Claim #216 Date Filed: 1/29/2010

B 10 (Official Form 10) (12/08)

UNITED STATES BANKRUPTCY COURT District of Delaware

PROOF OF CLAIM

Name of Debtor:
Cynergy Data, LLC

Case Number:
09-13040

NOTE: *This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):
America's Choice Readers Service

Name and address where notices should be sent:
America's Choice Readers Service
c/o Serlin & Whiteford, LLP
813 F Street, 2nd Floor, Sacramento, CA 95814

Telephone number:
(916) 446-0790

☐ Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number:__________
(If known)

Filed on:______________

Name and address where payment should be sent (if different from above):

Telephone number:

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: $ 130,056.85

If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

If all or part of your claim is entitled to priority, complete item 5.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.

2. Basis for Claim: Breach of Contract
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: __________

3a. Debtor may have scheduled account as: __________
(See instruction #3a on reverse side.)

4. Secured Claim (See instruction #4 on reverse side.)
Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other
Describe:

Value of Property:$________ **Annual Interest Rate**____%

Amount of arrearage and other charges as of time case filed included in secured claim,

if any: $________ **Basis for perfection:** ________

Amount of Secured Claim: $________ **Amount Unsecured: $**________

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

☐ Up to $2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

☐ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

Amount entitled to priority:

$________

**Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (*See instruction 7 and definition of "redacted" on reverse side.)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

Date:
01/28/2010

Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.

____________, Mark A. Serlin

FOR COURT USE ONLY

RECEIVED
JAN 29 2010
KURTZMAN CARSON CONSULTANTS

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

☒ Date Stamped Copy Returned
☐ No self addressed stamped envelope
☐ No copy to return

0913040100129000000000009

SERLIN & WHITEFORD, LLP
ATTORNEYS AT LAW

813 F Street, 2nd Floor
Sacramento, CA 95814

Telephone (916) 446-0790
Telecopier (916) 446-0791

Mark A. Serlin
mserlin@globelaw.com

Kevin P. Whiteford
kwhiteford@globelaw.com

January 28, 2010

VIA OVERNIGHT DELIVERY
Cynergy Claims Processing Center
c/o Kurtzman Carson Consultants, LLC
2335 Alaska Avenue
El Segundo, CA 90245

Re: *In re Cynergy Data, LLC*
U.S. Bankruptcy Court, District of Delaware Case No.: 09-13040

Ladies and Gentlemen:

Enclosed for filing please find an original and one copy of the following document:

- Proof of Claim (Creditor America's Choice Readers Service)
- Proof of Claim (Synergy Teleservices Corporation)

Also enclosed is a self-addressed, postage-prepaid envelope for your use in returning an endorsed/filed copy to this office. Thank you for your assistance.

Very truly yours,

SERLIN & WHITEFORD, LLP

Carissa Jeffries, Legal Assistant
SERLIN & WHITEFORD, LLP

/cj

Enclosures as stated.

Z:\Active Files\HORNBERGER\AMERICA'S CHOICE\CORRES\BK clerk.ltr1.wpd

MERCHANT APPLICATION

Merchant # ____________________

☐ New Location ☐ Additional Location

FAST TRANSACT
INTEGRATED PAYMENT TECHNOLOGIES

2590 Willamette Drive NE • Suite 202 • Lacey, WA 98516
Tel: 360-357-1400 Fax: 360-357-1425
www.fasttransact.com ISO#: 9765

Business Information

Legal Name: SYNERGY TELESERVICES CORP
Name of Account (Doing Business As): DISCOUNT CLUB USA
Legal Address: 350 E Street, Suite 300
Physical Street Address (No P.O. Box): Same
City: Santa Rosa State: CA Zip: 95404
City: State: Zip:
Phone #: 707 571-7728 Contact: RON Allen
DBA Phone #: 800 315-3904
Must Choose One Mailing Address: ☐ DBA Address ☑ Legal Address
E-Mail Address: RonAllen@magazin
Website Address: www. 501deals.com
Federal Tax #: 47-0883151 # of Locations: 1 Years in Business: NEW ☐ Home Based Business
Bank Reference: SONOMA NATIONAL BANK Contact: JENNIFER SULLIVAN Phone #: 707 579-2265

Owners or Officers • Individual Ownership Must be Equal to or Greater than 50%

Name: 1. Ron Allen JR Title: CEO Date of Birth: 9/1/70 Applicant's SS #: 559-95-0610 % Equity Ownership: 50%
Residence Address: 2801 Canyon Side Dr. City: Santa Rosa State: CA Zip: 95405
Years: Driver's Lic. #: C1063630S State: CA Home Phone: 707 537-7800

Name: 2. Ron Allen Sr. Title: President Date of Birth: 5/11/32 Applicant's SS #: 522-36-6012 % Equity Ownership: 50%
Residence Address: 1055 Sage Canyon Rd. City: St. Helena State: CA Zip: 94574
Years: Driver's Lic. #: A0453158 State: CA Home Phone: 707 963-4406

Business Profile

Type of Ownership: ☐ Sole Proprietor ☐ Partnership ☐ PA or PC ☑ Corporation ☐ Limited Liability Company ☐ Not For Profit
Type of Goods or Services Sold: DISCOUNT PRODUCTS/SERVICES SIC Code:
Do you currently accept Visa/Mastercard? ☐ Yes ☑ No (If yes, you should submit 3 current months' statements.)
Name of Current Processor: N/A
Has Merchant or any associated principal disclosed below filed bankruptcy or been subject to involuntary bankruptcy? ☐ Yes Date: ______ ☑ No

Sales Profile

Merchant Type: ☐ Retail ☐ Restaurant ☐ Lodging ☑ Service ☐ Internet ☐ Home Based ☐ Other

