



MERCHANT AGREEMENT

In consideration of the mutual promises and covenants contained in this Merchant Agreement ("Agreement"), the parties agree as follows:

1. Parties. The parties to this Agreement are MERRICK BANK CORPORATION, a Utah industrial loan corporation, whose address is 10705 South Jordan Gateway, Suite 200, South Jordan, Utah 84095 ("Bank"), SIGNATURE CARD SERVICES, a d.b.a. of CKC Holdings, Inc., a California Corporation, whose address is 8360 Melrose Ave., Los Angeles, CA 90069 ("SIGNATURE"), and the Merchant set forth on the Merchant Application form to which this Agreement is attached ("Merchant").

2. Definitions. For the purposes of this Agreement and the Schedules referred to herein, the following definitions apply unless the context otherwise requires:

- (a) Address Verification shall mean a service that allows Merchant to verify the home address of Cardholders with the relevant Issuer.
- (b) Association(s) shall mean VISA USA, Inc. ("Visa"), MasterCard International, Inc. ("MasterCard") and Discover Network ("Discover").
- (c) Authorization shall mean an affirmative response, by or on behalf of an Issuer to a request to effect a Transaction, that a Transaction is within the Cardholder's available credit limit and that the Cardholder has not reported the Card lost or stolen. All Transactions require Authorization.
- (d) Authorization Center shall mean the facility or facilities designated from time to time by Bank or SIGNATURE to which Merchant shall submit all requests for Authorization.
- (e) Business Day shall mean any day other than (i) a Saturday or Sunday, or (ii) a day on which banking institutions in Utah are authorized by law or executive order to be closed (and on which Bank is in fact closed).
- (f) Card(s) shall mean either a Visa, MasterCard or Discover credit card, debit card or other similar card that requires a PIN for identification purposes or pre-paid, stored-value or gift card.
- (g) Cardholder shall mean a person authorized to use a Card.
- (h) Chargeback shall mean a Transaction that Bank returns to Merchant pursuant to this Agreement.
- (i) Forced Sale shall mean a sales Transaction processed without an approved electronic Authorization number being obtained for the full amount of the sales Transaction at the time the Transaction is processed.
- (j) Full Recourse Transactions shall mean mail orders, telephone orders, e-commerce (Internet) orders, Pre-Authorized Recurring Order Transactions, and other "card not present" sales.
- (k) Issuer shall mean a member of an Association that enters into a contractual relationship with a Cardholder for the issuance of one or more Cards.
- (l) Merchant Statement shall mean an itemized monthly statement of all charges and credits to the Operating Account (as that term is defined in Section 9 of this Agreement).
- (m) Mid-Qualified Transactions shall mean: (i) key-entered retail Transactions; (ii) any MasterCard telephone or mail Transaction; and (iii) any Transaction designated as such by the organization designated by Bank to settle Transactions with the Associations
- (n) Non-Qualified Transactions shall mean: (i) any Transaction submitted for processing more than 48 hours past the time the Authorization occurred; (ii) any Transaction missing required data; and (iii) any Transaction designated as such by the organization designated by Bank to settle Transactions with the Associations.
- (o) Normal Transaction shall mean a Transaction in which the Card is swiped through a terminal, register or other device, capturing all of the necessary Card information encoded on the Card's magnetic strip.
- (p) Pre-Authorized Recurring Order Transactions shall mean Transactions that have been pre-authorized by the Cardholder and for which the goods or services are to be delivered or performed in the future by Merchant without having to obtain approval from the Cardholder each time.
- (q) Qualified Transactions shall mean: (i) retail Transactions in which the Card is swiped; (ii) Visa telephone or mail Transactions with Address Verification and order number entered; or (iii) Transactions that are part of a special registered program approved by the Associations.
- (r) Services shall mean the transaction processing services provided by Bank under this Agreement.
- (s) Transaction shall mean the acceptance of a Card or information embossed on the Card for payment for goods sold and/or leased or services provided to Cardholders by Merchant and receipt of payment from Bank, whether the Transaction is approved, declined, or processed as a Forced Sale. The term "Transaction" also includes credits, errors, returns and adjustments.

3. Merchant agrees to participate in program. Merchant agrees to participate in the card processing services program established by Bank.

4. SIGNATURE to provide services to Merchant. During the term of this Agreement, subject to the terms and conditions of this Agreement, SIGNATURE agrees to provide technical documentation and support in order to allow Merchant to accept and process Transactions. SIGNATURE shall provide technical support and customer support for all Transactions, including, without limitation, Authorization, settlement, Chargeback processing and reporting, twenty-four hours each day, seven days each week during the term of this Agreement.

5. Bank to Provide Services to Merchant. Bank agrees to provide Merchant with the Services indicated on *Schedule A*, as amended from time to time by Bank, during the term of this Agreement, subject to the terms and conditions of this Agreement.

6. Independent Contractor. In the performance of its duties hereunder, SIGNATURE shall be an independent contractor, and not an employee or agent of Bank.

