# MERCHANT CARD PROCESSING AGREEMENT

This Merchant Card Processing Agreement is for merchant card payment processing services among the Merchant that signed the Merchant Application, the Merchant Bank, the Processor,. The Processor and the Merchant Bank are collectively hereinafter referred to as the "Bank". Subject to the requirements of the Operating Rules, Processor and Merchant Bank reserve the right to allocate Bank's duties and obligations amongst themselves as they deem appropriate in their sole discretion, and Merchant Bank or Processor may jointly or individually assert or exercise any rights or remedies provided to Bank hereunder.

Merchant Bank does not sponsor Processor into the Discover® Network, is not providing or agreeing to provide Merchant any services hereunder with respect to Discover Network Card transactions, does not determine or approve or agree upon any fees, charges, pricing, or any other terms and conditions, relating to Discover Network Card transactions, and has no responsibility or liability to Merchant for Discover Network Card transactions. Nor does Merchant Bank provide or agree to provide Merchant any services hereunder or have any responsibility or liability to Merchant with respect to any online (PIN) based debit or electronic benefit transfer transactions, or any JCB, American Express, Diners Club/Carte Blanche, or other Card type transactions (other than Visa and MasterCard credit, debit and stored value Card transactions other than online (PIN) based transactions), any CrossCheck or other Check Services transactions, Tender Card or other merchant gift or loyalty card transactions, or any other services specified in the Merchant Application as covered in whole or in part by this Agreement but as not being provided by Merchant Bank. To the extent applicable to Discover Network Cards or Discover Network Card transactions, or to any of the other types of Cards, transactions or services referred to above or in the Merchant Application as not being provided by Merchant Bank, any reference herein or in any of the other documents constituting part of the "Merchant Agreement" (as defined below) to the terms "Bank" or "Merchant Bank" (except only to the extent the reference constitutes a complete disclaimer of responsibility or liability on the part of Bank or Merchant Bank, or constitutes an obligation on the part of Merchant to indemnify, defend or hold harmless Bank or Merchant Bank from or against any responsibility or liability ) means Processor only.

The appendices, addenda, schedules, Operating Guide and Fee Schedule that accompany this Merchant Card Processing Agreement, as amended from time to time as provided herein, are part of the terms and conditions of this Merchant Agreement, as are the Merchant Application and the Operating Rules, and are individually and collectively hereinafter referred to as the "Merchant Agreement."

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

According to the processing services selected by Merchant on the Merchant Application and, in accordance with the terms of this Merchant Agreement and applicable Operating Rules, Merchant agrees to participate in the Bank's Card processing program by honoring Cards in accordance with this Merchant Agreement; and to submit Transaction Receipts, Credit Transaction Receipts and other electronic data to Bank for the Card Program services provided by Bank.

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

With respect to MasterCard Transactions:
a)    The Merchant Agreement is not effective and may not be modified in any respect without the express written consent of Merchant Bank.

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

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

**1.  MERCHANT'S APPLICATION AND INFORMATION.**  By completing the Merchant Application, Merchant applies for the Card Program services covered by the Merchant Application and this Merchant Agreement. In their sole and absolute discretion, Processor and Merchant Bank may accept or reject Merchant's Merchant Application. Merchant may present Transactions to Bank only for the activities and in the volumes described on the Merchant Application, including the percentage of Mail/Phone Order and Electronic Commerce Transactions.

**2.  MERCHANT'S GENERAL DUTIES.**

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

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

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

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

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

**3.  PROCEDURES FOR CARD TRANSACTIONS.**

3.1    **Honoring Cards.**

(a)    Visa and MasterCard. If appropriately indicated herein, Merchant shall be a Limited Acceptance Merchant, which means that Merchant has elected to accept only certain Visa and MasterCard card types as indicated on the Merchant Application, or via later notification. Bank has no obligation other than those expressly provided under the Operating Rules and applicable law as they may relate to Limited Acceptance. Bank's obligations do not include policing card types at the point of sale. Merchant will be solely responsible for the implementation of its decision for limited acceptance including but not limited to policing the card type(s) of transactions at the point of sale submitted for processing by Bank. Should Merchant submit a transaction for processing for a card type it has indicated it does not wish to accept, Bank may process that transaction and Merchant will pay the applicable fees, charges, and assessments associated with that transaction.

