

## **MERCHANT PAYMENT CARD APPLICATION - TERMS & CONDITIONS**

This AGREEMENT is made by and BETWEEN WOODFOREST NATIONAL BANK ("BANK"), A National Banking Association, and the undersigned, "MERCHANT" and is subject to the approval of BANK. The parties hereto agree as follows:

### **1.0 AGREEMENT:**

- 1.1 This document, as well as other documents executed by MERCHANT, pursuant to the acceptance of BANK, shall be incorporated herein and made a part hereof and shall constitute the entire agreement between BANK and MERCHANT.
- 1.2 MERCHANT agrees that throughout the term of this Agreement, it will not use the services of any bank, corporation, entity or any person other than BANK for the processing of payment card transactions with the following exception:
- 1.3 MERCHANT may designate a third party that does not have a direct agreement with BANK as its agent for the direct delivery of data-captured Visa transactions to VisaNet for clearing and settlement. MERCHANT must:
  - a) Advise BANK that it will use a third party agent.
  - b) Agree that BANK must reimburse MERCHANT only for the amount of Visa transactions delivered by BANK to VisaNet, less the appropriate discount fee.
  - c) Assume responsibility for any failure by its agent to comply with the Visa International Operating Regulations, including but not limited to, any violation resulting in a chargeback.
- 1.4 MERCHANT acknowledges that BANK may provide financial transaction processing hereunder through contracts or subcontracts with third parties engaged in the business of transaction processing and authorization.
- 1.5 BANK hereby notifies MERCHANT that the following options are available hereunder: (i) MERCHANT may elect to accept ONLY consumer credit and commercial cards; (ii) MERCHANT may elect to accept ONLY consumer debit cards; OR (iii) MERCHANT may elect to accept consumer credit and commercial cards and consumer debit cards.

### **2.0 Rights, Duties, and Responsibilities of Merchant:**

- 2.1 MERCHANT shall honor all cards provided:
  - (a) The card is valid and is presented to MERCHANT at the time of the sale by the authorized cardholder or an authorized user of the card account. A card is valid only if it is presented on or after the valid date, if any, and before the expiration date shown on its face.
  - (b) The card is used as payment for products which are sold or rendered by MERCHANT under this Agreement.
  - (c) The MERCHANT has followed procedures as established by BANK for completion of sales drafts.
- 2.2 MERCHANT agrees to complete sales drafts in conformity with the terms of this Agreement, non-payment card's Rules and Regulations, the Card Association's Rules and Regulations, Discover<sup>®</sup> Network Operating Regulations, and additionally must comply with the following:
  - (a) For transactions that are not mail, phone orders or internet orders, unless electronically swiped, the imprint of the card, including the name of the cardholder, the cardholder account number and the card's expiration date;
  - (b) MERCHANT is not authorized to accept mail or phone order transactions unless specifically authorized by BANK and that acceptance of such transactions without written authorization from BANK will constitute a breach of the Agreement. If MERCHANT is authorized to accept mail or phone order transactions, the name of the cardholder, the cardholder account number and the expiration date;
  - (c) The signature of the cardholder or authorized card user. In the case of mail or phone orders, the letters MO or TO, as the case may be, shall be clearly indicated on the sales draft;
  - (d) The date of the sale;
  - (e) A short description of the products sold or rendered;
  - (f) The total cash price of the sale or the words "deposit" or "balance" if full payment is to be made in this manner at different times on different sales drafts; and
  - (g) The city and state wherein such transaction occurred.
  - (h) Type of fuel sold and odometer reading (if permitted by POS device) in the case of fleet card transactions
  - (i) MERCHANT shall deliver a completed copy of the sales draft to the cardholder.
- 2.3 MERCHANT'S policy for the exchange or return of goods sold and the adjustment for services rendered shall be established and posted in accordance with operating regulations of the applicable Card Associations' or other non-payment card's Rules and Regulations, and/or Discover Network Operating Regulations. MERCHANT agrees to disclose, if applicable, to a cardholder before a card sale is made, that if merchandise is returned:
  - (a) No refund, or less than 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 noncredit 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. MERCHANT shall under no circumstances issue cash for returns of products where products were originally purchased in a card transaction. Disclosures must be made on all copies of sales drafts or invoices in letters approximately 1/4 inch 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.
- 2.4 MERCHANT may not process for payment any transaction(s) representing the refinancing of an existing obligation of a cardholder including, but not limited to, obligations (i) previously owed to MERCHANT, (ii) arising from the dishonor of a cardholder's personal check, and/or (iii) representing the collection of any other pre-existing indebtedness.
- 2.5 MERCHANT must not disclose a cardholder account number, personal information, or other transaction information to third parties other than to MERCHANT'S agent, BANK, or BANK'S agent for the sole purpose of assisting MERCHANT in completing the transaction or as required by law. MERCHANT must store all material containing cardholder account numbers or imprints in an area limited to selected personnel and render all data unreadable prior to discarding. MERCHANT must not retain or store magnetic-stripe data verification data subsequent to authorization of a transaction.
- 2.6 MERCHANT agrees it will not require, unless specifically allowed by law, any cardholder to pay any part of any discount or charge imposed upon MERCHANT by this Agreement, whether through any increase in price or otherwise. Further, unless specifically allowed by law MERCHANT will not require a customer presenting a card for payment to pay any charge not also required from a person paying cash. These terms shall not, however, be construed as prohibiting discounts to customers for payments in cash.
- 2.7 MERCHANT agrees to obtain an authorization on all transactions. Any transaction which cannot be authorized electronically through a terminal is subject to a voice authorization charge. MERCHANT will obtain an authorization prior to completing a keyed transaction. Any transaction which is not properly authorized is made with full recourse and may be charged back to MERCHANT; furthermore, any keyed transaction will be subject to additional charges for a non-qualifying transaction. MERCHANT understands that an authorization does not constitute a guarantee of payment, only available credit and may be subject to dispute or chargeback. By signing this Agreement, Merchant agrees that the use of a "store & forward" terminal means that Merchant has the ability to store a swiped transaction at the terminal level when there is no phone line available. When a phone line becomes available, Merchant would then upload the transaction for a possible approval. Merchant understands and agrees that if Merchant uses this

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- type of terminal, there is no guaranty whatsoever that once the transactions are uploaded Merchant will receive an approval. If Merchant allows the release of merchandise/service to the cardholder before receiving approval, Merchant agrees that this is to be done at Merchant's sole risk.
- 2.8 MERCHANT shall not complete any card sale for which an authorization has been declined. Any unauthorized card transaction is made with full recourse to MERCHANT, and BANK may charge back the amount of such card sale to MERCHANT.
- 2.9 MERCHANT acknowledges that BANK shall have full recourse to charge back the amount of a card sale for which (i) the imprint of the card is not obtained or (ii) the signature of the cardholder is not obtained and the cardholder disputes that he/she authorized the charge.
- 2.10 MERCHANT agrees to electronically deposit sales drafts and credit vouchers no later than the business day following the transaction date.
- 2.11 (a) MERCHANT shall, at all times, maintain an account at a bank that is a member of the Federal Reserve ACH System ("the Account"). All credits for collected funds and debits for fees, payments and chargebacks under the terms of this Agreement shall be made to the Account. MERCHANT may not close or change the Account without written notice to BANK. MERCHANT will be solely liable for all fees and costs associated with the Account and for all overdrafts. MERCHANT will maintain sufficient funds in the Account to accommodate all transactions, including fees, contemplated by this Agreement.
- (b) MERCHANT shall promptly upon receipt, examine, balance, and reconcile all statements relating to the Account. Additionally, MERCHANT shall daily balance and reconcile all DAILY deposit and debit totals to confirm accuracy. MERCHANT is required to notify BANK IN WRITING of any and all errors on MERCHANT'S statements and/or DAILY totals. Each such written notice shall contain the following information: (i) MERCHANT name and account number, (ii) the specific dollar amount of the asserted error, (iii) a detailed description of the asserted error, and (iv) a detailed explanation of why MERCHANT believes an error exists and the cause of the error, if known. The written notice MUST be RECEIVED by BANK within thirty (30) days after MERCHANT receives the statement (regarding an asserted error on a statement) or within thirty (30) days from the date the alleged error on a DAILY total was made. **FAILURE TO TIMELY SEND THE NOTICE REFERRED TO HEREIN CONSTITUTES A WAIVER OF ANY AND ALL RIGHTS MERCHANT MAY HAVE AGAINST BANK RELATED TO THE ASSERTED ERROR.**
- (c) MERCHANT agrees to fees of up to \$10 per occurrence for maintenance activities including but not limited to Account changes and returned mail.
- 2.12 MERCHANT assumes the responsibility for storage of all sales drafts and credit vouchers. Failure to provide BANK with requested documentation within five (5) business days after receipt of such request may result in the transaction being charged back to MERCHANT, and BANK shall have the right to debit the Account for full amount of the transaction in question.
- 2.13 MERCHANT shall pay any fees charged to MERCHANT by the telephone company for the preparation of the site(s) prior to installation of electronic data capture terminals and/or peripheral equipment.
- 2.14 MERCHANT shall not deposit any transaction for the purpose of obtaining or providing a cash advance. MERCHANT agrees that any such deposit shall be grounds for immediate termination.
- 2.15 MERCHANT must notify BANK in writing of any changes to the information in this Application, including but not limited to:
- (a) Transfer or sale of 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; or
  - (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'S business.
- The notice must be received by BANK within ten (10) business days of the change. MERCHANT will provide updated information to BANK within a reasonable time upon request. Failure to provide notice as required above may be deemed as material breach and shall be sufficient grounds for immediate termination of MERCHANT. In the event any of the changes listed above should occur, BANK shall have the option to renegotiate the terms of this Agreement or provide thirty (30) days' notice of termination. MERCHANT is liable to BANK for all losses and expenses incurred by BANK arising out of a failure to report changes to BANK.
- 2.16 MERCHANT is liable for repayment to BANK for all valid chargebacks. BANK will comply with non-payment card's, Card Associations' prevailing Rules and Regulations, and/or Discover Network Operating Regulations in processing any chargebacks which result from cardholder disputes. However, all disputes which are not or cannot be resolved through established chargeback procedures shall be settled between MERCHANT and the cardholder, and MERCHANT will indemnify BANK and will provide reimbursement for all expenses, including reasonable attorney's costs, which it may incur as the result of any cardholder claim which is pursued outside the non-payment card's or Card Association's Rules and Regulations and/or Discover Network Operating Regulations. In the event of a chargeback loss to BANK, MERCHANT hereby transfers and assigns to BANK any lien rights that it has or may have on the merchandise sold to the cardholder.
- 2.17 MERCHANT shall not accept or deposit any fraudulent 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. MERCHANT shall be prohibited from making a deposit of a credit transaction without a preceding debit. MERCHANT shall not, under any circumstances, deposit telemarketing transactions under this Agreement unless authorized by BANK in advance of processing any telemarketing transactions. If MERCHANT deposits any such transaction, MERCHANT may be immediately terminated and BANK may hold funds and/or demand an escrow pursuant to Sections 4 and 8; further, MERCHANT may be subject to VISA, MasterCard, and Discover Network reporting requirements set forth in Section 8.8.
- 2.18 MERCHANT will not deposit duplicate transactions. MERCHANT shall be debited for any adjustments for duplicate transactions and shall be liable for any chargebacks which may result therefrom. Merchant will be liable for any fees assessed by the Card Associations' Rules and Regulations and/or Discover Network Operating Regulations to the BANK.
- 2.19 MERCHANT shall not initiate a sales transaction in an attempt to collect a chargeback.
- 2.20 Discount/Fee Schedule:
- (a) MERCHANT'S Account will be debited daily, through ACH for amounts set forth in the pricing schedule which is part of this Agreement, and for any other fees or charges incurred by MERCHANT and associated with processing services. MERCHANT is obligated to pay all taxes and other charges imposed by any governmental authority on the services provided under this Agreement. BANK reserves the right, in its sole discretion, to change, amend, add, or adjust any discount rates or fees set forth herein, in accordance with Section 10.6 of this Agreement.
  - (b) The "Qualified Retail Discount Rate" will be charged on all magnetic stripe or chip read ("Swiped") customer present retail payment card transactions that are electronically authorized, closed in a daily batch, and where the customer's signature is obtained. Additionally, for the Qualified Discount Rate to apply, payment cards have to be either U.S. bank issued consumer credit card (excluding rewards cards) or payment cards have to be signature debit cards or prepaid debit cards issued by a "Regulated U.S. Bank". ("Regulated U.S. Bank", meaning any issuer that together with its affiliates, has assets equal to or greater than ten billion (\$10,000,000,000); "Non-Regulated U.S. Bank", meaning any issuer that together with its affiliates has assets less than ten billion (\$10,000,000,000).) The "Mid-Qualified Retail Discount Rate" will be charged on all manually keyed or electronic commerce transactions, that have address verification (also known as "AVS" and is available only for Visa cards), and closed in a daily batch, or any traditional rewards card, signature debit card or prepaid debit card issued by a Non-Regulated U.S. Bank that would otherwise qualify for the Qualified Retail Discount Rate. The "Non-Qualified Retail Discount Rate" will be charged on all commercial, commercial rewards, international issued, or signature rewards card transactions, which include but are not limited to Visa Signature and Signature Preferred, MasterCard World Elite and High

