimburse Provider for all attorneys' fees, including in-house legal fees, and other costs and expenses paid or incurred by Provider in the enforcement of this Merchant Agreement or in matters related to this Merchant Agreement, or arising from any breach by Merchant of this Merchant Agreement, or any wrongdoing by Merchant. In the event Bank must engage in any recovery or collection efforts to collect any amounts due from Merchant to Provider, Merchant will reimburse Provider for all fees and expenses incurred in such collection, plus reasonable administrative fees and expenses.
- 5.16 Arbitration.** Merchant, Provider and Guarantor (if applicable) will attempt to resolve any dispute or controversy concerning or relating to this Merchant Agreement through binding arbitration before a single arbitrator, held at Dallas, Texas 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 Provider and Merchant. Claims hereunder will be arbitrated on an individual basis and, as such, the arbitrator's authority is limited to claims between the Provider and Merchant (and any Guarantor) alone. Merchant and Provider 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. In the event that Provider is required to engage in any recovery or collection efforts to collect any outstanding payment due and owing from Merchant or any Guarantor under the Merchant Agreement and Guaranty, and Merchant and/or any Guarantor does not unconditionally proceed with arbitration in accordance with this Section within 10 days after Provider sends a written demand for arbitration, Provider shall be entitled (but not obligated) to initiate litigation in any state or federal court located in Dallas County, Texas to recover any amount due and owing from Merchant to Provider.
- 5.17 Entire Agreement; Assignability.** This Agreement expresses the entire understanding of the parties with respect to the subject matter hereof. This Agreement may be assigned by Bank without Merchant's or ISO's consent. This Agreement may not be assigned, directly or by operation of law by either Merchant or ISO, without Bank's prior written consent. This Agreement will be binding upon and inure to the benefit of the parties' respective heirs, personal representatives, successors and assigns.
- 5.18 Deposit Account.** Merchant will at all times maintain an Account at a bank that is a member of the Federal Reserve ACH system and approved by Provider and will provide Provider with proper authorization to debit the Account. All credits for collected funds and debits for fees, payments and Chargebacks and other amounts for which Merchant is liable under the terms of this Agreement will be made to the Account. During the term of this Agreement and for a period of one (1) year after the termination of this Agreement, Merchant may not close or change the Account without prior written approval by Provider, which approval may not be unreasonably withheld. Merchant will be solely liable for all fees and costs associated with the Account and for all overdrafts. Merchant hereby grants to Provider a security interest in the Account to the extent of any and all fees, payments and Chargebacks and other amounts due which

may arise under this Agreement, and Merchant will execute any document and obtain any consents or waivers from the bank at which the Account is maintained as requested by Provider to protect its security interests therein. Merchant will maintain sufficient funds in the Account to accommodate all Transactions contemplated by this Agreement and all other fees, charges, credits or other payments or amounts due under this Agreement.

- 5.19 Credit and Financial Inquiries; Additional Locations; Inspections.** Provider may make, at any time, any credit inquiries which it may consider necessary to accept or review acceptance of this Agreement or investigate Merchant's deposit or Card acceptance activities subsequent to acceptance of this Agreement. Such inquiries may include, but are not limited to, a credit and/or criminal check of Merchant and business including its proprietor, partners, principals, owners or shareholders or officers. Upon Provider's request, Merchant will provide the written consent of any person for which an inquiry has been or is to be made if such person has not executed this Agreement and will provide any financial statements, income tax and business tax returns and other financial information as Provider may consider necessary to perform initial or periodic reviews of Merchant's financial stability and business practices. Merchant may accept Cards only at locations approved by Provider. Additional locations may be added, subject to Provider's prior consent. Provider or Merchant may remove locations by providing notice as provided herein. Merchant will permit Provider, at any time and from time to time, to inspect locations to confirm that Merchant has or is adhering to the terms of this Agreement and is maintaining the proper facilities, equipment, inventory, records and license or permits (where necessary) to conduct its business. However, nothing in this paragraph may be deemed to waive Merchant's obligation to comply in all respects with the terms of this Agreement or the Network Rules. Provider, its internal and external auditors, and its regulators may audit compliance with this Agreement, compliance with Laws and Network Rules, including, but not limited to, relating to Card acceptance and Transaction processing, data security provisions and Card Network compliance. Merchant will make available its records maintained and produced under this Agreement, and Merchant's facilities will be made accessible, upon notice during normal business hours for examination and audit and shall cooperate with such audits or examinations. Nothing in this section may be construed to require Merchant to give access to its facilities, personnel or records in a manner that unreasonably interferes with its business operations. Each party will bear its own expenses of any audit.
- 5.20 Marketing of Non-Card Services.** From time to time, Provider may offer to Merchant certain additional products and services which may or may not be related to the processing of credit card and debit card Transactions. If such offers are made, Merchant may decline the offers or Merchant may accept the offers and be liable for payment therefor. If any additional product or service is offered by ISO independently of Bank, then ISO (and not Bank) shall be responsible to deliver and perform such product and service and, accordingly, Merchant may not assert any claim against Bank as it relates to such additional product or service provided by ISO. Likewise, if any additional product or service is offered by Bank independently of ISO, then Bank (and not ISO) shall be responsible to deliver and perform such product and service and, accordingly, Merchant may not assert any claim against ISO as it relates to such additional product or service provided by Bank.
- 5.21 Force Majeure.** The parties will be released from liability hereunder if they fail to perform any obligation where the failure occurs by reason of any act of God, fire, flood, storm, earthquake, tidal wave, communications failure, sabotage, war, military operation, terrorism, national emergency, mechanical or electronic breakdown, civil commotion or the order, requisition, request or recommendation of any governmental authority, or either party's compliance therewith, or governmental regulation, or priority, or any other similar cause beyond either party's reasonable control.
- 5.22 No Third-Party Beneficiary.** No other person or entity may be deemed to be a third-party beneficiary of this Agreement.
- 5.23 Severability; Conflict with Network Rules.** If any provision in this Agreement is for any reason held to be invalid or unenforceable, no other provision shall be effected thereby, and this Agreement shall be construed as if the invalid or unenforceable provision had never been a part of it. In the event of a conflict between this Agreement and the Network Rules, the Network Rules shall govern and control.
- 5.24 IRS Reporting Information.** Pursuant to Section 6050W of the Internal Revenue Code, merchant acquiring entities such as Bank and third-party settlement organizations are required to file an information return reflecting all payment card transactions and third-party network transactions occurring in a calendar year. This requirement applies to returns for all calendar years after December 31, 2010 and Merchant will receive a form 1099-K reporting Merchant's gross transaction amounts for each calendar year. In addition, amounts payable under Section 6050W are subject to backup withholding requirements. Merchant acquirers such as Bank, either itself or through third parties, are required to perform backup withholding by deducting and withholding income tax from reportable transactions if (a) the payee fails to provide the payee's taxpayer identification number (TIN) to the merchant acquirer; or (b) if the IRS notifies the merchant acquirer that the TIN (when matched with the name) provided by the payee is incorrect. Accordingly, to avoid backup withholding, it is very important that Merchant provides Bank with the correct name and TIN that Merchant uses when filing its income tax return that includes the transactions for Merchant's business. In addition to the fees set forth on the Merchant Application, if Merchant fails to comply with the obligations set forth in this section, Provider may charge Merchant additional amounts determined by Provider and may pass through any additional fines, costs or expenses incurred by Provider.
- 5.25 Confidentiality.** Merchant shall protect all information or other items proprietary to Provider that Merchant obtains knowledge of or access to as a result of Provider's provision of the services pursuant to this Agreement (collectively, "Provider Confidential

Information”) from unauthorized disclosure, publication, or dissemination with the same standard of care and discretion Merchant uses to protect similar confidential information of Merchant’s own, but in no event less than reasonable care. Furthermore, Merchant shall not use, reproduce, distribute, disclose, or otherwise disseminate Provider Confidential Information, except in connection with the performance of Merchant’s obligations under this Agreement. The Provider Confidential Information described in the previous sentence, shall include, but not be limited to, the following types of information and other information of a similar nature (whether or not reduced to writing): scientific, technical, or business information, product makeup lists, ideas, concepts, designs, drawings, techniques, plans, calculations, system designs, formulae, algorithms, programs, software (source and object code), hardware, manuals, test procedures and results, identity and description of computerized records, identity and description of suppliers, customer lists, processes, procedures, trade secrets, “know-how,” marketing techniques and material, marketing and development plans, price lists, pricing policies, IRS W-9 form, and all other financial information. The obligations of non-disclosure provided hereunder shall continue during the Term and, (i) with respect to Provider Confidential Information that does not constitute a trade secret, for a period of three (3) years thereafter and, (ii) with respect to Provider Confidential Information that rises to the level of a trade secret under applicable Law, for such period of time thereafter as the Provider Confidential Information shall retain its status as a trade secret under applicable law, and no less than three (3) years thereafter.

- 5.26 Continuing Guaranty.** As a primary inducement to Provider to enter into this 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 this 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 Provider under this Agreement or any other agreement currently in effect or in the future entered into between Merchant or its principals and Provider, as such agreements now exist or are amended from time to time, with or without notice to Guarantor(s).

Guarantor(s) understands that Provider, without notice to Guarantor(s), may from time to time renew or extend the 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 Provider may proceed directly against Guarantor(s) without first exhausting Provider’s remedies against the Merchant, any other person or entity responsible to Provider or any security held by Provider. 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 Provider. 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).

