

# Merchant Account Application Check List

**Please complete and fax all of the items listed below to 801-717-9935.**

\_\_\_\_\_ Complete & Signed Merchant Application (All owners must sign all documents requiring signatures. Leave any fields blank that you are unsure about.)

\_\_\_\_\_ Complete General Business Information Form

\_\_\_\_\_ Voided Check or Letter from Bank (Check must be pre-printed, or if sending letter from bank, letter must be on bank letterhead and include the merchant's account number and routing number, state the account is in good standing, and must be signed by a bank official.)

\_\_\_\_\_ Enlarged Legible Drivers License Copy (Color copy if possible)

\_\_\_\_\_ 3 Months Merchant Statements (Only applicable for accounts that have processed credit cards with other merchant accounts in the past.)

\_\_\_\_\_ Letters of Incorporation or Copy of the Business License

\*\*Further Information maybe required for accounts with monthly volume of \$100,000.00+ or accounts that fall in the high risk, highly discouraged business/products, or if merchant's/officer's/owner's credit is questionable and/or poor.

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**Merchant Profile Analysis**

*Please answer the questions as completely as possible. An incomplete profile will delay the processing of your application.*

Name of Business: \_\_\_\_\_

1. Describe **in detail** the products or services you are selling:

\_\_\_\_\_  
\_\_\_\_\_

2. Explain how and where you advertise your products or services (Please supply examples of any brochures, catalogs, web pages or any other item used for marketing):

\_\_\_\_\_  
\_\_\_\_\_

3. Describe where inventory is stored and how you fill your orders (if applicable):

\_\_\_\_\_  
\_\_\_\_\_

4. If your product is drop-shipped, please provide the **name**, **address** and **telephone number** for the company that will be drop-shipping for you:

\_\_\_\_\_  
\_\_\_\_\_

5. Please explain, in detail, exactly what you will be charging the customer for:

\_\_\_\_\_  
\_\_\_\_\_

6. For those providing a service, please explain billing policies (i.e. **one time fee or monthly**):

\_\_\_\_\_  
\_\_\_\_\_

7. How far in advance will charges be made prior to fulfillment (shipping):

\_\_\_\_\_  
\_\_\_\_\_

8. What is your cancellation policy and how do you advise a customer of your policy?

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9. What is your refund policy, how long do your customers have to receive a refund and how should refunds be requested (written, verbal, 30-day etc.)

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**I/We acknowledge that regardless of the refund/return policy used, My/Our merchant account will be handled in accordance with VISA and MasterCard regulations regarding returns and chargebacks as outlined in the Merchant BankCard Agreement.**

Customer Signature: \_\_\_\_\_ Title: \_\_\_\_\_ Date: \_\_\_\_\_

Customer Signature: \_\_\_\_\_ Title: \_\_\_\_\_ Date: \_\_\_\_\_

*Should we have a question on any of your answers, what number should we use to contact you?*

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Terminal/ Gateway/ Software

Merchant Number

NMI Gateway

**Business Information**

Merchant's DBA:	Merchant's Legal Name:
Physical Address (No P.O. Box):	Legal Address:
City, State, Zip:	City, State, Zip:
DBA Phone: Fax:	Corp. Phone: Fax:
Customer Service Phone #: Contact:	Web Address: E-mail:

**Merchant Profile**

Type of Ownership:  Sole Proprietor  Partnership  LLC  
 Professional Assoc.  Corporation  Tax Exempt (501C)

Type of Goods or Services Sold: SIC Code:

Years in business/ Ownership? Federal Tax ID #

Do you currently accept Visa/MasterCard/Discover?  Yes  No

Do you accept prepayment for product or service?  Yes  No

Do you offer warranties, dues, subscriptions, memberships or extended services?  Yes  No

Monthly Visa/MC/Discover Sales: \$ Average Ticket: \$

**Visa/ MasterCard/ Discover®/ AMEX Information**

Market Type: <input type="checkbox"/> Retail <input type="checkbox"/> Supermarket <input type="checkbox"/> Restaurant <input type="checkbox"/> Emerging Mkt <input type="checkbox"/> Lodging <input type="checkbox"/> Public Sector <input type="checkbox"/> MO/TO <input type="checkbox"/> Auto Rental <input type="checkbox"/> P - Card <input type="checkbox"/> Cash Adv. <input type="checkbox"/> E-Commerce <input type="checkbox"/> Other	Sales Profile (must = 100%)	
	Card Present/ Swiped	%
	Manually Keyed with imprint	%
	Mail Order/ Telephone/ Internet	%

% sales in this category? \_\_\_\_\_ % cost that is prepayment: \_\_\_\_\_

Duration of benefits (in weeks): \_\_\_\_\_

Total Visa/MC/Discover Sales (multiple locations only): \$

**Member Bank (Acquirer) Information:**

National Bank of California - 145 S Fairfax Ave. Los Angeles, CA 90036 - (323) 655-6001

**Important Member Bank Responsibilities**

1. A Visa Member is the only entity approved to extend acceptance of Visa products directly to a merchant.
2. A Visa Member must be a principal (signer) to the Merchant Agreement.
3. The Visa Member is responsible for educating Merchants on pertinent Visa Operating Regulations with which Merchants must comply.
4. The Visa Member is responsible for and must provide settlement funds to the Merchant.
5. The Visa Member is responsible for all funds held in reserve that are derived from settlement.