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

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

3.3    **Submission of Valid Transactions**.

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

(b)    If at any time the volume of Transactions in the Card-Absent Environment substantially exceeds the projected annual volume stated on the Application, or if at any time Bank suspects fraud, money laundering or violations of the Operating Rules, Bank may, in its sole and absolute discretion and in addition to other remedies that the Bank may have:  (1) refuse to process the excessive or suspect Transactions; (2) process the Transactions and retain the funds received from processing until such time as the excess or suspect Transactions are found to be valid or invalid and  processed in accordance with the Operating Rules; (3) suspend processing  Card-Absent Environment Transactions and/or terminate the Agreement; or (4) amend the Agreement to protect the interests of Bank.

3.4    **Payments to Merchant for Valid Transactions**.

(a)    Merchant Bank will provide provisional credit to Merchant for each valid Transaction which Merchant submits to Bank by crediting Merchant's Settlement Account, provided Merchant Bank has received settlement for the valid Transaction through the Interchange procedures specified by the Card Association applicable to the Card used for the Transaction (Bank does not provide payment for all Card types for which Authorization services are provided).  Merchant Bank is not obligated to provide provisional credit to Merchant for Transactions submitted that are not valid Transactions, and may suspend or discontinue any provisional credit in Merchant Bank's and/or Processor's sole and absolute discretion, including for any reason that would justify termination of this Merchant Agreement. Each provisional credit from Merchant Bank to Merchant will be subject to adjustment, including revocation, upon Bank's further review and verification. **Provisional credit to Merchant for a Transaction disputed by a Cardholder for any reason is not final.**

(b)    Merchant Bank may deduct from any payment to Merchant the amount of any Credit Transaction Receipt processed for Merchant, any Chargeback to Merchant, any

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

(c)  Merchant acknowledges that all payments and credits provided to Merchant are provisional and subject to suspension, to Chargebacks and to adjustments in accordance with this Merchant Agreement and the Operating Rules and the Operating Guide.

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

3.6  **Equipment; Supplies; Displays.**

(a)  At Merchant's request, Processor will supply Merchant with point-of sale equipment ("POS Equipment") that Merchant may need to process and submit Transactions. Processor will use good faith efforts to program the POS Equipment to operate at the Merchant Outlets in compliance with the Operating Rules; however, Processor makes no representations or warranties that Processor's programming of the POS Equipment furnished by Processor will operate in compliance with the Operating Rules. If Processor supplies Merchant with a terminal or other equipment, then Merchant must return such equipment upon termination of this Agreement.

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

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

(d)  Merchant may not (i) indicate or imply that the Card Associations or Bank endorses any Merchant goods or services, (ii) refer to a Card Association or Bank in stating eligibility for Merchant's products, services or membership, or (iii) use any marks, symbols or logos owned by any Card Association or Bank for any purpose other than those permitted in the Operating Rules or the Operating Guide.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.15  Merchant is not (i) a Sanctioned Person, (ii) located in or operating under a license issued by a jurisdiction whose government has been identified by the U.S. Department of State as a sponsor of international terrorism under 22 U.S.C. 2371 or 50 U.S.C. App. 2405(j), (iii) located in or operating under a license issued by a jurisdiction

that has been designated as non-cooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the U.S. is a member, or (iv) located in or operating under a license issued by a jurisdiction that has been designated by the U.S. Secretary of Treasury pursuant to 31 U.S.C. 5318A as warranting special measures due to money laundering concerns; and

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

**5. CONFIDENTIALITY; DATA SECURITY.**

5.1  **Transaction Receipts.**  Merchant will retain in a secure and confidential manner original or complete and legible copies of each Transaction Receipt, and each Credit Transaction Receipt required to be provided to Cardholders, for at least two (2) years or longer if required by law or the Operating Rules. Merchant shall render all materials containing Cardholder Account Numbers unreadable prior to discarding.

