

## MERCHANT PAYMENT CARD TERMS & CONDITIONS

This AGREEMENT is made by and BETWEEN (“**Member Bank**”), Paynuity One LLC (“**Paynuity**”) and the undersigned merchant (“**Merchant**”) that submitted an Application to receive the merchant transaction processing and related services described herein (“**Processing Services**”), subject to the approval of Member Bank. Each of Paynuity, Member Bank, and Merchant is a “**Party**,” and are collectively the “**Parties**.” The Parties hereto agree as follows:

### Section 1. AGREEMENT:

**1.1.** This document, as well as other documents executed by Merchant, pursuant to the acceptance of Member Bank, shall be incorporated herein and made a part hereof and shall constitute the entire agreement between Member Bank and Merchant. This Agreement is effective upon acceptance by Member Bank or on the date when Merchant first accesses or uses the Processing Services, whichever comes first (“**Effective Date**”). By accessing or using any of the Processing Services, Merchant agrees to comply with the terms and conditions of this Agreement.

**1.2.** Each Party agrees that the electronic signatures and equivalent indications of acceptance by the Parties executing this Agreement are intended to authenticate this Agreement on behalf of each Party and will have the same force and effect as manual signatures. By accepting this Agreement or using the Processing Services, Merchant consents to the electronic communications requirements described in Section 10.6 of this Agreement.

**1.3.** Merchant acknowledges that Member Bank may provide financial transaction processing hereunder through contracts or subcontracts with third parties engaged in the business of transaction processing and authorization. Merchant agrees that throughout the Term of this Agreement, it will not use the services of any bank, corporation, entity or any person other than Member Bank for the processing of payment card transactions; provided, however, that Merchant may designate a third party that does not have a direct agreement with Member Bank as its agent for the direct delivery of data-captured Visa Transactions to VisaNet for clearing and settlement subject to the following requirements:

(a) Merchant must advise Member Bank that it will use a third party agent.

(b) Merchant must agree that Member Bank will reimburse Merchant only for the amount of Visa Transactions delivered by Member Bank to VisaNet, less the appropriate discount fee.

(c) Merchant must assume responsibility for any failure by its agent to comply with the Card Network Rules, including but not limited to, any violation resulting in a chargeback.

**1.4.** Subject to the terms and conditions of this Agreement, Merchant may choose one of the following options for receiving the Processing Services hereunder: (i) Merchant may elect to accept only consumer credit and commercial Cards; (ii) Merchant may elect to accept only consumer debit Cards; or (iii) Merchant may elect to accept consumer credit and commercial Cards and consumer debit Cards.

**1.11.** Merchant must immediately notify Member Bank in writing of any changes to the information in the Application, including but not limited to:

(a) Transfer or sale of 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; or

(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.

The notice must be received by Paynuity and Member Bank no later than ten (10) days following the occurrence of one or more of the aforementioned changes. Merchant will promptly provide updated information to Member Bank upon Member Bank's request. Failure to provide notice as required above may be deemed as material breach and shall be sufficient grounds for immediate termination of Merchant. In the event any of the changes listed above should occur, Member Bank shall have the option to renegotiate the terms of this Agreement or provide thirty (30) days' notice of termination. Merchant is liable to Member Bank for all losses and expenses arising out of a failure to report changes to Member Bank.

## **Section 2. Rights, Duties, and Responsibilities of Merchants**

**2.1.** Merchant agrees to honor all valid Cards it elects to accept pursuant to the Agreement, without discrimination, and to submit all sales and credits for Transactions to Member Bank according to the terms of the Agreement. Merchant agrees to properly obtain an authorization code for the total amount of the Transaction and will record the authorization code on the Transaction Data prior to completing the Transaction. Member Bank reserves the right to refuse to process any Transaction presented by Merchant that does not include a proper authorization. With respect to each Transaction, Merchant represents and warrants the following:

(a) The Card accepted is valid and was presented to Merchant at the time of the sale by the Cardholder. A Card is valid only if it is presented on or after the valid date, if any, and before the expiration date shown on its face.

(b) The Card is used as payment for products or services which are sold or rendered by Merchant in accordance with all Card Network Rules and Applicable Laws.

(c) The Merchant has followed the procedures established by Member Bank for completion of sales drafts.

**2.2.** Merchant agrees to complete sales drafts in compliance with the terms of this Agreement and the Card Network Rules, and any additional instructions provided by Paynuity and Member Bank. Merchant agrees to deliver a completed copy of each Transaction's sales draft to the applicable Cardholder in the form of a receipt in accordance with the terms of this Agreement, the Card Network Rules, and Applicable Laws. Merchant agrees to electronically deposit sales drafts and credit vouchers no later than the business day following the Transaction date. At a minimum, Merchant agrees to include the following Transaction Data in each sales draft:

(a) For Transactions that are not mail, phone, or internet orders, unless electronically swiped, a copy (or copies) of the imprint(s) of the Card sufficient to legibly show name of the Cardholder, the Cardholder's account number and the Card's expiration date;

(b) For Transactions that are mail or phone orders, the name of the Cardholder, the Cardholder's account number and the Card's expiration date, provided that Merchant is not authorized to accept mail or phone order Transactions unless specifically authorized by Member Bank in writing prior to accepting such Transactions and that acceptance of such Transactions without prior written authorization from Member Bank's will constitute a material breach of the Agreement;

(c) The signature of the Cardholder, provided that in the case of mail or phone order Transactions, the letters 'MO' to denote a mail order Transaction or 'TO' to denote a phone order Transaction, as the case may be, shall be clearly indicated on the sales draft;

(d) The date of the sale;

(e) A short description of the products sold or rendered;

(f) The total cash price of the sale or the words "deposit" or "balance" if full payment for the Transaction is to be made in this manner at different times on different sales drafts; and

(g) The city and state wherein the Transaction occurred.

(h) In the case of Fleet Card Transactions, the type of fuel sold and odometer reading (if permitted by POS device used during the Transaction).

**2.3.** Merchant agrees that, at all times, Merchant will maintain a return policy for the exchange or return of goods sold and the adjustment for services rendered that (i) is posted in accordance with the applicable Card Network Rules; (ii) applies equally to all Cards and does not treat any Card more favorably than any other Card; and (iii) complies with Card Network Rules and Applicable Laws. If applicable, Merchant agrees to conspicuously disclose to each Cardholder, before a Transaction is completed, that if merchandise is returned, Merchant's return policy dictates any of the following:

- (a) No refund, or a refund for any amount less than the full purchase price, will be given;
- (b) Returned merchandise will only be exchanged for similar merchandise of comparable value;
- (c) Only a credit toward future purchases from Merchant will be given; or
- (d) Cardholder will be required to pay one or more fees to receive a refund or other special conditions or circumstances apply to the refund (e.g. late delivery, delivery charges, or other noncredit 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. Merchant shall under no circumstances issue cash for returns of products where products were originally purchased in a Card Transaction. Disclosures must be made on all copies of sales drafts or invoices in letters approximately 1/4 inch 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. Member Bank will not reimburse the Merchant for interchange, dues, fees and assessments on returns and refunds. Member Bank will bill Merchant on gross processing volume.