Terms Below Are Additional Applicable Specifically to American Express Card Acceptance (capitalized terms below not defined elsewhere in the Agreement shall have the meanings assigned in the American Express Network Rules). With respect to participation in an American Express acceptance program, in the event of a conflict between the terms below and other terms of this Agreement, the terms below shall control.

- A5.27 Transaction Data.** Merchant authorizes Provider and/or its affiliates to submit American Express Transactions to, and receive settlement on such Transactions from, American Express or Bank on behalf of Merchant.
- A5.28 Marketing Message Opt-Out.** Merchant may opt-out of receiving future commercial marketing communications from American Express by contacting Provider. Note that Merchant may continue to receive marketing communications while American Express updates its records to reflect this choice. Opting out of commercial marketing communications will not preclude Merchant from receiving important transactional or relationship messages from American Express.
- A5.29 Conversion to American Express Direct Merchant.** Merchant acknowledges that it may be converted from American Express Card OptBlue program to a direct relationship with American Express if and when its Transaction volumes exceed the eligibility thresholds for the OptBlue program. If this occurs, upon such conversion, (i) Merchant will be bound by American Express’ then-current Card Acceptance Agreement; and (ii) American Express will set pricing and other fees payable by Merchant.
- A5.30 American Express as Third Party Beneficiary.** Notwithstanding anything in the Agreement to the contrary, American Express shall have third-party beneficiary rights, but not obligations, to the terms of this Agreement applicable to American Express Card acceptance to enforce such terms against Merchant.
- A5.31 American Express Opt-Out.** Merchant may opt out of accepting American Express at any time without directly or indirectly affecting its rights to accept Cards bearing Marks of other Card Networks.
- A5.32 Refund Policies.** Merchant’s refund policies for American Express purchases must be at least as favorable as its refund policy for purchase

on any other Card Network, and the refund policy must be disclosed to Cardholders at the time of purchase and in compliance with Law. Merchant may not bill or attempt to collect from any Cardholder for any American Express Transaction unless a Chargeback has been exercised, Merchant has fully paid for such Chargeback, and it otherwise has the right to do so.

A5.33 Establishment Closing. If Merchant closes any of its Establishments, Merchant must follow these guidelines: (i) notify ISO immediately; (ii) policies must be conveyed to the Cardholder prior to completion of the Transaction and printed on the copy of a receipt or Transaction record the Cardholder signs; (iii) if not providing refunds or exchanges, post notices indicating that all sales are final (e.g., at the front doors, by the cash registers, on the Transaction record and on websites and catalogs); (iv) return and cancellation policies must be clearly disclosed at the time of sale; and (v) for Advance Payment Charges or Delayed Delivery Charges, Merchant must either deliver the goods or services for which Merchant has already charged the Cardholder or issue Credit for any portion of the Transaction for which Merchant has not delivered the goods or services.

A5.34 Network Rules. Merchant shall be bound by American Express Network Rules, including the Merchant Operating Guide: www.americanexpress.com/merchantopguide

PAYMENT GATEWAY MERCHANT SERVICE AGREEMENT

Network Merchants, LLC (“Payment Gateway”) offers merchants various products and services relating to payment processing directly through Payment Gateway and through Third Party Service Providers (defined below).

In order for you, the person or entity identified on the applicable merchant application (“**Merchant**”, “**You**” or “**Your**”), to use the payment processing services, payment gateway services and other products and services, as such descriptions may be changed from time to time by Payment Gateway (“**Payment Gateway Services**”), you must agree to and accept the terms and conditions of this agreement (“**Agreement**”).

This Agreement for Payment Gateway Services supplements, and is hereby made a part of, the Merchant Agreement between Merchant, ISO and Bank. This Agreement governs the provision of the Payment Gateway Services provided to Merchant by Network Merchants, LLC. By using or accessing the Payment Gateway Services, Merchant agrees to the applicable terms and conditions set forth in this Agreement. The Payment Gateway Services are provided to Merchant by Network Merchants, LLC, and not Bank. Bank is not a party to this Agreement, and Merchant acknowledges that Bank is not liable to Merchant in any way with respect to such products or services.

The Payment Gateway Services, transactions processed, and the other matters contemplated under this Agreement are subject to the terms and conditions of the Merchant Agreement between Merchant, ISO and Bank, as applicable, except to the extent the terms of this Agreement directly conflict with another provision of the Merchant Agreement, in which case the terms of this Agreement will control.

Please read this Agreement carefully. You understand that by using any of the Payment Gateway Services, by clicking on the “I AGREE TO ALL TERMS ABOVE” button (or similar button captioned with acceptance language) and/or signing this Agreement, you represent and warrant that you (i) have the authority to bind your company to the terms of this Agreement; (ii) have reviewed and understand the Agreement, and (iii) agree, on behalf of your company, to be legally bound by all terms and conditions of the Agreement (including the terms and conditions stated on web pages incorporated by reference in this Agreement).

If you do not agree or are not willing to be bound by the terms and conditions of this Agreement, do not click on the “I AGREE TO ALL TERMS ABOVE” or similarly captioned button and do not use any of the Payment Gateway Services.

NOW THEREFORE, ” the parties agree as follows:

1. DEFINITIONS:

“**Account**” means an account portal established for You by Payment Gateway, and accessed by You (or by Payment Gateway on Your behalf) through an API or integration or online portal to utilize the Payment Gateway Services.

“**Acquiring Bank**” means the financial institution supplying You with the ability to accept credit and debit cards for payments. The financial institution will charge You fees for providing these services.

“**ACH**” means Automated Clearing House, which is an electronic network that allows the exchange and settlement of electronic payments between financial institutions.

“**Card Association**” means any network or association associated with processing Payment Cards of a specific brand, including but not limited to American Express Company, Discover Financial Services, JCB Co., Ltd., Mastercard Incorporated, Visa Inc., the National Automated Clearing House Association (**NACHA**), or any debit network, and each of their subsidiaries and successors.

“**Confidential Information**” means any information, data, trade secrets, know-how, provided or disclosed directly, or indirectly, in writing or orally, either designated as proprietary and/or confidential or that, by the nature of the circumstances surrounding disclosure, ought in good faith to be treated as proprietary and/or confidential, products, product plans, services, services documentation (in whatever form or media provided) customers, customer lists,

user data, revenue, markets, software developments, inventions, processes, formulas, technology, designs, drawings, engineering, hardware configuration, marketing, marketing materials, financial or other business information, or the financial terms of this Agreement. Data, as defined in this Agreement, are deemed Confidential Information.

"Data" has the meaning set forth in Section 5 (DATA SECURITY, COLLECTION, TRANSFER AND RETENTION; CREDENTIALS).

"Effective Date" means the earlier of the date You use the Payment Gateway Services or acknowledge Your acceptance of the Agreement by any method, including without limitation execution of Your merchant application that incorporates the Agreement by reference.

"Extension(s)" means additional services offered to you within the Payment Gateway Services platform now or in the future.

"Extensions Reseller" means any Third Party Service Provider that adds to, enhances or modifies existing hardware or software, adding value to the Payment Gateway Services.

"Fee Schedule" means a list of fees and charges that is provided to you by Payment Gateway.

"Payment Cards" means Visa, Mastercard, Discover, Amex, and any other Card Association debit or credit card that You and Payment Gateway mutually agree to participate in.

"PCI DSS" means Payment Card Industry Data Security Standard.

"Privacy Policy" means the then current Payment Gateway's Privacy Policy either available at its website or otherwise provided, which may be modified by Payment Gateway in its sole discretion.

"Return Payment Fee" is a fee charged to You by Payment Gateway on each occurrence when Payment Gateway is unable to collect fees on Your Account for any reason, including but not limited to insufficient funds, closed account, or any other negative response.

"Rules" means the rules, requirements, policies, procedures, and standards issued by the Card Associations or other industry bodies such as the PCI Security Standards Council LLC, including without limitation the Payment Card Industry Data Security Standard (PCI DSS) and the PCI Software Security Framework, or any successor or replacement framework or standard implemented by the PCI Security Standards Council, as each may be amended from time to time by the Card Associations or other applicable authorities.

"Third Party Service Provider" means a third party entity that maintains aspects of the Payment Gateway Services or provides certain bank and/or merchant payment services including but not limited to billing, reporting, customer service, authorization, and settlement services.

"Trademark(s)" means all common law or registered trademarks, service marks, trade names and trade dress rights and/or similar or related rights under any laws of any country or jurisdiction, including but not limited to the United States of America whether existing now or hereafter adopted.

"Transaction(s)" means any billable occurrence completed or submitted under Your Account including but not limited to sale, void, refund, credit, offline force, capture, authorization, validate, update or settlement regardless of whether approved or declined.

2. TERM

The term of the Agreement shall commence on the Effective Date and shall remain in full force and effect until terminated pursuant to Section 10 (TERMINATION) ("**Term**").

3. LEGAL

By accepting the terms and conditions of this Agreement, You represent and warrant that (i) all information You have provided and will provide to Payment Gateway is true and correct in all respects, and (ii) You will promptly update Payment Gateway in writing with any changes to information You have previously supplied. Payment Gateway reserves its right to refuse to provide You with any Payment Gateway Service and terminate this Agreement, with or without notice, if Payment Gateway reasonably believes, in its sole discretion, that You have supplied any information which is misleading, untrue, inaccurate, fraudulent, or incomplete.

