

MERCHANT AGREEMENT

In consideration of the mutual promises and covenants contained in this Merchant Agreement ("Agreement"), and the agreement of Merchant to participate in the card processing services program established by Bank, the parties agree as follows:

1. Parties. The parties to this Agreement are ESQUIRE BANK, a federally chartered bank whose address is 320 Old Country Road, Garden City, New York 11503 ("Bank"), American Payment Services of Coeur d'Alene, LLC, whose address is 1930 E. Brown Road, Mesa, AZ 85203 ("ISO"), and the Merchant set forth on the Merchant Application form to which this Agreement is attached ("Merchant").

2. Definitions. For the purposes of this Agreement and the Schedules referred to herein, the following definitions apply unless the context otherwise requires:

"Address Verification" means a service that allows Merchant to verify the home address of Cardholders with the relevant issuer.

"Applicable Law" means: (i) all applicable federal, state and local laws, rules and regulations; and (ii) all rules, regulations, by-laws, standards and procedures adopted and/or amended from time to time by the Associations (including, without limitation, the Payment Card Industry Data Security Standard), Bank and each relevant issuer.

"Association(s)" means VISA U.S.A., Inc. ("VISA"), MasterCard International Incorporated ("MasterCard") and Discover Financial Services LLC ("Discover").

"Authorization" means an affirmative response, by or on behalf of an Issuer to a request to effect a Transaction, that a Transaction is within the relevant Cardholder's available credit limit and that the Cardholder has not reported the Card lost or stolen. All Transactions requiring Authorizations by the Associations must be Authorized.

"Authorization Center" means the facility or facilities designated from time to time by Bank or ISO to which Merchant shall submit all requests for Authorization.

"Business Day" means any day other than: (i) a Saturday or Sunday; or (ii) a day on which banking institutions in New York are authorized by law or executive order to be closed (and on which Bank is in fact closed).

"Card(s)" means either a Visa, MasterCard or Discover credit card, debit card (or other similar card that requires a PIN for identification purposes), or pre-paid, stored-value or gift card.

"Cardholder" means a person authorized to use a Card.

"Chargeback" means a Transaction that Bank returns to Merchant pursuant to this Agreement.

"Forced Sale" means a sales Transaction processed without an approved electronic Authorization number being obtained for the full amount of the sales Transaction at the time the Transaction is processed.

"Full Recourse Transactions" means mail orders, telephone orders, e-commerce (Internet) orders, Pre-Authorized Recurring Order Transactions, and other "card not present" sales.

"Issuer" means a member of an Association that enters into a contractual relationship with a Cardholder for the issuance of one or more Cards.

"Merchant Statement" means an itemized monthly statement of all charges and credits to the Operating Account (as that term is defined in Section 5 of this Agreement).

"Mid-Qualified Transactions" means any Transaction categorized as such by the processor designated by Bank to settle Transactions with the Associations.

"Non-Qualified Transactions" means: (i) any Transaction submitted for processing more than 48 hours past the time the Authorization occurred; (ii) any Transaction missing required data; and (iii) any Transaction categorized as such by the processor designated by Bank to settle Transactions with the Associations.

"Normal Transaction" means a Transaction in which the Card is swiped through a terminal, register or other device, capturing the Card information encoded on the Card's magnetic strip.

"Pre-Authorized Recurring Order Transaction" means a Transaction that has been pre-authorized by the Cardholder and for which the goods or services are to be delivered or performed in the future by Merchant without having to obtain approval from the Cardholder each time.

"Qualified Transactions" means any Transaction categorized as such by the processor designated by Bank to settle Transactions with the Associations.

"Services" means the transaction processing services described on the attached Schedule A, as the same may be amended from time to time by Bank, in its sole discretion.

"Transaction" means the acceptance of a Card or information embossed on the Card for payment for goods sold and/or leased or services provided to Cardholders by Merchant and receipt of payment from Bank, whether the Transaction is approved, declined, or processed as a Forced Sale. The term "Transaction" also includes credits, errors, returns and adjustments.

3. Services Provided to Merchant. During the term of this Agreement, subject to the terms and conditions of this Agreement: (i) ISO shall provide technical documentation and support along with customer support in order to allow Merchant to accept and process Transactions; (ii) ISO shall provide Authorization, settlement and Chargeback processing and reporting, twenty -four hours each day, seven days each week; and (iii) Bank shall provide the Services to Merchant.

4. Term. This Agreement shall become effective when all parties sign the Merchant Application form to which this Agreement is attached and, unless sooner terminated, shall remain in effect for a term of three (3) years. This Agreement shall renew automatically for successive terms of three (3) years each, unless any party provides written notice of termination to the other parties at least 90 days prior to the end of the then-current term. All existing obligations, warranties, indemnities and agreements with respect to Transactions entered into before such termination shall remain in full force and effect, and regardless of any such termination, Merchant shall remain liable for all obligations to Cardholders and Bank that are incurred while this Agreement is in effect.

5. Merchant Operating Account. Prior to accepting any Cards, Merchant shall establish a demand deposit account at Bank, or at a financial institution approved by Bank (the "Operating Account"), through which fees, charges and credits due in accordance with this Agreement may be processed. Merchant authorizes Bank to debit all amounts Merchant owes Bank or ISO hereunder from the Operating Account, whether maintained at Bank or another financial institution, at times deemed appropriate by Bank, through the ACH Banking Network or by a manual debit of the Operating Account. Merchant waives any and all claims for loss or damage arising out of any such charges or debits to the Operating Account.

6. Reserve Account. Upon, or at any time after, execution of this Agreement, Bank may establish a reserve account at Bank ("Reserve Account"), for all future indebtedness of Merchant to Bank or ISO that may arise out of or relate to the obligations of Merchant under this Agreement, including, but not limited to, Chargebacks and fees, in such amount as Bank from time to time may determine in its sole discretion. Bank may fund the Reserve Account by deducting amounts from payments due to Merchant, by effecting a charge against Merchant's Operating Account or against any of Merchant's accounts at Bank, or by demanding payment from Merchant (which payment Merchant shall make within ten (10) days after receipt for any such demand). The Reserve Account will be maintained for a minimum of six months after the date on which this Agreement terminates or until such time as Bank determines that the release of the funds to Merchant is prudent, in the best interest of Bank, and commercially reasonable, and that Merchant's account with Bank is fully resolved. Upon expiration of this six-month period, any balance remaining in the Reserve Account will be paid to Merchant. Bank will inform Merchant in writing of any charges debited to the Reserve Account during this six-month period.

7. Fees. Merchant shall pay to Bank all fees specified on Schedule A, as amended by Bank from time to time. For each Transaction, Bank will charge Merchant as follows:

(a) An amount ("Merchant Discount Fees") equal to a specified percentage of the total cash price of each sales and cash withdrawal Transaction ("Merchant Discount Rate");

(b) A specified amount per Transaction ("Transaction Fee"); and

(c) A specified amount per Authorization ("Authorization Fee").

The Merchant Discount Rate, Authorization Fees and Transaction Fees are set forth on Schedule A. Different Merchant Discount Rates apply to Qualified, Mid-Qualified and Non-Qualified Transactions, as shown on Schedule A. Merchant agrees that Bank will, and authorizes Bank to, deduct Merchant Discount Fees from the Operating Account or Reserve Account on a daily basis unless a monthly basis is specified on Schedule A. Merchant also agrees to pay to Bank the amount of any fees, charges or penalties assessed against Bank by any Association or Issuer for Merchant's violation of any Applicable Law. Merchant shall pay Bank for any other services provided to Merchant by Bank and for all other fees shown on Schedule A, including, but not limited to, monthly minimum fees, Chargeback fees and customer service fees.

8. Billing. All amounts Merchant owes to Bank may be charged to the Operating Account or Reserve Account, recouped by adjustment to any credits due to Merchant, or set off against any account or property Bank holds for or on behalf of Merchant.