**2.4.** Merchant agrees that it will not:

- (a) Prepare and present to Member Bank for processing any Transaction(s) representing the refinancing of an existing obligation of a Cardholder including, but not limited to, obligations (i) previously owed to Merchant, (ii) arising from the dishonor of a Cardholder's personal check, and/or (iii) representing the collection of any other pre-existing indebtedness.
- (b) Complete any Card sale for which a Transaction authorization has been declined. Any unauthorized Card Transaction is made with full recourse to Merchant, and Member Bank may charge back the amount of such Card sale to Merchant.
- (c) Require, except as specifically permitted by the Card Network Rules and Applicable Law, any Cardholder to pay any part of any discount or charge imposed upon Merchant pursuant to this the Agreement, whether through any increase in price or otherwise. Except as specifically permitted by the Card Network Rules and Applicable Law, Merchant may not require a customer presenting a Card for payment to pay any surcharge or other charge not also required from a person paying cash. These terms shall not, however, be construed as prohibiting discounts to customers for payments in cash.
- (d) Deposit any Transaction for the purpose of obtaining or providing a cash advance. Merchant agrees that any such deposit shall be grounds for immediate termination of this Agreement.
- (e) Accept or deposit any Transactions that Merchant knows to be, or reasonably suspects to be, fraudulent or not authorized by the Cardholder, and Merchant may not under any circumstances present for processing or credit, directly or indirectly, a Transaction originated by anyone other than Merchant or Merchant's agents. Merchant shall be prohibited from making a deposit of a credit Transaction without a preceding debit. Merchant shall not, under any circumstances, deposit Transactions that are the result of telemarketing efforts under this Agreement unless authorized by Member Bank in advance of processing any telemarketing Transactions. If Merchant deposits any such Transaction, Merchant may be immediately terminated and Member Bank may hold funds and/or demand an escrow pursuant to Sections 4.1 and 8.5; further, Merchant may be subject to Card Network reporting requirements set forth in the Card Network Rules.
- (f) Deposit duplicate Transactions. Merchant shall be debited for any adjustments for duplicate Transactions and shall be liable for any chargebacks which may result therefrom. Merchant will be liable for any fees assessed by the Card Networks to the Member Bank in connection with Member Bank's provision of the Processing Services.

- (g) Require a Cardholder to complete a postcard or similar device that includes the Cardholder's account number, Card expiration date, signature, or any other sensitive Cardholder Data in plain view when mailed.
- (h) Request or use any Card account numbers for any purpose other than as payment for sales of its goods or services.
- (i) Add any tax to Transactions, unless Applicable Law expressly requires that a Merchant be permitted to impose a tax.
- (j) Disburse funds in the form of travelers cheques if the sole purpose is to allow the Cardholder to make a cash purchase of goods or services from Merchant.
- (k) Establish a minimum or maximum Transaction dollar amount as a condition of honoring a Debit Card Transaction.
- (l) Deposit a Transaction receipt that does not result from an act between the Cardholder and Merchant.

**2.5. Merchant agrees that it shall not disburse funds in the form of cash, unless:**

- (a) Merchant is a Lodging or Cruise Line merchant disbursing cash to a Premium Visa Product Cardholder, as specified in Visa International Operating Regulations.
- (b) Merchant is dispensing funds in the form of travelers cheques, Visa TravelMoney Cards, or foreign currency. In this case, the Transaction amount is limited to the values of the travelers cheques, Visa Travel Money Card, or foreign currency, plus any commission or fee charged by Merchant, or Merchant is participating in the Visa Cash Back Service, as specified in Visa International Operating Regulations.

**2.6. Merchant agrees that it shall not accept a range of Visa Cards for various purposes specified in the Card Network Rules (e.g., Scrip, Manual Cash Disbursement).**

**2.7. Merchant must not disclose any Cardholder Data or other Transaction Data to third parties other than to Merchant's agent, Member Bank, or Member Bank's agent for the sole purpose of assisting Merchant in completing the Transaction or as required by Applicable Law. Merchant must store all material containing Cardholder account numbers or imprints in an area limited to selected personnel and render all Transaction Data unreadable prior to discarding. Merchant must not retain or store magnetic stripe data verification data subsequent to authorization of a Transaction.**

**2.8. Merchant agrees to obtain a sufficient authorization on all Transactions in accordance with the Card Network Rules. Any Transaction which cannot be authorized electronically is subject to a voice authorization charge. Merchant will obtain an authorization prior to completing a keyed Transaction. Any Transaction which is not properly authorized is made with full recourse and may be charged back to Merchant; furthermore, any keyed Transaction will be subject to additional charges for a non-qualifying Transaction. Merchant understands that an authorization does not constitute a guarantee of payment, only available credit and may be subject to dispute or chargeback. By signing this Agreement, Merchant agrees that the use of a "store & forward" terminal means that Merchant has the ability to locally store Transaction Data at the terminal level when there is no phone line or other means of connecting to the Processing Services available. When a means of connecting to the Processing Services becomes available, Merchant would then upload the stored Transaction Data for a possible approval. Merchant understands and agrees that if Merchant uses this type of terminal, there is no guaranty whatsoever that, once the Transactions are uploaded, Merchant will receive an approval. If Merchant allows the release of merchandise/service to the Cardholder before receiving approval, Merchant agrees that this is to be done at Merchant's sole risk.**

**2.9. Merchant acknowledges that Member Bank shall have full recourse to charge back the amount of a Card sale for which (i) the imprint of the Card is not obtained or (ii) the signature of the Cardholder is not obtained and the Cardholder disputes that he/she authorized the charge.**

**2.10.** Merchant shall, at all times during the Term of this Agreement, maintain a deposit account at Member Bank or another bank that is acceptable to Member Bank (the “**Merchant Account**” or “**Account**”). All credits for settlement and other collected funds and debits for fees, payments and chargebacks under the terms of this Agreement shall be made to the Account. Merchant may not close or change the Account without written notice to Member Bank. Merchant will be solely liable for all fees and costs associated with the Account and for all overdrafts. Merchant will maintain sufficient funds in the Account to accommodate all Transactions, fees, and other amounts owed to Member Bank under this Agreement. Merchant agrees that Paynuity and/or Member Bank may charge fees of up to \$10 per occurrence at any time for maintenance activities including but not limited to Account changes and returned mail.

**2.11.** Merchant shall promptly upon receipt, examine, balance, and reconcile all statements relating to the Merchant Account. Merchant shall daily balance and reconcile all daily deposits and debit totals to confirm accuracy. Merchant is required to notify Member Bank in writing of any and all errors on Merchant’s statements and/or daily totals. Each such written notice shall contain the following information: (i) Merchant’s name and account number, (ii) the specific dollar amount of the asserted error, (iii) a detailed description of the asserted error, and (iv) a detailed explanation of why Merchant believes an error exists and the cause of the error, if known. The written notice must be received by Member Bank within ninety (90) days after Merchant receives the statement (regarding an asserted error on a statement) or within ninety (90) days from the date the alleged error on a daily total was made. **FAILURE TO TIMELY SEND THE NOTICE REFERRED TO HEREIN CONSTITUTES A WAIVER OF ANY AND ALL RIGHTS MERCHANT MAY HAVE AGAINST MEMBER BANK RELATED TO THE ASSERTED ERROR.**

**2.12.** Merchant assumes the responsibility for storage of all sales drafts and credit vouchers. Failure to provide Member Bank with requested Transaction Data and accompanying documentation within five (5) business days after receipt of such request may result in the Transaction being charged back to Merchant, and Member Bank shall have the right to debit the Account for full amount of the Transaction in question.

**2.13.** Merchant shall be solely responsible for any fees or other costs charged to Merchant by the telephone company or any other third party in connection with the preparation of the site(s) prior to installation of electronic data capture terminals and/or peripheral equipment.