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- Value, Discover Premium and Premium Plus. All other transactions that do not meet the criteria for Qualified or Mid-Qualified rates will be downgraded to the Non-Qualified Retail Discount Rate.
- (c) Increase in long-distance communications costs and processing charges from third-party vendors may be reflected in increased discount rates.
- (d) MERCHANT'S pricing is partially based upon the annual volume, average ticket and method of doing business stated in this MERCHANT Application. If the actual volume and average ticket are not as warranted or if MERCHANT significantly alters its method of doing business, BANK may adjust MERCHANT'S discount and/or transaction fees without prior notice. Merchants using AVS (Address Verification System) will be charged for each address verification request. This is in addition to the transaction fee. In the event of multiple locations, each location shall be considered to have a separate MERCHANT PAYMENT CARD AGREEMENT for all fee purposes. For the purposes of charging Transaction Fees under this Agreement, "transaction" is defined as any action by a merchant that results in activity to a cardholder or merchant account, including authorizations, batch closings, sales, or returns.
- 2.21 MERCHANT understands that there shall be fees, chargebacks, assessments, and/or amounts which shall arise as a result of the Agreement, both during and after termination of the Agreement. MERCHANT authorizes BANK to debit via ACH from any account held by MERCHANT at any financial institution in the amount of any amount owed by MERCHANT under this Agreement, including but not limited to any amounts owed for fees, chargebacks and or assessments which shall arise after termination of this Agreement. This ACH authorization will remain in effect after termination of this Agreement or until BANK has received written notice terminating this authorization. MERCHANT will indemnify and hold BANK harmless for any action they take pursuant to this Section. MERCHANT will also indemnify and hold harmless any other financial institution for acting in accordance with any instructions from BANK pursuant to this Section.
- 2.22 MERCHANT will be assessed a fee of \$35.00 for each return ACH debit.
- 2.23 MERCHANT will be assessed a merchant investigation fee for suspicious activity and/or Agreement deviations up to a maximum of ten percent (10%) of the dollar amount investigated.
- 2.24 A divert fee of \$25.00 per month will be charged for a special account maintained at BANK to house diverted funds for MERCHANT.
- 2.25 MERCHANT agrees that Excessive Activity during any monthly period will be a breach of this Agreement and cause of immediate termination. Excessive Activities include i) chargebacks in excess of one percent (1%) of the sales transactions processed, ii) sales activity that exceeds by 25% the dollar volume indicated on the Application, iii) the dollar amount of returns exceeds 20% of the average monthly dollar amount of MERCHANT'S card transactions, iv) other ratios required by VISA, MasterCard, Discover Network, or BANK. BANK will provide MERCHANT with any information possessed by BANK which may enable MERCHANT to recover from others the amount of any sale charged back to MERCHANT. MERCHANT understands that BANK will assess a fee per chargeback per presentation and a fee for each retrieval and each representation request.
- 2.26 Any transaction that has not received an authorization, or that is deposited (transmitted) more than two (2), but not greater than thirty (30), business days following the transaction date, or that is made with a foreign card will be subject to a non-qualified increase. NOTE: Days allowed for settlements are calculated by excluding the transaction date, Sundays and holidays; and including the processing (settlement) date.
- 2.27 MERCHANT will use its reasonable, best efforts to recover any card: (i) on VISA cards, if the printed four digits above the embossed account number do not match the first four digits of the embossed account number, (ii) if MERCHANT is advised by BANK (or its designee), the issuer of the card or the designated voice authorization center to retain it, (iii) if MERCHANT has reasonable grounds to believe the card is counterfeit, fraudulent or stolen, or not authorized by the cardholder, (iv) on Discover Network cards, if the printed four digits on the signature panel do not match the last four digits of the embossed account number, or if the card does not have the Discover Network acceptance mark in the lower right corner on both sides of the card, or (v) for MasterCard, the embossed account number, indent printed account number and/or encoded account number do not agree, or the card does not have a MasterCard hologram on the lower right corner of the card face.
- 2.28 ELECTRONIC COMMERCE
- (a) MERCHANT may process electronic commerce ("EC") transactions only if it has so indicated in this Agreement and only if MERCHANT has obtained BANK'S consent, and only if the transactions have been encrypted by a third party vendor acceptable to BANK. If MERCHANT submits EC transaction(s) without BANK'S consent, BANK may immediately terminate this Agreement. All transactions must comply with data security requirements as described in the Data Security Section of the Merchant Payment Card Application. MERCHANT understands that transactions processed via EC are high risk and subject to a higher incidence of chargebacks. MERCHANT is liable for all chargebacks and losses related to EC transactions, whether or not: i) EC transactions have been encrypted; and ii) MERCHANT has obtained BANK'S consent to engage in such transactions. Encryption is not a guarantee of payment and will not waive any provision of this Agreement or otherwise validate a fraudulent transaction. All communication costs related to EC transactions are MERCHANT'S responsibility. MERCHANT understands that BANK will not manage the EC telecommunications link and that it is MERCHANT'S responsibility to manage that link. All EC transactions will be settled by BANK into a depository institution in the United States in U.S. currency.
- (b) Whereas, MERCHANT desires to honor at its business location(s) Card Numbers presented in connection with the Mail/Telephone/Internet sale of products/services to customers the parties hereto agree to the following: i) MERCHANT agrees to use and retain proof of a traceable delivery system as means of shipment of product to customer. ii) MERCHANT agrees that transactions will not be processed until products are shipped to the cardholder. For goods to be shipped on EC transactions, MERCHANT may obtain authorization up to seven (7) calendar days prior to shipment date. MERCHANT need not obtain a second authorization if the sales draft amount is within fifteen percent (15%) of the authorized amount, provided that the additional amount represents shipping costs. Further, MERCHANT'S website must contain all of the following information: i) complete description of the goods or services offered, ii) returned merchandise and refund policy, iii) customer service contact, including electronic mail address and/or telephone number, iv) transaction currency (such as U.S. or Canadian dollars), v) export or legal restrictions, if known, and vi) delivery policy.
- (c) MERCHANTS engaging in EC agree to provide a detailed business description to BANK.
- 2.29 MERCHANT warrants and agrees that MERCHANT shall fully comply with all federal, state, and local laws, rules and regulations, as amended from time to time, including the Federal Truth-in-Lending Act, Regulation E, and Regulation Z of the Board of Governors of the Federal Reserve System.
- 2.30 This Agreement shall be effective only upon acceptance by BANK.
- 2.31 MERCHANT agrees to pay, in addition to any and all other fees referred to herein, a non-refundable annual customer service fee per year per location. This fee shall be generated and charged any time within one year from the date of this Agreement. The actual date of the initial charge (within said first year) shall be at the sole discretion of BANK. The fee shall be debited from the Account for the initial year and on the anniversary date (of the initial charge) for each year thereafter that the Account is in force. In the event this Agreement is terminated, for any reason, no portion of a charged annual customer service fee shall be rebated to MERCHANT.
- 2.32 MERCHANT agrees that in the event MERCHANT fails to pay BANK on a chargeback loss, MERCHANT hereby assigns any rights it may have against the cardholder (related to said chargeback loss) to BANK.
- 2.33 MERCHANT must not deposit a transaction receipt until it does one of the following:
- Completes the transaction,
  - Ships or provides the goods, except as specified in the Delayed Delivery Transactions section of the Visa International Operating Regulations,
  - Performs the purchase service, or obtains the cardholder's consent for a recurring transaction.

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- 2.34 MERCHANT will not present any sales draft or other memorandum to BANK for processing (whether by electronic means or otherwise) which relate to the sale of goods or services for future delivery without BANK'S prior written authorization. If BANK has previously given such consent, MERCHANT represents and warrants to BANK that you will not rely on any proceeds or credit resulting from such transactions to purchase or furnish goods or services. MERCHANT will maintain sufficient working capital to provide for the delivery of goods or services at the agreed upon future date, independent of any credit or proceeds resulting from sales drafts or other memoranda taken in connection with future delivery transactions.
- 2.35 All disputes between MERCHANT and any cardholder relating to any card transaction will be settled between MERCHANT and the cardholder. BANK bears no responsibility for such transactions.
- 2.36 As a primary inducement to BANK to enter into this Agreement, the Guarantor(s) indicated on this Application, by signing this Application, jointly and severally, unconditionally and irrevocably, guarantee the continuing full and faithful performance and payment by MERCHANT of each of its duties and obligations to BANK pursuant to this Agreement, as it now exists or amended from time to time, with or without notice. Guarantor(s) understands further that BANK may proceed directly against Guarantor(s) without first exhausting its remedies against any other person or entity responsible therefore to it or any security held by BANK or MERCHANT. Guarantor(s) authorizes BANK to debit via ACH from any account singly or jointly held by Guarantor(s) at any financial institution in the amount of any amount owed by Guarantor(s) under this Agreement. This ACH authorization will remain in effect after termination of this Agreement, and until BANK has received written notice terminating this authorization and all Guarantor(s) obligations to BANK have been paid in full. Guarantor(s) will indemnify and hold BANK harmless for any action they take pursuant to this Section. Guarantor(s) will also indemnify and hold harmless any other financial institution for acting in accordance with any instructions from BANK pursuant to this Section. This guarantee will not be discharged or affected by the death of the Guarantors, will bind all heirs, administrators, representatives and assigns and may be enforced by or for the benefit of any successor of BANK. Guarantor(s) understand that the inducement to BANK to enter into this Agreement is consideration for the guaranty, and that this guaranty remains in full force and effect even if the Guarantor(s) receives no additional benefit from the guaranty.
- 2.37 MERCHANT must not establish a minimum or maximum dollar amount as a condition of honoring a debit card transaction.
- 2.38 Legislation has passed ("Truncation Laws") requiring terminals to suppress all but the last few digits from the cardholder's account number, as well as the expiration date. MERCHANT is responsible for compliance. Although federal law is in place regarding this issue, specific state laws may have more strict deadlines and requirements. MERCHANT is required to check its specific state law to be sure that MERCHANT is in compliance.
- 2.39 In accordance with the requirements of the Unlawful Internet Gambling Enforcement Act of 2006 and Regulation GG, MERCHANT understands that restricted transactions are prohibited from being processed through the Merchant Account or relationship with BANK. Restricted transactions are transactions in which a person accepts credits, funds, instruments, or other proceeds from another person in connection with unlawful Internet gambling. By signing this agreement, MERCHANT certifies that its business does not engage in Internet gambling. MERCHANT agrees that it will notify BANK in the event of any change in circumstance.
- 2.40 MERCHANT agrees to identify all third party agents involved in the payment process that may have access to cardholder data.
- 2.41 MERCHANT agrees to provide BANK with previous processor statements as requested.
- 2.42 MERCHANT agrees not to deposit a transaction receipt that it knows or should have known to be either fraudulent or not authorized by the cardholder.
- 2.43 MERCHANT agrees that MERCHANT shall be solely responsible for its employees' actions while in MERCHANT'S employ.
- 2.44 MERCHANT agrees that it shall not 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.
- 2.45 MERCHANT agrees that it shall not request or use an account number for any purpose other than as payment for its goods or services.
- 2.46 MERCHANT agrees that it shall not add any tax to transactions, unless applicable law expressly requires that a MERCHANT be permitted to impose a tax.
- 2.47 MERCHANT agrees that it shall not 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.
- 2.48 MERCHANT agrees that it shall not disburse funds in the form of cash, unless:
- (a) MERCHANT is a Lodging or Cruise Line merchant disbursing cash to a Premium Visa Product cardholder, as specified in Visa International Operating Regulations
- (b) MERCHANT is dispensing funds in the form of travelers cheques, Visa TravelMoney Cards, or foreign currency. In this case, the transaction amount is limited to the values of the travelers cheques, Visa Travel Money Card, or foreign currency, plus any commission or fee charged by the merchant, or MERCHANT is participating in the Visa Cash Back Service, as specified in Visa International Operating Regulations
- 2.49 MERCHANT agrees that it shall not accept a range of Visa cards for various purposes (e.g., Scrip, Manual Cash Disbursement).
- 2.50 Any MERCHANT who relies on fulfillment houses must submit information to BANK about the fulfillment house, and steps for the underwriter to contact the fulfillment house to determine its financial capacity to support the MERCHANT.
- 2.51 BANK may immediately terminate MERCHANT for any significant circumstances that create harm or loss to the goodwill of the Visa system.
- 2.52 MERCHANT agrees, if undergoing a forensic investigation at the time the Merchant Agreement is signed, to fully cooperate with the investigation until completed.
- 2.53 MERCHANT agrees to abide by transaction deposit restrictions, as specified in the Visa International Operating Regulations.
- 2.54 MERCHANT agrees to abide by transaction processing prohibitions, as specified in the Merchant Prohibitions section of the Visa International Operating Regulations.
- 2.55 MERCHANT agrees that it shall not deposit a transaction receipt that does not result from an act between the cardholder and the merchant or the cardholder and its sponsored merchant (laundering).
- 2.56 MERCHANT agrees that it shall not violate disclosure of account and Visa transaction information prohibitions, as specified in the Visa International Operating Regulations.
- 2.57 MERCHANT agrees that during the Initial Term and any Renewal Term it shall achieve and maintain compliance with the Payment Card Industry ("PCI") Data Security Standard ("DSS") that it shall be liable for a PCI Compliance Non-Validation Fee per month in the amount stated in the section titled "Rates and Fees" of the Application if it fails to complete the PCI Protection Plan Self-Assessment Questionnaire (SAQ) and all other PCI requirements according to required timelines. Notwithstanding any payments of the PCI Compliance Non-Validation Fee, Merchant agrees that it shall still be liable for any and all fees, fines, assessments or reimbursements related directly or indirectly to the MERCHANT suffering a data security breach.
- 2.58 PCI Protection Plan. In the event MERCHANT chooses to participate in the PCI Protection Plan, MERCHANT must enroll in the PCI Protection Plan by completing, and validating PCI compliance through the PCI Self-Assessment Questionnaire and submitting such questionnaire to BANK. Additionally, a PCI scan may be required annually or quarterly (if applicable). Merchant agrees that it shall be liable for the PCI Protection Plan monthly fee in the amount set forth in Rates and Fees section of the Application. MERCHANT agrees to be bound by the terms and conditions of the PCI Protection Plan as set forth at [http://www.mcpscorp.com/PCI\\_PROTECTION\\_PLAN-2013.pdf](http://www.mcpscorp.com/PCI_PROTECTION_PLAN-2013.pdf). In the event MERCHANT does not participate in the

