



Merchant Services Agreement

Terms and Conditions

This Merchant Services Agreement (this “**Agreement**”) is entered into between BMO Harris Bank N.A. (“**Member Bank**”), Moneris Solutions, Inc., as Member Bank’s processor/member service provider for Visa® and MasterCard®, as acquirer for Discover® and as participant sales entity for American Express® under the American Express OptBlue® Program (the “**OptBlue Program**”) (“**Moneris**”), and the undersigned Merchant (“**Merchant**”) in consideration of mutual promises. Moneris and Member Bank are collectively referred to as “**Bank**” and may jointly or individually assert or exercise any rights or remedies provided to Bank hereunder. Moneris and Member Bank reserve the right to allocate Bank’s duties and obligations amongst themselves, as they deem appropriate in their sole discretion, subject to Section 22 of this Agreement. Bank and Merchant are independent parties contracting for services and neither is an agent, partner or joint venture of the other.

Introduction

Merchant is engaged in the business of providing goods and/or services to customers at location(s) owned or leased and operated by Merchant. Merchant desires to accept those credit and/or debit cards (“**Cards**”) indicated on the Schedule of Rates and Fees bearing the name and logo of the Visa®, MasterCard®, American Express® or Discover® credit card associations or the issuer of any other Card of any association or network (collectively, the “**Card Associations**”) that Bank authorizes Merchant to accept for processing under this Agreement as a means of payment for those goods and/or services sold by Merchant. Bank is engaged in the business of providing, for a fee, electronic debit and credit card authorization, processing, data capture, clearing and settlement services.

For purposes of this Agreement, the term “**transaction**” is meant to include any Card, debit, ACH, EFT or other electronic transaction as applicable in the context of this Agreement. Merchant agrees to honor all valid Cards it elects to accept pursuant to this Agreement, without discrimination, and to submit at the close of each business day all sales and credits for Card transactions, and all necessary information for all other types of transactions, as applicable (“**Items**”) exclusively to Bank, Moneris or their applicable vendor(s), which applicable party or parties shall acquire or process with full recourse to Merchant, according to the terms of this Agreement. For purposes of this Agreement (including without limitation, the Schedule of Rates and Fees), “**Debit Card**” means (i) a Discover, Visa or MasterCard card that accesses a consumer’s asset account within 14 days after purchase, including, but not limited to, stored value, prepaid, payroll, EBT, gift, and Visa consumer check cards, and (ii) all cards issued by a non U.S. bank.

1. Operating Manual

Merchant will receive and agrees to read and review an Operating Manual and any other Attachments received from Bank. These Attachments and the Operating Manual (as amended, modified or supplemented from time to time) form a part of this Agreement and are incorporated herein by reference as set forth in full. Bank and Merchant agree to the terms and conditions in the then-current Operating Manual. For example, the Operating Manual contains a description of Items subject to chargeback, certain promises and responsibilities of Merchant and other terms and conditions related to the processing of Card transactions, such as terms and conditions related to Merchant examining all Cards, obtaining authorization (for example, by “swiping” each Card) and authorization numbers for all Card transactions, and handling special situations (such as cardholder identification, sales without Cards, recovery of Cards upon request, returns and credits, and recurring transactions). Submission of Card transactions to Bank for processing constitutes Merchant’s agreement to the terms and conditions of this Agreement and the Operating Manual and Attachments. Transactions for any non-face to face transaction (e.g., Internet, mail, telephone and preauthorized orders) are subject to special requirements, including those specified in the Operating Manual. Merchant may not impose minimum or maximum amounts for Card transactions or impose

surcharges for any Card transaction that are not imposed generally to its customers for non-Card transactions.

2. Processing, Settlement and Other Services

Unless agreed by Bank in writing, Card transactions will be processed and settled through Card Association networks via electronic authorization and data capture methods. Additional Merchant locations require Bank approval, must be owned or leased and operated by Merchant under Merchant’s same name and must conduct the same business. Unless otherwise agreed in advance by Bank, Merchant will balance and settle each terminal every business day. Transactions at one Merchant location may not be processed through a terminal at another Merchant location. Merchant agrees not to process transactions of other entities, persons or merchants. Merchant must be equipped with properly installed and programmed terminals or other equipment capable of transmitting, receiving and communicating Card transaction data to Bank. If Merchant provides any software or equipment or utilizes third party system vendors, Merchant is solely responsible for all aspects of compatibility, installation, operation, security and systems integrations that will comply with the Operating Regulations and Bank’s processing requirements. If required, Merchant has directly entered into a separate agreement with any Card Association(s) which allows Merchant to accept and process Card transactions. For all Card transactions (including Debit Cards, travel vouchers or lodging reservation service), the terms and conditions of all rules and regulations of the Card Associations (the “**Operating Regulations**”) and the Operating Manual apply. Merchant agrees to all of the terms and conditions contained in the then current Operating Regulations and the then current Operating Manual, including, without limitation, prohibited transactions as described in the Card Acceptance section of the Operating Manual. Merchant obtains no rights in amounts settled between Bank and Card Associations unless and until Bank transfers amounts to Merchant.

3. Advertising and Promotion

Unless waived by a Card Association or Bank, Merchant agrees to adequately display the most current Card emblems, decals and other materials to inform the public that Card(s) that Merchant elects to accept pursuant to this Agreement will be honoured as required by the Operating Regulations. Merchant shall only indicate that Cards are accepted and shall not indicate that any Card Association endorses Merchant’s merchandise or services. While this Agreement is in effect, Merchant shall make no other use of the emblems or marks of any Card Association or Bank without Bank’s prior written consent. Any use of these emblems or marks shall be in compliance with the requirements of the Operating Regulations and the specifications of the Card Associations and/or Bank. Merchant shall immediately discontinue use of all such marks, emblems or names upon (a) direction of Bank or any Card Association or (b) termination of this Agreement. If Merchant has requested signage for the purpose of indicating their acceptance of Debit Cards, Merchant must display such signage for a minimum of three months.

4. Accounts

(a) **Settlement Account.** Merchant agrees to designate and maintain an account (the “**Settlement Account**”) that accepts automated clearing house (“**ACH**”) transfers (which does not have to be a separate account, but may be a general or commingled account) with a balance of available funds sufficient to accommodate Merchant’s obligations under this Agreement, either with Member Bank, or at an institution acceptable to Bank. If there are not sufficient available funds in the Settlement Account to cover Merchant’s obligations hereunder, Bank may make deductions from payments due Merchant from Card transactions without notice. Merchant agrees to promptly pay Bank on demand for all amounts owed under this Agreement.

