



**MANAGEMENT SERVICE CREDIT CARD AGREEMENT**

This Management Service Agreement (the “Agreement”) is made and effective this date \_\_\_/\_\_\_/\_\_\_ (the “Effective Date”).

**BETWEEN: PAYMENT AUTHORITIES LLC** (herein referred to as “Service Provider”), a Company organized an existing under the laws of the state of Massachusetts with its head office located at 39 Deer Run, Southwick, Ma 01077;

**AND:** \_\_\_\_\_(the “Merchant”), a Business/establishment with main address: \_\_\_\_\_.

**RECITALS**

**WHEREAS,** Service Provider is an establishment that provides merchant payment processing management and auditing service.

**WHEREAS,** Merchant desires to retain the Service of the Service Provider for the purpose of providing certain monitoring, auditing and other payment-related services with the objective of containing and/or reducing the expenses related to processing credit card and other fees and charges, as described in this Agreement (the “Services”);

**WHEREAS** Merchant agrees to engage the Service Provider as an independent contractor to perform such Services and the Service Provider hereby agrees to provide such services to the Merchant.

**By clicking on the “I AGREE” button or a similar affirmation, or by acknowledging acceptance of the Agreement by any other method allowed by Service Provider, or by using or accessing the Services through any means permissible including, without limitation via a computer or a mobile application, Merchant acknowledges and agrees that: (i) it has reviewed and understands the Agreement; (ii) it agrees to be legally bound by the terms and conditions of the Agreement; and (iii) its use of the Services and any related products or services will be governed by this Agreement. If Merchant does not agree or is not willing to be bound by the terms and conditions of this Agreement, Merchant should not click on the “I AGREE” button and should not seek to obtain or use the Services in any way whatsoever.**

**NOW, THEREFORE,** in consideration of the mutual covenants and agreements herein contained, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

**1. CAPACITY**

\_\_\_\_\_ By accepting the terms and conditions of this Agreement, Merchant represents and warrants that:  
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(a) the person executing this Agreement on behalf of Merchant is 18 years of age or older, (b) all information Merchant has provided to Service Provider is true and correct in all respects, (c) Merchant will update Service Provider by email with any changes to information merchant has previously supplied, and (d) Merchant has legal authority to accept the terms and conditions of this Agreement and that such acceptance will be binding on Merchant. Service Provider reserves the right in its sole discretion to refuse to provide Merchant with the Services (as defined below).

## 2. SERVICES

- a) **Working Backward (historical billing):** The Merchant hereby retains the Service Provider in accordance with the terms provided in this Agreement and the Service Provider hereby agrees to audit the Merchant's credit card payment processing statements (to the extent such statements are provided to Service Provider by Merchant for this purpose) for previous transactions processed on behalf of the Merchant.

The Service Provider shall provide the Merchant with analysis where applicable, plus also advise about cost inconsistencies when Service Provider deems such advice relevant to reducing Merchant's credit card processing fees. Service Provider may contact the Credit Card Company on Merchant's behalf seeking a refund of overbilling.

For the purpose of this Agreement, the above-referenced audit services will typically cover transactions within the past thirty-six (36) calendar months unless Service Provider elects to use a different time period or Merchant fails to provide Service Provider with sufficient information to conduct such an audit.

- b) **Moving Forward:** The Service Provider will review the Merchant's credit card processing statements (to the extent necessary in Service Provider's sole discretion to perform its services under this Agreement) for inaccuracies, change of processing rates and other related MSP or Processor, issues. Service Provider will to the best of its ability notify Merchant of inconsistencies found (or not found) where applicable. The above-referenced information will be provided in a monthly statement available in the Statement Simple merchant portal. Service Provider may contact Merchant's credit card processing company on Merchant's behalf to raise any issues regarding overbilling or other changes to the Merchant's agreement with the credit card processing company.
- c) **Authorization to Communicate with Merchant's Credit Card Processors:** Merchant hereby authorizes the Service Provider to negotiate and discuss its credit card processing needs with all relevant third parties, including, but not limited to Merchant's service providers, payment processors, banks or related companies. Merchant agrees to give Service Provider access to all relevant credit card processing statements and online portals used by Merchant or Merchant's credit card processor in connection with Merchant's credit card processing. Service Provider shall not have the authority to enter into any agreement on Merchant's behalf. Merchant shall bear all liability for any agreement entered into by Merchant, regardless of whether such agreement was negotiated by Service Provider. For avoidance of doubt, Service Provider shall not have any liability under any circumstance for actions taken or agreements executed by



Service Provider.