7. Compliance with Association Rules. Merchant agrees to comply with the bylaws, rules, regulations, policy statements and guidelines of the Associations.

8. Term. This Agreement shall become effective when all parties sign the Merchant Application form to which this Agreement is attached and, unless sooner terminated, shall remain in effect for a term of three (3) years. This Agreement shall renew automatically for successive terms of three (3) years each, unless any party provides written notice of termination to the other parties at least 90 days prior to the end of the then-current term. All existing obligations, warranties, indemnities and agreements with respect to Transactions entered into before such termination shall remain in full force and effect, and Merchant shall remain liable for all obligations to Cardholders and Bank incurred while this Agreement was in effect.

9. Merchant Operating Account. Prior to accepting any Cards, Merchant shall establish a demand deposit account at Bank, or at a financial institution approved by Bank ("Operating Account"), through which fees, charges and credits due in accordance with this Agreement may be processed. Merchant authorizes Bank to debit all amounts Merchant owes Bank or SIGNATURE hereunder from the Operating Account, whether maintained at Bank or another financial institution, at times deemed appropriate by Bank, through the ACH Banking Network or by a manual debit of the Operating Account. Merchant waives any claims for loss or damage arising out of any such charges or debits to the Operating Account against any other financial institution where the Operating Account is maintained.

10. Reserve Account. Upon, or at any time after, execution of this Agreement, Bank may establish a reserve account at Bank or any other financial institution designated by Bank ("Reserve Account"), for all future indebtedness of Merchant to Bank or SIGNATURE that may arise out of or relate to the obligations of Merchant under this Agreement, including, but not limited to, Chargebacks and fees, in such amount as Bank from time to time may determine in its sole discretion. Bank may fund the Reserve Account by deduction from payments due Merchant or a charge against Merchant's Operating Account or against any of Merchant's accounts at Bank. The Reserve Account will be maintained for a minimum of six months after the date on which this Agreement terminates or until such time as Bank determines that the release of the funds to Merchant is prudent, in the best interest of Bank, and commercially reasonable, and that Merchant's account with Bank is fully resolved. Upon expiration of this six-month period, any balance remaining in the Reserve Account will be paid to Merchant. Bank will inform Merchant in writing of any charges debited to the Reserve Account during this six-month period.

12. Fees. Merchant shall pay Bank all fees specified on *Schedule A*, as amended by Bank from time to time. For each Transaction, Bank will charge Merchant as follows:

- (a) An amount ("Merchant Discount Fees") equal to a specified percentage of the total cash price of each sales and cash withdrawal Transaction ("Merchant Discount Rate");
- (b) A specified amount per Transaction ("Transaction Fee"); and
- (c) A specified amount per Authorization ("Authorization Fee").

The Merchant Discount Rate, Authorization Fees and Transaction Fees are set forth on *Schedule A*. The Merchant Discount Fees are based on sales, not net sales. Different Merchant Discount Rates apply to Qualified, Mid-Qualified and Non-Qualified Transactions, as shown on *Schedule A*. Merchant agrees that Bank will deduct Merchant Discount Fees from the Operating Account or Reserve Account on a daily basis unless a monthly basis is specified on *Schedule A*. Merchant also agrees to pay Bank the amount of any fees, charges or penalties assessed against Bank by any Association or Issuer for Merchant's violation of the by-laws, rules, regulations, guidelines, policy

statements or threshold requirements of such entities. Merchant shall pay Bank for any other services provided to Merchant by Bank and for all other fees shown on *Schedule A*, including, but not limited to monthly minimum fees, Chargeback fees and customer service fees.

13. Billing. All amounts Merchant owes Bank may be charged to the Operating Account or Reserve Account, recouped by adjustment to any credits due to Merchant, or set off against any account or property Bank holds for or on behalf of Merchant.

14. Security Interest. As security for the performance by Merchant of all of its obligations under this Agreement, Merchant hereby grants to Bank a security interest in the funds held in the Operating Account and in the Reserve Account. Merchant will execute and deliver to Bank such documents, in form satisfactory to Bank, as Bank may reasonably request in order to perfect Bank's security interest in the Operating Account and Reserve Account, and will pay all costs and expenses of filing the same or of filing this Agreement in all public filing offices, where filing is deemed by Bank to be necessary or desirable. Bank is authorized to file financing statements relating to the Operating Account and the Reserve Account without Merchant's signature where authorized by law.

15. Power of Attorney. Merchant appoints Bank as its attorney-in-fact to execute such documents as are necessary or desirable to accomplish perfection of any security interests. This appointment is coupled with an interest and shall be irrevocable as long as Merchant owes any amount to Bank or SIGNATURE.

16. Equipment. In processing Transactions, Merchant shall use only equipment or software programs provided or approved by the Authorization Center or SIGNATURE ("equipment") and related equipment installed or approved by SIGNATURE, subject to Bank's approval, and the following additional terms:

(a) The equipment shall be suitable for processing the Services;

(b) Merchant will provide, at Merchant's expense, suitable electric power and telephone services and will pay for any alterations to Merchant's premises required to properly locate Merchant's equipment.

