

## **Redwood Merchant Services**

A division of Westamerica Bank

2800 Cleveland Avenue, Suite B

Santa Rosa, CA 95403

Phone: 800-939-9942 Fax: 707-546-9989

FDIC Insured

## **MERCHANT AGREEMENT**

THIS AGREEMENT and the related Merchant Application is entered into on the day and year indicated in the application submitted by Merchant (the Merchant Application) by and between Redwood Merchant Services, a division of WESTAMERICA BANK, whose principle place of business is 2800 Cleveland Avenue, Suite B Santa Rosa, CA 95403 (hereinafter referred to as "Bank" or "RMS", and "Merchant," whose name, complete address, business organization and type of business are set forth on the Merchant Application. Merchant acknowledges that this Agreement is not and shall not be effective until accepted by Bank, and that the signature of the representative on the Merchant Application only constitutes acknowledgement of the offer made by the representative on behalf of, and contingent upon the approval of Bank (as evidenced by Bank's assignment of a merchant identification number to Merchant).

By entering into this Agreement, Merchant agrees to comply with and be subject to, all VISA and MasterCard rules and regulations, as they may exist from time to time, including but not limited to, charge back procedures and the resolution of any disputes relating thereto. Merchant's agreement to be so bound is made regardless of whether Merchant has seen or read the rules and regulations. Merchant acknowledges that the sole responsibility for obtaining these rules and regulation and updates thereto is with Merchant.

Any violations of VISA or MasterCard rules and regulations by Merchant shall constitute a material breach of this Agreement and shall be grounds for Bank terminating this Agreement.

### **ARTICLE I - DEFINITIONS**

- 1.01** "**Account**" means a Bank account maintained by Merchant as set forth in Section 5.19 for the crediting of collected funds and the debiting of fees and charges pursuant to the terms of this Agreement.
- 1.02** "**ACH**" means the Automated Clearing House paperless entry system operated by the Federal Reserve.
- 1.03** "**Agreement**" means these Terms & Conditions, the Merchant Business Application, the ACH Authorization and any supplementary documents indicated herein, as amended from time to time.
- 1.04** "**Authorization**" means a computerized function or a direct phone call to a designated number to examine individual Transactions to obtain credit approval from the Card Issuer.
- 1.05** "**AVS**" (Address Verification System) this allows verification of the cardholder's Zip code and billing address while requesting authorizations for transactions or during a request for address verification only.
- 1.06** "**Card**" means (i) a valid credit card in the form issued under license from Visa USA, Inc., Visa International, Inc., or MasterCard International, Inc. ("Bank Card") or (ii) any other valid credit card accepted by Merchant by agreement with RMS.
- 1.07** "**Card Association**" means Visa, MasterCard or any other Card Issuers that provide Cards that are accepted by Merchant by agreement with RMS.
- 1.08** "**Cardholder**" means the person whose name is embossed upon the face of the Card.
- 1.09** "**Card Issuer**" means the financial institution or company which has provided a Card to a Cardholder.
- 1.10** "**Chargeback**" means the procedure by which, and the value of, a Sales Draft (or disputed portion thereof) is returned to Bank by a Card Issuer.
- 1.11** "**Credit Voucher**" means a document executed by a Merchant evidencing any refund or price adjustment credited to a Cardholder account.
- 1.12** "**Imprint**" means (i) an impression on a Sales Draft manually obtained from a Card through the use of an imprinter, or (ii) the electronic equivalent obtained by swiping a Card through a terminal and electronically printing a Sales Draft.
- 1.13** "**MasterCard**" means MasterCard International, Incorporated.
- 1.14** "**Password**" means unique alphanumeric access code provided to access information, software, database, and other content owned or licensed by RMS.
- 1.15** "**Retrieval**" means a card issuer's or card holder's request of the transaction receipt.
- 1.16** "**Rules**" means the rules and regulations of any Card Association, as amended from time to time.
- 1.17** "**Sales Draft**" means the paper form, approved in advance by RMS, whether such form is electronically or manually imprinted, evidencing a sale Transaction.
- 1.18** "**Transaction**" means any retail sale of goods and services, or credit for such, from Merchant for which the customer makes payment through the use of any Card and which is presented to RMS for collection.
- 1.19** "**Visa**" means Visa U.S.A., Inc. or Visa International, Inc.
- 1.20** "**Voice Authorization**" means a direct phone call to a designated number to obtain credit approval on a Transaction.

### **ARTICLE II - CARD ACCEPTANCE**

**2.01** **Honoring Cards.**

- (a) Merchant will accept without discrimination, all valid Cards properly presented by Cardholders for payment for goods or services within the Merchants category of acceptance.
- (b) Merchant will elect upon application to accept or not accept (limited acceptance) Credit and/or Debit cards for payment. A full acceptance Merchant will accept all valid cards unless Merchant provides 30 days written notice to RMS requesting limited acceptance and stating Merchants election of card types.
- (c) Merchant shall not establish minimum or maximum amounts for Card sales as a condition for accepting any Card.
- (d) Merchant shall not require any Cardholder to pay any part of any discount or charge imposed upon Merchant by this Agreement, whether through any increase in price or otherwise require a customer presenting a Card to pay any charge as a condition of sale that is not also required from a customer paying cash. However, Merchant may offer discounts to customers for cash purchases.
- (e) Merchant shall not accept a Card as payment (other than for a mail order, telephone order, or preauthorized sale to the extent permitted under this Agreement), if the person seeking to use the Card does not present the Card to permit Merchant to examine it and obtain an imprint or otherwise use the physical Card to complete the Transaction.

**2.02** **Advertising.**

- (a) Merchants that accept all cards will prominently display the promotional materials provided by RMS in its place(s) of business. Merchants that have selected Limited Acceptance will prominently display promotional materials representing the Limited Acceptance Category the Merchant has selected. Use of promotional materials and use of any trade name, trademark, service mark or logotype ("Marks")

associated with Card(s) shall be limited to informing the public that Card(s) will be accepted at Merchant's place(s) of business. Merchant's use of promotional materials and Marks is subject to the direction of RMS.

- (b) Merchant may use promotional materials and Marks during the term of this Agreement and shall immediately cease their use and return any inventory to RMS upon termination thereof.
- (c) Merchant shall not use any promotional materials or Marks associated with Visa or MasterCard in any way, which implies that Visa or MasterCard endorses any goods or services than other Bank Card services.

#### **2.03 Card Acceptance.**

When accepting a Card, Merchant will follow the steps provided by RMS for accepting Cards and will:

- (a) Determine in good faith and to the best of its ability that the Card is valid.
- (b) Obtain Authorization before completing any Transaction. Where Authorization is obtained, Merchant will be deemed to warrant the true identity of the customer as the Cardholder.
- (c) Unless the Sales Draft is electronically generated from a swiped transaction or is the result of an Internet, mail, phone or preauthorized order obtain an Imprint of the Card.
- (d) 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 processing the sales draft.
- (e) Enter a complete description of the goods or services sold and the price thereof (including any applicable taxes).
- (f) Obtain the Cardholder's signature on the Sales Draft and compare that signature to the signature on the Card.
- (g) Deliver a true and completed copy of the Sales Draft to the Cardholder at the time of delivery of the goods or performance of the services, or if the Sales Draft is prepared by a point-of-sale terminal, at the time of the sale.
- (h) Offer the Sales Draft to RMS for purchase according to the RMS' procedures and the terms of this Agreement.
- (i) Legibly reproduce without alteration of the original transaction receipt, the Cardholder's name, account number, expiration date and the Merchant's name and place of business if that information is not legibly imprinted on the Sales Draft. Also, for MasterCard transactions, Merchant will legibly reproduce the name of the Card Issuer as it appears on the face of the Card.
- (j) You are responsible for your employees' actions.