- d) **Other Services:** In addition to Statement Simple which is mandatory for our management solution, other services related to credit card processing may be offered to the Merchant to enhance and secure their business operations and to protect said Merchant whenever possible.

The Service Provider may seek to do as follows:

1. Use its commercially reasonable efforts to recover excess amounts, or amounts saved (as revealed by the auditing service) by the Merchant from Merchant's service providers, payment processors, banks or related companies.
2. Have the right to recommend other companies to Merchant for the purpose of moving its payment processing to such new companies. The Service Provider shall not be liable under any circumstance for added rates, or fee increases or any other cost or liability arising from or related to Merchant changing payment processing providers or point of sale software solution providers or any other change in Merchant's relationships with third parties relating to its credit card processing.
3. Audit Merchant's credit card processing statements.
4. Assist the Merchant with Compliance with Payment Card Industry Data Security Standard (PCI DSS) upon request. For avoidance of doubt, Service Provider shall have no liability for Merchant's non-compliance with PCI DSS.

### 3. BILLING TERMS

- a) **Working Backwards:** In payment for the Services, the Merchant agrees to pay the Service Provider an amount equal to 50% of all amounts recovered (or saved) by the Merchant from its merchant service providers, payment processors, banks or related companies. This shall also include credit, refund, sign-on bonuses received by Merchant or any negotiation for more favorable terms on behalf of the Merchant. This will be a one-time payment due to the Service Provider within thirty (30) days of Service Provider sending an invoice to Merchant.
- b) **Moving Forward:** In addition to any amounts Service Provider is entitled to be paid pursuant to subsection (a) above, Merchant shall pay to Service Provider a monthly management fee (the "Monthly Management Fee(s)" equal to fifty percent (50%) of the sum of all savings and benefits (the "Benefits") from all Transactions received by Merchant during the Term of this Agreement (which shall include Benefits from any Transaction for a period of thirty-six months after said Transaction is entered into, negotiated or begins to benefit Merchant, whichever occurs last, regardless of whether this period extends beyond the Term of this Agreement or the termination of this Agreement). The Monthly Management Fees shall be calculated monthly by the Service Provider in its reasonable discretion during the entire Term of this Agreement and any period that extends beyond said Term, since the Parties intend for fees to be payable by Merchant to Service Provider for a full thirty-six (36) months after each Transaction. The Monthly Management Fee shall be calculated by the Service Provider as follows:
- 1) **Definition of a Transaction:** For each transaction entered into or negotiated between the Merchant and the Merchant's current or former credit card processing provider,



including, but not limited to, transaction(s) which result in changes in Merchant's credit card processing providers, negotiation of new or reduced credit card processing fees or other related charges for Merchant, prevention of a proposed or planned increase in Merchant's credit card processing fees or other related charges or renegotiation of credit card processing fees or other related charges previously negotiated (each a "Transaction" and collectively the "Transactions"), Service Provider shall be entitled to increase its Monthly Management Fee by an amount equal to fifty-percent (50%) of the Benefits associated with each Transaction for a period of thirty-six (36) months beginning on the later to occur of (i) the date each applicable Transaction is agreed or consummated or (ii) the date Merchant begins receiving Benefits from said Transaction. For avoidance of doubt, the Monthly Management Fee shall continue to be increased as described in this paragraph and the Merchant shall remain liable to Service Provider for the Monthly Management Fees after the termination of this Agreement or expiration of the Term of this Agreement. Merchant acknowledges and agrees that it shall be required to pay fees to Service Provider for a full thirty-six (36) month period following each and every Transaction, regardless of whether this Agreement has expired or been terminated.

- 2) Determination of Baseline Fees: With regard to each Transaction (as defined above) recommended or facilitated by Service Provider and/or Service Provider's audit reports, the Service Provider shall first determine the amount of credit card processing fees imposed on Merchant by its credit card processing company prior to said Transaction (the "Baseline Fees"). "Baseline Fees" shall initially be equal to the sum of all credit card processing fees paid by Merchant on a monthly basis to its credit card processor, including both flat fees and percentage-based fees. In the event that Merchant's gross sales are greater in any given month than in its sales in the first month the Baseline Fees were calculated, the Service Provider may in its sole discretion increase the Baseline Fees to reflect an estimate of additional fees that would have been imposed on Merchant by its credit card processing provider if its gross sales had always been equal to the current figure. The increase in Baseline Fees associated with such increase in gross sales shall be equal to the increased sales figure, multiplied by the effective rate of credit card processing fees imposed by the Merchant's credit card processing provider as determined by Service Provider in its reasonable discretion. In addition, each time Merchant's credit card processing provider announces or declares any new or additional fee or an increase in any existing fee, the Service Provider may in its sole discretion increase the Baseline Fees used with regard to all previous Transactions by an amount equal to the cumulative increase in such fees as determined by the Service Provider in its reasonable discretion. As used in this Agreement, "gross sales" shall be equal to the sum of all sales without any reductions whatsoever. As used in this Agreement, the phrase "credit card processing fees" shall include all fees charged by a credit card processing company and all fees related to credit card processing, including, but not limited to, PCI, the discount rate, transaction fees, the qualified rate, EMV fees, network fees and surcharge fees. For purposes of determining the Baseline Fees, the Service Provider may, in its reasonable discretion, base its determination on the credit card