Visa/MasterCard Sales Profile (Be Accurate):	ES
Card Swipe	~~25~~ %
Manual Key Entry with Imprint, Card Present	%
Mail Order/Telephone	100. ~~75~~ %
Internet	%
Total =	100%

Business Trade Suppliers • List Two

Name: SOLITEX Address: D. N. DUTTON SANTA ROSA, CA 95401 Contact: ALEX HISEN Phone #: 707 579-2084
Name: WMI CAPITAL Address: 610 16th St #230 OAKLAND CA 94612 Contact: SEAN GULFARO Phone #: 800-823-6601

Merchant Site Survey Report • To Be Completed by Sales Representative

Merchant Location: ☐ Retail Location with Store Front ☐ Office Building ☐ Internet ☐ Residence ☐ Other ______
Area Zoned: ☐ Commercial ☐ Industrial ☐ Residential Square Footage: ☐ 0-250 ☐ 251-500 ☐ 501-2,000 ☐ 2,001+
Does the amount of inventory and merchandise on shelves and floor appear consistent with this type of business? ☐ Yes ☐ No
If No, explain:
The Merchant: ☐ Owns ☐ Leases the Business Premises Landlord Name & Phone #:
Further Comments by Inspector (Must Complete)

I hereby verify that this application has been fully completed by merchant applicant and that I have physically inspected the business premises of the merchant at this address and the information stated above is true and correct to the best of my knowledge and belief.

Verified and Inspected by: X Office #: 9765 Representative #: Representative Signature: X Date:

Visa / Mastercard Standard Retail / High Risk Retail Rates

Merchant Chooses to accept the following:

VS/MC (Other Cards) Discount Rate:	%
VS/MC Debit Card Discount Rate	%
VS/MC MID Qualified	%
VS/MC Non Qualified	%
AMEX Discount Rate:	%
Discover Discount Rate:	%

Fees

VS/MC Transaction Fee:		Per Item
Non-Bankcard Transaction Fee:	.25	Per Item
Statement Fee:		Monthly
VIMAS Online Service:		Monthly
Monthly Minimum.	$20.00	Monthly
Annual Fee:	$55.00	Per Year
Debit Transaction Fee Plus Network Fees:		Per Item
EBT Transaction Fee:		Per Item
EBT Statement Fee:		Monthly
Batch Fee:	.25	Per Batch
Manual Imprinter: QTY:		One Time
Chargeback/ACH Reject Fee:	$25.00	Per Item
Retrieval Fee:	$5.00	Per Item
Voice Authorization Fee:	.95	Per Call
Early Termination Fee:	$250.00	One Time
Others (please specify):		

Mail / Phone / Internet / Touchtone Rates

Merchant Chooses to accept the following:

VS/MC (Other Cards) Discount Rate:	3.96 %
VS/MC Debit Card Discount Rate:	3.96 %
VS/MC MID Qualified	4.00 %
VS/MC Non Qualified	5.25 %
AMEX Discount Rate:	as per Amex %
Discover Discount Rate:	as per Discover %

Fees

VS/MC Transaction Fee:	.35	Per Item
Non-Bankcard Transaction Fee:	.35	Per Item
Statement Fee:		Monthly
VIMAS Online Service:	10.00	Monthly
Monthly Minimum:	$25.00	Monthly
Annual Fee:	$59.00	Per Year
MOTO/Internet Surcharge:		Per Item
AVS Surcharge:		Per Item
Batch Fee:	.15	Per Batch
Manual Imprinter: QTY:		One Time
Chargeback/ACH Reject Fee:	$25.00	Per Item
Retrieval Fee:	$5.00	Per Item
Voice Authorization Fee:	.95	Per Call
Early Termination Fee:	$250.00	One Time
Others (please specify):		

Merchant Benefits Club

☐ Yes, I want to participate in the optional Merchant Benefits Club which includes equipment support and replacement for an additional $9.50 per terminal per month. Initials: X

American Express

By signing below, I represent that the information I have provided on the Application is complete and accurate and I authorize American Express Travel Related Services Company, Inc ("American Express") to verify the information on this Application and to receive and exchange information about me, including, requesting reports from consumer reporting agencies. If I ask American Express whether or not a consumer report was requested, American Express will tell me, and if American Express received a report, American Express will give me the name and address of the agency that furnished it. I understand that upon American Express' approval of the business entity indicated above to accept the American Express Card, the Terms and Conditions for American Express®Card Acceptance ("Terms and Conditions") will be sent to such business entity along with a Welcome Letter. By accepting the American Express card for the purchase of goods and/or services, you agree to be bound by the Terms and Conditions.

Signature: X Date:

Discover

By signing below, I represent that the information I have provided on this application is complete and accurate. I hereby request for Discover® Card acceptance to be added to my Cynergy Data Merchant Application. I understand that the Terms and Conditions for Discover Card Acceptance (Terms and Conditions) will be sent to the business indicated above upon approval by Discover Financial Services, Inc. for this business entity to accept the Discover Card by Discover Financial Services, Inc. By accepting the Discover Card for the purchase of goods and/or services, I agree to be bound by the Terms and Conditions.

Signature: X Date:

Debit/Credit Authorization • Staple Voided Check Here

Merchant authorizes Processor or Bank to present Automated Clearing House credits, Automated Clearing House debits, wire transfers, or depository transfer checks to and from the following account and to and from any other account for which Processor or Bank are authorized to perform such functions under the Merchant Processing Agreement, for the purposes set forth in the Merchant Processing Agreement. This authorization extends to such entries in said account concerning lease, rental or purchase agreements for POS terminals and/or accompanying equipment and/or check guarantee fees and amounts due for supplies and materials. This Automated Clearing House authorization cannot be revoked until all Merchant obligations under this Agreement are satisfied, and Merchant gives Cynergy Data written notice of revocation.