**2.14.** Merchant is liable for repayment to Member Bank for all valid chargebacks. Member Bank will comply with all Card Network Rules in processing any chargebacks which result from Cardholder disputes. However, all disputes which are not or cannot be resolved through established chargeback procedures shall be settled between Merchant and the Cardholder, and Merchant will indemnify Member Bank and will provide reimbursement for all expenses, including reasonable attorney’s costs, which it may incur as the result of any Cardholder claim which is pursued outside the Card Network Rules. In the event of a chargeback loss to Member Bank, Merchant hereby transfers and assigns to Member Bank any lien rights that it has or may have on the merchandise sold to the Cardholder. Additionally, Merchant is prohibited against billing or collecting from any Cardholder for any purchase or payment on a payment Card unless a chargeback has been initiated, Merchant has fully paid for the chargeback, and it has the right to collect on such chargeback. Merchant shall not initiate a sales transaction in an attempt to collect a chargeback.

**2.15.** Discount/Fee Schedule:

(a) Merchant’s Account will be debited daily and/or monthly, through ACH, for amounts set forth in the pricing schedule which is part of this Agreement, and for any other fees or charges incurred by Merchant and associated with the Processing Services. Merchant is obligated to pay all taxes and other charges imposed by any governmental authority on the Processing Services. Member Bank reserves the right, in its sole discretion, to change, amend, add, or adjust any discount rates or fees set forth herein, in accordance with Section 10.8 of this Agreement.

(b) The “**Qualified Retail Discount Rate**” will be charged on all magnetic stripe or chip read customer present retail payment Card Transactions that are electronically authorized, closed in a daily batch, and where the Cardholder’s signature is obtained. Additionally, for the Qualified Discount Rate to apply, payment Cards either have to be U.S. Bank issued consumer credit cards (excluding rewards cards) or payment cards have to be signature debit cards or prepaid debit cards issued by a Regulated U.S. Bank. The “**Mid-Qualified Retail Discount Rate**” will be charged on all manually keyed or electronic commerce Transactions, that have address verification (also known as “**AVS**” and is available only for Visa Cards), and closed in a daily batch, or any traditional rewards card, signature debit card, or prepaid debit card issued by a Non-Regulated U.S. Bank that would otherwise qualify for the Qualified Retail Discount Rate. The “**Non-Qualified Retail Discount Rate**” will be charged on all commercial, commercial rewards, international issued, or signature rewards Transactions, which include but are not limited to Visa Signature and Signature Preferred, Mastercard World Elite and High Value, Discover Premium and Premium Plus. All other Transactions that do not meet the criteria for Qualified Retail Discount Rate or Mid-Qualified Retail Discount Rates will be downgraded to the Non-Qualified Retail Discount Rate.

(c) The Enhanced Recover Reduced (“**ERR**”) pricing will be charged if selected in the Application. Under ERR pricing only, any Transaction that does not meet the criteria for the Qualified Retail Discount Rate will be charged the sum of the following: (i) Qualified Retail Discount Rate, (ii) the Non-Qualified Retail Discount Rate and fees, and (iii) the difference between the actual interchange cost as assessed by the Card Network and the interchange cost assessed on a Transaction that qualified for a Qualified Retail Discount Rate.

(d) Increase in long-distance communications costs and processing charges from third-party vendors may be reflected in increased discount rates.

(e) Merchant acknowledges and agrees that pricing for the discount rates and fees described herein is partially based upon Merchant’s annual Transaction volume, average ticket size, and method of doing business stated in the Application. If the actual volume and average ticket are not as warranted or if Merchant significantly alters its method of doing business, Member Bank may adjust Merchant’s discount and/or Transaction fees without prior notice. Merchants using AVS (Address Verification System) will be charged for each address verification request. This is in addition to the Transaction fee. In the event that Merchant has multiple locations, each location shall be considered to have a separate MERCHANT PAYMENT CARD AGREEMENT for all fee purposes.

**2.16.** Merchant understands that there shall be fees, chargebacks, assessments, and/or amounts which shall arise as a result of the Agreement, both during and after termination of the Agreement. Merchant authorizes Member Bank to debit via ACH from any account held by Merchant at any financial institution in the amount of any amount owed by Merchant under this Agreement, including but not limited to any amounts owed for fees, chargebacks and or assessments which shall arise after termination of this Agreement. This ACH authorization will remain in effect for at least one-hundred eighty (180) days after termination of this Agreement. Merchant will indemnify and hold Member Bank harmless for any action Member Bank may take pursuant to this Section. Merchant will also indemnify and hold harmless any other financial institution for acting in accordance with any instructions from Member Bank pursuant to this Section.

**2.17.** Merchant acknowledges and agrees to pay the following fees:

(a) Merchant will be assessed a fee of \$35.00 for each return ACH debit.

(b) Merchant will be assessed a merchant investigation fee for suspicious activity and/or Agreement deviations up to a maximum of ten percent (10%) of the dollar amount investigated.

(c) A divert fee of \$25.00 per month will be charged for a special account maintained at Member Bank to house diverted funds for Merchant.

**2.18.** Merchant agrees that Excessive Activity during any monthly period will be a breach of this Agreement and may cause of immediate termination. **“Excessive Activity”** includes (i) chargebacks in excess of one percent (1%) of the monthly total Transactions processed, (ii) Transaction activity that exceeds by twenty-five percent (25%) the dollar volume indicated on the Application, (iii) the dollar amount of returns exceeds 20% of the average monthly dollar amount of Merchant’s Card Transactions, (iv) Merchant or Transaction activity which exceeds other ratios required by the Card Networks, Paynuity, or Member Bank, as may be communicated to Merchant from time-to-time. Paynuity will provide Merchant with any information possessed by Member Bank which may enable Merchant to recover from others the amount of any Transactions charged back to Merchant. Merchant understands that Paynuity and Member Bank will assess a fee per chargeback per presentment and a fee for each retrieval and each representment request.

**2.19.** Notwithstanding anything to the contrary in this Agreement, any Transaction that has not received an authorization, or that is deposited (transmitted) more than two (2), but not greater than thirty (30), business days following the Transaction date, or that is made with a Card issued by a foreign Card issuer may, in Member Bank’s sole discretion, be subject to Non-Qualified Retail Discount Rate. NOTE: Days allowed for settlements are calculated by excluding the Transaction date, Sundays and holidays; and including the processing (settlement) date.

**2.20.** Merchant will use its reasonable, best efforts to confiscate or recover any Card if: (i) on VISA Cards, the four digits above the embossed account number printed on the Card do not match the first four digits of the embossed account number, (ii) Merchant is advised by Member Bank (or its designee) that the issuer of the Card or the designated voice authorization center to retain it, (iii) if Merchant has reasonable grounds to believe the Card is counterfeit, fraudulent or stolen, or otherwise not authorized by the Cardholder, (iv) on Discover Network Cards, the printed four digits on the signature panel do not match the last four digits of the embossed account number, or the Card does not have the Discover Network acceptance mark in the lower right corner on both sides of the Card, or (v) for Mastercard Cards, the embossed account number, indent printed account number and/or encoded account number do not agree, or the Card does not have a Mastercard hologram on the lower right corner of the Card face.

#### **2.21. ELECTRONIC COMMERCE**

(a) Merchant may accept electronic commerce (“EC”) Transactions only if it has requested to do so in the Application or if Merchant has obtained Member Bank’s prior written consent, and Merchant has procured a third-party vendor acceptable to Member Bank who will provide services to encrypt all Transaction Data associated with Merchant’s EC Transactions. If Merchant submits EC Transaction(s) without Member Bank’s consent, Member Bank may immediately terminate this Agreement. All Transactions must comply with data security requirements as described in the Data Security Section of the Merchant Payment Card Application. Merchant understands that EC Transactions are high risk and likely to be subject to a higher incidence of chargebacks. Merchant is liable for all chargebacks and losses incurred by Member Bank related to EC Transactions, whether or not: (i) EC Transactions have been encrypted; and (ii) Merchant has obtained Member Bank’s prior written consent to engage in EC Transactions. Encryption is not a guarantee of payment and will not waive any provision of this Agreement or otherwise validate a fraudulent Transaction. All communication costs related to EC Transactions are Merchant’s responsibility. Merchant understands that Member Bank will not manage the EC telecommunications link and that it is Merchant’s responsibility to manage that link. All EC Transactions will be settled by Member Bank into the Account.