9. Security Interest. As security for the performance by Merchant of all of its obligations under this Agreement, Merchant hereby grants to Bank a security interest in: (i) the funds held in the Operating Account and in the Reserve Account; and (ii) any inventory with respect to which a Transaction has occurred but has not yet been fulfilled. Merchant will execute and deliver to Bank such documents, in form satisfactory to Bank, as Bank may reasonably request in order to perfect Bank's security interest in the Operating Account, Reserve Account and such inventory, and will pay all costs and expenses associated with filing the same or this Agreement in all public filing offices, where filing is deemed by Bank to be necessary or desirable. Bank is authorized to file financing statements relating to the Operating Account, the Reserve Account and such inventory without ISO

where authorized by law. Merchant appoints Bank as its attorney-in-fact to execute such documents as are necessary or desirable to accomplish perfection of any security interests. This appointment is coupled with an interest and shall be irrevocable as long as Merchant owes any amount to Bank or ISO.

10. Processing Transactions.

(a) Merchant shall obtain Authorizations and process Transactions using such equipment and software as may be approved from time to time by Bank, in its sole discretion (the "Equipment").

(b) Merchant shall obtain Authorizations for Transactions in the manner, and following the processes and procedures, determined from time to time by Bank, in its sole discretion, and communicated to Merchant by either Bank or ISO.

(c) Merchant shall submit, in the manner determined from time to time by Bank, such information to Bank or Bank's designee in connection with Transaction processing as Bank from time to time may determine.

(d) Merchant shall not submit a Transaction to Bank (electronically or otherwise) until Merchant has performed its obligations to the Cardholder in connection with the Transaction or obtained Cardholder's consent for a Pre-Authorized Recurring Order Transaction.

(e) Merchant shall not transmit any Transaction to Bank that Merchant knows or should have known to be fraudulent or not authorized by the Cardholder.

(f) Merchant shall not process a Transaction that does not result from an act between a Cardholder and Merchant.

(g) Merchant shall not request or use any Card number for any purpose other than as payment for its goods or services.

(h) Merchant may transmit a Transaction that effects a prepayment of services or full prepayment of custom-ordered merchandise, manufactured to a Cardholder's specifications, if Merchant advises Cardholder of the immediate billing at the time of the Transaction and within time limits established by the Associations.

11. Prohibited Transactions.

Merchant shall not do any of the following:

(a) Establish a minimum on debit cards or greater than \$10.00 on credit cards or maximum dollar Transaction amount;

(b) Obtain multiple Authorizations for amounts less than the total sale amount;

(c) Obtain Authorization for the purpose of settling aside the Cardholder's credit line for use in future sales;

(d) Extend credit for or defer the time of payment of the total cash price in any Transaction;

(e) Honor a Card except in a Transaction where a total cash price is due and payable;

(f) Make any special charge to or extract any special agreement or security from any Cardholder in connection with any Transaction;

(g) Transmit or accept payment for any Transaction that was not originated directly between Merchant and a Cardholder for the sale or lease of goods or the performance of services of the type indicated in the Merchant Application form to which this Agreement is attached;

(h) Honor or accept a Card as payment for any legal services or expenses arising out of or related to: (i) any domestic relations matter where such services or expenses are furnished to a person whose name is not embossed on a Card; or (ii) any bankruptcy, insolvency, compromise, composition or other process affecting Cardholder's creditors;

(i) Use Merchant's own Card, or one to which Merchant has access, to process a Transaction for the purpose of obtaining credit for Merchant's own benefit;

(j) Re-process any Transaction that was previously charged back to Bank and subsequently returned to Merchant, irrespective of Cardholder approval;

(k) Initiate a Transaction credit without a preceding debit at least equal to the credit;

(l) Initiate a Transaction credit without a balance in the Operating Account at least equal to the credit;

(m) Use the Equipment or any data received thereon for any other purpose other than for determining whether or not Merchant should accept checks or Cards in connection with a current sale or lease of goods or services;

(n) Use the Equipment or any data received thereon for credit inquiry purposes or any other purpose not authorized by this Agreement;

(o) Draw or convey any inference concerning a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living when any Card or check is processed as non-accepted;

(p) Disclose any information obtained through the Equipment to any person except for necessary disclosures to affected Cardholders, Bank and/or the Issuer;

(q) 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;

(r) Disburse funds in the form of cash;

(s) Accept a credit Card to collect or refinance an existing debt (whether originally owed to Merchant or otherwise) that is considered uncollectible (for example, payments to a collection agency or attempts to recover funds for a dishonored check);

(t) Issue a Transaction credit in respect of goods or services acquired in a cash transaction which are returned;

(u) Make any cash refund to a Cardholder who has made a purchase with a credit Card (all Transaction credits shall be issued to the same credit Card account number used in the sale);

(v) 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;

(w) Process a Transaction that represents collection of a dishonored check;

(x) Accept a Card for the purchase of Scrip (as defined by applicable VISA regulations);

(y) Accept any payment directly from a Cardholder for previous Card charges incurred and processed by Merchant; or

(z) Require, through an increase in price or otherwise, any Cardholder to pay any surcharge in connection with any Transaction or to pay any part of any charge imposed on Merchant by Bank except, in either case, as expressly permitted by, and under terms and conditions that comply in full with, Applicable Law.

12. Prohibition of Furnishing Account Information. Merchant shall not, without the Cardholder's consent, sell, purchase, provide or exchange any Card information in the form of Transaction documents, carbon copies of imprinted Transaction documents, mailing lists, tapes, journal rolls or other media obtained through the use of a Card to any third party. Merchant shall notify Bank of the identity of any third party performing services to Merchant in connection with which such third party has access to any Card information.

13. Daily Reconciliation of Transactions.

(a) **Electronically Transmitted Transactions.** Bank shall control and disburse all Transaction-related settlement funds to Merchant. Transactions with respect to which Bank receives payment from or through the Associations will be settled on a daily basis, and Bank shall deliver payment to Merchant in connection with such Transactions by effecting a credit to the Operating Account equal to the reconciled and paid summary Transaction total of all of Merchant's total paid summary Transactions since the previous credit. Notwithstanding the foregoing, Bank may, in its sole discretion, effect a credit to the Operating Account in connection with any Transaction prior to the point in time Bank receives payment in connection therewith from or through the Associations. In either case, Bank may, if necessary or appropriate, reduce any credit made to the Operating Account by, and/or Bank may require that Merchant pay to Bank an amount equal to: (i) the sum of all Cardholder charges denied, refused or charged back; (ii) all refunds processed on account of Cardholders during said time period; (iii) the fees and charges, including Chargebacks, Merchant owes Bank or ISO hereunder; (iv) all taxes, penalties, charges, fees and other items incurred by Bank that are reimbursable pursuant to this Agreement; (v) all applicable rates, fees and charges described on Schedule A; (vi) any amount Bank previously credited to the Operating Account that Bank determines, in good faith, was incorrectly so credited; and (vii) any amounts Bank determines, in its sole discretion, to be of questionable risk to any relevant Cardholder or Bank.

(b) **Reconciliation of Transactions.** Merchant shall reconcile each settled Transaction within fifteen (15) days after the date on which such Transaction is submitted to Bank for payment, and shall notify Bank and ISO immediately of any discrepancies or errors Merchant notes as a result of such reconciliation. Neither Bank nor ISO shall have any responsibility or liability for Transaction-related errors or omissions that are brought to their attention more than sixty (60) days after the date on which the Transaction to which such error or omission relates is first presented to Bank for settlement.

(c) **Provisional Credit.** Any credits to the Operating Account are provisional only and subject to revocation by Bank until such time that the Transaction is final and no longer subject to Chargeback by the Issuer, Cardholder or Associations. Bank may withhold payment for a Transaction to Merchant, for any reason, until such time as the Transaction has been verified as legitimate by the relevant Issuer, or Bank and/or ISO receives adequate supporting documentation from Merchant to authenticate the Transaction and mitigate Chargeback risk.