processing fees being charged to Merchant by its credit card processing company (i) in a single month preceding the Transaction or (ii) on average over a period of two (2) to twelve (12) months preceding the Transaction; provided further that Service Provider may in its reasonable discretion disregard any month or month(s) which it deems to be an outlier or not representative of Merchant's credit card processing fees. Any election made by Service Provider with regard to any Transaction in determining the Baseline Fees shall not be binding on Service Provider shall not be binding on Service Provider with regard to any other Transaction.

- 3) Determination of Negotiated Fees. With regard to each Transaction (as defined above) recommended or facilitated by Service Provider and/or Service Provider's audit reports, the Service Provider shall next determine the amount of credit card processing fees imposed on Merchant by its credit card processing company in each month following said Transaction (the "Negotiated Fees") for a period of thirty-six (36) months (with regard to each separate Transaction) beginning on the later to occur of (i) the date the applicable Transaction is agreed or consummated or (ii) the date Merchant begins receiving Benefits from said Transaction. The "Negotiated Fees" shall each month be equal to the total credit card processing fees imposed on Merchant by its' credit card processing company in any given month going forward after a Transaction; provided that Negotiated Fees will not be increased by any subsequent increases in Merchant's credit card processing fees to the extent such increases are attributable to fees (including, but not limited to, interchange fees, network fees and other non-negotiable fees) either imposed directly on merchant by credit card companies (such as Visa or Mastercard) or indirectly via charges imposed on Merchant's credit card processing companies (which are passed on to Merchant) by credit card companies. Notwithstanding any other provision of this Agreement, for purposes of determining the Negotiated Fees with regard to any Transaction, Negotiated Fees shall include any termination fees, early termination fees or other fees imposed on Merchant for terminating its credit card processing agreement, nor shall any fees or damages associated with breach of exclusivity or any other fee associated with or related to the termination of any of Merchant's credit card processing agreements with its credit card processing companies. Merchant hereby agrees and acknowledges that all fees imposed on Merchant in connection with the breach or termination of any of its credit card processing agreements with credit card processing companies are Merchant's sole responsibility. For avoidance of doubt, Service Provider may in its sole discretion redetermine the Negotiated Fees each month or periodically in any subsequent month or months following any Transaction to reflect changes in circumstances.
- 4) Determination of Merchant's Benefits with Regard to Each Transaction. With regard to each Transaction (as defined above) recommended or facilitated by Service Provider and/or Service Provider's audit reports, the Service Provider shall next determine the amount of "Benefits" (as defined below) for a period of thirty-six (36) months (with regard to each separate Transaction) beginning on the later to occur of (i) the date the applicable Transaction is agreed or consummated or (ii) the date Merchant begins receiving Benefits from said Transaction. With regard to each Transaction, Merchant's





“Benefits” in any given month shall be equal to the difference between (A) the Merchant’s “Baseline Fees” (as defined above, including any adjustments) and (B) Merchant’s “Negotiated Fees” (as defined above, including any adjustments).

- 5) Determination of Merchant’s Cumulative Benefits. Next, the Service Provider shall determine the sum of all Benefits received by Merchant in each month with regard to all Transactions (the “Cumulative Benefits”). Merchant’s “Cumulative Benefits” shall be equal to the sum of (i) any sign-on or similar bonuses or payments received by Merchant in such month (or in any prior month to the extent it was not factored into determining Merchant’s Monthly Management Fee in any prior month); (ii) any reduction in any termination fee or other charge imposed on Merchant by its credit card processing company in any given month (or in any prior month to the extent it was not factored into determining Merchant’s Monthly Management Fee in any prior month), which reduction was negotiated or facilitated by Service Provider or Service Provider’s audit reports; and (iii) the sum of all Benefits associated with all Transactions.
- 6) Determination of Monthly Management Fee. Finally, the Service Provider shall determine the Monthly Management Fee each month during the Term of this Agreement and each month following the expiration of said Term or termination of this Agreement to the extent that any Transaction was either entered into by Merchant, recommended by Service Provider or began producing Benefits for Merchant within thirty-six (36) months of the month for which the Monthly Management Fee is being determined. The “Monthly Management Fee” payable by Merchant to Service Provider shall be equal to fifty percent (50%) of the Cumulative Benefits received by Merchant, as calculated by Service Provider in its reasonable discretion with regard to the applicable month. A sample calculation of the Monthly Management Fee(s) in a hypothetical fact pattern is attached hereto as Exhibit A for illustrative purposes.