(b) Whereas, Merchant desires to honor at its business location(s) Cards presented in connection with the Mail/Telephone/Internet sale of products/services to customers, the Parties hereto agree to the following: (i) Merchant agrees to use and retain proof of a traceable delivery system as means of shipment of product to the Cardholder; and (ii) Merchant agrees that Transactions will not be processed until products are shipped to the Cardholder. For goods to be shipped on EC Transactions, Merchant may obtain authorization up to seven (7) calendar days prior to shipment date. Merchant need not obtain a second authorization if the sales draft amount is within fifteen percent (15%) of the authorized Transaction amount, provided that the additional amount represents shipping costs.

(c) Merchant's website must contain all of the following information: (i) a complete, accurate, and truthful description of the goods or services offered, (ii) returned merchandise and refund policy, (iii) customer service contact, including electronic mail address and/or telephone number, (iv) transaction currency (such as U.S. or Canadian dollars), (v) export or legal restrictions, if known, and (vi) delivery policy.

(d) Merchants engaging in EC Transactions agree to provide a detailed description of Merchant's EC business to Member Bank upon Member Bank's request.

**2.22.** Merchant warrants and agrees that Merchant shall fully comply with all Applicable Laws, including, without limitation, all federal, state, and local laws, rules and regulations, as amended from time to time, including the Federal Truth-in-Lending Act, Regulation E, and Regulation Z of the Board of Governors of the Federal Reserve System.

**2.23.** Merchant agrees to pay, in addition to any and all other fees referred to herein, a non-refundable annual customer service fee per year per location. This fee shall be generated and charged any time within one (1) year from the date of this Agreement. The actual date of the initial charge (within said first year) shall be at the discretion of Paynuity and Member Bank. The fee shall be debited from the Account for the initial year and on the anniversary date (of the initial charge) for each year thereafter that the Account is in force. In the event this Agreement is terminated, for any reason, no portion of a charged annual customer service fee shall be rebated to Merchant.

**2.24.** Merchant agrees that in the event Merchant fails to pay Member Bank on a chargeback loss, Merchant hereby assigns any rights it may have against the Cardholder (related to said chargeback loss) to Member Bank.

**2.25.** Merchant must not deposit a Transaction receipt until it does one of the following:

(a) Completes the Transaction,

(b) Ships or provides the goods, except as specified in the Delayed Delivery Transactions section of the Visa International Operating Regulations,

(c) Performs the purchase service, or obtains the Cardholder's consent for a recurring Transaction in accordance with Applicable Laws governing recurring Transactions.

**2.26.** Merchant will not present any Transaction to Member Bank for processing (whether by electronic means or otherwise) which relate to the sale of goods or services for future delivery without Member Bank's prior written authorization. If Member Bank has previously given such consent, Merchant represents and warrants to Member Bank that you will not rely on any proceeds or credit resulting from such Transactions to purchase or furnish goods or services. Merchant will maintain sufficient working capital to provide for the delivery of goods or services at the agreed upon future date, independent of any credit or proceeds resulting from sales drafts or other memoranda taken in connection with future delivery Transactions.

**2.27.** All disputes between Merchant and any Cardholder relating to any Card Transaction will be settled between Merchant and the Cardholder. Member Bank bears no responsibility for such Transactions.

**2.28.** As a primary inducement to Member Bank to enter into this Agreement, the Guarantor(s) indicated on the Application, if any, by signing this Application, jointly and severally, unconditionally and irrevocably, guarantee the continuing full and faithful performance and payment by Merchant of each of its duties and obligations to Member Bank pursuant to this Agreement, as it now exists or amended from time to time, with or without notice. Guarantor(s) understands further that Member Bank may proceed directly against Guarantor(s) without first exhausting its remedies against any other person or entity responsible therefore to it or any security held by Member Bank or Merchant. Guarantor(s) authorize Member Bank to debit via ACH from any account singly or jointly held by Guarantor(s) at any financial institution in the amount of any amount owed by Guarantor(s) under this Agreement. This ACH authorization will remain in effect after termination of this Agreement, and until Member Bank has received written notice terminating this authorization and all Guarantor(s) obligations to Member Bank have been paid in full. Guarantor(s) will indemnify and hold Member Bank harmless for any action they take pursuant to this Section. Guarantor(s) will also indemnify and hold harmless any other financial institution for acting in accordance with any instructions from Member Bank pursuant to this Section. This guarantee will not be discharged or affected by the death of the Guarantors, will bind all heirs,



administrators, representatives and assigns and may be enforced by or for the benefit of any successor of Member Bank. Guarantor(s) understand that the inducement to Member Bank to enter into the Agreement is consideration for the guaranty, and that this guaranty remains in full force and effect even if the Guarantor(s) receives no additional benefit from the guaranty.

**2.29.** Merchant is responsible for compliance with Applicable Laws requiring terminals to suppress all but the last few digits from the Cardholder's account number, as well as the expiration date. Although federal law is in place regarding this issue, specific state laws may have more strict deadlines and requirements. Merchant is required to check its specific state law to ensure compliance.

**2.30.** In accordance with the requirements of the Unlawful Internet Gambling Enforcement Act of 2006 and Regulation GG, Merchant understands that Restricted Transactions are prohibited from being processed through the Merchant Account or Merchant's relationship with Member Bank. **"Restricted Transactions"** are Transactions in which a person accepts credits, funds, instruments, or other proceeds from another person in connection with unlawful Internet gambling. By signing this Agreement, Merchant certifies that its business does not engage in Internet gambling. Merchant agrees that it will immediately notify Member Bank in the event of any change in circumstances which could affect Merchant's compliance with this Section.

**2.31.** Merchant agrees to identify to Member Bank all third party agents involved in the payment process that may have access to Cardholder Data.

**2.32.** Merchant agrees to provide Member Bank with previous processor statements as requested.

**2.33.** Merchant agrees that Merchant shall be solely responsible for its employees' actions while in Merchant's employ.

**2.34.** If Merchant relies on fulfillment houses, Merchant must submit information to Member Bank about the fulfillment house, including a means for Member Bank to contact the fulfillment house to determine its financial capacity to support the Merchant.

**2.35.** Member Bank may immediately terminate Merchant for any significant circumstances that create harm or loss to the goodwill of any Card Network.

**2.36.** Merchant agrees, if undergoing a forensic investigation at the time this Agreement is signed, to fully cooperate with the investigation until completed.

**2.37.** Merchant agrees to abide by Transaction deposit restrictions, or Transaction processing prohibitions, as specified in the Visa International Operating Regulations. Merchant agrees that it shall not violate disclosure of account and Visa Transaction information prohibitions, as specified in the Visa International Operating Regulations.

**2.38.** Merchant agrees that, at all times during the Term of this Agreement, it shall achieve and maintain compliance with the Payment Card Industry ("**PCI**") Data Security Standard ("**DSS**"). Furthermore, Merchant agrees that it shall be liable for a PCI Compliance Non-Validation Fee per month in the amount stated in the section titled "Rates and Fees" of the Application if it fails to complete the PCI Protection Plan Self-Assessment Questionnaire (SAQ) or any other PCI-DSS requirements according to required timelines. Notwithstanding any payments of the PCI Compliance Non-Validation Fee, Merchant agrees that it shall still be liable for any and all fees, fines, assessments, or reimbursements related directly or indirectly to the Merchant suffering a data security breach.