**Important Merchant Responsibilities**

1. Ensure compliance with cardholder data security and storage requirements.
  2. Maintain fraud and chargebacks below thresholds.
  3. Review and understand the terms of the Merchant Agreement.
  4. Comply with Visa Operating Regulations.
- The responsibilities listed above do not supersede terms of the Merchant Agreement and are provided to ensure the Merchant understands these specific responsibilities.

**Cardholder Data Storage Compliance & Service Provider**

\*\*\*\*\* PCI DSS and card association rules prohibit storage of track data under any circumstances. If you or your POS system pass, transmit, store or receive full cardholder's data, then the POS software must be PA DSS (Payment Application Data Security Standard) compliant or you (merchant) must validate PCI DSS compliance (see 1(b) below and questions 3 and 4 must be completed). If you use a payment gateway, they must be PCI DSS compliant.\*\*\*\*\*

1. Have you ever experienced an Account Data Compromise "ADC"?  Yes  No Date of compromise? \_\_\_\_\_  
a) Have you validated PCI DSS (Payment Card Industry Data Security Standard) compliance?  Yes  No If yes, go to 1(b); If no, go to #2  
b) Date of compliance, Report on Compliance "ROC" or Self Assessment Questionnaire "SAQ"? 12/2010  
c) What is the name of your Qualified Security Assessor "QSA" Security Metrics or Self Assessment Questionnaire "SAQ"? A, B, C, or D  
d) Date of last scan 12/2010 Approved Scanning Vendor's name: Security Metrics
2. Are you using a "dial-up" terminal or "TTC" Touch Tone Capture?  Yes  No
3. Do you or your Service Provider(s) receive, pass, transmit or store the Full Cardholder Number "FCN", electronically?  Yes  No  
a) If yes, where is card data stored?  Merchant's location only  Merchant's Headquarters/Corp office only  
 Primary Service Provider  Both Merchant and Service Provider(s)  Other Service Provider  All Apply
4. What Primary Service Provider/Software Developer did you purchase your point of sale "POS" application from (ie software, gateway)? NMI  
a) What is the name of the Service Provider/Software Developer's application? NMI Software Version #? \_\_\_\_\_  
b) Do your transactions process through any other Service Provider (ie web hosting companies, gateways, corporate office)?  Yes  No  
c) If yes, name the other Service Provider? NMI

**Merchant Site Survey Report (To be Completed by Sales Representative)**

Merchant Location:  Retail Location with Store Front  Office Building  Residence  Other: \_\_\_\_\_

Surrounding Area:  Commercial  Industrial  Residential Does product and inventory appear legitimate?  YES  NO

Does the Merchant use a Fulfillment House?  YES  NO If yes, was the Fulfillment House inspected?  YES  NO

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

Rep Code: 658 K Rep Name: JR Cook Rep Signature: X Date: \_\_\_\_\_

Billing disputes must be forwarded, in writing, to Customer Service within 60 days of the date of the statement and/or notice.

Complete Merchant Solutions, LLC is a Registered ISO/TPA/MSP of National Bank of California



## Merchant Services General Terms and Conditions

These terms and conditions, and the Merchant Application (hereinafter known as the "Agreement") is entered into by and among CMS, LLC., Sponsor Financial Institution ("Bank") and the business entity indicated on the Merchant Application ("Merchant"). The Agreement shall become effective on the date executed by a duly authorized representative of CMS. CMS, Bank and Merchant shall be collectively known as the "Parties."