(c) If Merchant is using equipment, Merchant acknowledges receipt of a copy of the equipment User's Guide. Merchant will use and operate the equipment only in accordance with the equipment User's Guide; and

(d) Bank will have no liability to Merchant if any installation is delayed or cannot be completed. SIGNATURE will not have liability to Merchant if any installation is delayed or cannot be completed for reasons not caused by the act or neglect of SIGNATURE. At no time will SIGNATURE's liability exceed the amount of fees collected or reasonably expected to be collected from merchant for this delay period.

17. Documenting Transactions. Merchant shall submit the following information to Bank or Bank's designee in connection with Transaction processing:

(a) The DBA name of Merchant (if any), name of Merchant and Merchant's address;

(b) Merchant's customer service telephone number;

(c) Merchant's Internet address (if applicable);

(d) The Merchant Number assigned to Merchant by Bank;

(e) The Card account number, validation date and/or expiration date of the Card, if one appears on the Card used to effect the Transaction;

(f) The name, address and telephone number of Cardholder; and

(g) Such additional information as may from time to time be required by Bank and/or the relevant Issuer.

Merchant shall not submit a Transaction to Bank (electronically or otherwise) until Merchant has performed its obligations to the Cardholder in connection with the Transaction or obtained Cardholder's consent for a Pre-Authorized Recurring Order Transaction. Merchant shall not transmit any Transaction to Bank that Merchant knows or should have known to be fraudulent or not authorized by the Cardholder. Merchant is responsible for its employees' actions. Merchant may transmit a Transaction that effects a prepayment of services or full prepayment of custom-ordered merchandise, manufactured to a Cardholder's specifications, if Merchant advises Cardholder of the immediate billing at the time of the Transaction and within time limits established by the Associations.

18. Authorization for Transactions. Merchant shall obtain Authorization for Transactions as follows:

(a) **Electronically Transmitted Transaction.** Merchant shall submit each Normal Transaction for Authorization to the Authorization Center using the equipment. The Authorization Center shall authorize or decline a Normal Transaction transmitted for Authorization and shall capture and process for Merchant the information relating to the Normal Transaction. If equipment is inoperable at the time of an Authorization request, the Transaction may be authorized by using the appropriate dial-up facility. In that case, the Transaction shall be entered as a Forced Sale Transaction, provided the approval number is also entered, and Merchant shall be subject to [an additional voice or audio response unit ("ARU") Authorization Fee as outlined on *Schedule A*.

(b) **Full Recourse Transactions.** The following additional requirements apply to Full Recourse Transactions:

(1) All Full Recourse Transactions are at Merchant's risk. As to each Full Recourse Transaction, Merchant warrants to Bank that the person whose name is submitted to Bank as Cardholder either made or authorized another to make the purchase. Upon breach of this warranty, Bank may charge back the Transaction to Merchant. If Bank charges back the Transaction to Merchant: (i) Merchant shall pay Bank the amount of the Transaction, any Chargeback fee set forth on *Schedule A*, plus any Association fine or assessment; and (ii) Bank may charge all such amounts to the Operating Account or Reserve Account without prior notice to Merchant;

(2) All Full Recourse Transactions must be electronically authorized through the Authorization Center and, in addition to the information required in Section 19 of this Agreement, each such request for Authorization also shall include: (i) an Authorization code, if required; (ii) the Cardholder's address and Address Verification results; and (iii) in lieu of the Cardholder's signature, a notation of (A) mail order (MO), (B) telephone order (TO), (C) e-commerce order (EO), or (D) pre-authorized order (PO) on the signature line;

(3) If Merchant accepts a Pre-Authorized Recurring Order Transaction, the Cardholder shall execute and deliver to Merchant a written request for this pre-authorization. This written request shall be maintained by Merchant and made available upon request to Bank. All annual billings must be reaffirmed at least once each year. Merchant shall not deliver goods or perform services covered by a pre-authorization order after receiving notification from the Cardholder that the pre-authorization is canceled or from Bank that the Card covering the pre-authorization is not to be honored; and

(4) Merchant shall verify Cardholder's address from the Association network. For telephone or mail order sales, Merchant shall transmit a ticket/invoice number and shall do an Address Verification to qualify for the Qualified Transaction discount rate.