DDA: 1314145 ABA Routing: 121141107

INVESTIGATIVE CONSUMER REPORT: An investigative or consumer report may be made in connection with application. MERCHANT authorizes BANK or any of its agents to investigate the references provided or any other statements or data obtained from MERCHANT, from any of the undersigned individual credit or financial responsibility. You have a right, upon written request, to a complete and accurate disclosure of the nature and scope of the investigation requested.

AVERAGE TICKET SIZE: 19.95 AVERAGE MONTHLY VOLUME: 75,000.00

Each person certifies that the average ticket size and sales volume indicated is accurate and agrees that any transaction or monthly volume that exceeds either of the above amounts could result in delayed and/or withheld settlement of funds. Also, see paragraphs 4c and 13b of the MERCHANT Processing Agreement regarding suspension and termination of MERCHANT.

IMPORTANT NOTICE: All information contained in this application was completed, supplied and/or reviewed by the undersigned Merchant. Processor shall not be responsible for any change in printed terms unless specifically agreed to in writing by an officer of Processor and/or Bank of America, N.A., Charlotte, NC. By signing below you are agreeing to the provisions stated within this merchant application, on the reverse side (the Merchant Agreement) and acknowledge receipt of the merchant operating guide. Those provisions must be read before signing. By signing below, you agree to the terms on the front and back of this MERCHANT Processing Agreement and the merchant operating guide.

Individual Guaranty • No Titles

As a primary inducement to Processor and Bank to enter into this Agreement, the undersigned Guarantor(s), by signing this Agreement, jointly and severally, unconditionally and irrevocably, personally guarantee the continuing full and faithful performance and payment by Merchant of each of its duties and obligations to Processor and Bank under this Agreement or any other agreement currently in effect or in the future entered into between Merchant or its principals and Processor or Bank, as such agreements now exist or are amended from time to time, with or without notice. Guarantor(s) understands further that Processor or Bank may proceed directly against Guarantor(s) without first exhausting their remedies against any other person or entity responsible to it or any security held by Processor and Bank or Merchant. This guarantee will not be discharged or affected by the death of the undersigned, will bind all heirs, administrators, representatives and assigns and may be enforced by or for the benefit of any successor of Processor and Bank. Guarantor(s) understand that the inducement to Processor and Bank to enter into this agreement is consideration for the guaranty, and that this guaranty remains in full force and effect even if the Guarantor(s) receive no additional benefit from the guaranty.

AGREED AND ACCEPTED

X 6/21/05

#1 From Application - Signature Date

X 6/21/05

#2 From Application - Signature Date

For All Corporations • Corporate Resolution

The indicated officer(s) identified in numbers 1 and/or 2 below have the authorization to execute the MERCHANT Processing Agreement on behalf of the here within named corporation. MERCHANT UNDERSTANDS THAT THIS AGREEMENT SHALL NOT TAKE EFFECT UNTIL MERCHANT HAS BEEN APPROVED BY BANK AND A MERCHANT NUMBER IS ISSUED.

Synergy Teleservices Corp.

Print Legal Name of Merchant Business

X 6/21/05

#1 From Application - Signature Date

X 6/21/05

#2 From Application - Signature Date

X

Accepted by Processor Date

X

Accepted by Bank of America, N.A., Charlotte, NC. Date

FAST TRANSACT

INTEGRATED PAYMENT TECHNOLOGIES

2590 Willamette Dr. NE Suite 202 Lacey, WA 98516 Phone: 360.357.1400

Mail and Telephone Order Merchant Addendum

Must Submit sample(s) of product brochure, promotional materials, product catalogue, etc.

How will product be advertised or promoted? PHONE CALLS + ADVERTISING

If advertising on Internet – Web site address: www.

List name(s) and address (es) of vendor from which the product is purchased.

NONE

List name(s) and address(es) of third party or fulfillment organizations, or parties aside from your staff who will assist or participate with the sales, marketing, processing of orders or shipping of merchandise.

NONE

In what geographical areas will the product be marketed and sold?

ENTIRE U.S.

List carrier service that will deliver product: U.S.P.S.

What is your return or refund policy? SATISFACTION GUARANTEE

How does the customer order the product? PHONE

When you receive an authorization, how long before merchandise is shipped? IMMEDIATELY

Do you perform recurring monthly billing? ☒ Yes ☐ No

This amendment is made by and between Bank of America, N.A., Charlotte, NC ('Bank'), and the undersigned 'MERCHANT' and subject to the aproval of BANK.

WHEREAS: BANK is engaged in the general banking business including the purchase of Credit Card transactions from merchants and provide certain services related to the processing of Credit Card Transactions to MERCHANT; and

WHEREAS: MERCHANT desires to honor at this business location(s) Card Numbers presented in connection with the Mail Order/Telephone Order sale of product/services to cusomers; and

WHEREAS: BANK and MERCHANT have entered into Bank of America, N.A., Charlotte, NC (Bank) VISA/MasterCard Processing Agreement ('Agreement').

NOW THEREFORE, in consideration of the representations, convenats and promises made herin, the parties herto agree to amend Agreement as follows:

1. **MERCHANT** agrees to use and retain proof of a traceable delivery sustem as means of shipment of product to customer.
2. **MERCHANT** agrees that transactions will not be processed until products are shipped to cardholder.
3. **MERCHANT** agrees to a charge of $0.05 per AVS transactions when applicable.
4. Agreement may be immediately terminated by BANK if MERCHANT fails to comply with any of the terms of this agreement.