**WHEREAS**, Bank as a member of VISA, U.S.A., Inc. ("VISA") and MasterCard Worldwide ("MasterCard") and Discover® provides transaction processing and other services and products in relation to financial services provided by VISA, MasterCard and Discover and other card associations ("Card Associations"); and

**WHEREAS**, CMS, through Bank provides credit card processing services; and

**WHEREAS**, Merchant is engaged in the business of selling goods and services and desires that CMS provide one or more Merchant Services to Merchant on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual promises made herein and other valuable consideration, receipt and sufficiency of which are hereby acknowledged, the Parties do hereby agree as follows:

### ARTICLE 1. GENERAL PROVISIONS

1. DEFINITIONS: For purposes of this Agreement, the following definitions shall apply to this Application and General Provisions article:

- 1.1 "ACH" - The Federal Reserve Bank's Automated Clearing House.
- 1.2 "Application" - the document titled, Merchant Services Application, executed and delivered to CMS by Merchant, upon which Merchant's acceptability for Merchant Services was evaluated.
- 1.3 "Chargeback" - For Credit cards, the procedure by which an issuer charges all of or part of the amount of a transaction back to the Merchant.
- 1.4 "Credit Card" - Credit cards and signature debit cards used as the method of payment for a transaction or purchase.
- 1.5 "Credit Voucher" - Merchant's record of return or refund to be credited to cardholder's account.
- 1.6 "Goods and Services" - those goods and/or services for which Merchant is authorized by CMS to utilize CMS's services.
- 1.7 "Merchant Account" - the CMS Account or commercial demand deposit checking account designated by Merchant for use in conjunction with Merchant Services.
- 1.8 "Merchant Services" - the services provided to Merchant by CMS under this Agreement.
- 1.9 "Original Agreement" - The PDF file of the Agreement identified by the footer information maintained by CMS's legal department.
- 1.10 "POS" - means point of sale.
- 1.11 "CMS Account" - The Merchant Account or Merchant Services representing the settlement of the proceeds from Merchant's transactions processed under and subject to the terms of this Agreement is referred to herein as the CMS Account. Funds in the CMS Account will not bear interest.
- 1.12 "Sales Draft" - for Credit Card, Merchant's record of a cardholder purchase.
- 1.13 "Transaction Fee"- for Credit Card services means the fee charged for each transmission initiated from Merchant to CMS.
- 1.14 "Visa" and "MC" - Visa U.S.A. and MasterCard Worldwide.

2. AMENDMENTS AND MODIFICATIONS TO AGREEMENT: Merchant agrees that this Agreement may be amended and modified by Bank and/or CMS from time to time. Any material amendments and modifications shall be signed by CMS and delivered to Merchant, in writing, and shall become effective on the day of receipt by Merchant. Submission of a Credit Card transaction by Merchant for determination of eligibility for approval hereunder on or after the effective date of any such amendment or modification shall constitute Merchant's acceptance of, and agreement to, such amendment or modification.
3. TERMINATION OF AGREEMENT: This Agreement takes effect on the earlier of (I) our acceptance hereof (as evidenced by the execution of the Agreement by us) or (II) the date we process your first Transaction, and has an initial term expiring 3 years from that date. Unless otherwise terminated by either party as provided in this Agreement, the Agreement will automatically extend for the successive one year terms. Either party may give notice of non-renewal of this Agreement in writing no more than 90 days and no less than 30 days prior to any expiration date. If you terminate the Agreement prior to the expiration of the term other than as a result of our material breach of this Agreement, in order to compensate us for our lost revenue, you agree to pay as liquidated damages the greater of (a) an amount equal to the fees (net of CMS Brand Interchange, assessments, and fines) that CMS would have received during the months remaining in the term of the Agreement based upon your representations contained in your Application and, (b) if we have at such time been processing all of your Transaction Data for at least 6 consecutive months, an amount calculated by multiplying the average monthly fees (net of the CMS Brand Interchange, assessments and fines) from the immediately preceding 6 months by the number of months remaining in the term of the Agreement and, (c) a flat early termination fee of \$499.99. Such amount will be funded, to the extent possible, according to the same methods for collecting amounts due under this Agreement. This Agreement shall be subject to the immediate termination of Merchant by CMS or Bank for any significant circumstances that create harm or loss of goodwill to the Card Associations. All of Banks and CMS's obligations will end upon termination of the Agreement. Notwithstanding anything to the contrary contained herein, in the event of any termination of this Agreement, the obligation of Merchant under this Agreement for fees, fines, expenses or other obligations incurred prior to the effective date of termination, and the obligations of Merchant under this Agreement for expenses or other liabilities arising from or relating to acts or omissions which occurred prior to the effective date of termination, shall survive the termination of this Agreement. All obligations of Merchant with respect to Sales Drafts accepted by Bank and or CMS prior to the effective date of termination shall survive such termination. Merchant specifically agrees to maintain funds on deposit in Merchant Account for a period of time determined in Bank's or CMS's discretion, based upon cardholder and card issuer Chargeback rights following termination, an amount sufficient to cover all Chargebacks or other costs incurred by Bank and/or CMS pursuant to this Agreement. Merchant will immediately stop using all program marks and return to CMS or destroy (at CMS's sole option) all materials bearing any of the program marks.
4. HEADINGS: The headings listed after each section number in this Agreement are inserted for convenience only and do not constitute a part of this Agreement and are not to be considered in connection with the interpretation or enforcement of this Agreement.
5. NOTICE: Any notice required or permitted hereunder shall be in writing and shall be deemed given when: (i) deposited in the United States mail, or similar private mail carrier, postage prepaid, addressed to the respective parties at the addresses set forth below, or at such other address as the receiving party may have provided by notice to the other; or (ii) one (1) business day after being sent by e-mail or other electronic communication, if to Merchant, at the last e-mail address provided by Merchant to CMS; and if to CMS at [www.cmsonline.com](http://www.cmsonline.com).