19. Prohibited Transactions. Merchant shall not do any of the following with respect to any Transaction:

(a) Impose a surcharge on a Cardholder who elects to use a Card in lieu of payment by cash, check or other mode of payment;

(b) Charge a Cardholder more than the amount the Cardholder would pay if payment were made by cash or check;

(c) Establish a minimum or maximum dollar Transaction amount;

(d) Obtain multiple Authorizations for amounts less than the total sale amount;

(e) Obtain Authorization for purposes of setting aside Cardholder's credit line for use in future sales;

(f) Extend credit for or defer the time of payment of the total cash price in any Transaction;

(g) Honor a Card except in a Transaction where a total cash price is due and payable;

(h) Make any special charge to or extract any special agreement or security from any Cardholder in connection with any Transaction;

(i) Transmit or accept for payment any Transaction that was not originated directly between Merchant and a Cardholder for the sale or lease of goods or the performance of services of the type indicated in the Merchant Application form to which this Agreement is attached;

(j) Honor or accept a Card as payment for any legal services or expenses arising out of or related to: (i) the defense of any crime other than a traffic violation; (ii) any domestic relations matter where such services or expenses are furnished to a person whose name is not embossed on a Card; or (iii) any bankruptcy, insolvency, compromise, composition or other process affecting Cardholder's creditors;

(k) Use Merchant's own Card, or one to which Merchant has access, to process a Transaction for the purpose of obtaining credit for Merchant's own benefit;

(l) Redeposit a previously charged Transaction, regardless of whether the Cardholder consents;

(m) Initiate a Transaction credit without a balance in the Operating Account equal to the credit;

(n) Use the equipment or any data received thereon for any other purpose other than for determining whether or not Merchant should accept checks or Cards in connection with a current sale or lease of goods or services;

(o) Use the equipment or any data received thereon for credit inquiry purposes or any other purpose not authorized by this Agreement;

(p) Draw or convey any inference concerning a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living when any Card or check is processed as non-accepted;

(q) Disclose any information obtained through the equipment to any person except for necessary disclosures to affected Cardholders, Bank and/or the Issuer;

(r) Add any tax to Transactions unless applicable law expressly requires that Merchant be permitted to impose a tax. Any tax, if allowed, must be included in the Transaction amount and not collected separately;

(s) Disburse funds in the form of travelers cheques, if the sole purpose is to allow the Cardholder to make a cash purchase of goods or services from Merchant;
(t) Disburse funds in the form of cash;
(u) Accept a Card to collect or refinance an existing debt;
(v) Issue a transaction credit in respect of goods or services acquired in a cash transaction which are returned; or
(w) Make any cash refund to a Cardholder who has made a purchase with a Card. All transaction credits will be issued to the same Card account number as the sale.

20. Prohibition of Furnishing Account Information.

Merchant shall not, without the Cardholder's consent, sell, purchase, provide or exchange Card account number information in the form of Transaction documents, carbon copies of imprinted Transaction documents, mailing lists, tapes, journal rolls or other media obtained by reason of a Card to any third party.

21. Daily Reconciliation of Transactions.

(a) **Electronically Transmitted Transactions.** Transactions will be settled on a daily basis. Bank shall deliver payment to Merchant as soon thereafter as practicable by a credit to the Operating Account equal to the reconciled summary Transaction total of all of Merchant's total summary Transactions since the previous credit. This credit will be reduced, if necessary, by: (i) the sum of all Cardholder charges denied, refused or charged back; (ii) all refunds processed on account of Cardholders during said time period; (iii) the fees and charges, including Chargebacks, Merchant owes Bank or SIGNATURE hereunder; (iv) all taxes, penalties, charges and other items incurred by Bank that are reimbursed pursuant to this Agreement; and (v) all applicable rates, fees and charges described on *Schedule A*.

(b) **Reconciliation of Transactions.** Merchant shall reconcile each settled Transaction within fifteen (15) days after the date on which such Transaction is submitted to Bank for payment, and shall notify Bank and SIGNATURE immediately of any discrepancies or errors Merchant notes as a result of such reconciliation. Neither Bank nor SIGNATURE shall have any responsibility or liability for Transaction-related errors or omissions that are brought to their attention more than thirty (30) days after the date on which the Transaction to which such error or omission relates is first presented to Bank for settlement.

(c) **Provisional Credit.** Any credits to the Operating Account are provisional only and subject to revocation by Bank until such time that the Transaction is final and no longer subject to Chargeback by the Issuer, Cardholder or Associations. Bank may withhold payment for a Transaction to Merchant, for any reason, until such time as the Transaction has been verified as legitimate by the relevant Issuer or Bank and/or SIGNATURE receive adequate supporting documentation from Merchant to authenticate the Transaction and mitigate Chargeback risk.

22. Adjustments and Returns. Merchant will maintain a fair exchange and return policy and make adjustments with respect to goods and services sold and/or leased to its customers whenever appropriate. If goods are returned, or services are terminated or canceled, or any price is adjusted, Merchant will prepare and transmit a credit or return Transaction, either electronically or by paper, for the amount of the adjustment as a deduction from the total amount of Transactions transmitted that day. If the amount of credit or return Transactions exceeds the amount of sales Transactions, Merchant shall pay Bank the excess. Merchant shall make no cash refunds on Transactions and shall handle all credit adjustments as provided in this Section 24. If no refund or return will be given, Cardholder must be advised in writing that the sale is a "final sale" and "no returns" are permitted at the time of the Transaction. Cardholder also must be advised in writing of any policy of Merchant that provides for no-cash refunds and in-store credit only. Merchant shall follow Association reservation/no-show policies. Merchant shall notify Cardholders in writing of this policy on all advance reservations. Merchant also shall notify Cardholders at the time of the reservation of the exact number of days required for reservation deposit refunds.