4. USE OF PAYMENT GATEWAY SERVICES

4.1 Payment Gateway Services Grant

(a) You are granted a limited, revocable, non-transferable, non-sublicensable, non-exclusive right to use the Payment Gateway Services during the Term so long as You are in compliance with (i) this Agreement, including being current in paying all applicable fees as referenced in Section 8 (PAYMENT TERMS) and Section 9 (FEES), and (ii) the current policies, procedures, guidelines and restrictions contained in this Agreement and policies, procedures, guidelines and restrictions communicated to You by Payment Gateway, all of which may be amended by Payment Gateway from time to time. Payment Gateway shall, directly or through its Third Party Service Providers, provide the Payment Gateway Services to You in accordance with this Agreement and the rights granted to You under this Agreement are for the purposes contained in this Agreement and for no other purpose.

(b) Your use of the Payment Gateway Services shall be restricted to You. You shall not submit Data to Payment Gateway or otherwise process orders on behalf of any other entity or individual not permitted under this Agreement. Any attempt by You to use the Payment Gateway Services on behalf of another entity or individual in breach of this Agreement may result in Your obligation to pay to Payment Gateway additional fees and charges and/or Payment Gateway may revoke Your right to access or use the Payment Gateway Services and terminate this Agreement.

(c) In addition to Your compliance with this Agreement, You will comply, at Your own expense, with all Rules, applicable laws, regulations, rules, ordinances and orders of governmental authorities. You may not request, introduce, or process Transactions using the Payment Gateway Services on behalf of any other person or entity, and shall not use the Payment Gateway Services in any other prohibited manner, including those set forth in Appendix B and set forth in the Rules or in furtherance of any activity that may cause Payment Gateway to be subject to investigation, prosecution, or legal action.

(d) If you have elected to receive any Extensions in connection with the Payment Gateway Services, then, in addition to the other terms of this Agreement, the terms and conditions set forth in Appendix A will govern Your access to and use of the Extensions, which terms and conditions are incorporated by reference in to this Agreement, as may be amended or updated from time to time. Payment Gateway must approve of Your enrollment in any Extensions. The Extensions may be provided by Payment Gateway or a Third Party Service Provider as indicated upon Your enrollment. Your election to receive certain Extensions may require You to enter into a direct agreement with the respective Third Party Service Provider. If the pricing of any Extensions is not set forth on the Fee Schedule, such Extensions may be subject to separate pricing schedules which will be provided to You in connection with Your registration for such Extension.

4.2 Data License Grant

(a) You grant Payment Gateway a royalty-free, non-exclusive license (with right to sublicense) to use Data, materials, and other intellectual property as necessary or useful for Payment Gateway to provide the Payment Gateway Services to You and to otherwise perform Payment Gateway's obligations under this Agreement. Payment Gateway may collect and hold Data from and about You and Your customers for the purpose of providing the Payment Gateway Services or to consider Your eligibility for the Payment Gateway Services as part of Your merchant application process. You understand and agree that such Data may be shared with and used by certain third parties (including without limitation Third Party Service Providers, government agencies, or courts). Additionally, you understand that such Data may be shared with Payment Gateway by such certain third parties and You authorize Payment Gateway to receive Your or Your customer's Data from such third parties.

4.3 Support of Payment Gateway Services

(a) Regardless of whether the Payment Gateway Services or any Extensions are provided by Payment Gateway directly or through a Third Party Service Provider or Extensions Reseller, You and Payment Gateway agree that Payment Gateway (and not the Third Party Service Provider or Extensions Reseller) will provide first line support to You and Your customers on issues relating to Your and Your customers' use of the Payment Gateway Services. You acknowledge and agree that You will look to Payment Gateway for all support, including for any Payment Gateway Services provided by a Third Party Service Provider, Extensions Reseller, or any additional supplier, agent, vendor, contractor or third party providing any part of the Payment Gateway Services.

5. DATA SECURITY, COLLECTION, TRANSFER AND RETENTION; CREDENTIALS

5.1 Use and Sharing of Your Data

(a) Payment Gateway will collect, retain, use and share information and Data (defined below) collected from You and Your customers, and Payment Gateway will share such information and Data with its Third Party Service Providers, in accordance with Payment Gateway's then current Privacy Policies. You consent, to the collection, use, processing and transfer of Data, and the sharing of Data with Third Party Service Providers and other third party vendors, agents, and suppliers, as described in this Section 5 (DATA SECURITY, COLLECTION, TRANSFER AND RETENTION; CREDENTIALS) and pursuant to Payment Gateway's Privacy Policy. You agree to monitor Payment Gateway's Privacy Policy periodically to review any possible amendments. By using the Payment Gateway Services after modifications to Payment Gateway's Privacy Policy, You have agreed to such amendments.

(b) Payment Gateway may collect, use, share, and hold personal or non-public information about You and Your customers, including but not limited to: Your name, address, telephone number, email address, social security number and/or tax identification number and payment data, Transaction data, including account numbers and purchase history as well as Your customers' names, mailing & shipping addresses, email addresses, phone number, types of purchases and descriptions of purchases, and various Transaction data related to Your customers ("**Data**") for the purpose of considering eligibility for the Payment Gateway Services and for the purpose of providing You and Your customers with the Payment Gateway Services. Payment Gateway shall have the right to (i) use the Data as necessary to perform the Payment Gateway Services (including distributing the Data to its Third Party Service Providers and other third parties, as requested by You and as necessary to perform the Payment Gateway Service); (ii) maintain the Data as long as necessary or as required by law and used internally for record keeping, internal reporting, and support purposes; (iii) compile and disclose Data in the aggregate where the Data is not identifiable, including without limitation, calculating merchant averages by region or industry; and (iv) provide the Data as required by Rules, law or court order, or to defend Payment Gateway's rights in a legal dispute. Payment Gateway, its subsidiaries, Third Party Service Providers, suppliers and/or their agents and/or contractors may have access to, use, and transfer such Data among themselves as necessary for the purpose of the provision and management of the Payment Gateway Services. Payment Gateway may further transfer Data (a) with non-affiliated entities that assist Payment Gateway in providing products and services that You have requested; (b) with companies that provide support services to Payment Gateway; (c) with companies that provide marketing services on behalf of Payment Gateway; or (d) as otherwise provided by law.

(c) In evaluating Your eligibility for, provision of, administration and management of the Payment Gateway Services, as well as under circumstances described in the Privacy Policy that may be changed from time to time, Payment Gateway may obtain various consumer reports regarding You or Beneficial Owners associated with You from third parties, run a credit check or obtain other personal or credit information about You or Your Beneficial Owners (defined below in this Section 5.1 (c)). Pursuant to such, Payment Gateway may, from time to time, obtain consumer-identifying and credit information (including credit reports) and other consumer reports from multiple consumer reporting agencies for any individual required by Payment Gateway or Beneficial Owner associated with You, for the purpose of verifying the identities of such individuals and evaluating the fraud and credit risk associated with You in connection with a business transaction. You expressly authorize Payment Gateway, prior to the creation of Your Account and from time to time thereafter, to investigate Your individual and business history and background, consumer-identifying and credit information (and that of any of Your and Your authorized representatives, directors, officers, partners, proprietors, owners, etc.), and to obtain credit or consumer reports or other background

investigation reports on each of them that Payment Gateway consider necessary to review the acceptance of Your merchant application and continuation of the Payment Gateway Services. You also authorize any person or credit reporting agency that issues consumer reports to answer those credit inquiries and to furnish that information to Payment Gateway. You represent and warrant to Payment Gateway that You have obtained, and will provide to Payment Gateway upon request, written instructions and all authorizations, consents, and disclosures necessary from each such individual for Payment Gateway to obtain (and for a consumer reporting agency to provide) such information including consumer reports of such individual to Payment Gateway. You represent and warrant that You will ensure that such individual shall also authorize Payment Gateway's sharing of information of such individual in connection with obtaining such consumer reports from the consumer reporting agencies and other third party providers who conduct background and identification screening. You agree to cooperate with and provide Payment Gateway with any information or documentation needed for Payment Gateway to obtain such information from consumer reporting agencies, and agrees that it will comply with all applicable requirements under all applicable state and federal laws and regulations. For purposes of this Agreement, "**Beneficial Owner**" means any person who either directly or indirectly owns or controls at least 25% or more of Your ownership interests as well a person who exercises substantial control over You. There must be at least one Beneficial Owner identified.

(d) While Payment Gateway uses commercially reasonable efforts to safeguard Data transmitted while using Payment Gateway Services, Payment Gateway does not warrant that Data will be transported without unauthorized interception or modification or that Data will not be accessed or compromised by any unauthorized third parties.

(e) With respect to the Payment Gateway Services, to the extent applicable to Payment Gateway, Payment Gateway will maintain compliance with the Payment Card Industry Data Security Standard (PCI DSS).

5.2 Your Duties

(a) You will comply at all times with the terms of this Agreement, all applicable Rules, and then-current legal obligations and security measures including without limitation those issued by the United States government, federal, state and municipal laws and ordinances, Card Association, the Federal Trade Commission, PCI DSS and any other governing body. You will comply with all Payment Gateway security protocols, notices and safeguards in effect during the term of this Agreement. Notwithstanding Payment Gateway's assistance in understanding the Rules, You expressly acknowledge and agree that You are assuming the risk of compliance with all provisions of the Rules, regardless of whether You have possession of such Rules. You warrant that You have taken such precautions as are necessary to ensure that Your Data and Your customer's Data is protected and that Your electronic systems are secure from breach, intrusion or compromise by any unauthorized third parties. In the event that Your system is breached and an unauthorized third party has access to or has accessed Data, You shall notify the designated parties as required under any applicable laws or industry guidelines and shall immediately notify Payment Gateway of such breach and take such prompt action and precautions as necessary to prevent any continuous or additional breach.