Merchant agrees that it must provide CMS with its current email address and update CMS within two (2) business days of any change to the Merchant's email address.

6. **ASSIGNMENT:** This Agreement may not be assigned either voluntarily or by operation of law without the prior written consent of CMS and the Bank. Merchant also acknowledges and agrees that CMS, with the consent of Bank, may assign or otherwise transfer this Agreement at its sole discretion, as it deems necessary or appropriate. Subject to the foregoing, all provisions contained in this Agreement shall extend to and be binding upon the parties hereto or their respective successors and permitted assigns.
7. **NO WAIVER:** Any waiver, permit, consent or approval by Bank and/or CMS of any breach of any provision, condition, or covenant of this Agreement must be in writing and shall be effective only to the extent set forth in writing. No waiver of any breach or default shall be deemed a waiver of any later breach or default of the same or any other provision of this Agreement. Any failure or delay on the part of Bank and/or CMS in exercising any power, right or privilege under this Agreement shall not operate as a waiver thereof, nor shall any single or partial exercise of any such power, right or privilege preclude any further exercise thereof.
8. **JURISDICTION:** The Parties further agree that all performances due and transactions undertaken pursuant to this Agreement shall be deemed to be due or have occurred in the City of Orem, Utah County, State of Utah, and that the entry into and performance hereof by Merchant shall be conclusively deemed to be the transaction of business within the State of Utah. In event of any disputes under this Agreement, Merchant or guarantor(s) hereby consent to and will be subject to the jurisdiction of the courts of the State of Utah, Utah County.
9. **ENTIRE AGREEMENT:** This Agreement, including any exhibits, constitutes a fully integrated agreement and sets forth all of the promises, agreements, conditions and understandings between the Parties respecting the subject matter hereof and all prior or contemporaneous negotiations, conversations, discussions, correspondence, memorandums and agreements between the Parties concerning the subject matter are merged herein.
10. **JURY WAIVER:** In the event any controversy or claim between or among the parties, their agents, employees, representatives, or affiliates shall arise in any judicial or legal proceeding, each party hereby waives its respective right to trial by jury of such controversy or claim. In addition, any party may elect to have all decisions of fact and law determined by a referee appointed by the court in accordance with applicable state reference procedures. Judgment upon any award rendered shall be entered in the court in which any such reference proceeding was commenced.
11. **NO WARRANTY:** EXCEPT AS SET FORTH HEREIN, BANK AND CMS MAKE AND MERCHANT RECEIVES, NO REPRESENTATIONS OR WARRANTY, EXPRESSED OR IMPLIED, AND THERE ARE EXPRESSLY EXCLUDED ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. BANK AND CMS SHALL HAVE NO LIABILITY WITH RESPECT TO THEIR OBLIGATIONS UNDER THIS AGREEMENT FOR CONSEQUENTIAL, SPECIAL, DIRECT, EXEMPLARY, OR INCIDENTAL DAMAGES TO MERCHANT OR THIRD PARTIES DEALING WITH MERCHANT EVEN IF BANK OR CMS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE STATED EXPRESS WARRANTY IS IN LIEU OF ALL LIABILITIES OR OBLIGATIONS OF BANK OR CMS FOR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE DELIVERY, USE, OR PERFORMANCE OF THE SERVICES PURSUANT TO THIS AGREEMENT.
12. **DUE ORGANIZATION:** Merchant is duly organized and in good standing under the laws of the jurisdiction of its organization, and is duly qualified to conduct business in each jurisdiction where failure to do so would have a material adverse effect on the business.
13. **AUTHORIZATION, VALIDITY and ENFORCEABILITY:** The execution, delivery and performance of this Agreement executed by Merchant is within Merchant's powers, has been duly authorized and constitutes a valid and binding obligation of the Merchant, enforceable in accordance with its terms.
14. **COMPLIANCE WITH APPLICABLE LAWS:** Merchant has complied with all licensing, permit and fictitious name requirements necessary to lawfully conduct the business to which it is engaged and with all laws and regulations applicable to the sales of the Goods and Services described in the type of business therein.
15. **NON-DISCLOSURE OF CONFIDENTIAL INFORMATION, PROPRIETARY INFORMATION, OR TRADE SECRETS:** Merchant agrees that this Agreement, the process utilized by CMS for providing Merchant Services, and all written communications concerning Merchant Services hereunder are confidential, the proprietary information of CMS, and trade secrets of CMS. Merchant agrees that neither it nor any of its employees, agents, representatives, or independent contractors will disclose any of CMS's confidential, proprietary information or trade secrets to any person or entity that is not a party to this Agreement without the express written consent of CMS.
16. **COMPLIANCE:** CMS agrees to comply with all Card Association, and state and federal rules and regulations and shall be responsible for timely and accurate implementation of all regulatory changes applicable to Merchant Services. CMS agrees it will strictly comply with all requirements set forth in this Agreement.
17. **MERCHANT COMPLIANCE:** Merchant agrees that it will strictly comply with requirements set forth in this Agreement which are incorporated herein by this reference and with all Card Association, and state and federal rules and regulations and shall be responsible for timely and accurate implementation of all regulatory changes applicable to Merchant Services.
18. **FORCE MAJEURE:** If performance by CMS, or its affiliates, of any service or obligation under this Agreement is prevented, restricted, delayed or interfered with by reason of, inter alia, labor disputes, strikes, acts of God, fire, floods, lightning, earthquakes, severe weather, utility or communications failures, computer associated outages or delay in receiving electronic data, war, civil commotion, or any law, order or regulation, etc. having legal effect, then CMS, Bank and their affiliates shall be excused from their performance hereunder to the extent of the prevention, restriction, delay or interference.
19. **FURTHER ASSURANCES:** At any time or from time to time upon the request of Bank or CMS, Merchant will execute and deliver such further documents and do such other acts as Bank or CMS may reasonably request in order to effectuate fully the purposes of this Agreement.
20. **JOINT AND SEVERAL:** Should more than one person sign this Agreement as Merchant, the obligations of each signer shall be joint and several.
21. **GOVERNING LAW:** This Agreement shall be governed by and construed in accordance with the laws of the State of Utah. Any action at law or in equity to interpret or enforce any provisions of this Agreement shall be brought only in a court of competent jurisdiction in the County of Utah, State of Utah.
22. **SEVERABILITY:** Should any provision of this Agreement be determined to be invalid or unenforceable under any law, rule or regulation, such determination will not affect the validity or enforceability of any other provision of this Agreement.
23. **INCONSISTENT LANGUAGE:** The parties agree that this Agreement is an exact copy of the Original Agreement. In the event that there is an inconsistency in the language in the final executed Agreement and Original Agreement, the duties and obligations of the parties shall be determined by the language set forth in the Original Agreement.
24. **RIGHTS CUMULATIVE:** All rights and remedies existing in this Agreement are cumulative to, and not exclusive of, any other rights or remedies available under contract or applicable law.
25. **POS EQUIPMENT REQUIREMENT:** For POS services, Merchant agrees to utilize only equipment approved by CMS for use in conjunction with Services.
26. **FAILURE OF POS EQUIPMENT:** Merchant agrees that Bank or CMS shall not be responsible for damages incurred by Merchant or any third party as a result of mechanical failure of POS equipment or as a result of a third party's failure to provide POS equipment to Merchant in a timely manner.