23. Chargebacks. The acceptance by Bank of any Transaction processed in accordance with the terms of this Agreement shall be without recourse to Merchant, except for:

- (i) Full Recourse Transactions; (ii) as otherwise indicated in this Agreement; and (iii) as follows:
 - (a) No specific prior Authorization for the Transaction was obtained from the Authorization Center, the approval number does not appear in the electronic transmittal that is maintained by Bank, or the Transaction was submitted to the Bank or SIGNATURE thirty (30) days or more after the date on which the goods and/or services to which the Transaction relates were purchased or leased by the relevant Cardholder;
 - (b) The Transaction was based on a pre-authorization form and the Card on which the Authorization was based has been canceled and Merchant was so notified prior to the Transaction;
 - (c) The Card giving rise to the Transaction was canceled and prior to, or at the time of, the Transaction, and Merchant received notice of the cancellation through the electronic terminal, in writing or otherwise;
 - (d) The Card expired prior to the date of the Transaction or the date of Transaction was prior to the validation date, if any, indicated on the Card;
 - (e) The information required in Sections 17 and 18(b) above was not submitted to Bank;
 - (f) Bank or Issuer has received a complaint from or on behalf of a Cardholder stating that there is an unresolved dispute or defense to a charge (whether or not valid) between Merchant and Cardholder;
 - (g) The Cardholder makes a written complaint to Bank or Issuer that the Cardholder did not make or authorize the Transaction;
 - (h) A setoff or counterclaim of any kind exists in favor of any Cardholder against Merchant that may be asserted in defense of an action to enforce payment against the Cardholder in a Transaction;
 - (i) The Transaction was made at or by a Merchant other than Merchant named in this Agreement;
 - (j) The Transaction otherwise violates the terms of this Agreement or any other Association or Issuer bylaw, rule, regulation, policy or guideline;
 - (k) A Transaction is charged back by an Issuer; or
 - (l) Any representation or warranty made by Merchant in connection with the Transaction is false or inaccurate in any respect.

In any such case, Bank shall not be obligated to accept a Transaction for credit to the Operating Account. If Bank has credited the Operating Account or Reserve Account for such a Transaction, Bank may return the Transaction to the Merchant, and Merchant shall pay Bank the amount of the Transaction. Merchant agrees that Bank, without prior notice to Merchant, may (i) charge the amount of the Transaction to the Operating Account or Reserve Account; (ii) recoup the amount of the Transaction by adjustment of the credits due to Merchant; or (iii) set off the amount of the Transaction against any account or property Bank holds for or on behalf of Merchant. If Merchant disagrees with Bank's decision to charge back a Transaction, Merchant must so notify Bank in writing within 10 days of the Chargeback, and provide documentation that the dispute has been resolved to Cardholder's satisfaction or proof that a credit has been issued.

Without limiting the generality of any other provision of this Agreement, if Bank or SIGNATURE, if SIGNATURE has indemnified Bank, takes legal action against Merchant for any Chargebacks or any amounts due Bank or SIGNATURE hereunder, Merchant shall pay the costs and attorneys' fees incurred by Bank and/or SIGNATURE, whether suit is commenced or not.

24. Merchant Statement. At least once per month, Bank shall provide Merchant with a statement (the "Merchant Statement"). All information appearing on the Merchant Statement shall be deemed accurate and affirmed by Merchant unless Merchant objects by written notice specifying the particular item in dispute within 30 days of the date of the Merchant Statement.

25. Retention of Original Sales Information. Merchant shall retain the information required by Sections 19 and 20(a) for seven years from the date of the Transaction. At the request of Bank, Merchant shall provide such information to Bank or SIGNATURE, as directed by Bank, within five (5) days of receipt of a request from Bank. Failure to meet such time frame or non-delivery of any item or delivery of an illegible copy of an item requested by an Issuer shall constitute a waiver by Merchant of any claims and may result in an irrevocable Chargeback for the full amount of the Transaction.

26. Recovery of Cards. Merchant will use its best efforts to reasonably and peaceably recover and retain any Card for which Merchant receives notification of cancellation, restrictions, theft or counterfeiting. This notice may be given: (i) electronically through the equipment; (ii) by the Authorization Center through any means; or (iii) by listing on any canceled Card or restricted Card list. Merchant shall also take reasonable steps to recover a Card which it has reasonable grounds to believe is counterfeit, fraudulent or stolen.