PCI Protection Plan by properly validating PCI compliance and completing the PCI SAQ, MERCHANT agrees to pay the PCI Compliance Non-Validation Fee as set forth in section 2.57 above.

2.59 DataMiner. The DataMiner service ("DataMiner") is a data analytics tool that provides MERCHANTS, who do not opt out, with detailed information about MERCHANT's customers. MERCHANT agrees that if MERCHANT does not opt out of DataMiner, it shall be liable for the monthly DataMiner Access Fee in the amount of \$9.95. However, the DataMiner Access Fee will be waived for the first two calendar months of the Initial Term of this Agreement ("Free Trial"). During the Free Trial, MERCHANT shall have access to information gathered during the first two calendar months of the Initial Term. MERCHANT may opt out of DataMiner at any time to avoid subsequent DataMiner charges. IN ORDER TO OPT OUT OF DATAMINER, MERCHANT MUST DO ONE OF THE FOLLOWING: (1) NOTIFY US IN WRITING THAT MERCHANT WANTS TO OPT OUT OF DATAMINER, (2) VISIT WWW.MERCHANTFOUNDRY.COM AND SELECT THE DATAMINER OPT OUT OPTION OR (3) CALL OUR CUSTOMER SERVICE CENTER AT 800-327-0093 AND REQUEST TO OPT OUT. MERCHANT also agrees that the monthly DataMiner Access Fee will be debited by a third party from the Account via the Federal Reserve ACH System on or about the first day of each month and will be debited separately from any other fee listed in this Agreement.

2.60 Merchant Foundry. Merchant Foundry is an online portal that provides MERCHANT with online access to information about their merchant processing activity, including, but not limited to statements and batch totals. MERCHANT agrees that it shall be liable for the monthly Merchant Foundry fee as disclosed in the Rates and Fees section of the Agreement.

**3.0 Rights, Duties and Responsibilities of BANK.**

3.1 BANK will accept for purchase all sales drafts deposited by MERCHANT that comply with the terms of this Agreement. The electronic submission of sales transactions to BANK through services provided by BANK shall constitute an endorsement by MERCHANT to BANK of the sales drafts representing such transactions. Unless otherwise informed by BANK and provided MERCHANT completes batch operation prior to 5:59pm CST, BANK will pay MERCHANT up to three (3) business days after the date the BANK receives the transaction, the total face amount of each sales draft, less any credit vouchers, discounts, fees or adjustments determined daily or monthly. All payments, credits and charges are subject to audit and final checking by BANK, and prompt adjustments shall be made for inaccuracies discovered.

3.2 Notwithstanding any other provisions of this Agreement, BANK may refuse to accept any sales draft, or revoke its prior acceptance, in any of the following circumstances:

- (a) the sale giving rise to such sales draft was not made in compliance with all the terms and conditions of this Agreement including Card Associations' Rules and Regulations, Discover Network Operating Regulations, as well as applicable laws and regulations of any governmental authority; or
- (b) The cardholder disputes his/her liability on any of the following grounds: (i) that the products covered by such sales drafts were returned, rejected or defective in some respect or MERCHANT failed to perform any obligation on its part in connection with such products, and MERCHANT has refused to issue a credit voucher in the proper amount; (ii) MERCHANT has failed to obtain a signature on the sales draft and the cardholder claims he/she did not authorize the transaction. In the event of a revocation of a prior acceptance of a sales draft, BANK may withdraw from the Account any amount previously paid to MERCHANT for such sales draft.

3.3 BANK will provide electronic data capture, monthly activity statement, and will assign customer service phone numbers which will accept all customer service calls and other communications from MERCHANT relating to the services provided under this Agreement including, but not limited to, disbursement of funds, account charges, monthly statements and chargebacks.

3.4 BANK will process all requests for drafts and chargebacks from card issuers and will provide MERCHANT with timely notice of requests and chargebacks for documentation.

3.5 BANK will provide, at MERCHANT'S option, a 24 hour toll-free help line for servicing of peripheral equipment which shall include repair and reprogramming of equipment leased, rented or purchased from other vendors.

3.6 Use of Independent Sales Offices: MERCHANT acknowledges that BANK may have been referred to MERCHANT through an independent sales office operating under applicable VISA, MasterCard, and Discover Network rules and regulations. The independent sales office is only an independent contractor, is not an employee or agent of BANK, and has no authority to alter the terms of this Agreement without BANK'S prior written approval.

3.7 MERCHANT authorizes BANK to control and disburse all appropriate settlement funds to the merchant.

**4.0 Account Monitoring.**

4.1 MERCHANT acknowledges that BANK will monitor MERCHANT'S daily deposit activity. MERCHANT agrees that BANK may, upon reasonable grounds, divert the disbursement of MERCHANT'S funds from any account MERCHANT has in ANY financial institution for any reasonable period of time required to investigate suspicious or unusual deposit activity. BANK will make good faith efforts to notify MERCHANT immediately. BANK shall have no liability for any losses, either direct or indirect, which MERCHANT may attribute to any diversion of funds disbursement. Any funds diverted shall be deposited immediately into a non-interest bearing account at BANK, and not be released until such time that questionable/suspect/fraudulent transactions have been resolved to the BANK'S satisfaction.

4.2 Agents of BANK are not permitted to directly access or hold merchant funds whether from settlement or reserves.

**5.0 Warranties; Disclaimer of Warranties.**

5.1 MERCHANT unconditionally represents and warrants to BANK that all sales drafts submitted to BANK hereunder will represent the indebtedness of cardholder with whom MERCHANT has completed a sales transaction in amounts set forth therein for products only, shall not involve any element of credit for any other purposes and shall not be subject to any defense, dispute, offset or counterclaim which may be raised by a cardholder under the Card Associations' Rules and Regulations, Discover Network Operating Regulations, or the Consumer Credit Protection Act (15 USC 1601) or other relevant state or federal statutes or regulations. Further, MERCHANT warrants that any credit voucher which it issues represents a bonafide refund or adjustment on a card sale by MERCHANT with respect to which a sales draft has been accepted by the BANK.

**6.0 Limitations of Liability; Indemnification; Due Care.**

6.1 BANK shall have no liability for any negligent design or manufacture of any point-of-sale terminal, printer, or other equipment used by MERCHANT for the acceptance of credit card transactions. BANK MAKES NO WARRANTIES WHATSOEVER, EXPRESSED OR IMPLIED, CONCERNING ANY EQUIPMENT, OR OTHER SERVICE PROVIDED BY OTHERS AND, IN PARTICULAR, MAKES NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURCHASE. Should MERCHANT fail to pay for any amounts due to their ISO/MSP, MERCHANT grants to BANK the right to set-off against MERCHANT'S deposit account in order to allow BANK to collect any and all equipment payments not made by MERCHANT.

6.2 MERCHANT shall indemnify and hold BANK harmless from all liability, loss and damage, including reasonable attorney's fee and costs which may arise as a result, whether direct or indirect, of any act or failure to act or the breach of any warranty by MERCHANT pursuant to the terms of this Agreement, the Card Associations' Rules and Regulations, and Discover Network Operating Regulations. In the event any Card Association, Discover Network, or other entity assesses a fine or assessment to BANK or request reimbursement from BANK due to the direct or indirect actions of MERCHANT, MERCHANT shall reimburse BANK the amount of the fine, assessment or requested reimbursement.

**6.3 BANK WILL USE DUE CARE IN PROVIDING SERVICES COVERED BY THIS AGREEMENT AND THE PERFORMANCE OF ALL SERVICES CALLED FOR IN THIS AGREEMENT SHALL BE CONSISTENT WITH INDUSTRY STANDARDS. THE**

**LIABILITY, IF ANY, OF BANK UNDER THIS AGREEMENT FOR ANY CLAIMS, COSTS, DAMAGES, LOSSES AND EXPENSES FOR WHICH IT IS OR MAY BE LEGALLY LIABLE, WHETHER ARISING IN NEGLIGENCE OR OTHER TORT, CONTRACT, OR OTHERWISE, WILL NOT EXCEED IN THE AGGREGATE THE AMOUNT OF FEES PAID BY MERCHANT, LESS INTERCHANGE AND ASSESSMENTS, OVER THE PREVIOUS TWELVE (12) MONTH PERIOD, CALCULATED FROM THE DATE THE LIABILITY ACCRUED. IN NO EVENT WILL BANK OR ITS AGENTS, OFFICERS, DIRECTORS OR EMPLOYEES BE LIABLE FOR INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES.**

#### **7.0 Display of Materials; Trademarks.**

7.1 MERCHANT agrees to prominently display the promotional materials provided by BANK in its place(s) of business. Use of promotional materials and use of any trade name, trademark, service mark or logo type ("Mark") associated with Card(s) shall be limited to informing the public that card(s) will be accepted at MERCHANT'S place(s) of business. MERCHANT'S use of promotional materials and marks is subject to the direction of BANK.

7.2 MERCHANT may use promotional materials and marks during the term of the Agreement and shall immediately cease use and return any inventory to BANK upon any termination thereof.

7.3 MERCHANT shall not use any promotional material or marks associated with VISA, MasterCard or Discover Network in any way which suggests or implies that either endorses any goods or services other than payment card services. Further, MERCHANT may be subject to immediate termination if deemed to be creating harm or loss to the goodwill of VISA, MasterCard, Discover Network, or BANK.

7.4 Discover Network Program Marks. MERCHANT is prohibited from using the Program Marks, as defined below, other than as expressly authorized in writing by BANK. Program Marks mean the brands, emblems, trademarks, and/or logos that identify the Discover Network Cards. Additionally, MERCHANT shall not use the Program Marks other than to display decals, signage, advertising, and other forms depicting the Program Marks that are provided to MERCHANT by BANK or otherwise approved in advance in writing by BANK. MERCHANT may use the Program Marks only to promote the services covered by the Program Marks by using them on decals, indoor and outdoor signs, websites, advertising materials and marketing materials; provided that all such uses by MERCHANT are approved in advance by BANK in writing. MERCHANT shall not use the Program Marks in such a way that customers could believe that the products or services offered by MERCHANT are sponsored or guaranteed by the owners of the Program Marks. MERCHANT recognizes that it has no ownership rights in the Program Marks. MERCHANT shall not assign to any third party any of the rights to use the Program Marks.