(b) You are solely responsible for the security of Data residing on servers owned or operated by You, or any third party designated by You (e.g., a web hosting company, processor, or other service provider), including Payment Card numbers and any other Data. You shall comply with all Card Association rules, applicable laws and regulations governing the collection, retention and use by You of Payment Card and other financial information, and You agree to provide notice to Your customers on Your web site that discloses how and why personal and financial information is collected and used, including uses governed by this Agreement.

(c) You are solely responsible for verifying the accuracy and completeness of all Transactions submitted and processed by Payment Gateway associated with Your Account and verifying that all corresponding funds are accurately processed. If You use any application programming interfaces (**APIs**) provided in connection with the Payment Gateway Services, You are solely responsible for such use of the API, the security of Your credentials associated with the API, and the security of information and data submitted through the API. The fees associated with any and all Transactions and associated Data submitted to Payment Gateway are earned by Payment Gateway and shall not be reimbursed. Payment Gateway and its Third Party Service Providers will not be liable for any Transactions, including without limitation those that are unauthorized, improperly processed or approved, wrongfully declined, or otherwise, or for any access to any Transaction or Account data or Your or Your customers' Data, including without limitation any unauthorized, illegal, or fraudulent access. Payment Gateway's liability for

unauthorized Transactions or improperly processed Transactions solely attributable to the negligence of Payment Gateway is limited pursuant to Section 13 (LIMITATION OF LIABILITY).

(d) You will not use, disclose, sell or disseminate any card, cardholder, bank account, or ACH information obtained in connection with a Transaction except for purposes of completing or settlement of a Transaction and/or resolving chargebacks, retrievals or similar issues involving a Transaction unless required to do so by court order or governmental agency request, subpoena or order.

(e) You are solely responsible for compiling and retaining permanent records of all Data for Your reference. Except as otherwise provided in this Agreement, Payment Gateway shall have no obligation to store, retain, report or otherwise provide any copies of or access to any records of Transactions or other Data collected or processed by Payment Gateway. Upon termination of this Agreement, Payment Gateway shall have no obligation to provide You with any Data. You shall use proper controls for and limit access to all Data. Prior to discard You shall render all Data unreadable and abide by any laws or regulations imposed on You for Data destruction and/or disposal.

(f) You represent and warrant that You have provided notice to, and obtained consent from, Your customer whose Data You supply to Payment Gateway with regard to: (i) the purposes for which Your customer's Data has been collected; (ii) the sharing and use of Your customer's Data with Payment Gateway and its Third Party Service Providers and its and their agents, suppliers, and contractors; (iii) which parts of customer's Data are obligatory and which parts, if any, are voluntary; and (iv) how Your customers can access and, if necessary, rectify the Data You hold about them. Neither Payment Gateway nor its Third Party Service Providers are responsible for any consequences resulting from Your failure to provide notice or obtain consent from such individuals nor for Your providing outdated, incomplete or inaccurate information.

5.3 Your User Name and Password Credentials

(a) In connection with Your rights described in Section 4.1 (Payment Gateway Services Grant), Payment Gateway will issue to You, or permit You to use a user name and password, to enable You and/or Your employees and agents to access Your Account and use the Payment Gateway Services. You will restrict access to such user name, password, and Account to Your employees and agents as may be reasonably necessary and consistent with the purposes of this Agreement and will ensure that each such employee and agent accessing and using the Account is aware of and otherwise complies with all applicable provisions of this Agreement and any recommendations and notices regarding such use and access.

(b) You are solely responsible for maintaining adequate security and control of any and all user names, passwords, or any other codes that are issued to You by Payment Gateway or selected by You, for purposes of giving You access to the Payment Gateway Services. Payment Gateway shall be entitled to rely on information it receives from You and may assume that all such information was transmitted by or on behalf of You.

5.4 Audits

Payment Gateway and its Third Party Service Providers, or their designees, may, during the term of this Agreement and for a period of 12 months thereafter, conduct an audit of Your books, records, and operations to verify the accuracy of fees, Your proper use of the Payment Gateway Services, and compliance with this Agreement and with applicable laws and Rules. The auditing party will use reasonable efforts to provide at least five business days' advance notice of any such audit, and will use reasonable efforts to ensure that the audit does not unreasonably disrupt Your business. You will provide all reasonable cooperation with any such audit and will provide all requested information and records and reasonable access to Your premises, computer systems, databases, equipment, and personnel. Each party will bear its own costs in connection with any such audit, except that if an audit reveals a material breach of this Agreement by You, You will reimburse Payment Gateway or the Third Party Service Provider for its costs incurred in connection with such audit. If the audit identifies that You have underpaid any fees due under this Agreement, You will pay all such amounts within 15 days.

6. TRADEMARKS

6.1 Trademark Use

(a) Payment Gateway grants to You the right to use, reproduce, publish, perform and display the Payment Gateway Marks as follows: (i) on Your web site in connection with Your offering of Payment Gateway Services to Your customers; and (ii) in promotional and marketing materials and electronic and printed advertising, publicity, press releases, newsletters and mailings about or related to any of the Payment Gateway Services.

(b) You grant to Payment Gateway and its Third Party Service Provider the right to use, reproduce, publish, perform and display Your Marks as follows: (i) in connection with the development, use, reproduction, modification, adaptation, publication, display and performance of the Payment Gateway Services offered and/or accessible through Your web site; and (ii) in promotional and marketing materials and electronic and printed advertising, publicity, press releases, newsletters and mailings about or related to any of the Payment Gateway Services.

(c) For purposes of this Agreement, “**Your Marks**” means Your customary name and logo, and such other trademarks as You may provide to Payment Gateway and from time to time notify Payment Gateway to be “Your Marks” within the meaning of this Agreement. For purposes of this Agreement, “**Payment Gateway Marks**” means Payment Gateway customary name and logo, and such other trademarks as Payment Gateway may provide to You and from time to time notify You to be “Payment Gateway Marks” within the meaning of this Agreement. If such a license is granted by a Third Party Service Provider for You to be able to use or display such Third Party Service Provider’s trademarks, then Payment Gateway Marks may also include such Third Party Service Provider’s trademarks.

6.2 Trademark Restrictions

(a) Each party shall comply with all standards with respect to the other party’s Trademarks which may be furnished by such party from time to time and all uses of the other party’s Trademarks in proximity to the trade name, trademark, service name or service mark of any other person or entity shall be consistent with the standards furnished by the other party from time to time. Neither party shall create a combination mark consisting of one or more Trademarks of each party. All uses of the other party’s Trademarks shall inure to the benefit of the party owning such Trademark. Each party acknowledges and agrees that, as between the parties, the other party is the owner of the Trademarks identified as its Trademarks in any written notice provided to the other party pursuant to this Agreement. Either party may update or change the list of Trademarks usable by the other party at any time by written notice to the other party.

(b) Except as otherwise provided in this Agreement, You shall not use, register or attempt to register any Payment Gateway Trademarks or marks or domain names that are confusingly similar to any of the Payment Gateway Trademarks, marks or domain names. Except as authorized in this Agreement, You shall not take any actions inconsistent with Payment Gateway’s ownership of Payment Gateway’s Trademarks and any associated registrations or attack the validity of them. You shall not use Payment Gateway’s Trademarks in any manner that would indicate You are using such Payment Gateway Trademarks other than as a licensee nor assist any third party do any of the same.

7. INTELLECTUAL PROPERTY

As between Payment Gateway and You, Payment Gateway (or its Third Party Service Providers and Extensions Resellers, as applicable) owns and retains all right, title and interest in and to the Payment Gateway Services, Trademarks, copyrights, technology and any related technology utilized under or in connection with this Agreement, including but not limited to all intellectual property rights associated pursuant to this Agreement. No title to or ownership of any of the foregoing is granted or otherwise transferred to You, Your customers, or any other entity or person under this Agreement. You shall not reverse engineer, disassemble, decompile or otherwise attempt to discover the source code or trade secrets for any of Payment Gateway Services or related technology. You agree to promptly report to Payment Gateway any unauthorized use or infringement of the Payment Gateway Services or any Payment Gateway’s intellectual property which comes to Your attention.

8. PAYMENT TERMS

8.1 Due Date and ACH Authorization

(a) Payment Gateway fees shall begin on the Effective Date and You will be billed on the first business day of each month following the Effective Date for any and all amounts owing under this Agreement. If fees accrue to more than \$50.00 USD at any time in any given month, Payment Gateway will bill You the full amount due on a more frequent basis at Payment Gateway's discretion.

(b) You authorize Payment Gateway and its Third Party Service Providers and agents to initiate transaction entries to Your depository account through ACH. This authority will remain in full force and effect until (i) Payment Gateway has received written notification from You of Your request for termination in such time as to afford Payment Gateway and Your depository institution a commercially reasonable opportunity to acknowledge and respond to the request or (ii) Payment Gateway has collected all fees due and owing under this Agreement. If Payment Gateway is unable to collect amounts owing from Your depository account, You authorize Payment Gateway to charge Your credit card for any and all amounts owing to Payment Gateway under this Agreement. Entries initiated to or from Your depository account will be in accordance with the NACHA Rules and/or any other applicable Rules, regulatory body or agency having jurisdiction over the subject matter.