**2.39.** PCI Manage. In the event Merchant chooses to participate in the PCI Manage Plan, Merchant must enroll in the PCI Manage Plan by completing, and validating PCI-DSS compliance through, the PCI Self-Assessment Questionnaire and submitting such questionnaire to Member Bank. Additionally, a PCI scan may be required annually or quarterly (if applicable). Merchant agrees that it shall be liable for the PCI Manage Plan monthly fee in the amount set forth in Rates and Fees section of the Application. Merchant agrees to be bound by the terms and conditions of the PCI Manage Plan as set forth at <http://www.paynuity.com/pcimanage-plan-terms-conditions>. In the event Merchant does not participate in the PCI Manage Plan by properly validating PCI compliance and completing the PCI SAQ, Merchant agrees to pay the PCI Compliance Non-Validation Fee as set forth in Section 2.38 above.

**2.40. Paynuity Insights.** Paynuity Insights is an online portal that provides Merchant with online access to information about their merchant processing activity, including, but not limited to statements and batch totals. Merchant agrees that it shall be liable for the monthly Paynuity Insights fee as disclosed in the Rates and Fees section of the Agreement.

**2.41. Paynuity Data Insights.** Paynuity Data Insights (“PDI”) is a product that combines Transactions Data with the ability to monitor Merchant’s business and online reputation. PDI provides information to Merchant about business growth, performance and comparison to Merchant’s market and business peers. Merchant agrees that it shall be liable for the monthly PDI fee in the amount of \$29.99 (the “PDI Fee”). However, the PDI Fee will be waived for the first three calendar months of the Initial Term of this Agreement (“PDI Free Trial”). Merchant shall have access to PDI during the PDI Free Trial. Merchant also agrees that the PDI Fee will be deducted from the transaction proceeds or from an Account via the Federal Reserve ACH System on or about the first day of each month and will be debited separately from any other fee listed in this Agreement. Merchant may cancel PDI at any time to avoid subsequent FBI Fees. IN ORDER TO CANCEL PDI, MERCHANT MUST DO ONE OF THE FOLLOWING: (1) NOTIFY US IN WRITING THAT MERCHANT WANTS TO CANCEL PDI, OR (2) CALL OUR CUSTOMER SERVICE CENTER AT 888-878-7100 AND REQUEST TO CANCEL PDI

### **Section 3. Rights, Duties and Responsibilities of Member Bank.**

**3.1.** Member Bank will process all Transactions presented by Merchant that comply with the terms and conditions of this Agreement. The electronic submission of Transactions to Member Bank through services provided by Member Bank shall constitute an endorsement by Merchant to Member Bank of the sales drafts representing such Transactions. Unless otherwise informed by Member Bank and provided Merchant completes batch operation prior to 5:59pm CST, Member Bank will pay Merchant up to three (3) business days after the date the Member Bank receives the Transaction, the total face amount of each sales draft, less any credit vouchers, discounts, fees or adjustments determined daily or monthly. All payments, credits and charges are subject to audit and final checking by Member Bank, and prompt adjustments shall be made for inaccuracies discovered.

**3.2.** Notwithstanding any other provisions of this Agreement, Member Bank may refuse to accept any Transaction or sales draft, or revoke its prior acceptance thereof, in any of the following circumstances:

(a) The sale giving rise to such Transaction or sales draft was not made in compliance with all the terms and conditions of this Agreement, including all Card Network Rules and Applicable Laws; or

(b) The Cardholder disputes his/her liability on any of the following grounds: (i) that the products covered by such sales drafts were returned, rejected or defective in some respect or Merchant failed to perform any obligation on its part in connection with such products, and Merchant has refused to issue a credit voucher in the proper amount; (ii) Merchant has failed to obtain a signature on the sales draft and the Cardholder claims he/she did not authorize the Transaction.

In the event of a revocation of a prior acceptance of a sales draft, Member Bank may withdraw from the Merchant Account any amount previously paid to Merchant for such sales draft.

**3.3.** Member Bank will provide electronic data capture, monthly activity statement, and will assign customer service phone numbers which will accept all customer service calls and other communications from Merchant relating to the Processing Services provided under this Agreement including, but not limited to, disbursement of funds, account charges, monthly statements, and chargebacks.

**3.4.** Member Bank will process all requests for drafts and chargebacks from Card issuers and will provide Merchant with timely notice of requests for documentation and chargebacks.

**3.5.** Member Bank will provide, at Merchant’s option, a 24-hour toll-free help line for servicing of peripheral equipment which shall include repair and reprogramming of equipment leased, rented or purchased from other vendors.

**3.6.** Use of Independent Sales Offices: Merchant acknowledges that Merchant may have been referred to Member Bank through an independent sales office operating under applicable Card Network Rules. The independent sales

office is only an independent contractor, is not an employee or agent of Member Bank, and has no authority to alter the terms and conditions of this Agreement without Member Bank's prior written approval.

**3.7.** Merchant authorizes Member Bank to control and disburse all appropriate settlement funds to the Merchant including funds received from the Card Networks.

#### **Section 4. Account Monitoring.**

**4.1.** Merchant acknowledges that Member Bank will monitor Merchant's daily deposit activity. Merchant agrees that Member Bank may, upon reasonable grounds, divert the disbursement of Merchant funds from the Merchant Account or any account Merchant has in ANY financial institution for any reasonable period required to investigate suspicious or unusual deposit activity. In the event funds are diverted pursuant to this Section, Member Bank will make good faith efforts to notify Merchant immediately to the extent permissible under Applicable Law. Merchant shall have no liability for any losses, either direct or indirect, which Merchant may attribute to any diversion of funds disbursement. Any funds diverted shall be deposited immediately into a non-interest-bearing account at Member Bank, and not be released until such time that questionable/suspect/fraudulent Transactions have been resolved to the Member Bank's satisfaction.

**4.2.** Agents of Member Bank are not permitted to directly access or hold Merchant funds whether from settlement or reserves.

#### **Section 5. Warranties; Disclaimer of Warranties.**

**5.1.** Merchant unconditionally represents and warrants to Member Bank that all Transactions and sales drafts submitted to Member Bank hereunder will represent the indebtedness of Cardholder with whom Merchant has completed a bona fide sales Transaction in amounts set forth therein, shall not involve any element of credit for any other purposes and shall not be subject to any defense, dispute, offset or counterclaim which may be raised by a Cardholder under the Card Network Rules or the Consumer Credit Protection Act (15 USC 1601) and other Applicable Laws. Further, Merchant warrants that 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 the Merchant.

#### **Section 6. Limitations of Liability; Indemnification; Due Care.**

**6.1.** Member Bank shall have no liability for any negligent design or manufacture of any point-of-sale terminal, printer, or other equipment used by Merchant for the acceptance of Card Transactions. MEMBER BANK MAKES NO WARRANTIES WHATSOEVER, EXPRESSED, OR IMPLIED, CONCERNING ANY EQUIPMENT, OR OTHER SERVICE PROVIDED BY OTHERS AND, IN PARTICULAR, MAKES NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURCHASE. Should Merchant fail to pay for any amounts due to their ISO/MSP, Merchant grants to Member Bank the right to set-off against funds deposited to the Merchant Account in order to allow Member Bank to collect any and all equipment payments not made by Merchant.

