

Merchant Processing Agreement

This Merchant Processing Agreement ("Agreement") is entered into on the Effective Date defined below, between the business indicated on the Merchant Application ("Merchant" or "you"), Merchant Management Systems, Inc. ("MMS"), and affiliate bank ("Bank").

Recitals

Merchant desires to accept credit cards ("Cards") validly issued by members of Visa U.S.A. Inc. ("Visa") and MasterCard International, Incorporated ("MasterCard"). Bank and MMS desire to provide credit card processing services to Merchant. Therefore, Merchant, MMS and Bank agree as follows:

Terms and Conditions

1. Honoring Cards.

A. Without Discrimination. You will honor, without discrimination, any Card properly tendered by Cardholder. "Cardholder" means a person possessing a Card and purporting to be the person in whose name the Card is issued. You will not establish a minimum or maximum transaction amount as a condition for honoring a Card.

B. Cardholder Identification. You will identify the Cardholder and check the expiration date and signature on each Card. You will not honor any Card if: (i) the Card has expired, (ii) the signature on the sales draft does not correspond with the signature on the Card, (iii) the account number embossed on the Card does not match the account number on the Card's magnetic strip (as printed in electronic form) or the account number listed on a current Electronic Warning Bulletin file. You may not require a Cardholder to provide personal information, such as a home or business telephone number, a home or business address, or a driver's license number as a condition for honoring a Card unless permitted under the Laws and Rules (defined in Section 14, below).

C. Card Recovery. You will use your reasonable, best efforts to recover any Card: (i) on Visa Cards if the printed four digits above the embossed account number do not match the first four digits of the embossed account number; (ii) if you are advised by MMS or Bank (or a designee) the issuer of the Card or the designated voice authorization center to retain it; (iii) if you have reasonable grounds to believe the Card is counterfeit, fraudulent or stolen, or not authorized by the cardholder; or (iv) for MasterCard Cards, the embossed account number, indent printed account number and/or encoded account number do not agree or the Card does not have a MasterCard hologram on the lower right corner of the Card face.

D. Surcharge. You will not add any amount to the posted price of goods or services you offer as a condition of paying with a Card, except as permitted by the Rules. This paragraph does not prohibit you from offering a discount from the standard price to induce a person to pay by cash, check or similar means rather than by using a Card.

E. Return Policy. You will properly disclose to the Cardholder at the time of the Card transaction and in accordance with the Rules, any limitation you have on accepting returned merchandise.

F. No Claim Against Cardholder. You will not have any claim against or right to receive payment from Cardholder unless MMS and Bank refuse to accept Sales Draft (as defined in Section 3) or revokes a prior acceptance of the Sales Draft after receipt or a chargeback or otherwise. You will not accept any payments from a Cardholder relating to previous charges for merchandise or services included in a Sales Draft, and if you receive any such payments you promptly will remit them to MMS and Bank.

G. Disputes With Cardholder. All disputes between you and any Cardholder relating to any Card transaction will be settled between you and the Cardholder. Neither MMS nor Bank bear any responsibility for such transactions.

2. Authorization.

A. Required on all Transactions. You will obtain a prior authorization for the total amount of a transaction via electronic terminal or device before completing any transaction, and you will not process any transaction that has not been authorized. You will follow any instructions received during the authorization process. Upon receipt of authorization, you may consummate only the transaction authorized and must note on the Sales Draft the authorization number. Where authorization is obtained, you will be deemed to warrant the true identity of the customer as the Cardholder.

B. Effect. Authorizations are not a guarantee or acceptance of payment of the Sales Draft. Authorizations do not waive any provisions of this Agreement or otherwise validate a fraudulent transaction or a transaction involving the use of an expired card.

C. Unreadable Magnetic Stripes. When you present Card transactions for authorization electronically, and if your terminal is unable to read the magnetic stripe on the card, you will obtain an imprint of the card and the Cardholder's signature on the imprinted draft before presenting the Sales Draft to MMS and Bank for processing. Failure to do so may result in the assessment of a transaction surcharge on non-qualifying transactions.

3. Presentation of Sales Drafts.

A. Forms. You will use a Sales Draft ("Sales Draft") or any other form approved by MMS and Bank to document each Card transaction. Each Sales Draft will be legibly imprinted with: (i) merchant's name, location and account number; (ii) the information embossed on the Card presented by the Cardholder (either electronically or manually); (iii) the date of the transaction; (iv) a brief description of the goods or services involved; (v) the transaction authorization number; (vi) the total amount of the sale including any applicable taxes, or credit transaction; and (vii) adjacent to the signature line, a notation that all sales are final, if applicable.