#### **2.04 Authorization.**

- (a) Merchant will obtain an Authorization for all Card sales. If Merchant cannot, for any reason, obtain an electronic Authorization, Merchant will request a Voice Authorization from the designated authorization center, and will legibly print the authorization number on the Sales Draft. Voice authorizations will be charged at a rate of \$1.00 each.
- (b) Merchant shall not obtain or attempt to obtain authorization unless Merchant intends to submit a Transaction for the authorized amount.
- (c) Merchant will not divide a single Transaction between two or more Sales Drafts.
- (d) Merchant acknowledges that an Authorization provides only that the Cardholder account has sufficient credit available to cover the amount of the current sale, that an Authorization is not a guarantee for payment, and that an Authorization will not waive any provision of this Agreement or otherwise validate a fraudulent transaction or a transaction involving the use of an expired Card. Merchant is fully liable for all Chargebacks.
- (e) Merchant will not attempt to obtain Authorization on an expired Card. Transactions will be deemed invalid on Cards that are expired, whether or not Authorization has been obtained.

#### **2.05 American Express, Discover, Diner's/Carte Blanche, or JCB Transaction.**

Upon your request, RMS will provide access to authorization and/or data capture services for Discover, Diner's Card/Carte Blanche, JCB, or American Express transactions. You must enter into a separate merchant agreement with NOVUS Services, Inc., Citicorp Diner's Club/Carte Blanche, JCB, or American Express. RMS is not responsible for funding such transactions. Further, RMS may notify you that Discover, Diner's/Carte Blanche, JCB, American Express or other cards ("Additional Cards") may be accepted by you. If you do not decline this offer in writing, RMS will forward certain information, including but not limited to your Merchant Account number, to the Additional Card Issuer. The terms of this Agreement will apply to Additional Card transactions. RMS will notify you orally and/or in writing of the fees applicable to Additional Card transactions. Your acceptance of Additional Cards and transmission of Additional Card transactions to RMS will constitute your agreement to the terms of this Agreement with regard to Additional Cards.

#### **2.06 Retention and Retrieval of Cards.**

- (a) Merchant shall use its best efforts, by reasonable and peaceful means, to retain or recover a Card when receiving such instructions upon making a request for Authorization.
- (b) The obligation of Merchant imposed by this section to retain or recover a Card does not authorize a breach of the peace or any injury to persons or property and Merchant will hold RMS harmless from any claim arising from any injury to person or property, or other breach of the peace in connection with the retention or recovery of a Card.

#### **2.07 Personal Information.**

Merchant as a condition of sale may not impose a requirement on Cardholders to provide any personal information as a condition for honoring Cards unless such information is required to provide delivery of goods or services or Merchant has reason to believe the identity of the person presenting the Card may be different than that of the Cardholder.

#### **2.08 Multiple Transaction Records: Partial Consideration.**

Merchant shall not prepare more than one Sales Draft for a single sale or for a single item but shall include all items or goods and services purchased in a single Transaction in the total amount on a single Sales Draft except: (i) for purchases in separate departments of a multiple department store; (ii) for installment payment; or (iii) for delayed or amended charges governed by rules for travel and entertainment merchants and transactions.

#### **2.09 Telephone Orders "TO", Mail Orders "MO", Preauthorized Orders "PO" and Installment Orders "IO".**

- (a) Unless Merchant has been approved by RMS to accept Internet, mail and phone orders, Merchant warrants that it is a walk-in trade business, located in a retail business place. If Merchant is found to be accepting mail orders, telephone orders, or Internet Transactions without such consent, this Agreement will be immediately terminated and the value of all Sales Drafts collected from the first day of processing may be charged back to Merchant and all funds therefrom shall be held pursuant to Section 3.
- (b) If authorized to accept payment by Internet, mail, phone or pre-authorized order, the Sales Draft may be completed without the Cardholder's signature or an imprint, but in such case Merchant shall create a Sales Draft containing Cardholder account number, expiration date, transaction date, an authorization number, the sale amount and the letters "MO", "TO", "PO", or "IO" as appropriate. In addition, the Merchant's business name, city and state must be included. Receiving an Authorization shall not relieve the Merchant of liability for Chargeback on any Transaction for which the Merchant did not obtain an imprint and the Cardholders signature.
- (c) For Approved MO, TO, PO, and IO Merchants, AVS is recommended and in some cases required. AVS is not a guarantee for payment, and the use of AVS will not waive any provision of this Agreement or otherwise validate a fraudulent transaction.
- (d) Unless acknowledged and approved in writing by RMS, Merchant shall not process sales prior to delivery of product or service. Violation could result in immediate termination.

#### **2.10 Lodging and Vehicle Rental Transactions.**

- (a) Merchant must estimate and obtain Authorization for the amount of the Transaction based upon the Cardholder's intended length of stay or rental. Additional Authorization must be obtained and recorded for charges actually incurred in excess of the estimated amount.
- (b) Regardless of the terms and conditions of any written preauthorization form, the Sales Draft amount for any lodging or vehicle rental Transaction shall include only that portion of the sale, including any applicable taxes, evidencing a bona fide rental of personal property by