**6.2.** Merchant shall indemnify and hold Member Bank harmless from all liability, loss and damage, including reasonable attorney's fee and costs which may arise as a result, whether direct or indirect, of any act or failure to act or the breach of any warranty by Merchant pursuant to the terms of this Agreement, the Card Network Rules, or Applicable Laws. In the event any Card Network or other entity assesses a fine or assessment to Member Bank or request reimbursement from Member Bank due to the direct or indirect actions of Merchant, Merchant shall reimburse Member Bank the amount of the fine, assessment or requested reimbursement.

**6.3. MEMBER BANK WILL USE DUE CARE IN PROVIDING SERVICES COVERED BY THIS AGREEMENT AND THE PERFORMANCE OF ALL SERVICES CALLED FOR IN THIS AGREEMENT SHALL BE CONSISTENT WITH INDUSTRY STANDARDS. THE LIABILITY, IF ANY, OF MEMBER BANK UNDER THIS AGREEMENT FOR ANY CLAIMS, COSTS, DAMAGES, LOSSES AND EXPENSES FOR WHICH IT IS OR MAY BE LEGALLY LIABLE, WHETHER ARISING IN NEGLIGENCE OR OTHER TORT, CONTRACT, OR OTHERWISE, WILL NOT EXCEED IN THE AGGREGATE THE AMOUNT OF FEES PAID BY MERCHANT, LESS INTERCHANGE AND ASSESSMENTS, OVER THE PREVIOUS TWELVE (12) MONTH PERIOD, CALCULATED FROM THE DATE THE LIABILITY ACCRUED. IN NO EVENT WILL MEMBER BANK OR ITS AGENTS, OFFICERS, DIRECTORS OR EMPLOYEES BE LIABLE FOR INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES.**

## Section 7. Display of Materials; Trademarks.

**7.1.** Merchant agrees to prominently display the promotional materials provided by Paynuity in its place(s) of business. Use of promotional materials and use of any trade name, trademark, service mark or logo type ("**Mark**") associated with Card(s) or Card Networks shall be limited to informing the public that Card(s) will be accepted at Merchant's place(s) of business. Merchant's use of promotional materials and Marks is subject to the direction of Paynuity and the Member Bank.

**7.2.** Merchant may use promotional materials and Marks during the Term of the Agreement. Upon any termination thereof, Merchant shall immediately cease using all Marks and return any inventory of promotional materials to Paynuity.

**7.3.** Merchant shall not use any promotional material or Marks associated with any Card Network in any way which suggests or implies that a Card Network endorses the goods or services sold by Merchant. Further, Merchant may be subject to immediate termination if Paynuity or Member Bank, in its sole discretion, reasonably determines that Merchant's activities are causing, or substantially risk causing, harm or loss to the goodwill of a Card Network, Paynuity, or Member Bank.

**7.4.** Discover Network Program Marks. Merchant is prohibited from using the Discover Network Program Marks, as defined by the Discover Network Rules, other than as expressly authorized in writing by Paynuity or Member Bank. Program Marks mean the brands, emblems, trademarks, and/or logos that identify the Discover Network Cards. Additionally, Merchant shall not use the Program Marks other than to display decals, signage, advertising, and other forms depicting the Program Marks that are provided to Merchant by Paynuity or Member Bank or otherwise approved in advance in writing by Paynuity or Member Bank. Merchant may use the Program Marks only to promote the services covered by the Program Marks by using them on decals, indoor and outdoor signs, websites, advertising materials and marketing materials; provided that all such uses by Merchant are approved in advance by Paynuity or Member Bank in writing. Merchant shall not use the Program Marks in such a way that customers could believe that the products or services offered by Merchant are sponsored or guaranteed by the owners of the Program Marks. Merchant recognizes that it has no ownership rights in the Program Marks. Merchant shall not assign to any third party any of the rights to use the Program Marks.

## Section 8. Term; Termination.

**8.1.** This Agreement shall become effective upon the Effective Date and shall continue in full force and effect for a term disclosed in the Merchant Application ("**Initial Term**"). At the end of the Initial Term and at the end of every renewal term thereafter ("**Renewal Term**") (the Initial Term and each subsequent Renewal Term together, the "**Term**"), the Agreement will automatically renew for additional periods as disclosed in the Merchant Application, unless any Party delivers written notice of such Party's intent to not renew the Agreement at least thirty (30) days prior to the end of the then existing Term or twenty (20) days thereof as per the Voyager Merchant Agreement. In the event Merchant terminates this Agreement prior to expiration of the Initial Term, Merchant be liable to Member Bank for an early termination fee described in the Merchant Payment Card Application/Agreement ("**Early Termination Fee**"). Notwithstanding the foregoing, no Early Termination Fee shall be applicable if: (a) Merchant terminates this Agreement within ninety (90) days of a change or increase to a Non-Pass-Through Fee; or (b) Merchant receives a valid Bid (hereinafter defined) for processing services from another merchant services provider during the Term of this Agreement and presents said Bid to Member Bank and Member Bank chooses not to match said Bid. For purpose of this Section 8.1, (x) "**Non-Pass-Through Fee**" means any fees or portions of fees that are assessed by Member Bank for payment card processing services pursuant to this Agreement that are retained by Member Bank and are not amounts assessed by the Card Networks or other third parties that are simply "passed through" to merchants; and (y) "**Bid**" means a written proposal from a third party processor for the processing of payment card transactions.

**8.2.** In addition to any other reason stated in this Agreement, this Agreement may be immediately terminated by Paynuity and/or Member Bank for the following reasons:

- (a) Reasonable belief that Merchant has employed business practices that involve elements of fraud or conduct deemed to be injurious, unfair, deceptive, or abusive to Cardholders;
- (b) Reasonable belief that Merchant will constitute a risk to Paynuity and/or Member Bank by failing to meet the terms of this Agreement;
- (c) Issuing cash advances as set forth in Section 2.4(d); or
- (d) Merchant appears on any Card Network's security reporting.
- (e) Merchant fails to comply with its PCI-DSS compliance obligations under this Agreement.
- (f) Merchant has breached any term, provision, condition, representation or warranty of this Agreement.

**8.3.** In the event this Agreement is terminated prior to the expiration date for any of the reasons set forth in Section 8.2 and when permitted by Applicable Law, Merchant shall be liable to Paynuity for the early Termination Fee as defined in Section 8.1 of this Agreement.

**8.4.** Paynuity and Member Bank may terminate this Agreement immediately and without cause upon providing Merchant with written notice of such termination.

**8.5.** In the event of termination whether with or without cause, Merchant expressly authorizes Paynuity and Member Bank to withhold and discontinue the disbursement of all Card and other payment Transactions of Merchant in process of being collected and deposited. Collected funds may be placed in an escrow account at Member Bank until Merchant pays any outstanding charges or losses. Further, Member Bank reserves the right to require Merchant to deposit additional amounts, based upon Merchant's processing history and /or anticipated risk of loss to Paynuity and Member Bank, into an escrow account. Paynuity and Member Bank shall be granted a continuing security interest in funds held pursuant to this Section. Said escrow account shall be maintained for a minimum of one hundred eighty (180) days after the termination date and for any reasonable period thereafter, during which Cardholder disputes may remain valid under the Card plans. Any balance remaining after chargeback rights have expired will be disbursed to Merchant.