14. Adjustments and Returns. Merchant will maintain a fair exchange and return policy and make adjustments with respect to goods and services sold and/or leased to its customers whenever appropriate. If goods are returned, or services are terminated or canceled, or any price is adjusted, Merchant will prepare and transmit a credit or return Transaction, electronically for the amount of the adjustment as a deduction from the total amount of Transactions transmitted that day. If the amount of credit or return Transactions exceeds the amount of sales Transactions, Merchant shall pay the excess to Bank. Merchant shall make no cash refunds on credit Transactions and shall handle all credit adjustments as provided in this Section 14. If no refund or return will be given, Merchant must advise Cardholder in writing, at the time of the Transaction that the sale is a "final sale" and "no returns" are permitted. Merchant must advise Cardholder in writing of any policy of Merchant that provides for no-cash refunds and in-store credit only. Merchant shall follow Association reservation/no-show policies, and shall notify Cardholders in writing of this policy on all advance reservations. Merchant also shall notify Cardholders at the time of the reservation of the exact number of days required for reservation deposit refunds.

15. Adjustments and Returns. Merchant will maintain a fair exchange and return policy and make adjustments with respect to goods and services sold and/or leased to its customers whenever appropriate. If goods are returned, or services are terminated or canceled, or any price is adjusted, Merchant will prepare and transmit a credit or return Transaction, electronically for the amount of the adjustment as a deduction from the total amount of Transactions transmitted that day. If the amount of credit or return Transactions exceeds the amount of sales Transactions, Merchant shall pay the excess to Bank. Merchant shall make no cash refunds on credit Transactions and shall handle all credit adjustments as provided in this Section 14. If no refund or return will be given, Merchant must advise Cardholder in writing, at the time of the Transaction that the sale is a "final sale" and "no returns" are permitted. Merchant must advise Cardholder in writing of any policy of Merchant that provides for no-cash refunds and in-store credit only. Merchant shall follow Association reservation/no-show policies, and shall notify Cardholders in writing of this policy on all advance reservations. Merchant also shall notify Cardholders at the time of the reservation of the exact number of days required for reservation deposit refunds.

15. **Chargebacks.** The acceptance by Bank of any Transaction processed in accordance with the terms of this Agreement shall be without recourse to Merchant, except for:
- (i) Full Recourse Transactions; (ii) as otherwise indicated in this Agreement; and (iii) under any of the following circumstances:
 - (a) No specific prior Authorization for the Transaction was obtained from the Authorization Center, the approval number does not appear in the electronic transmittal that is maintained by Bank, or the Transaction was submitted to the Bank or ISO thirty (30) days or more after the date on which the goods and/or services to which the Transaction relates were purchased or leased by the relevant Cardholder;
 - (b) The Transaction was based on a pre-authorization form, the Card on which the Authorization was based was canceled and Merchant was so notified prior to the Transaction;
 - (c) The Card giving rise to the Transaction was canceled and prior to, or at the time of, the Transaction, and Merchant received notice of the cancellation through the electronic terminal, in writing or otherwise;
 - (d) The Card expired prior to the date of the Transaction or the date of the Transaction was prior to the validation date, if any, indicated on the Card;
 - (e) The Transaction information required by this Agreement was not submitted to Bank, or the procedures required by this Agreement to be followed in connection with processing a Transaction were not followed;
 - (f) Bank or Issuer receives a complaint from or on behalf of a Cardholder stating that there is an unresolved dispute or defense to a charge (whether or not valid) between Merchant and Cardholder;
 - (g) The Cardholder makes a written complaint to Bank or Issuer that the Cardholder did not make or authorize the Transaction;
 - (h) A setoff or counterclaim of any kind exists in favor of any Cardholder against Merchant that may be asserted in defense of an action to enforce payment against the Cardholder in the Transaction;
 - (i)) The Transaction was made at or by a merchant other than Merchant;
 - (j)) The Transaction otherwise violates the terms of this Agreement or any Applicable Law;
 - (k)) A Transaction is charged back by an Issuer; or
 - (l) Any representation or warranty made by Merchant in connection with the Transaction is false or inaccurate in any respect.

In any such case, Bank shall not be obligated to accept a Transaction for credit to the Operating Account. If Bank has credited the Operating Account or Reserve Account for such a Transaction, Bank may return the Transaction to the Merchant, and Merchant shall pay Bank the amount of the Transaction. Merchant agrees that it is solely responsible for all Chargebacks, and that Bank, without prior notice to Merchant, may: (i) charge the amount of the Transaction to the Operating Account or Reserve Account; (ii) recoup the amount of the Transaction by adjustment of the credits due to Merchant; or (iii) set off the amount of the Transaction against any account or property Bank holds for or on behalf of Merchant. If Merchant disagrees with Bank's decision to charge back a Transaction, Merchant must so notify Bank in writing within 10 days of the Chargeback, and provide documentation that the dispute has been resolved to Cardholder's satisfaction or proof that a credit has been issued. Without limiting the generality of any other provision of this Agreement, if Bank or ISO, if ISO has indemnified Bank, takes legal action against Merchant for any Chargebacks or any amounts due Bank or ISO hereunder, Merchant shall pay the costs and attorneys' fees incurred by Bank and/or ISO, whether suit is commenced or not.

16. **Merchant Statement.** At least once each month, Bank shall provide a statement (the "Merchant Statement") to Merchant. All information appearing on the Merchant Statement shall be deemed accurate and affirmed by Merchant unless Merchant objects by written notice specifying the particular item in dispute within 60 days of the date of the Merchant Statement.

17. **Retention of Information.** Merchant shall retain the information required to be submitted in connection with a Transaction or to be maintained in connection with a complaint for seven years from the date of the Transaction or the complaint. At the request of Bank, Merchant shall provide such information to Bank or ISO, as directed by Bank, within five (5) days of receipt of a request from Bank. Failure to meet such time frame or non-delivery of any item or delivery of an illegible copy of an item requested by an Issuer shall, among other things, constitute a waiver by Merchant of any claims and may result in an irrevocable Chargeback for the full amount of the Transaction.

18. **Recovery of Cards.** Merchant will use its best efforts to reasonably and peaceably recover and retain any Card with respect to which Merchant receives notification of cancellation, restrictions, theft or counterfeiting. This notice may be given: (i) electronically through the Equipment; (ii) by the Authorization Center through any means; or (iii) by listing on any canceled Card or restricted Card list. Merchant shall also take reasonable steps to recover a Card that it has reasonable grounds to believe is counterfeit, fraudulent or stolen.

19. **Customer Complaints.** Merchant shall respond promptly to inquiries from Cardholders and shall attempt to resolve any disputes amicably. If unresolved disputes occur with a frequency unacceptable to Bank, Bank may terminate this Agreement. Bank reserves the right to charge Merchant reasonable fees and reimbursement on account of excessive Cardholder inquiries, refunds or Chargebacks. Merchant agrees to maintain the following information in writing with respect to each claim or defense asserted by a Cardholder for which Merchant has received notice:

- (a) The Cardholder's name;
- (b) The truncated Card account number or token;
- (c) The date and time the Cardholder asserted the claim or defense;
- (d) The nature of the claim or defense; and
- (e) The action that Merchant took in an attempt to resolve the dispute.

Upon request, Merchant shall furnish Bank with this information in writing within 10 days.

20. **Confidentiality.** Merchant shall treat all information received in connection with this Agreement as confidential. Merchant shall prevent the disclosure of this information except for necessary disclosures to affected Cardholders, to Bank, to ISO and to Issuers.