- Merchant to the Cardholder and shall not include any consequential charges. Nothing contained herein is intended to restrict Merchant from enforcing the terms and conditions of its preauthorization form through means other than a Card Transaction.
- 2.11 Returns and Adjustments: Credit Vouchers.**
- (a) Merchant's policy for the exchange or return of goods sold and the adjustment for services rendered shall be established and posted in accordance with the Rules. Merchant agrees to disclose to a Cardholder before a Card sale is made, that if merchandise is returned: (i) no refund, or less than a full refund, will be given; (ii) returned merchandise will only be exchanged for similar merchandise of comparable value; (iii) only a credit toward purchases will be given; or (iv) special conditions or circumstances apply to the sale (e.g., late delivery, charges, or other noncredit terms).
  - (b) Disclosures must be made on all copies of Sales Drafts in letters approximately 1/4" high in close proximity to the space provided for the Cardholder's signature on the sales draft and issued at the time of sale.
  - (c) If Merchant does not make these disclosures, a full refund in the form of a credit to the Cardholder's Card account must be given. Merchant will not refund cash to a Cardholder who paid for the item by Card.
  - (d) Credits must be made to the same Card account number on which the original sale Transaction was processed.
  - (e) "If Merchant accepts any goods for return, any services are terminated or canceled that "in conjunction with each such transaction, Merchant shall have sufficient funds in its account available to RMS to cover the amount of the transaction and any related fees."
- 2.12 Cash Payments.**
- Merchant shall not receive any payments from a cardholder for charges included in any Transaction resulting from the use of a Card nor receive any payment from a Cardholder to prepare and present a Transaction for the purpose of effecting a deposit to the Cardholder's Card account.
- 2.13 Cash Advances.**
- (a) Merchant shall not deposit any Transaction for the purpose of obtaining or providing a cash advance either on Merchant's Card or the Card of any other party. Merchant agrees that any such deposit shall be grounds for immediate termination.
  - (b) Merchant shall not under any circumstances obtain Authorization for, nor process a sale on any card that Merchant is not authorized to use. Processing Merchant's own card is grounds for immediate termination.
- 2.14 Duplicate Transactions.**
- Merchant shall not deposit duplicate Transactions. Merchant shall be debited for any duplicate Transactions and shall be liable for any Chargebacks, which may result therefrom.
- 2.15 Deposit of Fraudulent Transactions.**
- Merchant shall not accept or deposit any fraudulent Transaction and may not under any circumstances present for processing or credit, directly or indirectly, a Transaction which originated with any other merchant or any other source. Merchant shall not, under any circumstances, deposit Transactions evidencing sales that were solicited by telemarketers. If Merchant deposits any such transactions, this Agreement may be immediately terminated, and RMS may hold funds and/or demand a Reserve Account pursuant to Section 5.07 further, Merchant may be subject to the Card Association reporting requirements set forth in Section 4.02(c). Perpetrators of fraudulent transactions will be referred to law enforcement officials.
- 2.16 Collection of Pre-Existing Debt.**
- Merchant shall not present any Transaction representing the refinancing of an existing obligation of a Cardholder including, but not limited to obligations (i) previously owed to Merchant, (ii) arising from the dishonor of a Cardholder's personal check, and/or (iii) representing the collection of any other pre-existing indebtedness, including collection of delinquent accounts on behalf of third parties.
- 2.17 Release of Cardholder Account Information/Payment Card Industry Data Security Standards**
- (a) Merchant will not, under any circumstances, disclose any Cardholder's account number or any information relating to any Cardholder's account number or any Sales Drafts or Credit Vouchers which may have been imprinted with any Card to any person other than RMS, or as required by law. Further, Merchant agrees to store any material containing Cardholder account information in a secure manner or destroy such information at the proper time in a fashion, which renders the data unreadable. Merchant must not retain or store the full contents of any track on the Magnetic-Stripe subsequent to Authorization of the transaction or request the Card Verification value 2 data on any paper order form. Merchant must follow the PCI Data Security standards as follows: build and maintain a secure network, protect stored cardholder data, encrypt transmission of cardholder data and sensitive information across public networks, maintain a vulnerability management program, implement strong access control measures, regularly monitor and test networks and maintain an information security policy.
  - (b) Merchant is required to keep all systems and media containing Cardholder account information in a secure manner to prevent access by or disclosure to any unauthorized party. Merchant shall store cardholder information in an area limited to selected personnel. All sensitive Cardholder information that merchant no longer considers necessary to retain must be destroyed in a manner that will render the data unreadable and unrecoverable. Merchants who store, process or transmit Cardholder data must comply with the Payment Card Industry Data Security Standards (PCI). Requirements for this program are available at: [http://usa.visa.com/business/merchants/cisp\\_index.html](http://usa.visa.com/business/merchants/cisp_index.html). Merchants that store Cardholder data are also required to be in compliance with the MasterCard Security Standards. Requirements for this program are available at <https://sdp.mastercardintl.com>.
  - (c) Merchant must notify RMS of its use of any third party that will have access to cardholder data.
- 2.18 Compliance with Card Association Rules.**
- Merchant shall comply with the Association Rules.
- 2.19 Merchant's Business.**
- (a) Merchant shall provide RMS with immediate notice of its intent to: (i) transfer or sell any substantial part of its total assets, or liquidate; (ii) change the basic nature of its business, including selling any products or services not related to its current business; (iii) change ownership or transfer control of its business; (iv) enter into any joint venture, partnership or similar business arrangement whereby any person or entity not a party to this Agreement assumes any interest in Merchant's business; or (v) alter in any way Merchant's approved monthly volume and average ticket.
  - (b) Failure to provide notice as required above may be deemed a material breach and shall be sufficient grounds for termination of this Agreement. Merchant agrees that a failure to disclose such information shall constitute a presumption that Merchant has committed an act of fraud in the event RMS suffers any financial loss at the hands of a subsequent unreported purchaser or operator of Merchant. If any of the changes listed above should occur, RMS shall have the option to re-negotiate the terms of this Agreement or provide immediate notice of termination.
  - (c) Merchant will immediately notify RMS of any Bankruptcy, receivership, insolvency, or similar action initiated by or against Merchant or any of its principals. Merchant will include RMS on the list of creditors filed with the Bankruptcy Court, whether or not a claim exists at the time of filing.
  - (d) A Merchant must not, in the event of its failure, including bankruptcy, insolvency, or other suspension of business operations, sell, transfer, or disclose any materials that contain Cardholder Account Numbers, personal information, or Visa Transaction Information to agent, vendors or third parties. The merchant must return this information to its acquirer or provide acceptable proof of destruction of this information to RMS.
  - (e) Merchant must notify RMS in writing of any changes to the information in the Merchant Application, including but not limited to: a change to Merchant's financial condition within 3 days, any additional location or new business, the identity of principals and/or owners, the form of

business organization, type of goods and services provided, and how sales are completed. Merchant must also notify RMS in writing if Merchant sells or closes its business. Except for a change to the financial condition, all such notices must be received by RMS 7 days before the change. Merchant will provide updated information to RMS upon request. Merchant and or Guarantors agree that they are liable to RMS for all losses and expenses incurred by RMS arising out of Merchant's failure to report changes. RMS may immediately terminate this Agreement upon a change to the information in the Merchant Application, whether such change is independently discovered by RMS or whether RMS is notified of such change by Merchant.

- (f) Separate notification regarding changes to account information, including those to Account, must be made to outside services used by merchant including but not limited to American Express, Discover Card, and leasing company.

## **2.20 Warranties of Merchant.**

- Merchant hereby provides the following warranties to RMS at the time of execution and during the term of this Agreement that:
- (a) All information contained in the Merchant Application or any other documents delivered to RMS in connection therewith is true and complete and properly reflects Merchant's business, financial condition, and principal partners, owners or officers.
  - (b) Merchant has the power to execute, deliver, and perform this Agreement, and this Agreement is duly authorized, and will not violate any provisions of law, or conflict with any other agreement to which Merchant is subject.
  - (c) Merchant has all licenses, if any, required to conduct its business and is qualified to do business in every jurisdiction where it is required to do so.
  - (d) There is no action, suit or proceeding at law or in equity now pending or to Merchant's knowledge, threatened by or against or affecting Merchant which would substantially impair its right to carry on its business as now conducted or adversely affect its financial condition or operations.
  - (e) Each Sales Draft presented to RMS's Bank for collection is genuine and is not the result of any fraudulent transaction or telemarketing sale or is not being deposited on behalf of any business other than Merchant. Further, Merchant warrants that each Sales Draft is the result of a bona fide Card Transaction for the purchase of goods or services by the Cardholder in the total amount stated on the Sales Draft.
  - (f) Merchant has performed or will perform all of its obligations to the Cardholder in connection with the Card Transaction evidenced thereby.
  - (g) Merchant has complied with RMS's procedures accepting Cards, and the Card Transaction itself shall not involve any element of credit for any other purposes other than as set forth in this Agreement and shall not be subject to any defense, dispute, offset or counter claim which may be raised by any Cardholder under the rules, the Consumer Credit Protection Act (15 USC 1601) or other relevant state or federal statutes or regulations.
  - (h) Merchant warrants that any Credit Voucher, which it issues represent a bona fide refund or adjustment on a Card sale by Merchant with respect to which a Sales Draft has been accepted.
  - (i) Unless Merchant notifies RMS in writing (either on the Merchant Application or otherwise), no other processing relationship exists between Merchant and another Bankcard processing institution, for this, or any other business run or owned by Merchant.