AGREED & ACCEPTED BY: DATE: 6/20/05

OWNER/OFFICER | Authorized Bank of America, N.A. Agent:

RON ALLEN

Print Name | Print Name

Merchant Processing Agreement
This Merchant Processing Agreement ("Agreement") is entered into on the Effective Date defined in Section 13 A. below, between the business indicated on the Merchant Application ("Merchant" or "you"), Cynergy Data ("CD"), BA Merchant Services, LLC ("BAMS") (CD and BA Merchant Services, LLC are collectively referred to as Processor), and Bank of America, N.A. ("Bank").

Recitals
Merchant desires to accept Debit Cards and/or Other Cards, as indicated on the Merchant Application, validly issued by members of Visa U.S.A., Inc. ("Visa") and MasterCard International, Incorporated ("MasterCard"). "Debit Card" means all Visa or MasterCard cards issued by a non-U.S. bank, a Visa or MasterCard card that accesses a consumer's asset account within 14 days after purchase, including but not limited to Visa or MasterCard issued stored value, prepaid, payroll, EBT, gift, and consumer check cards, and debit cards validly issued by the debit card networks indicated in Section 4.G below ("Debit Networks"), such as on-line (PIN-based) cards. "Other Cards" means all cards issued by a non-U.S. bank and all Visa or MasterCard cards other than Debit Cards, including but not limited to business and consumer credit cards and business debit cards. The category of card acceptance you have indicated on the Merchant Application will collectively be referred to as "Cards". Bank and Processor desire to provide Card processing services to Merchant. Therefore, Merchant, Processor and Bank agree as follows:
Terms and Conditions
1. Honoring Cards.
A. Without Discrimination. You will honor, without discrimination, any Debit Card and/or Other Card, as indicated by you on the Merchant Application, properly tendered by a Cardholder. "Cardholder" means a person presenting a Card and purporting to be the person in whose name the Card is issued. If you elect to accept only one of the card acceptance categories but later submit a transaction from a card in a different category, you agree that Processor and Bank may process the transaction and assess the appropriate fee, and that all terms of this Agreement will apply to that transaction. You will not establish a minimum or maximum transaction amount as a condition for honoring a Card. Cardholders will be entitled to the same services and return privileges you extend to cash customers, and you will not impose any special conditions (unless permitted by the Card Associations) in connection with the acceptance of a Card. "Card Association" means Visa, MasterCard, Discover, American Express, Japanese Credit Bureau, and/or a Debit Network, as applicable.
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 is 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 drivers license number as a condition for honoring a Card unless permitted under the Laws and Rules (defined in Section 14, below). You may not require a Cardholder to complete a postcard or similar device that includes the Cardholder's account number, Card expiration date, signature, or any other Card account data in plain view when mailed.
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 Processor 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 a Cardholder unless Processor and Bank refuse to accept the Sales Draft (as defined in Section 3) or revoke a prior acceptance of the Sales Draft after receipt of 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 Processor 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 Processor or 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 of acceptance or 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 Processor and Bank for processing. Failure to do so may result in the assessment of a transaction surcharge on non-qualifying transactions.
3. Presentment of Sales Drafts.
A. Forms. You will use a Sales Draft ("Sales Draft") or other form approved by Processor 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, and truncated, if applicable); (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 Drafts must be signed by the Cardholder unless the Card transaction is a valid mail/telephone order Card transaction, or PIN-based Debit 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 Processor and Bank: (i) the Cardholder's name; (ii) account number (truncated, if applicable); (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 Processor's and Bank's requirements for processing transactions. Information regarding a sales or credit transaction transmitted with a computer or magnetic stripe reading terminal will be transmitted by you to Processor and Bank or their agent in the form Processor and Bank from time to time specifies or as required under the Rules. If Processor or Bank requests a copy of a Sales Draft, credit voucher or other transaction evidence, you will provide it within 24 hours following the 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 credits), adjustments, fines, chargebacks, or fees). You understand and agree that Bank may withhold deposit and payment to you without notice until the expiration of any chargeback period for: a) mail order, telephone order, or Internet transactions on Cards issued by non-U.S. financial institutions, and b) if Processor or Bank determine, in their sole and reasonable discretion, that a transaction or batch of transactions poses a risk of loss. Neither Processor nor Bank are responsible for any losses you may incur, including but not limited to NSF fees, due to such delayed deposit of funds. You acknowledge that your obligation to Processor and Bank for all amounts owed under this Agreement arise out of the same transaction as Processor and Bank's obligation to deposit funds to the Designated Account.
ii. Provisional Credit. Not withstanding the previous sentences, under no circumstance will Processor or Bank be responsible for processing credits or adjustments related to Sales Drafts not originally processed by Processor and Bank. All Sales Drafts and deposits are subject to audit and final checking by Processor and 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 Processor 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. Processor and Bank may elect to grant conditional credit for individual or groups of any funds evidenced by Sales Drafts. Final credit for those conditional funds will be granted within Processor and Bank's sole discretion.
iii. Processing Limits. Processor and 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 Processor and Bank. This limit may be changed by Processor and 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 all chargebacks. You will fully cooperate in complying with the Rules regarding chargebacks.
C. Excessive Activity. Your presentation to Processor 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 by 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, Processor and Bank to take any action they deem necessary including but not limited to suspension or termination 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 were the subject of a Card transaction.
ii. Revocation of Credit. Processor or Bank may refuse to accept any Sales Draft and Processor 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 Processor and 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 pursuant to 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 Processor and Bank any amount previously credited to you for a Sales Draft not accepted by Processor and Bank or where accepted, is revoked by Processor and Bank.
E. Reprocessing. Not withstanding 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 directly between you and a Cardholder or any 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.
G. Debit Card Processing.
i. "Debit Networks" means those debit card networks accepted by Processor, including but not limited to the following organizations and their successors: Star, NYCE, Pulse, Interlink, AFFN, Alaska, Jeanie, Accel, and Money Station.
ii. Credit Refunds. You will attempt to settle in good faith any dispute between you and a Cardholder involving a transaction. You will establish a fair, consistent policy for the exchange and return of merchandise and for the adjustment of amounts due on Debit Card sales. You will promptly initiate a refund to the customer (which may be made in cash, by an adjustment credit or with a check or cashier's check, as permitted by the Rules) whenever you determine that a Debit Card transaction should be canceled or reversed.
iii. Adjustments. Except as the Debit Networks may permit, you will not make any cash refunds or payments for returns of adjustments on Debit Card transactions but will instead complete an adjustment form provided or approved by Processor. The Debit Card Sales Draft for which no refund or return will be accepted by you must be clearly and conspicuously marked (including on the Cardholder's copy) as "final sale" or "no return" and must comply with the Rules.