21. **Compliance with Applicable Law.** Merchant represents and warrants that it has obtained all necessary regulatory approvals, certificates and licenses, and that it is in compliance with all Applicable Law, in connection with the operation of its business. Merchant represents and warrants that it understands the importance of complying with Applicable Law in connection with any and all actions it takes in connection with Transactions (including, without limitation, complying with requirements relating to Transaction information, storage and disclosure), and covenants at all times to comply in full with all Applicable Law. Merchant further acknowledges and agrees that it is responsible for the actions of all of its employees while in Merchant's employ.

22. **Taxes.** Each party hereto shall report its income and pay its own taxes to any applicable jurisdiction. If either Bank or ISO is required to pay any taxes, interests, fines or penalties owed by Merchant, said amount shall become immediately due and payable by Merchant to Bank or ISO. If excise, sale or use taxes are imposed on Transactions, Merchant shall be responsible for the collection and payment thereof. Merchant shall not add any tax to any Transaction unless Applicable Law expressly provides that Merchant is permitted to impose a tax, and any such tax amount, if so allowed, shall be included in the Transaction amount and not collected separately. Bank or ISO shall be entitled to recover from Merchant any of said taxes paid by it on behalf of Merchant immediately after payment.

23. **Limitation of Liability.** In addition to all other limitations on the liability of Bank and ISO contained in this Agreement, neither Bank nor ISO shall be liable to Merchant or Merchant's customers or any other person for any of the following:

- (a) Any loss or liability resulting from the denial of credit to any person or Merchant's retention of any Card or any attempt to do so;
- (b) Any loss caused by a Transaction downgrade resulting from defective or faulty Equipment, even if such Equipment is owned by Bank or ISO;
- (c) The unavailability of Services caused by the termination of contracts with computer hardware vendors, processors or installers, whether terminated by Bank, ISO or any other person for any reason; or
- (d) Interruption or termination of any Services caused by any reason except for failure of ISO to repair or replace Equipment at Merchant's expense (in which case, any resulting liability shall be for the sole account of ISO). At no time will ISO's liability exceed the amount of fees collected or reasonably expected to be collected from Merchant for this delay period.

NEITHER BANK NOR ISO SHALL BE LIABLE FOR ANY LOST PROFITS, PUNITIVE, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES TO MERCHANT OR TO ANY THIRD PARTY IN CONNECTION WITH OR ARISING OUT OF THIS AGREEMENT OR ANY OF THE SERVICES TO BE PERFORMED BY BANK OR ISO PURSUANT TO THIS AGREEMENT. MERCHANT ACKNOWLEDGES THAT BANK HAS PROVIDED NO WARRANTIES, EITHER EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO ANY EQUIPMENT AND THAT BANK HAS NO LIABILITY WITH RESPECT TO ANY EQUIPMENT. BANK MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE SERVICES IT PROVIDES HEREUNDER. IF THERE ARE ERRORS, OMISSIONS, INTERRUPTIONS OR DELAYS RESULTING FROM BANK'S OR ISO'S PERFORMANCE OR ANY FAILURE TO PERFORM, BANK'S AND ISO'S LIABILITY SHALL BE LIMITED TO CORRECTING SUCH ERRORS, IF COMMERCIALY REASONABLE.

24. **Limitation on Damages.** In no case shall Merchant be entitled to recover damages from ISO or Bank that exceed the fees retained by Bank and ISO pursuant to this Agreement during the six month period immediately prior to the event giving rise to the claim for damages.

25. **Indemnification.** Merchant agrees to indemnify and hold Bank and ISO harmless from any and all losses, claims, damages, liabilities and expenses, including attorneys' fees and costs (whether or not an attorney is an employee of Bank or Bank's affiliates, ISO or affiliates of ISO) arising out of any of the following:

- (a) Merchant's failure to comply with this Agreement;
- (b) Any act or omission of Merchant;
- (c) Merchant's failure to comply with any Equipment's user's guide;
- (d) Merchant's failure to comply with any Applicable Law;
- (e) Any dispute concerning the quality, condition or delivery of any merchandise or the quality of performance of any service;
- (f) The fraud or dishonesty of Merchant or Merchant's employees, licensees, successors, agents and/or assigns;
- (g) Merchant's selection of an Internet service provider or other telecommunication services provider;
- (h) The theft of or damage or destruction to any Equipment; or
- (i) Full Recourse Transactions, unauthorized Transactions and prohibited Transactions.

26. **Credit Investigation and Bank Auditing.** Bank may audit, from time to time, Merchant's compliance with the terms of this Agreement. Merchant shall provide all information requested by Bank to complete Bank's audit. Merchant authorizes parties contacted by Bank to release the credit information requested by Bank, and Merchant agrees to provide a separate authorization for release of credit information, if requested by Bank. Merchant shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Merchant's financial condition. Such information shall be true, complete and accurate. Without limiting the generality of the foregoing, Merchant shall provide to Bank and ISO its balance sheet and income statements not less frequently than every three calendar months during the term of this Agreement.

27. **Termination of Agreement by Bank and ISO.** Bank may terminate this Agreement upon at least 30 days' prior written notice to the other parties. In addition, Bank may terminate this Agreement immediately upon written notice to Merchant upon the occurrence of any of the following (each, an "Event of Default"):

- (a) Any information concerning Merchant obtained by Bank is unsatisfactory to Bank, in Bank's sole discretion.
- (b) Any act of fraud or dishonesty is committed by Merchant, its employees or agents, or Bank believes in good faith that Merchant, its employees or agents have committed, are committing or are planning to commit any acts of fraud or misrepresentation.
- (c) Chargebacks are excessive, in the opinion of Bank.
- (d) There is a breach of any representation or warranty made by Merchant to Bank, or Merchant defaults in the performance of any of its obligations under this Agreement.
- (e) Merchant files a petition under any bankruptcy or insolvency law.
- (f) Bank determines that the continuation of this Agreement may create harm or the loss of goodwill to Bank or any Association.
- (g) Merchant fails to maintain sufficient funds in the Operating Account to cover the amounts due to Bank hereunder.
- (h) Merchant's percentage of error Transactions or retrieval requests is excessive in the opinion of Bank.
- (i) Any insurance policy obtained by Bank, ISO or Merchant relating to Transactions and/or Chargebacks is cancelled or terminated for any reason.
- (j) Merchant fails to provide financial statements suitable to Bank on request.
- (k) ISO does not or cannot perform its duties under this Agreement and Bank determines that it is not feasible to provide the Services contemplated by this Agreement to Merchant. Bank is not obligated to provide replacement Services if ISO does not or cannot perform.

Bank may selectively terminate one or more of Merchant's approved locations without terminating this entire Agreement.

In the event of termination, all obligations of Merchant incurred or existing under this Agreement prior to termination shall survive the termination. Merchant's obligations with respect to any Transaction shall be deemed incurred and existing on the date of such Transaction.

In the event Bank terminates this Agreement following any Event of Default, Merchant: (i) agrees that Bank may place Merchant on each Association's "Terminated Merchant File" (or any other list or file serving a similar purpose); and (ii) agrees to indemnify and hold Bank and ISO harmless from and against any and all costs, expenses and liabilities incurred by Bank and/or ISO in connection with or arising out of such Event of Default.

28. **Termination of Agreement by Merchant.** Merchant may terminate this Agreement without incurring an early termination fee upon at least 30 days' prior written notice to the other parties if Bank amends *Schedule A* pursuant to Section 31 to increase the rates, fees or charges Merchant pays hereunder, except for fees or rates that result from a pass through from an Association.

29. **Setoff.** In addition to any other legal or equitable remedy available to it in accordance with this Agreement or by law, Bank and/or ISO may set off any amounts due to Bank and/or ISO under this Agreement against any property of Merchant in the possession or control of Bank or ISO.