All calculations or determinations required pursuant to this Section 3 or any other provision of this Agreement shall be calculated or determined (as applicable) by the Service Provider. In the event that the Merchant fails to provide the Service Provider with any credit card processing statements or other adequate documentation to make such calculations, the Service Provider shall be authorized to either estimate the Baseline Fees and Negotiated Fees or deem the Monthly Management Fee to be equal to the highest Monthly Management Fee applicable in any prior month, in the Service Provider’s sole discretion. The Monthly Management Fee(s) shall be due and payable regardless of whether Merchant fails to act on Service Provider’s recommendation(s) or Merchant engages in a recommended Transaction or a Transaction with a similar purpose without Service Provider’s involvement. Monthly Management Fee(s) shall be paid by Merchant to Service Provider monthly. For avoidance of doubt, Merchant’s liability to Service Provider for the Monthly Management Fees shall not be reduced by or offset by any fees or penalties paid by Merchant to its credit card processor or any other third party relating to termination, early termination or breach of any Agreement or relationship to which Merchant is a party, nor shall Service Provider ever be liable to Merchant for such fees or penalties. A sample calculation of the Monthly Management Fee(s) in a hypothetical fact pattern is attached hereto as Exhibit A for illustrative purposes. In the event that Service Provider discovers new information, receives



additional information from Merchant or determines it undercharged Merchant in any previous month, Service Provider may in its sole discretion elect to assess Merchant additional Monthly Management Fees to reflect any changes in circumstances or miscalculations which resulted in Merchant being undercharged.

- c) **ACH Credit/Debit Authorization:** Payments shall be made through ACH credit or debit payments to the Service Provider. Merchant agrees to expeditiously take any necessary steps to set up the ACH payments to Service Provider. Merchant authorizes recurring debits or credit card charges for all amounts due and payable by Merchant to Service Provider. Merchant hereby authorizes Service Provider to charge/debit its account or credit card for all amounts due pursuant to this Agreement (including, but not limited to, the Termination Fee as described below) on or after the effective date of this Agreement. This authorization is to remain in full force and effect until the Service Provider has received written notification from the Merchant of its termination.
- d) **Base Fee for Statement Simple:** In addition to the amounts described above, during the term of this Agreement, Merchant will pay a monthly fee (based on Service Provider's regular fee schedule which may be updated from time to time) for the Statement Simple monthly audit program.
- e) **Default:** In the event that Merchant either: (i) fails to pay any invoice in full within thirty (30) days (including any disputed invoice) of the date on which the invoice is mailed or emailed by Service Provider; (ii) materially violates any other provision of this Agreement or any other agreement between Merchant and Service Provider and fails to cure such breach within thirty (30) days of being notified of the breach by Service Provider; (iii) seeks to terminate this Agreement prior to the end of the Term (as defined below); or (iv) files for bankruptcy, insolvency or any equivalent legal process or is adjudicated to be bankrupt or insolvent, the Merchant shall be deemed to be in default ("Default") of this Agreement. Notwithstanding any other provision of this Agreement, all fees payable by Merchant to Service Provider, including but not limited to, Monthly Management Fees, pursuant to this Agreement shall be due and payable regardless of whether Service Provider has performed each service enumerated in this Agreement and Service Provider's failure to perform a particular service or services shall not be a defense to excuse Merchant of its liabilities hereunder in any circumstance.
- f) **Acceleration Upon Default:** In the event that Merchant is in Default (as defined above), Service Provider shall have the option (with no obligation to do so) to deem all amounts payable during the remaining Term of the Agreement to be due and payable immediately and provide Merchant with an invoice for such amount; provided further that Service Provider may also deem a Default to be an early termination as defined in Section 8(d) below and Service Provider may also assess Merchant the Early Termination Fee described therein and add such fee to Service Provider's invoice. Service Provider shall be permitted to estimate the amounts that would have been due and payable during the remaining Term of the Agreement and any periods following the expiration or termination of such Term to the extent any Transaction was entered into by Merchant, recommended by Service Provider began producing Benefits for Merchant within thirty-six (36) months of the month for which the Monthly Management Fee is being determined. In the event that Service Provider does not exercise the right to accelerate the amounts due, this shall not be deemed a waiver or Service Provider's right to do so and Service Provider reserves the right to accelerate all amounts due at any time in the future after the date of Default.