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

5.3  **Merchant Servicers and Agents.**  Merchant must notify Bank and receive Bank's approval prior to engaging any Merchant Servicer or Agent in connection with Merchant's acceptance of Cards or the submission of Transactions to Bank. Merchant shall provide Merchant Bank and Processor at least sixty (60) days advance written notice of Merchant's election to use a Merchant Servicer or Agent. Merchant Bank and/or Processor may individually approve or deny the use of a Merchant Servicer or Agent in their sole and absolute discretion and at any time. If a Merchant Servicer or Agent is required to certify, register, or act in any fashion pursuant to the Operating Rules, Merchant shall cause such Merchant Servicer or Agent to cooperate with Merchant Bank in completing any steps required for registration and/or certification and/or action. Merchant is solely responsible for any and all applicable fees, costs, expenses and liabilities associated with such registration and/or certification and/or action. Bank shall in no event be liable to Merchant or any third party for any actions or inactions of any Merchant Servicer or Agent used by Merchant, and Merchant hereby expressly assumes all such liability.

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

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

5.4  **Security.**  Merchant agrees and shall ensure that Merchant Servicers and Agents utilized by Merchant provide the same levels of security as those required of Merchant, and that such Merchant Servicers and Agents transmit data in accordance with: (a) the required format(s) of the Card Associations; (b) the Operating Rules; and (c) the requirements of Bank. Merchant must have a  written contract between the Merchant and its Agent or between the Merchant and the Merchant Servicer that stipulates adherence to the provisions of such information security requirements. Merchant shall indemnify and hold Merchant Bank and Processor harmless against losses or damages arising from the acts or omissions of Merchant Servicers or Agents engaged by Merchant.

5.5  **Loss or Theft.**  Merchant must immediately notify Merchant Bank and Processor of any suspected or confirmed loss or theft of materials or records that contain Cardholder Account Numbers or Card Transaction information. In the event of a suspected or confirmed loss or theft Merchant shall provide immediate access to all facilities, systems, procedures, equipment, and documents as may be deemed appropriate by Bank or its designated representatives for inspection, audit, and copying as deemed appropriate by both Merchant Bank and Processor in their individual sole discretion. Merchant shall be responsible for all costs associated with such inspection, audit, and copying however such costs may occur.

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

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

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

5.9 Merchant agrees to establish security procedures to protect Cardholder information and comply with the Visa Cardholder Information Security Program (CISP), MasterCard's Site Data Protection (SDP) Program, Discover Information Security Compliance (DISC), Security Requirements, and the Payment Card Industry data security standards. The Card Associations or Bank, and the respective representatives, may inspect the premises of Merchant or any Merchant Servicer or Agent engaged by Merchant for compliance with security requirements. Merchant acknowledges that any failure to comply with security requirements may result in the imposition of restrictions on Merchant or the permanent prohibition of Merchant's participation in Card acceptance programs by the Card Associations. Merchant shall indemnify and hold Bank harmless against any losses or damages arising from Merchant's failure to comply with security procedures, Merchant's acts or omissions that result in a breach of data security, or Merchant's non-participation in any breach security program Processor may offer.

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

## 6. OPERATING RULES.

6.1 Merchant must comply with the Operating Rules, as the same may be amended from time to time. The Operating Rules may change with little or no advance notice to Merchant and Merchant will be bound by all such changes. If Merchant objects to any change in the Operating Rules, it must immediately stop accepting new Transactions for Cards governed by the change. The Operating Rules will govern in the event that there is any inconsistency between this Merchant Agreement and the Operating Rules.