B. Signatures. Sales Draft must be signed by the Cardholder unless the Card transaction is a valid mail/telephone order Card transaction which fully complies with the requirements set forth in this Agreement. You may not require the Cardholder to sign the Sales Draft before you enter the final transaction amount in the Sales Draft.

C. Reproduction of Information. If the following information embossed on the Card and the Merchant's name is not legibly imprinted on the Sales Draft, you will legibly reproduce on the Sales Draft before submitting it to MMS and Bank: (i) the Cardholder's name; (ii) account number; (iii) expiration date and (iv) the Merchant's name and place of business. Additionally, for MasterCard transactions you will legibly reproduce the name of the Bank issuing the Card as it appears on the face of the Card.

D. Delivery and Retention of Sales Drafts. You will deliver a complete copy of the Sales Draft or credit voucher to the Cardholder at the time of the transaction. You will retain the "merchant copy" of the Sales Draft or credit memorandum for at least 3 years following the date of completion of the Card transaction (or such longer period as the Rules require).

E. Electronic Transmission. In using electronic authorization and/or data capture services, you will enter the data related to a sales or credit transaction into a computer terminal or magnetic stripe reading terminal no later than the close of business on the date the transaction is completed (unless otherwise permitted by the Rules). Failure to do so may result in the assessment of a transaction surcharge on non-qualifying transactions. If you provide your own electronic terminal or similar device, such terminals must meet MMS's and Bank's requirements for processing transactions, and must be Year 2000 compliant. Information regarding a sales or credit transaction transmitted with a computer or magnetic stripe reading terminal will be transmitted by you to MMS and Bank or their agent in the form MMS and Bank from time to time specifies or as required under the Rules. If MMS or Bank requests a copy of a Sales Draft, credit voucher or other transaction evidence, you will provide it within 24 hours following request.

4. Deposit of Sales Drafts and Funds Due Merchant.

A. Deposit of Funds.

i. Deposits. You agree that this Agreement is a contract of financial accommodation within the meaning of the Bankruptcy Code, 11 U.S.C. § 365 as amended from time to time. Subject to this Section, Bank will deposit to the Designated Account (defined in section 6 below) funds evidenced by Sales Drafts (whether evidenced in writing or by electronic means) complying with the terms of this Agreement and the Rules and will provide you provisional credit for such funds (less recoupment of any credit(s), adjustments, fines, chargebacks or fees). You acknowledge that your obligation to Bank for all amounts owed under this Agreement arise out of the same transaction as Bank's obligation to deposit funds to the Designated Account.

ii. Provisional Credit. Notwithstanding the previous sentences, under no circumstances will Bank be responsible for processing credits or adjustments related to Sales Drafts not originally processed by Bank. All Sales Drafts and deposits are subject to audit and final checking by Bank and may be adjusted for inaccuracies. You acknowledge that all credits provided to you are provisional and subject to chargebacks and adjustments; (i) in accordance with the Rules; (ii) for any of your obligations to MMS and Bank; and (iii) in any other situation constituting suspected fraud or a breach of this Agreement, whether or not a transaction is charged back by the Card issuer. Bank may elect to grant conditional credit for individual or groups of funds evidenced by Sales Drafts. Final credit for those conditional funds will be granted within Bank's sole discretion.

iii. Processing Limits. Bank may impose a cap on the volume and ticket amount of Sales Drafts that they will process for you, as indicated to you by MMS and Bank. This limit may be changed by Bank upon written notice to you.

B. Chargebacks. You are fully liable for all transactions returned for whatever reason, otherwise known as "chargebacks". You will pay on demand the value of all chargebacks. Authorization is granted to offset from incoming transactions and to debit the Designated Account, the Reserve Account (defined in Section 7, below) or any other account held at Bank or at any other financial institution the amount of chargebacks. You will fully cooperate in complying with the Rules regarding chargebacks.

C. Exceeds Activity. Your presentation to MMS and Bank of Excessive Activity will be a breach of this Agreement and cause for immediate termination of this agreement. "Excessive Activity" means, during any monthly period: (i) the dollar amount of chargebacks and/or retrieval requests in excess of 1% of the average monthly dollar amount of your Card transactions; (ii) sales activity that exceeds 25% of the dollar volume indicated on the Application; or (iii) the dollar amount of returns equals 20% of the average monthly dollar amount of your Card transactions. You authorize, upon the occurrence of Excessive Activity, Bank to take any action they deem necessary including but not limited to, suspension of processing privileges or creation or maintenance of a Reserve Account in accordance with this Agreement.