(b) **Reserve Account.** At any time and for any reason (including, without

limitation, notice of termination or actual termination of this Agreement, unauthorized transactions, cessation of business, insolvency, excessive Chargebacks, suspected or actual fraud, or competing claims regarding funds generated via Merchant's processing activities), Bank may require Merchant to establish a reserve account, increase the funding amount of an existing reserve account, or provide other security to pay Chargeback amounts and other amounts due or anticipated to become due hereunder to Bank (the "**Reserve Account**"). Bank shall notify Merchant either orally or in writing of the establishment or increased funding of the Reserve Account, except in the event of (a) notice of termination or actual termination of this Agreement, (b) unauthorized transactions, (c) cessation of business, (d) suspected or actual breach or default, or cessation of processing under this Agreement. If notice is required, Bank may notify Merchant either before or after the establishment or increased funding of the Reserve Account, but not later than three (3) business days after the establishment or increased funding of the Reserve Account. Merchant agrees to deposit and maintain in such non-interest bearing accounts, at Bank's sole discretion, either (a) with Member Bank (which Member Bank may commingle with other funds) or (b) at a financial institution designated by Bank, such additional funds or other security as Bank may require. Bank shall specify in its notice, in Bank's sole discretion, the amounts to be funded and the timing for establishment or increased funding of such Reserve Account; provided, Bank may require that such Reserve Account be funded (whether initially or due to increased funding requirements) immediately (including, without limitation, in instances of unauthorized transactions, suspected or actual fraud or termination for cause). Bank may without notice also fund the Reserve Account (whether initially or due to increased funding requirements) with deductions from payments due Merchant from Card transactions or by a charge against the Settlement Account or any other available account of Merchant, including, without limitation, amounts in accounts at affiliated institutions. Bank will hold or be entitled to hold the funds in the Reserve Account until such time as Bank is satisfied that Merchant has no further obligations to Bank under this Agreement. Merchant's failure to fund the Reserve Account (whether initially or due to increased funding requirements) may result in immediate termination of this Agreement at Bank's sole discretion.

5. Provisions Applicable to All Accounts

(a) This Agreement and Merchant authorize Bank to initiate and make deposits and withdrawals from the Settlement Account, the Reserve Account and any account to which Bank has access which may be transmitted electronically or accessed through ACH, or to delay or place holds on any amounts in such accounts in order to protect any of Bank's rights and to obtain payment of any amount due Bank under this Agreement, including, without limitation, fees, charges and discount rates, without any further notice or demand. Merchant agrees that any depository bank shall comply with instructions originated by Bank directing dispositions of the funds in those accounts without any further consent required by Merchant unless required by applicable law. If required, Merchant authorizes Bank to enter into any agreement with any depository institution for this purpose, including on behalf of Merchant, to effect the security interest granted to Bank below. Merchant agrees to enter into any such agreement. Merchant will confirm to any institution holding any account of Merchant the existence of this authorization and direct it to comply with Bank's directions. Merchant will not change any such confirmation or direction without Bank's prior written consent. Any such confirmation, direction or authorization will remain in effect for at least 180 days after termination of this Agreement or, in Bank's discretion, longer to process trailing activity. Bank may, without notice, delay or stop making payments to Merchant or setoff, retain or otherwise hold (or direct Merchant's financial institution to place a hold on) any funds (i) to protect itself against losses, Chargebacks, any amounts due or to become due under this Agreement, (ii) based on Merchant's financial condition or (iii) in the event Merchant submits transactions that are not authorized or do not conform to this Agreement, the Operating Manual, the Operating Regulations or applicable law, including transactions subject to verification by any Card Association or cardholder. Merchant agrees that Bank shall not be liable for any losses, either direct or indirect, due to holding of funds, suspension of processing, termination of this Agreement or any dishonour of any Item by a financial institution or Merchant's depository bank as a result of these actions. Merchant agrees to promptly notify Bank of any discrepancy within thirty (30) days of receipt of any statement regarding Merchant's accounts, or such statements will be deemed to have been accepted as accurate by

Merchant. Any account is subject to review, verification, acceptance and audit by Bank. Bank may return Items to Merchant for correction.

(b) Merchant hereby grants to Bank a lien and security interest in all of Merchant's right, title and interest in or to any of the following assets or properties: (i) the Settlement Account, (ii) the Reserve Account, (iii) all Items (including future Items), (iv) any rights to receive credits or payments under this Agreement and (v) all deposits and other property of Merchant that Bank or its affiliates possess or maintain (including all proceeds of the foregoing). Merchant shall execute, acknowledge or deliver any documents or take any actions Bank may from time to time request to better assure, preserve, protect, perfect, maintain or enforce this security interest. To the extent permitted by law, Merchant irrevocably authorizes Bank to file any financing statements (at Merchant's expense) in any relevant jurisdiction or any other documents or instruments related to this security interest. Bank shall also be the beneficiary of any insurance, surety bond or similar indemnity or guaranty (whether voluntary or required by law) of Merchant or for the benefit of Merchant's customers, and Merchant hereby assigns to Bank the rights to make claims or receive the benefits thereof with respect to Card transactions hereunder. Merchant represents and warrants that (i) Merchant has good and valid rights and title to the property described herein, (ii) Merchant has full power and authority to grant to Bank the security interest pursuant hereto and to execute, deliver and perform its obligations in accordance with the terms of this Agreement, without the consent or approval of any other person or entity, (iii) no other person or entity has a security interest or lien in any of the property described herein and (iv) this security interest is a first lien security interest and secures Merchant's obligations to Bank under this Agreement. Bank shall have all rights of a secured party and Merchant must obtain the prior written consent of Bank before granting any subsequent security interest or lien in the property described herein. Merchant agrees that it is Merchant's intent that these accounts and secured property shall to the extent allowed by applicable law not be subject to any preference, claim, or stay by reason of any bankruptcy or insolvency law. Merchant agrees to act consistently with the understanding that said accounts and secured property under this Agreement are free of all such preferences, claims or stays by reason of and as allowed by any such law.