30. **Exclusivity.** Notwithstanding any other provision of this Agreement, Bank or ISO may terminate this Agreement immediately by providing written notice to Merchant: (i) if Merchant's Visa, Mastercard, and Discover Network gross sales volume (collectively, "Volume") decreases by more than fifty percent (50%) of the monthly average for the most recent twelve (12) month period, and the resultant decrease in Volume is not related to an overall decrease in Merchant's business sales; or (ii) following notification by Merchant of its intent to terminate this Agreement and stop processing before the end of the term hereof or any extension thereof, as long as the early termination by Merchant is not made pursuant to the terms of Section 28. Merchant agrees upon early termination of this Agreement to pay ISO any one-time expenses used to set up Merchant such as, but not limited to, discounted equipment, travel expenses, software, conversion costs, etc., plus the amount of Merchant's average monthly discount multiplied by the months remaining in the term of this Agreement or any renewal thereof, including but not limited to all normal and customary processing fees and revenues, less the estimated costs and expenses of ISO relating to the Agreement for the remaining term of this Agreement.

31. **Amendments to this Agreement.** From time to time Bank may amend this Agreement as follows:

- (a) Bank may amend or delete Cards or Services listed in *Schedule A* by notifying Merchant in writing of any such amendment. All provisions of this Agreement shall apply to Cards or Services added to this Agreement. Bank shall notify Merchant of the fees to be charged for processing the additional Cards and Services. Acceptance by Merchant of a new approved Card as payment for a Transaction or use of a new Service after Bank has sent Merchant notice of an amendment shall constitute Merchant's agreement to the amendment and the fees or charges related to these additions.
- (b) From time to time, Bank may change all rates, fees and charges set forth on *Schedule A*. Bank will provide written notice to Merchant of all such amendments. Bank may change the rates, fees and charges without prior written notice if Merchant's sales volume or average Transaction amount does not meet Merchant's projections contained in the Merchant Bankcard Application to which this Agreement is attached or the underlying risk factors to process Transactions increase. If notice is required, Bank will give written notice on the Merchant Statement. All new rates, fees and charges will become effective for the month immediately following the month in which the notice appeared on the Merchant Statement unless Merchant terminates this Agreement in accordance with Section 28.
- (c) Bank may amend this Agreement in any manner other than as described in Section 31(a) or 31(b) above simply by providing written notice of such amendment to Merchant, and such amendment shall become effective on the latter of: (i) the date on which such written notice is received by Merchant; or (ii) a date specified by Bank in such written notice.

32. **Assignment.** This Agreement may not be assigned by Merchant without the prior written consent of Bank. Bank may assign this Agreement without limitation. Assignment of this Agreement by Bank shall relieve Bank of any further obligations under this Agreement.

33. **Financial Accommodations.** Bank, ISO and Merchant intend this Agreement to be construed as a contract to extend financial accommodations for the benefit of Merchant.

34. **Waiver.** To the extent that Merchant becomes a debtor under any chapter of title 11 of the United States Code and such event does not result in the termination of this Agreement, Merchant hereby unconditionally and absolutely waives any right or ability that Merchant may otherwise have had to oppose, defend against or otherwise challenge any motion filed by Bank for relief from the automatic stay of 11 U.S.C. § 362(a) to enforce any of Bank's rights or claims under this Agreement.

35. **Cooperation.** In their dealings with one another, each party agrees to act reasonably and in good faith and to fully cooperate with each other in order to facilitate and accomplish the transactions contemplated hereby.

36. Entire Agreement. This Agreement, together with the Schedules attached hereto, supersedes any other agreement, whether written or oral, that may have been made or entered into by any party (or by any officer or officers of any party) relating to the matters covered herein and constitutes the entire agreement of the parties hereto.

37. Severability. If any provisions of this Agreement shall be held, or deemed to be, or shall in fact be, inoperative or unenforceable as applied in any particular situation, such circumstance shall not have the effect of rendering any other provision or provisions herein contained invalid, inoperative or unenforceable to any extent whatsoever. The invalidity of any one or more phrases, sentences, clauses or sections herein contained shall not affect the remaining portions of this Agreement or any part hereof.

38. Notices. Except for notices provided by Bank to Merchant on the Merchant Statement, all notices, requests, demands or other instruments which may or are required to be given by any party hereunder shall be in writing and each shall be deemed to have been properly given when: (i) served personally on an officer of the party to whom such notice is to be given, (ii) upon expiration of a period of three (3) business days from and after the date of mailing thereof when mailed postage prepaid by registered or certified mail, requesting return receipt, or (iii) upon delivery by a nationally recognized overnight delivery service, addressed as follows:

If to BANK: 320 Old Country Road
Garden City, NY 11503
If to ISO: 1930 E. Brown Road
Mesa, AZ 85203
If to MERCHANT: Address listed on the application to which this Agreement is attached.

Any party may change the address to which subsequent notices are to be sent by notice to the others given as aforesaid.

39. Governing Law. This Agreement shall be governed and construed in accordance with the laws of the State of New York, without regard to internal principles of conflict of laws, and federal law. The state and federal courts located in Maricopa County, Arizona shall have sole and exclusive jurisdiction of any and all claims, disputes and controversies arising under or relating to this Agreement.

40. Captions. Captions in this Agreement are for convenience of reference only and are not to be considered as defining or limiting in any way the scope or intent of the provisions of this Agreement.

41. No Waiver. Any delay, waiver or omission by Bank to exercise any right or power arising from any breach or default of the other party in any of the terms, provisions or covenants of this Agreement shall not be construed to be a waiver of any subsequent breach or default of the same or any other terms, provisions or covenants on the part of the other party. All remedies afforded by this Agreement for a breach hereof shall be cumulative.

42. Force Majeure. The parties shall be excused from performing any of their respective obligations under this Agreement which are prevented or delayed by any occurrence not within their respective control including but not limited to strikes or other labor matters, destruction of or damage to any building, natural disasters, accidents, riots or any regulation, rule, law, ordinance or order of any federal, state or local government authority.

43. Merchant Warranties and Acknowledgements. Merchant represents and warrants to Bank all of the following:

- All representations and statements made in this Merchant Bankcard Application and Agreement, or in any other document relating hereto, by Merchant or on Merchant's behalf are true, accurate and complete in all material respects. Merchant hereby authorizes Bank to investigate and confirm the information herein. For this purpose, Bank may utilize credit bureau / reporting agencies and/or its own agents.
- Merchant is engaged in the lawful business shown on the Merchant Bankcard Application that includes the sale of merchandise and/or services, and is duly licensed to conduct such business under the laws of the state, county and city in which Merchant is located.
- Merchant has not been terminated from settlement of Card transactions by any financial institution or determined to be in violation of any of the rules and/or regulations of Visa, MasterCard, or Discover Network except as specifically disclosed in the Merchant Bankcard Application. Merchant acknowledges that the signature of the representative on the Merchant Bankcard Application and/or this Agreement only constitutes acknowledgment of the offer made by the representative on behalf of, and contingent upon the approval of, Bank and such agreement is not binding until approved by Bank.

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

45. Miscellaneous. Merchant may not make a claim against Bank or hold Bank liable for the acts or omissions of other merchants, service providers, the Associations, financial institutions or others that do not have a written contractual relationship with Bank or over which Bank has no control. These provisions supplement, augment and are in addition to obligations of indemnification, audit, confidentiality and other similar provisions contained in this Agreement. This Section 45 will survive this Agreement's termination. Merchant may not store in any system or in any manner discretionary Card read data including without limitation CVV2 data, PIN data, address verification data or any other information prohibited by Applicable Law.

46. PCI Certification. Merchant will provide an annual certification to Bank if requested by Bank (in a form acceptable to Bank) certifying compliance with the data security provisions of this Agreement, including compliance with applicable Association requirements such as PCI, SDP and CISP. Merchant will provide annual certifications for Merchant's service providers, subcontractors and agents. Failing to meet the requirements of this mandate will increase Merchant's underlying risk factors.