D. Credit.

i. Credit Memoranda. You will issue a credit memorandum in any approved form, instead of making a cash advance, a disbursement or a refund on any Card transaction. Bank will debit the Designated Account for the total face amount of each credit memorandum submitted to Bank. You will not submit a credit relating to any Sales Draft not originally submitted to Bank, nor will you submit a credit that exceeds the amount of the original Sales Draft. You will within the time period specified by the Rules, provide a credit memorandum or credit statement for every return of goods or forgiveness of debt for services which are the subject of a Card transaction.

ii. Revocation of Credit. Bank may refuse to accept any Sales Draft and Bank may revoke prior acceptance of a Sales Draft in the following circumstances: (a) the transaction giving rise to the Sales Draft was not made in compliance with this Agreement, the Laws or the Rules; (b) the Cardholder disputes his liability to Bank for any reason, including but not limited to a contention that the Cardholder did not receive the goods or services, that the goods or services provided were not as ordered, or those chargeback rights enumerated in the Rules; or (c)

the transaction giving rise to the Sales Draft was not directly between you and the Cardholder. You will pay Bank any amount previously credited to you for a Sales Draft not accepted by Bank or where accepted, is revoked by Bank.

E. Reprocessing. Notwithstanding any authorization or request from a Cardholder, you will not re-enter or reprocess any transaction which has been charged back.

F. Miscellaneous. You will not present for processing or credit, directly or indirectly, any transaction not originated as a result of a Card transaction you know or should know to be fraudulent or not authorized by the Cardholder. You will not sell or disclose to third parties Card account information other than in the course of performing your obligations under this agreement.

5. Other Types of Transactions.

A. Mail/Telephone Order. MMS and Bank caution against mail orders or telephone orders or any transaction in which the Cardholder and Card are not present ("mail/telephone orders") due to the high incidence of customer disputes. You will obtain the expiration date of the Card for a mail/telephone order and submit the expiration date when obtaining authorization of the Card transaction. For mail/telephone order transactions, you will type or print legibly on the signature line the following as applicable: telephone order or "TO" or mail order or "MO". You must promptly notify MMS and Bank if your retail/mail order/telephone order mix changes from the percentages represented to MMS and Bank in the Merchant Application. Bank may cease accepting mail/telephone order transactions, or limit its acceptance of such transactions, or increase their fees if this mix changes.

B. Recurring Transactions. For recurring transactions, you must obtain a written request from the Cardholder for the goods and services to be charged to the Cardholder's account, the frequency of the recurring charge, and the duration of time during which such charges may be made. You will not complete any recurring transaction after receiving: (i) a cancellation notice from the Cardholder (ii) notice from Bank (iii) a response that the Card is not to be honored. You must print legibly on the Sales Draft the words "Recurring Transaction".

C. Multiple Sales Drafts. You will include a description and total amount of goods and services purchased in a single transaction on a single Sales Draft or transaction record, unless (i) partial payment is entered on the Sales Draft or transaction record and the balance of the transaction amount is paid in cash or by check at the time of transaction, or (ii) a Sales Draft represents an advance deposit in a Card transaction completed in accordance with this Agreement and the Rules.

D. Partial Completion.

i. Prior Consent. You will not accept for payment by Card any amount representing a deposit or partial payment for goods or services to be delivered in the future without the prior written consent of Bank. Such consent will be subject to Bank's final approval. The acceptance of a Card for payment or partial payment of goods or services to be delivered in the future without prior consent will be deemed a breach of this Agreement and cause for immediate termination, in addition to any other remedies available under the Laws or Rules.

ii. Acceptance. If you have obtained prior written consent, then you will complete such Card transactions in accordance with the terms set forth in this Agreement, the Rules and the Laws. Cardholders must execute one Sales Draft when making a deposit with a Card and a second Sales Draft when paying the balance. You will note upon the Sales Draft the words "deposit" or "balance" as appropriate. You will not deposit the Sales Draft labeled "balance" until the goods have been delivered to Cardholder or you have fully performed the services.

E. Future Delivery. You will not present any Sales Draft or other memorandum to Bank for processing "whether by electronic means" which is related to the sale of goods or services for future delivery without Bank's prior written authorization. Such consent will be subject to Bank's final approval. If Bank has given such consent, you represent and warrant to Bank that you will not rely on any proceeds or credit resulting from such transactions to purchase or furnish goods or services. You will maintain sufficient working capital to provide for the delivery of goods or services at the agreed upon future date, independent of any credit or proceeds resulting from sales drafts or other memoranda taken in connection with future delivery transactions.

F. Electronic Commerce Transactions. You must get Bank's consent to process electronic commerce transactions, and you may process such transactions only if the transactions have been encrypted by a third party vendor acceptable to Bank. Such consent will be subject to Bank's final approval. You understand that electronic commerce transactions are high risk and subject to a higher incidence of chargebacks. All communication costs related to such transactions will be your responsibility. You understand MMS and Bank will not manage the telecommunications link and that it is your responsibility to manage that link. You also understand that MMS and Bank does not have 7 days per week/24 hrs per day service operation. All electronic commerce transactions will be settled by Bank into a depository institution of the United States in US currency. You may be required to establish a Reserve account if you process electronic commerce transactions.