6. Chargebacks

Bank shall have the right, at any time and without notice, to chargeback to Merchant the full amount of any Item designated by Bank or a Card Association or Card issuing bank or which fails to meet the requirements of this Agreement, the Operating Manual, the Operating Regulations or applicable law ("**Chargeback**") and to deduct, divert, withdraw or setoff the full amount of any such Chargeback from (a) payments due Merchant from Card transactions, (b) the Settlement Account, (c) the Reserve Account or (d) any other account or amounts due Merchant. Merchant agrees to be liable for and pay Bank for all Chargebacks. Merchant agrees to pay (a) the full amount of any Chargeback, including any fine or fee associated therewith and (b) the costs and expenses of Bank (including, without limitation, administrative charges, investigations, retrieval and legal fees and costs) related to any Item subject to (i) legal process (including reproduction of records), (ii) a bankruptcy or insolvency proceeding or (iii) Chargeback. If Bank or any Card Association determines or suspects any Item to be questionable, such Item is subject to Chargeback. Bank shall retain any discount or fee related to a Chargeback transaction. Disputes relating to Chargebacks shall be governed by the Operating Regulations, including Merchant's obligation to provide required documentation. If any of the Card Associations assess a fine in connection with Merchant's activities, including, without limitation, due to Chargebacks or credits/returns that exceed the industry standards or constitute excessive Chargebacks under the Operating Manual or Operating Regulations, Merchant shall be obligated to pay such fine, plus any other applicable charges. In addition, Merchant agrees to pay any fines or other amounts imposed by any Card Association for its activities, including without limitation, Chargebacks. Merchant agrees to obtain authorization for all Card transactions. Any Card transaction not properly authorized is made with full recourse to Merchant. Merchant acknowledges and agrees that authorization for a Card transaction (i) indicates only the availability of credit at the time of the authorization, (ii) does not warrant that the person presenting the Card is the rightful cardholder, (iii) is not an unconditional guaranty of payment to Merchant and (iv) does not guaranty that any Card transaction will not be subject to Chargeback. Merchant shall not submit

a transaction that is an attempt to collect a Chargeback or which represents the financing of an existing obligation to Merchant, including a dishonoured check.

7. Merchant Indemnity

In addition to any other indemnities in this Agreement (including, without limitation, the Operating Manual) or in the Operating Regulations, Merchant agrees to indemnify, defend and hold Bank and Bank's parent companies, subsidiaries and affiliates (including, without limitation, the respective officers, directors, employees, attorneys, shareholders, representatives and agents of all of the foregoing) harmless from and against any and all liabilities, judgments, arbitration awards, settlements, actions, suits, claims, demands, losses, damages, costs (including, but not limited to, court costs and out of pocket costs and expenses), expenses of any and every type, litigation expenses, and attorneys' fees, including, but not limited to, attorneys' fees incurred in any and every type of suit, proceeding, or action, including but not limited to, bankruptcy proceedings, in connection with, by virtue of, or arising from, either directly or indirectly: (a) an Item that does not conform to the requirements of this Agreement, the Operating Manual, the Operating Regulations or applicable laws; (b) any Card transaction or any act or omission of Merchant in connection with a cardholder; (c) Merchant's breach or default or an alleged breach or default of or under any term, covenant, condition, representation, warranty, obligation, undertaking, promise or agreement contained in this Agreement (including the Operating Manual and Attachments) or in any agreement (whether oral or written) with any cardholder, any agreement with any Card Association, or in any other agreement with Bank (including, without limitation, Merchant's application to Bank made in connection with this Agreement), any breach or threatened breach by Merchant of the Operating Regulations or any violation by Merchant of laws, rules and regulations applicable to Merchant; (d) the rescission, cancellation or avoidance of any Card transaction or Item, by operation of law, adjudication or otherwise; (e) any claim, counterclaim, complaint, dispute or defense, including, without limitation claims brought by Merchant, whether or not well founded, with respect to this Agreement, a Card transaction or any Special Programs; (f) damages, including, without limitation, those for death or injury caused by the good or service purchased with the Card; or (g) for all web based, Internet or electronic commerce transactions, including Merchant's insecure transmission of Card transaction data and/or storage of cardholder information. For purposes of this Agreement, including the foregoing indemnities, Merchant is responsible and liable for the acts and omissions of its employees, agents and representatives (whether or not acting within the scope of their duties).

8. Merchant Representations, Warranties and Covenants

Merchant represents, warrants and covenants that (a) it has not been terminated by any other Card processor or bank with respect to the processing of Card transactions; (b) no Card transaction shall be for the purpose of obtaining or providing cash or a cash advance to Merchant or to Merchant's employees, owners or customers; (c) Merchant shall not engage in accepting mail orders or telephone orders or engage in Internet or electronic commerce transactions for processing of Card transactions pursuant to this Agreement without Bank's prior written approval; and (d) all Card transactions shall be originated by Merchant in a bonafide transaction in which Merchant has sold or leased goods or services directly to customers who have presented their Card for use in payment thereof. As a condition to transmitting any Item to Bank, Merchant hereby continuously warrants, covenants and represents compliance with all of the representations, warranties and covenants contained in this Agreement, the Operating Manual, the Operating Regulations, and applicable law, rules and regulations. Bank may charge back any Item at any time where a breach of any representation, warranty or covenant exists with respect to such Item. Merchant shall not submit any Item which is not a bonafide, direct sale transaction between the Merchant and the cardholder in the Merchant's ordinary course of business (Merchant shall not submit any Card transactions arising from or with an agent or representative of Merchant unless approved in advance in writing by Bank), or which is (a) a transaction between a cardholder and an entity or source other than Merchant, (b) a fraudulent transaction or (c) a duplicate transaction. Merchant shall not submit a credit Item for which there is no corresponding sales Item. A credit Item shall not exceed the amount of the corresponding sales Item. Merchant has and shall retain all required licenses and qualifications to sell its products and

services and perform its obligations under this Agreement and shall comply with applicable law. Merchant is responsible for the actions of its employees, agents and representatives (whether or not acting within the scope of their duties). Merchant shall provide business and financial information promptly upon Bank's request. Merchant shall notify Bank at least thirty (30) days in advance of any material change in name, jurisdiction, type of organization, location, ownership, nature of business (including, without limitation, monthly or annual processing volume), products and/or services offered, marketing of Merchant's products or services, adverse changes (e.g., going out of business or deteriorating financial condition) or any change in information furnished on any application or other information submitted to Bank. Merchant agrees to abide by Bank's or Bank's service provider's terms and conditions with respect to Special Programs. Merchant shall immediately notify Bank upon the commencement of any voluntary or involuntary bankruptcy or insolvency proceedings. Merchant represents and warrants that the Tax Filing Name ("TFN") and Taxpayer Identification Number ("TIN") furnished on the Merchant's application to Bank are true and correct. Merchant acknowledges and agrees that if either the TFN or TIN is incorrect, Bank may withhold income tax from the settlement amounts due Merchant and assess a fee.