vi. Error Resolution. You will refer Debit Card Cardholders with questions or problems to the institution that issued the Debit Card. You will cooperate with Processor and with each applicable Debit Network and its other members to resolve any alleged errors relating to transactions. You will permit and will pay all expenses of periodic examination and audit of functions related to each Debit Network, at such frequency as the applicable Debit Network deems appropriate. Audits will meet Debit Network standards, and the results will be made available to the Debit Network.
5. Other Types of Transactions.
A. Mail/Telephone Order. Processor 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 perform AVS and 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 Processor and Bank if your retail/mail order/ telephone order mix changes from the percentages represented to Processor and Bank in the Merchant Application. Processor and Bank may cease accepting mail/telephone order transactions, or limit its acceptance of such transactions, or increase their fees, or terminate this Agreement, or impose a Reserve Account (defined in Section 7.A), if this mix changes. You may not deposit a mail/telephone order Sales Draft before the product is shipped.
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 Cardholders 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 Processor or Bank, or (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 Processor or 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 or otherwise) which relates to the sale of goods or services for future delivery without Processor or Bank's prior written authorization. Such consent will be subject to Bank's final approval. If Processor or Bank have given such consent, you represent and warrant to Processor and 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. You may process electronic commerce ("EC") transactions only if you have so indicated on the Application, and only if you have obtained CD's consent. If you submit EC transactions without such consent, Processor may immediately terminate this Agreement. If you have indicated on the Application that you will be submitting EC transactions, you acknowledge that you have received a copy of the Visa Cardholder Information Security Program ("CISP") manual. If you present EC transactions, such transactions must comply with the CISP requirements and all other applicable Rules and Law. You understand that transactions processed via EC are high risk and subject to a higher incidence of chargebacks. You are liable for all chargebacks and losses related to EC transactions, whether or not: i) EC transactions have been encrypted; and ii) you have obtained consent to engage in such transactions. Encryption is not a guarantee of payment and will not waive any provision of this Agreement or otherwise validate a fraudulent transaction. You must offer Cardholders a secure transaction method, such as Secure Sockets Layer (SSL) or 3-D Secure. All communication costs related to EC transactions are your responsibility. You understand that Processor will not manage the EC telecommunications link and that it is your responsibility to manage that link. All EC transactions will be settled by Bank into a depository institution of the United States in U.S. currency.
i. Requirements. For goods to be shipped on EC transactions, you may obtain authorization up to 7 calendar days prior to the shipment date. You need not to obtain a second authorization if the Sales Draft amount is within 15% of the authorized amount, provided that the additional amount represents shipping costs. Further, your web site must contain all of the following information: a) complete description of the goods or services offered, b) returned merchandise and refund policy, c) customer service contact, including electronic mail address and/or telephone number, d) transaction currency (such as U.S. or Canadian dollars), e) export or legal restrictions, if known, f) delivery policy, consumer data privacy policy, g) your security method for transmission of payment data, and h) the Visa flag symbol in full color. If you store cardholder account numbers, expiration dates, and other personal cardholder data in a database, you must follow Visa and MasterCard guidelines on securing such data. You shall immediately notify Processor of any suspected or confirmed loss or theft of any transaction information. In addition, you must provide reasonable access to Visa, MasterCard, a Debit Network or independent third party to verify your ability to prevent future security breaches in a manner consistent with the requirements of any Rule.
ii. Cardholder Information Security. You agree that you are, and will remain, fully compliant with the Payment Card Industry Data Security Standard required by the Card Associations, including but not limited to undertaking the required annual or quarterly self-assessments and Web infrastructure scans, as appropriate. If you accept EC transactions, you must: install and maintain a working network firewall to protect data accessible via the Internet; keep security patches up-to-date; encrypt stored data and data sent over open networks; use and update antivirus software; restrict access to data by business "need-to-know"; assign a unique ID to each person with computer access to data; not use vendor-supplied defaults for system passwords and other security parameters; track access to data by unique ID; regularly test security systems and processes; maintain a policy that addresses information security for employees and contractors; and restrict physical access to cardholder information. When outsourcing administration of information assets, networks, or data you must retain legal control of proprietary information and use limited "need-to-know" access to such assets, networks or data. Further, you must reference the protection of cardholder information and compliance with the Visa CISP Rules in contracts with other service providers. You agree to indemnify and reimburse Processor and Bank immediately for any loss, liability, assessment or fine incurred due to your breach of this Section.