G. American Express, Discover, JCB and Diners' Transactions. Upon your request, MMS and Bank will provide authorization and/or data capture service for Discover, JCB, Diners' and American Express transactions. You must enter into a separate merchant agreement with NOVUS Services, Inc., Japanese Credit Bureau, Diners' or American Express. MMS and Bank are not responsible for funding such transactions. Initial setup fees may apply.

H. Cash Advances. You will not deposit any transaction for purpose of obtaining or providing a cash advance. You agree that any such deposits shall be grounds for immediate termination.

I. Prohibited Transactions. You will not accept or deposit any fraudulent transaction and you may not, under any circumstances, present for deposit directly or indirectly, a transaction which originated with any other merchant or any other source. You will not, under any circumstance, deposit telemarketing transactions unless you obtain Bank's prior written consent. Such consent will be subject to Bank's final approval. If you process such transactions, you may be terminated and Bank may hold funds and/or require you to establish a Reserve Account. Further, you may be subject to Visa and MasterCard reporting requirements.

6. Designated Account.

A. Establishment and Authority. Merchant will establish and maintain an account at an ACH receiving depository institution approved by Bank ("Designated Account"). Merchant will maintain sufficient funds in the Designated Account to satisfy all obligations, including fees contemplated by this Agreement. Merchant irrevocably authorizes Bank to debit the Designated Account for chargebacks, fees and any other Penalties or amounts owed under this Merchant Agreement, and irrevocably authorizes Bank to debit the Designated Account for any other amount owed to MMS under this Agreement other than the amounts directly attributable to the settlement of transactions. You also authorize Bank to debit the Merchant Account for any fees due such vendor or agent under this Agreement. This authority will remain in effect for at least 2 years after the termination of this Agreement whether or not you have notified MMS and Bank of a change to the Designated Account. If Merchant does not get that consent, Bank may immediately terminate the Agreement and may take other action necessary, as determined by them with their sole discretion.

B. Deposit. Bank will deposit all Sales Drafts to the Designated Account subject to Section 4 of this Agreement. The funds represented by Sales Drafts will be deposited 3 business days following MMS's receipt of Sales Draft, except for mail order/telephone order and electronic commerce transactions, which will be deposited 5 business days following receipt of the Sales Draft. "Business Day" means Monday thru Friday, excluding Holidays observed by the Federal Reserve Bank of New York. Merchant authorizes Bank to initiate reversal or adjustment entries and initiate or suspend such entries as may be necessary to grant Merchant conditional credit for an entry. You authorize and appoint Bank to act as your agent to collect Card transaction amounts from the Card-issuing bank. As the collecting agent, Bank, in its sole discretion, may grant you provisional credit for transaction amounts in the process of collection, subject to receipt of final payment by Bank and subject to all chargebacks.

C. Asserted Errors. You must promptly examine all statements relating to the Designated Account, and immediately notify MMS and Bank in writing of any errors. Your written notice must include: (i) Merchant name and account number, (ii) the exact dollar amount of the asserted error, (iii) a description of the asserted error, and (iv) an explanation of why you believe an error exists and the cause of it, if known. That written notice must be received by MMS and Bank within 30 calendar days after you receive the periodic statement containing the asserted error. You may not make a claim against MMS or Bank for any loss or expense relating to any asserted error for 60 calendar days immediately following our receipt of your written notice. During that 60-day period, MMS and Bank will be entitled to investigate the asserted error.

D. Indemnity. You will indemnify and hold MMS and Bank harmless for any action they take against the Designated Account, the Reserve Account, or any other account pursuant to this Agreement.

E. ACH Authorization. You authorize Bank to initiate debit/credit entries to the Designated Account, the Reserve Account, or any other account maintained by you at any institution, all in accordance with this Agreement and the ACH Authorization on the attached Exhibit B, Merchant Authorizations. The ACH Authorization will remain in effect beyond termination of this Agreement. In the event you change the Designated Account, you will execute a new ACH authorization.