9. General Provisions

(a) Notices. Except as otherwise provided herein, notices shall be given in writing, addressed to the party to receive the notice at its address listed on the signature page of this Agreement, or to such other place as either party shall hereafter designate, by personal delivery, first class mail (postage prepaid) or by overnight courier or facsimile. Notices shall be deemed given when either mailed, delivered or receipt confirmed respectively.

(b) Amendment. Except as otherwise provided in this Agreement, this Agreement, the Operating Manual and other Attachments may be amended by Bank at any time by giving written notice to Merchant effective on the date stated in the notice. The Operating Regulations may be amended by the Card Associations at any time. Submission of any Items to Bank on or after the effective date of any amendment to this Agreement, the Operating Manual, the other Attachments, or the Operating Regulations constitutes acceptance of any such amendment.

(c) Effective Date. This Agreement shall not be effective as to the obligations of Bank hereunder until accepted in writing by Bank by dating and signing this Agreement.

(d) Term and Termination.

(1) **Term.** The term of this Agreement, including any equipment rental, shall be for three (3) years commencing on the acceptance of this Agreement by Bank and the issuance of a merchant identification number to Merchant and shall remain in full force and effect until termination. This Agreement shall be automatically renewed thereafter for successive three (3) year periods unless Merchant delivers written notice of termination at least sixty (60) days but not more than one hundred twenty (120) days prior to the expiration of the then existing term.

(2) **Fees for Discontinuing Processing.** In the event Merchant (i) discontinues or ceases processing of Card Transactions prior to the end of the term hereof, (ii) gives notice of discontinuance of processing (including an invalid or ineffective termination notice), or (iii) violates Section 15 of this Agreement, Bank will suffer a substantial injury for which it is impracticable or difficult to fix actual damages. In an effort to liquidate in advance the sum that should represent such damages, Merchant agrees to pay Bank the Early Termination Fee described in the Schedule of Rates and Fees attached to and made part of this Agreement. Merchant acknowledges that it has been given notice of the Early Termination Fee and agrees that such Early Termination Fee is fair and reasonable and does not constitute a penalty. Merchant agrees that Bank may immediately collect the Early Termination Fee and other outstanding fees from the Settlement Account, Reserve Account or any other account to which Bank has access.

(3) **Termination by Merchant.** Merchant has no right to terminate this Agreement except as provided in this subsection. If Bank fails to perform Bank's obligations hereunder, and Merchant intends to terminate this Agreement, then Merchant must deliver written notice to Bank stating such intent, identifying the non-performance, and giving Bank the opportunity to remedy such non-performance for a period of sixty (60)

days following the date notice is delivered. Upon expiration of such sixty (60) day cure period, if the performance has not been remedied, Merchant may terminate the Agreement upon providing written notice to Bank.

(4) **Termination by Bank.** Bank may terminate this Agreement without prior notice at any time and for any reason, which termination may be effective immediately. At Bank's discretion, termination of the relationship between Bank and Merchant's ISO/MSP (as defined below) may terminate this Agreement. Bank may suspend the processing of Card transactions or close terminals of Merchant without prior notice if so directed by any of Card Associations, for breaches, defaults or suspected breaches or defaults of this Agreement, for other reasonable cause and in the event of termination of this Agreement. Merchant's rights to make Card transactions and any other rights in this Agreement shall cease upon termination, and Merchant shall return any of Bank's property, equipment or forms. All obligations of Merchant under this Agreement for transactions prior to termination (including, without limitation, document retention, retrieval and responsibility for all Chargebacks) and Merchant's obligations of Indemnity and Confidentiality under Sections 7 and 12 shall be binding on Merchant and shall survive termination. Merchant expressly acknowledges that Bank is required to report the business name of Merchant and the names and identification of its principals to the Terminated Merchant File (the "**MATCH System**") maintained by MasterCard when Bank determines that Merchant has been terminated for one or more of the reasons specified in Visa, MasterCard, American Express or Discover Operating Regulations. Merchant also acknowledges that, if Bank determines that Merchant has failed to fulfill its obligations arising from this Agreement, Bank may submit a derogatory report on Merchant and its principals to a consumer and/or business credit reporting agency. Bank shall not be liable to Merchant for any damages (including prospective sales or profits) due to termination of this Agreement or reporting to the MATCH System or a credit reporting agency by Bank. It is the express agreement of Bank and Merchant that the acquisition of Items hereunder is a financial accommodation and, in the event Merchant becomes a debtor in any bankruptcy or similar proceeding, then (i) such event shall be deemed a default for purposes of this agreement and section 365(B)(1) of the United States bankruptcy code or any applicable successor statutory provision thereto, and (ii) it is the intent of the parties that, unless otherwise agreed by Bank, this Agreement should not be assumed or enforced by any other person and Bank should be excused from performance hereunder. If Bank sponsors Merchant in to any Card program or Card Association, such sponsorship shall extend only so long as this Agreement is in effect.

(5) **Equipment Fee.** Upon discontinuance of processing by Merchant or termination of this Agreement, Bank may impose, collect and receive from Merchant the value of any equipment rented from or through Bank that is not returned to Bank within ten (10) days of the discontinuance of processing or the termination of this Agreement. Bank may withhold any such amount from settlement amounts due Merchant pending return of such equipment. Merchant agrees to pay this fee.

(e) **Assignment.** This Agreement shall be binding upon Merchant and Bank and their respective heirs, successors and assigns. Neither this Agreement nor Merchant's right to receive payments pursuant to this Agreement shall be assigned by Merchant without Bank's express prior written consent and any purported assignment without such consent shall be void. Bank may assign this Agreement to any affiliate or successor that is conducting a merchant acquiring business upon the giving of notice to Merchant.