- g) **Late Charge; Costs; Attorney's Fees**: In the event that Merchant is in Default (as defined above), a late charge of one and one-half percent (1.5%) per month, or the legal maximum if less, shall accrue on any amount payable by Merchant to Service Provider under this Agreement until paid in full. In addition to the late charge, Merchant shall also be required to reimburse Service Provider for all costs incurred by Service Provider in connection with the collection of any delinquent payment hereunder, including but not limited to, attorney's fees and court costs. Merchant shall also be required to pay Service Provider an additional \$50.00 for any returned EFT/ ACH as reimbursement for any costs and expenses incurred by Service Provider.
- h) **Disputes**: Merchant shall promptly notify Service Provider of any disputed charges pursuant to this Agreement. All disputes by Merchant must be made in good faith and within 30 days of the date of the disputed charge or invoice. All charges and invoices shall be deemed approved by Merchant unless Merchant objects in writing within 30 days of the date of the applicable charge or invoice.

#### **4. INFORMATION & MATERIALS**

- a) Merchant will be solely responsible to supply the Service Provider all information, materials, data, and documents necessary for Service Provider to perform the services under this Agreement. In no event shall Service Provider be deemed obligated to obtain any of the above-referenced information, materials, data, and documents from third parties.
- b) Merchant acknowledges and agrees that the accuracy of financial information supplied to Service Provider is the sole responsibility of the Merchant.
- c) Service Provider shall not be held responsible for the production of inaccurate financial statements, records, and billings or any other financial reports if the financial data submitted by the Merchant is inaccurate.
- d) In the event Merchant processing provider not send the processing statement directly to the Service Provider, the Merchant shall be responsible for providing the Service Provider with monthly statements of transaction.

#### **5. INDEPENDENT CONTRACTOR STATUS**

- a) Service Provider shall provide the Services as an independent contractor
- b) Service Provider shall not act as an employee, agent or broker of the Merchant.
- c) As an independent contractor, Service Provider will be solely responsible for paying any and all taxes levied by applicable laws on its compensation. Service Provider understands that Merchant will not withhold any amounts for payment of any taxes from Service Provider's compensation.

#### **6. EXPENSES**

- a) The Merchant agrees to reimburse any pre-approved out of pocket expenses incurred by the Service Provider in connection with the Services within 10 days of request for reimbursement by Service Provider, including, but not limited to, travel expenses, audit fees, tax fees, payroll service fees, etc.
- b) The Merchant will receive a quote of expected expenses in advance will be asked to approve it





for the expenses incurred.

## 7. CONFIDENTIALITY

Each Party (the “Receiving Party”) hereby agrees (a) to hold the other party’s (the “Disclosing Party’s”) confidential information in strict confidence and to take reasonable precautions to protect such confidential information and (b) not to divulge such confidential information or make any use of such confidential information except as contemplated under this Agreement. Notwithstanding any provision of this Agreement to the contrary, each party may disclose confidential information of the other party to the extent it is required to be disclosed pursuant to a valid order or requirement of a governmental agency or court of competent jurisdiction.

