

RESOLUTION NUMBER 13-17

**A RESOLUTION OF THE CITY COUNCIL OF THE
CITY OF COLOGNE, CARVER COUNTY, MINNESOTA, AUTHORIZING
THE ENTRY INTO A MERCHANT AGREEMENT: TERMS AND CONDITIONS AND
AMENDMENT TO MERCHANT AGREEMENT WITH
PIVOTAL PAYMENTS INC. AND MERRICK BANK**

WHEREAS, staff of the City of Cologne (the "City") have recommended that the City enter into a Merchant Agreement: Terms and Condition and an Amendment to Merchant Agreement with Pivotal Payments Inc. and Merrick Bank in order to facilitate the processing of credit cards, debt cards, and ACH transactions for payments made to the City for various uses, utilities, and services by residents and third parties; and


WHEREAS, attached to this Resolution as Exhibit "A" is the proposed Merchant Agreement: Terms and Conditions, and the Amendment to Merchant Agreement (collectively, the "Agreements"); and

WHEREAS, the City Council finds it in the best interests of the City to enter into the Agreements with Pivotal Payments Inc. and Merrick Bank.

NOW, THEREFORE, it is hereby resolved by the City Council of the City of Cologne, Minnesota:


That the City enter into the Agreements with Pivotal Payments Inc. and Merrick Bank and that Matthew Lien, Mayor, and Scott Williams, City Council Member, are authorized and empowered to execute such Agreements.

Adopted by the City Council of the City of Cologne, this 7th day of October, 2013.



Matthew Lien, Mayor
Lien

Attest:



Susan Mueller, Deputy Account Clerk

EXHIBIT "A"
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Merchant Agreement: Terms and Conditions

MERCHANT AGREEMENT: TERMS AND CONDITIONS

Merchant Agreement

Subject to the requirements of applicable Card Association rules, Pivotal Payments Inc. ("ISO") and Merck Bank may allocate their respective duties and obligations between themselves as they deem appropriate at their sole discretion, and ISO or Bank may jointly or individually assert or exercise the rights or remedies provided to the Bank hereunder. For purposes of this Agreement, Merck Bank and ISO are collectively referred to hereinafter as the "Bank". This Merchant Agreement contains the terms and conditions under which Bank and/or other third parties will provide services to you and includes the Merchant Application signed by merchant.

PART ONE: Card Services

ARTICLE I - DEFINITIONS

- 1.01 "Account" means a commercial checking or demand deposit account maintained by Merchant referred to in Section 5.16 for the crediting of collected funds and the debiting of fees and charges under this Agreement.
- 1.02 "ACH" means the Automated Clearing House computer entry system controlled by the Federal Reserve Board.
- 1.03 "Agreement" means these terms and conditions, any supplementary documents referenced herein, and valid schedules and amendments to the foregoing.
- 1.04 "Authorization" means a computerized function or a direct phone call to a designated number to obtain approval from the Card issuer to charge the Card for the amount of the sale.
- 1.05 "Card" means (i) a valid credit card in the form issued under license from Visa U.S.A. Inc., Visa International, Inc., Discover® or MasterCard International, Inc.; or (ii) any other valid credit card accepted by Merchant by agreement with Bank.
- 1.06 "Card Association" means Visa U.S.A. Inc., Visa International, Inc., Discover, MasterCard International, Inc. or any other Card issuer that provides Cards accepted by Merchant by agreement with Bank.
- 1.07 "Card issuer" means the financial institution or company which has provided a Card to a Cardholder.
- 1.08 "Card Not Present (CNP)" means that an imprint of the Card is not obtained at the point-of-sale.
- 1.09 "Cardholder" means the person whose name is embossed upon the face of the Card.
- 1.10 "Cardholder Information" means any non-public, sensitive information about a Cardholder, including any combination of Cardholder name plus the Cardholder's social security number, driver's license or other identification number or credit or debit card number, or other bank account number.
- 1.11 "Chargeback" means the procedure by which a Sales Draft (or disputed portion thereof) is returned to Bank by a Card issuer because such item does not comply with the applicable Card plan's operating regulations.
- 1.12 "Credit Voucher" means a document issued by a Merchant evidencing any refund or price adjustment relating to Cards to be credited to a Cardholder account.
- 1.13 "Imprint" means (i) an impression on a Sales Draft manually obtained from a Card through the use of an imprinter, or (ii) the electronic equivalent obtained by swiping a Card through a terminal and electronically capturing Card data and printing a Sales Draft.
- 1.14 "Mid or Non-Qualifying Transaction" means any sale Transaction that fails to qualify for lowest interchange rate assigned by the applicable Card Association for Merchant's standard card industry code and which may be charged fees as set forth in Schedule A.
- 1.15 "Sales Draft" means the paper form, whether electronically or manually imprinted, evidencing a sale Transaction.
- 1.16 "Transaction" means any sale of products or services, or credit for such, from a Merchant for which the Cardholder makes payment through the use of any Card and which is presented to Bank for collection.
- 1.17 "Voice Authorization" means a direct phone call to a designated number to obtain credit approval on a Transaction from the Card issuer, whether by voice or voice-activated system.

ARTICLE II - CARD ACCEPTANCE

2.01 Honoring Cards.

Merchant will accept all valid Cards when properly presented by Cardholders in payment for goods or services, subject to applicable Card Association rules requiring Merchant to elect whether it will accept credit only, debit only or both debit and credit Cards. Merchant's election is set forth in the Application. Merchant may not establish minimum or maximum amounts for Card sales as a condition for accepting any Card. Merchant may not require any Cardholder to pay as a surcharge any part of any discount or charge imposed upon Merchant by this Agreement, whether through any increase in price or otherwise require a Cardholder to pay any charge or price as a condition of sale that is not also required from a customer paying cash. However, Merchant may not, by this term, be prevented from offering discounts to Cardholders for cash purchases. Merchant may not engage in a Transaction (other than a mail, internet, telephone order, or preauthorized sale to the extent permitted under the Agreement) if the person seeking to charge the purchase to his or her Card account does not present the Card to permit Merchant to compare the signature on the Card to the signature on the Sales Draft and obtain an imprint or otherwise use the physical Card to complete the Transaction.

2.02 Advertising.

Merchant will prominently display the promotional materials provided by Bank in its place(s) of business. Merchant's use of promotional materials and use of any trade name, trademark, service mark or logo type ("Marks") associated with a Card is limited to informing the public that the Card will be accepted at Merchant's place(s) of business. Merchant's use of promotional materials and Marks is subject to the Bank's direction. Merchant may use promotional materials and Marks only during the term of the Agreement and will immediately cease use and return any inventory to Bank upon termination thereof. Merchant may not use any promotional materials or Marks associated with Visa, Discover and MasterCard in any way which suggests or implies that other endorse any goods or services other than Payment Card services.

2.03 Card Acceptance.

When accepting a Card, Merchant will follow the steps provided by Bank for accepting Cards and will: (a) determine in good faith and to the best of its ability that the Card is valid on its face; (b) obtain Authorization from the Card issuer to charge the Cardholder's account; (c) unless the Sales Draft is electronically generated, or is the result of a mail, internet, phone or preauthorized order; (d) obtain an imprint of the Card including embossed data

from the merchant imprinter plate; and (e) obtain the Cardholder's signature on the Sales Draft and compare the signature to the signature on the Card; (f) enter a description of the goods or services sold and the price thereof (including any applicable taxes); (g) deliver a true and complete copy of the Sales Draft to the Cardholder at the time the goods are delivered or services performed, or, if the Sales Draft is prepared by a point-of-sale terminal, at the time of the sale; (h) offer the Sales Draft to Bank for purchase according to Bank's procedures and the terms of the Agreement; and (i) make a Card imprint, if the Transaction is not based upon a mail, internet, phone or pre-authorized order.

2.04 Authorization.

Merchant will obtain an Authorization for all Card sales. If Merchant cannot, for any reason, obtain an electronic Authorization through the use of a terminal, Merchant will request a Voice Authorization from Bank's designated authorization center and will legibly print the authorization number on the Sales Draft. Merchant will not obtain or attempt to obtain authorization from Bank's authorization center unless Merchant intends to submit to Bank a Transaction for the authorized amount. If Authorization for the Transaction is given, Merchant may not divide a single Transaction between two or more Sales Drafts on a single Card to avoid Authorization limits that may be set by the Card issuer. Merchant acknowledges that an Authorization provides only that the Cardholder account has sufficient credit available to cover the amount of the current sale and that an Authorization is not a guarantee that the Transaction will not be subject to dispute or Chargeback and does not warranty the Cardholder's identity. Merchant may not attempt to obtain an authorization by successively decreasing the sale amount. Bank may refuse to purchase or process any Sales Draft presented by Merchant: (a) unless a proper authorization or approval code has been recorded on the Sales Draft; (b) if Bank determines that the Sales Draft is or is likely to become uncollectible from the Cardholder to which the transaction would otherwise be charged; or (c) if Bank has reason to believe that the Sales Draft was prepared in violation of any provision of this Agreement. Merchant will use, and may not document, fraud identification tools requested by Bank, including Address Verification System processing and CVV/CVC processing, and acknowledges that the use of such tools may prevent Merchant from accepting certain Cards as payment. Merchant acknowledges that the use of fraud identification tools may not prevent fraudulent Card usage, and agrees that any fraudulent Transaction may ultimately result in a Chargeback, for which Merchant, makes full liability under the Agreement.