(c) You must promptly update Your Account information with Payment Gateway with current and accurate information. If You fail to provide Payment Gateway with current and accurate depository account or credit card account information, Payment Gateway may immediately discontinue or suspend providing Payment Gateway Services to You, without liability of any kind, until such information is provided to Payment Gateway and/or terminate this Agreement without liability of any kind. You acknowledge that any change in You depository or credit card account information may not be effective until the month following the month in which Payment Gateway receives such notice. Termination of Your authorization shall result in termination of any and all Payment Gateway Services.

9. FEES

9.1 Payment Gateway Service Fees

You shall pay to Payment Gateway the fees as set forth in the Fee Schedule provided to You by Payment Gateway. The Fee Schedule is incorporated into the terms of this Agreement by reference. Payment may modify or update the Fee Schedule in its sole discretion with 30 days' prior notice to You.

9.2 Other Fees and Charges

(a) You shall incur a late fee in the amount set forth in the fee schedule if any amounts due to Payment Gateway under this Agreement are not paid on or before the tenth (10th) day following the date when due. In addition, You shall be subject to a finance charge equal to one and one-half percent (1.5%) per month or the highest rate allowable by law, whichever is less, determined and compounded daily from the date due until the date paid. Payment of such late fees and finance charges will not excuse or cure any breach or default for late payment. Payment Gateway may accept any check or payment from You without prejudice to its rights to recover the balance due or to pursue any other right or remedy. No endorsement or statement on any check or payment or any correspondence accompanying any check or payment or elsewhere will be construed as an accord or satisfaction.

(b) On each occurrence when Payment Gateway is unable to collect fees on Your Account for any reason, including but not limited to insufficient funds, closed depository account, or any other negative response, Payment Gateway may charge You a Return Payment Fee in the amount of \$25.00 USD per occurrence, or as otherwise set forth in the Fee Schedule.

(c) If You have not paid all owing amounts after two (2) days past the due dates set forth in this Section 9 (FEES), Payment Gateway may, in its sole discretion, discontinue or suspend providing You with Payment Gateway Services. If You have still not paid all owing amounts after thirty (30) days following the date the payment was due, then Payment Gateway may, in its sole discretion and without liability of any kind, immediately terminate this Agreement.

Notwithstanding, if You subsequently pay in full all owing fees, including but not limited to late fees, finance charges and Return Payment Fees, and if Payment Gateway has not already terminated this Agreement, then Payment Gateway may elect to reactivate the Payment Gateway Services and charge You a Payment Gateway Service reactivation fee in the amount set forth in the Fee Schedule.

(d) You agree to pay all costs and expenses of whatever nature, including attorneys' fees, incurred by or on behalf of Payment Gateway in connection with the collection of any unpaid charges and fees.

9.3 Taxes

All fees set forth in the applicable Fee Schedule are exclusive of taxes. You are solely responsible for, and will indemnify and hold Payment Gateway and its Third Party Service Providers harmless from, payment of all applicable taxes and duties (only excluding taxes levied on Payment Gateway based on its own net income).

10. TERMINATION

10.1 Termination by You

You may terminate this Agreement with or without cause, and for any reason, by providing Payment Gateway with at least thirty (30) days written notice of Your intent to terminate this Agreement.

10.2 Termination by Payment Gateway

(a) Payment Gateway may terminate this Agreement and/or terminate Your use of Payment Gateway Services immediately, or at any time, without advance notice and with or without cause, for any reason including without limitation to Your breach or default of any obligation set forth in this Agreement or if Payment Gateway determines, in its sole discretion, that Your business practices are detrimental to the achievement of Payment Gateway's business objectives, or if a Payment Gateway's relationship with its Third Party Service Provider terminates or the Third Party Service Provider otherwise ceases supplying Payment Gateway with services necessary for the delivery of the Payment Gateway Services.

10.3 Termination by Third Party

In the event Payment Gateway is notified by a Third Party Service Provider, court of competent jurisdiction, governmental body or authority, Acquiring Bank or the Card Association that You are no longer entitled to receive the Payment Gateway Services for any reason whatsoever, Payment Gateway may suspend and/or terminate Payment Gateway Services and/or this Agreement without notice and without liability.

10.4 Effect of Termination and Survival

Upon termination of this Agreement for any reason whatsoever, all rights and interests under this Agreement shall be extinguished and shall be given no further force or effect except that (i) all accrued payment obligations under this Agreement shall survive such expiration or termination; and (ii) the rights and obligations of the parties under Section 15.11 (SURVIVAL) shall survive termination.

11. CONFIDENTIALITY AND NONDISCLOSURE

11.1 Use of Confidential Information

(a) Each party that receives Confidential Information ("**Receiving Party**") from the other party ("**Disclosing Party**") agrees to use reasonable best efforts to protect all Confidential Information provided by or disclosed by the Disclosing Party, and in any event, to take precautions at least as great as those taken to protect its own Confidential Information of a similar nature. The Receiving Party will only use the Confidential Information of the Disclosing Party to perform its obligations under this Agreement. Each party agrees that the terms and conditions of this Agreement will be Confidential Information, provided that each party may disclose the terms and conditions of this Agreement to its immediate legal and financial consultants in the ordinary course of its business.

(b) Each party agrees not to divulge any confidential information, trade secrets or know how or any information derived therefrom to any third person or entity and shall only disclose Confidential Information to employees, agents, contractors, or required third persons on a “need to know” basis who have executed a nondisclosure agreement with similar terms and obligations as restrictive as those set forth in this Agreement.

(c) The Receiving Party shall not make any use whatsoever at any time of the Disclosing Party’s Confidential Information except as permitted by, or in order to comply with its obligations under, this Agreement.

(d) The Receiving Party shall not copy or reverse engineer any portion of the Disclosing Party’s Confidential Information.

11.2 Exclusions

The foregoing restrictions will not apply to any information that: (a) the Receiving Party can document it had in its possession prior to disclosure by the Disclosing Party, (b) was in or entered the public domain through no fault of the Receiving Party, (c) is disclosed to the Receiving Party by a third party legally entitled to make such disclosure without violation of any obligation of confidentiality, (d) is required to be disclosed by applicable laws or regulations (but in such event, only to the extent required to be disclosed), or (e) is independently developed by the Receiving Party without reference to or use of any Confidential Information of the Disclosing Party.

11.3 Return of Confidential Information

Upon written request of the Disclosing Party and at Disclosing Party’s sole discretion, Receiving Party will destroy or return to Disclosing Party all materials, in any medium, that contain, embody, reflect or reference all or any part of any Confidential Information of the Disclosing Party. Such destruction will be certified in writing by Receiving Party.

11.4 Injunctive Relief

Each party acknowledges that breach of this provision by it may result in irreparable harm to the other party, for which money damages could be an insufficient remedy, and therefore that the other party may be entitled to seek injunctive relief to enforce the provisions of this Section 11 (CONFIDENTIALITY AND NONDISCLOSURE).

12. REPRESENTATIONS AND WARRANTIES

12.1 Mutual Representations and Warranties

Each party represents and warrants to the other that (a) this Agreement constitutes a legal, valid and binding obligation, enforceable against it in accordance with its terms; (b) the party’s obligations under this Agreement do not violate any law or breach any other agreement to which such party is bound; (c) it has all necessary right, power and ability to execute this Agreement and to perform its obligations under this Agreement; and (d) no authorization or approval from any third party is required in connection with such party’s execution, delivery or performance of this Agreement.

12.2 Your Representations and Warranties

(a) You represent and warrant that (i) You are engaged in a lawful business that includes the sale of products and/or services, and are duly licensed to conduct such business under the laws of all jurisdictions in which You conduct business; (ii) all statements made by You pursuant to this Agreement, or in any other document relating hereto by You or on Your behalf, are true, accurate and complete in all material respects; (iii) all Transactions submitted in connection with the Payment Gateway Services are for bona fide business operations compliant with applicable Rules, laws, and regulations; (iv) You are not engaged in any illegal or fraudulent business operation or any business operation prohibited by any applicable law, regulation, or Rule, or in any business identified on a prohibited activities list promulgated by any Third Party Service Provider or the Card Associations; and (v) You have all necessary right to any data or materials You use or provide to Payment Gateway in conjunction with the Payment Gateway Services, and no such data or materials infringe the intellectual property rights of any third party. You authorize Payment Gateway to investigate and confirm the information submitted by You. For this purpose, Payment Gateway may utilize credit bureau / reporting agencies and / or its own agents, as described in Section 5.1(b) (Use of Your Data).

(b) You represent and warrant that You will comply with all Rules, applicable laws, regulations, rules, ordinances and orders of governmental authorities having jurisdiction. You will further comply with PCI DSS, the Gramm-Leach-Bliley Act, and any other regulatory body or agency having jurisdiction over the subject matter hereof.

(c) You will abide with all material terms of the then current policies, procedures, and guidelines of Payment Gateway governing the Payment Gateway Services.

12.3 Payment Gateway Representations and Warranties

(a) Payment Gateway Services are designed for use with certain third-party programs, including, without limitation, certain Internet browser software programs. You will look solely to the developers and manufacturers of such programs with regard to warranty, maintenance or other support regarding the same. Payment Gateway makes no warranty, express or implied, with regard to any such third-party software. Payment Gateway does not warrant the services of any third party, including without limitation Third Party Service Providers, Extensions Resellers, if applicable, or the Card Association.