**8.6. Security Interests.** This Agreement will constitute a Security Agreement under the Uniform Commercial Code. Merchant grants to Member Bank a security interest in and lien upon: (i) all funds at any time in the Merchant Account, (ii) all funds in a diverted account (see Section 4.1), (iii) the Reserve Account (as defined below), (iv) future sales drafts, (v) all rights relating to this Agreement including, without limitation, all rights to receive any payments or credits under this Agreement and (vi) any other account Merchant has in any financial institution, (collectively, the "**Secured Assets**"). Upon request of Member Bank, Merchant will execute one or more financing statements or other documents to evidence and perfect this security interest. Merchant represents and warrants that no other party has a security interest in the Secured Assets. These security interest and liens will secure all of Merchant's obligations under this Agreement and any other agreements between Merchant and Member Bank including, but not limited to, Merchant's obligation to pay any amounts due and owing to Paynuity and Member Bank. With respect to such security interests and liens, Member Bank will have all rights afforded under the Uniform Commercial Code, any other applicable law and in equity. Merchant will obtain from Paynuity and Member Bank written consent prior to granting a security interest of any kind in the Secured Assets to a third party. In the event Merchant grants a security interest in the Secured Assets to a third party with Member Bank's consent, Merchant agrees that any indebtedness arising from the bona fide sale of goods and/or services are free of liens, claims, and encumbrances other than ordinary sales taxes. Merchant represents and warrants that no other person or entity has a security interest in any property in which you have granted Member Bank a security interest hereunder. Merchant agrees that this is a contract of recoupment and Member Bank is not required to file a motion for relief from a bankruptcy action automatic stay to realize on any of the Secured Assets. Nevertheless, Merchant agrees not to contest or object to any motion for relief from the automatic stay filed by Paynuity or Member Bank. Merchant hereby grants Paynuity and Member Bank the right to offset by ACH any account Merchant has in ANY financial institution in order to collect any amount due from Merchant to Paynuity or Member Bank pursuant to this Agreement.

**8.7. Reserve Account.** (i) Establishment: Upon termination of this Agreement or upon Paynuity or Member Bank's request at any point during the Term, Merchant will establish and maintain a deposit account ("**Reserve Account**") at Member Bank in an amount reasonably determined by Paynuity and/or Member Bank necessary to protect Member Bank's interests under this Agreement. (ii) Funding: Member Bank has the right to debit the Merchant Account to establish or maintain funds in the Reserve Account. Member Bank may deposit into the Reserve Account funds it would otherwise be obligated to pay Merchant, for the purpose of establishing or maintaining the Reserve Account in accordance with this Section, if it determines such action is reasonably necessary to protect its interests. (iii) Funds: in no event will Merchant be entitled to return of Reserve Account funds before two-hundred seventy (270) days following the effective date of termination of this Agreement, provided however, that Merchant will remain liable to Member Bank for all liabilities occurring beyond such two-hundred seventy (270) day period. Member Bank will have sole control of the Reserve Account. In the event of a bankruptcy proceeding and the determination by the court that this Agreement is assumable under Bankruptcy Code Section 365, as amended from time to time, Merchant must establish or maintain a Reserve Account in an amount satisfactory to Paynuity and Member Bank.

**8.8. Recoupment and Set-Off.** Paynuity or Member Bank has the right of recoupment and set-off from the Reserve Account or the Account. This means that it may offset any outstanding uncollected amounts owed from: (i) any amounts it would otherwise be obligated to deposit into the Account, and (ii) any other amounts Merchant may owe Member Bank under this Agreement or any other agreement. Merchant acknowledges that in the event of a bankruptcy proceeding, in order for Merchant to provide adequate protection under Bankruptcy Code Section 362 to M Paynuity and Member Bank, Merchant must create or maintain the Reserve Account as required by Paynuity, and Paynuity and Member Bank will have the right of offset against the Reserve Account for any and all obligations which Merchant may owe to Paynuity or Member Bank, without regard to whether the obligations relate to sales drafts initiated or created before or after the filing of the bankruptcy petition.

**8.9.** If Merchant is terminated for cause, Merchant acknowledges that Paynuity and Member Bank may be required to report Merchant's business name and the names and other identification of its principals to the Member Alert to Control High-Risk (M.A.T.C.H.) maintained by Mastercard. Merchant expressly agrees and consents to such reporting in the event Merchant is terminated for any of the reasons specified as cause by VISA, Mastercard, and Discover Network. Furthermore, Merchant shall hold harmless Paynuity or Member Bank for claims which Merchant may raise as a result of such reporting.

**8.10. Bankruptcy.** Merchant will immediately notify Member Bank of any bankruptcy, receivership, insolvency or similar action or proceeding initiated by or against Merchant or any of its principals. Merchant will include Member Bank on the list and matrix of creditors as filed with the bankruptcy court, whether or not a claim may exist at the time of filing, and failure to do so will be cause for immediate termination or any other action available to Member Bank under Applicable Law and Card Network Rules. Merchant acknowledges that this Agreement constitutes an executory contract to make a loan, or extend other debt financing or financial accommodations to or for the benefit of Merchant, and, as such, cannot be assumed or assigned in the event of Merchant's bankruptcy.

**8.11.** In the event Paynuity and Merchant agree to any reduction of a rate or a fee set forth in this Agreement, Merchant hereby agrees that said reduction shall result in an extension of the then-current Term of this Agreement by three (3) years from the date said rate or fee reduction takes effect.

## **Section 9. Notices.**

**9.1.** All notices and other communications required or permitted under this Agreement shall be deemed delivered when mailed first class, postage prepaid, addressed as follows:

(a) If to Merchant Bank and/or Paynuity : Merchant Bank Notifications C/O Paynuity Corporation, 111 N Orange Ave, STE 1900, Orlando FL 32801 USA.

(b) If to Merchant, at the Merchant's place of business as also stated on this Merchant Application or current mailing address on file with Member Bank.

## **Section 10. Additional Terms**

**10.1.** Card Networks. This Agreement is subject to the Card Network Rules promulgated by VISA, Mastercard, Discover Network, or any other Card Network. The Parties hereto are bound by and shall fully comply with these bylaws and Card Network Rules and by such amendments or additions as may be made hereto. The Parties hereto shall further comply with all Debit/ATM Network rules and regulations.

**10.2.** Inspection of Books and Records. Representatives of Member Bank may, during normal business hours, inspect, audit and make records of Merchant's books, accounts, records and files pertaining to any Card Transactions. During the Term hereof, at the request of Member Bank, Merchant shall provide up to two (2) years of current financial statements and other related information that is requested by Member Bank. Merchant will preserve its records of any card sale and any refund or credit adjustment thereon for at least seven (7) years from the date of such sale, credit, refund or adjustment. Merchant agrees that Member Bank may obtain information from credit reporting agencies for the Merchant and its principals once a year during the Initial Term and any Renewal Term of this Agreement.

**10.3.** Confidentiality. Merchant will not use for its own purposes, will not disclose to any third party, and will retain in strictest confidence all information and data belonging to or relating to the business of Member Bank (including without limitation the terms of this Agreement), and will safeguard such information and data by using the same degree of care that Merchant uses to protect its own confidential information, but in no event using less than reasonable care.

**10.4.** Privacy. Member Bank complies with the Bank Secrecy Act and the USA PATRIOT Act to help the government fight the funding of terrorism and money laundering activities. Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account or becomes a new customer of the financial institution. Our Customer Identification Program is designed to comply with all federal mandates. When Merchant opens a new account or obtains a service from the Member Bank, Member Bank will ask for owner/officer name, address, date of birth, and other information that will allow Member Bank to identify Merchant. Member Bank will also be asking Merchant to provide identifying documentation, such as driver's license or other forms of identification. Member Bank can and will refuse to open an account or provide services if adequate identification is not provided, or Member Bank is dissatisfied with the identification provided. Member Bank collects non-public personal information about Merchant from the following sources: information received from on applications or other forms; information about transactions with Member Bank, our affiliates, or others; and information received from consumer reporting agencies. As required by the USA PATRIOT Act, Member Bank also collects information and takes actions necessary to verify Merchant identity. Member Bank may disclose all the information collected, as described above, to companies that perform marketing services on Member Bank's behalf, to American Express, or to other financial institutions with which Member Bank has joint marketing agreements. Member Bank does not disclose any non-public personal information about our Merchants to anyone, including our affiliates, except as permitted by law. Internally, Member Bank restricts access to non-public personal information about Merchants to associates who need to know that information to provide customer support and or to maintain records. Member Bank's internal conduct clearly defines the manner in which an associate may access, use, or disseminate non-public information. Member Bank maintains physical, electronic, and procedural safeguards that comply with federal standards to guard Merchant's non-public personal information. If Merchant decides to close account(s) or become an inactive merchant, Member Bank will adhere to the policies and practices as described in this notice.