2.05 Retention and Retrieval of Cards.

Merchant will use its best efforts, by reasonable and practical means, to reuse or recover a Card when receiving such information when making a request for Authorization or if Merchant has reasonable grounds to believe the Card is counterfeit, fraudulent or stolen. Merchant's obligations under this section does not authorize a breach of the peace or any injury to persons or property, and Merchant will hold Bank harmless from any claim arising from any injury to person or property or other breach of the peace in connection with the retention or recovery of a Card.

2.06 Multiple Transaction Records; Partial Consideration.

Merchant may not prepare more than one Sales Draft for a single sale or for a single item but will include all items of goods and services purchased in a single Transaction in the total amount on a single Sales Draft except under the following circumstances: (i) for purchases in separate departments of a multiple department store; (ii) for partial payment, installment payment, delayed delivery or an advance deposit; or (iii) for delayed or extended charges governed by rates for travel and entertainment merchants and Transactions.

2.07 Telephone Orders, Mail Orders, Internet, Preauthorized Orders and Installment Orders.

Unless Merchant has been approved by Bank to accept mail orders or telephone orders, Merchant warrants that it is a walk-in retail business, located in a retail business place where the public moves in and out freely in order to purchase merchandise or obtain services. If Bank determines Merchant has accepted unapproved Card Transactions which are placed by telephone, generated through telephone solicitation, mail order or other means that does not create a Sales Draft that bears the Card imprint and Cardholder's signature, the Agreement will be immediately terminated and the value of all Sales Drafts collected from the first day of processing may be charged back to Merchant and all funds therefrom held as provided in Article IV. Unless approved by Bank, this Agreement does not authorize regular acceptance of Cards for sales accepted by mail, internet or telephone nor through pre-authorized orders. If an occasional Card Transaction is made by mail, phone or pre-authorized order, the Sales Draft may be completed without the Cardholder's signature or an imprint, but in such case Merchant will create a sales slip containing Cardholder data, an Authorization number, the sale amount and the letters "M", "T" or "P", as appropriate. Receiving an Authorization will not relieve the Merchant of liability for Chargeback on any Transaction for which the Merchant did not obtain an imprint or the Cardholder's signature.

2.08 Lodging and Vehicle Rental Transactions.

Merchant must estimate and obtain Authorization for the amount of the Transaction based upon the Cardholder's intended length of stay or rental. Additional Authorization must be obtained and recorded for charges actually incurred in excess of the estimated amount. Regardless of the terms and conditions of any written preauthorization form, the Sales Draft amount for any lodging or vehicle rental Transaction must include only that portion of the sale, including any applicable taxes, evidencing a bona fide rental of real or personal property by Merchant to the Cardholder and may not include any consequential charges. Nothing contained herein is intended to restrict Merchant from enforcing the terms and conditions of its preauthorization form through means other than a Card Transaction.

2.09 Returns and Adjustments; Credit Vouchers.

Merchant's policy for the exchange or return of goods sold and the adjustment for services rendered will be established and posted in accordance with operating regulations of the applicable Card Association's regulations. Merchant will declare, if applicable, to a Cardholder before a Card sale is made, that if merchandise is returned: (a) no refund, or less than a full refund, will be given; (b) returned merchandise will only be exchanged for similar merchandise of comparable value; (c) only a credit toward purchases will be given; or (d) special conditions or circumstances apply to the sale (e.g., late delivery, delivery charges, or other non-credit terms). If Merchant does not make these disclosures, a full refund in the form of a credit to the Cardholder's Card account must be given. Discounts must be made on all copies of Sales Drafts or invoices in letters approximately 1/4" high in close proximity to the space provided for the Cardholder's signature or on an invoice issued at the time of the sale or on an invoice being presented for the Cardholder's signature. Any change in Merchant's return or cancellation policy must be announced in writing to Bank not less than 14 days prior to the change. Bank may refuse to process any Sales Draft made subject to a revised return or cancellation policy of which Bank has not been notified as required herein.

2.10 Cash Payments.

Merchant may not receive any payments from a Cardholder for charges included in any Transaction resulting from the use of any Card nor receive any payments from a Cardholder to prepare and present a Transaction for the purpose of attaching a deposit to the Cardholder's Card account.

2.11 Cash Advances; Scrip Purchases.

Merchant may not deposit any Transaction for the purpose of obtaining or providing a cash advance either on Merchant's Card or the Card of any other party and may not accept any Card at a scrip terminal, and either action will be grounds for Bank's immediate termination of this Agreement.

2.12 Duplicate Transactions.

Merchant may not deposit duplicate Transactions. Bank may debit Merchant for any adjustments for duplicate Transactions and Merchant is liable for any Chargebacks resulting therefrom.

2.13 Deposit of Fraudulent Transactions.

Merchant may not accept or deposit any fraudulent Transaction and may not under any circumstances present for processing or credit, directly or indirectly, a Transaction which originated with any other merchant or any other source other than Transactions arising from bona fide purchases from Merchant for the goods and services for which Merchant has been approved under this Agreement. If Merchant deposits any prohibited Transaction, Bank may: (a) immediately terminate this Agreement; (b) withhold funds and demand an escrow as provided in this Agreement; (c) report Merchant to Visa, Discover and MasterCard under Section 4.04. Merchant's employees' actions are chargeable to Merchant under this Agreement.

2.14 Collection of Pre-existing Debt.

Merchant may not prepare and present to Bank for purchase any Transaction representing the refinancing of an existing Cardholder obligation including, but not limited to, obligations: (a) previously owed to Merchant; (b) arising from the dishonor of a Cardholder's personal check or relating to a Chargeback; or (c) representing the collection of any other pre-existing indebtedness, including collection of delinquent accounts on behalf of third parties.

2.15 Data Security/Personal Cardholder Information.

Merchant may not, as a condition of sale, impose a requirement on Cardholders to provide any personal information as a condition for honoring Cards unless such information is required to provide delivery of goods or services or Merchant has reason to believe the identity of the person presenting the Card may be different than that of the Cardholder. Merchant will not, under any circumstances, release, sell or otherwise disclose any Cardholder information to any person other than Bank or the applicable Card Association, except as expressly authorized in writing by the Cardholder, or as required by law.

(a) **Safeguards.** Merchant will maintain appropriate administrative, technical and physical safeguards for all Cardholder information. These safeguards will (a) insure the confidentiality of Cardholder information; (b) protect against any anticipated threats or hazards to the security or integrity of Cardholder information; (c) protect against unauthorized access to or use of Cardholder information that could result in substantial harm or inconvenience to any Cardholder; and (d) properly dispose of all Cardholder information to ensure no unauthorized access to Cardholder information. Merchant will maintain all such safeguards applicable to Merchant or Bank in accordance with applicable federal and state laws, rules, regulations and guidance. Merchants transacting in electronic commerce must: (i) Cardholders secure transaction methods such as SSL or 3-D Secure; install and maintain network firewalls; regularly update security patches; restrict and track employee access to all data relating to Cardholders and Card transaction ("Data"); encrypt all stored Data sent over open networks; use only approved or validated payment software applications; establish policies for properly managing use and allocation of passwords; and consistently assess and revise security systems and processes.

(b) **Compliance with Card Association Rules.** Merchant represents, warrants and covenants that it is and will remain throughout the term of the Agreement in compliance with Card Association bylaws, operating regulations and rules related to data security, data integrity and the safeguarding of Cardholder information including the Payment Card Industry Data Security Standard ("PCI"), Visa's Customer Information Security Program ("CISP"), Discover's Information Security and Compliance (DISC) program and MasterCard's Site Data Protection Program ("SDPP"), in effect and Merchant will cause all of its service providers, subcontractors and agents to comply with PCI, SDP, CISP and DISC requirements at all times. Merchant will report any non-compliance immediately to Bank. To accomplish the foregoing, Merchant will encrypt all debit, credit or stored value card numbers whether in storage, transport or backup and will not store data security codes on its systems, network or software.