## **ARTICLE III - PRESENTMENT, PAYMENT, CHARGEBACK**

### **3.01 Acceptance.**

Bank shall accept from Merchant all valid Sales Drafts deposited by Merchant under the terms of this Agreement and shall present the same to the appropriate Card issuers for collection against Cardholder accounts. All presentation and assignment of Sales Drafts, collection therefore and re-assignment or rejection of such Sales Drafts are subject to this Agreement and the Rules. RMS shall be the only entity that will provisionally credit the value of collected Sales Drafts to Merchant's Account and reserves the right to adjust amounts collected to reflect the value of Chargebacks, fees, penalties, late submission charges and items for which Bank did not receive final payment. RMS may refuse to accept any Sales Draft or revoke its 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 all the terms and conditions of this Agreement; (b) the Cardholder disputes his liability to RMS for any reason, including but not limited to those chargeback rights enumerated in the Rules; (c) the transaction giving rise to the Sales Draft was not directly between Merchant and Cardholder, or (d) the transaction is outside the parameters indicated on the Merchant Application. Merchant will pay RMS, as appropriate, any amount previously credited to Merchant for a sales Draft not accepted or later revoked by RMS.

### **3.02 Endorsement.**

The presentation of Sales Drafts to Bank for collection and payment is Merchant's agreement to sell and assign its right, title and interest in each Sales Draft completed in conformity with RMS's acceptance procedures and shall constitute an endorsement by Merchant to RMS of such Sales Drafts. Merchant hereby authorizes RMS to supply such endorsement on Merchant's behalf. Merchant agrees that this Agreement is a contract of financial accommodation within the meaning of Bankruptcy Code 11 U.S.C. Section 365, as amended from time to time. Merchant acknowledges that its obligation to RMS for all amounts owed under this Agreement arise out of the same transaction as RMS' obligation to deposit funds to the Account.

### **3.03 Transmission Method.**

If Merchant utilizes electronic authorization and/or data capture services, Merchant will enter 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. If Merchant provides its own electronic terminal or similar device, such terminals must meet RMS requirements for processing transactions. Information regarding a sales or credit transaction transmitted with a computer or magnetic stripe reading terminal will be transmitted by Merchant to RMS in the form RMS from time to time specifies or is required under the Rules. If RMS requests a copy of a Sales Draft, credit voucher or other transaction evidence, Merchant will provide it within 3 business days following the request. The means of transmission indicated in the Merchant Application shall be the exclusive means utilized by Merchant until Merchant has provided RMS with at least 30 days prior written notice of Merchant's intention to change the means of such delivery or otherwise to alter in any material respect Merchant's medium of transmission of data to RMS.

### **3.04 Prohibited Payments.**

RMS shall have the sole right to receive payment of any Sales Draft presented by Merchant and paid by RMS unless and until there is a Chargeback. Unless specifically authorized in writing by RMS, Merchant shall not make or attempt to make any collections from Cardholders on any Transaction and shall hold any funds or property recovered in trust for RMS and shall promptly deliver to RMS any payment Merchant receives, in whole or in part of the amount of any accepted Transaction, together with the Cardholder's name and account number and any correspondence accompanying the payment.

### **3.05 Chargebacks.**

- (a) All chargebacks are due upon presentation to Merchant's Bank. A failure to pay a Chargeback upon such presentation shall be considered a material breach of this Agreement and Merchant in addition to any other remedies as may be exercised by RMS shall be charged a late charge of one and one half percent (1.5%) per month or portion thereof on all unpaid Chargebacks. Merchant and/or guarantor(s) agree that they are fully liable to RMS for all Chargebacks, and that RMS is authorized to offset from incoming transactions and to debit via ACH, the Account, the Reserve Account, or any other account held at any other financial institution in the amount of any Chargeback, including fees and costs. Merchant agrees to accept for chargeback any sale for which the Cardholder disputes the validity of the sale according to the Rules, or RMS determines that Merchant has in any way failed to comply with the Rules or RMS procedures, including but not limited to the following:
  - (i) The Sales Draft is illegible, not signed by the Cardholder or has not been presented to RMS within the required time frames.

- (ii) The Sales Draft does not contain the Imprint of a valid unexpired Card.
  - (iii) A valid Authorization number has not been correctly and legibly recorded on the Sales Draft.
  - (iv) The Sales Draft is a duplicate of a prior Transaction or is the result of two or more Transactions generated on one credit card for a single sale.
  - (v) The Cardholder alleges that he or she did not participate in the sale, authorize the use of the Card, receive goods or services purchased, or receive a required credit adjustment, or disputes the quality of the goods or services purchased.
  - (vi) The price of goods or services on the Sales Draft differs from the amount, which Merchant presents for payment.
  - (vii) The Transaction results from an Internet, mail, phone or preauthorized order and the Cardholder disputes entering into or authorizing the Transaction or the Transaction has been made on an expired or non-existing account number.
  - (viii) RMS reasonably believes, within its sole discretion that Merchant has violated any provision of this Agreement.
  - (ix) RMS reasonably determines that the transaction record is fraudulent or that the Transaction is not bona fide or is subject to any claim of illegality, cancellation, rescission, avoidance, or offset for any reason whatsoever, including without limitation, negligence, fraud, or dishonesty on the part of Merchant or Merchant's agents or employees.
  - (x) Merchant fails to provide a Sales Draft or legible copy thereof to RMS in accordance with this Agreement. Merchant acknowledges that RMS shall have full recourse to chargeback the amount of a Card sale for which the Cardholder disputes that he/she did not authorize the charge if (i) the Imprint of the Card or (ii) the signature of the Cardholder was not obtained by Merchant.
  - (xi) Merchant shall not initiate a sale Transaction in an attempt to collect a Chargeback.
  - (xii) Guarantors are personally liable for all Chargebacks. In the event Merchant sells its business and a new owner incurs Chargebacks, the original Merchant and all guarantors will be held personally liable for the Chargebacks and any other liabilities of the new owner(s).
- (b) In the event the Account is closed or is otherwise unavailable to RMS for ACH debit, Merchant and/or guarantors consent to RMS locating additional deposit accounts or assets by using any means available. In this event Merchant and/or guarantors waive all rights to their privacy in favor of RMS until such time as all unpaid chargebacks and fees owed to RMS have been paid in full.
- (c) Merchant agrees to pay \$25.00 per Chargeback received by RMS.

#### **3.06 Processing Limits.**

RMS may impose a cap on the dollar amount of Sales Drafts that it will process for Merchant as indicated on the Approved Merchant Application as your monthly volume or as established by RMS. This limit may be changed by RMS from time to time with or without notice to Merchant. If Merchant exceeds the limit established by this Agreement, RMS may suspend processing, charge over limit fees, hold the funds over the cap, and/or return all Sales Drafts evidencing funds over the cap to Merchant.

### **ARTICLE IV - TERMINATION AND EFFECT OF TERMINATION**

#### **4.01 Term: Termination.**

- (a) This Agreement shall become effective upon acceptance by RMS. Any party may terminate this Agreement at any time with or without cause by providing written notice to the other parties. However, if Merchant terminates this Agreement, RMS shall have thirty (30) days from date of receipt of the notice to delete Merchant's account. Merchant shall remain liable for all fees and charges, including any monthly minimum processing charge and a termination fee of \$295.00. The termination fee may be charged if this agreement is terminated for any reason in the first 24 months. RMS may charge the termination fee after the 24<sup>th</sup> month if RMS terminates the agreement for the following reasons stated in this section 4.01. RMS may terminate this Agreement immediately without prior notice if (i) either party has reason to believe that fraudulent Card Transactions or other activity prohibited by this Agreement is occurring at any Merchant location; (ii) such action is taken to prevent loss to RMS or Card Issuers, (iii) Merchant appears on any Card Association's security reporting, or (iv) RMS' Merchant Acceptance Criteria changes. All rights and obligations of the parties existing hereunder as of the effective time of termination shall survive the termination hereof.
- (b) If any case or proceeding is commenced by or against Merchant under any federal or state law dealing with insolvency, Bankruptcy, receivership or other debt relief, this Agreement shall simultaneously therewith automatically terminate, and any amounts due to RMS shall accelerate and become immediately due and payable, without the necessity of any notice, declaration or other act whatsoever by RMS. Notwithstanding such termination, RMS at its sole discretion, may determine that consent to Merchant's subsequent assumption of this Agreement is in RMS' best interests. In such event, the assumption will be made under terms and conditions that are acceptable to RMS and comply with the applicable federal or state laws governing such assumption.