27. Customer Complaints. Merchant shall respond promptly to inquiries from Cardholders and shall resolve any disputes amicably. If unresolved disputes occur with a frequency unacceptable to Bank, Bank may terminate this Agreement. Bank reserves the right to charge Merchant reasonable fees and reimbursement on account of excessive Cardholder inquiries, refunds or Chargebacks. Merchant agrees to maintain the following information in writing with respect to each claim or defense asserted by a Cardholder for which Merchant has received notice:

- (a) The Cardholder's name;
- (b) The Card account number;
- (c) The date and time the Cardholder asserted the claim or defense;
- (d) The nature of the claim or defense; and
- (e) The action that Merchant took in an attempt to resolve the dispute.

Upon request, Merchant shall furnish Bank with this information in writing within 10 days.

28. Confidentiality. Merchant shall treat all information received in connection with this Agreement as confidential. Merchant shall prevent the disclosure of this information except for necessary disclosures to affected Cardholders, to Bank, to SIGNATURE and to Issuers.

29. Associations' and Issuers' Requirements. Merchant shall comply with all bylaws, rules, regulations, policies and guidelines of the Associations and any Issuer whose Cards are used to process Transactions in accordance with this Agreement. Merchant will display prominently at its place of business Card emblems and other promotional material and literature provided by Bank directly or through SIGNATURE. Subject to the prior written consent of Bank and upon such conditions as authorized by Bank, Merchant may use Card service marks or design marks in its own advertisement and promotional materials.

30. Compliance with Applicable Law. Merchant represents and warrants that it has obtained all necessary regulatory approvals, certificates and licenses to sell any product or provide any service it intends to offer, and that it is in compliance with the Telephone Disclosure and Dispute Resolution Act and the regulations of the Federal Trade Commission and the Federal Communications Commission. Merchant shall comply with all present and future federal, state and local laws and regulations pertaining to Transactions, including, without limitation, the Federal Fair Credit Reporting Act, the Federal Truth-in-Lending Act, the Electronic Fund Transfers Act and the Federal Equal Credit Opportunity Act, as amended.

31. Taxes. Each party hereto shall report its income and pay its own taxes to any applicable jurisdiction. If Bank or SIGNATURE are required to pay any taxes, interests, fines or penalties owed by Merchant, said amount shall become immediately due and payable by Merchant to Bank or SIGNATURE. If excise, sale or use taxes are imposed on the Transactions, Merchant shall be responsible for the collection and payment thereof. Bank or SIGNATURE shall be entitled to recover any of said taxes paid by it on behalf of Merchant from Merchant immediately after payment.

32. Limitation of Liability. In addition to all other limitations on the liability of Bank and SIGNATURE contained in this Agreement, neither Bank nor SIGNATURE shall be liable to Merchant or Merchant's customers or any other person for any of the following:

- (a) Any loss or liability resulting from the denial of credit to any person or Merchant's retention of any Card or any attempt to do so;
- (b) Any loss caused by a Transaction downgrade resulting from defective or faulty equipment regardless if owned by Bank, SIGNATURE or Merchant;
- (c) The unavailability of Services caused by the termination of contracts with computer hardware vendors, processors or installers, whether terminated by Bank, SIGNATURE or any other person for any reason; or
- (d) Interruption or termination of any Services caused by any reason except for failure of SIGNATURE to repair or replace equipment at Merchant's expense; or
- (e) Equipment has been modified by any other party.

At no time will SIGNATURE's liability exceed the amount of fees collected or reasonably expected to be collected from merchant for this delay period. .

NEITHER BANK NOR SIGNATURE SHALL BE LIABLE FOR ANY LOST PROFITS, PUNITIVE, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES TO MERCHANT OR TO ANY THIRD PARTY IN CONNECTION WITH OR ARISING OUT OF THIS AGREEMENT OR ANY OF THE SERVICES TO BE PERFORMED BY BANK OR SIGNATURE PURSUANT TO THIS AGREEMENT.

MERCHANT ACKNOWLEDGES THAT BANK HAS PROVIDED NO WARRANTIES, EITHER EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO ANY EQUIPMENT AND THAT BANK HAS NO LIABILITY WITH RESPECT TO ANY EQUIPMENT. BANK MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE SERVICES IT PROVIDES HEREUNDER. SHOULD THERE BE ERRORS, OMISSIONS, INTERRUPTIONS OR DELAYS RESULTING FROM BANK'S OR SIGNATURE'S PERFORMANCE OR FAILURE TO PERFORM OF ANY KIND, BANK'S AND SIGNATURE'S LIABILITY SHALL BE LIMITED TO CORRECTING SUCH ERRORS IF COMMERCIALY REASONABLE OR SUPPLYING SUCH OMISSIONS IN THE WORK PRODUCT IN WHICH THEY HAVE OCCURRED.

33. Limitation on Damages. In no case shall Merchant be entitled to recover damages from SIGNATURE or Bank that exceed the fees retained by Bank and SIGNATURE pursuant to this Agreement during the six month period immediately prior to the event giving rise to the claim for damages.