## 8. TERM; TERMINATION; TERMINATION FEE; EARLY TERMINATION FEE

- a) **Term:** This Agreement shall have an initial term of three (3) years and shall automatically renew for additional one (1) year terms on the last day of the Term and each successive anniversary of the last day of the Term thereafter until terminated as described below (the “Term”).
- b) **Termination:** After the initial three (3) year term, either party may terminate this Agreement for any reason or no reason by providing forty-five (45) days written notice (“Termination Notice”) to the other party; provided, however, that Merchant may still be liable to Service Provider for a Termination Fee as defined below.
- c) **Termination Fee:** Notwithstanding any other provision of this Agreement, in the event that Merchant terminates this Agreement as described above (after the initial three (3) year term, but such termination is within thirty-six (36) months of a Transaction or multiple Transactions (as defined above) being entered into by Merchant, recommended by Service Provider or such Transaction(s) begins producing Benefits for Merchant, the Merchant shall remain liable to the Service Provider for the Monthly Management Fees associated with each Transaction for a period of thirty-six (36) months as described in more detail in Section 3 above (the “Termination Fee”). For avoidance of doubt, this Termination Fee shall be due regardless of whether Merchant was within its rights to terminate under this Agreement and the Termination Fee shall constitute reasonable compensation to Service Provider for services performed during the Term of the Agreement. The Service Provider may in its sole discretion elect to estimate the amount of the Termination Fee based on the then applicable Monthly Management Fee and the portion(s) attributable to such Transaction(s) due and invoice Merchant for the full amount of the Termination Fee calculated as described above. The Termination Fee will be due and payable within thirty (30) days of the invoice date where it is assessed by Service Provider. The Termination Fee shall be calculated by the Service Provider in its reasonable discretion. In the event that the Merchant fails to provide the Service Provider with adequate documentation to determine the amount of the Termination Fee, the Service Provider shall be authorized in its sole discretion to estimate the Baseline Fees, Negotiated Fees, Benefits, Cumulative Benefits and Monthly Management Fees. The Termination Fee shall be due in addition to any Monthly Management Fee(s) due at that time, as well as any other amounts payable by the Merchant to the Service Provider and payment of the Termination Fee shall not discharge any of Merchant’s other obligations.
- d) **Early Termination Fee:** In the event that Merchant seeks to terminate this Agreement in violation of this Section 8 (i.e. during the initial three (3) year term), an early termination fee may be assessed (the “Early Termination Fee”) by Service Provider (in Service Provider’s sole discretion) in addition to the Monthly Management Fees and all other amounts due and payable under this Agreement. The Early Termination Fee shall be calculated with regard to



Transaction(s) in the same manner as the Termination Fee described in subsection (c) above. Notwithstanding any other provision of this Agreement, in no event shall the Early Termination Fee shall be less than the greater of (i) Seven Thousand Five Hundred Dollars (\$7,500.00) or (ii) the sum of all credit card processing fees paid by the Merchant during the three (3) months prior to Merchant's early termination of this Agreement (the "Minimum Early Termination Fee"), regardless of whether Merchant has received any Benefits or Service Provider has performed any services. The Minimum Early Termination Fee is intended to compensate Service Provider for fees Service Provider would have been able to earn had the Agreement not been terminated in violation of this Section 8.

## **9. DISCLAIMER**

THE SERVICES ARE PROVIDED ON AN "AS IS," "AS AVAILABLE" BASIS WITHOUT ANY REPRESENTATIONS OR WARRANTIES. SERVICE PROVIDER DOES NOT REPRESENT OR WARRANT THAT THE SERVICES WILL BE AVAILABLE, ACCESSIBLE, UNINTERRUPTED, TIMELY, SECURE, ACCURATE, COMPLETE, OR ENTIRELY ERROR-FREE OR THAT MERCHANT WILL INCUR SAVINGS OR PRICE REDUCTIONS. MERCHANT MAY NOT RELY UPON ANY REPRESENTATION OR WARRANTY REGARDING THE SERVICES BY ANY THIRD PARTY IN CONTRAVENTION OF THE FOREGOING STATEMENTS, INCLUDING REPRESENTATIONS OR WARRANTIES OF ANY MERCHANT SERVICE PROVIDER. SERVICE PROVIDER SPECIFICALLY DISCLAIMS ALL REPRESENTATIONS, WARRANTIES, AND CONDITIONS WHETHER EXPRESS OR IMPLIED, ARISING BY STATUTE, OPERATION OF LAW, USAGE OF TRADE, COURSE OF DEALING, OR OTHERWISE, INCLUDING BUT NOT LIMITED TO, WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR TITLE WITH RESPECT TO THE SERVICES, OR OTHER SERVICES OR GOODS PROVIDED UNDER THIS AGREEMENT. MERCHANT UNDERSTANDS AND AGREES THAT SERVICE PROVIDER SHALL BEAR NO RISK WITH RESPECT TO MERCHANT'S SALE OF PRODUCTS OR SERVICES, INCLUDING, WITHOUT LIMITATION, ANY RISK ASSOCIATED WITH CARD FRAUD OR CHARGEBACKS.