#### **4.02 Effect of Termination.**

- (a) In the event of termination for any reason, Merchant expressly authorizes RMS to withhold and discontinue the disbursement for all Cards and other payment transactions of Merchant in the process of being collected and deposited.
- (b) Collected funds will be placed in a Reserve Account (defined below) until Merchant pays any equipment and processing cancellation fees and any outstanding charges, losses or amounts for which Merchant is liable under this Agreement. Further, RMS reserves the right to require Merchant to deposit additional amounts based upon Merchant's processing history and/or anticipated risk of loss to RMS into the Reserve Account. The Reserve Account shall be maintained for a minimum of 270 days after the termination date and for a reasonable time thereafter during which Cardholder disputes may remain valid under the Rules. The provisions of this Agreement relating to the debiting and crediting of the Account shall be applied to the Reserve Account and shall survive termination of this Agreement until RMS terminates the Reserve Account. Any balance which remains after Chargeback rights have expired and all other expenses, losses, and damages have been paid will be disbursed to Merchant.
- (c) Merchant expressly acknowledges that MATCH (formerly known as the Combined Terminated Merchant Files or "CTMF") is a file maintained by MasterCard and accessed by Visa containing the business names and the identification of principals of Merchant, which have been terminated for one or more reasons specified in the Rules. Such reasons include, but are not limited to: fraud, counterfeit paper, unauthorized transactions, excessive Chargebacks/Retrievals or highly suspect activity. Merchant acknowledges that RMS is required to report the business name of Merchant and the names and identification of its principals to MATCH when Merchant is terminated for such reasons. Merchant consents to such reporting to the Card Associations by RMS. Further, Merchant waives and will hold harmless RMS from any claims, which Merchant may raise as a result of such reporting.
- (d) Upon termination for any reason, Merchant will immediately cease requesting Authorizations and will cease transmitting Sales Drafts to RMS. In the event Merchant obtains any Authorization after termination, Merchant expressly acknowledges and agrees that the fact that any Authorization was requested or obtained shall not operate to reinstate this Agreement.
- (e) Following termination, Merchant shall upon request provide RMS with all original and microfilm copies of Sales Drafts and Credit Vouchers to be retained as of the date of termination.

#### **4.03 Guarantors.**

As a primary inducement to RMS to enter into this agreement with Principal and/or the signed Guarantor(s), whether by signing the Merchant Application Agreement form or by acknowledging consent by electronic means, jointly and severally, unconditionally and irrevocably, guarantee the continuing full and faithful performance and payment by Merchant of each of its duties and obligations to RMS pursuant to this agreement, as it now exists or is amended from time to time, with or without notice. Guarantor(s) understands further that RMS may proceed directly against Guarantor(s) without first exhausting its remedies against any other person or entity responsible therefore to it or any security held by RMS 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 RMS.

Guarantor(s) understand that the inducement to RMS to enter into this Agreement is consideration for this guaranty, and that this guaranty remains in full force and effect even if the guarantor(s) receives no additional benefit from the guaranty.

## ARTICLE V - MISCELLANEOUS

### 5.01

#### Account Monitoring.

- (a) Merchant acknowledges that RMS will monitor Merchant's daily deposit activity. The deposit activity must remain consistent to the "approved" monthly volume and average ticket amount approved on the Merchant Application and/or by RMS. If the Merchant should exceed "approved" monthly volume, the Merchant acknowledges that additional documentation could be required. Merchant agrees that RMS may not deposit volumes over the approved monthly volume, and that Merchant is subject to a 5% fee on all monies processed over the approved monthly volume. Merchant agrees that RMS may, within its sole discretion suspend the disbursement of Merchant's funds for any reasonable period of time required to investigate suspicious or unusual deposit activity. RMS will make good faith efforts to notify Merchant immediately. Merchant agrees to pay \$25.00 for each release of suspended funds. RMS shall have no liability for any losses, either direct or indirect, which Merchant may attribute to any suspension of funds disbursement. RMS is solely responsible for providing settlement funds to the Merchant.
- (b) In the event of unusual Transactions that have been "suspended." Merchant agrees that a security processing fee not to exceed 110% of the unusual Transaction(s) may be assessed.
- (c) If a batch is suspended by RMS, Merchant acknowledges that the consumer's product or service must be delivered just as if the merchant has been paid. Further, if a batch or a transaction is suspended, Merchant acknowledges that fees will be associated including security fees.
- (d) Merchant's presentation to RMS of Excessive Activity will be a breach of the Agreement and a cause for immediate termination of this Agreement. "Excessive Activity" means, during any monthly period and for any one of Merchant's terminal identification numbers or merchant identification numbers, Chargebacks and/or retrieval requests in excess of 1% of the average monthly dollar amount of Transactions or returns in excess of 3% of the average monthly dollar amount of Transactions. Merchant authorizes, upon the occurrence of Excessive Activity, RMS to take additional actions as deemed necessary, including, but not limited to, suspension of processing privileges or creation or maintenance of a Reserve Account in accordance with this Agreement.

### 5.02

#### Password.

If you receive a password from RMS to access RMS's database, you will: (i) keep the password confidential; (ii) not allow any other entity or person to use the password or gain access to RMS's database; (iii) be liable for all action taken by any user of the password; and (iv) promptly notify RMS if you believe the confidentiality of RMS's database or your information has been compromised by use of the password.

### 5.03

#### Forms.

Merchant shall use only such forms or modes of transmission of Sales Drafts and Credit Vouchers as are provided or approved in advance by RMS, and Merchant shall not use forms provided by RMS other than in connection with Card Transactions without RMS's prior written consent.

### 5.04

#### Records.

In addition to any records routinely furnished to RMS under this Agreement, Merchant shall preserve a paper or microfilm copy of all actual paper Sales Drafts and Credit Vouchers and if a mail, phone order or preauthorized order is involved, the Cardholder's signed Authorization for the Transaction for at least three (3) years after the date Merchant presents the Transaction.

### 5.05

#### Requests for Copies/Retrievals.

Within three (3) days of receipt of any written or verbal request by RMS, Merchant shall provide either the actual paper Sales Draft or a legible copy thereof (in size comparable to the actual Sales Draft) and any other documentary evidence available to Merchant and reasonably requested by RMS to meet Bank's obligations under law (including its obligations under the Fair Credit Billing Act) or otherwise to respond to questions concerning Cardholder accounts. Merchant agrees to pay \$15.00 for each retrieval request.

### 5.06

#### Compliance with Law.

Merchant shall comply with all laws applicable to Merchant, Merchant's business and any Card Transaction, including without limitation to all Rules, state and federal consumer credit and consumer protection laws.