12.4 Warranty Disclaimer

PAYMENT GATEWAY SERVICES ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS, WITHOUT ANY REPRESENTATIONS OR WARRANTIES. PAYMENT GATEWAY AND ITS THIRD PARTY SERVICE PROVIDERS DO NOT REPRESENT OR WARRANT THAT THE PAYMENT GATEWAY SERVICES WILL BE AVAILABLE, ACCESSIBLE, UNINTERRUPTED, TIMELY, SECURE, ACCURATE, COMPLETE, OR ENTIRELY ERROR FREE. YOU MAY NOT RELY UPON ANY REPRESENTATION OR WARRANTY REGARDING THE PAYMENT GATEWAY SERVICES BY ANY THIRD PARTY IN CONTRAVENTION OF THE FOREGOING STATEMENTS, INCLUDING, BUT NOT LIMITED TO REPRESENTATIONS BY THIRD PARTY SERVICE PROVIDERS. PAYMENT GATEWAY AND ITS THIRD PARTY SERVICE PROVIDERS SPECIFICALLY DISCLAIM ALL REPRESENTATIONS, WARRANTIES AND CONDITIONS WHETHER EXPRESS OR IMPLIED ARISING BY STATUTE, OPERATION OF LAW, USAGE OF TRADE, COURSE OF DEALING, OR OTHERWISE, INCLUDING BUT NOT LIMITED TO WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR TITLE WITH RESPECT TO THE PAYMENT GATEWAY SERVICES, OR OTHER SERVICES OR GOODS PROVIDED UNDER THIS AGREEMENT. YOU UNDERSTAND AND AGREE THAT PAYMENT GATEWAY AND ITS THIRD PARTY SERVICE PROVIDERS SHALL BEAR NO RISK WITH RESPECT TO YOUR SALE OF PRODUCTS OR SERVICES, INCLUDING WITHOUT LIMITATION, ANY RISK ASSOCIATED WITH CREDIT CARD FRAUD, ACH FRAUD, CHECK FRAUD OR CHARGEBACKS.

12.5 Disputes of Fees

The parties shall promptly investigate any disputes under this Agreement. If the disputed amount is less than five percent (5%) of the total fees invoiced by Payment Gateway for the relevant billing statement, the total amount invoiced shall be due and payable on or before the due date. If the amount in dispute is greater than five percent (5%) of the total fees invoiced by Payment Gateway for the relevant billing statement, the disputed amount may be withheld until the dispute is resolved. All disputes must be made in good faith and in writing within thirty (30) days after the billing statement date. Fees billed shall be deemed accepted where written objections are not provided to Payment Gateway within thirty (30) days after the billing statement date.

13. LIMITATION OF LIABILITY

13.1 Payment Gateway Disclaimers

(a) PAYMENT GATEWAY AND ITS THIRD PARTY SERVICE PROVIDERS EXPRESSLY DISCLAIM ANY LIABILITY OR LOSS, HOWEVER OCCURRING INCLUDING NEGLIGENCE, WHICH ARISES FROM OR RELATED TO ANY UNAUTHORIZED ACCESS TO YOUR ACCOUNT, FACILITIES, OR TO YOUR DATA OR PROGRAMS DUE TO ACCIDENT, ILLEGAL OR FRAUDULENT MEANS OR DEVICES USED BY ANY THIRD PARTY, OR OTHER CAUSES BEYOND PAYMENT GATEWAY'S REASONABLE CONTROL.

(b) PAYMENT GATEWAY AND ITS THIRD PARTY SERVICE PROVIDERS EXPRESSLY DISCLAIM ANY LIABILITY OR LOSS, HOWEVER OCCURRING INCLUDING NEGLIGENCE, ARISING FROM OR RELATED TO: (I) YOUR FAILURE TO PROPERLY ACTIVATE, INTEGRATE OR SECURE YOUR ACCOUNT(S); (II) FRAUDULENT TRANSACTIONS PROCESSED THROUGH

YOUR ACCOUNT(S); (III) DISRUPTION OF PAYMENT GATEWAY SERVICES, SYSTEMS, SERVER OR WEB SITE BY ANY MEANS, INCLUDING WITHOUT LIMITATION, DDOS ATTACKS, SOFTWARE VIRUSES, TROJAN HORSES, WORMS, TIME BOMBS, OR ANY OTHER TECHNOLOGY; (IV) ACTIONS OR INACTIONS BY ANY THIRD PARTY, INCLUDING WITHOUT LIMITATION, A THIRD PARTY SERVICE PROVIDER, OR ACQUIRING BANK; (V) UNAUTHORIZED ACCESS TO YOUR DATA OR YOUR CUSTOMER'S DATA INCLUDING BUT NOT LIMITED TO, PAYMENT CARD NUMBERS, OTHER PERSONALLY IDENTIFIABLE INFORMATION, TRANSACTION DATA OR PERSONAL INFORMATION BELONGING TO PAYMENT GATEWAY, YOU, YOUR CUSTOMER, OR ANY THIRD PARTY; OR (VI) YOUR SALE OF PRODUCTS OR SERVICES (INCLUDING WITHOUT LIMITATION ANY RISK ASSOCIATED WITH PAYMENT CARD FRAUD, ACH FRAUD, CHECK FRAUD, CHARGEBACKS, TRANSACTION RATING, IMPROPERLY AUTHORIZED TRANSACTIONS, LEGITIMATE BUT UNAUTHORIZED TRANSACTIONS, DATA TRANSMISSION ERRORS, OR ANY ACTION OR OMISSION BY A THIRD PARTY).

(c) PAYMENT GATEWAY AND ITS THIRD PARTY SERVICE PROVIDERS EXPRESSLY DISCLAIM ANY LIABILITY OR LOSS FOR THE LEGITIMACY OF YOUR TRANSACTIONS, ORDERS FORWARDED FROM YOU AND FOR ANY AND ALL CLAIMS OF LOSS AND/OR FRAUD INCURRED RESULTING FROM CONCLUSIONS DRAWN FROM THE DATA PROVIDED BY ANY PAYMENT GATEWAY SERVICES PROVIDED BY PAYMENT GATEWAY, OR ANY ASSOCIATED SYSTEM OR PROGRAM OR THE LIMITATION OF THE FUNCTIONING OF ANY ASSOCIATED SERVICES OR SOFTWARE, HARDWARE, OR EQUIPMENT, WHETHER IT IS OWNED BY PAYMENT GATEWAY OR OFFERED THROUGH A THIRD PARTY SERVICE PROVIDER OR OTHER ENTITY.

13.2. Payment Gateway Limitation of Liability

(a) UNDER NO CIRCUMSTANCES WILL PAYMENT GATEWAY OR ANY OF ITS PARENTS, AFFILIATES OR THIRD PARTY PROVIDERS, OR ANY OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS OF THE PARTIES, OR ITS PARENTS, AFFILIATES OR THIRD PARTY PROVIDER, BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES HOWEVER OR WHENEVER ARISING, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOST REVENUE, LOST PROFITS, ANTICIPATED PROFITS, LOST BUSINESS OR INJURY TO BUSINESS REPUTATION, COST OF PROCUREMENT OF SUBSTITUTE SERVICES, UNDER ANY THEORY OF LIABILITY OR CAUSE OF ACTION WHETHER IN TORT, INCLUDING NEGLIGENCE, CONTRACT OR OTHERWISE, REGARDLESS OF WHETHER IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. ANY FINES, FEES, PENALTIES, ASSESSMENTS OR OTHER AMOUNTS IMPOSED BY THE CARD ASSOCIATIONS ARE DIRECT DAMAGES AND WILL NOT BE DEEMED TO BE SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR PUNITIVE DAMAGES.

(b) PAYMENT GATEWAY'S TOTAL LIABILITY TO YOU, WHETHER ARISING IN TORT (INCLUDING NEGLIGENCE), CONTRACT OR OTHERWISE, UNDER THIS AGREEMENT OR WITH REGARD TO ANY PAYMENT GATEWAY SERVICES OR PRODUCTS, SHALL NOT EXCEED THE AGGREGATE COMPENSATION PAYMENT GATEWAY RECEIVED FOR PROVIDING THE PAYMENT GATEWAY SERVICES TO YOU DURING THE THIRTY (30) DAYS PRECEDING THE DATE ON WHICH THE CLAIM AROSE OR \$1,500.00 USD, WHICHEVER IS LESS.

(c) You will remain liable for any liabilities and losses and other amounts incurred by Payment Gateway arising under this Agreement that are attributable in whole or in part to: (i) intentional misrepresentation, fraud, willful or intentional acts or omissions or negligence by You or Your employees or agents, or the failure of any of such persons to comply with this Agreement, Rules, applicable laws, rules or regulations, (ii) Your breach of any provision of this Agreement or other applicable agreement associated with the Payment Gateway Services; (iii) any information, Data, or Transactions that You know or should have known contains inaccuracies or omissions; (iv) any security breach or unauthorized access to Data or Confidential Information caused by the actions of You or any of Your employees or agents; or (v) any assessments, fines, penalties or other amounts (however labeled) imposed by the Card Associations or any governmental or regulatory body or other third party as a result of any action or inaction by You or any of Your employees or agents. All such obligations and amounts imposed by third parties will be deemed direct, not indirect or consequential, damages, and will be collectible notwithstanding any provision in this Agreement to the contrary.