(c) **Annual Certification.** Merchant will provide an annual certification to Bank if requested by Bank (in a form acceptable to Bank) certifying compliance with the data security provisions of the Agreement, including compliance with applicable Card Association requirements such as PCI, SDP, CISP and DISC. Merchant will provide annual certifications for Merchant's service providers, subcontractors and agents.

(d) **Information Use Limitations.** Merchant may not sell, disclose, or otherwise make Cardholder information available, in whole or in part, in a manner not provided for in this Agreement, without Bank's prior written consent. Merchant may, however, disclose Cardholder information to its service providers, subcontractors and agents who have a need to know such information to provide the Service described in this Agreement, provided that those individuals or entities have assumed confidentiality obligations in accordance with this Agreement, or as may be required by legal process or applicable federal and state laws, rules, regulations and guidance and have entered into a written agreement with Merchant, concerning Merchant's and such individuals' or entities' agreement to the foregoing data security provisions including compliance with Card Association rules, regulations or bylaws.

(e) **Response to Unauthorized Access.** Merchant will notify Bank within 24 hours after it knows of any breach in security resulting in an unauthorized access to Cardholder information. Merchant will provide any assistance that Bank, the issuing bank of any Cardholder, and their regulators and the Card Association deem necessary to contain and control the incident to prevent further unauthorized access to or use of Cardholder information. Such assistance may include, but not be limited to, preserving records and other evidence and compiling information to enable Bank and the issuing bank(s) or the Card Association to investigate the incident and provide assistance and cooperation to: (a) file a security activity report (as applicable); (b) notify their regulators (as applicable); and (c) notify the affected Cardholder (as required). Unless the unauthorized access was due to Bank's acts or omissions, Merchant will bear the cost of notifying affected Cardholder.

(f) **Miscellaneous.** Merchant may not make a claim against Bank or hold Bank liable for the acts or omissions of other merchants, service providers, Card Associations, financial institutions or others that do not have a written contractual relationship with Bank or over which Bank has no control. These provisions supplement, augment and are in addition to obligations of indemnification, audit, confidentiality and other similar provisions contained in this Agreement. This Section 2.15 and each of its subsections will survive this Agreement's termination. Merchant may not store in any system or in any manner discretionary Card read data including without limitation CVV2/CID data, PIN data, address verification data or any other information prohibited by Card Association Rules.

2.16 Compliance with Card Association Rules.

Merchant will comply with and conduct its Card activities in accordance with all applicable Card Association rules and regulations. Failure to comply with such rules and regulations may result in Merchant being terminated for cause and listed on various Card Association and industry databases, including the Consortium Merchant Negative File (CMNF), the CTMF (Combined Terminated Merchant File) and the Merchant Alert to Control High Risk Merchants file ("MAATCH"). With respect to MasterCard, Discover or Visa USA, Merchant may not: (a) accept Cardholder payments for previous Card charges incurred at the Merchant location; (b) establish a minimum or maximum transaction amount as a condition for honoring a Card; (c) require a Cardholder to complete a password or similar device that includes the Cardholder's account number, card expiration date, signature, or any other card account data in plain view when mailed; (d) add any surcharge to transactions; (e) add any tax to transactions, unless applicable law expressly requires that Merchant be permitted to impose a tax (any tax amount, if allowed, must be included in the transaction amount and not collected separately); (f) enter into interchange any transaction receipt for a transaction that was previously charged back to Bank and subsequently returned to Merchant, irrespective of Cardholder approval (Merchant may pursue payment from the Cardholder outside the Card Association system); (g) accept a card for an unlawful internet gambling transaction; (h) request or use an account number of any purpose other than as payment for its goods or services; (i) 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 Merchant; (j) disburse funds in the form of cash, unless: (i) Merchant is a lodging or cruise line merchant debursing cash to a Cardholder; (ii) Merchant is debursing funds in the form of travelers checks, Cards, or foreign currency; or (iii) Merchant is participating in the Card Association cash back service; (k) accept a Card for the purchase or scrip; (l) accept a Card for manual cash deburment; (m) accept a Card to collect or enforce existing debt that has been deemed uncollectible by the Merchant providing the associated goods or services; or (n) enter into a Transaction that represents collection of a dishonored check. Merchant will pay all Card Association fines, penalties and all other assessments or indebtedness levied by Card Associations to Bank which are attributable, at the Bank's discretion, to Merchant's Transaction processing or business.

2.17 Merchant's Business.

Merchant will notify Bank immediately if it intends to (a) transfer or sell any substantial part of its total assets, or liquidate; (b) change the basic nature of its business, including selling any products or services not related to its current business; (c) change ownership or transfer control of its business; (d) enter into any joint venture, partnership or similar business arrangement whereby any person or entity not a party to this Agreement assumes any interest in Merchant's business; (e) enter in any way Merchant's approved monthly volume, average, or maximum sales; or (f) changes its return policies or to another fulfillment house different from those identified in Merchant Application. Merchant will notify Bank promptly in writing if it becomes subject to any voluntary or involuntary bankruptcy or insolvency petition or proceeding. Merchant's failure to provide notice as required above may be deemed a material breach and will be sufficient grounds for termination of Merchant and for Bank's exercise of all its rights and remedies provided by this Agreement. If any change listed above occurs, Bank may immediately terminate this Agreement.

2.18 Merchant's Warranties.

Merchant represents and covenants that (a) all information contained in the Merchant Application or any other documents delivered to Bank in connection therewith is true and complete and properly reflects Merchant's business, financial condition and principal partners, owners or officers; (b) Merchant has power to execute, deliver and perform the Agreement, and this Agreement is duly authorized, and will not violate any provisions of law, or conflict with any other agreement to which Merchant is subject; (c) Merchant holds all licenses, if any, required to conduct its business and is qualified to do business in every jurisdiction where it is required to do so; (d) there is no action, suit or proceeding at law or in equity now pending or to Merchant's knowledge, threatened by or against or affecting Merchant which would substantially impair its right to carry on its business as now conducted or adversely affect its financial condition or operations; (e) each Sales Draft presented to Bank for collection is genuine and is not the result of any fraudulent or prohibited transaction or is not being deposited on behalf of any business other than Merchant as authorized by this Agreement; (f) each Sales Draft is the result of a bona fide Card Transaction for the purchase of goods or services from Merchant by the Cardholder in the total amount stated on the Sales Draft; (g) Merchant has performed or will perform all of its obligations to the Cardholder in connection with the Card Transaction evidenced thereby; (h) Merchant has complied with Bank's procedures for accepting Cards, and the Card Transaction itself does not involve any element of credit for any other purposes other than as set forth in this Agreement, and is not subject to its invoice, dispute, offset or counterclaim which may be raised by any Cardholder under the Card Association's rules, the Consumer Credit Protection Act (15 USC § 1601) or other relevant state or federal statutes or regulations; and (i) any Credit Voucher which it issues represents a bona fide refund or adjustment on a Card sale by Merchant with respect to which a Sales Draft has been accepted by Bank.

ARTICLE III - PRESENTMENT, PAYMENT, CHARGEBACK**3.01 Acceptance.**

Bank will accept from Merchant all Sales Drafts deposited by Merchant under the terms of this Agreement and will present (i) same to the appropriate Card issuers for collection against Cardholder accounts. Merchant must transmit Sales Drafts and Credit Vouchers to Bank or its processing vendor on the same or next business day immediately following the day that such Sales Drafts and Credit Vouchers have been originated. All presentment and assignment of Sales Drafts, collection therefor and assignment or rejection of such Sales Drafts are subject to the terms of this Agreement and regulations of the Card Association. Bank will only provisionally credit the value of collected Sales Drafts to Merchant's Account and reserves the right to adjust amounts collected to reflect the value of Chargebacks (actual and anticipated), fees, penalties, late submission charges, reserve deposits, negative Sales Draft batch deposits and items for which Bank did not receive final payment.

3.02 Endorsement.

By presenting Sales Drafts to Bank for collection and payment, Merchant agrees to sell and assign all its right, title and interest in each Sales Draft completed in conformity with Bank's acceptance procedures and constitutes an endorsement by Merchant to Bank of each Sales Draft. Bank may supply such endorsement on Merchant's behalf.

3.03 Prohibited Payments.

Bank may receive payment of any Sales Draft presented by Merchant and paid by Bank unless and until there is a Chargeback. Unless specifically unauthorized in writing by Bank, Merchant may not collect or attempt to collect any Sales Draft, including Chargebacks, and will hold in trust for Bank and promptly deliver in kind to Bank any payment Merchant receives, in whole or in part, of the amount of any accepted Transaction, together with the Cardholder's name and account number and any correspondence accompanying payment.