7. Security Interests, Reserve Account, Recoupment and Set-Off.

A. Security Interests.

i. Security Agreement. This Agreement is a security agreement under the Uniform Commercial Code. You grant to Bank a security interest in and lien upon: (i) all funds at any time in the Designated Account, regardless of the source of such funds; (ii) all funds at any time in the Reserve Account, regardless of the source of such funds; (iii) present and future Sales Draft; and (iv) any and all amounts which may be due to you under this Agreement including, without limitation, all rights to receive any payments or credits under this Agreement (collectively, the "Secured Assets"). You agree to provide other collateral or security to Bank to secure your obligations under this Agreement and any other agreements now existing or later entered into between you and Bank. This security interest may be exercised by Bank without notice or demand of any kind by making an immediate withdrawal or freezing the secured assets.

ii. Perfection. Upon request of MMS or Bank, you will execute one or more financing statements or other documents to evidence this security interest. You represent and warrant that no other person or entity has a security interest in the Secured Assets. Further, with respect to such security interests and liens, Bank will have all rights afforded under the Uniform Commercial Code, any other applicable law and entity. You will obtain from Bank written consent prior to granting a security interest of any kind in the Secured Assets to a third party. You agree that this is a contract of recoupment and MMS and Bank are not required to file a motion for relief from a bankruptcy action automatic stay for Bank to realize on any of its collateral (including any Reserve Account). Nevertheless, you agree not to contest or object to any motion for relief from the automatic stay filed by MMS or Bank.

B. Reserve Account.

i. Establishment. You will establish and maintain a non-interest bearing deposit account ("Reserve Account") at Bank initially or at any time in the future as requested by MMS and Bank, with sums to sufficiently satisfy your current and future obligations as determined by MMS and Bank. You authorize Bank to debit the Designated Account or any other account you have at Bank or any other financial institution to establish or maintain funds in the Reserve Account. Bank may deposit into the Reserve Account funds it would otherwise be obligated to pay you, for the purpose of establishing, maintaining or increasing the Reserve Account in accordance with this Section, if it determines such action is reasonably necessary to protect its interests.

ii. **Authorizations.** Bank may, without notice to you, apply deposits in the Reserve Account against any outstanding amounts you owe under this Agreement or any other agreement between you and MMS or Bank. Also, Bank may exercise their rights under this Agreement against the Reserve Account to collect any amounts due to MMS or Bank including, without limitation, rights of set-off and recoupment.

iii. **Funds.** Funds in the Reserve Account will remain in the Reserve Account until 270 calendar days following the later of termination of this Agreement or your last transaction of sales drafts to MMS or Bank, provided, however, that you will remain liable to MMS and Bank for all liabilities occurring beyond such 270 days period. You agree that you will not use funds in the Reserve Account for any purpose, including but not limited to paying chargebacks, fees, fines, or other amounts you owe MMS and Bank under this Agreement. Bank (and not Merchant) shall have sole control of the Reserve Account.

iv. **Assurance.** In the event of a bankruptcy proceeding and the determination by the court that this Agreement is assumable under Bankruptcy Code § 365, as amended from time to time, you must establish or maintain a Reserve Account in an amount satisfactory to Bank.

D. **Recoupment and Set-Off.** Bank have the right of recoupment and set-off. This means that they may offset or recoup any outstanding/uncollected amounts owed by you from: (i) any amounts they would otherwise be obligated to deposit into the Designated Account; (ii) any other amounts Bank or MMS may owe you under this Agreement or any other agreement; and (iii) any funds in the Designated Account or Reserve Account. You acknowledge that in the event of a bankruptcy proceedings, in order for you to provide adequate protection under Bankruptcy Code § 362 to MMS and Bank, you must create or maintain the Reserve Account as required by MMS and Bank, without regard to whether the obligations relate to Sales Drafts initiated or created before or after the filing of the bankruptcy petition.

E. **Remedies Cumulative.** The rights and remedies conferred upon MMS and Bank in this Agreement, at law or in equity, are not intended to be exclusive of each other. Rather, each and every right of MMS and Bank under this Agreement, at law or in equity, will be cumulative and concurrent and in addition to every other right.

8. Fees and Other Amounts Owed Bank.

A. **Fees and Taxes.** You will pay Bank fees for services, forms and equipment in accordance with the rates set forth on the Application and the following: up to \$.30 per batch; \$10 per retrieval; \$25 per chargeback; \$2.00 per voice authorization; \$25 per ACH reject; and \$25 per deposit correction. Such fees will be calculated and debited from the Designated Account once each business day or month for the previous business day's or month's activity or will be netted out from the funds due you attributable to Sales Drafts presented to Bank. Bank reserve the right to adjust the fees set forth on the Application and in this Section, in accordance with Section 16.J, below. You are also, obligated to pay all taxes, and other charges imposed by any governmental authority on the services provided under this Agreement.