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

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

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

7.2 **Change in Name or Business.** Merchant will give Merchant Bank and Processor at least thirty (30) days' prior written notice before any change in Merchant's name or location, any change in ownership or management of Merchant's business, any sale, assignment, rental, lease or transfer of ownership of any location that accepts Cards, or any material change in information concerning Merchant in the Merchant Application, and material change in the type or nature of the business carried out by Merchant or otherwise required to be provided to Bank.

7.3 **Other Processors.** Merchant agrees that it will not participate in a Card Program with another financial institution or processor without Bank's written approval.

## 8. CREDIT REPORTS AND OTHER INFORMATION.

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

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

## 9. ASSIGNMENT; BANKRUPTCY.

9.1 **Assignment.** This Merchant Agreement is binding upon the successors and assigns of Bank and Merchant. Merchant will not assign this Merchant Agreement to another entity without Bank's prior written consent and any purported assignment made without Bank's consent will be void.

9.2 **Bankruptcy.**

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

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

## 10. AMENDMENTS; WAIVERS.

10.1 **Amendments**. Unless otherwise provided for in this Merchant Agreement, Bank may amend this Merchant Agreement at any time by providing Merchant with fifteen (15) days' prior notice by: (a) sending Merchant written notice of such amendment, or (b) posting such amendment to the Processor web site and providing Merchant with electronic notice as provided in Section 2.3. The amendment will become effective unless Bank receives Merchant's notice terminating this Merchant Agreement before the effective date. Bank may amend this Merchant Agreement upon less than fifteen (15) days' prior notice if Bank reasonably determines immediate modification is required by Requirements of Law, Operating Rules or any adverse change in Merchant's financial condition. Amendments submitted by Merchant will bind Bank only if in writing and approved and signed by Bank's authorized officer.

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

## 11. TERM; TERMINATION.

11.1 **Term/Renewal.** The initial term of this Merchant Agreement shall be for the term of three (3) years (the "Initial Term") commencing on the date this Merchant Agreement is executed by authorized officers of Merchant Bank and Processor. At the expiration of the Initial Term, this Merchant Agreement will automatically renew for successive one (1) year periods (each a "Renewal Term" and collectively with the Initial Term the "Term") unless a party provides the other parties with notice of its intent not to renew this Merchant Agreement at least ninety (90) days prior to the expiration of the then current term.

11.2 **Termination.**

(a) Termination without Cause. Merchant Bank or Processor or Merchant Bank's or Processor's designated representative may terminate this Merchant Agreement as to all Card types or individually specified Card types, without cause, upon thirty (30) days advance written notice.

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

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

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

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

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

(v) At any time during the term of this Merchant Agreement, Merchant has had a monthly ratio of Chargebacks to Transactions exceeding one percent (1%), or Chargebacks are in excess of three percent (3%) of any monthly dollar amount of Transactions.

(vi) There is an overdraft for three (3) days or more in the Settlement Account, or overdrafts in the Settlement Account are otherwise excessive.

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

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

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

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

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

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

(xiii)    Bank is served with legal process seeking to attach or garnish any of Merchant's funds or property in Bank's possession, and Merchant does not satisfy or appeal the legal process within fifteen (15) days of the Bank being served.

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

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

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

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

(c)    Termination for Cause by Merchant.  Merchant may terminate this Merchant Agreement in the event of a material breach of the terms of this Merchant Agreement by Bank, provided Merchant gives Bank written notice of any alleged breach and such breach remains uncured for a period of thirty (30) days following receipt of written notice by the Bank.

(d)    Damages for Early Termination.