3.04 Chargebacks.

Merchant will accept for chargeback any sale for which the Cardholder disputes the validity of the sale according to prevailing Card Association regulations, or a Card Issuer or Bank determines that Merchant has in any way failed to comply with Card Association regulations or Bank's procedures in accepting a Card and presenting the resulting Sales Draft to Bank for purchase. Section 2.03 notwithstanding, Bank may charge back the amount of a Card sale for which the Cardholder disputes that authorizing the charge if Merchant failed to obtain the Card Imprint or the Cardholder's signature. Merchant may not initiate a sale Transaction in an attempt to collect a Chargeback. Merchant will pay the current published fees for each Chargeback as listed on Schedule A of the Merchant Application.

3.05 Chargeback Reserve Account.

Notwithstanding anything to the contrary in this Agreement, Bank may establish (without notice to Merchant) and Merchant agrees to fund a non-interest bearing chargeback reserve account (the "Reserve Account"), or demand of other security or raise any discount, transaction or other fees. This account may be established at any time or for any reason. Specific examples might include: (a) Merchant engages in any charge processing that creates an overcharge (in a transaction by duplicating charges); (b) any activity designed by Merchant to circumvent a "call center" message when attempting to process a transaction; (c) Merchant breaches this Agreement, violates any representation, covenant or warranty herein, violates any applicable Card Association rule or applicable law; (d) Merchant's application is in any way inaccurate or becomes inaccurate subsequent to Bank's approval of the application; (e) Merchant changes its type of business without Bank's prior written approval; (f) fraud, Merchant processes an unauthorized charge, or other action that violates Bank's applicable risk management standards; or is likely to cause a loss; (g) Merchant has chargebacks exceeding 1% of the total number of transactions completed by Merchant in any 90 calendar day period; (h) excessive numbers of requests from consumers or issuing banks to retrieve documentation; (i) Merchant's financial stability is in question or Merchant ceases doing business; or (j) Merchant terminates this Agreement. Once the Reserve Account is established, collected funds will be placed in the Reserve Account. Before releasing funds after this Agreement is terminated, Merchant will pay any equipment cancellation fees and any outstanding charges, losses or amounts, and Chargebacks for which Merchant has provided indemnification under this Agreement. Further, Bank may require Merchant to deposit additional amounts based upon Merchant's processing history and/or anticipated risk of loss to Bank into the Reserve Account. Once established, unless Bank determines otherwise at its sole discretion, the Reserve Account will remain in place for 180 days and a reasonable period thereafter during which Cardholder disputes may remain valid under applicable Card Association rules. The provisions of this Agreement relating to account debits and credits apply to the Reserve Account and survive this Agreement's termination until Bank terminates the Reserve Account. Any balance remaining after chargeback rights have expired and all of Bank's other expenses, losses and damages have been paid will be disbursed to Merchant.

ARTICLE IV - TERMINATION AND EFFECT OF TERMINATION**4.01 Term.**

This Agreement will be effective once Bank accepts it, and unless otherwise terminated in accordance with Section 4.02 below, will continue for three years and will automatically renew for successive three-year terms, unless Merchant provides written notice of non-renewal at least 60 days before the end of the then-current term.

4.02 Termination.

(a) Without Cause. Bank may terminate this Agreement, without cause, upon 30 days advance written notice to Merchant.

(b) For Cause. Bank may terminate this Agreement in its sole discretion, effective immediately, upon written or verbal notice, or by closing Merchant's point-of-sale terminal, if Bank reasonably determines that any of the following conditions exist: (i) Merchant has violated any provision of this Agreement; (ii) there is a material adverse change in Merchant's financial condition; (iii) if any case or proceeding is commenced by or against Merchant under any federal or state law dealing with insolvency, bankruptcy, receivership or other debt relief; (iv) any information which Merchant provided to Bank including Application information, was false, incomplete or misleading when received; (v) at any time during the term of this Agreement, Merchant has had a monthly ratio of Chargebacks to total transactions exceeding Card Association requirements or 1%, or Chargebacks exceed 3% of any monthly dollar amount of total transactions; (vi) an overall loss in the settlement account exists for more than three days; (vii) Merchant or any of Merchant's officers or employees has been involved in processing transactions arising from fraudulent or otherwise unauthorized transactions; (viii) Merchant is or will be unable or unwilling to perform its obligations under this Agreement or applicable law; (ix) Merchant has failed to timely pay Bank any amount due; (x) Merchant has failed to properly perform or discharge any obligation under its settlement account or the Reserve Account; (xi) any of Merchant's representations or warranties made in connection with this Agreement was not true or accurate when given; (xii) Merchant has defaulted on any agreement it has with the Bank; (xiii) Bank is served with legal process seeking to attach or garnish any of Merchant's funds or property in Bank's possession, and Merchant does not timely or appeal the legal process within 15 days of such service; (xiv) any Card Association rules are amended in any way so that the continued existence of this Agreement would cause Bank to be in breach of those rules; (xv) any guaranty supporting Merchant's obligations is revoked, withdrawn, terminated or altered in any way; (xvi) if any circumstances arise regarding Merchant or its business that create harm or loss of goodwill to any Card Association; (xvii) termination is necessary to prevent loss to Bank or Card Issuer; (xviii) Merchant's type of business indicated on the Application or as conducted by Merchant could endanger the Bank's safety or soundness; (xix) Merchant's owner, officer, guarantor, or corporate entity has a separate relationship with the Bank and that relationship is terminated; (xx) Merchant appears on any Card Association's security reporting; or (xxi) Bank's security for repayment becomes impaired.

4.03 Effect of Bankruptcy.

Any account or security held by Bank will not be subject to any preference, claim or stay by reason of bankruptcy or similar law. The parties expressly agree that the acquisition of Card Transactions hereunder is a financial accommodation and if Merchant becomes a debtor in any bankruptcy or similar proceeding, this Agreement may not be assumed or enforced by any other person and Bank will be excused from performance hereunder.

4.04 Effect of Termination.

When termination becomes effective, the parties' rights and obligations existing under this Agreement survive. If this Agreement is terminated, regardless of cause, Bank may withhold and discontinue the debits and for all Cards and other Merchant Transactions in the process of being collected and deposited. If Merchant is terminated for cause, Merchant acknowledges that Bank may be required to report Merchant's business name and the names and other identification of its principals to the MATCH file maintained by Visa and MasterCard and/or the CMINF file maintained by Discover. Merchant expressly agrees and consents to such reporting if Merchant is terminated for any reason requiring listing on the MATCH file or CMINF. Merchant waives and will hold harmless Bank from any claims that Merchant

may raise as a result of Bank's MATCH file reporting or Discover's CMINF reporting. Merchant will also immediately cease requesting Authorizations. If Merchant obtains any Authorization after termination, the fact that any Authorization was requested or obtained will not restate this Agreement. Further, Merchant will return all Bank property, forms, or equipment. All obligations for Transactions prior to termination (including payment for Chargebacks and Bank's expenses relating to Chargebacks) survive termination. Bank is not liable to Merchant for damages (including prospective sales or profits) due to termination. Following termination, Merchant will upon request provide Bank with all original and electronic copies of Sales Drafts and Credit Vouchers that have been retained by Merchant as of the date of termination. Upon termination, any amounts due to Bank will accelerate and be immediately due and payable, without any notice, declaration or other act whatsoever by Bank. The parties agree that if for any reason other than a material uncured breach by Bank, the Agreement is terminated before completion of the then-current term and without first giving Bank the right to match the terms of a written bona fide third party offer, Merchant shall be liable for de-conversion fees represented by multiplying Merchant's average monthly processing fees by the number of months remaining in term, plus Bank's costs and attorneys' fees. If, however, Bank fails to respond to such third party offer or is not willing to match it, then Merchant shall only be liable for de-conversion fees representing four hundred (\$400) dollars per location.

ARTICLE V - MISCELLANEOUS**5.01 Account Monitoring.**

Merchant acknowledges that Bank will monitor Merchant's daily deposit activity. Bank may upon reasonable grounds suspend deburment of Merchant's funds for any reasonable period of time required to investigate suspicious or unusual deposit activity. Bank will make good faith efforts to notify Merchant promptly following suspension. Bank is not liable to Merchant for any loss, either direct or indirect, which Merchant may attribute to any suspension of funds deburment.

5.02 Forms.

Merchant will use only the forms or modes of transmission of Sales Drafts and Credit Vouchers that are provided or approved in advance by Bank, and Merchant may not use such forms other than in connection with card transactions.