(f) **Entire Agreement.** This Agreement (including the Operating Manual and any Attachments), the Operating Regulations and Merchant's application to Bank, set forth the entire understanding of Bank and Merchant with respect to the subject matter hereof and supersede any prior oral or written communications. This Agreement may not be amended, modified or waived except as provided in Section 9(b) above or otherwise by a writing signed by Merchant and Bank.

(g) **Validity.** If any provision of this Agreement is void or unenforceable, such determination shall not affect the validity or enforceability of any other provision of this Agreement.

(h) **Waiver.** No failure or delay by Bank in exercising any power, right or remedy under this Agreement shall operate as a waiver. All waivers by Bank must be in writing and signed by Bank.

(i) **Governing Law.** This Agreement is a contract made under, governed by and construed in accordance with Illinois law.

(j) **Financial Statements/Audits.** Without limiting the generality of Section 13(i) of the Operating Manual, Merchant shall provide financial statements and other information concerning Merchant (including its affiliates), Merchant's business and Merchant's compliance with the terms and provisions of this Agreement as Bank may reasonably request. Merchant authorizes Bank to obtain from third parties financial and credit information relating to Merchant in connection with this Agreement and Bank's continuing evaluation of Merchant. Upon request, Merchant shall provide Bank or its representatives reasonable access to Merchant's facilities and records for the purpose of performing any inspection and/or copying of Merchant's books and/or records deemed appropriate by Bank.

(k) **Survival/Remedies Cumulative.** All of Bank's rights and remedies under this Agreement shall be cumulative to any other rights and remedies afforded to Bank by law or equity, and Bank's rights and remedies may be exercised concurrently, independently, or successively under this Agreement. Sections 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 18, 21 and 22 along with corresponding provisions of the Operating Manual shall survive the termination or expiration of this Agreement.

(l) **Facsimile and Electronic Transmissions.** Bank and Merchant agree that facsimile transmissions are acceptable for purposes of this Agreement and that facsimile signatures shall be deemed to be originals and have the full force and effect thereof. The Federal E-Sign Act (HR-1714) on Final Digital Signature provides that electronic signatures on documents hold equivalent legal status as traditional handwritten signatures. Bank and Merchant agree that electronic signatures and transmissions may be utilized and shall be deemed to be originals.

(m) **ISO/MSP.** Merchant understands and agrees that other than Moneris Solutions, Inc., any independent sales organization or member service provider (each, an "**ISO/MSP**") that solicits or provides services to Merchant is an independent contractor and is not an agent of Bank. Any ISO/MSP must comply with the Operating Regulations. Merchant must notify Bank of its use of any agent that will have access to cardholder data. No ISO/MSP has any authority to (i) make representations on behalf of Bank; (ii) bind Bank or (iii) execute this Agreement or alter its terms. Bank is not responsible or liable for the acts or omissions of the ISO/MSP.

10. Fees and Rates; Settlement

For the services provided by Bank, Merchant agrees to offer for purchase all Items that comply with this Agreement and to pay to Bank the non-refundable fees, charges and discounts specified on the Schedule of Rates and Fees and any applicable Exhibit or Attachment, including amendments, or to which Bank otherwise agrees in writing. Electronic or other submission of Items constitutes an endorsement to Bank. Merchant authorizes Bank to supply any endorsement on Merchant's behalf. Merchant agrees to reimburse Bank for the amount of any credit Items, any Items subject to Chargeback and for any and all applicable fees, penalties, assessments, charges or fines specified in this Agreement, in the Operating Manual, the Operating Regulations or imposed by any Card Association (including, without limitation, those for foreign transactions or excess Chargeback fees), plus an administrative charge. Bank shall have the right to pass through to Merchant any increases in fees or costs due to changes in the Operating Regulations, charged by any Card Association or in anticipation of any Card Association charge or liability. Bank reserves the right to increase rates and fees if there is any material variance from the information provided by Merchant in Merchant's application or other information (such as projected volume or average ticket size) upon which rates were initially determined. Rates and fees are based on qualified transactions ("**Qualifications**"). Rates and fees are subject to increase if such Qualifications are not met. If any fee, including the discount rate or interchange rates, charged by Card Associations is based on Qualifications, and Merchant fails to meet the requirements for reduced fees, Merchant agrees that the fee may be adjusted to the proper amount and Merchant agrees to pay the increased amount, including any additional or applicable surcharge of Bank. Bank may back bill Merchant for these amounts plus Bank's billback fee. Fees are subject to change pursuant to Section 9(b) hereof. Bank may adjust rates and fees to offset increased costs to Bank to provide services hereunder. Merchant agrees to pay all taxes and other charges imposed

by any governmental authority on the services provided under this Agreement. Equipment rentals include applicable taxes. Merchant agrees to reimburse Bank for all interchange or discount costs and expenses related to the enforcement of this Agreement, including, without limitation, investigation costs, reasonable attorneys' fees and costs, settlements, arbitration awards, Card Association fees or fines and court costs. Clearing and settlement services and availability of funds are subject to the procedures of Bank and any respective financial institution of Bank or Merchant. Bank does not guarantee the timeliness of settlement including by Merchant's depository institution. Bank is not responsible for third party processors, networks, systems, Card Associations, settlement switches, telecommunications or other forces beyond its reasonable control. Subject to Bank's obligation to make payment in accordance with the terms of this Agreement, Merchant assigns to Bank all right, title and interest in and to the Items purchased and acquired by Bank with the right to endorse Items. Bank may refuse to accept and purchase Items or revoke its prior acceptance for Items which do not comply with the terms of this Agreement, the Operating Manual, the other Attachments, the Operating Regulations, or applicable law or if a Cardholder disputes liability. Bank shall deposit Items that fully comply with this Agreement no later than two banking business days after Merchant submits such Items to Bank. All funds advanced by Bank to Merchant for the purchase of Items are provisionally credited subject to Bank's right of payment here under and contingent claims for Chargebacks, adjustments, and final settlement. Bank has the right to receive payment on all Items acquired until Chargeback, in which case, Merchant shall have the right to collect the charged back Item from its customer, provided that Bank has been paid in full. Merchant will not attempt to collect any Items. If Merchant receives any payment, Merchant will hold it in trust for, and promptly deliver it, to Bank. Bank will process all Items and upon, acceptance and purchase, credit the Settlement Account for (i) the aggregate face amount of Items acquired less (ii) the aggregate face amount of credit Items, Chargebacks, refunds, disputes, billing errors, adjustments, fines, processing fees and other amounts due Bank. At the times designated by Bank, Bank may deduct as a credit to the Settlement Account, or as a deduction from any amounts owed Merchant, any amounts owed to Bank by Merchant for processing fees, Chargebacks and Card Association interchange fees and assessments for all Items acquired during the applicable preceding period(s). Where Bank charges a fee on a per Item (whether sales or credit) basis, the fee will be based on the applicable fee multiplied by the number of transactions. Where Bank charges a fee based on a discount rate, the face amount of Card transactions is multiplied by the discount rate to determine the applicable fee. Fees shall become due and accrue at the time the Item is submitted to Bank by Merchant. Bank may delay or divert payment as provided in Section 5 of this Agreement.