B. **Other Amounts Owed Bank.** You will immediately pay Bank any amount incurred by MMS and Bank attributable to this Agreement including but not limited to chargebacks, fines imposed by Visa or MasterCard, non-sufficient fund fees, and ACH debits that overdraw the Designated Account, Reserve Account or are otherwise dishonored, you authorize Bank to debit via ACH the Designated Account, Merchant Account, or any other account you have at Bank or at any other financial institution for any amount you owe Bank under this Agreement or under any other contract, note, guaranty, instrument or dealing of any kind now existing or later entered into between you and MMS or Bank, whether your obligation is direct, indirect, primary, secondary, fixed, contingent, joint or several. In the event MMS and Bank demand sums due or such ACH does not fully reimburse MMS and Bank for the amount owed, you will immediately pay Bank such amount.

9. Application, Indemnification, Limitation of Liability

A. **Application.** You represent and warrant to MMS and Bank that all information in the Application is correct and complete. You must notify MMS and Bank in writing of any change to the information in the Application, including but not limited to: any additional location or new business, (the identity of principals and/or owners, the form of business organization (i.e., sole, proprietorship, partnership, etc.), type of goods and services provided and how sales, are completed (i.e. by telephone, mail, or in person at your place of business)). The notice must be received by MMS within 10 business days of the change. You will provide updated information to MMS and Bank within a reasonable time upon request. You are liable to MMS for all losses and expensed incurred by MMS and Bank arising out of your failure to report changed to it. Bank may immediately terminate this Agreement upon notification by you of a change to the information in the Application.

B. **Indemnification.** You will hold harmless and indemnify MMS and Bank, their employees and agents (i) against all claims by third parties arising out of this Agreement, and (ii) for all attorneys' fees and other costs and expenses paid or incurred by MMS or Bank in the enforcement of this Agreement, including but not limited to those resulting from any breach by you of this Agreement and those related to any bankruptcy proceeding.

C. **Limitation of Liability.** Any liability of MMS or Bank under this Agreement, whether to you or any other party, whatever the basis of the liability, shall not exceed in the aggregate the difference between (i) the amount of fees paid by you to Bank during the month in which the transaction out of which the liability arose occurred, and (ii) assessments, chargebacks, and offsets against such fees which arose during such month. In the event more than one month is involved, the aggregate amount of MMS's and Bank's liability shall not exceed the lowest amount determined in accord with the foregoing calculation for any one month involved. Neither MMS, Bank nor their agents, officers, directors, or employees shall be liable for indirect, special, or consequential damages.

D. **Performance.** MMS and Bank will perform all services in accordance with the Agreement. MMS and Bank make no warranty, express or implied, regarding the services, and nothing contained in the Agreement will constitute such a warranty. **MMS and Bank disclaim all implied warranties, including those of merchantability and fitness for a particular purpose.** No party will be liable to others for any failure or delay in its performance of this Agreement if such failure or delay arises out of causes beyond the control and without the fault or negligence of such party. Neither MMS or Bank shall be liable for the acts or commissions of any third party.

10. **Representations and Warranties.** You represent and warrant to MMS and Bank at the time of execution and during the term of this Agreement the following:

A. **Information.** You are a corporation, limited liability company, partnership or sole proprietorship validly existing and organized in the United States. All information contained on the Application or any other document submitted to MMS or Bank is true and complete and properly reflects the business, financial condition, and principal partners, owners, or officers of Merchant. You are not engaged or affiliated with any businesses, products or methods of selling other than those set forth on the Application, unless you obtain the prior written consent of MMS and Bank.

B. **Entire Power.** Merchant and the person signing this Agreement have the power to execute and perform this Agreement. This Agreement will not violate any law, or conflict with any other agreement to which you are subject.

C. **No Litigation or Termination.** There is no action, suit or proceeding pending or to your knowledge threatened, which if decided adversely would impair your ability to carry on your business substantially as now conducted or which would adversely affect your financial condition or operations. You have never entered into an agreement with a third party to perform credit or debit card processing which has been terminated by that third party.

D. **Transactions.** All transactions are bonafide. No transaction will involve the use of a Card for any purpose other than the purchase of goods or services from you nor does it involve a Cardholder obtaining cash from you unless allowed by the Rules and agreed in writing with MMS and Bank.

E. **Rule Compliance.** You will comply with the Laws and Rules.

11. Audit and financial information.

A. **Audit.** You authorize MMS or Bank to audit your records to confirm compliance with this Agreement, as amended from time to time. You will obtain and will submit a copy of, an audit of your business when requested by MMS or Bank.

B. Financial Information.

i. **Authorizations.** You authorize MMS or Bank to make any business or personal credit inquiries they consider necessary to review the acceptance and continuation of this Agreement. You also authorize any person or credit reporting agency to compile information to answer those credit inquiries and to furnish that information to MMS and Bank.

ii. **Documentation.** You will provide MMS or Bank personal and business financial statements and other financial information as requested from time to time. If requested, you will furnish within 120 calendar days after the end of the fiscal year to MMS and Bank a financial statement of profit and loss for the fiscal year and a balance sheet as of the end of the fiscal year.