14. INDEMNIFICATION

You shall defend, indemnify, and hold harmless Payment Gateway and its Third Party Service Providers, parents, and/or subsidiaries, and any of their officers, directors, agents and employees, from and against any and all claims,

actions, proceedings, and suits and all related liabilities, damages, settlements, penalties, fines, costs or expenses (including reasonable attorneys' fees and other litigation expenses) incurred by Payment Gateway, arising out of or relating to (i) any breach or alleged breach by You of any representation, warranty, or obligation of You set forth in this Agreement; (ii) Your violation or non-compliance with any Rules, applicable law, rule, regulation, order; (iii) any damage or loss caused by negligence, fraud, dishonesty or willful misconduct by You or any of Your employees, agents or customers; (iv) the reliability, accuracy, or legitimacy of Data or purchase orders submitted by You to Payment Gateway; (v) Transactions, including unauthorized or fraudulent Transactions, submitted using the Payment Gateway Services, including Transactions rejected by Payment Gateway or an issuing bank, and; (vi)) any alleged infringement of a patent, copyright, trademark or other intellectual property right by You or arising from any data or other materials or technology supplied by You or from Your use of the Payment Gateway Services in unauthorized manner; (vii) any claims by Your customers, including, without limitation, claims relating to the disclosure of personal data or other consumer data, or claims relating to the goods or services sold by You; (viii) any alleged or actual violation or non-compliance by You of any Rules, applicable laws, regulations or rules of (a) the Card Associations, including non-compliance of PCI-DSS; (b) the Gramm Leach Bliley Act; (c) or any regulatory body or agency having jurisdiction over the subject matter hereof; (ix) any violation of Payment Gateway's then current policies or guidelines; or (x) any data breach or any unauthorized access, use, or disclosure of Confidential Information, personal data, card information, or Your credentials from systems and networks controlled by You or Your service providers;. In the event You cause fines and/or penalties to be charged to Payment Gateway by the Card Associations or any other entity, You agree to immediately reimburse Payment Gateway for said fines and penalties.

15. GENERAL PROVISIONS

15.1 Non-exclusivity

Each party acknowledges and agrees that the rights granted to the other party in this Agreement are non-exclusive, and that, without limiting the generality of the foregoing, nothing in this Agreement shall be deemed or construed to prohibit either party from participating in similar business arrangements as those described in this Agreement.

15.2 Notices

All notices to You shall be given electronically, sent to the electronic mail address provided by or for You during registration for the Payment Gateway Services and/or posted in the Merchant Control Panel of Your Account. All notices to Payment Gateway shall be given electronically by sending an email to Payment Gateway's email address listed within the Merchant Control panel of Your Account or, if otherwise, to [insert email address and physical address if applicable], which written notice will be deemed given upon personal delivery, upon confirmation of receipt if sent by fax, or three (3) days after the date of mailing if sent by certified or registered mail, postage prepaid.

15.3 Relationship of the Parties

The parties are independent contractors and nothing in this Agreement shall make them joint venturers, partners, employees, agents or other representatives of the other party. Neither party shall make any representation that suggests otherwise.

15.4 Assignment

You will not have the right or the power to assign any of Your rights or delegate the performance of any of Your obligations under this Agreement without the prior written consent of Payment Gateway, including in the case of a merger. Payment Gateway will have the right to assign this Agreement to its successors and/or assigns, subsidiaries, affiliates, and/or Third Party Service Providers.

15.5 Amendment

No amendment to any provision of this Agreement, nor consent to any departure by either party, will in any event be effective unless in writing and signed by the other party, and then such consent will be effective only in the specific instance and for the specific purpose for which given. Notwithstanding the foregoing, Payment Gateway

may amend this Agreement at any time upon written or electronic notice to You or post notice on its Web site not less than ten (10) days prior to the effective date of such amendment; provided that the addition or change of service fees, will become effective upon at least thirty (30) days' notice. If You do not agree to such amendments, Your sole remedy is to immediately terminate this Agreement upon written notice to Payment Gateway.

15.6 Waiver

The failure of any party to insist on or enforce strict performance of any provision of this Agreement or to exercise any right or remedy under this Agreement or applicable law will not be construed as a waiver or relinquishment to any extent of the right to assert or rely upon any such provision, right or remedy in that or any other instance; rather, the same will be and remain in full force and effect. Waiver by either party of a breach of any provision contained in this Agreement must be in writing, and no such waiver will be construed as a waiver of any other and/or succeeding breach of such provision or a waiver of the provision itself.

15.7 Severability; Headings

If any provision of this Agreement is held to be invalid or unenforceable for any reason, the remaining provisions will continue in full force without being impaired or invalidated in any way. The parties agree to replace any invalid provision with a valid provision, which most closely approximates the intent and economic effect of the invalid provision. Headings are used for convenience of reference only and in no way define, limit, construe or describe the scope or extent of any section, or in any way affect this Agreement.

15.8 Force Majeure

Neither party will be liable for any losses arising out of the delay or interruption of its performance of obligations under the Agreement due to any acts of God, acts of civil or military authorities, civil disturbances, wars, strikes or other labor disputes, fires, transportation contingencies, interruptions in telecommunications, utility, Internet services or network provider services or other catastrophes or any other occurrences which are beyond such parties' reasonable control (each a "**Force Majeure Event**"), provided that the party delayed will provide the other party notice of any such delay or interruption as soon as reasonably practicable, will use commercially reasonable efforts to minimize any delays or interruptions resulting from the Force Majeure Event and in no event will any failure to pay any monetary sum due under this Agreement be excused for any Force Majeure Event.

15.9 Governing Law; Jurisdiction

This Agreement and performance under it will be interpreted, construed and enforced in all respects in accordance with the laws of the State of Delaware without reference or giving effect to its conflicts of law principles. You hereby irrevocably consent to the personal jurisdiction of and venue in the state and federal courts located in Delaware with respect to any action, claim or proceeding arising out of or related to this Agreement and agree not to commence or prosecute any such action, claim or proceeding other than in such courts. EACH PARTY EXPRESSLY WAIVES ITS RIGHT TO A JURY TRIAL IN ANY DISPUTE UNDER THIS AGREEMENT.

15.10 Entire Agreement

This Agreement together with all of Payment Gateway's policies referenced in this Agreement sets forth the entire understanding and agreement of the parties, and supersedes any and all prior or contemporaneous oral or written agreements or understandings between the parties, as to the subject matter of this Agreement. You acknowledge that this Agreement reflects an informed, voluntary allocation between Payment Gateway and You of all risks (both known and unknown) associated with Payment Gateway Services.

15.11 Survival

The provisions of this Agreement relating to any fees or other amounts owed, payment of finance charge on unpaid fees, confidentiality, warranties, limitation of liability, indemnification, governing law, severability, headings, third party beneficiary, this section 15, and any other provisions that by their nature should survive termination shall survive termination or expiration of this Agreement.

15.12 Third Party Beneficiary

You acknowledge and agree that Network Merchants, LLC (“NMI”) as a Third Party Service Provider is an intended third party beneficiary of this Agreement, and NMI is entitled to enforce the terms of this Agreement against You with respect to the Payment Gateway Services as if it were an original party to this Agreement.

Appendix A – Extensions

In the event You enroll in, and Payment Gateway provides You with, Extension(s), You agree as follows and are subject to the applicable terms for Extensions that are presented during your enrollment.

1. Expansion of Services

The term “Payment Gateway Services,” as defined in the Agreement, shall include each of the Extensions. Each Extension is described on the Payment Gateway website and in other documentation provided to You from time to time. All terms of the Agreement applicable to the Payment Gateway Services shall be applicable to each Extension.

2. Your Obligations

In addition to Your obligations set forth in the Agreement, You agree to pay the Extension Fees, in accordance with Section 8 (PAYMENT TERMS) and Section 9 (FEES) of the Agreement, in the amounts provided in the Fee Schedule provided to You by Payment Gateway. The Fee Schedule is incorporated into the terms of this Agreement by reference and/or in the Extension documentation page accessed during enrollment in the applicable Extension. By checking the “I ACCEPT” button next to a Extension Fee schedule, You acknowledge Your acceptance of such fees, Your obligation to pay same and the terms and conditions applicable to the Extension.

3. Your Warranty

You represent, warrant, and covenant to Payment Gateway that Your use of the Extensions and any information submitted in connection with the Extensions: **(a)** will be fully compliant with all applicable local, state and federal laws, rules, and regulations, Card Association rules, NACHA rules; **(b)** will be in accordance with all applicable documentation; and **(c)** will not be used for any purpose other than in connection with the Extension.

4. Acknowledgement

You understand, acknowledge, and agree that **(a)** You will be solely responsible for ALL transactions processed through Your Account(s), regardless of whether such Transactions are monitored by an Extension; **(b)** You will be solely responsible for Your use of the Extensions including, without limitation (i) configuring, maintaining and updating, as You deem necessary, the applicable settings for Your Extension account; and (ii) with respect to each Transaction processed via Your Account(s), and regardless of any data, analysis, or information generated or not generated by the Extension, as applicable, determining the appropriate action for each such Transaction (i.e., approve, void, decline, reject); **(c)** under certain circumstances, it may be necessary for Payment Gateway to adjust Your Extension security settings, with or without notice to You, to guard against fraudulent activity and that such actions may inadvertently cause legitimate transactions to expire, be rejected or delayed; and **(d)** Payment Gateway shall not be liable under any theory of law, including negligence, for any loss associated with any of the foregoing.