#### **8.0 Term; Termination.**

8.1 This Agreement shall become effective upon acceptance by BANK and shall continue in full force and effect for a term of three (3) years therefrom ("Initial Term or "Term"). At the end of the Initial Term and at the end of every renewal term thereafter ("Renewal Term" or "Term"), the Agreement will automatically renew for additional three (3) year periods, unless terminated by any party upon written notice at least thirty (30) days prior to the end of the then existing Term or twenty (20) days as per the Voyager Merchant Agreement. In the event MERCHANT terminates this Agreement prior to the maturity date of the then existing term, MERCHANT SHALL be liable to BANK for an early termination fee equal to the greater of (i) \$495.00 per location; or (ii) an amount equal to the average monthly charges, excluding any interchange fees assessed by the Card Associations, but including and not limited to all card and miscellaneous fees, on MERCHANT statements (for months during which MERCHANT processed any transactions) multiplied by the number of months remaining on the Term thereof ("Early Termination Fee"). In the event MERCHANT receives a valid "Bid" (hereinafter defined) for processing services from another merchant services provider during the Term of this Agreement and presents said Bid to BANK and BANK chooses not to match said Bid, then the Early Termination Fee shall not be applicable. "Bid" means a written proposal from a third party processor for the processing of payment card transactions.

8.2 This Agreement may be immediately terminated by BANK for the following reasons:

- (a) Reasonable belief that MERCHANT is employed in practices that involve elements of fraud or conduct deemed to be injurious to cardholders;
- (b) Reasonable belief that MERCHANT will constitute a risk to BANK by failing to meet the terms of this Agreement;
- (c) Issuing cash advances as set forth in Section 2.14; or
- (d) MERCHANT appears on any Card Association's and/or Discover Network's security reporting.
- (e) MERCHANT fails to comply with Payment Card Industry Security Standards as outlined in the Data Security Section of Merchant Payment Card Application.
- (f) MERCHANT has breached any term, provision, condition, representation or warranty of this Agreement.

8.3 In the event this Agreement is terminated prior to the expiration date for any of the reasons set forth in Section 8.2 and when permitted by state law, MERCHANT shall be liable to BANK for the Early Termination Fee as defined in section 8.1 of this Agreement.

8.4 BANK may terminate this Agreement immediately and without cause upon providing MERCHANT with written notice of such termination.

8.5 In the event of termination whether with or without cause, MERCHANT expressly authorizes BANK to withhold and discontinue the disbursement of all cards and other payment transactions of MERCHANT in process of being collected and deposited. Collected funds may be placed in an escrow account at BANK until MERCHANT pays any outstanding charges or losses. Further, BANK reserves the right to require MERCHANT to deposit additional amounts, based upon MERCHANT'S processing history and /or anticipated risk of loss to BANK, into an escrow account. BANK shall be granted a continuing security interest in funds held pursuant to this Section. Said escrow account shall be maintained for a minimum of one hundred eighty (180) days after the termination date and for any reasonable period thereafter, during which cardholder disputes may remain valid under the card plans. Any balance remaining after chargeback rights have expired will be disbursed to MERCHANT.

8.6 Security Interests. This Agreement will constitute a Security Agreement under the Uniform Commercial Code. MERCHANT grants to BANK a security interest in and lien upon: (i) all funds at any time in the Account (ii) all funds in diverted account (see Section 4.0), (iii) the Reserve Account (as defined below), (iv) future sales drafts, (v) all rights relating to this Agreement including, without limitation, all rights to receive any payments or credits under this Agreement and (vi) any other account MERCHANT has in any financial institution, (collectively, the "Secured Assets"). Upon request of BANK, MERCHANT will execute one or more financing statements or other documents to evidence and perfect this security interest. MERCHANT represents and warrants that no other party has a security interest in the Secured Assets. These security interest and liens will secure all of MERCHANT'S obligations under this Agreement and any other agreements between MERCHANT and BANK including, but not limited to, MERCHANT'S obligation to pay any amounts due and owing to BANK. With respect to such security interests and liens, BANK will have all rights afforded under the Uniform Commercial Code, any other applicable law and in equity. MERCHANT will obtain from BANK written consent prior to granting a security interest of any kind in the Secured Assets to a third party. Merchant represents and warrants that no other person or entity has a security interest in any property in which you have granted BANK a security interest hereunder. MERCHANT agrees that this is a contract of recoupment and BANK is not required to file a motion for relief from a bankruptcy action automatic stay to realize on any of the Secured Assets. Nevertheless, MERCHANT agrees not to contest or object to any motion for relief from the automatic stay filed by BANK. MERCHANT hereby grants BANK the right to offset by ACH any account MERCHANT has in ANY financial institution in order to collect any amount due from MERCHANT to BANK pursuant to this Agreement.

8.7 Reserve Account. (i) Establishment: Upon termination of this Agreement or upon BANK'S request and within BANK'S sole discretion, MERCHANT will establish and maintain a deposit ("Reserve Account") at BANK in an amount reasonably determined by BANK necessary to protect BANK'S Merchants' Choice Payment Solutions is a registered ISO/MSP of Woodforest National Bank, Houston, Texas

- interests under this Agreement. (ii) Funding: BANK has the right to debit the Account to establish or maintain funds in the Reserve Account. BANK may deposit into the Reserve Account funds it would otherwise be obligated to pay MERCHANT, for the purpose of establishing or maintaining the Reserve Account in accordance with this Section, if it determines such action is reasonably necessary to protect its interests. (iii) Funds: in no event will MERCHANT be entitled to return of Reserve Account funds before two-hundred seventy (270) days following the effective date of termination of this Agreement, provided however, that MERCHANT will remain liable to BANK for all liabilities occurring beyond such two-hundred seventy (270) day period. BANK will have sole control of the Reserve Account. In the event of a bankruptcy proceeding and the determination by the court that this Agreement is assumable under Bankruptcy Code Section 365, as amended from time to time, MERCHANT must establish or maintain a Reserve Account in an amount satisfactory to BANK.
- 8.8 Recoupment and Set-Off. BANK has the right of recoupment and set-off from the Reserve Account or the Account. This means that it may offset any outstanding/uncollected amounts owed from: (i) any amounts it would otherwise be obligated to deposit into the MERCHANT Account, and (ii) any other amounts MERCHANT may owe BANK under this Agreement or any other agreement. MERCHANT acknowledges that in the event of a bankruptcy proceeding, in order for MERCHANT to provide adequate protection under Bankruptcy Code Section 362 to BANK, MERCHANT must create or maintain the Reserve Account as required by BANK, and BANK will have the right of offset against the Reserve Account for any and all obligations which MERCHANT may owe to BANK, without regard to whether the obligations relate to sales drafts initiated or created before or after the filing of the bankruptcy petition.
- 8.9 If MERCHANT is terminated for cause, MERCHANT acknowledges that BANK may be required to report MERCHANT'S business name and the names and other identification of its principals to the Member Alert to Control High-Risk (M.A.T.C.H.) maintained by MasterCard. MERCHANT expressly agrees and consents to such reporting in the event MERCHANT is terminated for any of the reasons specified as cause by VISA, MasterCard, and Discover Network. Furthermore, MERCHANT shall hold harmless BANK for claims which MERCHANT may raise as a result of such reporting.
- 8.10 Bankruptcy. MERCHANT will immediately notify BANK of any bankruptcy, receivership, insolvency or similar action or proceeding initiated by or against MERCHANT or any of its principals. MERCHANT will include BANK on the list and matrix of creditors as filed with the Bankruptcy Court, whether or not a claim may exist at the time of filing, and failure to do so will be cause for immediate termination or any other action available to BANK under applicable rules or law. MERCHANT acknowledges that this Agreement constitutes an executory contract to make a loan, or extend other debt financing or financial accommodations to or for the benefit of MERCHANT, and, as such, cannot be assumed or assigned in the event of MERCHANT'S bankruptcy.
- 8.11 In the event BANK and MERCHANT agree to any reduction of a rate or a fee set forth in this Agreement, merchant hereby agrees that said reduction shall result in an extension of the Term of this Agreement by three (3) years from the date said rate or fee reduction takes effect.
- 9.0 Notices.**
- 9.1 All notices and other communications required or permitted under this Agreement shall be deemed delivered when mailed first class, postage prepaid, addressed as follows:
- (a) If to BANK: Woodforest National Bank, P.O. Box 8339, The Woodlands, TX 77387-8339
- (b) If to MERCHANT, at the MERCHANT'S place of business as also stated on this Merchant Application or current mailing address on file with BANK.
- 10.0 Additional Terms.**
- 10.1 Card Plans. This Agreement is subject to the bylaws and rules promulgated by VISA, MasterCard, Discover Network, or any other card plan. The parties hereto are bound by and shall fully comply with these bylaws and rules and by such amendments or additions as may be made hereto. The parties hereto shall further comply with all Debit/ATM Network rules and regulations.
- 10.2 Inspection of Books and Records. Representatives of BANK may, during normal business hours, inspect, audit and make records of MERCHANT'S books, accounts, records and files pertaining to any card transactions. During the Term hereof, at the request of BANK, MERCHANT shall provide up to two (2) years of current financial statements and other related information that is requested by BANK. MERCHANT will preserve its records of any card sale and any refund or credit adjustment thereon for at least seven (7) years from the date of such sale, credit, refund or adjustment. MERCHANT agrees that BANK may obtain information from credit reporting agencies for the MERCHANT and its principals once a year during the Initial Term and any Renewal Term of this Agreement.
- 10.3 Confidentiality. MERCHANT will not use for its own purposes, will not disclose to any third party, and will retain in strictest confidence all information and data belonging to or relating to the business of BANK (including without limitation the terms of this Agreement), and will safeguard such information and data by using the same degree of care that MERCHANT uses to protect its own confidential information.
- 10.4 Privacy. Woodforest National Bank complies with the Bank Secrecy Act and the USA Patriot Act 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 or becomes a new customer of the financial institution. Our Customer Identification Program is designed to comply with all federal mandates. When MERCHANT opens an account or obtains a service from the bank, BANK will ask for owner/officer name, address, date of birth, and other information that will allow BANK to identify MERCHANT. BANK will also be asking MERCHANT to provide identifying documentation, such as driver's license or other forms of identification. BANK can and will refuse to open an account or provide services if adequate identification is not provided, or BANK is dissatisfied with the identification provided. BANK collects non-public personal information about MERCHANT from the following sources: Information received from on applications or other forms; Information about transactions with BANK, our affiliates, or others; and Information received from consumer reporting agencies. As required by the USA PATRIOT Act, BANK also collects information and takes actions necessary to verify MERCHANT identity. BANK may disclose all the information collected, as described above, to companies that perform marketing services on BANK'S behalf or to other financial institutions with which BANK has joint marketing agreements. BANK does not disclose any non-public personal information about our MERCHANTS to anyone, including our affiliates, except as permitted by law. Internally, BANK restricts access to non-public personal information about MERCHANTS to associates who need to know that information to provide customer support and or to maintain records. BANK'S internal conduct clearly defines the manner in which an associate may access, use, or disseminate non-public information. BANK maintains physical, electronic, and procedural safeguards that comply with federal standards to guard MERCHANT'S non-public personal information. If MERCHANT decides to close account(s) or become an inactive merchant, BANK will adhere to the policies and practices as described in this notice.
- 10.5 Force Majeure. BANK shall not be liable for any damages resulting from any delay in performance or non-performance caused by circumstances beyond BANK'S control including, but not limited to acts of God, fire, flood, war, governmental action, accident, labor trouble or shortage, or other events of similar effect in connection with BANK'S obligation herein.
- 10.6 Amendment. MERCHANT acknowledges that the terms set forth herein including but not limited to fees, rates, and charges may be changed by BANK. MERCHANT agrees that any such changes shall be considered accurate and final unless MERCHANT disputes them in writing within 30 days of receipt of documentation showing said changes.
- 10.7 Section Headings. All section headings contained herein are for descriptive purposes only, and the language of such section shall control.
- 10.8 Assignability. This Agreement may not be assigned, directly or by operation of law, without the prior written consent of BANK.