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

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

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

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

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

(g)    It is understood that a file for terminated merchants referred to as "**MATCH"** is maintained by Card Associations containing the names of any business (and its principals) which have been terminated for certain reasons, including fraud, depositing excessive counterfeit paper, excessive unauthorized transactions, depositing paper for others (laundering), bankruptcy or breach of this Merchant Agreement. Merchant acknowledges that Merchant Bank or Processor is required to report Merchant to the **MATCH** (and/or on the Consortium Merchant Negative File (the CMNF) published by Discover® Network if this Merchant Agreement is terminated for any of the foregoing reasons or other reasons as may be modified by the Card Associations. Merchant agrees and consents to such reporting in the event of the termination of this Merchant Agreement for any of the foregoing reasons.

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

## 12. SETTLEMENT  ACCOUNT.

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

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

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

12.4    **Audits and Adjustments.**  Merchant agrees that Bank may audit all Transaction calculations and that Merchant Bank shall have the right, without notice, to make

withdrawals, deposits, or other adjustments to or from the Settlement Account for any deficiencies or overages.

12.5    **Errors and Disputes.**  Bank shall presume that any amounts the Bank pays to or debits from Merchant are correct unless Merchant disputes these by sending Bank written notice within thirty (30) days of the date of the applicable statement containing any disputed payments or debits.

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

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

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

## 13. ADDITIONAL COLLATERAL SECURITY; RESERVE ACCOUNT.

As a condition for providing Card Program services, Merchant may be required to provide additional collateral security for Merchant's obligations hereunder, which additional collateral security shall be of a kind, and in amounts, satisfactory to Bank in Bank's sole discretion, and which shall be in addition to all other collateral provided for in Section 14 hereof.  Such additional collateral security may include, for example, (A) a letter of credit, if issued in an amount and on terms acceptable to Bank by a letter of credit issuing bank acceptable to Bank, or (B) the pledge to Bank of a certificate of deposit owned by Merchant in amount satisfactory to Bank and provided all agreements (including agreements of third parties) in form and substance satisfactory to Bank and all filings and/or other actions necessary in order to perfect in Bank a continuing first priority security interest therein on terms acceptable to Bank, are entered into, made and/or taken as the case may be. Bank may require that all or any part of the additional collateral take the form of a Reserve Account, established as hereinafter set forth in this Section 13, at any time when: (i) this Merchant Agreement, or the provision of Card Program services hereunder, shall have terminated for any reason or any party hereto shall have given notice of termination thereof, or (ii) there shall have occurred an event which entitles Bank to terminate this Merchant Agreement or the provision of Card Program services hereunder or which, with the giving of notice and/or the passage of time would entitle Bank to terminate this Merchant Agreement or the provision of Card Program services hereunder, and Merchant has not provided alternative additional collateral security of a kind, and in amounts, satisfactory to Bank as set forth above in this Section, or (iii) neither (i) nor (ii) above in this Section is applicable, but Bank has determined that additional collateral security is required, has requested that Merchant provide same, and Merchant has failed to provide alternative additional collateral security of a kind, and in amounts satisfactory to Bank as set forth above in this Section.  Any Reserve Account that is established shall be subject to the terms and conditions of Section 14 and all other terms and conditions of this Agreement relating to the "Reserve Account".  Whenever Bank requires that additional collateral security take the form of a Reserve Account, the following provisions of this Section 13 shall apply:

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

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

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

13.2    **Reserve Account Deposits.**

(a)    At any time in Bank's sole and absolute discretion, Bank may (i) designate the minimum balance required to be deposited in the Reserve Account, (ii) require that the amount on deposit in the Reserve Account be increased, (iii) require that the Merchant deposit, or Merchant Bank may deposit for Merchant into the Reserve Account a percentage of, or a fixed amount from each Transaction processed, or (iv) otherwise determine the amount to be deposited in the Reserve Account. Bank at its sole and absolute discretion may require that each month Merchant deposit, or Merchant Bank may deposit by deducting from any payment due to Merchant or from any funds in the Settlement Account or any other deposit account of Merchant sums into the Reserve

Account no later than the twentieth (20th) day of the month. Bank shall notify the Merchant as to the amount of the funds to be deposited each month.