34. Indemnification. Merchant agrees to indemnify and hold Bank and SIGNATURE harmless from any and all losses, claims, damages, liabilities and expenses, including attorneys' fees and costs (whether or not an attorney is an employee of Bank or Bank's affiliates, SIGNATURE or affiliates of SIGNATURE) arising out of any of the following:

- (a) Merchant's failure to comply with this Agreement;
- (b) Any act or omission of Merchant;
- (c) Merchant's failure to comply with the equipment's User's Guide;
- (d) Merchant's failure to comply with any bylaw, rule, regulation, guideline or policy of any Association or Issuer;
- (e) Merchant's failure to comply with any applicable law, rule or regulation;
- (f) Any dispute concerning the quality, condition or delivery of any merchandise or the quality of performance of any service;
- (g) The fraud or dishonesty of Merchant or Merchant's employees, licensees, successors, agents and/or assigns;
- (h) Merchant's selection of an Internet service provider or other telecommunication services provider;
- (i) The theft of or damage or destruction to any equipment; or
- (j) Full Recourse Transactions, unauthorized Transactions and prohibited Transactions.

35. Credit Investigation and Bank Auditing. Bank may audit, from time to time, Merchant's compliance with the terms of this Agreement. Merchant shall provide all information requested by Bank to complete Bank's audit. Merchant authorizes parties contacted by Bank to release the credit information requested by Bank, and Merchant agrees to provide Bank a separate authorization for release of credit information, if requested. Merchant shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Merchant's financial condition. Such information shall be true, complete and accurate. [Without limiting the generality of the foregoing, Merchant shall provide to Bank and SIGNATURE its balance sheet and income statements not less frequently than every three calendar months during the term of this Agreement.]

36. Termination of Agreement by Bank and SIGNATURE. Bank may terminate this Agreement upon at least 30 days' prior written notice to the other parties. In addition, Bank and SIGNATURE jointly may terminate this Agreement without notice to Merchant under any of the below listed circumstances. Any such notice of termination by Bank is effective upon mailing.

- (a) Any information concerning Merchant obtained by Bank is unsatisfactory to Bank in Bank's sole discretion;
- (b) Any act of fraud or dishonesty is committed by Merchant, its employees and/or agents, or SIGNATURE or Bank believes in good faith that Merchant, its employees and/or agents have committed, are committing or are planning to commit any acts of fraud or misrepresentation;
- (c) Chargebacks are excessive in the opinion of Bank;
- (d) Breach of this Agreement by Merchant;
- (e) Any representation or warranty made by Merchant in this Agreement is not true and correct;
- (f) Merchant files a petition under any bankruptcy or insolvency law;
- (g) Merchant fails to maintain sufficient funds in the Operating Account to cover the amounts due to Bank hereunder;
- (h) Merchant's percentage of error Transactions or retrieval requests is excessive in the opinion of Bank;
- (i) Any insurance policy obtained by Bank, SIGNATURE or Merchant relating to Transactions and/or Chargebacks is cancelled or terminated for any reason;
- (j) Merchant fails to provide financial statements suitable to Bank on request; or
- (k) SIGNATURE does not or cannot perform its duties under this Agreement and Bank determines that it is not feasible to provide to Merchant the Services contemplated by this Agreement. Bank is not obligated to provide replacement Services if SIGNATURE does not or cannot perform.

Bank may selectively terminate one or more of Merchant's approved locations without terminating this entire Agreement. In the event of termination, all obligations of Merchant incurred or existing under this Agreement prior to termination shall survive the termination. Merchant's obligations with respect to any Transaction shall be deemed incurred and existing on the transaction date of such Transaction.

37. Termination of Agreement by Merchant. Merchant may terminate this Agreement upon at least 30 days' prior written notice to the other parties if Bank amends *Schedule A* pursuant to Section 40 to increase the rates, fees or charges Merchant pays hereunder, except for fees or rates that result from a pass through from an Association.

38. Setoff. In addition to any other legal or equitable remedy available to it in accordance with this Agreement or by law, Bank and/or SIGNATURE may set off any amounts due to Bank and/or SIGNATURE under this Agreement against any property of Merchant in the possession or control of Bank or SIGNATURE.

39. Exclusivity. Merchant shall submit all Transactions made during the term hereof solely to Bank for processing. If Merchant fails to comply with this provision, Merchant agrees to pay Bank, within 10 days of the date of non-compliance, a liquidated damages sum to be determined by computing the projected gross dollar volume of Transactions processed by Bank on behalf of the Merchant for the remainder of the term hereof and multiplying that number by 1%. Merchant and Bank agree that the damages suffered by

Bank as a result of such non-compliance would be extremely difficult to calculate with precision. For that reason, the parties hereto agree that the liquidated damages should be computed as set forth above. Any exceptions to this exclusive arrangement must be approved by Bank and SIGNATURE in advance in writing.