5.03 Indemnification.

Merchant will defend, indemnify and hold Bank and its officers, directors, members, shareholders, partners, employees, agents, subcontractors and representatives harmless from and against, any and all fines, penalties, claims, damages, expenses, liabilities or fees of any nature whatsoever, including attorneys' fees and costs ("Damages"), asserted against or incurred by Bank arising out of, relating to or resulting from, either directly or indirectly: (a) a breach of the security of the system safeguarding Cardholder information resulting in unauthorized access to Cardholder information; (b) a breach of any representation, warranty or term of this Agreement, including, but not limited to, the data security provisions by Merchant, or any service provider, subcontractor or agent of Merchant; (c) the negligence, gross negligence or willful misconduct of Merchant in the performance of its obligations under this Agreement, including, but not limited to, the data security provisions; (d) any violation of applicable federal and state laws, rules, regulations and guidance and Card Association rules by Merchant; and (e) all third party claims arising from the foregoing. Notwithstanding the foregoing, Merchant is not liable to Bank if Damages are caused by, related to or arise out of Bank's negligence, gross negligence or willful misconduct, or Bank's breach of this Agreement. Merchant will promptly reimburse Bank for any assessments, fines, fees or penalties imposed by the Card Association in connection with this Agreement, including the data security provisions, and authorizes Bank to deduct any such sums from amounts to be cleared and settled with Merchant.

5.04 Records.

In addition to any records Merchant routinely furnishes to Bank under this Agreement, Merchant will preserve a copy of actual paper Sales Drafts and Credit Vouchers and any written authorization of the Cardholder for at least two years after the date Merchant presents the Transaction to Bank.

5.05 Requests for Copies.

Immediately after Merchant receives the request by Bank, Merchant will provide to Bank either the original or a legible copy (in a size comparable to the actual Sales Draft) of the paper Sales Draft and any other documentary evidence available to Merchant that Bank reasonably requests to meet Bank's obligations under law (including its obligations under the Fair Credit Billing Act) or otherwise to respond to questions concerning Cardholder accounts.

5.06 Compliance with Law.

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

5.07 Fees and Charges.

Merchant will pay to Bank the fees and charges set forth on Schedule A including any additional charges applied to transactions that fail to meet Card Association requirements for the lowest interchange levels. Where applicable, Merchant shall also pay the following fees: *Voice/ARU Authorization*: \$0.95 per authorization request; *ACH Modifications*: \$25.00 per event; *ACH Return*: \$25 per return; *Operator Assisted Voice Auth*: \$2.95 per call; *Pass-through Association fees* include Visa Acquirer Processing fee, Visa Misuse of Auth fee, Visa International Service Assessment (ISA), Visa Zero Floor Limit fee, Van International Acquirer fee, MC Acquirer Program Support fee, MC Cross Border fee, and the MC Network Access and Brand Usage (NABU) fee; *Dispute Resolution Fee*: \$25; *Third Party Helpdesk Calls*: \$5.00 per call; *Unsupported Terminals*: \$20 per call. A monthly minimum of \$25 shall apply. Account will be debited through ACH or withheld from daily payments to Merchant for such amounts and for any other fees, charges or adjustments incurred or owed by Merchant hereunder. Upon 30 days written notice to Merchant, Bank may change fees, including adding fees for additional services utilized by Merchant and/or increasing fees for any adverse change to Merchant's risk profile, as reasonably determined by Bank.

5.08 Security Interest.

To secure payment of Merchant's obligations under this Agreement, Merchant grants to Bank a security interest in all now existing or hereafter acquired: (a) Transactions, Sales Drafts, Credit Vouchers and other items submitted to Bank for processing by or for Merchant; (b) accounts receivable and payment rights relating to or arising from this Agreement, including all amounts due Merchant (including any rights to receive credits or payments hereunder); (c) accounts (including without limitation all deposit accounts) maintained with the Bank or any institution other than Bank including the Reserve Account, in the name of or for the benefit of Merchant, or any guarantor of Merchant's obligations under this Agreement; (d) deposits, regardless of source, to Merchant's or any guarantor's accounts with Bank or any institution other than Bank, including the Reserve Account; (e) all deposits and all other property and funds deposited by Merchant or withheld by Bank, including funds and property withheld as the result of security monitoring and (f) proceeds of the foregoing, if Bank reasonably determines that Merchant has breached any obligation under this

Agreement, or that proceeds of Merchant's future card sales are unlikely to cover anticipated Chargebacks, credits, fees and adjustments, as reasonably determined by Bank (whether because this Agreement has been terminated or for any other reason), Bank may sell or otherwise exercise its security interest without notice or demand by immediately withdrawing from or freezing any account or otherwise exercising its rights under this Agreement or those rights available under applicable laws, including the Utah Uniform Commercial Code, or in equity. In addition to the collateral pledged above, Bank may require Merchant to furnish such other and different securities Bank deems appropriate in its sole discretion to secure Merchant's obligations under this Agreement. Bank may fully or partially prohibit withdrawal by Merchant of funds from Merchant's deposit accounts maintained with Bank or financial institutions other than Bank, pending Bank's determination from time to time to exercise its rights as a secured party against such accounts in partial or full payment of Merchant's obligations to Bank. Merchant will execute any documents and take any actions required to comply with and perfect any security interest under this paragraph, at Merchant's cost. Merchant represents and warrants that no other party has a security interest or lien in any of the collateral pledged above, and Merchant will obtain Bank's written consent before a grants a lien or security interest in that pledged collateral to any other person.

5.09 Modifications to Agreement.

This Agreement is subject to amendment to conform with Card Association regulations, as amended from time to time. From time to time Bank may amend any provision or provisions of this Agreement, including, without limitation, those relating to the discount rate or to other fees and charges payable by Merchant by mailing written notice to Merchant of the amendment at least 20 days prior to the effective date of the amendment, and if the amendment will become effective unless Bank receives Merchant's notice of written termination of this Agreement before such effective date. Amendments required due to changes in either Card Association's rules and regulations or any law or judicial decision may become effective on such shorter period of time as Bank may specify if necessary to comply with the applicable rule, regulation, law or decision. The term of this Agreement shall be automatically extended an additional three years in the event of a price decrease or the introduction of a new product or service used by Merchant (including any equipment upgrade), effective as of the date such price change is implemented or new product/service accepted by Merchant.

5.10 Warranty Disclaimer.

BANK MAKES NO WARRANTIES REGARDING THE USE, OPERATION OR PERFORMANCE OR NON-PERFORMANCE OF SOFTWARE AND SYSTEMS UTILIZED FOR THIS AGREEMENT, WHETHER EXPRESS OR IMPLIED, AND BANK EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

5.11 Limitation of Liability.

Bank's liability with respect to any Card Transaction may not exceed the amount of the Sales Draft in connection with that Transaction less any applicable fees and charges. Bank is not liable for any incidental or consequential damages whatsoever. Merchant waives all claims against Bank for any fees, claim demand, penalty, action, delay, cost or expense (including reasonable attorneys' fees) of any kind unless Merchant provides written notice to Bank of the occurrence that gave rise to the alleged liability within 30 days after Merchant knew or should have known of the occurrence. Merchant will indemnify and hold Bank harmless from any claim relating to any Sales Draft paid for by Bank as may be made by anyone by way of defense, dispute, offset, counterclaim or affirmative action, or for any damage or losses that Bank may incur as a result of Merchant's breach of this Agreement. Further, Merchant will reimburse Bank for all expenses and costs, including attorneys' fees, with regard thereto.

5.12 Waiver.

Bank's failure by Bank to enforce one or more of the provisions of this Agreement will not constitute a waiver of the right to enforce the same or other provision in the future.

5.13 Written Notices.

All written notices and other written communications required or permitted under this Agreement will be deemed delivered immediately when hand-delivered or sent via facsimile and the sender obtains a fax confirmation receipt, and upon mailing when sent first class mail, postage prepaid, addressed as follows:

(a) If to Bank: Merrick Bank Corporation, 10705 South Jordan Gateway, Suite 200, South Jordan, UT 84095. Attn: Fed Horn, Facsimile: (516) 576-6741;

(b) If to Merchant: At the facsimile number or address provided as the billing address and to the contact listed on the Merchant Application.

5.14 Choice of Law; Jurisdiction.

This Agreement shall be governed exclusively by New York law, without regard to its choice of law provisions. Merchant agrees that any legal action or proceeding arising out of or relating to the relationship between Bank and Merchant shall be instituted solely in the state or federal courts of the State of New York and hereby submits to the jurisdiction of such courts in any such action or proceeding. Merchant hereby waives, releases and agrees not to assert any rights it may have under any foreign law or regulation that would be inconsistent with the terms of this Agreement as governed by New York law. Merchant also waives its right to a trial by jury of any disputes arising from its relationship with Bank.