11. Association Regulations

Merchant agrees to be bound by the requirements and terms of the Operating Manual and Operating Regulations of all applicable Card Associations, as amended, modified, supplemented, updated or replaced from time to time. As required by the Operating Regulations, Bank is authorized to inform any Card Association or other relevant party of the name of Merchant and its principals if this Agreement is terminated by Bank. Merchant understands that the Card Associations publish a list of names (including principals) of merchants terminated for cause. Merchant understands that being placed on this list could affect its or its principals' ability to obtain credit card processing in the future. Merchant agrees to indemnify Bank and its affiliates (pursuant to the provisions hereof) and any Card Association from any and all claims that Merchant or any other person may have as a result of Merchant or its principals being placed on any such list. Merchant represents and warrants that neither it nor its principals have been placed on any such list previously. Merchant agrees to retain and retrieve records as required by the Operating Manual and Operating Regulations and to allow Bank to examine them. If Bank sponsors Merchant in to any debit or other Card program, such sponsorship shall extend only as long as the term of this Agreement. Bank and Merchant hereby designate the Card Associations as third party beneficiaries under this Agreement having the right to enforce the terms of this Agreement against Merchant.

12. Confidentiality

(a) Merchant agrees to keep confidential (and store in a secured area with limited access) and shall not copy, publish, sell, exchange, disclose

or provide to others or use any information, documents or data, provided or disclosed to Merchant, or any account information (including account numbers) related to Cards or cardholders for any purpose other than performing Merchant's obligations under this Agreement. Merchant shall not retain or store magnetic stripe data after a Card transaction has been authorized. If Merchant stores any electronically captured signature of a cardholder, Merchant may not reproduce such signature except upon specific request of Bank. Merchant shall comply with all Operating Regulations related to the foregoing, including, without limitation, the Cardholder Information Security Program ("**CISP**"), the Site Data Protection Service ("**SDP**"), the American Express Data Security Requirements ("**DSR**"), the Discover Information Security and Compliance Program ("**DISC**"), the Payment Card Industry Data Security Standard ("**PCI DSS**"), the Payment Application Data Security Standard ("**PADSS**"), and the PCI Pin Entry Device Requirement ("**PCIPED**"). In addition, Merchant shall not disclose to any third party and shall retain in strictest confidence all information and data belonging to or relating to the business of Bank (including without limitation, the terms of this Agreement), and shall safeguard such information and data by using the same degree of care that Merchant uses to protect its own confidential information.

(b) Merchant shall not use Bank's name or marks without Bank's prior written consent and, if consented to, Merchant shall obtain no right, title, or interest in Bank's names or marks.

(c) Merchant authorizes Bank to obtain from and share all financial, credit, sales, experience and other information about Merchant with its affiliates, the Card Associations and with others as otherwise allowed by applicable law. Merchant acknowledges that Bank or any of the Card Associations may use such information (i) to screen and/or monitor Merchant in connection with Card marketing and administrative purposes and (ii) to promote such Card Association, perform analytics and create reports, and for any other lawful business purposes, including marketing purposes; provided, Merchant may elect to opt out of such marketing communications in accordance with the opt-out procedures provided in such communications. Merchant authorizes Bank to contact or communicate with Merchant's customers with respect to Card transactions.

(d) In the event Bank provides (either directly or indirectly), software, systems or other proprietary information (collectively "**Software**") to Merchant, in addition to any terms and conditions specified to Merchant for the use thereof (to which Merchant agrees by using such Software), Merchant agrees (i) to keep such Software strictly confidential and secure as Merchant would its own proprietary information and require any employees or agents with access to the Software to agree to abide by the provisions of this subsection (and Merchant agrees to be responsible for any breaches hereof by them), (ii) not to use or disclose such Software except for purposes allowed by this Agreement or by the terms and conditions of such Software, (iii) that Merchant acquires no proprietary interest in the Software, (iv) the terms and conditions of this Agreement apply to the Software, (v) to indemnify, defend, and hold Bank and its parent companies, subsidiaries, and affiliates (including, without limitation, the respective officers, directors, employees, attorneys, shareholders, representatives, and agents of all of the foregoing) and hold each of them harmless from and against any and all demands, claims, loss, liability, damages, costs and expenses (including attorney fees and costs) whatsoever related to, in connection with or arising from, either directly or indirectly, the Software or the use or results thereof, (vi) not to infringe, copy, reverse engineer, disassemble or try to determine the source code with respect to the Software, and (vii) to cease to use the Software upon termination of this Agreement and to return or destroy it as directed by Bank.

13. Bank Liability

BANK SHALL NOT BE RESPONSIBLE OR LIABLE FOR ANY ACTION TAKEN BY BANK (OR THE RESULTS THEREOF), WHICH IS AUTHORIZED BY THIS AGREEMENT. BANK MAKES NO WARRANTIES EXPRESS, IMPLIED OR STATUTORY IN CONNECTION WITH THIS AGREEMENT AND, WITHOUT LIMITING THE FOREGOING, BANK DISCLAIMS ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. BANK MAY UTILIZE SYSTEMS OF OTHERS, INCLUDING, WITHOUT LIMITATION, CARD ASSOCIATIONS AND PROCESSORS. BANK SHALL NOT BE RESPONSIBLE OR LIABLE FOR ANY INFORMATION PROVIDED BY OTHERS OR FOR THE USE OF ANY SYSTEM OR