27. **WARRANTY OF APPLICATION:** In connection with this Agreement, Merchant has executed and delivered an Application to Bank and/or CMS containing, among other things, information describing the nature of Merchant's business and the individuals who are the principal owners of Merchant. Merchant warrants to Bank and/or CMS that all information accompanying financial data (personal or business) and statements contained in such Application are true, correct and complete. Merchant further agrees to notify Bank and/or CMS promptly of any and all changes which may occur from time to time regarding any information in such Application, including but not limited to, the identity of principal owners, types of Goods and Services provided, how sales are completed (i.e. by telephone, mail order, via the Internet or in person at the Merchant's place of business), or change in geographical location. Bank and/or CMS reserve the right to immediately terminate this Agreement based upon the nature of changes reported by Merchant or discovered by Bank or CMS. Merchant and principal owner(s) identified on approved Application shall be jointly and severally liable to Bank and CMS for any and all loss, costs and expense suffered or incurred by Bank or CMS, resulting from incorrect or incomplete information contained in Application or Merchant's failure to report changes to Bank or CMS in accordance herewith. If, in Bank's or CMS's judgment, a significant discrepancy exists between Merchant's actual business activity and the business activity described in Merchant's Application, Bank or CMS may immediately and without notice freeze all funds in Merchant Account, chargeback all Returns to the Merchant, and/or suspend Services until Bank or CMS, in their sole opinion, feel confident in releasing funds and/or allowing subsequent Services. Bank or CMS may impose a monthly administration fee on such frozen accounts.
28. **RIGHT TO INFORMATION/AUDIT:** From time to time, Bank or CMS may: (a) obtain credit information and/or credit reports on Merchant and/or principals from others (such as lenders and credit reporting agencies); (b) request financial statements and tax returns from Merchant and/or principals; (c) furnish information on Bank's or CMS's experience with Merchant to others seeking such information, and (d) examine and verify, at any reasonable time, all the records of Merchant pertaining to Sales Drafts and Credit Vouchers transmitted to and processed by Bank or CMS. Merchant agrees that Bank and CMS can share Merchant Account information with its agents, and third parties engaged in the performance of this Agreement. Merchant shall have an ongoing obligation to provide to CMS or cooperate with CMS in obtaining the information set forth above.
29. **ON-GOING RESPONSIBILITY:** In instances where Merchant acquires a business currently processing with Bank or CMS, Merchant agrees to assume responsibility for previous owner's billing, Chargebacks and other Merchant Services related obligations to Bank and CMS.
30. **RESERVE ACCOUNT:** As a condition of providing continued Merchant Services, Bank or CMS may require Merchant to fund and maintain, in an amount reasonably determined by Bank or CMS, an account (hereinafter called "Reserve Account") with Bank or CMS as security against any costs, losses, assessments, fines, fees or expenses incurred by Bank or CMS in connection with the provision of Services to Merchant. Merchant hereby grants Bank or CMS a security interest in such Reserve Account and the proceeds thereof, to secure the obligation of Merchant to Bank or CMS hereunder. Merchant acknowledges that if a fine is accessed to Bank or CMS by VISA, MasterCard, or Discover that is caused by the processing activity of merchant, CMS may retain any variance in the amount charged to Merchant as compensation for damages to the CMS brand. Bank or CMS may enforce such security interest without notice or demand. Merchant's obligation to maintain such Reserve Account shall survive the termination of this Agreement by a period of one hundred eighty (180) days (or longer depending on Merchant's product and business practices) during which time Bank's or CMS's security interest shall continue. After three hundred sixty five (365) days from termination of this Agreement, if reserve funds have not been requested from Bank or CMS, funds become the property of CMS. Bank or CMS may impose a monthly administration fee on reserve accounts related to inactive or terminated Merchant Accounts.
31. **GUARANTORS:** Any individual(s), by execution as guarantor, hereby jointly and severally, unconditionally and irrevocably guarantees the full and faithful performance and payment of Merchant of each and all its duties and obligations herein set forth, whether prior or subsequent to termination of this Agreement.