5.15 Entire Agreement; Assignability.

This Agreement expresses the entire understanding of the parties with respect to the subject matter hereof and except as provided herein, may be modified only in writing executed by Bank and Merchant. This Agreement may not be assigned, directly or by operation of law, without Bank's prior written consent. This Agreement will be binding upon and inure to the benefit of the parties' respective heirs, personal representatives, successors and assigns.

5.16 Deposit Account.

Merchant will at all times maintain an Account at a bank that is a member of the Federal Reserve ACH system and will provide Bank with proper authorization to debit the Account. All credits for authorized funds and debits for fees, payments and Chargebacks and other amounts for which Merchant is liable under the terms of this Agreement will be made to the Account. Merchant may not close or change the Account without written notice to Bank. Merchant will be solely liable for all fees and costs associated with the Account and for all overdrafts. Merchant hereby grants to Bank a security interest in the Account to the extent of any and all fees, payments and Chargebacks and other amounts due which may arise under this Agreement, and Merchant will execute any document and obtain any consents or waivers from the bank at which the Account is maintained as requested by Bank to protect its security interests therein.

5.17 Credit and Financial Inquiries; Additional Locations; Inspections.

Bank may make, at any time, any credit inquiries which it may consider necessary to accept or review acceptance of this Agreement or investigate Merchant's deposit or Card acceptance activities subsequent to acceptance of this Agreement. Such inquiries may include, but are not limited to, a credit and/or criminal check of the business including

its proprietor, partners, principal owners or shareholders or officers. Upon Bank's request, Merchant will provide the written consent of any person for which an inquiry has been or is to be made if such person has not executed this Agreement and will provide any financial statements, income tax and business tax returns and other financial information as Bank may consider necessary to perform initial or periodic reviews of Merchant's financial stability and business practices. Merchant may accept Cards only at locations approved by Bank. Additional locations may be added, subject to Bank's approval. Any party to the Agreement may delete any location by providing notice as provided herein. Merchant will permit Bank at any time and from time to time, to inspect locations to confirm that Merchant has or is adhering to the terms of this Agreement and is maintaining the proper facilities, equipment, inventory, records and license or permit (where necessary) to conduct its business. However, nothing in this paragraph may be deemed to waive Merchant's obligation to comply in all respects with the terms of this Agreement. Bank, its internal and external auditors, and its regulators may audit compliance with this Agreement, compliance with federal and state laws, rules, regulations and guidance applicable to the services, Card acceptance and Transaction processing, and data security provisions, including Card Association compliance. Merchant will make available its records maintained and produced under the Agreement, and Merchant's facilities will be made accessible, upon notice during normal business hours for examination and audit. Nothing in this section may be construed to require Merchant to give access to its facilities, personnel or records in a manner that unreasonably interferes with its business operations. Each party will bear its expenses of any audit.

5.18 Marketing of Payment Card Services.

From time to time, Bank may offer to Merchant certain additional products and services which may or may not be related to the processing of credit card Transactions. If such offers are made, Merchant may decline the offers or be deemed to have accepted the offers and be liable for payment therefor.

5.19 Force Majeure.

The parties will be released from liability hereunder if they fail to perform any obligation where the failure occurs by reason of any act of God, fire, flood, storm, earthquake, tidal wave, communications failure, sabotage, war, military operation, terrorism, national emergency, mechanical or electronic breakdown, civil commotion or the order, requisition, request or recommendation of any governmental authority, or other party's compliance therewith, or governmental regulation or priority, or any other similar cause beyond either party's reasonable control.

5.20 No Third Party Beneficiary.

No other person or entity may be deemed to be a third party beneficiary of this Agreement.

5.21 Exclusivity.

Merchant agrees that Bank will be Merchant's exclusive acquirer for Visa, MasterCard and Discover transactions. Accordingly, Merchant shall not use the services of any bank, corporation, entity or person other than Bank for authorization and/or processing of payment transactions during the term of this Agreement.

PART TWO: TERMINAL BAILMENT

If Merchant has accepted to receive a terminal from ISO that is neither leased nor purchased, the following additional terms and conditions of Part Two shall apply:

1.1 Bailment. ISO hereby agrees to bail to Merchant, at no charge and for the benefit of Merchant, the terminal(s) described in the Application ("Terminal") for 3 years, subject to the terms and conditions hereof.

1.2 Activation. Merchant understands and agrees that bailment of the Terminal is conditional upon: (i) Merchant actively processing, pursuant to this Agreement within thirty (30) days of the date of Delivery of the Terminal; and (ii) continued processing under this Agreement.

1.3 Maintenance. Merchant shall at all times during the term of this Agreement maintain the Terminal in good operating order, repair, and condition, and protect same from damage or deterioration. Merchant shall not use Terminal for any purpose other than that for which it was intended under this Agreement.

1.4 Return. In the event of a termination of this Agreement, the bailment shall be deemed automatically terminated and Merchant shall, at Merchant's sole expense, immediately return Terminal to ISO in its original condition, save for normal wear and tear, failing which Merchant agrees to immediately pay ISO an amount equal \$800.

1.5 Delivery. Delivery shall be as of the time that Terminal is received by Merchant.

1.6 Representations and Warranties. AS REGARDS THE TERMINAL AND ANY DATA STORED THEREIN, ISO MAKES ABSOLUTELY NO REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED, WRITTEN OR ORAL, AS TO MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, CONDITION, QUALITY, DURABILITY OR SUITABILITY OF THE EQUIPMENT, TITLE OR NON-INFRINGEMENT AND EXPRESSLY DISCLAIMS SAME.

1.7 Risk of Loss. Merchant assumes all risk of loss or damage to the Terminal as at the time of Delivery. Merchant agrees to indemnify and hold ISO harmless from and against all claims, liability, damage, loss or expense which may occur to or arise from the Terminal during or after such time.

1.8 Entire Agreement. This Part Two, together with any documents to be delivered pursuant hereto, constitutes the entire agreement between Merchant and ISO pertaining to the bailed terminals and supersedes all prior agreements, understandings, negotiations, and discussions, whether oral or written, of such parties.

1.9 Limitation of Liability: Amount. IN NO EVENT SHALL ISO BE LIABLE TO MERCHANT FOR ANY LIABILITY, WHETHER BASED UPON WARRANTY, CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE, IN AN AMOUNT GREATER THAN THE WHOLESALE VALUE OF THE TERMINAL.

1.10 Limitation of Liability: Damages. IN NO EVENT SHALL ISO BE LIABLE TO THE MERCHANT FOR SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY, PUNITIVE, TREBLE OR OTHER INDIRECT DAMAGES, OR FOR LOSS OF PROFITS AND REVENUE, LOSS OF DATA OR LOSS OF USE, DAMAGES, ARISING OUT OF THE MANUFACTURE, SALE, SUPPLYING OR FAILURE OR DELAY IN SUPPLYING OF THE TERMINAL, WHETHER BASED UPON WARRANTY, CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE, EVEN IF AWARE OF THE POSSIBILITY OF SUCH DAMAGES OR LOSSES. UNDER NO CIRCUMSTANCES SHALL ISO'S AGGREGATE LIABILITY TO MERCHANT EXCEED THE TERMINAL VALUE INDICATED IN THE APPLICATION HERETO.

PART THREE: PivotalONE

Merchant shall be automatically enrolled in "PivotalONE", a merchant loyalty program containing savings, discounts and/or other benefits, as more fully described on the website located at www.PivotalONE.com.

1.1 Free Trial Period. During the first 60 days following enrollment, Merchant will have free access to certain PivotalONE benefits, namely, Free Paper, POS Supplies and PivotalONE Discounts. Merchant shall have the right to use a free trial period one time, upon its initial enrollment into PivotalONE. After expiration of the initial trial period, Merchant will be charged a monthly membership fee of \$9.95 per merchant identification number. The monthly membership fee will be automatically debited via ACH and is non-refundable.

1.2 Cancellation of Membership. To cancel membership, merchant must opt out at least three business days before the first day of the first month following the end of trial period. Merchant may opt out by visiting the PivotalONE website located at www.PivotalONE.com. If the amount of the fee changes after enrollment for any reason, ISO will provide at least thirty (30) days advance written notice to Merchant regarding any such change.

PART FOUR: THIRD PARTY AGREEMENTS

The below Equipment Lease Agreement is a third party agreement between Merchant and First Data Merchant Services Corporation and will apply if Merchant has checked the appropriate box or otherwise indicated as desired in the Merchant Application forming part of this Agreement to enter into such lease arrangement. The signature page found on such application or any Schedule thereto shall also serve as a signature page to this Equipment Lease Agreement.