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

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

13.4 **Replenishment of Reserve Account Deficiencies.** Whenever the balance in the Reserve Account is less than the minimum balance required, or is otherwise deficient, Merchant Bank may, without prior notice, deposit the deficiency into the Reserve Account by reducing any payment to Merchant required by this Merchant Agreement or deduct the deficiency from the Settlement Account or any other deposit account of Merchant with another depository institution (including accounts of general partners if Merchant is a partnership) and deposit it into the Reserve Account. Merchant authorizes deductions from its accounts by ACH entry, sight draft, preauthorized check, reverse wire, or otherwise as Bank deems appropriate under the circumstances. In addition, Merchant will deposit any deficiency into the Reserve Account within one (1) Business Day after receiving Bank's oral or written request. Without limiting Bank's remedies, Merchant's failure to deposit any deficiency on time will permit Bank, without advance notice, to suspend or cease processing additional Transaction Receipts and Credit Transaction Receipts. Bank will give Merchant written notice of any suspension or cessation of processing.

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

13.6 **Reserve Account After Merchant Agreement Terminates.** Merchant Bank may continue to hold or deposit funds in the Reserve Account after termination of this Merchant Agreement, regardless of whether termination is by Merchant or Bank. Upon termination of the Merchant Agreement by Merchant or Bank, Bank may retain sufficient funds to satisfy any and all Processing Fees, Chargebacks, Credit Transaction Receipts, Damages, and any and all additional fees, and sums sufficient to reimburse Bank for the amount of any fines, penalty amounts and charges due the Card Associations. If no funds have been deposited into the Reserve Account before termination, Bank, at Bank's option, may notify Merchant to deposit funds into the Reserve Account upon termination of this Merchant Agreement. All provisions which apply to a pre-termination Reserve Account will apply after termination, including replenishment of deficiencies. The funds will be held by Bank or its designated agent for a period of not less than one hundred eighty (180) days from the date of the last Transaction processed under the Merchant Agreement, plus the period of any warranty, guarantee, and/or return policy on goods and/or services sold. Bank will return the balance in the Reserve Account to Merchant after Bank reasonably determines that the risk of Chargebacks and other Processing Fees has ended and after deducting all amounts that Merchant owes to Bank under this Merchant Agreement or any other agreement.

**14. SECURITY INTEREST.**

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

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

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

14.2 **Perfection of Security Interest.** Upon request of Bank, Merchant will execute one or more financing statements or other documents to evidence the security interests granted to Bank under this Section 14. Merchant shall cooperate with Bank in obtaining any control agreement or similar agreement with a depository bank necessary to perfect the security interests granted herein. In addition, Merchant agrees that its signature on the Merchant Application will be considered Merchant's signature agreeing to any control agreement as defined in Article 9 of the Uniform Commercial Code among Merchant, Bank and any other financial institution under which Bank, Merchant and any other

financial institution agree to the disposition of funds in the Settlement Account, the Reserve Account or any other deposit account without further consent by Merchant.

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

**16. PROCESSING FEES.**

16.1 **Fee Schedule.** Merchant will pay Processing Fees in the amount specified in the Fee Schedule attached to the Merchant Application or as otherwise provided for in this Merchant Agreement or an Addendum thereto. Bank may increase the Processing Fees, including, without limitation, introducing new products or services, by giving Merchant thirty (30) days advance written notice effective for Transactions submitted on and after the effective date of the change.

16.2 **Card Association Actions.** Bank will not be required to provide the Merchant with thirty (30) days notice of an increase in Processing Fees in the event that any Card Association, or any other entity having such authority increases the Processing Fees and the effective date for implementation of the increase in the Processing Fees is less than thirty (30) days. In such cases, the Bank shall make reasonable efforts including, but not limited to, written correspondence, notification on statements, website notification, email, fax and direct contact via the telephone or otherwise, to provide reasonable notification to Merchant. However, failure to provide advance notice of the increase in Processing Fees will not affect Merchant's obligation to pay the increased Processing Fees. The increase(s) in Processing Fees shall be effective on the date specified by Bank.