### 5.07

#### Reserve Account, Recoupment and Set-Off.

In addition to the security interest and chargeback rights granted to RMS by Merchant as set forth within Article 5.07, Article 5.08, and article 5.09 of this Agreement, Merchant hereby authorizes RMS to establish a Reserve Account, with or without prior notice to Merchant, at any time prior to, or after termination of this Agreement, to ensure the recovery of any liabilities owed them or reasonably anticipated by RMS in their sole discretion to be owed by Merchant pursuant to this Agreement. Merchant further agrees:

- (a) Liabilities to be paid from the Reserve Account include, but are not limited to those arising out of actual and/or potential post-termination chargebacks, as well as any and all post-termination fees, charges and expenses due or anticipated to be due RMS from Merchant.
- (b) Merchant agrees that if a Reserve Account is established, it shall be in any amount RMS deems reasonable under the circumstances. The Reserve Account may be funded and/or replenished by RMS by withholding or withdrawing from, or freezing all or any part of, the Account and/or any other deposit accounts maintained by Merchant and/or Guarantor at any Bank wherever found by any means available. Unless RMS agrees otherwise in writing with Merchant, the Reserve Account shall not bear interest.
- (c) RMS may enforce its security interest in the Reserve Account without notice or demand being first made to Merchant. RMS's right to sums owed it by Merchant pursuant to this Agreement, shall in no way be limited by the balance or existence of the Reserve Account. RMS's rights with respect to the Reserve Account, as well as the security interest granted RMS under this Agreement, shall survive the termination of this Agreement.
- (d) RMS may exercise their rights under this Agreement to collect any amounts due to RMS including, without limitation, rights of set-off and recoupment. Merchant shall have no right to withdraw funds or debit the Reserve Account.
- (e) It is stipulated and agreed that the funds placed in the Account, or the Reserve Account are trust fund monies held and "earmarked" for the benefit of RMS as that term has been defined by case law as applied within the United States Bankruptcy Courts. In the event of Bankruptcy proceedings, RMS may exercise their rights under this Agreement to debit the Account or the Reserve Account for amounts due RMS regardless of the pre-petition or post petition nature of the amount due RMS. In the event of a Bankruptcy proceeding, Merchant also agrees that it will not contest any Motion For Relief From the Automatic Stay, which RMS may file to debit the Account and/or Reserve Account.
- (f) Funds in the Reserve Account will remain in the Reserve Account for a minimum of 270 days following termination. RMS will have sole control of the Reserve Account. In the event of a Bankruptcy proceeding, RMS do not consent to the assumption of this Agreement. Nevertheless if this Agreement is assumed Merchant agrees that in order to establish assurance of future performance within the meaning of 11 U.S.C. Sec 365, as amended from time to time, Merchant must establish a Reserve Account in an amount satisfactory to RMS.
- (g) RMS has the right of recoupment and set-off. This means that they may offset any outstanding/uncollected amounts owed to them from: (i) any amounts they would otherwise be obligated to deposit into the Account, and (ii) any other amounts merchant may owe RMS under this Agreement or any reporting, or any other agreement.

- (h) The rights conferred upon RMS in this Section are not intended to be exclusive of each other or of any other rights and remedies of RMS under this Agreement, at law or in equity. Rather, each and every right of RMS at law or in equity will be cumulative and concurrent and in addition to every other right.
- 5.08 Fiduciary Relationship.**
- As provided in California Financial Code Section 952 as it now exists and as it may be amended from time to time, whenever Merchant and/or its guarantor has a deposit held, arising from or subject to this Agreement with any Bank which, pursuant to this Agreement, Merchant is not entitled to, Merchant's entitlement to such deposit shall be as a fiduciary of RMS until any claim by RMS against Merchant has been resolved. Merchant agrees that its failure to repay, within five (5) calendar days of notification by RMS, funds to which Merchant is not entitled to, shall result in a presumption that Merchant intends to misappropriate such funds. Merchant further agrees that in the event RMS seeks to enforce its rights herein in a court of competent jurisdiction, that any Receivership, Temporary Restraining Order, Preliminary Injunction, Writ of Attachment or Writ of Possession may be issued against Merchant may issue without bond.
- 5.09 Security Interest.**
- Merchant and Guarantors acknowledge that all documents submitted in conjunction with this Agreement are being submitted in order to induce a federally insured financial institution to extend them credit and that submission of any false information herein may subject them to criminal prosecution, fine and/or imprisonment. To secure Merchant's performance under this Agreement, including without limitation Merchant's obligations arising out of Chargebacks, Merchant hereby grants pursuant to the California Uniform Commercial Code, to RMS a security interest in Merchant's electronic terminal, printer, imprinter and imprinter plate. Further, Merchant and/or Guarantor(s) grants to RMS, a Security Interest in all Sales Drafts, credit drafts, and in all deposit accounts, regardless of source, wherever found, standing in the name of Merchant and/or Guarantor(s), including any affiliated companies of Merchant and/or Guarantor, whether established or designated and maintained pursuant to this Agreement or not, as well as in the proceeds of those deposits. In the event of Merchant's default in payment of chargebacks, Merchant and Guarantor(s) stipulate: (i) that all personal Bank accounts standing in their names shall be subject to this Agreement and ACH debit, and (ii) all ACH debits, whether made against Merchant's Account or a Guarantor's personal account shall bear a commercial account code designation (CCD) for purposes of electronic collection via the ACH system, and (iii) Merchant and/or Guarantor irrevocably consent to RMS using any means available to locate such deposit accounts until such time as all amounts due have been paid. RMS may enforce this security interest as applicable by:
- (a) Making an immediate debit/charge via the ACH system (code CCD) to any deposit account standing in the name or names of Merchant and/or Guarantor(s), without notice or demand of any kind; and/or interrupting the electronic transmission of funds to any account through the Automated Clearing House (ACH) system;
  - (b) Freezing the entire Account, without notice or demand of any kind, upon RMS' determination that Merchant has breached any term of this Agreement;
  - (c) Taking possession of any or all of Merchant's sales drafts, verification and confirmation of transactions;
  - (d) Taking possession of any and/or all of Merchant's electronic terminals, printers, imprinters, and imprinter plates.
  - (e) By placing a receiver within Merchant's place of business without notice or bond to intercept and collect all income derived from Merchant's operations until such time as any indebtedness owed to RMS arising under this Agreement has been satisfied in full;
  - (f) By obtaining either a writ of attachment or a writ of possession without bond pertaining to Merchant and/or its guarantor's personal property upon a showing of a presumption that Merchant has committed an act of fraud or is about to misappropriate funds to which it is not entitled. Merchant shall provide any statement or notice that RMS determines to be necessary to preserve and protect this security interest. Merchant's and/or Guarantor's granting of this security interest in no way limits Merchant's liabilities to RMS under this Agreement.
- 5.10 Severability.**
- If any provision of this agreement is held invalid or unenforceable by any court of final jurisdiction, it is the intent of the parties that all other provisions of this Agreement be construed to remain fully valid, enforceable, and binding on the parties.
- 5.11 Third Parties.**
- (a) Merchant may be using special services or software provided by a third party to assist Merchant in processing transactions, including authorizations and settlements, or accounting functions. Merchant is responsible for insuring compliance with the requirements of any third party in using their products. This includes making sure Merchant has and complies with any software updates. RMS has no responsibility for any transaction until that point in time RMS receives data about the transaction.
  - (b) Merchant will notify RMS immediately if Merchant decides to use electronic authorization or data capture terminals or software provided by any entity other than RMS or its authorized designee ("third party terminals") to process transactions. If Merchant elects to use third party software or terminals, Merchant agrees: (i) the third party providing the software or terminals will be Merchant's agent in the delivery of the Transactions to RMS via a data processing system or network; and (ii) to assume full responsibility and liability for any failure of that third party to comply with the Rules of this Agreement. RMS will not be responsible for any losses or additional fees incurred by Merchant as a result of any error by a third party agent or a malfunction in a third party's software or terminal.
- 5.12 Modifications to Agreement.**
- This Agreement is subject to amendment to conform with the Rules. From time to time RMS may amend any provision of this Agreement, including, without limitation, those relating to the discount rate or to other fees and charges payable by Merchant by mailing written notice to Merchant of the amendment, and the amendment shall become effective unless RMS receives Merchant's notice of termination of this Agreement within 7 days. Amendments due to changes in either Card Association's fees, interchange, assessments, Rules or any law or judicial decision may become effective on such shorter period of time as RMS may specify if necessary to comply with the applicable Rule, law, or decision.
- 5.13 Supplementary Documents.**
- Reference to "this Agreement" includes any valid schedules, appendices and amendments thereto.
- 5.14 Limitation of Liability/Indemnity.**
- (a) The liability, if any, of RMS, under this Agreement whether to Merchant or to any other party, whatever the basis of liability, shall not exceed in the aggregate the difference between (i) the amount of fees paid by Merchant to RMS during the month in which the transaction out of which the liability arose occurred, and (ii) assessments, Chargebacks, and any offsets authorized under this Agreement against such fees which arose during such month. In the event more than one month was involved, the aggregate amount of RMS's liability shall not exceed the lowest amount determined in accord with the foregoing calculation for any one-month involved. In no event will RMS, nor its officers, agents, directors, or employees be liable for any indirect, special, or consequential damages including loss profits, revenues and business opportunities.
  - (b) Merchant hereby agrees to indemnify and hold RMS and their employees harmless from any claim relating to a dispute between Merchant and a Cardholder, any Sales Draft paid for by Bank as may be made by anyone by way of defense, dispute, off-set, counterclaim or affirmative action, or for any damages of, or losses that RMS may incur as a result of Merchant's breach of this Agreement. Further, Merchant shall reimburse RMS, as the case may be, for all expenses and costs, including attorney's fees, with regard thereto.
  - (c) RMS will perform all services in accordance with this Agreement. RMS makes no other warranty, express or implied, regarding the services, and nothing contained in the Agreement will constitute such a warranty. RMS disclaims all implied warranties, including those of merchantability and fitness for a particular purpose. RMS will not be liable to the other parties 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 RMS.
- 5.15 Waiver.**