Merchant acknowledges that First Data Merchant Services Corporation is relying upon the information contained in the Merchant Application and the Schedules thereto, all of which are incorporated by reference into the Equipment Lease Agreement.

EQUIPMENT LEASE AGREEMENT

This Equipment Lease Agreement ("Lease Agreement") is being entered into by and between First Data Merchant Services Corporation (through its business unit First Data Global Leasing) ("we," "our," "us," "Lessor") and the Merchant ("Lessee" or "you") identified on the Merchant Application forming part of this Merchant Agreement ("MA"). In this Lease Agreement, the words "we," "our" and "us" refer to First Data Merchant Services Corporation and its successors and assigns.

Lessee hereby authorizes us or our designee, successors or assigns (hereinafter "Lessor") to withdraw any amounts including any and all sales taxes now due or hereinafter imposed, owed by Lessee in conjunction with this Lease Agreement by initiating debit entries to the bank account designated by the Lessee on the MA (the "Settlement Account"). In the event of default of Lessee's obligation hereunder, Lessee authorizes debit of its account for the full amount due under this Lease Agreement. Further, Lessee authorizes its financial institution to accept and charge any debit entries initiated by Lessor to Lessee's account. In the event that Lessor withdraws funds erroneously from Lessee's account, Lessee authorizes Lessor to credit Lessee's account for an amount not to exceed the original amount of the debit. This authorization is to remain in full force and effect until Lessor has received written notice from Lessee of its termination in such time and in such manner as to afford Lessor a reasonable opportunity to act. Lessee also authorizes Lessor from time to time to obtain investigative credit reports from a credit bureau or a credit agency concerning Lessee.

1.1. Equipment. We agree to lease to you and you agree to lease from us the equipment identified on the MA or such other comparable equipment we provide you (the "Equipment"), according to the terms and conditions of this Lease Agreement. We are providing the Equipment to you "as is" and make no representations or warranties of any kind as to the suitability of the equipment for any particular purpose. The term Equipment includes the Equipment initially deployed under the Lease Agreement and/or any additions, replacements, substitutions, or additions thereto.

1.2. Effective Date, Term and Interim Rent.

a) This Lease Agreement becomes effective on the earlier of the date we deliver any piece of Equipment to you (the "Delivery Date") or acceptance by us. The Lease Agreement remains in effect until all of your obligations and all of our obligations under it have been satisfied. We will deliver the Equipment to the site designated by you.

b) The term of this Lease Agreement begins on a date designated by us after the receipt of all required documentation and acceptance by us (the "Commencement Date"), and continues for the number of months indicated on the MA. THIS IS A NON-CANCELABLE LEASE FOR THE TERM INDICATED.

c) You agree to pay an Interim Lease Payment in the amount of one thirtieth (1/30th) of the monthly lease charge for each day from and including the Delivery Date until the date preceding the Commencement Date.

d) YOU ACKNOWLEDGE THAT THE EQUIPMENT AND/OR SOFTWARE YOU LEASE UNDER THIS LEASE AGREEMENT MAY NOT BE COMPATIBLE WITH ANOTHER PROCESSOR'S SYSTEMS AND THAT WE DO NOT HAVE ANY OBLIGATION TO MAKE SUCH SOFTWARE AND/OR EQUIPMENT COMPATIBLE. IN THE EVENT THAT YOU ELECT TO USE ANOTHER SERVICE PROVIDER UPON TERMINATION OF YOUR MERCHANT PROCESSING AGREEMENT, YOU ACKNOWLEDGE THAT YOU MAY NOT BE ABLE TO USE THE EQUIPMENT AND/OR SOFTWARE LEASED UNDER THIS AGREEMENT WITH SAID SERVICE PROVIDER.

1.3. Site Preparation. You will prepare the installation site(s) for the Equipment, including but not limited to the power supply circuits and phone lines, in conformance with the manufacturer's and our specifications and will make the site(s) available to us by the confirmed shipping date.

1.4. Payment of Amounts Due.

a) The monthly lease charge is due and payable monthly, in advance. You agree to pay all recessed costs for delivery and installation equipment.

b) In addition to the monthly lease charge, you shall pay, or reimburse us for, amounts equal to any taxes, assessments or arising out of this Lease Agreement or the Equipment, and related supplies or any services, use or activities hereunder, including without limitation, state and local sales, use, property, privilege and excise tax, tax preparation, compliance expenses, but exclusive of taxes based on our net income. Property taxes are calculated and charged based on the average of the estimated annual property taxes over the course of the term of the lease. You will also be charged an annual Tax Handling Fee, as set forth in the MA and/or applicable Fee Schedule.

c) Your lease payments will be due despite dissatisfaction with the Equipment for any reason.

d) Whenever any payment is not made by you in full when due, you shall pay us as a late charge, an amount equal to ten percent of the amount due but no less than \$5.00 for each month during which it remains unpaid (prorated for any partial month), but in no event more than the maximum amount permitted by law. You shall also pay to us an administrative charge of \$10.00 for any debit we attempt to make against your Settlement Account that is rejected.

e) In the event your account is placed into collections for past due lease amounts, you agree that we can recover a collection expense charge of \$50.00 for each aggregate payment requiring collection effort.

1.5 Use and Return of Equipment; Insurance.

a) You shall cause the Equipment to be operated by competent and qualified personnel in accordance with any operating instructions furnished by us or the manufacturer. You shall maintain the Equipment in good operating condition and protect it from deterioration, normal wear and tear, excepted.

b) You shall not permit any physical alteration or modification of the Equipment, or change the installation site of the Equipment, without our prior written consent.

c) You shall not create, incur, assume, or allow to exist any consensual or judicially imposed liens or encumbrances on, or part with possession of, or sublease the Equipment, without our prior written notice.

d) You shall comply with all governmental laws, rules and regulations relating to the use of the Equipment. You are also responsible for obtaining all permits required to operate the Equipment at your facility.

e) We or our representatives may, at any time during normal business hours, enter your premises for purposes of inspecting, examining or repairing the equipment.

f) The Equipment shall remain our personal property and shall not under any circumstances be considered to be a fixture affixed to your real estate. You shall permit us to affix suitable labels or stamps to the Equipment evidencing our ownership.

g) You shall keep the Equipment adequately insured against loss by fire, theft, and all other hazards and you shall provide proof of insurance. The loss, destruction, theft or damage of or to the Equipment shall not relieve you from your obligation to pay full purchase price or total monthly lease charges hereunder.

h) You may choose not to insure the Equipment and participate in the Equipment Service Program. The Equipment Service Program provides a replacement of the Equipment for as long as you participate in the Program during the Lease Term. The Equipment Service Program includes (i) loss comparable replacement terminal (new or refurbished) in the event of a defect or malfunction (terminal defects or malfunctions caused by acts of God are not covered by this Program), (ii) free shipping and handling on both the replacement terminal and return of defective terminal, (iii) free overnight shipping and handling on replacement terminal if requested by 3:00 pm ET (Monday-Thurseday). If you don't return your damaged equipment, you will be charged the full purchase price of the replacement equipment sent to you. The monthly fee of \$4.85 for the optional Equipment Service Program is a per terminal fee. You can choose to insure the Equipment and terminate your participation in the program at any time by calling our Customer Service department.

1.6 Title to Equipment. The Equipment is, and shall at all times be and remain, our sole and exclusive property, and you shall have no right, title or interest in or to the Equipment except as expressly set forth in this Lease Agreement or otherwise agreed in writing. Except as expressly provided in Section 1.8, no interference of intellectual property rights is intended by or conferred in this Lease Agreement. You agree to execute and deliver to us any statement or instrument that we may request to confirm or evidence our ownership of the Equipment, and you irrevocably appoint us as your attorney-in-fact to execute and file the same in your name and on your behalf. If a court determines that the leasing transaction contemplated by this Lease Agreement does not constitute a financing and is not a lease of the Equipment, then we shall be deemed to have a first lien security interest on the Equipment as of the date of this Lease Agreement, and you will execute such documentation as we may request to evidence such security interest. If this Lease Agreement is deemed a loan despite the intention of the parties, then in no contingency or event whatsoever shall interest, deemed charge or interest hereunder, however such interest may be characterized or computed, exceed the highest rate permissible under any law which a court of competent jurisdiction shall, in a final determination, deem applicable hereto.