- 10.9 Attorney's Fees and Costs. MERCHANT shall be liable for and indemnify BANK for any and all attorney's fees and other costs and expenses paid or incurred by the BANK in the enforcement hereof, or in collecting any amounts due from MERCHANT to BANK hereunder or resulting from any breach by MERCHANT of any of the terms or conditions of this Agreement.
- 10.10 Binding Effect: Governing Law; jurisdiction and Venue. Any action or proceeding on this Agreement by or against BANK shall be initiated and maintained under the jurisdiction of the State of Texas with venue in the courts of Montgomery County, in which case this Agreement shall be construed and governed by the laws of the State of Texas. If any provision of this Agreement shall be held to be invalid, illegal, or unenforceable, the remaining provisions shall remain in effect.
- 10.11 Survivability. The following sections shall survive the termination of this Agreement and shall remain enforceable after such termination: 2.11, 2.12, 2.16, 2.20, 2.21, 2.22, 2.25, 2.28, 2.32, 2.35, 2.36, 2.43, 2.52, 3.2, 3.4, 4.1, 6.1, 6.2, 6.3, 8.4, 8.5, 8.6, 8.7, 8.8, 8.9, 9.1, 10.3, 10.5, 10.9, 10.10, 10.11 and 10.14.
- 10.12 The rights conferred upon BANK in this Agreement are not intended to be exclusive of each other or of any other rights and remedies. Rather, each and every right of BANK at law or in equity will be cumulative and concurrent and in addition to every other right.
- 10.13 In the event MERCHANT chooses to participate in the Optional Merchant Club, the following Terms and Conditions shall apply: The term of enrollment is for one (1) year. The term shall be automatically and continually renewed for consecutive one-year terms unless the Merchant or Bank provides a written notice of non-renewal at least sixty (60) days prior to end of the then existing term. The fee for membership shall be charged per unit of equipment per month (terminal, printer, pinpad or any combination thereof). MERCHANT understands membership fee is in addition to fees charged by BANK in MERCHANT's Merchant Payment Card Agreement. In the event MERCHANT's Merchant Payment Card Agreement is terminated during the existence of any term of membership, the fee shall be paid for the remainder of the then existing term. Example: In the event a MERCHANT becomes a member and is terminated after seven (7) months, the remaining five (5) months of fees shall still be paid by MERCHANT to BANK. For all members in good standing, and subject to the terms herein, BANK shall provide equipment support or repair during the membership term. If the equipment cannot be repaired, it shall be replaced with refurbished equipment of comparable quality. MERCHANT agrees to pay any and all encryption fees. For any equipment shipped by BANK to MERCHANT hereunder, MERCHANT shall pay BANK the sum of \$29.95 per item to cover shipping and handling. MERCHANT agrees to pay BANK additional fees for Saturday or priority delivery. In the event BANK replaces any item of equipment for MERCHANT's faulty equipment, MERCHANT is required to send BANK the faulty equipment within thirty (30) days from the date MERCHANT receives the replacement equipment. In the event MERCHANT fails to comply with this Section, MERCHANT shall be required to pay BANK the full retail price for the replacement equipment immediately upon the expiration of said thirty (30) day period. Full membership benefits do not take effect for thirty (30) days following the Date of Enrollment. In the event BANK provides replacement equipment during the first thirty (30) days of membership, MERCHANT shall pay BANK the sum of \$75.00 per unit replaced. The following items are NOT covered under the membership and MERCHANT shall receive NO benefits for said items: wireless terminals, power packs, pin pad cables, check reader cables, printer cables, printer ribbons, or any other cable that would connect a peripheral device to the terminal, equipment which in the sole discretion of BANK has been subject to abuse, accidental damage, alteration, modification, tampering, negligence, misuse, faulty installation, lack of reasonable care, repair or service which in any way is not contemplated in the documentation for the equipment, equipment with alteration, tampering or defacing of the serial number or model number, any damage that occurs in shipment, any damage due to an act of God, failures due to power surges, cosmetic damage.
- 10.14 MERCHANT is liable for repayment to BANK for all valid chargebacks related to Debit and/or ATM Transactions. BANK will comply with Debit/ATM Networks' prevailing Rules and Regulations in processing any chargebacks which result from cardholder disputes. However, all disputes which are not or cannot be resolved through established chargeback procedures shall be settled between MERCHANT and the cardholder, and MERCHANT will indemnify BANK and will provide reimbursement for all expenses, including reasonable attorney's costs, which it may incur as the result of any cardholder claim which is pursued outside the Debit/ATM Network Rules and Regulations.
- 10.15 MERCHANT agrees to \$25 per hour, with one (1) hour minimum, research fee to be charged by BANK for research it performs at MERCHANT's request.
- 10.16 For purposes of compliance with Payment Card Industry Security Standards, MERCHANT is required to notify BANK in writing of any changes to the software type and version number from that originally stated within this Agreement. MERCHANT is liable to BANK for all losses and expenses incurred by BANK arising out of a failure to report changes to BANK.
- 10.17 MERCHANT must report to BANK its participation in any cash advance program outside of that offered by BANK. Failure to report participation in such a program shall result in immediate termination of MERCHANT account.

**11.0 Fleet Card Acceptance.**

- 11.1 If MERCHANT executes a Wright Express ("WEX") Merchant Agreement, MERCHANT understands that BANK will provide such agreement to WEX, but that neither BANK nor WEX shall have any obligation whatsoever to MERCHANT with respect to processing WEX Cards unless and until WEX executes WEX Merchant Agreement. If WEX executes WEX Merchant Agreement and MERCHANT accepts WEX cards, MERCHANT understands that WEX transactions are processed, authorized, and funded by WEX. MERCHANT understands that WEX is solely responsible for all agreements that govern WEX transactions and that BANK is not responsible and assumes absolutely no liability with regard to any such agreement or WEX transactions, including, but not limited to, the funding and settlement of WEX transactions. MERCHANT understands that WEX will charge additional fees for the services that it provides.
- 11.2 If MERCHANT accepts Voyager Cards, MERCHANT should adhere to the following Voyager Regulations:
- MERCHANT should check Fleet Cards for any printer restrictions at the point of sale,
  - If an increase in the number of Voyager transaction authorization calls from MERCHANT, not due to Voyager system outages, are in excess of 15% for a given month as compared to the previous month, Voyager may, in their sole discretion, deduct telephone charges not to exceed \$.25 per call for the increased calls from MERCHANT settlement of MERCHANT's Voyager transactions,
  - Settlement of Voyager transactions will generally occur by the fourth banking day after the applicable card transaction is processed. Voyager shall reimburse MERCHANT for the dollar amount of sales submitted for a given day by MERCHANT, reduced by the amount of chargebacks, tax exemptions, discounts, credits, and other fees,
  - For daily transmission of data, MERCHANT shall maintain true and complete records for not less than thirty-six (36) months from the date of generation of the data, and MERCHANT is responsible for the expense of retaining such sales data records and sales drafts,
  - In addition to the information provided in Section 6.3, in no event shall BANK's cumulative liability to MERCHANT for losses, claims, suits, controversies, breaches or damages for any cause whatsoever in connection with Voyager transactions, exceed the lesser of \$10,000.00 or the Voyager transaction fees paid by MERCHANT for the two months prior to the action giving rise to the claim.

**12.0 Data Security.**

- 12.1 MERCHANT hereby warrants and represents that the POS Software, as listed on this Agreement is 100% accurate and that the POS Software used by the Merchant during the Initial Term or any Renewal Term of this Agreement is PCI-DSS Compliant as listed at [https://www.pcisecuritystandards.org/security\\_standards/vpa/](https://www.pcisecuritystandards.org/security_standards/vpa/). If MERCHANT conducts any business over the Internet or over a VOIP terminal, MERCHANT must: install and maintain a working network firewall to protect data accessible via the Internet; keep security patches up-to-date; encrypt Merchants' Choice Payment Solutions is a registered ISO/MSP of Woodforest National Bank, Houston, Texas



## MERCHANT PAYMENT CARD APPLICATION/AGREEMENT

stored data sent over open networks; use and update anti-virus software; restrict access to data by business "need-to-know"; assign a unique ID to each person with computer access to data by unique ID; regularly test security systems and processes; maintain a policy that addresses information security for employees and contractors; and restrict physical access to cardholder information. When outsourcing administration of information assets, networks, or data, MERCHANT must retain legal control of proprietary information and use limited "need-to-know" access to such assets, network, or data. Further, MERCHANT must reference the protection of cardholder information and compliance with the PCI Security Standards Council in contract with other service providers. If MERCHANT stores cardholder account numbers, expiration dates, and other personal cardholder data in a database, MERCHANT must follow VISA, MasterCard, and Discover Network guidelines on securing such data as outlined by the Visa Cardholder Information Security Procedures (CISP), MasterCard Site Data Protection (SDP), and Discover Information Security and Compliance Program (DISC). MERCHANT understands that failure to comply with this Section may result in fines, fees, assessments or requests for reimbursement by VISA, MasterCard, and/or Discover Network, and MERCHANT agrees to indemnify and reimburse BANK immediately for any fine imposed due to MERCHANT'S breach of this Section. For more information on the Payment Card Industry Security Standards, including each of the specific security programs, see [www.pcisecuritystandards.org](http://www.pcisecuritystandards.org).

### 13.0 American Express Card Acceptance

13.1 MERCHANT agrees to accept American Express Cards and agrees to adhere to the American Express Card Acceptance Agreement available at [www.merchantfoundry.com](http://www.merchantfoundry.com) under the Resources section.

## LEASE TERMS & CONDITIONS

14.0 Equipment. BANK agrees to lease to MERCHANT and MERCHANT agrees to lease from BANK the equipment identified in Section VI of this Agreement or such other comparable equipment BANK provides MERCHANT (the "Equipment"), according to the terms and conditions of this Agreement. BANK is providing the Equipment to MERCHANT "as is" and makes no representations or warranties of any kind as to the suitability of the Equipment for any particular purpose.

14.1 Effective Date and Term of Agreement.

(a) The Lease Agreement becomes effective on the earlier of the date BANK delivers any piece of Equipment to MERCHANT (the "Delivery Date") or acceptance by BANK. This Lease Agreement remains in effect until all of MERCHANT'S obligations and all of BANK'S obligations under it have been satisfied. BANK will deliver the Equipment to the site designated by MERCHANT.

(b) The term of this Lease Agreement begins on a date designated by BANK after receipt of all required documentation and acceptance by BANK ("the Commencement Date"), and continues for the number of months indicated on the Equipment Lease Agreement. THIS IS A NON-CANCELABLE LEASE FOR THE TERM INDICATED.

(c) MERCHANT agrees to pay an Interim Lease Payment in the amount of one-thirtieth (1/30th) of the monthly lease charge for each day from and including the Delivery Date until the date preceding the Commencement Date.

(d) MERCHANT ACKNOWLEDGES THAT THE EQUIPMENT AND/OR SOFTWARE LEASED UNDER THIS LEASE AGREEMENT MAY NOT BE COMPATIBLE WITH ANOTHER PROCESSOR'S SYSTEMS AND THAT BANK DOES NOT HAVE ANY OBLIGATION TO MAKE SUCH SOFTWARE AND/OR AND OR EQUIPMENT COMPATIBLE IN THE EVENT THAT MERCHANT ELECTS TO USE ANOTHER SERVICE PROVIDER. UPON TERMINATION OF THIS MERCHANT PROCESSING AGREEMENT MERCHANT ACKNOWLEDGES THAT EQUIPMENT AND/OR SOFTWARE LEASED UNDER THIS AGREEMENT MAY NOT BE ABLE TO BE USED WITH SAID SERVICE PROVIDER.

14.2 Site Preparation. MERCHANT will prepare the installation site(s) for the Equipment, including but not limited to the power supply circuits and phone lines, in conformance with the manufacturer's and BANK'S specifications and will make the site(s) available to BANK by the confirmed shipping date.

14.3 Payment of Amounts Due.

(a) The monthly lease charge is due and payable on the same day of each successive month thereafter of the lease period for each piece of lease equipment, except that the first payment of the monthly lease charge for each piece of Equipment is due and payable upon acceptance of the Equipment by MERCHANT. MERCHANT agrees to pay all assessed costs for delivery and installation of Equipment.

(b) In addition to the monthly lease charge, MERCHANT shall pay, or reimburse BANK for, amounts equal to any taxes or assessments on or arising out of this Agreement or the Equipment, and related supplies or any services, use or activities hereunder, including without limitation, state and local sales, use, property, privilege and excise tax, exclusive, however, of taxes based on BANK'S net income. Reimbursement of property tax calculation is based on an average tax rate.

(c) MERCHANT'S lease payments will be due despite dissatisfaction with the Equipment for any reason.

(d) Whenever any payment is not made by MERCHANT in full when due, MERCHANT shall pay BANK as a late charge, an amount equal to ten percent of the amount due but no less than \$5.00 for each month during which it remains unpaid (prorated for any partial month), but in no event more than the maximum amount permitted by law. MERCHANT shall also pay to BANK an administrative charge of \$10.00 for any debit we attempt to make against MERCHANT'S bank account that is rejected.

(e) In the event MERCHANT'S account is placed into collections for past due lease amounts, MERCHANT agrees that BANK can recover a collection expense charge of \$50 for each aggregate payment requiring a collection effort.