47. OptBlue® Acceptance. By checking the Accept checkbox next to OptBlue® on page two of this 5 page Agreement call Merchant Bankcard Application the following terms and conditions apply to MERCHANT's participation in the AMERICAN EXPRESS OptBlue® Program ("AMERICAN EXPRESS CARD ACCEPTANCE"): Section 3.2 of the MOG found at (www.americanexpress.com/merchantoptguide) – Merchant authorizes Bank/ISO and/or its affiliates to submit AMERICAN EXPRESS SALES to, and receive settlement on such SALES from AMERICAN EXPRESS on behalf of MERCHANT. MERCHANT agrees that BANK/ISO may disclose to AMERICAN EXPRESS information regarding MERCHANT and MERCHANT's SALES to AMERICAN EXPRESS, and that AMERICAN EXPRESS may use such information to perform its responsibilities in connection with AMERICAN EXPRESS CARD ACCEPTANCE, promote AMERICAN EXPRESS, perform analytics and create reports, and for any other lawful business purposes, including commercial marketing communications purposes within the parameters of AMERICAN EXPRESS CARD ACCEPTANCE, and important transactional or relationship communications from AMERICAN EXPRESS. AMERICAN EXPRESS may use the information about MERCHANT obtained in the AGREEMENT at the time of setup to screen and/or monitor MERCHANT in connection with AMERICAN EXPRESS marketing and administrative purposes. MERCHANT agrees it may receive messages from AMERICAN EXPRESS, including important information about AMERICAN EXPRESS products, services, and resources available to its business. These messages may be sent to the mailing address, phone numbers, email addresses or fax numbers of MERCHANT. MERCHANT may be contacted at its wireless telephone number and the communications sent may include autodialed short message service (SMS or "text") messages or automated or prerecorded calls. MERCHANT agrees that it may be sent fax communications

48. OptBlue® Acceptance Opt-out: By unchecking the Accept checkbox next to OptBlue® or by contacting Bank/ISO at any time you may opt out of accepting American Express Cards without directly or indirectly affecting its rights to accept any other payment product.

49. OptBlue® Right of Assignment: MERCHANT shall not assign to any third party any payments due to it under AMERICAN EXPRESS CARD ACCEPTANCE, and all indebtedness arising from SALES will be for bona fide sales of goods and services (or both) at its business locations and free of liens, claims, and encumbrances other than ordinary sales taxes; provided, however, that the MERCHANT may sell and assign future SALES receivables to BANK/ISO, its affiliated entities and/or any other cash advance funding source that partners with BANK/ISO or its affiliated entities, without consent of AMERICAN EXPRESS. Notwithstanding the foregoing, BANK/ISO prohibits MERCHANT from selling or assigning future SALES receivables to any third party.

50. OptBlue® Direct Relationship: MERCHANT acknowledges that it may be converted from AMERICAN EXPRESS CARD

ACCEPTANCE to a direct relationship with AMERICAN EXPRESS if and when its SALES volumes exceed the eligibility thresholds for AMERICAN EXPRESS CARD ACCEPTANCE. If this occurs, upon such conversion, (i) MERCHANT will be bound by AMERICAN EXPRESS' then-current Card Acceptance Agreement; and (ii) AMERICAN EXPRESS will set pricing and other fees payable by MERCHANT. Notwithstanding anything in the AGREEMENT to the contrary, AMERICAN EXPRESS shall have third-party beneficiary rights, but not obligations, to the terms of the AGREEMENT applicable to AMERICAN EXPRESS CARD ACCEPTANCE to enforce such terms against MERCHANT.

51. OptBlue® Right To Terminate: BANK/ISO shall have the right to terminate MERCHANT'S participation in AMERICAN EXPRESS CARD ACCEPTANCE immediately upon written notice to MERCHANT (i) if MERCHANT breaches any of the provisions of this AMERICAN EXPRESS OPTBLUE PROGRAM AGREEMENT or any other terms of the AGREEMENT applicable to AMERICAN EXPRESS CARD ACCEPTANCE, or (ii) for cause or fraudulent or other activity, or upon AMERICAN EXPRESS' request. In the event MERCHANT's participation in AMERICAN EXPRESS CARD ACCEPTANCE is terminated for any reason, MERCHANT must immediately remove all AMERICAN EXPRESS branding and marks from MERCHANT's website and wherever else they are displayed. Further, American Express has the right to modify the Agreement with respect to American Express Card transactions or to terminate your acceptance of American Express Card transactions and to require Processor to investigate your activities with respect to American Express Card transactions.

52. OptBlue® Refund policy: MERCHANT'S refund policies for AMERICAN EXPRESS SALES must be at least as favorable as its refund policy for purchase on any other CARD BRAND, and the refund policy must be disclosed to cardholders at the time of purchase and in compliance with LAWS. MERCHANT may not bill or attempt to collect from any cardholder for any AMERICAN EXPRESS SALE unless a CHARGEBACK has been exercised, MERCHANT has fully paid for such CHARGEBACK, and it otherwise has the right to do so.

53. OptBlue® Payment Acceptance: MERCHANT must accept AMERICAN EXPRESS as payment for goods and services (other than those goods and services prohibited by this AMERICAN EXPRESS OPTBLUE PROGRAM AGREEMENT, the AGREEMENT, or the RULES) sold, or (if applicable) for charitable contributions made at all of its business locations and websites, except as expressly permitted by state statute. MERCHANT is jointly and severally liable for the obligations of MERCHANT's business locations and websites under the AGREEMENT.

54. OptBlue® Claim Resolution: In the event that MERCHANT or BANK/ISO is not able to resolve a Claim against AMERICAN EXPRESS, or a Claim against BANK/ISO or any other entity that AMERICAN EXPRESS has a right to join in resolving a Claim, this section explains how Claims can be resolved through arbitration. MERCHANT or AMERICAN EXPRESS may elect to resolve any Claim by individual, binding arbitration. Claims are decided by a neutral arbitrator.

55. OptBlue® Merchant Marketing Opt-outs: MERCHANT may opt-out of receiving future commercial marketing communications from AMERICAN EXPRESS by unchecking the checkbox Receive Marketing Comm. Next to the OptBlue® Accept checkbox or by contacting BANK/ISO. Note that MERCHANT may continue to receive marketing communications while AMERICAN EXPRESS updates its records to reflect this choice. Opting out of commercial marketing communications will not preclude MERCHANT from receiving important transactional or relationship messages from AMERICAN EXPRESS.

56. OptBlue® Payment Assignment: Merchant acknowledges and agree that you shall not assign to any third party any payments due to you under this Agreement as the result of American Express Card transactions, and all indebtedness arising from American Express Card charges will be for bona fide sales of goods and services.

57. OptBlue® Data Security: A copy of the American Express Data Security Requirements ("DSR") can be obtained online at www.americanexpress.com/dsr. Merchant shall abide by and fully comply with applicable Association requirements such as PCI, SDP and CISP.

ClickToPay Direct Agreement

NACHA Merchants may opt-in to participate in card processing services that allow for ClickToPay Direct transactions to occur. ClickToPay Direct is a proprietary payment method available through the proprietary software and system called ClickToPay operated and designed by APS Payments. APS Payment's ClickToPay Direct transactions utilizes the (North American Clearing House Association). A Merchant may opt-in to allow for NACHA Transactions through the ISO's ClickToPay features named ClickToPay Direct. The following Terms and Conditions shall apply between the Merchant, Third-Party Processes Service Provider, and ISO to these specific transactions (hereinafter the "Agreement").