1.7. Return or Purchase of Equipment at End of Lease Period. Upon the completion of your lease term or any extension thereof, you will have the option to (a) return the Equipment to us, or (b) purchase the Equipment from us for its then fair market value, calculated as a percentage of the aggregate lease payments in accordance with the following: if the term of this Lease is forty-eight (48) months or more, the buyout option as a percentage of the aggregate lease payments shall be ten percent (10%). If the term of this lease is thirty-six (36) to forty-seven (47) months, the buyout option as a percentage of the aggregate lease payments shall be fifteen percent (15%). If the term of this lease is twenty-four (24) to thirty-five (35) months, the buyout option as a percentage of the aggregate lease payments shall be twenty percent (20%). If the term of this lease is twelve (12) to twenty-three (23) months, the buyout option as a percentage of the aggregate lease payments shall be twenty-five percent (25). In the absence of an affirmative election by you to purchase or return the Equipment, the lease will continue on a month-to-month basis at the existing monthly lease payment. If we terminate the lease pursuant to Section 1.12 due to a default by you, then you shall immediately return the Equipment to us no later than the tenth business day after termination, or rent to us the fair market value of the Equipment as determined in good faith by us. We may collect any amounts due to us under this Section 1.7 by debiting your bank account, and in the event we are unable to obtain full satisfaction in this manner, you agree to pay the amounts owed to us promptly upon our request.

1.8. Software License. We retain all ownership and copyright interest in and to all computer software, related documentation, technology, know-how and processes embodied in or provided in connection with the Equipment other than those owned or licensed by the manufacturer of the Equipment (collectively "Software"), and you shall have only a nonexclusive license to use the software in your operation of the Equipment.

1.9. Limitation on Liability. We are not liable for any loss, damage or expense of any kind or nature caused directly or indirectly by the Equipment, including any damage or injury to persons or property owned by the Equipment. We are not liable for the use or maintenance of the Equipment, its failure to operate, any repairs or service to it, or by any interruption of service or loss of use of the Equipment or resulting loss of business. Our liability arising out of or in any way connected with this Lease Agreement shall not exceed the aggregate lease amount paid to us for the particular Equipment involved. In no event shall we be liable for any indirect, incidental, special or consequential damages. The remedies available to you under this Lease Agreement are your sole and exclusive remedies.

1.10. Warranties.

a) All warranties, express or implied, made to you or any other person are hereby disclaimed, including without limitation, any warranties regarding quality, suitability, merchantability, fitness for a particular purpose, quiet enjoyment or non-impairment.

b) You warrant that you will only use the Equipment for commercial purposes and will not use the Equipment for any

household or personal purposes.

1.11. Indemnification. You shall indemnify and hold us harmless from and against any and all losses, liabilities, damages and expenses resulting from (a) the operation, use, condition, lease against, or return of the equipment or (b) any breach by you of any of your obligations hereunder, except to the extent any losses, liabilities, damages or expenses result from our gross negligence or willful misconduct.

1.12. Default; Remedies.

a) If any debt of your Settlement Account, initiated by us is rejected when due, or if you otherwise fail to pay us any amounts due hereunder when due, or if you default in any material respect in the performance or observance of any obligation or provision of this Lease Agreement or any agreement with our affiliates or joint ventures, any such event shall be a default hereunder. Without limiting the foregoing, any default by you under a processing agreement with us or with an affiliate or joint venture to which we are a party will be treated as a default under this Lease Agreement. Such a default would include a default resulting from early termination of the MA.

b) Upon the occurrence of any default, we may at our option, effective immediately without notice, either (i) terminate the lease and our future obligations under this Lease Agreement, repossess the Equipment and proceed in any lawful manner against you for collection of all charges that have accrued and are due and payable, or (ii) accelerate and declare immediately due and payable all monthly lease charges for the remainder of the applicable lease period together with the fair market value of the Equipment (as determined by us), not as a penalty but as liquidated damages. Upon any such termination for default, we may proceed in any lawful manner to obtain satisfaction of the amounts owed to us and, if applicable, our recovery of the Equipment, including entering onto your premises to recover the Equipment. In any case, you shall also be responsible for our costs of collection, court costs, as well as applicable shipping, repair and refurbishing costs of recovered Equipment. You agree that we shall be entitled to recover any amounts due to us under this Lease Agreement, by charging your Settlement Account or any other funds of yours that come into our possession or control, or within the possession or control of our affiliates or joint ventures, or by setting off amounts that you owe to us against any amounts we may owe to you, in any case without notifying you prior to doing so. Without limiting the foregoing, you agree that we are entitled to recover amounts owed to us under this Lease Agreement by obtaining directly from an affiliate or joint venture to which we are a party and with which you have entered into an MA any funds held or available as security for payment under the terms of the MA, including funds available under the "Reserve Account; Security Interest" section of the MA, if applicable.

1.13. Assignment. You may not assign or transfer this Lease Agreement, by operation of law or otherwise, without our prior written consent. For purposes of this Lease Agreement, any transfer of voting control of you or your parent shall be considered an assignment or transfer of this Lease Agreement. We may assign or transfer this Lease Agreement and our rights and obligations hereunder, in whole or in part, to any third party without the necessity of obtaining your consent.

1.14. Lease Guaranty. No guarantor shall have any right of subrogation to any of our rights in the Equipment or this Lease Agreement or against you, and any such right of subrogation is hereby waived and released. All indebtedness that exists now or arises after the execution of this Lease Agreement between you and any guarantor is hereby subordinated to all of your present and future obligations, and those of your guarantor, to us, and no payment shall be made or accepted on such indebtedness due to you from a guarantor until the obligations due to us are paid and satisfied in full.

1.15. Governing Law; Venue; Miscellaneous. This Lease Agreement shall be governed by and will be construed in accordance with the laws of the State of New York (without applying its conflicts of laws principles). The exclusive venue for any actions or claims arising under or related to this Lease Agreement shall be in the state of federal court located in Suffolk County, New York. If any part of this Lease Agreement is not enforceable, the remaining provisions will remain valid and enforceable.

1.16. Notices. All notices must be in writing, and shall be given (a) if sent by mail, when received, and (b) if sent by courier, when delivered; if to you at the address appearing on the MA, and if to us at 4000 Coral Ridge Drive, Coral Springs, Florida 33065. Attn: Lease Department, Customer Service toll free number 1-877-257-2094.

1.17. Entire Agreement. This Lease Agreement constitutes the entire Agreement between parties with the respect to the Equipment, supersedes any previous agreements and understandings and can be changed only by a written agreement signed by all parties. This Lease Agreement may be executed in any number of counterparts and all such counterparts taken together shall be deemed to constitute one and the same instrument. Delivery of an executed counterpart of a signature page of this Lease Agreement by facsimile shall be effective as delivery of a manually executed counterpart of this Lease Agreement.

Initial here: _____

R. Lawrence Harris, Esq.

Direct Dial:
(952) 442-7744

E-mail Address:
rhharris@mhsllaw.com



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BRANCH OFFICES
Chaska, Minnesota
Hutchinson, Minnesota

CERTIFICATE OF INCUMBENCY

Merrick Bank
Pivotal Payments Inc.
101 Crossway Park West
Woodbury, New York 11797

Re: City of Cologne

TO WHOM IT MAY CONCERN:

The undersigned is the City Attorney for the City of Cologne, a Minnesota municipal corporation, located in Carver County, Minnesota (the "City"), and certifies as follows:

1. Incumbency. The persons signing this Certificate of Incumbency at Section 2 below are, as of October 7, 2013, duly elected and qualified officers of the City as set forth opposite their signatures, and as officers, pursuant to a Resolution adopted by the City Council of the City on October 7, 2013, have all the right, power, and authority under the laws of the State of Minnesota to execute the: (i) Merchant Agreement: Terms and Conditions, and (ii) Amendment to Merchant Agreement attached hereto, binding the City to the terms and provisions thereof.

2. Identification of Officers. The following persons occupy the following offices of the City, to wit:

NAME	OFFICE	SIGNATURE
Matthew Lien	Mayor	<i>M. A. Y.</i>
Scott Williams	Council Member	<i>Scott Williams</i>

3. Reliance. Pivotal Payments Inc./Merrick Bank located at 101 Crossway Park West, Woodbury, New York 11797 may rely upon this Certificate of Incumbency in connection with the execution of: (i) the Merchant Agreement: Terms and Conditions, and (ii) the Amendment to Merchant Agreement by and between the

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Merrick Bank
Pivotal Payments Inc.
Page 2

City and Pivotal Payments Inc. and Merrick Bank executed by the City on October
____, 2013.

Dated this ____ day of October, 2013.

R. Lawrence Harris
Melchert Hubert Sjodin, PLLP

http://clients.intranet.mhslaw.com/6/36792/draft_documents/cert_of_incumbency_merrick_bank_09.26.13.docx