## **10. LIMITATIONS OF LIABILITY**

UNDER NO CIRCUMSTANCES (I) WILL SERVICE PROVIDER OR ANY OF ITS PARENTS, AFFILIATES OR VENDORS (OR ANY OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS OF THE PARTIES, OR ITS PARENTS, AFFILIATES OR VENDORS) BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGE OR LOSS SUFFERED OR INCURRED BY MERCHANT, REGARDLESS OF THE FORM OF ACTION, OR ANY LOSS OF REVENUE, PROFITS OR BUSINESS, ANTICIPATED SAVINGS, PRICE INCREASES, LOSS OF GOODWILL OR REPUTATION, COSTS OF DELAY, LOST OR DAMAGED DATA, OR THE INCURRING OF LIABILITY FOR LOSS OR DAMAGE OF ANY NATURE WHATSOEVER SUFFERED BY THIRD PARTIES, ALL WHETHER IN CONTRACT, STRICT LIABILITY OR TORT (INCLUDING NEGLIGENCE), REGARDLESS OF WHETHER IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES; OR (II) WILL SERVICE PROVIDER'S TOTAL AGGREGATE LIABILITY TO MERCHANT UNDER THIS AGREEMENT EXCEED THE AGGREGATE COMPENSATION SERVICE PROVIDER RECEIVED FOR PROVIDING THE TRANSACTION SERVICES TO MERCHANT DURING THE SIX (6) MONTHS



PRECEDING THE DATE ON WHICH THE CLAIM AROSE. NOTHING IN THIS AGREEMENT SHALL BE DEEMED TO EXCLUDE OR LIMIT LIABILITY THAT CANNOT BE EXCLUDED OR LIMITED AS A MATTER OF LAW.

EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, MERCHANT EXPRESSLY AGREES THAT SERVICE PROVIDER SHALL NOT BE LIABLE FOR ANY LOSS (HOWEVER OCCURRING, INCLUDING NEGLIGENCE), ARISING FROM OR RELATED TO: (A) MERCHANT'S FAILURE TO PROPERLY ACTIVATE, INTEGRATE OR SECURE MERCHANT'S PAYMENT ACCOUNT(S); (B) FRAUDULENT TRANSACTIONS PROCESSED THROUGH MERCHANT'S PAYMENT ACCOUNT(S); (C) DISRUPTION OF TRANSACTION SERVICES, SYSTEMS, SERVER OR WEBSITE BY ANY MEANS, INCLUDING WITHOUT LIMITATION, DDOS ATTACKS, SOFTWARE VIRUSES, TROJAN HORSES, WORMS, TIME BOMBS, OR ANY OTHER TECHNOLOGY; (D) ACTIONS OR INACTIONS BY ANY THIRD PARTY, INCLUDING WITHOUT LIMITATION, A MERCHANT SERVICE PROVIDER, PAYMENT PROCESSOR OR BANK; OR (E) THE LIMITATION OF THE FUNCTIONING OF ANY TRANSACTION SERVICES OR SOFTWARE, HARDWARE, OR EQUIPMENT ASSOCIATED THEREWITH.

SERVICE PROVIDER MAKES NO REPRESENTATION, WARRANTY OR GUARANTEE WHATSOEVER IN RELATION TO THIRD PARTY PRODUCTS OR SERVICES. MERCHANT'S USE OF THIRD-PARTY PRODUCTS AND SERVICES IS AT MERCHANT'S OWN RISK REGARDLESS OF WHETHER SUCH THIRD-PARTY PRODUCTS OR SERVICES WERE RECOMMENDED BY SERVICE PROVIDER. SERVICE PROVIDER ASSUMES NO RESPONSIBILITY AND EXPRESSLY DISCLAIMS ANY LIABILITY FOR CLAIMS OF LOSS AND/OR FRAUD INCURRED RESULTING FROM THE USE OF OR CONCLUSIONS DRAWN FROM ANY THIRD-PARTY PRODUCT OR SERVICE, REGARDLESS OF WHETHER OR NOT SERVICE PROVIDER IS A RESELLER OF OR REFERRAL AGENT FOR SUCH PRODUCT OR SERVICE.

## **11. ASSIGNMENT**

- a) Merchant may not assign any of its rights under this Agreement or delegate the performance of any of the obligations or duties hereunder, without the prior written consent of Service Provider.
- b) Any attempt by Merchant to so assign, transfer, or subcontract any rights, duties, or obligations arising hereunder shall be void and of no effect.

## **12. NOTICES**

All notices, bills, invoices, or reports required by this Agreement shall be deemed received on (a) the day of delivery if delivered by hand during receiving party's regular business hours or by email before or during receiving party's regular business hours; or (b) on the second business day following deposit in the United States mail, postage prepaid, to the addresses above written.

## **13. ARBITRATION**

If any claim arises out of or relating to this Agreement or the breach thereof the parties having a claim shall agree upon the selection of an arbitrator and a method of arbitration to resolve said



dispute. The arbitrator selected shall be an attorney licensed to practice in Massachusetts or a retired Massachusetts Superior or Appeals Court judge. If no agreement for arbitration is entered into between such parties within ninety (90) days of the receipt of written notice from one to the other requesting arbitration and the appointment of an arbitrator, such claim shall be settled by arbitration in the City of Springfield in accordance with the rules then in effect of the Uniform Arbitration statute adopted by the Commonwealth of Massachusetts, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. Except as otherwise provided herein, each party shall be responsible for its attorney's fees and the cost of arbitration shall be shared equally by the parties in arbitration. The arbitrator shall not have the authority to award punitive damages.