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

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

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

17.2 **Limitation of Liability.** Bank will not accept responsibility for errors, acts, or failure to act by others, including but not limited to, Merchant Servicers, Agents, third party suppliers of software, equipment or services; or, banks, communication common carriers, data processors or clearinghouses through which transactions may be passed, originated and/or authorized. Bank will not be responsible for any loss, liability or delay caused by fires, earthquakes, war, civil disturbances, power surges or failures, acts of governments, acts of terrorism, labor disputes, failures in communication networks, legal constraints or other events beyond the control of Bank. Bank undertakes no duties to Merchant other than the duties expressly provided for in this Merchant Agreement, and any and all other or additional duties that may be imposed upon Bank in law or equity are hereby irrevocably waived and released to the maximum extent permitted by law. In any event, Bank's cumulative liability to Merchant, whether arising in contract, tort (including, without limitation, negligence and strict liability) or otherwise, shall not exceed the lesser of $10,000 or, an amount equal to the aggregate of monthly net Processing Fees paid by Merchant in the three (3) month period prior to the month that the incident giving rise to liability occurred.

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

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

**18. NOTICES.** Each notice required by this Merchant Agreement will be in writing (hard copy or electronic) and will be effective when delivered, (i) to Merchant Bank at the address designated on the Merchant Application, and the return address on the Merchant's Card processing statements, (ii) to Processor at the address designated on the Merchant

Application and (iii) to Merchant at Merchant's address to which Bank mails Merchant's statements or at the electronic mail address provided by Merchant in the Merchant Application, or at such other address as any party may provide by written notice to the other parties. Any address Merchant designates may also be the address to which Bank mails Merchant's statements. Delivery by facsimile transmission or electronic mail will be considered effective when the sender receives electronic confirmation of the transmission.

**19. COLORADO LAW; JURISDICTION; VENUE.** Merchant's offer to enter into this Merchant Agreement is made in Boulder Colorado; this Merchant Agreement shall be performed by Merchant in Boulder, Colorado and governed by Colorado law, excluding its conflict of laws rules. Merchant and Guarantor agree to bring any claim or other litigation arising from or relating to this Merchant Agreement that it or they may have in the county and district courts in and for Boulder County, Colorado, and Merchant and any Guarantor irrevocably and unconditionally submit to the jurisdiction of such courts with respect to any such litigation. Merchant consents to service of process by registered mail or any electronic or other means permitted by a court of competent jurisdiction.

**20. ATTORNEY FEES; ARBITRATION.**

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

20.2 **Arbitration**. Merchant, Bank and any Guarantor at Bank's election will settle any dispute or controversy concerning or relating to this Merchant Agreement through binding arbitration before a single arbitrator, held at Denver or Boulder, Colorado in accordance with the provisions of the Colorado Uniform Arbitration Act or any successor statute. If Merchant and/or any Guarantor does not unconditionally proceed with arbitration in accordance with this Section 20.02 within ten (10) days after Bank sends a written demand for arbitration, Bank shall be entitled (but not obligated) to initiate litigation concerning the dispute or controversy.

**21. FINAL AGREEMENT; EFFECTIVE DATE.** This Merchant Agreement is the complete and final agreement between Merchant and Bank for the Card Program services covered by this Merchant Agreement and supersedes all prior or contemporaneous negotiations, stipulations or agreements. If any provision of this Merchant Agreement is invalid or unenforceable, the other provisions remain effective. This Merchant Agreement becomes effective when the Merchant Application is signed and approved by Bank.

**22. CONTINUING GUARANTY.**

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

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

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

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