A. PROCESSING SERVICES NACHA TRANSACTIONS AND MERCHANT CAPTURE

- 1. Parties.** The Parties of the Agreement are American Payment Services of Coeur d'Alene, LLC. dba APS Payments ("APS"), and the MERCHANT set forth on the MERCHANT Bankcard Application to which is attached hereto and is incorporated herein for reference.
- 2. Definitions.** the following terms have the meaning identified below:
 - (a) "Bank of First Deposit" is defined as a in a Check 21 transaction, the financial institution which receives the Entry from JHA and transmits the Entry through the Federal Reserve Bank system for transmittal to the Customer's financial institutional for debit or credit to the to the Customer's account.
 - (b) "Check 21" is defined as the federal statutes 12 U.S.C. § 5001 *et seq*, known as the "Check Clearing for 21st Century Act" and any and all subsequent regulations pertaining to these federal statutes.
 - (c) "Check 21 Transaction" is defined as an electronic payment transaction utilizing a Substitute Check image permitted by Check 21.
 - (d) "Customer" is defined as a MERCHANT's customer who submits a payment to MERCHANT by means of a paper check or NACHA transfer.
 - (e) "Entry" is defined as a transaction submitted by MERCHANT for processing by the Services and further defined in the NACHA Rules.
 - (f) "Hardware" is defined as the scanner equipment used to electronically scan and capture the paper check image.
 - (g) "JHA" is a Third-Party Processing Services Provider named Jack Henry & Associates, Inc.

- (h) "NACHA" is a electronic network of financial institutions that facilitate transactions in the United States.
- (i) "NACHA Rules" is defined as the then-current rules, regulations, and procedural guidelines published by the NACHA and/or all regional payment alliances associated with NACHA.
- (j) "NACHA Transactions" is defined as an electronic payment transaction originated by MERCHANT and processed through the NACHA network in the Federal Reserve System.
- (k) "Originating Depository Financial Institution" or "ODFI": is defined as an NACHA Transaction, the financial institution which receives the Entry and transmits the Entry to its NACHA Operator for transmittal to a Receiving Depository Financial Institution for debit or credit to the Customer's account, as these terms are further defined in the NACHA Rules.
- (l) "Reseller" is defined as an Independent Service Organizations ("ISO") who facilitate transactions between the MERCHANT, a third-party processor and financial institution that is part of the NACHA Transaction. For purposes of this Agreement, APS is considered a Reseller.
- (m) "Services" is defined as the NACHA or Check 21 Processing Services provided to MERCHANT under this Agreement.
- (n) "Settlement Account" is defined as a commercial demand deposit bank account which MERCHANT has established for JHA's access and use to settle financial payment transactions processed by JHA on behalf of MERCHANT.
- (o) "Shortfalls" is defined as a MERCHANT having insufficient funds within its Settlement Account to pay for fees, transaction costs, and any additional charges incurred in the use of NACHA Transactions.
- (p) "Substitute Check" means the electronic image of a paper check, as defined in Check 21.
- (q) "Third-Party Processing Service Provider" is defined as non-bank entities that provide payment processing services to MERCHANTs and other business entities. For purposes of this Agreement, JHA is considered to be a Third-Party Processor ("3PP").

3. SET-UP AND DELIVERY OF SERVICES

- (a) In conjunction with this Agreement, Merchant has completed and submitted to "APS" an initial written application and supporting documentation about Merchant's business and financial status, for "APS's" and "3PP's" consideration in the account set-up and provision of the Services to Merchant. Merchant acknowledges that "APS" and "3PP" shall be entitled to rely upon the validity, accuracy and completeness of the information provided by Merchant in its application and supporting documentation to "APS" and "3PP", for "APS's" and "3PP's" use in performing its due diligence review of Merchant's status and financial standing for determining (a) if "APS" and "3PP" will enter into this Agreement with Merchant; (b) if "APS" and "3PP" will provide all or any of the Services to Merchant under this Agreement; and (c) the credit and account processing standards and limits that

“APS” and “3PP” will apply to the processing of Merchant’s Entries. Subsequent to the initial acceptance and set-up of Merchant for “APS’s” and “3PP’s” provision of the Services, “APS” and “3PP” may from time to time request that Merchant provide updated information and supporting documentation to “APS” to confirm Merchant’s then-current business and credit status, which Merchant shall apply best efforts to deliver to “APS” within three (3) business days following receipt of APS’s written request. Any failure by Merchant to provide the information and supporting documentation requested by “APS” via the application or by other means within a timely manner shall be deemed to be a material breach of this Agreement by Merchant.

- (b) When Merchant’s application has been accepted and approved by “3PP”, “APS” shall provide the Services selected by Merchant in its application. Merchant shall utilize and access the Services in accordance with the terms of this Agreement and the practices and procedures established for the Services which have been communicated in writing to Merchant. As part of the Merchant set-up and boarding process:
 - (i) “APS” will provide Merchant with an administrative and gateway user name and password (“Password”) to access the Services which are hosted on “APS” and/or “3PP’s” processing system. Merchant will designate an Administrator who shall be the sole individual vested with the authority to determine who will be authorized to use the Services; establish separate passwords for each user; and establish limits on each user’s authority to access information and conduct transactions. Merchant is responsible for the actions of its Administrator, the authority the Administrator gives others to act on Merchant’s behalf, and the actions of the persons designated by the Administrator to use the Services. Merchant shall take reasonable security procedures and practices to safeguard the confidentiality of the passwords; limit access to its passwords solely to persons who have a need to know such information; closely and regularly monitor the activities of employees who access the Services; and prohibit its employees and agents from initiating entries in the Services without proper authorization and supervision and adequate security controls. Merchant understands that the password and Services access and use instructions provided by APS or 3PP are confidential and agrees to assume all risks of accidental disclosure or inadvertent or wrongful use by any party, whether such disclosure of use are on account of Merchant’s negligence or are deliberate acts. Merchant acknowledges that no person from JHA will ever ask for any password and that APS or 3PP employees do not need and should not ask for Merchant’s password.

4. Services Provided to MERCHANT. During the term of this Agreement, and subject to the terms and conditions of this Agreement, the parties shall provide:

- a. The Reseller APS shall provide technical documentation and support along with customer support in order to allow MERCHANT to accept and process NACHA Transactions; and
- b. The Third-Party Processing Services Provider JHA shall provide the Services to MERCHANT to allow for, accept, and process NACHA Transactions.

5. Fees. MERCHANT shall pay to Reseller all fees specified on MERCHANT Application and on *Schedule A*, as amended by Reseller from time to time. Fees shall be assessed at the time of the Services and will be reflected on the monthly statements

received by the MERCHANT.

6. **Term.** The Agreement shall become effective when the parties sign the MERCHANT Application form that this Agreement is incorporated herein for reference. The term is contingent on the term specified in the underlying MERCHANT Application and Agreement. If a termination occurs, any existing obligations, warranties, indemnities and agreements with respect to NACHA Transactions entered into before such termination shall remain in full force and effect, and, regardless of any such termination, MERCHANT shall remain liable for all obligations to Reseller and Third-Party Processing Service Provider.
7. **Processing Services Requirements.** All Checks deposited electronically through use of the Services defined above shall be subject to the following requirements:
 - (a) The original paper check will not be deposited through the Services more than once;
 - (b) All checks will conform to the requirements of MERCHANT's deposit agreement with its financial institution;
 - (c) All checks will conform to the requirements of the applicable NACHA Rules and Check 21;
 - (d) MERCHANT, as applicable, shall review and validate the accuracy and completeness of the check data being captured including but not limited to the amount of the check and the legibility of the check image generated from use of the Services.
8. **Selection and Use of Hardware.** MERCHANT is solely responsible for the selection, use, and operation of the Hardware used to capture the electronic image of the paper checks using the Services, including the quality of the scanned check image results generated from the Hardware. Hardware utilized must be certified for use with the Services by the Reseller and Third-Party Processing Service Provider in order to be deemed compatible with the Services.
9. **MERCHANT Liability.** MERCHANT shall be solely liable and responsible for all damages, losses, expenses and claims arising from any of the following which are not caused by Reseller:
 - (a) Duplication of images of deposited checks using the Services;
 - (b) Alteration of scanned images of deposited checks;
 - (c) Inaccurate or incomplete data captured from the deposited checks;
 - (d) Deposit of checks on accounts with insufficient funds, counterfeit checks, fraudulent checks, or checks bearing unauthorized or forged endorsements;

- (e) Acts of fraud, negligence or willful misconduct committed by employees, agents or subcontractors of MERCHANT in depositing checks using the Services;
- (f) Hardware failure or use of scanner hardware not certified by Third-Party Processing Service Provider or Reseller; or
- (g) Failure to properly store or destroy original checks once scanned image has been captured.