14.4 Use and Return of Equipment; Insurance

(a) MERCHANT shall cause the Equipment to be operated by competent and qualified personnel in accordance with any operating instructions furnished by BANK or the manufacturer. MERCHANT shall maintain the Equipment in good operating condition and protect it from deterioration, normal wear and tear excepted.

(b) MERCHANT shall not permit any physical alteration or modification of the Equipment, or change the installation site of the Equipment, without BANK'S prior written consent.

(c) MERCHANT shall not create, incur, assume or allow to exist any consensually or judicially imposed liens or encumbrances on, or part with possession of, or sublease the Equipment without BANK'S prior written consent.

(d) MERCHANT shall comply with all governmental laws, rules and regulations relating to the use of the Equipment. MERCHANT is also responsible for obtaining all permits required to operate the Equipment at MERCHANT'S facility.

(e) BANK or its representatives may, at any time, enter MERCHANT'S premises for purposes of inspecting, examining or repairing the Equipment.

(f) The Equipment shall remain BANK'S personal property and shall not under any circumstances be considered to be a fixture affixed to MERCHANT'S real estate. MERCHANT shall permit BANK to affix suitable labels or stencils to the Equipment evidencing BANK'S ownership.

(g) MERCHANT shall keep the Equipment adequately insured against loss by fire, theft, and all other hazards and MERCHANT shall provide proof of insurance. The loss, destruction, theft, or damage of or to the Equipment shall not relieve MERCHANT from MERCHANT'S obligation to pay the full purchase price or total monthly lease charges hereunder.

(h) MERCHANT may choose not to insure the Equipment and participate in the Equipment Service Program. The Equipment Service Program provides a replacement of the Equipment for as long as MERCHANT participates in the Program during the Lease Term. The Equipment Service Program includes (i) free comparable replacement terminal (new or refurbished) in the event of a defect or malfunction (terminal defects or malfunctions caused by acts of God are not covered by this Program), (ii) free shipping and handling on both the replacement terminal and return of the defective terminal, (iii) free overnight shipping and handling on replacement terminal if requested to 3:00pm ET (Monday-Thursday). If MERCHANT doesn't return damaged equipment, MERCHANT will be charged the full purchase price of the replacement equipment sent to MERCHANT. The monthly fee of \$9.95 for the optional Equipment Service Program is a per terminal fee. MERCHANT can choose to insure the Equipment and terminate MERCHANT'S participation in the program at any time by calling the Customer Service department.

14.5 Title to Equipment. BANK at all times retains title to the Equipment unless BANK agrees otherwise in writing. MERCHANT agrees to execute and deliver to BANK any statement or instrument that BANK may request to confirm or evidence BANK'S ownership of the Equipment, and MERCHANT irrevocably appoints BANK as MERCHANT'S attorney-in-fact to execute and file the same in MERCHANT'S name and on MERCHANT'S behalf. If a court determines that the leasing transaction contemplated by this Agreement does not constitute a financing and is not a lease of the Equipment, then BANK shall be deemed to have a first lien security interest on the Equipment as of the date of this Agreement, and MERCHANT will execute such documentation as BANK may request to evidence such security interest.

14.6 Return or Purchase of Equipment at End of Lease Period. Upon the completion of MERCHANT'S lease term or any extension thereof, MERCHANT will have the option to (a) return the Equipment to BANK, or (b) purchase the Equipment from BANK for its then fair market value, calculated as a percentage of the aggregate lease payments in accordance with the following: If the term of this Lease is forty- eight (48) months or more , the buyout option as a percentage of the aggregate lease payments shall be ten percent (10%). If the term of this lease is thirty-six (36) to forty-seven (47) months, the buyout option as a percentage of the aggregate lease payments shall be fifteen percent (15%). If the term of this lease is twenty-four (24) to thirty-five (35) months, the buyout option as a percentage of the aggregate lease payments shall be twenty percent (20%) or (c) after the final lease payment has been received by BANK, the Agreement will revert to a month by month rental at the existing monthly lease payment. If MERCHANT does not want to continue to rent the Equipment, then MERCHANT will be obligated to provide BANK with 30-day written notice to terminate and return the equipment to BANK. If BANK terminates the lease pursuant to Section 11(b) due to a default by MERCHANT, then MERCHANT shall immediately return the Equipment to BANK no later than the tenth business day after termination, or remit to BANK the fair market value of the Equipment as determined in good faith by BANK. BANK may collect any amounts due to BANK under this Section 7 by debiting MERCHANT'S bank account, and to the extent BANK is unable to obtain full satisfaction in this manner, MERCHANT agrees to pay the amounts owed to BANK promptly upon BANK'S request.

14.7 Software License. BANK retains all ownership and copyright interest in and to all computer software, related documentation, technology, know-how and processes embodied in or provided in connection with the Equipment other than those owned or licensed by the manufacturer of the Equipment (collectively "Software"), and MERCHANT shall have only a nonexclusive license to use the Software in MERCHANT'S operation of the Equipment.

14.8 Limitation on Liability. BANK 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 persons or property caused by the Equipment. BANK is not liable for the use or maintenance of the Equipment, its failure to operate, any repairs or service to it, or by any interruption of service or loss of use of the Equipment or resulting loss of business. Our liability arising out of or in any way connected with this Agreement shall not exceed the aggregate lease amount paid to BANK for the particular Equipment involved. In no event shall BANK be liable for any indirect, incidental, special or consequential damages. The remedies available to MERCHANT under this Agreement are MERCHANT'S sole and exclusive remedies.

14.9 Warranties.

- (a) All warranties express or implied, made to MERCHANT or any other person are hereby disclaimed including without limitation, any warranties regarding quality, suitability, merchantability, fitness for a particular use, quiet enjoyment or infringement.
- (b) MERCHANT warrants that MERCHANT will only use the Equipment for commercial purposes and will not use the Equipment for any household or personal purposes.

14.10 Indemnification. MERCHANT shall indemnify and hold BANK harmless from and against any and all losses, liabilities, damages and expenses, (including attorneys' fees) resulting from (a) the operation, use, condition, liens against, or return of the Equipment or (b) any breach by MERCHANT of any of MERCHANT'S obligations hereunder, except to the extent any losses, liabilities, damages or expenses result from our gross negligence or willful misconduct.

14.11 Default; Remedies.

- (a) If any debit of MERCHANT'S bank account initiated by BANK is rejected when due, or if MERCHANT otherwise fails to pay BANK any amounts due hereunder when due, or if MERCHANT defaults in any material respect in the performance or observance of any obligation or provision of this Agreement or any agreement with any of BANK'S affiliates, alliances or joint ventures, any such event shall be a default hereunder. Without limiting the foregoing, any default by MERCHANT under a Merchant Processing Agreement ("MPA") with BANK or with an Alliance or joint venture to which BANK is a party will be treated as a default under this agreement. Such a default would include a default resulting from early termination of the MPA, if applicable.
- (b) Upon the occurrence of any default, BANK may at our option, effective immediately without notice, either (i) terminate this lease and BANK'S future obligations under this Agreement, repossess the Equipment and proceed in any lawful manner against MERCHANT for collection of all charges that have accrued and are due and payable, or (ii) accelerate and declare immediately due and payable all monthly lease charges for the remainder of the applicable lease period together with the fair market value of the Equipment (as determined by BANK), not as a penalty but as liquidated damages for BANK'S loss of the bargain. Upon any such termination for default, BANK may proceed in any lawful manner to obtain satisfaction of the amounts owed to BANK and, if applicable, BANK'S recovery of the Equipment, including entering onto MERCHANT'S premises to recover the Equipment. In any case, MERCHANT shall also be responsible for BANK'S costs of collection, court costs and reasonable attorneys' fees, as well as applicable shipping, repair and refurbishing costs of recovered Equipment. MERCHANT agrees that BANK shall be entitled to recover any amounts due to BANK under this Agreement by charging MERCHANT'S bank account or any other funds of MERCHANT'S that come into our possession or control, or within the possession or control of BANK'S affiliates, alliances or joint ventures, or by setting off amounts that MERCHANT owes to BANK against any amounts BANK may owe to MERCHANT, in any case without notifying you prior to doing so. Without limiting the foregoing, MERCHANT agrees that BANK is entitled to recover amounts owed to BANK under this Agreement by obtaining directly from an alliance or joint venture to which BANK is a party and with which MERCHANT has entered into an MPA any funds held or available as security for payment under the terms of the MPA, including funds available under the "Reserve Account; Security Interest" section of the MPA, if applicable.

14.12 Assignment. MERCHANT may not assign or transfer this Agreement, by operation of law or otherwise, without BANK'S prior written consent. For purposes of this Agreement, any transfer of voting control of MERCHANT or MERCHANT'S parent shall be considered an assignment or transfer hereof. BANK WILL ASSIGN THIS LEASE AGREEMENT AFTER IT'S EXECUTION TO FIRST DATA GLOBAL LEASING (FDGL), A BUSINESS UNIT OF FIRST DATA MERCHANT SERVICES. AFTER SUCH ASSIGNMENT, BANK SHALL HAVE NO FURTHER OBLIGATION UNDER THE LEASE AGREEMENT.

- 14.13 Lease Guaranty. No guarantor shall have any right of subrogation to any of BANK'S rights in the Equipment or this Lease or against MERCHANT, and any such right of subrogation is hereby waived and released. All indebtedness that exists now or arises after the execution of this Agreement between MERCHANT and any guarantor is hereby subordinated to all of MERCHANT'S present and future obligations, and those of MERCHANT'S guarantor, to BANK, and no payment shall be made or accepted on such indebtedness due to MERCHANT from a guarantor until the obligations due to BANK are paid and satisfied in full.
- 14.14 Governing Law; Miscellaneous. This Agreement shall be governed by and will be construed in accordance with the laws of the State of New York (without applying its conflicts of laws principles). If any part of this Agreement is not enforceable, the remaining provisions will remain valid and enforceable.
- 14.15 Dispute Resolution and Arbitration. If the parties disagree as to any matter governed by this Agreement, the parties shall promptly consult with one another in an effort to resolve the disagreement. If such effort is unsuccessful, any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, except that equitable relief may also be sought in any court of competent jurisdiction.
- 14.16 Notices. All notices must be in writing, and shall be given (a) if sent by mail, when received, and (b) if sent by courier, when delivered; if to MERCHANT at the address appearing on the cover page of this Agreement, and if to BANK at 4000 Coral Ridge Drive, Coral Springs, Florida 33065 Attn: Lease Department. Toll free customer service: 1 (877) 257-2094.
- 14.17 Entire Agreement. This Agreement constitutes the entire Agreement between the parties with respect to its subject matter, supersedes any previous agreements and understandings and can be changed only by a written agreement signed by all parties. This Agreement may be executed in any number of counterparts and all of such counterparts taken together shall be deemed to constitute one and the same instrument. Delivery of an executed counterpart of a signature page of this Agreement by facsimile shall be effective as delivery of a manually executed counterpart of this Agreement.

**ELECTRONIC CHECK TERMS & CONDITIONS**

## 15.0 Electronic Check Services

15.1 If MERCHANT opts for and is approved to accept electronic check services as set forth in section XI. Merchant Acceptance I, MERCHANT agrees to abide by and be bound by the terms and conditions of BANK'S third party electronic check vendor, EZ CHECK, set forth below and also available at [www.ezchk.com](http://www.ezchk.com).

15.2 Term, Termination and Amendments. This Agreement shall have a term of one (1) year from the date of acceptance by an authorized representative of EZCheck. This Agreement will renew for successive one year terms unless terminated by either party with written notice to the other at least thirty (30) days prior to the termination of the then existing term. In the event EZCheck changes the Fees, Rates or Check Limits, Merchant may terminate this Agreement upon thirty (30) days written notice to EZCheck. EZCheck may terminate this Agreement at any time upon written notice to Merchant. This Agreement, plus any addenda, including Fees, Rates and Check Limit, may be changed or amended from time to time by EZCheck by providing Merchant with written notice. Amendments to Fees, Rates and Check Limit shall take effect immediately. Other such amendments shall be effective thirty (30) days from mailing. If Merchant terminates this Agreement prior to the termination date of the then existing term, for any reason except as expressly set forth above, Merchant shall be subject to pay EZCheck an amount equal to the greater of (a) \$125, or (b) six (6) months of the current Monthly Minimum and Merchant Club fees for each Merchant location. Except as specifically provided herein, this Agreement may not be altered, amended, or otherwise varied except by written mutual agreement of the parties.

15.3 Service Type. Merchant agrees to utilize EZCheck's Electronic Check Transfer (ECT) Service as indicated by the Merchant's initials, (initial only one) and solely for point of sale transactions at the location(s) listed in this Agreement.