12. Third Parties.

A. **Services.** You may be using special services or software provided by a third party to assist you in processing transactions, including authorizations and settlements, or accounting functions. You are responsible for ensuring compliance with the requirements in any third party in using their products. This includes making sure you have and comply with any software updates. MMS and Bank have no responsibility for any transactions until that point in time MMS or Bank receive data about the transaction.

B. **Use of Terminals Provided by Others.** You will notify MMS and Bank immediately if you decide to use electronic authorization or data capture terminals or software provided by any entity other than MMS and Bank or its authorized designee ("Third Party Terminals") to process transactions. If you elect to use Third Party Terminals, you agree (i) the third party providing the terminals will be your agent in the delivery of Card transactions to MMS and Bank; and (ii) to assume full responsibility and liability for any failure of that third party to comply with the Rules of this Agreement. Neither MMS nor Bank will be responsible for any losses or additional fees incurred by you because of any error by a third party agent or a malfunction in a Third Party Terminal.

13. Term and Termination.

A. **Term.** The Agreement will become effective on the date Bank executes this Agreement ("Effective Date"). The Agreement will remain in effect for a period of 3 years ("Initial Term") and will renew for successive 1 year terms ("Renewal Term") unless terminated as set forth below.

B. **Termination.** The Agreement may be terminated by Bank or Merchant to be effective at the end of the Initial Term or any Renewal Term by giving written notice of an intention not to renew at least 90 calendar days before the end of the current term. Further, this Agreement may be terminated at any time with or without cause by Bank.

C. Action upon Termination.

i. **Terminated Merchant File.** You acknowledge that Bank is required to report your business name and the name of Merchant's principals to Visa and MasterCard when Merchant is terminated due to the reasons listed in the Rules.

ii. **Designated Account.** All your obligations regarding accepted Sales Drafts will survive termination. You must maintain in the Designated Account and the Reserve Account enough funds to cover all chargebacks, deposit charges, refunds and fees incurred by you for a reasonable time, but in any event not less than the time specified in this agreement. You authorize Bank to charge those accounts, or any other account maintained under this Agreement, for all such amounts. If the amount in the Designated Account or the Reserve Account is not adequate, you will pay Bank the amount you owe it upon demand, together with all costs and expenses incurred to collect that amount, including reasonable attorneys' fees.

iii. **Equipment.** Within 14 business days of the date of termination, you must return all equipment owned by MMS and immediately pay MMS and Bank any amount you owe them for equipment costs.

iv. **Early Termination.** This Agreement is binding upon it's execution by Bank and will continue in force for the Initial Term of three (3) years and shall renew annually after the initial term. You agree to give written notice of cancellation by registered mail to MMS not less than 30 days prior to the anniversary date of the initial term or any subsequent renewal. You agree to pay your average discount rate charged, or your monthly minimum, whichever amount is greater, for the remainder of the months left. Termination of this agreement in the first ninety (90) days will result in an early termination fee of \$395.00. Notwithstanding the foregoing, we may terminate this Agreement with or without cause.

14. **Compliance With Laws and Rules.** You agree to comply with all rules and operating regulation issued from time to time by MasterCard and Visa and any policies and procedures provided by MMS or Bank, including those set forth in the Merchant Operating Manual ("Rules"). The Rules are incorporated into this Agreement by reference as if they were fully set forth in this Agreement. You further agree to comply with all applicable state, federal, and local laws, rules and regulations ("Laws"), as amended from time to time. You will assist MMS and Bank in complying with all Laws and Rules now or hereafter applicable to any Card transaction or this Agreement. You will execute and deliver to MMS and Bank all instruments it may from time to time reasonably deem necessary.

15. Use of Trademarks and Confidentiality.

A. **Use of Trademarks.** Your use of Visa and MasterCard trademarks must fully comply with the Rules. Your use of Visa, MasterCard or other cards' promotional materials will not indicate directly or indirectly that Visa or MasterCard endorse any goods or services other than their own and you may not refer to Visa or MasterCard in stating eligibility for your products or services.

B. Confidentiality.

i. **Cardholder Information.** You will not disclose to any third party Cardholders' account information or other personal information except to an agent of yours assisting in completing a Card transaction, or as required by law. You must destroy all material containing Cardholders' account numbers, Card Imprints, Sales Drafts, Credit Vouchers (except for Sales Drafts maintained in accordance with this Agreement, Laws, and the Rules). Further, you must take all steps reasonably necessary to ensure Cardholder information is not disclosed or otherwise misused.

ii. **Prohibitions.** You will not use for your own purposes, will not disclose to any third party, and will retain in strictest confidence all information and data belonging to or relating to the business of MMS and Bank (including without limitation the terms of this Agreement), and will safeguard such information and data by using the same degree of care that you use to protect your own confidential information.

iii. **Disclosure.** You authorize MMS and Bank to disclose your name and address to any third party who requests such information or otherwise has a reason to know such information.