32. **INDEMNIFICATION:** Merchant shall indemnify and hold Bank and CMS, its affiliates, officers, directors and employees, harmless from and against all claims, demands, losses, damages, liability, actions, costs, judgments, arbitral awards, assessments, fines, fees and expenses (including reasonable attorneys' fees, expenses, arbitration costs and court costs) incurred by Bank, CMS, VISA, MasterCard, Discover, and any other Card Association, networks, or their affiliates, officers, directors and employees, arising out of, related to or in connection with: a) any breach by Merchant of any of its duties or obligations under this Agreement; b) any Credit Card transaction Merchant processes under this Agreement (including any Chargebacks); c) any act or omission by Merchant or any of Merchant's employees in connection with any Credit Card at the Merchant's location (including, but not limited to fraudulent activity); d) Merchant's violation of the MasterCard merchant rules manual, as amended from time to time (fully incorporated herein by reference), the VISA rules for VISA merchants, as amended from time to time (fully incorporated herein by reference), the payment card industry data security standard (PCI DSS), Visa's Cardholder Information Security Program ("CISP") and MasterCard's Site Data Protection Program ("SDP") and DISC (Discover Information Security Compliance (fully incorporated herein by reference), any other VISA, MasterCard or network rules and regulations as amended from time to time, or any applicable state, federal and/or municipal laws or ordinances; and e) any return of goods, price adjustments or other disputes with, or claims by a customer (whether or not such dispute or claim is valid). Merchant is responsible for its actions in honoring or refusing Credit Cards and in retaining Credit Cards, and all information contained therein in accordance with this Agreement and all of the laws, rules and regulations set forth above and agrees to indemnify and hold harmless Bank and CMS from any claim, loss or liability arising from any injury to persons, property or reputation which occurs as a result hereof. Merchant agrees to indemnify Bank and CMS against all reasonable attorneys' fees, expenses and court costs incurred in enforcing this Agreement or in defending any claim brought by Merchant against Bank and/or CMS (unless Merchant prevails on said claim after the exhaustion of all appellate remedies). This indemnification shall survive the termination of this Agreement.
33. **RIGHT TO SETOFF:** Merchant hereby acknowledges that Bank and CMS have the right to offset any outstanding/uncollected amounts owed to Bank and/or CMS by Merchant from: (a) any amounts owed to Merchant that they would otherwise be obligated to deposit into the Merchant Account, (b) any other amounts CMS may owe Merchant under this Agreement or any other agreement, and (c) the checking account (DDA) which Merchant has linked to its CMS Account, or any other checking account that Merchant may have.
34. **MERCHANT ACCOUNT:** CMS shall use commercially reasonable efforts to remit settled funds to the Merchant Account within two (2) business days of its receipt of funds. If CMS does not remit settled funds to the Merchant Account within two (2) business days, it shall use commercially reasonable efforts to provide Merchant with notice of that fact. Merchant agrees to reimburse CMS for any shortfalls that occur due to non-sufficient funds in Merchant Account that are covered by Bank. Merchant also agrees to authorize Bank or CMS to freeze all funds in Merchant Account, without prior notice to Merchant, if either Bank or CMS in their sole opinion deem themselves at risk relative to any CMS service performed under this Agreement. Merchant agrees to execute any document required by Bank or CMS and/or Merchant's depository bank in order to effectuate the ACH credits and debits contemplated hereunder. This authorization to initiate ACH credits and debits shall survive termination of this Agreement for a period of one hundred eighty (180) days.
35. **PROCESSING LIMITS.** All of Merchant's processing limits are established by Bank and CMS in their sole discretion. Merchant will be assigned a maximum dollar amount per card transaction by Bank and CMS. Any increase in the maximum dollar amount per card transaction shall be at the sole discretion of Bank and CMS. Bank and CMS reserve the right to reverse and decrease any increase previously authorized. Bank and CMS shall provide Merchant with advance notice of any change in the authorized maximum dollar amount per card transaction.
36. **COSTS AND EXPENSES:** Merchant shall reimburse, upon demand, Bank and CMS for all costs and expenses, including attorneys' fees expended or incurred by Bank or CMS in any arbitration, mediation, judicial reference, legal action, or otherwise in connection with (a) the negotiation, preparation, amendment, interpretation and enforcement of this Agreement, (b) collecting any sum which becomes due Bank or