(a) \_\_\_\_\_ GUARANTEE. EZCheck shall purchase 100% of the face amount of the check, up to the Check Limit, for any approved ECT transaction that meets all Warranty Requirements and Representations on the reverse side of this Agreement. Merchant acknowledges that EZCheck shall establish the Check Limit as part of the New Account Information materials. EZCheck may, at its sole discretion, increase or decrease the Check Limit upon written notice.

(b) \_\_\_\_\_ NON-GUARANTEE. EZCheck shall have zero liability on any dishonored check accepted by Merchant. Merchant agrees that there will be no payment for any loss from check transactions processed by EZCheck that are returned unpaid by either the Checkwriter's bank or the ACH Network. Merchant agrees to be liable for all ECT transactions that are returned, dishonored, reversed or that cannot be collected through Checkwriter's account and that are not subsequently covered by debit against Merchant Account.

15.4 Merchant Acceptance. This Agreement includes all of the terms and conditions contained on the front and back of this Agreement. This Agreement is not valid and binding until signed by an authorized manager of EZCheck. Merchant authorizes EZCheck or agent of EZCheck, or any credit reporting agency used by EZCheck, to make whatever inquiries that EZCheck deems appropriate to investigate, verify or research references, statements or data obtained from Merchant for the purpose of this application or any application for accompanying POS terminal(s) or equipment financing.

15.5 Personal Guarantee. To induce and in consideration of EZCheck acceptance of this Agreement, the undersigned (herein referred to as "Guarantor") unconditionally, personally, individually, jointly and severally guarantees performance of the Merchant's obligations under this Agreement and payment of all sums due hereunder and hereby continues to personally indemnify EZCheck for any and all funds due from Merchant under the terms of this Agreement.

15.6 ACH Debit/Credit Authorization. Merchant hereby authorizes EZCheck/BANK in accordance with this Agreement to initiate debit/credit entries to Merchant's Account, as indicated per the attached copy of a voided check from the Merchant. The authority is to remain in full force and effect until (a) EZCheck/BANK has received written notification from Merchant of its termination in such a manner as to afford EZCheck/BANK reasonable opportunity to act on it; and (b) all obligations of Merchant to EZCheck/BANK that have arisen under this Agreement have been paid in full.

15.7 Fees and Rates. Merchant shall pay EZCheck the Fees and Rates set forth in this Agreement plus all applicable taxes, as amended from time to time by EZCheck. The Transaction Fee is the charge per transaction for all transactions charged to EZCheck by reason of Merchant's use of the Service. The Base Discount Rate shall be applied to the face amount of all checks processed for authorization by EZCheck, and debited daily from Merchant's funding credit. The Merchant Club Fee is a monthly fee for services associated with POS equipment maintenance and customer support as outlined in Paragraph 21 below. EZCheck reserves the right to change at its discretion, any Fees, or Rates by giving written notice to Merchant. Such changes shall be effective as of the date of the notice. Merchant's failure to give EZCheck written notice of termination of this Agreement after such notice of changes shall be deemed to constitute acceptance of the changes.

15.8 Payment. All Fees and Rates are due and payable upon receipt. Unless otherwise agreed by EZCheck in writing, Merchant authorizes EZCheck to debit all payments owing to EZCheck under this Agreement (including all chargebacks) and to credit all amounts owing to Merchant under this Agreement to Merchant's Account. If there are insufficient funds in Merchant's Account to pay amounts owed to EZCheck, including delinquent fees, Merchant shall immediately reimburse EZCheck upon demand. EZCheck may, at its option, offset such amount against any amounts due Merchant from EZCheck, including funding of transactions, under this or any other agreement between Merchant and EZCheck. A delinquency charge of 1-1/2 percent per month or the highest amount permitted by law, whichever is lower, shall be added to the outstanding balance of any account 20 days delinquent. Without

prejudice to its rights stated in paragraph 17, EZCheck reserves the right to suspend its services and obligations to Merchant, including the payment of ECT transactions due and all ECT transactions previously authorized, during any period which Merchant's account is delinquent. Continuance of service and payment during any period of delinquency shall not constitute a waiver of EZCheck rights of suspension or termination. For any check or ACH debit in payment of services or charges provided herein, Merchant agrees to pay EZCheck a Returned Item Fee of \$25 for each such payment that is not paid by merchant's bank upon presentment. Merchant agrees that the Return Item Fee may be debited from its ACH account.

15.9 ECT Process. For each ECT transaction that EZCheck approves, EZCheck shall initiate via the Automated Clearing House (ACH) system an Electronic Funds Transfer (EFT) credit to Merchant's Account in the amount of such transaction as part of an ECT batch credit less applicable Rates and/or Fees. Such credit shall occur within three banking days following Merchant's regular transmission to EZCheck for processing the saved ECT transactions ("ECT batch"). Such credit shall occur regardless of whether or not customer's ECT transaction is paid by consumer's financial institution. EZCheck reserves the right to decline to process any transaction as an ECT transaction.

15.10 Transactions Qualifying For ECT. Only transactions (a) originally made payable to Merchant, (b) for which the MICR number imprinted on the check is read and approved by the check reader device working in conjunction with EZCheck's system are eligible for EFT credit to Merchant's Account. ECT transaction as used herein shall include only a transaction for the contemporaneous purchase of goods or services and shall not include transactions for cash or for payment on an account or a check already due Merchant.

15.11 Warranty Requirements. EZCheck will reimburse Merchant for one check per ECT transaction that is returned unpaid, up to the Check Limit, which meets all of the following requirements: (a) check must be a first party check drawn on a United States or Canadian financial institution and must be made payable to Merchant, (no credit card convenience checks, traveler's checks or third party checks); (b) the name of the individual or company must be imprinted on the check by the check manufacturer, (no starter or temporary checks); (c) if P.O. Box is used or address is not imprinted by the check manufacturer, a physical address must be written on the check; (d) Merchant shall have made an inquiry to EZCheck according to EZCheck's authorization procedures and received an approval code; (e) EZCheck Merchant Number, check writer's telephone number including area code and identification type and number used for authorization must be written on the face of the check; (f) the signature and physical description of check writer must reasonably correspond to any signature and description contained in the piece of identification used for authorization; (g) the signature on the signature block must not be substantially different from the name imprinted on the check; (h) the date of the check must be no more than one day from the actual inquiry date to EZCheck, (no Pre- or Post-Dated checks); (i) the amount authorized by EZCheck and the amount shown in words and figures on the check must all agree; (j) and the check, if processed as a paper item and manually deposited in Merchant's Account must be received by EZCheck for purchase within thirty (30) days of the date the check was authorized. Warranty does not apply to a check on which payment has been stopped or authorization revoked due to disputes over payment of goods and/or services between Merchant and Customer.

15.12 Representations. Merchant represents and warrants with respect to all ECT transactions submitted by Merchant to EZCheck under this Agreement that (a) the checkwriter has authorized the debiting of his/her account and that the ECT transaction is in all respects properly authorized and in an amount agreed to by the customer; (b) Merchant received a signed EFT receipt from the checkwriter and either the checkwriter or Merchant voided the paper check to which the ECT transaction relates; (c) the ECT transaction represents an obligation of the person who is tendering the check and the ECT transaction is for merchandise actually sold or rented or services actually rendered for the actual price of such merchandise or services (including tax) and does not involve any element of credit for other purposes; (d) the signature and physical description of the checkwriter reasonably correspond to any signature and description contained in the piece of identification and the signature on the ECT receipt is not substantially different from the name imprinted on the check to which the ECT transaction relates; (e) the amount of the ECT transaction and the amount on the ECT receipt all agree and are not the subject of any dispute, setoff or counterclaim and the date of the ECT transaction accurately coincides with the date the transaction actually occurred; (f) Merchant has no reason to believe or have notice of any fact, circumstance or defense which would impair the validity or collectibility of the checkwriter's obligation or relieve the checkwriter from liability for the ECT transaction; (g) the check to which the ECT transaction relates is a personal check and not a business check or payroll check; (h) the ECT transaction is not the result of a phone order, mail order or internet order; (i) the checkwriter shall have signed a separate ECT receipt for each ECT transaction processed; (j) and Merchant may not split the sale among multiple payment authorizations to circumvent the established Check Limit. No split sales. Merchant agrees to indemnify and hold EZCheck harmless for any losses, liabilities, cost, expenses and/or consequential damages whatsoever incurred by EZCheck as a result of a breach by Merchant of any of these representations.

15.13 Assignment Of Checks/ECT Transactions. By the execution of this Agreement, Merchant ASSIGNS, TRANSFERS and CONVEYS to EZCheck all of Merchant's rights, title and interest in any check or ECT transaction submitted to or processed by EZCheck for reimbursement under this Agreement and agrees, at EZCheck's request, to endorse such checks and to take any further action reasonably deemed necessary by EZCheck to aid in the enforcement of such rights, including but not limited to providing a copy of the sales invoice, sales contract or work order for which the check was written or the ECT transaction was authorized.

15.14 Chargeback or Reassignment of ECT Transactions or Checks. EZCheck may chargeback to Merchant and debit Merchant's Account for any ECT transaction processed by EZCheck or any check reimbursed by EZCheck pursuant to this Agreement in any of the following circumstances; (a) the goods and/or services for which the check or ECT transaction was issued have been returned to Merchant, have not been delivered by Merchant, or are claimed by the purchaser to have been unsatisfactory; (b) Merchant has received full or partial payment or security in any form whatsoever for secure payment of the check or ECT transaction, or the goods or services for which the ECT transaction was issued were initially delivered on credit or under a lease; (c) the business transaction for which the ECT transaction or check was tendered is for any reason illegal, void, invalid or a court of law determines that the check in whole or in part is not due and payable by the checkwriter; (d) Merchant has failed to comply with the terms and conditions of this Agreement including, but not limited to, the Warranty Requirements ; (e) the ECT transaction was not a qualifying transaction as defined in paragraph 6; (f) Merchant failed to comply with any of the representations made in paragraph 8; (g) a duplicate ECT transaction was received and processed or the original paper check was deposited, thereby creating a duplicate entry against the checkwriter's financial institution account; (h) Merchant, or any of its owners, agents or employees intentionally altered the check to proceed the ECT transaction with reason to know that it was likely to be dishonored (including having received a non-Approval Code) or that the identification used was forged or did not belong to the customer; (i) the ECT receipt was incomplete or unsigned; (j) a legible copy of the ECT receipt is not received by EZCheck within 7 days of a request by EZCheck; or (k) the customer disputes authorizing the ECT transaction or the validity or accuracy of the ECT transaction debit to his account; or (l) if Merchant has any outstanding items with EZCheck or EZCheck affiliates, settlement banks or leasing companies. Merchant shall immediately notify EZCheck upon the happening of any of the above circumstances. EZCheck may also chargeback to Merchant any amount over the Check Limit where EZCheck has neither received payment for such ECT transactions from the checkwriter or checkwriter's financial institution. If a check is reassigned as provided herein, EZCheck may debit Merchant's Account in the amount reimbursed by EZCheck for the check, and upon request, Merchant shall remit the amount of the check to EZCheck. Upon chargeback or reassignment of a check, EZCheck shall have no further liability to Merchant. Following termination of this Agreement, Merchant shall continue to bear initial responsibility for any chargebacks and adjustments made under this paragraph.

15.15 Collection And Returned Check Fees. Merchant agrees that EZCheck shall be entitled to collect from the check writer and retain any fees of exemplary damages in addition to the check amount, which are allowed by law. Merchant agrees to follow procedures and post all notices that in

EZCheck's opinion may be required for it to collect any such amounts arising from returned or dishonored checks or unpaid ECT transactions. For checks or ECT transactions that do not qualify for guarantee, (either the items do not meet the requirements under this Agreement or the Merchant utilizes the Non-Guarantee ECT service), the Merchant may elect to utilize EZCheck's collection services. Merchant will receive a reimbursement payment equal to 65% of the amount collected of the face value of the check. Should Merchant accept payment for items that have been reimbursed by EZCheck, or submitted to EZCheck for collection, Merchant shall notify EZCheck within 24 hours of collecting payment and Merchant shall be responsible for collecting all applicable check fees. EZCheck shall bill the Merchant for all applicable fees and have no further liability under this Agreement.

15.16 Deposit Of Paper Checks. Any transaction which: (a) does not qualify as an ECT transaction, as described in paragraph 6 above; or (b) does not meet all of the representations described in paragraph 8, must be physically deposited by Merchant to Merchant's Account. Merchant will forward or notify Merchant's depository bank to forward returned checks directly to EZCheck for collection efforts within 30 days of authorization.