MERCHANT shall indemnify, defend and hold "APS", "3PP", "JHA", the ODFI and the Bank of First Deposit harmless from and against all claims, actions, losses and expenses, including reasonable attorney's fees and legal costs, incurred by JHA, the ODFI and/or the Bank of First Deposit arising out of (a) Merchant's breach of this Agreement, the NACHA Rules or applicable laws and regulations; (b) return of an Entry due to incorrect or incomplete data or information provided by Merchant in the submission of the Entry to "APS", "JHA", or "3PP", a closed Customer account, or insufficient funds in the Customer account, and/or (c) fraudulent activity, wrongful or unauthorized use of the Services, or submission of fraudulent or illegal Entries by Merchant or a third party who has gained access to the Services through the use of Merchant's password.

10. Compliance With Laws And NACHA Rules. MERCHANT shall comply with all laws, regulations, and any and all additional legal requirements, including the NACHA Rules, that apply to its performance under this Agreement.

11. Third Party Processing Services. The MERCHANT acknowledges that JHA, as Third-Party Processing Services Provider, is providing some of the Services specified in this Agreement, and as a result, JHA is a third-party beneficiary of this Agreement between APS and MERCHANT. JHA shall have the right to enforce directly against MERCHANT, the terms of this Agreement which relate to the provision of the Third-Party Processing Services Provider's processing services to MERCHANT and the ownership and the protection of the intellectual property rights of JHA and its licensors in and to its processing services. MERCHANT acknowledge that JHA has no responsibility or liability with regard to Reseller's obligations to MERCHANT under this Agreement.

12. Settlement Accounts. In the event that JHA's ODFI is acting as the ODFI for MERCHANT, the following provisions shall also apply:

- a. MERCHANT shall immediately reimburse JHA and APS, as applicable, for any shortfalls that occur due to non-sufficient funds in the Settlement Account. JHA reserves the right to delay the availability of funds for deposit without prior written notices to MERCHANT if in its sole discretion JHA deems itself at financial or relative risk for any and all Services performed under this Agreement.
- b. MERCHANT hereby acknowledges and agrees that JHA shall have a right of setoff against any and all fees, returns and refunds owned JHA by MERCHANT under this agreement.

13. Termination. This Agreement terminates when the underlying MERCHANT Application and Agreement terminates. MERCHANT is responsible for all fees, costs, and expenses incurred to APS up to and including 6 months after the date of termination. This Agreement may be terminated by “APS” or “3PP” for any reason upon giving Merchant written Notice.

14. Indemnification. MERCHANT agrees to indemnify and hold APS, JHA, and 3PP harmless from any and all losses, claims, damages, liabilities and expenses, including attorneys’ fees and costs arising out of any of the following:

- a. MERCHANT’s failure to comply with this Agreement;
- b. Any act or omission of MERCHANT;
- c. MERCHANT’s failure to comply with any Applicable Law; or
- d. The fraud or dishonesty of MERCHANT or MERCHANT’s employees, licensees, successors, agents and/or assigns

15. Limitation on Damages. IN NO EVENT SHALL “APS”, “3PP”, JHA, THE ODFI OR THE BANK OF FIRST DEPOSIT BE LIABLE TO MERCHANT OR ANY OTHER PARTY FOR ANY LOSS OF PROFITS OR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES, EVEN IF THE POSSIBILITY OF THE OCCURRENCE OF SUCH DAMAGES WAS FORESEEABLE. Except for “APS’s”, “3PP’s”, or “JHA’s” actual, direct damages arising from any action or omission of action by “APS”, “3PP” or “JHA” which constitutes the gross negligence or willful misconduct of “APS”, “3PP” or “JHA”, “APS’s”, “3PP’s”, or “JHA’s combined aggregate, cumulative liability to the Merchant for all claims of actual direct damages relating to the Services, this Agreement, or the relationship between “APS”, “3PP” or “JHA” and Merchant, including any cause of action in contract, negligence, tort, strict liability or otherwise, shall not exceed an amount equal to the total amount of all fees paid by the Merchant to “APS”, “3PP” or “JHA” for Services delivered under this Agreement during the three (3) month period preceding the origination of the claim giving rise to liability.

16. Assignment. This Agreement may not be assigned by MERCHANT without the prior written consent of Reseller. Reseller may assign this Agreement without limitation. Assignment of this Agreement by Reseller shall relieve Reseller of any further obligations under this Agreement

17. Agreement Jointly Drafted. The MERCHANT and APS acknowledge that this Agreement is jointly drafted and shall not be construed more harshly against one party or the other.

18. Severability. If any provisions of this Agreement shall be held, or deemed to be, or shall in fact be, inoperative or unenforceable as applied in any particular situation, such circumstance shall not have the effect of rendering any other provision or provisions

herein contained invalid, inoperative or unenforceable to any extent whatsoever. The invalidity of any one or more phrases, sentences, clauses or sections herein contained shall not affect the remaining portions of this Agreement or any part hereof.

19. Notices. All notices, requests, demands or other instruments which may or are required to be given by any party hereunder shall be in writing and each shall be deemed to have been properly given when:

- a. Served personally on an officer of the party to whom such notice is to be given;
- b. Upon expiration of a period of three (3) business days from and after the date of mailing when notice is mailed postage prepaid by registered or certified mail, requesting return receipt; or
- c. Upon delivery by a nationally recognized overnight delivery service, addressed as follows. Notices shall be delivered to the MERCHANT and Reseller at the addresses provided on the MERCHANT Application.

20. Captions. Captions in this Agreement are for convenience of reference only and are not to be considered as defining or limiting in any way the scope or intent of the provisions of this Agreement.

21. No Waiver. Any delay, waiver or omission by Reseller or Third-Party Processing Services Provider to exercise any right or power arising from any breach or default of the other party in any of the terms, provisions or covenants of this Agreement shall not be construed to be a waiver of any subsequent breach or default of the same or any other terms, provisions or covenants on the part of the other party. All remedies afforded by this Agreement for a breach hereof shall be cumulative.

22. Choice of Law and Attorneys' Fees. The laws of the State of Arizona shall govern this Agreement. Any litigation commenced between the Parties emanating from this Agreement shall be resolved by courts located in the State of Arizona, Maricopa County. The prevailing party shall be entitled to recover its reasonable attorneys' fees, litigation costs, and other expenses.

23. Entire Agreement. This Agreement together with the Schedule attached hereto, supersedes and other agreement, whether written or oral, that may have been made or entered into by the MERCHANT and APS, whether written or oral relating to the Services outlined herein.

24. Authority. ENACHA party represents and warrants that (a) the person(s) executing this Agreement on its behalf is(are) duly authorized and empowered to enter into and execute this Agreement, and (b) all persons, partnerships, corporations, joint ventures, and other associations affiliated with the party are bound by the terms of this Agreement.

25. Modification of Agreement. This Agreement shall bind the MERCHANT and APS hereto and their successors and shall not be modified or amended except by a written document duly executed by the MERCHANT, APS, or their successors.

26. Additional Acts. The MERCHANT and APS agree that each of them shall take such further action and execute such further documents, if any, which may be reasonably necessary or appropriate to implement his Agreement according to its terms.