CMS hereunder, (c) any proceeding for declaratory relief, any counterclaim to any proceeding, or any appeal, or (d) the protection, preservation or enforcement of any rights of Bank or CMS.

37. COMPENSATION PAYABLE TO CMS: Merchant agrees (i) to compensate CMS, as set forth in this Agreement; (ii) that CMS may collect its fees by netting against the proceeds of Merchant's processing activity; and (iii) the fees set forth in this Agreement are subject to modification by amendment.
38. CONFIDENTIALITY.
  - 38.1 CMS'S OBLIGATION: CMS shall not disclose confidential information relating to Merchant's sales other than to financial institutions, Card Associations and third parties that need the information for a purpose relating to the Agreement. CMS shall have no obligation, however, to keep confidential information, which becomes public other than as a result of its disclosure by CMS. The obligations of this Section 38.1 shall survive termination of the Agreement.
  - 38.2 MERCHANT'S OBLIGATION: Except to the extent specifically required by the operating rules of VISA, MasterCard or this Agreement and with prior written consent of CMS, Merchant shall not disclose any information relating to CMS, any network, any financial institution, any POS Transaction any cardholder to any person or entity other than CMS, CMS's employees, agents and independent contractors, and those of Merchant's employees who have a specific need to know such information for a purpose relating to this Agreement (such as responding to a cardholder inquiry, resolving a cardholder dispute, or investigating a possible processing error), or as otherwise specifically required by law. Merchant shall treat all documents provided by CMS, any financial institution or any Network relating to this Agreement as confidential and proprietary and protect them with the same degree of care as Merchant would protect its own confidential and proprietary information, and not less than reasonable care. The obligations of this Section 38.2 will survive termination of this Agreement.
39. BREACH OF SECURITY: Merchant agrees that any loss incurred as a result of any party gaining access to Merchant's Merchant Account, CMS Account, bank account, or CMS's website using information which that party was not authorized to obtain or using such information in a manner not permitted by this Agreement (including but not limited to improper or unauthorized use of the Merchant's ID number and PIN) shall be the responsibility of Merchant and Merchant shall indemnify Bank and CMS for any loss Bank or CMS sustains unless the party obtained the information through a breach of security of CMS's website without the participation in any way of Merchant.
40. FDIC INSURANCE: The funds in the CMS Account are eligible for Federal Deposit Insurance Corporation ("FDIC") pass-through insurance up to an aggregate maximum amount provided by the FDIC from time to time.
41. PRESS RELEASE: Merchant acknowledges that CMS may issue a press release upon execution of this Agreement.
42. TAXES: Merchant shall promptly pay when due and shall hold Bank and CMS harmless from, any and all liability or expense relating to the payment of federal, state, and local taxes (other than taxes based in whole or in part upon income attributable to CMS).
43. MERCHANT DISPUTE DEADLINE: Merchant is responsible for the timely reconciliation of all issues related to Services provided under this Agreement. Merchant must submit any dispute to CMS, in writing within sixty (60) days of the initial posting of the disputed item to the Merchant Account or appearance of the disputed item on the Merchant's statement.
44. TRANSACTION PROCESSING PROHIBITIONS. Merchant **must not**: (a) accept cardholder payments for previous card charges incurred by the Merchant for the same service(s); (b) establish a minimum or maximum transaction amount as condition of honoring a card; (c) require a cardholder to complete a postcard or similar device that includes the cardholder's account number, expiration date, signature or any other card account data in plain view when mailed; (d) add any surcharge to a card transaction (except as specified in the rules for a tax payment); (e) add any tax to card transactions, unless required by applicable law and if required it must be included in the card transaction and not collected separately; (f) enter into interchange any card transaction for a transaction that was previously