EQUIPMENT OF BANK OR OTHERS OR FOR ANY CIRCUMSTANCES BEYOND ITS CONTROL. IN NO EVENT SHALL BANK BE LIABLE FOR LOST PROFITS, CONSEQUENTIAL, SPECIAL, PUNITIVE, EXEMPLARY, INCIDENTAL OR SIMILAR DAMAGES EVEN IF BANK HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE SOLE AND EXCLUSIVE LIABILITY OF BANK AND REMEDY OF MERCHANT HEREUNDER SHALL BE GENERAL MONEY DAMAGES FOR BANK'S WILLFUL MISCONDUCT NOT TO EXCEED THE AMOUNT OF FEES, WHICH BANK HAS CHARGED, ON THE ITEM OR FOR THE SERVICE, SUBJECT TO CLAIM OR DISPUTE, REGARDLESS OF THE CHARACTERIZATION OF SUCH CLAIM OR ACTION. BANK SHALL HAVE NO LIABILITY FOR ANY TAXES ARISING UNDER THIS AGREEMENT (WHICH LIABILITY WILL BE THAT OF MERCHANT), OTHER THAN TAXES BASED ON BANK'S INCOME.

14. System Terms

Merchant agrees to use terminals and related software systems or equipment acceptable to Bank. Merchant may, but is not obligated to, obtain equipment from Bank. If Merchant does, Merchant agrees to pay the fees specified in the Schedule of Fees for such equipment and accept the terms stated in the Operating Manual with respect to the equipment. Merchant authorizes Bank to make payment for any equipment utilized by Merchant to Bank, any other seller or lessor through ACH deduction from the Settlement Account. Upon cessation of processing prior to the end of the term of this Agreement, Merchant agrees to pay all uncollected or remaining rental equipment fees. If rented equipment is not returned within ten (10) days of cessation of processing or upon termination of this Agreement, Merchant agrees to pay Bank the value of the equipment not returned.

15. Exclusivity

During the term of this Agreement, Merchant shall not engage or use any other Visa, MasterCard, American Express or other Card Association Card processor or servicer in the United States except Bank, and Bank shall be the sole provider of the types of services provided hereunder for all locations of Merchant.

16. Waiver of Jury Trial/Jurisdiction

Bank and Merchant hereby waive any right to a trial by jury in any action concerning any rights under this Agreement. Bank and Merchant hereby agree that any action or dispute arising from, or related to, this Agreement shall only be litigated in an appropriate federal or state court located in Chicago, Illinois.

17. Force Majeure

The parties to this Agreement shall be released from liability hereunder for failure to perform any of the obligations herein where such failure to perform occurs by reason of any force majeure event, including, without limitation, act of God, fire, flood, storm, earthquake, tidal wave, communication failure, sabotage, war, military or terrorist operation, national emergency, mechanical or electronic break down, civil commotion, or the order requisition, request or recommendation of any government agency or acting governmental authority or either party's compliance therewith, or governmental regulation or priority or any other cause beyond either party's reasonable control whether similar or dissimilar to such causes.

18. Waiver of Personal Service and Acceptance of Service by Mail

The Merchant hereby waives personal service of any and all process and agrees and consents that all such service of process may be made by certified mail, return receipt requested directed to the under signed officer or owner of Merchant, as the case may be, or to Merchant's registered agent and agrees that service of process so made shall be complete upon mailing by Bank or Bank's attorney.

19. Special Programs

From time to time, Bank may offer, directly or from other service providers, other services or programs to Merchant (collectively, "**Special Programs**"). If Merchant elects and Bank approves Merchant to receive any Special Program(s), Merchant agrees to the terms, conditions and fees specified by Bank and any provider of those services with respect to all such Special Program(s). In order to receive some Special Programs, Merchant may need to enter into a separate agreement with the provider

of services. All terms and conditions of this Agreement apply with respect to all Special Programs. Merchant agrees to pay fees for all Special Programs as specified in the Schedule of Rates and Fees (attached hereto and incorporated in this Agreement) or as provided to Merchant by Bank or by any third party service provider as the rates and fees for those programs. Merchant holds Bank and its affiliates harmless from any and all claims related to the Special Programs. Some special programs include:

(a) Gift Card. With Bank's approval, Merchant may utilize Bank's "Gift Card" Program. All Gift Card transactions using Bank's Gift Card Program must be processed on point of sale equipment certified as acceptable for loading, redeeming, and performing balance inquiries on the Gift Card Program's Gift Cards. Integration of the Gift Card Program to any proprietary or VAR software is the responsibility of the Merchant. Collection of all amounts loaded onto Gift Cards at the point of sale shall be the responsibility of the Merchant at the time the Gift Card is sold to the consumer. All Gift Cards loaded and sold to consumers remain valid as long as a balance is maintained on the Gift Card. All unredeemed amounts through the sale of Gift Cards are the property of the Merchant. The Merchant shall be responsible for adhering to applicable law, including state escheat laws, before claiming unredeemed Gift Card amounts.

(b) Electronic Check. With Bank's approval, all electronic check transactions using Bank's eCheck Program must be processed on point-of-sale equipment certified as acceptable for entry and collection of consumer paper draft data for conversion to ACH file format. Conversion capability is limited to consumer paper draft items as defined by National Automated Clearinghouse Association ("**NACHA**") Operating Rules. Bank assumes no liability for checks accepted by Merchant for check conversion that are not defined as acceptable by the NACHA Operating Rules. Items accepted at the point of sale converted to electronic transactions must be deposited within seventy-two (72) hours of acceptance. Merchant agrees that the eCheck Program is strictly a conversion program and offers no verification, guaranty, or warranty that funds are available in the account on which any item converted to an electronic transaction is drawn. Bank shall have no liability in the event funds are not available for any reason.

(c) Returned Item Program. With Bank's prior approval, Merchant may utilize Bank's returned item representation program, provided Merchant complies with NACHA rules (including, but not limited to, posting a sign at point of sale and obtaining signed customer authorizations) and applicable law.