FOR ACTIONS THAT ARE NOT SUBJECT TO MANDATORY ARBITRATION UNDER THIS SECTION, THE PARTIES HERETO SUBMIT AND IRREVOCABLY CONSENT TO THE EXCLUSIVE JURISDICTION OF THE FEDERAL AND STATE COURTS LOCATED IN SPRINGFIELD, MASSACHUSETTS, AND AGREE NOT TO RAISE AND IRREVOCABLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY OBJECTION BASED UPON *FORUM NON CONVENIENS* OR ANY OTHER OBJECTION SUCH PARTY MAY NOW HAVE OR HEREAFTER HAVE TO SUCH JURISDICTION OR VENUE.

EACH PARTY HEREBY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, ANY OTHER TRANSACTION AGREEMENTS, OR THE SUBJECT MATTER HEREOF OR THEREOF. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS (INCLUDING NEGLIGENCE), BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF THE PARTIES HERETO AND THESE PROVISIONS WILL NOT BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY HERETO HEREBY FURTHER WARRANTS AND REPRESENTS THAT SUCH PARTY HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT SUCH PARTY KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.

#### **14. SEVERABILITY**

If any provision of this Agreement shall be held to be illegal, invalid or unenforceable under present or future laws, in the state of Massachusetts or federal law, such provisions shall be fully severable, this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Agreement; and, the remaining provisions of this Agreement shall remain in full force and effect.

#### **15. INDEMNIFICATION**



Subject to the limitations on liability described above, each party shall at its own expense indemnify and hold harmless, and at the other party's request defend such party its affiliates, subsidiaries, successors and assigns officers, directors, employees, sublicensees, and agents from and against any and all claims, losses, liabilities, damages, demand, settlements, loss, expenses and costs (including attorneys' fees and court costs) which arise directly or indirectly out of or relate to (a) any breach of this Agreement, or (b) the gross negligence or willful misconduct of a party or its employees or agents.

## **16. COMPLIANCE BY MERCHANT**

Merchant represents and warrants that it will comply, at Merchant's own expense, with all laws, policies, guidelines, regulations, ordinances, rules applicable to Merchant, this Agreement, end user data, confidential information, privacy, the transactions described herein and/or orders of any governmental authority or regulatory body having jurisdiction over the subject matter hereof, including but not limited to, the Federal Trade Commission.

## **17. MOBILE DEVICE APPLICATION**

If Merchant chooses to download and use any of Service Provider's mobile device application(s), Merchant's use of the application shall be subject to additional usage terms governing such application located within the application service provider's user interface.

## **18. ENTIRE AGREEMENT; AMENDMENT**

This Agreement is the final, complete and exclusive agreement of the parties with respect to the subject matter hereof and supersedes and merges all prior or contemporaneous representations, discussions, proposals, negotiations, conditions, communications and agreements, whether written or oral, between the parties relating to the subject matter hereof and all past courses of dealing or industry custom. No modification of or amendment to this Agreement shall be effective unless in writing and signed by each of the parties.

## **19. WAIVER**

The waiver by either party of a breach of or a default under any provision of this Agreement shall not be effective unless in writing and shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy.

## **20. NO STRICT CONSTRUCTION**

The language used in this Agreement will be deemed to be the language chosen by the parties to express their mutual intent, and no rules of strict construction will be applied against any party.

## **21. COUNTERPARTS**

For the convenience of the parties and to facilitate execution, this Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same document.





## **22. GOVERNING LAW**

This Agreement is to be construed in accordance with and governed by the internal laws of the Commonwealth of Massachusetts without regard to its conflict of laws provisions.

[SIGNATURE PAGE IMMEDIATELY FOLLOWS]



**IN WITNESS WHEREOF**, the parties have signed this Agreement as of the date first set forth above.

**SERVICE PROVIDER**

**MERCHANT**

**Entity Name:** \_\_\_\_\_

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Print Name and Title

\_\_\_\_\_  
Print Name and Title

\_\_\_\_\_  
Email Address for Communications

\_\_\_\_\_  
Phone Number



**Exhibit A**

**Sample Calculation of Monthly Management Fee(s)**

[TO BE PROVIDED UPON REQUEST]