charged back to the Merchant and subsequently returned to the Merchant, irrespective of cardholder approval (Merchant may pursue payment outside of the card associations' systems); (g) request or use a cardholder account number for any purpose other than as payment for its goods or services; (h) disburse funds in the form of travelers checks, if the sole purpose is to allow the cardholder to make a cash purchase of goods or services from that Merchant (i) disburse funds in the form of cash; (j) accept a card to collect or refinance an existing debt that has been deemed uncollectible by the Merchant providing the associated goods or services; (k) enter into Interchange a card transaction that represents the collection of a dishonored check; (l) accept an expired card unless an authorization is obtained from CMS; (m) accept a card prior to the embossed or printed "valid from" date; or, (n) depositing a card transaction receipt that does not result from an act between the cardholder and the Merchant
45. USE OF AGENT. Merchant shall notify Bank and CMS if it intends to use an agent that will have access to cardholder data.
46. PCI DSS, CISP, DISC, and SDP COMPLIANCE: Merchant and its agents are required to implement and maintain compliance with the provisions of PCI DSS, CISP, DISC and SDP relating to cardholder data and its transmission, storage and disclosure. The Merchant is responsible for demonstrating compliance of its agents with the foregoing data security requirements. If the Merchant is undergoing a forensic investigation at the time this Agreement is signed, the Merchant shall fully cooperate with the investigation until it is completed, Merchant has never been placed on the MasterCard MATCH system or the Combined Terminated Merchant file or the Consortium Merchant Negative File (the CMNF) published by Discover, and if so Merchant has disclosed this to CMS prior to the execution of this Agreement.
47. BANK. CMS's Sponsor Bank is National Bank of California, located at 145 S. Fairfax Avenue, Los Angeles, CA 90036. The funds from all Merchant transactions will be settled to the Merchant's CMS Account at National Bank of California.
48. STORAGE OF CARDHOLDER DATA. A Merchant or its agent must store all material containing cardholder account numbers or imprints (such as transaction receipts and carbons) in an area limited to selected personnel and render all unreadable prior to discarding.
49. DEPOSIT TIME LIMITS. Merchant must deposit transaction receipts to CMS within five (5) calendar days of the transaction date.
50. MERCHANT BANKRUPTCY OR INSOLVENCY. In the event of its failure, including bankruptcy, insolvency or other suspension of business, the Merchant shall not sell, transfer, or disclose any materials that contain cardholder account numbers, personal information or transaction information to third parties. The Merchant must return this information to the Bank or provide acceptable proof of destruction of this information to the Bank.
51. TRANSACTION DEPOSIT RESTRICTIONS. Merchant must: (a) only deposit transaction receipts that directly result from cardholder transactions with that Merchant; (b) not deposit a transaction receipt until Merchant does one of the following (i) completes the transaction, (ii) ships or provides the goods; (iii) performs the purchased services, or, (iv) obtains the cardholder's consent to a recurring transaction; and (c) not deposit a transaction receipt that it knows or should have known to be either fraudulent or not authorized by the cardholder. The Merchant may deposit a prepayment, if the Merchant advises the cardholder of the immediate billing at the time of the transaction, for: (i) prepayment or services, excluding estimates for services to be provided; and (ii) full prepayment of custom-ordered merchandise, manufactured to the cardholder's specifications. An advance payment service Merchant may deposit a transaction receipt representing a partial or complete advance payment.
52. ALTERATIONS: Any alteration, strikeover, modification or addenda to the preprinted text or line entries of this Agreement shall be of no effect whatsoever, Bank and/or CMS, at its sole discretion, may render this Agreement invalid.
53. COUNTERPARTS: This Agreement may be executed and delivered in several counterparts and transmitted by facsimile, a copy of which will constitute an original and all of which taken together will constitute a single agreement.