Failure by RMS to enforce one or more of the provisions of this Agreement shall not constitute a waiver of the right to enforce the same or other provision in the future. All waivers must be signed by the waiving party.

**5.16**

**Notices.**

All notices and other communications required or permitted under this Agreement by Merchant to RMS shall be delivered by Merchant to RMS by overnight carrier or certified mail, postage or other charges prepaid, addressed and transmitted as set forth below. All notices and other communications required or permitted under this Agreement by RMS to Merchant shall be delivered by RMS to Merchant either by FAX, e-mail, or first class mail, postage or other charges prepaid, addressed and transmitted as set forth below. Notice by FAX or e-mail shall be deemed delivered when transmitted. Notice by mail or overnight carrier shall be deemed delivered on the first business day after mailing or delivery to the carrier. Following are the addresses for the purposes of notices and other communications hereunder, which may be changed by written notice in accordance with this section:

- (a) If to RMS, addressed and transmitted as follows:  
Redwood Merchant Services, a division of WESTAMERICA BANK, 2800 Cleveland Avenue, Suite B, Santa Rosa, CA 95403 ♦ FAX (707) 546-9989 Attn: Customer Service
- (c) If to Merchant, at the address provided as the billing address, or the e-mail address and to the contact listed on the Processing Services Application.

**5.17**

**Choice of Law: Jurisdiction.**

The parties agree that all performances and transactions under this Agreement will be deemed to have occurred in California and that Merchant's entry into and performance of the Agreement will be deemed to be the transaction of business within the State of California. This agreement shall be governed and construed under the laws of the State of California, and any claim or cause of action against RMS shall be initiated and maintained in the state courts of the State of California.

**5.18**

**Entire Agreement: Assignability.**

This Agreement, including the Merchant Application and the Schedule of Fees, expresses the entire understanding of the parties with respect to its subject matter and except as provided herein, may be modified only in writing executed by all parties. This Agreement may be assigned by RMS, but may not be assigned by Merchant, directly or by operation of law, without the prior written consent of RMS. If Merchant nevertheless assigns this Agreement without such consent, the Agreement will be binding upon the assignee. If you sell your business and the new owners incur chargebacks, the original owner and all of the original guarantors will be held personally liable for all chargebacks and any other liabilities of the new owners. This Agreement shall be binding upon and inure to the benefit of the parties' respective heirs, personal representatives, successors, and assigns.

**5.19**

**Account.**

- (a) Merchant will establish and maintain an Account at an ACH receiving depository institution approved by RMS. Merchant will maintain sufficient funds in the Account to satisfy all obligations, including the fees and chargebacks contemplated by this Agreement. Merchant irrevocably authorizes RMS to debit Account for Chargebacks, fees and any other penalties or amounts owed under this Agreement. In the event the Account lacks sufficient funding Merchant and Guarantors authorize RMS to debit via ACH without notice any Bank account standing in their name(s) or the name of any affiliated entity. Merchant must obtain prior written consent from RMS to change Account. If Merchant does not get that consent, RMS may immediately terminate the Agreement and may take other action necessary, as determined by them within their sole discretion.
- (b) RMS will be the only entity to deposit all Sales Drafts to the Account subject to Section 3.01 of this Agreement. Merchant authorizes RMS to initiate reversal or adjustment entries and initiate or suspend such entries as may be necessary to grant Merchant conditional credit for any entry.
- (c) RMS, in its sole discretion may grant Merchant provisional credit for transaction amounts in the process of collection, subject to receipt of final payment by RMS and subject to all Chargebacks and other amounts owed to RMS under this Agreement.
- (d) Merchant will promptly examine all statements relating to Account and immediately notify RMS in writing of any errors. Merchant's 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 an explanation of why Merchant believes an error exists and the cause of it, if known. That written notice must be received by RMS within 30 days after Merchant received the periodic statement containing the asserted error. Merchant may not make any claim against RMS for any loss or expense relating to any asserted error for 60 days immediately following receipt of Merchant's written notice. During that 60 day period, RMS will be entitled to investigate the asserted error and Merchant will not incur any cost or expense in connection with the asserted error without notifying RMS.
- (e) Merchant will indemnify and hold RMS harmless for any action they take against the Account pursuant to this Section. Merchant will also indemnify and hold harmless the institution at which Merchant maintains the Account for acting in accordance with any instruction from RMS regarding the Account. This section will survive termination of this Agreement.
- (f) Merchant authorizes RMS to initiate debit/credit entries to the Account, as the Account may be changed from time to time and to any other account maintained by Merchant at any institution that is a receiving Bank of ACH, all in accordance with this Agreement. In the event Merchant changes Account, Merchant will notify RMS, and this authorization will apply to the new Account. This authorization will be effective until both: (i) RMS has received written notification from Merchant terminating this authorization, and (ii) all obligations of Merchant to RMS have been paid in full. Merchant will provide to RMS a voided Account check and will fill in the Account numbers on the Merchant's ACH Business Application.
- (g) Merchant agrees to pay \$15.00 for each debit or credit rejected or returned from the Account and \$20.00 for each checking account change submitted to RMS during the term of this agreement.