C. **Return to Bank.** All promotional materials, advertising displays, emblems, Sales Drafts, credit memoranda and other forms supplied to you and not purchased by you or consumed in used will remain the property of MMS and Bank and will be immediately returned to MMS upon termination of this Agreement. You will be fully liable for loss, cost, and expense suffered or incurred by MMS and Bank arising out of the failure to return or destroy such materials following termination.

16. General Provisions.

A. **Entire Agreement.** This Agreement as amended from time to time, including the Rules, the Merchant Operating Manual, and the completed Merchant Application, all of which are incorporated into this Agreement, constitute the entire agreement between the parties, and all prior or other agreements or representations, written or oral are superseded. This Agreement may be signed in one or more counterparts, all of which, taken together, will constitute one agreement.

B. **Governing Law.** This Agreement will be governed by laws of the state of Kentucky. Proper venue for any dispute arising from this agreement shall be in any state or federal court of competent jurisdiction in Boyd County, Kentucky. Merchant and Guarantor(s) agree to submit to the personal jurisdiction of courts located in Boyd County, Kentucky.

C. **Exclusivity.** During the initial and any renewal term of this Agreement, you will not enter into an agreement with any other entity that provides credit card or debit card processing services similar to those provided by MMS and Bank as contemplated by this Agreement without MMS and Bank's written consent.

D. **Construction.** The headings used in this Agreement are inserted for convenience only and will not affect the interpretation of any provision. The language used will be deemed to be the language chosen by the parties to express their mutual intent, and no rule of strict construction will be applied against any party. Any alteration or strikeover in the text of this pre-printed Agreement will have no binding effect, and will not be deemed to amend this Agreement.

E. **Assignability.** This Agreement may be assigned by Bank, but may not be assigned by Merchant directly or by operations of law, without the prior written consent of Bank. If Merchant nevertheless assigns this Agreement without the consent of MMS, the Agreement shall be binding upon the assignee. MMS will be informed of any such assignments.

F. **Notices.** Any written notice under this Agreement will be deemed received upon the earlier of: (i) actual receipt or (ii) five calendar days after being deposited in the United States mail, and addressed to the last address shown on the records of the sender.

G. **Bankruptcy.** You will immediately notify MMS and Bank of any bankruptcy, receivership, insolvency or similar action or proceeding initiated by or against Merchant or any of its principals. You will include MMS and Bank on the list and matrix of creditors as filed with the Bankruptcy Court, whether or not a claim may exist at the time of filing, and failure to do so will be cause for immediate termination or any other action available to MMS and Bank under applicable Rules of Law.

H. **Attorneys' Fees.** Merchant will be liable for and will indemnify and reimburse MMS and Bank for all attorneys' fees and other costs and expenses paid or incurred by MMS and Bank or their agents in the enforcement of this Agreement, or in collecting any amounts due from Merchant or resulting from any breach by Merchant of this Agreement.

I. **Amendments.** Bank may propose amendments or additions to this Agreement. Bank or MMS will inform you of a proposed change in a periodic statement or other written notice. You will be deemed to have agreed to the change if you continue to present transactions to Bank after 7 business days following the mailing of the notice. Notwithstanding the previous sentence, changed to fees authorized by this Agreement will be effective upon notice to you, unless a later effective date is provided.

J. **Severability and Waiver.** If any provision of this Agreement is illegal, the invalidity of that provision will not affect any of the remaining provisions and this Agreement will be construed as if the illegal provision is not contained in the Agreement. Neither the failure nor delay by MMS or Bank to exercise, or partially exercise, any right under this Agreement will operate as a waiver or estoppels of such right, nor shall it amend this Agreement. All waivers must be signed by the waiving party.

K. **Independent Contractors.** MMS, Bank and Merchant will be deemed independent contractors and will not be considered agent, joint venture or partner of the other, except as provided in 6.C and 7.A (i).

L. **Employee Actions.** You are responsible for your employees' actions while in your employment.

M. **Survival.** Sections 4.A, 4.B, 6, 7, 8, 9, 13.C, 15, 16.B, and 16.H will survive the termination of this Agreement.

Merchant Management Systems	Merrick Bank
2021 13 th Street	101 Crossways Park West
Ashland, KY 41101	Woodbury, NY 11797
606-325-1199 (voice)	(800) 328-9155
606-324-7903 (fax)	

Customer Service: 800-795-6899