G. American Express, Discover, JCB and Diners Club Transaction. Upon your request, Processor and Bank will provide authorization and/or data capture service, for Discover, JCB, Diners Club and American Express transactions. By signing this Merchant Agreement, Merchant agrees to abide by the terms and conditions of Diners Club, American Express and Discover. I understand that the Diners Club Agreement will be sent to the business entity indicated on this application. By accepting the Diners Club card for goods and/or services Merchant agrees to be bound by the terms and conditions of the Agreement. Processor 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 deposit 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, engage in any transaction prohibited by the Rules or deposit telemarketing transactions unless you obtain Bank or Processor's prior written consent. Such consent will be subject to Bank's final approval. If you process any such transactions, you may be immediately terminated and Bank may hold funds and/or require you to establish a Reserve Account. Further, you may be subject to Card Association reporting requirements. You will not: accept cash, checks or other negotiable items from any Cardholder and forward a credit through any Card Association or Debit Network (i.e., as a purported payment or deposit to an account maintained by the Cardholder); forward any transaction or initiate any reversal of a transaction that did not originate between you and the Cardholder; complete any transaction that you know or should have known to be fraudulent or not authorized by the Cardholder; accept any Debit Card in payment for any legal services or for expenses related to the defense of any crime (other than a traffic violation), or any domestic relations matter where services or expenses are furnished a person whose name is not embossed on the Debit Card or any bankruptcy, insolvency, or other proceeding affecting the creditors of any Cardholder; present for processing a transaction that does not represent a sale of goods or service directly between Cardholder and you. You will fully cooperate with Processor and with each Card Association in the event that Processor or any Card Association determines that there is a substantial risk of fraud arising from your access to the Card Association. You will take whatever actions Processor or Card Associations reasonably deem necessary in order to protect such Card Association, its members, and its Cardholders. Neither the Card Associations, Processor, nor any of their respective personnel will have any liability to you for any action taken in good faith.
J. Debit Card Transactions.
i. For each PIN-based Debit Card sale, the Cardholder must enter his Personal Identification Number ("PIN") through a PIN pad located at the point of sale.
ii. Each PIN pad will be situated to permit Cardholders to input their PINs without revealing them to other persons, including your personnel.
iii. You will instruct personnel that they may not ask any Cardholder to disclose the PIN and that in the event that any of your personnel nevertheless becomes aware of any Cardholder's PIN, such personnel will not use such PIN or create or maintain any record of such PIN, and will not disclose such PIN to any other person
iv. The PIN message must be encrypted from the PIN pad to the point of sale device connected to a Debit Network used to initiate transactions ("Terminal") and from the Terminal to the Debit Network and back so that the PIN message will not be in the clear at any point in the transaction.
v. You will comply with any other requirements relating to PIN security as required by BAMS or by any Debit Network.
vi. A transaction receipt in conformity with Regulation E and the Rules will be made available to the Cardholder
vii. You may not establish a minimum or maximum transaction amount as a condition for use of a Debit Card
viii. You may not charge any Cardholder for the use of any Debit Card unless the Rules so permit
ix. You may not collect tax as a separate cash transaction.
K. Debit Card Terminals. Debit Card terminals, including hardware and software, must be certified for use by BAMS and by all of the Debit Networks. Terminals must include encrypted PIN pads which allow entry of up to sixteen character PINs, printers and a keyboard lock function. You are responsible for compliance with all Rules regarding the use of Terminals, regardless of whether such Terminals are obtained through CD or through a third party
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 Agreement. This authority will remain in effect for at least 2 years after termination of this Agreement whether or not you have notified Processor and Bank of a change to the Designated Account. Merchant must obtain prior written consent from Bank or Processor to change the Designated Account. If Merchant does not get that consent, Processor and Bank may immediately terminate the Agreement and may take other action necessary, as determined by them within their sole discretion
B. Deposit. Bank will initiate a deposit in an amount represented on Sales Drafts to the Designated Account subject to Section 4 of this Agreement upon receipt of funds from Visa, MasterCard or a Debit Network. Typically the deposit will be initiated 3 business days following Processor's receipt of the Sales Draft, except for mail order/telephone order and electronic commerce transactions, which will be initiated 5 business days following receipt of the Sales Draft. "Business Day" means Monday through Friday, excluding holidays observed by the Federal Reserve Bank of New York. Merchant authorizes Bank and Processor to initiate reversal or adjustment entries and initiate or suspend such entries as may be necessary to grant Merchant conditional credit for any entry. 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 Processor and Bank in writing of any errors. Your written notice must include: (i) Merchant name and account number; (ii) the 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 Processor and Bank within 30 calendar days after you received the periodic statement containing the asserted error. You may not make any claim against Processor or Bank for any loss or expense relating to any asserted error for 60 calendar days immediately following Processor's receipt of your written notice. During that 60 day period, Processor and Bank will be entitled to investigate the asserted error.
D. Indemnity. You will indemnify and hold Processor 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 Processor and 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. This authorization will remain in effect beyond termination of this Agreement. In the event you change the Designated Account, this authorization will apply to the new account.