**5.20**

**Credit and Financial Inquiries: Additional Locations: Inspections.**

- (a) Merchant authorizes RMS to make, at any time during which Merchant owes any obligation to RMS, any credit inquiries, which RMS may consider necessary to accept or review acceptance of this Agreement or investigate Merchant's deposit or Card acceptance subsequent to acceptance of this Agreement. Such inquiries shall include, but are not limited to, a credit check of the business including its proprietor, principal owners, or officers. If requested to do so by RMS, Merchant shall provide the written consent of any person for which an inquiry has been or is to be made if such person has not executed this Agreement and will provide any financial statements, income tax and business tax returns and other financial information as RMS may consider necessary to perform initial or periodic reviews of Merchant's financial stability and business practices.
- (b) Merchant may honor Cards only at locations approved by RMS. Additional locations may be added, subject to RMS's approval. Either Merchant or RMS may delete any location by providing notice as provided in this Agreement.
- (c) Merchant agrees to permit RMS at any time from time to time, to inspect locations to confirm that Merchant has or is adhering to the terms of this Agreement and is maintaining the proper facilities, equipment, inventory, records and license or permit (where necessary) to conduct its business. However, nothing in this paragraph shall be deemed to waive Merchant's obligation to comply in all respects with the terms of this Agreement.
- (d) Representatives of RMS may, during normal business hours, inspect, audit, and make copies of Merchant's books, accounts, records, and files pertaining to any Card Transaction.

**5.21**

**Marketing of Non-Bankcard Services by RMS.**

From time to time, RMS may offer to Merchant certain additional products and services which may or may not be related to the processing of credit card Transactions. In the event of such offers, Merchant shall indicate its desire to RMS to decline such offers or be deemed to have accepted the offers and be liable for payment therefore.

- 5.22 Fees and Other Amounts Owed.**
- (a) Merchant shall pay to RMS the fees and charges set forth on this agreement and the Merchant Application. Merchant's Account will be debited through ACH for such amounts and for any other fees, charges or adjustments incurred by Merchant and associated with processing services. Merchant is obligated to pay all taxes and other charges imposed by any governmental authority on the services provided under this Agreement. RMS shall have the right to change fees, including adding fees for additional services utilized by Merchant, upon thirty (30) days written notice.

- (b) Merchant will immediately pay RMS any amount incurred by RMS attributable to this agreement or any other agreement between Merchant and RMS or any subsidiary or affiliate of RMS, including but not limited to equipment fees, Chargebacks, fines imposed by a third party, non-sufficient fund fees and ACH debits that overdraw the Account, Reserve Account, or are otherwise dishonored. Merchant authorizes RMS to debit via ACH the Account, the Reserve Account any other Account Merchant has with RMS, an affiliate or subsidiary of RMS or at any other financial institution for any amount Merchant owes under this Agreement or under any other contract, note, guaranty, or dealing of any kind now existing or later entered into between Merchant and RMS or any subsidiary or affiliate, whether Merchant's obligation is direct, indirect, primary, secondary, fixed, contingent, joint or several. In the event such ACH does not fully reimburse RMS for the amount owed, Merchant will immediately pay RMS such amount.

- 5.23 Signature.**
- Merchant represents and warrants that the person signing, physically and/or by acknowledging consent by electronic means, is duly authorized to bind Merchant to all provisions of this Agreement and that such person is authorized to execute any documents and to take any action on behalf of Merchant, which may be required by RMS now or in the future. Merchant will execute a separate Entity Certification if requested to do so by RMS. Further, Merchant, by its signature, upon its first transmission of Transactions, or first payment of fees acknowledges that it has received and understands the Merchant Agreement provided by RMS. Merchant acknowledges that if Merchant has not entered into this Agreement by executing a copy or by acknowledging consent by electronic means, Merchant agrees that Merchant's first transmission of transactions or first payment of fees to RMS constitutes Merchant's acceptance of this Agreement.

- 5.24 General.**
- If any provision of this Agreement is illegal, the invalidity of that provision will not affect any of the remaining provisions of this Agreement and will be construed as if the illegal provision is not contained in the Agreement. Merchant is responsible for its employee's actions while in its employ. The parties do not intend to confer any benefits on any person or entity other than Merchant and RMS. Sections 2.16, 2.17, 2.19, 3.02, 4.02, 4.03, and the entirety of section 5 will survive termination of this Agreement.

- 5.25 Costs.**
- Merchant will be liable for and will indemnify and reimburse RMS for all costs paid or incurred by RMS in the enforcement of this Agreement, including but not limited to attorney's and investigator's fees, or in collecting any amounts due from Merchant or resulting from any breach by Merchant of this Agreement.

- 5.26 Equipment.**
- (a) Merchant is required to verify the terms of the Lease agreement by way of a telephone conference call between Merchant, RMS, and the leasing company. Each Merchant will have a scheduled appointment date and time to complete this verification. If Merchant does not verify Lease on the scheduled appointment date and time, an RMS representative will make two additional attempts to contact the merchant and complete the verification. If the Lease cannot be successfully verified after these additional attempts, an ACH debit will be made to the Merchant's Account to recover the costs of equipment, shipping and handling. The Merchant may call and reschedule the appointment prior to the initial appointment date and time. The new appointment cannot be set more than 5 business days from the original appointment date.
  - (b) Occasionally to meet specific programming requirements, especially in the case of debit card processing, RMS will be required to swap a Merchant's pre-existing piece of equipment with one provided by RMS. In return for the RMS equipment, Merchant must send to RMS Merchant's existing equipment of same type and function. This swap must be completed within 30 calendar days from the date Merchant receives RMS's equipment or the price of equipment, shipping and handling will be debited from Merchant Account.
  - (c) Merchant cannot return equipment after 30 days from the receipt. All equipment returns will be assessed a 20% restocking fee.

## ARTICLE VI - SUPPORT FEES AND CHANGES

- 6.01 Fees.** If fees are not listed on merchant application to the contrary, the following fees are applicable.

Providing Research Copies	\$2.00 per page
Checking Account Change	\$20.00 per change
Business Name Change	\$75.00 each
Retrieval Fee	\$15.00 each
Reject Fee	\$15.00 each per item
Reject Fee	\$15.00 per daily batch

- 6.02 Discount Percentages.**

Standard Swiped Transaction Rate (Merchants 0-50% Keyed)

The quoted qualified discount rate will be charged on all swiped bankcard transactions that are electronically authorized & closed in a daily batch. All manually keyed bankcard transactions that are closed daily, have AVS, an order number and reply to the Mail/Telephone order prompt with a "Yes" will be charged a "Mid-Qualified Rate" which is calculated by adding the "Mid Qualified Surcharge" as stated on the Merchant Application to the "Qualified Rate". All bankcard transactions that do not meet the requirements stated above, business cards, foreign cards and transactions that do not meet Visa/MC requirements for the best interchange program will be charged a "Non-Qualified Rate" which is calculated by adding the "Non Qualified Surcharge" as stated on the Merchant Application to the "Qualified Rate".

Standard Keyed Transaction Rate (Merchants 51% - 100% Keyed)

The quoted qualified discount rate will be charged on all bankcard transactions that are electronically authorized, closed daily and include AVS, an order number and a "Yes" reply to the Mail/Telephone order prompt. All bankcard transactions that do not meet the requirements stated above, business cards, foreign cards and transactions that do not meet Visa/MC requirements for the best interchange program will be charged a "Non-Qualified Rate" which is calculated by adding the "Non Qualified Surcharge" as stated on the Merchant Application to the "Qualified Rate".

Automated AVS responses obtained through a POS or similar device are charged at the rate stated on the Merchant Application for "Address Verification". AVS responses obtained from a live operator are charged at a rate of **\$1.00** each. The discount rate will be deducted daily. Statements will be sent each month. A monthly minimum fee will be deducted unless you have met your minimum processing volume. Additional charges that may occur from time to time include chargeback fees, representation fees, and retrieval fees.

- 6.02 Batch Header Fee.**

A Merchant is billed a batch header fee for each time a batch is transmitted to the Host for settlement. The batch header fee charged is equivalent to the transaction fee indicated on the application..

**6.03**

**Transaction Fee.**  
A Merchant is billed a transaction fee each time communication is made with the Host. This fee is assigned by the Agent or sales representative at the time the Merchant applies for an account.