40. Amendments to this Agreement. From time to time Bank may amend this Agreement as follows:

(a) **Amendment to Cards and/or Services.** Bank may amend or delete Cards or Services listed in *Schedule A* by notifying Merchant in writing of any such amendment. All provisions of this Agreement shall apply to Cards or Services added to this Agreement. Bank shall notify Merchant of the fees to be charged for processing the additional Cards and Services. Acceptance by Merchant of a new approved Card as payment for a Transaction or use of a new Service after Bank has sent Merchant notice of an amendment shall constitute Merchant's agreement to the amendment and the fees or charges related to these additions.

(b) **Amendment to Fees and Charges.** From time to time, Bank may change all rates, fees and charges set forth on *Schedule A*. Bank will provide written notice to Merchant of all such amendments. Bank may change the rates, fees and charges without prior written notice if Merchant's sales volume or average Transaction amount does not meet Merchant's projections contained in the Merchant Application form to which this Agreement is attached. If notice is required, Bank will give written notice on the Merchant Statement. All new rates, fees and charges will become effective for the month immediately following the month in which the notice appeared on the Merchant Statement unless Merchant terminates this Agreement in accordance with Section 37.

(c) **Amendments to all other Provisions.** Bank may amend this Agreement in any manner other than as described in Section 40(a) or 40(b) above simply by providing written notice of such amendment to Merchant, and such amendment shall become effective on the latter of: (i) the date on which such written notice is received by Merchant; or (ii) a date specified by Bank in such written notice.

41. Assignment. This Agreement may not be assigned by Merchant without the prior written consent of Bank. Bank may assign this Agreement without limitation.

Assignment of this Agreement by Bank shall relieve Bank of any further obligations under this Agreement.

42. Financial Accommodations. Bank, SIGNATURE and Merchant intend this Agreement to be construed as a contract to extend financial accommodations for the benefit of Merchant.

43. Waiver. To the extent that Merchant becomes a debtor under any chapter of title 11 of the United States Code and such event does not result in the termination of this Agreement, Merchant hereby unconditionally and absolutely waives any right or ability that Merchant may otherwise have had to oppose, defend against or otherwise challenge any motion filed by Bank for relief from the automatic stay of 11 U.S.C. § 362(a) to enforce any of Bank's rights or claims under this Agreement.

44. Cooperation. In their dealings with one another, each party agrees to act reasonably and in good faith and to fully cooperate with each other in order to facilitate and accomplish the transactions contemplated hereby.

45. Entire Agreement. This Agreement, together with the Schedules attached hereto, supersedes any other agreement, whether written or oral, that may have been made or entered into by any party (or by any officer or officers of any party) relating to the matters covered herein and constitutes the entire agreement of the parties hereto.

46. Severability. If any provisions of this Agreement shall be held, or deemed to be, or shall in fact be, inoperative or unenforceable as applied in any particular situation, such circumstance shall not have the effect of rendering any other provision or provisions herein contained invalid, inoperative or unenforceable to any extent whatsoever. The invalidity of any one or more phrases, sentences, clauses or sections herein contained shall not affect the remaining portions of this Agreement or any part hereof.

47. Notices. Except for notices provided by Bank to Merchant on the Merchant Statement, all notices, requests, demands or other instruments which may or are required to be given by any party hereunder shall be in writing and each shall be deemed to have been properly given when (i) served personally on an officer of the party to whom such notice is to be given, (ii) upon expiration of a period of three (3) Business Days from and after the date of mailing thereof when mailed postage prepaid by registered or certified mail, requesting return receipt, or (iii) upon delivery by a nationally recognized overnight delivery service, addressed as follows:

If to BANK:

Merrick Bank Corporation
10705 South Jordan Gateway, Suite 200
South Jordan, Utah 84095

With a Copy to:

Mr. Fred Horn
Merrick Merchant Services
101 Crossways Park Boulevard
Woodbury, New York 11797

If to SIGNATURE:

Signature Card Services
8360 Melrose Ave.
Third Floor
Los Angeles, CA 90069

If to MERCHANT:

Address listed on Merchant Application

Any party may change the address to which subsequent notices are to be sent by notice to the others given as aforesaid.

48. Governing Law. This Agreement shall be governed and construed in accordance with the laws of the State of Utah, without regard to internal principles of conflict of laws, and federal law.

49. Captions. Captions in this Agreement are for convenience of reference only and are not to be considered as defining or limiting in any way the scope or intent of the provisions of this Agreement.

50. No Waiver. Any delay, waiver or omission by Bank to exercise any right or power arising from any breach or default of the other party in any of the terms, provisions or covenants of this Agreement shall not be construed to be a waiver of any subsequent breach or default of the same or any other terms, provisions or covenants on the part of the other party. All remedies afforded by this Agreement for a breach hereof shall be cumulative.

51. Force Majeure. The parties shall be excused from performing any of their respective obligations under this Agreement which are prevented or delayed by any occurrence not within their respective control including but not limited to strikes or other labor matters, destruction of or damage to any building, natural disasters, accidents, riots or any regulation, rule, law, ordinance or order of any federal, state or local government authority.