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 Processor and 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 Processor and Bank to secure your obligations under this Agreement upon Processor or Bank's request. These security interests and liens will secure all of your obligations under this Agreement and any other agreements now existing or later entered into between you and Processor and Bank. This security interest may be exercised by Processor and Bank without notice or demand of any kind by making an immediate withdrawal or freezing the secured assets.
ii. Perfection. Upon request of Processor 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, Processor and Bank will have all rights afforded under the Uniform Commercial Code, any other applicable law and in equity. You will obtain from Processor and 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 Processor and Bank are not required to file a motion for relief from a bankruptcy action automatic stay for Processor or 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 Processor or Bank. You authorize Processor or Bank and appoint Processor or Bank your attorney in fact to sign your name to any financing statement used for the perfection of any security interest or lien granted hereunder.
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 Processor and Bank, with sums sufficient to satisfy your current and future obligations as determined by Processor 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 Processor or Bank. Also, Processor and Bank may exercise their rights under this Agreement against the Reserve Account to collect any amounts due to Processor 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 transmission of sales drafts to Processor or Bank, provided, however, that you will remain liable to Processor and Bank, for all liabilities occurring beyond such 270 day period. After the expiration of such 270 day period you must provide Processor with written notification indicating you desire a release of any funds remaining in the Reserve Account in order to receive such funds. You agree that you will not use these funds in the Reserve Account for any purpose, including but not limited to paying chargebacks, fees, fines or other amounts you owe Processor and Bank under this Agreement. Bank (and not Merchant) shall not 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 Processor and Bank.
C. Recoupment and Set Off. Processor and 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 Processor 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 proceeding, in order for you to provide adequate protection under Bankruptcy Code § 362 to Processor and Bank, you must create or maintain the Reserve Account as required by Processor and Bank, and Processor and Bank must have the right to offset against the Reserve Account for any and all obligations which you may owe to Processor and Bank, without regard to whether the obligations relate to Sales Drafts initiated or created before or after the filing of the bankruptcy petition.
D. Remedies Cumulative. The rights and remedies conferred upon Processor 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 Processor 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 Processor and Bank fees for services, forms and equipment in accordance with the rates set forth on the Application. 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 Processor and Bank. Processor and Bank reserve the right to adjust the fees set forth on the Application and in this Section, in accordance with Section 16.I below, provided that Bank must approve, in advance, any fee to or obligation of Merchant arising from or related to performance of this Agreement. You are also obligated to pay all taxes, and other charges imposed by any governmental authority on the services provided under this Agreement. Bank may not assign or otherwise transfer an obligation to pay or reimburse Merchant arising from, or related to, performance of this Agreement to Processor.
B. Other Amounts Owed. You will immediately pay Processor and Bank any amount incurred by Processor 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 Processor or 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 Processor or Bank, whether your obligation is direct, indirect, primary, secondary, fixed, contingent, joint or several. In the event Processor or Bank demand sums due or such ACH does not fully reimburse Processor and Bank for the amount owed, you will immediately pay Processor and Bank such amount.
C. Merchant Supply/Replacement Program. You are responsible for purchasing all supplies required to properly process Card transactions (sales slips, printer rolls, etc.). If you elect to participate in CD's Supply/Replacement Program, you understand that you are entitled to a maximum of 6 rolls of paper and 2 printer ribbons per month. Quantity of supplies provided is at the discretion of CD. Enrollment in CD's Supply/Replacement Program also entitles merchant to free refurbished replacement equipment after CD has collected 3 monthly payments from you (you are responsible for all shipping costs). A separate program is required for each terminal you may have. If your terminal type is unavailable, at CD's discretion, a substitute may be provided. CD may choose to cancel the merchant's Supply/Replacement Program at any time without notice. This program is non-transferable without written consent. Maintenance is not available for any wireless terminals.
9. Application, Indemnification, Limitation of Liability.
A. Application. You represent and warrant to Processor and Bank that all information in the Application is correct and complete. You must notify Processor in writing of any changes 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 Processor within 10 business days of the change. You will provide updated information to Processor within a reasonable time upon request. You are liable to Processor for all losses and expenses incurred by Processor arising out of your failure to report changes to it. Bank and Processor 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 the Card Associations, Processor 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 Processor or Bank in the enforcement of the 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 Processor 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 Processor and 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 Processor's and Bank's liability shall not exceed the lowest amount determined in accord with the foregoing calculation for any one month involved. Neither Processor Bank nor their agents, officers, directors, or employees shall be liable for indirect, special, or consequential damages.
D. Performance. Processor and Bank will perform all services in accordance with this Agreement. Processor and Bank make no warranty, express or implied, regarding the services, and nothing contained in the Agreement will constitute such a warranty. Processor and Bank disclaim all implied warranties, including those of merchantability and fitness for a particular purpose. No party will be liable to the 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 Processor nor Bank shall be liable for the acts or omissions of any third party. For purposes of this Agreement, Processor is the exclusive agent of Bank and Bank is at all times entirely responsible for, and in control of Processor's performance.
10. Representations and Warranties. You represent and warrant to Processor 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 Processor 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 Processor and Bank.
B. Entity Power. Merchant and the person signing this Agreement have the authority 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 bona fide. No transaction involves 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 Processor and Bank.
E. Rule compliance. You will comply with the Laws and Rules.
11. Audit and financial Information.
A. Audit. You authorize Processor or Bank to audit your records, systems, processes or procedures 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 Processor or Bank.
B. Financial Information.
i. Authorizations. You authorize Processor or Bank to make any business or personal credit inquiries they consider necessary to review the acceptance and continuation of the Agreement. You also authorize any person or credit reporting agency to compile information to answer those credit inquiries and to furnish that information to Processor and Bank.
ii. Documents. You will provide Processor or Bank personal and business financial statements and other information as requested from time to time. If requested, you will furnish within 120 calendar days after the end of each fiscal year to Processor 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 of any third party in using their products. This includes making sure you have and comply with any software updates. Processor and Bank have no responsibility for any transaction until that point in time Processor or Bank receive data about the transaction.