5. Payment Gateway Warranty

IN ADDITION TO ANY LIMITATIONS OR DISCLAIMERS SET FORTH IN THE AGREEMENT, YOU UNDERSTAND, ACKNOWLEDGE AND AGREE THAT THE EXTENSIONS ARE PROVIDED TO YOU BY PAYMENT GATEWAY “AS IS” AND THAT PAYMENT GATEWAY DOES NOT REPRESENT OR WARRANT THAT THE EXTENSIONS OR ANY OTHER TECHNOLOGY, CONTENT, INTELLECTUAL PROPERTY, OR ANY OTHER INFORMATION, DATA, PRODUCTS, OR SERVICES, WILL BE AVAILABLE, ACCESSIBLE, UNINTERRUPTED, TIMELY, SECURE, ACCURATE, COMPLETE, OR ERROR-FREE, AND THAT YOUR SOLE REMEDY FOR ANY ISSUE RELATED TO OR ARISING FROM THE EXTENSIONS, AND PAYMENT

GATEWAY'S SOLE LIABILITY FOR THE SAME, WILL BE TO TERMINATE THIS AGREEMENT AND DISCONTINUE YOUR USE OF THE EXTENSIONS.

6. Risk, Security and Disclosure

The risk and security suggestions provided to You in the documentation for any of the Extensions are solely for illustrative purposes to show best industry practices, and You shall be solely responsible for choosing the appropriate settings and parameters for Your Account.

7. Termination

If this Agreement is terminated for any reason, Payment Gateway shall immediately cancel access to Your Extension account. It is Your responsibility to download all reports prior to the effective date of any such termination as such reports will not be available following the termination date.

8. Incorporation by Reference

The Extensions Fee Schedules are incorporated into the Agreement by reference.

9. Third Party Programs

Payment Gateway makes no warranty, express or implied, with regard to any third party services or software.

10. Definitions

All terms and conditions of the Agreement not specifically modified in this Appendix A shall remain unchanged and in full force and effect. Unless separately defined in the Agreement, capitalized words used in this Appendix as defined terms shall have the same meanings as in the Agreement.

Appendix B – Prohibited Activities

You agree that You will not at any time conduct Your business in any manner that directly or indirectly offers, sells, leases, licenses or displays, delivers, advertises, recommends, or promotes any product(s), service(s), data, information, image(s), text and/or any content which:

(i) is unlawful or violates any applicable local, state, federal, national or international law, statute, ordinance, or regulation including, without limitation, Card Association rules, consumer protection laws, unfair competition, antidiscrimination or false advertising;

(ii) is associated with any illegal form of adult, sexually oriented, or obscene materials or services, including without limitation, any material clearly designed to sexually arouse the viewer/reader with images of children less than 18 years old and/or escort services;

(iii) infringes on any patent, trademark, trade secret, copyright, right of publicity, or other proprietary right of any party, including, but not limited to, the unauthorized copying and posting of trademarks, pictures, logos, software, articles, musical works and videos;

(iv) is threatening, abusive, harassing, defamatory, obscene, libelous, slanderous, deceptive, fraudulent, invasive of another's privacy, tortuous, or otherwise violate Payment Gateway's rules or policies;

(v) victimizes harasses, degrades, or intimidates an individual or group of individuals on the basis of religion, gender, sexual orientation, race, ethnicity, age, or disability;

(vi) impersonates any person or entity;

(vii) contains harmful content, including, without limitation, software viruses, Trojan horses, worms, time bombs, cancel bots, spy-ware, or any other files, software programs, or technology that is designed or intended to disrupt,

damage, surreptitiously intercept or expropriate the Payment Gateway Services or any system, program, data or personal information or limit the functioning of any software, hardware, or equipment or to damage or obtain unauthorized access to any data or other information of any third party;

(viii) violates any U.S. export or import laws, including, without limitation, the Export Administration Act and the Export Administration Regulations maintained by the Department of Commerce;

(ix) offers or disseminates fraudulent goods, services, schemes, or promotions (i.e., make money fast schemes, chain letters, pyramid schemes) or engage in any unfair deceptive act or practice;

(x) is associated with any form of illegal gambling or illegal lottery type services;

(xi) is associated with illegal telecommunications or illegal cable television equipment or illegal satellite equipment;

(xii) is associated with electronic wallets (i.e., “e-wallets”) or any similar payment type; or

(xiii) is associated with the sale of (a) any controlled drug that requires a prescription from a licensed practitioner unless You are authorized by the National Association of Boards of Pharmacy to offer such products as a Verified Internet Pharmacy Practice Site and only if such a prescription has been issued by the practitioner after a bona fide examination of the patient; or (b) any over-the-counter drug, unless the sale of such product, without a prescription, has been approved by the Food & Drug Administration; or (c) nonprescription drugs that make false or misleading treatment claims or treatment claims that require FDA approval; or (d) any drug or controlled substance that Payment Gateway believes to be or may become harmful, unlawful, or prohibited. Payment Gateway requires sellers of prescription drugs to abide by all laws applicable to both the buyer and seller and may require You to provide evidence of compliance with these requirements. In addition, due to the complexities of current laws regulating the importation of controlled drugs into the United States, You may not use the Payment Gateway Services to sell prescription drugs that are imported into the United States from an international location. The foregoing list is a non-exhaustive list of prohibited goods and services.

ANOVIA PLATINUM PROGRAM

If Merchant elects to enroll in the Anovia Platinum Program and receive a terminal from Anovia Payments (Anovia), the following terms and conditions shall apply and shall be incorporated fully into the Merchant Application and the Terms and Conditions (collectively, the “Merchant Agreement”) agreed to by Merchant:

- 1. Equipment.** Anovia will provide to Merchant the terminal device (the “Equipment”) indicated on the Merchant Application. Anovia provides the equipment to Merchant “as is” and makes no representations or warranties of any kind as to suitability of the Equipment for any particular purpose. The term “Equipment” includes the Equipment initially deployed to Merchant and/or any additions, replacements, substitutions or additions thereto. The Equipment is, and shall at all times be and remain, Anovia’s sole and exclusive property and Merchant shall have no right, title or interest in or to the Equipment.
- 2. Effective Date, Term.** The effective date of this Anovia Platinum Program shall be the effective date of the Merchant Application. The terms of this Anovia Platinum Program shall remain in effect until the termination of the Merchant Agreement.
- 3. Payment Terms.** The one-time set up fee indicated on the Merchant Application will be charged to Merchant based on the Merchant’s device selection. The monthly fee indicated on the Merchant Application based on the Merchant’s device selection will be billed to the Merchant monthly on Merchant’s statement.
- 4. Replacement Terms.** The Anovia Platinum Program offers a replacement terminal if the device provided to Merchant is determined by Anovia, in its commercially reasonable discretion, to be defective or inoperable due to normal wear and usage. The \$50.00 replacement fee will be billed to Merchant for a standard device. A replacement fee of \$75.00 will be billed to Merchant for smart terminals. The replacement fee includes the shipping costs of the replacement device to the Merchant location and the return shipping of the defective device. If Merchant fails to return the defective device within 60 days Merchant will be billed the market cost of the device. Returned devices that are damaged as a result of abuse, accident or neglect by Merchant will not be eligible for replacement at the replacement fee cost and Merchant will be billed the full cost of the replacement device in addition to the applicable replacement fee.
- 5. Replacement Request Process.** Merchant must make replacement requests by contacting the Anovia support desk. Anovia customer support will assist Merchant with troubleshooting the device prior to processing a replacement request.
- 6. Technology Upgrades.** The Anovia Platinum Program provides technology upgrade options. Merchant will be eligible to request a technology upgrade after the 24th month from the effective date of the Merchant Agreement. Merchant must agree to an extension of the Initial Term of the Merchant Agreement to be eligible for a technology upgrade. Technology upgrade options shall be based on the devices available in the Anovia Platinum Program at the time of the

request. One-time set up fee and a monthly fees will apply and will be based upon the device selected by Merchant for the upgrade.

7. Return or Purchase of Equipment at End of Term. Upon the termination or expiration of the Merchant Agreement Merchant shall return the Equipment to Anovia within 60 days. If Merchant elects to keep the Equipment Merchant must notify Anovia's customer support within 30 days of the expiration or termination of the Merchant Agreement and Merchant will be billed the fair market value of the Equipment (as determined in good faith by Anovia). If Anovia has not received the Equipment within 60 days Merchant will be billed the fair market value of the Equipment.

8. Limitation of Liability and Indemnification. Anovia is not liable for any loss, damage or expense of any kind or nature caused directly or indirectly by the Equipment, including any damage or injury to any person or property caused by the Equipment. Anovia is not liable for the use or maintenance of the Equipment, its failure to operate, any repairs or services to it, or by any interruption of service or loss of use of the Equipment or resulting loss of business. Anovia's liability arising out of or in any way connected to the Anovia Platinum Program shall not exceed the aggregate amount paid to Anovia for the particular Equipment. In no event shall Anovia be liable for any indirect, incidental, special or consequential damages. Merchant shall indemnify and hold Anovia harmless from and against any and all losses, liabilities, damages and expenses resulting from (a) the operation, use, condition, liens against, or return of the Equipment or (b) any breach by Merchant of any of the obligations hereunder.