(d) Vault Service. Merchant may elect to utilize Bank's Vault Service in connection with this Agreement. The "Vault Service" is an account data management service that allows Merchants utilizing eSELECT plus to register their customers' signature debit/credit card/ pinless debit and bank account information (collectively, the "**Vault Information**") on to the eSELECTplus database. Merchant can use the Vault Information to bill their customer on a recurring or on demand basis. If the Merchant elects to utilize the Vault Service, Merchant agrees as follows: Merchant will pay all fees associated with the Vault Service. Merchant is solely responsible for the content and accuracy of all Vault Information. Bank takes no responsibility for the content and accuracy of any Vault Information, or for any information stored on Merchant's systems. Merchant is responsible for, and Bank has no liability for, maintaining the privacy and security of all payment and other information stored on Merchant's systems. Bank will use commercially reasonable efforts to make the Vault Service available, but cannot guarantee the availability of the Vault Service at any particular time. Without limiting the foregoing, Bank is entitled at any time, and without prior notice, to interrupt Merchant's access to the Vault Service for any reason, including, without limitation, for security considerations or to do maintenance work.

(e) ABU Service. If Merchant elects and Bank provides VISA Account Updater and MasterCard Automatic Billing Updater services ("**ABU Service**"), Merchant agrees to be bound by and follow the ABU Service Terms and Conditions.

20. Electronic Commerce

Processing of Card Transactions through websites, over the Internet or by similar electronic means of commerce requires disclosure by Merchant and explicit written approval of Bank. Merchant shall be solely

responsible for security and maintaining confidentiality of Card transactions processed by means of electronic commerce. Merchant shall be required by the Card Associations to have Merchant's website contain certain information as specified in the Operating Manual. Merchant shall be solely responsible for utilizing any and all fraud prevention options offered by any third party or web software vendor selected by Merchant, and Merchant agrees to activate all such fraud prevention options. Bank shall not be responsible for security or fraud in electronic commerce transactions or for any third party providing electronic commerce services to Merchant. Merchant shall disclose all third parties that have access to cardholder data. Chargebacks or losses from fraudulent activity related to electronic commerce (including, without limitation, web site hacking) are the complete, full and sole responsibility of Merchant. Merchant agrees to these requirements. Merchant agrees to indemnify, defend and hold Bank and its parent companies, subsidiaries and affiliates (including, without limitation, the officers, directors, employees, attorneys, shareholders, representatives, and agents of all of the foregoing) harmless from and against any and all liabilities, judgments, arbitration awards, settlements, actions, suits, claims, demands, losses, damages, costs (including, but not limited to, court costs and out of pocket costs and expenses), expenses, litigation expenses, and attorneys' fees, including, but not limited to, attorneys' fees incurred in any and every type of suit, proceeding, or action, including, but not limited to, bankruptcy proceedings, in connection with, by virtue of, or arising from, either directly or indirectly, electronic commerce activities of Merchant or losses and Chargebacks resulting there from.

21. Interfaces

If Merchant incorporates an interface between software solutions for data transfer or any other means, it shall be the Merchant's sole and exclusive responsibility to create, maintain, and support such interface and Merchant shall defend, indemnify, and hold Bank harmless from and against any and all demands, claims, losses, liabilities, damages, costs and expense of every kind and nature, including, but not limited to, claims of infringement, attorneys fees, court costs, and litigation expenses, arising from, in connection with, or by virtue of, either directly or indirectly, the use of any such interface. Any such interface must be fully compatible with the processing systems and networks established and used by Bank. Merchant agrees that Bank is not liable for damages of any type or kind caused, by virtue of, or in connection with, either directly or indirectly, the use, malfunction, or failure of any interface utilized by Merchant to operate or function in whole or in part and that Bank has no responsibility to service, maintain or repair any interface utilized by Merchant. In the event that Bank elects in its sole and exclusive discretion to implement any interfaces elected by Merchant (it being understood that Bank has no such obligation to do so), if the implementation process requires consulting assistance from Bank, the Merchant shall be billed at Bank's then current rates which shall be calculated from the time the consultation assistance began. Further, any consultation assistance provided by Bank shall not negate in any way the non-liability on the part of Bank with respect to the utilization by Merchant of any interface.

22. Bank's Processor/Member Service Provider/Discover® Acquirer

The services of Member Bank (other than funds settlement and transfer) for Visa® and MasterCard® transactions are provided through Moneris, an affiliate of Member Bank, and a member service provider to Member Bank, which may enforce this Agreement directly against Merchant in its own name or on behalf of Member Bank. Moneris is the acquirer for American Express® and Discover® transactions, and Member Bank is not a party to the agreement with American Express® and Discover®, notwithstanding any use by Moneris of Member Bank as its agent to perform any of the obligations set forth herein.

23. Future Delivery

Merchant agrees that it shall not submit Items to Bank in connection with the sales of goods or services for future delivery to customers or custom made goods without the prior, express written consent of Bank. If Merchant is so approved for future delivery, Merchant agrees to maintain operations, finances and capital sufficient to provide for the delivery of such goods and services at the agreed upon future date, without reliance upon any proceeds resulting from Items previously submitted for processing under this Agreement.

24. Risk Monitoring

Bank may monitor Merchant's Card transactions for risk management purposes. If, compared to information contained in the application, such as annual volume (measured on an annual, prorated monthly or other basis), average ticket size, number of transactions, actual activity differs, or Bank notices other unusual or suspicious activity (including, without limitation, unauthorized transactions, excessive Chargebacks, suspected or actual fraud, and/or breach or default), Bank is authorized to take protective actions including closing terminals, blocking transactions, holding funds (including, without limitation, charging additional discount rates and/or fees as a reserve or additional reserve), and investigating these matters. Merchant agrees to hold Bank and its affiliates harmless from and against any and all claims related to risk monitoring.

25. Provisions Applicable to American Express Cards.

(a) **High CV Merchants.** Merchant acknowledges that it may be converted from the OptBlue Program with Bank to a direct American Express Card acceptance relationship with American Express if and when it becomes a "High CV Merchant" pursuant to OptBlue Program eligibility requirements. 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 for American Express Card acceptance.

(b) **American Express Opt-Out.** Merchant may opt out of accepting American Express Cards at any time without directly or indirectly affecting its rights to accept other Cards pursuant to this Agreement.

26. Attachments

The following Attachments are expressly made a part of this Agreement as if fully set:

- Schedule of Rates and Fees
- Operating Manual

Merchant acknowledges receipt of all additional Attachments pertaining to services and/or conditions of service specific to Merchant, including, without limitation, the Card Not Present Addendum and/or any debit sponsorship agreement and/or debit processing application. Any unilateral alteration or modification to the pre-printed form of this Agreement (except as to Bank as provided herein) has no effect and, at Bank's discretion, may render this Agreement invalid.