15.17 Merchant Account. Merchant agrees to maintain a commercial demand deposit checking account designated by Merchant for use in conjunction with ECT services. Merchant agrees to immediately reimburse EZCheck and ODFI for any shortfalls that occur due to non-sufficient funds in Merchant Account that are covered by EZCheck. Merchant also agrees to authorize EZCheck to suspend crediting of ECT transactions to Merchant Account, without prior notice to Merchant, if Merchant should breach or fail to comply with any terms of this Agreement, or if either EZCheck or ODFI in its sole opinion deems itself at risk relative to any services performed under this Agreement.

15.18 Reporting and Reconciliation. For transactions provided for under this Agreement, EZCheck will provide Merchant with transaction volume reporting and transaction fee record keeping in a format and manner to be determined by EZCheck. Merchant agrees to notify EZCheck promptly of any discrepancies between Merchant's records or bank statements and the information in the reports provided by EZCheck. If Merchant fails to notify EZCheck within 60 days of the transaction of any such discrepancy or funding error, Merchant shall be precluded from asserting any losses, claims or liability against EZCheck arising from such discrepancies or errors.

15.18 Rules and Regulations. Merchant agrees to comply with current National Automated Clearing House Association (NACHA), rules and regulations ("Rules") regarding the processing of ECT transactions. EZCheck will make copies of all such Rules available to Merchant upon Merchant's request. Such Rules are hereby made part of this Agreement and incorporated herein by this reference. Merchant agrees to hold EZCheck harmless for any liability due to Merchant's noncompliance with NACHA rules.

15.19 EZCheck Procedures. EZCheck shall supply Merchant with its ECT Quick Reference Guide ("ECT Guide") as may be changed from time to time by EZCheck, the terms of which are incorporated into this Agreement. Merchant agrees to comply with and to be bound by additional items contained in the ECT Guide as amended from time to time. To the extent that there is any conflict between the ECT Guide and terms of this agreement, the terms of this Agreement shall govern.

15.20 Settlement Advance. As a condition of providing services under this Agreement, or continued processing of ECT transactions, Merchant may be required, at the option of EZCheck, to fund and maintain an advance ("Settlement Advance") with ODFI in an amount to be determined by EZCheck in its sole discretion based on Merchant's processing history and potential risk of loss to EZCheck. Merchant hereby acknowledges and agrees that any Settlement Advance will be deposited in an EZCheck account for exclusive use by EZCheck or ODFI for purposes of offsetting any Returns or other Merchant obligations under the Agreement not recoverable from Merchant Account. If Merchant's Settlement Advance falls below the required amount, Merchant hereby authorizes EZCheck to immediately replenish the Settlement Advance to an amount to be determined by EZCheck via an ACH debit to Merchant Account or by a direct deposit to the Settlement Advance account within twenty-four (24) hours after verbal or written notification from EZCheck of the replenishment requirement. In the event of fraud or breach of this Agreement by Merchant the Settlement Advance may be funded immediately at EZCheck's election via an ACH debit to Merchant's Account or applying funds from ECT transactions due Merchant. No interest will be paid on the Settlement Advance. In addition, Merchant hereby acknowledges and agrees that EZCheck may use the Settlement Advance in whatever manner it desires, i.e., commingling with other merchant funds, etc., subject to EZCheck's requirement, should this Agreement be terminated, to refund any remaining Settlement Advance balance ninety (90) days after the termination date ("Termination Period"). Merchant hereby grants EZCheck and ODFI a security interest in any Settlement Advance that EZCheck or ODFI may enforce for purposes of securing any obligation owed by Merchant under this Agreement without notice or demand to Merchant. Merchant's obligation to maintain a Settlement Advance shall survive the termination of this Agreement for the duration of the Termination Period during which time EZCheck's and ODFI's security interest shall continue.

15.21 Right of Setoff. Merchant hereby acknowledges and agrees that EZCheck shall have a right to setoff against any and all fees or other funds owed EZCheck by Merchant under this Agreement.

15.22 Retention Of EFT Receipts. Merchant agrees to have the checkwriter sign an EFT receipt in a form approved by EZCheck for each ECT transaction processed through EZCheck. Merchant agrees to maintain the signed EFT receipt for a minimum period of two years from the date of the transaction or for the period specified by the rules of the NACHA, whichever is longer. Upon request by EZCheck, Merchant shall promptly produce either the original or a legible copy of the EFT receipt to EZCheck within seven days of EZCheck's request. Merchant agrees upon reasonable notice and during normal business hours that EZCheck may audit Merchant for its compliance with this requirement.

15.23 Non-Guarantee. If Merchant utilizes EZCheck's Non-Guarantee services, information is given only to assist Merchant in deciding whether or not to accept a check. EZCheck does not guarantee the accuracy or completeness of the information and there will be no payments to Merchant by EZCheck for any loss from check transactions processed by EZCheck. Merchant assumes all risk on checks accepted by Merchant and processed by EZCheck and EZCheck's liability on any check processed through the Non-Guarantee service shall be zero.

15.24 Equipment. EZCheck will replace or repair equipment for Merchants that are members of the 'Merchants Club' upon Merchant's request. A swap fee of \$29.95 will be charged per equipment item replaced. If replacement equipment is mailed to Merchant, it is Merchant's responsibility to return defective equipment to EZCheck's office within 7 business days or Merchant will be deemed to have purchased equipment and be billed for such equipment. A fee of \$40.00 per hour plus the cost of parts will be charged for any repair of equipment beyond ordinary wear and tear. A reprogramming fee of \$15.00 will be charged for each occasion that a piece of equipment is reprogrammed for additional features or different information. Merchant shall not permit persons other than authorized representatives of EZCheck to adjust, maintain, program or repair any equipment. Merchant shall bear the entire risk of loss, theft, or damage of or to equipment. There is a 90-day manufacturer's warranty on sold equipment.

15.25 Hold Harmless. Merchant agrees to promptly inform EZCheck of collection or dispute of any amounts recorded, or items submitted, to EZCheck and to hold EZCheck harmless for any liability arising from Merchant's failure to do so.

15.26 Credit Law Compliance. Merchant certifies that it has a legitimate business need, in connection with a business transaction involving the consumer, for the information provided by EZCheck under this Agreement. Merchant also certifies that the information provided by EZCheck will only be used for permissible purposes as defined in the Fair Credit Reporting Act, and applicable state laws, with the exception that the information will not be used for employment purposes, and will not be used by Merchant for any purpose other than one transaction between Merchant and customer. Merchant agrees that neither it nor its agents or employees will disclose the results of any inquiry made to EZCheck except to the person about whom such inquiry is made and in no case to any other person outside the Merchant's organization and that Merchant shall defend, and hold harmless, EZCheck for all liability resulting directly or indirectly from any disclosure forbidden herein. If Merchant decides to reject any transaction, either wholly or partly because of information obtained from EZCheck, Merchant agrees to provide the customer with all information required by law or EZCheck.

15.27 Use of EZCheck's Materials. Merchant shall have the use of decals, identification data and other material furnished by EZCheck during the term of this Agreement. Merchant shall not permit any person other than its own officers or employees at subscribing locations to use the EZCheck Merchant Number assigned by EZCheck. Merchant agrees that upon termination it will return or destroy all EZCheck materials and return, in good condition, all EZCheck's equipment. The monthly fees to Merchant will apply for all months or fractions of a month any materials or equipment remain in use.

15.28 Use of Merchant Information. Merchant agrees that EZCheck may use any credit information provided to EZCheck or an EZCheck affiliate for EZCheck's ECT credit review. Merchant also agrees that EZCheck may share any experiential information it has regarding Merchant with any EZCheck affiliate.

15.29 Assignment of Agreement. Merchant may assign this Agreement only with prior written consent of EZCheck. EZCheck may freely assign this Agreement, its rights, benefits of duties hereunder. This Agreement shall insure to the benefit of and be binding upon the successors and assigned of EZCheck and the heirs, executor, administrators, successors, and assigns of Merchant.

15.30 Application. In connection with this Agreement, Merchant has executed and delivered an Application containing, among other things, information describing Merchant's business and the individuals who are the principal owners of Merchant. Merchant warrants that all information and statements contained in such Application are true, correct and complete. Merchant further agrees to promptly notify EZCheck of any and all changes which may occur from time to time regarding any information contained in such Application, including but not limited to, the identity of principal owners and the type of goods and services provided. EZCheck reserves the right to immediately terminate this Agreement based upon the nature of changes reported by Merchant or discovered by EZCheck. Merchant and principal owner(s), identified on the Application shall be jointly and severally liable to EZCheck, and remain liable for any and all loss, costs and expense suffered or incurred by EZCheck, resulting from incorrect or incomplete information contained in Application or Merchant's failure to report all changes to EZCheck in accordance herewith. If, in EZCheck's sole judgment, a significant discrepancy exists between Merchant's actual processing activity and the activity described in Merchant's Application, EZCheck may immediately and without notice, suspend all processing and funding activity until EZCheck, in its sole opinion, feels confident in allowing subsequent processing activity.

15.31 Legal Responsibility. In the event of Merchant's violation of the terms of this Agreement, Merchant agrees to pay all cost, including reasonable attorneys' fees, for steps taken by EZCheck whether by suit or otherwise, to defend, preserve or enforce its rights under this Agreement and EZCheck shall have the right to immediately repossess all equipment owned by EZCheck. In the event of any legal action with third parties, customers, businesses, or regulatory agencies concerning any transaction or event arising under this Agreement, Merchant agrees to: (a) promptly notify EZCheck of the claim or legal action; (b) reasonably cooperate with EZCheck in the making of any claims or defenses and; (c) provide information, assist in the resolution of the claims and make available at least one employee or agent who can testify regarding said claims or defenses. EZCheck and Merchant shall each be responsible for its own attorneys' fees and court cost except as otherwise provided by this paragraph.

15.32 Warranty Limitations. Except as expressly set forth herein, EZCheck makes no warranty, express or implied, and it is agreed that no implied at law warranty shall arise from this Agreement or from performance by EZCheck. In no event shall EZCheck be liable to Merchant or to any other person for any loss or injury to earnings, profits or goodwill or for any incidental or consequential damages. Merchant agrees that a decision to reject any check or ECT transaction, driver's license or other forms of identification or payment for its products and/or services shall be made solely Merchant's own responsibility. Notwithstanding anything to the contrary in this Agreement, in no event shall EZCheck's liability under this Agreement exceed the total amount of fees paid to EZCheck by Merchant pursuant to this Agreement during the preceding 12-month period.

15.33 Notices. Any notice or other communication required or permitted to be given hereunder shall be in writing and shall be hand delivered or delivered by facsimile transmission or overnight courier or U.S. Postal Service addressed or transmitted to the party to be notified at such party's address or number as provided on the front of this Agreement or at such party's last known address or number. Any notice delivered hereunder shall be deemed effective upon delivery, if hand delivered or sent by overnight courier, or upon deposit with the U.S. Postal service, and upon receipt, as evidenced by the date of transmission indicated on the transmitted material if by facsimile transmission. Merchant's continued use of the affected service after receipt of such notice will evidence Merchant's continued use of the affected service after receipt of such notice. The parties addressed may be charged by written notice to the other party as provided herein.

15.34 Force Majeure. EZCheck shall not be held responsible for any delays in or failure of suspension of service caused by mechanical or power failure, strikes, labor difficulties, fire, earthquakes, inability to operate or obtain service for its equipment, unusual delay in transportation, act of God, or other causes reasonably beyond the control of EZCheck.

15.35 Covering Law and Jurisdiction. Merchant agrees to comply with all application laws, rules and regulations relating to the services provided hereunder. This Agreement plus any addenda attached herein is the entire Agreement between the parties concerning the processing of electronic and paper checks, and supersedes all previous understanding, representations and agreements in relation to its subject matter. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS. Any suit brought relating to this Agreement MUST be brought in Montgomery County, Texas.

15.36 Severability. If any provision of this Agreement, or the application of such provisions to any person or circumstance, is declared by a court of competent jurisdiction to be invalid, illegal or unenforceable for any reason, such fact shall not affect the remaining provisions to persons or circumstances other than those to which it is held invalid, and in lieu of each such provision there shall be substituted a new provision as similar as possible to the provision declared invalid, illegal or unenforceable.

15.37 Waiver. All rights and duties within this Agreement are material and time is of the essence. No waiver of any right hereunder shall be deemed effective unless in writing executed by the waiving party. The parties agree that no failure to exercise and no delay in exercising, any right hereunder on the part of whether party shall operate as a waiver of any such right. The parties agree that no single or partial exercise of any right hereunder shall preclude its further exercise.

15.38 Survivability. All representations, warranties, indemnities and covenants made herein shall survive the termination of this Agreement and shall remain enforceable after such termination.

15.39 Entire Agreement. This Agreement together with any Addenda constitutes a fully integrated agreement and the entire Agreement between the parties with respect to its subject matter. All prior or contemporaneous agreements, understandings or representations in relation to the subject matter of this Agreement are merged herein.