B. Use of Terminals Provided by Others. You will notify Processor and Bank immediately if you decide to use electronic authorization or data capture terminals or software provided by any entity other than Processor 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 Processor and Bank; and (ii) to assume full responsibility and liability for any failure of that third party to comply with the Rules or this Agreement. Neither Processor nor Bank will be responsible for any losses or additional fees incurred by you as a result of any error by a third party agent or a malfunction in a Third Party Terminal.
C. Debit Network Requirements. In order to inform Cardholders that Debit Cards may be accepted at your locations, you will prominently display the trademark of each Debit Network at each location and will display signage of each Debit Network at the entrance, near all Terminals and on the window of such location. All uses by you of any Debit Network trademark will comply with the Rules. You acknowledge and agree that in displaying any such trademark, you will be subject to approval by the applicable Debit Network. You will under no circumstances be deemed to be a licensee or sublicensee of any trademark of any Debit Network, nor will you otherwise be deemed to have or to acquire any right, title or interest in such trademarks.
13. Term and Termination.
A. Term. The Agreement will become effective on the date Bank executes this Agreement ("Effective Date"), provided, however that if you submit a transaction prior to the Effective Date, you will be bound by all terms of this Agreement. 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, the Agreement may be terminated at any time with or without notice and with or without cause by Processor and Bank. Processing under a particular Debit Network may be suspended or terminated (without terminating this entire Agreement) if: (i) the Debit Network determines to suspend or terminate processing; or (ii) automatically, upon termination or expiration of Processor's or your access to such Debit Network whether caused by termination or expiration of Processor's agreement with such Debit Network or otherwise. In addition, in the event that Processor's participation in such Debit Network is suspended for any reason, processing through such Debit Network by you will be suspended for the period of time of such suspension and BAMS or CD will immediately notify you of that event. Neither Processor, Bank, nor any Debit Network will have any liability to you as a result of any such suspension or termination.
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 Reserve Account is not adequate, you will pay Processor and 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 Processor and immediately pay Processor and Bank any amounts you owe them for equipment costs.
iv. Early Termination. If you terminate this Agreement before the end of the Initial Term, you will immediately pay Bank as deconversion costs, an early termination fee equal to $250. You agree that the early termination fee is not a penalty, but rather is reasonable in light of the financial harm caused by your early termination. Other remedies Bank or Processor may have under this Agreement still apply.
14. Compliance With Laws And Rules. You agree to comply with all rules and operating regulations issued from time to time by a Debit Network, Diners' Club, JCB, any other issuer of Cards, MasterCard, and Visa and any policies and procedures provided by Processor 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 Processor 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 Processor 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. If you have requested signage for the purpose of indicating acceptance of Debit Cards, you must display such signage for a minimum of 3 months. All point of sale displays or websites must include either appropriate Visa-owned marks to indicate acceptance of Debit and Other Cards or Visa approved signage to indicate acceptance of the limited acceptance category you have selected.
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, a Card Association, or as required by law. You must keep all systems and media containing account, Cardholder, or transaction information (physical or electronic, including but not limited to account numbers, card imprints, and TIDs) in a secure manner, to prevent access by or disclosure to anyone other than your authorized personnel. 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. You may not retain or store magnetic stripe or CVV2 data after authorization.
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 Processor 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. If you have requested BIN information, you must only use this BIN information for product identification purposes at the point of sale, and not disclose this proprietary and confidential Visa BIN information to any third party without prior written permission from Visa.
iii. Disclosure. You authorize Processor 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 use will remain the property of Processor and Bank and will be immediately returned to Processor upon termination of this Agreement. You will be fully liable for all loss, cost, and expense suffered or incurred by Processor 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 the laws of the State of New York. Proper venue for any dispute arising from this agreement shall be in any state or federal court of competent jurisdiction in Queens County, New York. Merchant and Guarantor(s) agree to submit to the personal jurisdiction of courts located in Queens County, New York.
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 Card processing services similar to those provided by Processor and Bank as contemplated by this Agreement without Processor 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. This Agreement may be executed by facsimile, and facsimile copies of signatures to this Agreement shall be deemed to be originals and may be relied on to the same extent as the originals.
E. Assignability. This Agreement may not be assigned by Merchant directly or by operation of law, without the prior written consent of Processor. If Merchant nevertheless assigns this Agreement without the consent of Processor, the Agreement shall be binding upon the assignee. Bank will be informed of any such assignment.
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. If your business fails, including bankruptcy, insolvency, or other suspension of business operations, you must not sell, transfer, or disclose any materials that contain Cardholder account numbers, personal information, or other Visa transaction information to third parties. You must either return this information to Processor or provide acceptable proof of destruction of this information. You will immediately notify Processor 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 Processor 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. Failure to comply with either of these requirements will be cause for immediate termination or any other action available to Processor and Bank under applicable Rules of Laws.
H. Attorneys' Fees. Merchant will be liable for and will indemnify and reimburse Processor and Bank for all attorneys' fees and other costs and expenses paid or incurred by Processor 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 and Processor may amend this Agreement at any time upon notice to you. With regard to increases in existing fees, or imposition of new fees, except for any fee increases imposed by Visa, MasterCard, or a Debit Network, you may cancel this Agreement if you object to the fee changes in writing within 30 days. If you do not object, and continue to process for 30 days after receiving notice of the fee change, you will be deemed to assent to the new fees.
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 Processor or Bank to exercise, or partial exercise of, any right under this Agreement will operate as a waiver or estoppel of such right, nor shall it amend this Agreement. All waivers must be signed by the waiving party.
K. Independent Contractors. Processor, Bank and Merchant will be deemed independent contractors and will not be considered agent, joint venture or partner of the other.
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 termination of this Agreement.
N. Bank Contact. You may contact Bank at the following address and telephone number: Bank of America, N.A., 1231 Durrett Lane, Louisville, KY 40285-0001, 502-315-2948.