**10.5. PRIVACY POLICY.** Merchant represents, warrants and covenants that it has obtained all required consents from cardholders in respect to their personal information to be accessed, collected, used or transferred by Member Bank in providing the services under this Agreement, and it has read, understood and hereby accepts Paynuity's privacy policy on behalf of itself and the Cardholders at <https://www.paynuity.com/privacy-policy/>.

**10.6. Electronic Communications.** Merchant consents to (a) receive communications electronically; and (b) the use of electronic signatures. Merchant agrees that communications between Merchant and Member Bank that are received, sent, or signed electronically will have the same legal effect as a signed physical document. Merchant agrees that the Processing Services are subject to the federal Electronic Signatures in Global and National Commerce Act, and that this law will apply to validate Merchant's ability to engage electronically in transactions related to the Processing Services.

**10.7. Force Majeure.** Member Bank shall not be liable for any damages resulting from any delay in performance or non-performance caused by circumstances beyond Member Bank's control including, but not limited to acts of God, fire, flood, war, governmental action, accident, labor trouble or shortage, or other events of similar effect in connection with Member Bank's obligation herein.

**10.8. Amendment.** Merchant acknowledges that the terms set forth herein including but not limited to fees, rates, and charges may be changed by Member Bank. Merchant agrees that any such changes shall be considered accurate and final unless Merchant disputes them in writing within thirty (30) days of receipt of documentation showing said changes.

**10.9. Section Headings.** All section headings contained herein are for descriptive purposes only, and the language of such section shall control.

**10.10. Assignability.** This Agreement may not be assigned, directly or by operation of law, without the prior written consent of Member Bank.

**10.11. Attorney's Fees and Costs.** Merchant shall be liable for and indemnify Member Bank for any and all attorney's fees and other costs and expenses paid or incurred by the Member Bank in the enforcement hereof, or in collecting any amounts due from Merchant to Member Bank hereunder or resulting from any breach by Merchant of any of the terms or conditions of this Agreement.

**10.12. Dispute Resolution; Arbitration and Class Action Waiver.** Any claims or controversies between the parties arising out of or relating to this Agreement or the breach thereof, including disputes over the enforceability, validity or scope of this Section 10.12, shall be resolved through arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as then may be in effect (which rules are available at [www.adr.org](http://www.adr.org)), except that (i) temporary equitable judicial relief may be sought in a federal or state court located in Montgomery County, Texas, until an arbitrator can be empaneled and has determined whether that relief should be continued, modified or ended, and the parties hereby expressly consent to the exclusive jurisdiction of such courts for such purpose and (ii) judicial relief may be sought in such court or any other court of competent jurisdiction to compel arbitration or to enforce an award issued pursuant to this section. THE PARTIES ALSO AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN ITS INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both Parties agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. In the event the foregoing prohibition on representative or class proceedings is invalidated or otherwise held unenforceable, the Parties agree that the remainder of this Section 10.12 similarly shall be deemed void and unenforceable.

**10.13. Binding Effect: Governing Law; jurisdiction and Venue.** This Agreement shall be construed and governed by the laws of the State of Utah and the Federal Arbitration Act. Except where otherwise expressly stated, if any provision of this Agreement shall be held to be invalid, illegal, or unenforceable, the remaining provisions shall remain in effect. In the event Section 10.12 is deemed void or unenforceable, all claims or controversies between the Parties arising out of or relating to this Agreement or the breach thereof, shall be brought in a federal or state court located in Salt Lake City, Utah, and the parties hereby expressly consent to the exclusive jurisdiction of such courts for such purpose.



**10.14. Survivability.** The following sections shall survive the termination of this Agreement and shall remain enforceable after such termination: 2.10, 2.12, 2.14, 2.15, 2.16, 2.17, 2.18, 2.21, 2.24, 2.27, 2.28, 2.33, 2.36, 3.2, 3.4, 4.1, 6.1, 6.2, 6.3, 8.1, 8.3, 8.5, 8.6, 8.7, 8.8, 8.9, 9.1, 10.3, 10.5, 10.6, 10.11, 10.12, 10.13, 10.16, and 10.17.

**10.15.** The rights conferred upon Member Bank in this Agreement are not intended to be exclusive of each other or of any other rights and remedies. Rather, each and every right of Member Bank at law or in equity will be cumulative and concurrent and in addition to every other right.

**10.16.** Intentionally Omitted.

**10.17.** Merchant is liable for repayment to Member Bank for all valid chargebacks related to Debit and/or ATM Transactions. Member Bank will comply with Debit/ATM Card Network Rules in processing any chargebacks which result from Cardholder disputes. However, all disputes which are not or cannot be resolved through established chargeback procedures shall be settled between Merchant and the Cardholder, and Merchant will indemnify Member Bank and will provide reimbursement for all expenses, including reasonable attorney's costs, which it may incur as the result of any Cardholder claim which is pursued outside the Debit/ATM Card Network Rules.

**10.18.** Merchant agrees to \$25 per hour, with one (1) hour minimum, research fee to be charged by Paynuity for research it performs at Merchant's request.

**10.19.** For purposes of compliance with PCI-DSS, Merchant is required to notify Paynuity in writing of any changes to the software type and version number from that originally stated within this Agreement. Merchant is liable to Member Bank for all losses and expenses incurred by Paynuity and Member Bank arising out of a failure to report changes to Paynuity and Member Bank.

**10.20.** Merchant must report to Paynuity and Member Bank its participation in any cash advance program outside of that offered by Member Bank. Failure to report participation in such a program shall result in immediate termination of Merchant account.

## **Section 11. Fleet Card Acceptance.**

**11.1.** If Merchant executes a Wright Express ("WEX") Merchant Agreement, Merchant understands that Member Bank will provide such agreement to WEX, but that neither Member Bank nor WEX shall have any obligation whatsoever to Merchant with respect to processing WEX Cards unless and until WEX executes WEX Merchant Agreement. If WEX executes WEX Merchant Agreement and Merchant accepts WEX Cards, Merchant understands that WEX Transactions are processed, authorized, and funded by WEX. Merchant understands that WEX is solely responsible for all agreements that govern WEX Transactions and that Member Bank is not responsible and assumes absolutely no liability with regard to any such agreement or WEX Transactions, including, but not limited to, the funding and settlement of WEX Transactions. Merchant understands that WEX will charge additional fees for the services that it provides.

**11.2.** If Merchant accepts Voyager Cards, Merchant should adhere to the following Voyager Regulations:

(a) Merchant should check Fleet Cards for any printer restrictions at the point of sale,

(b) If an increase in the number of Voyager Transaction authorization calls from Merchant, not due to Voyager system outages, are in excess of 15% for a given month as compared to the previous month, Voyager may, in their sole discretion, deduct telephone charges not to exceed \$.25 per call for the increased calls from Merchant settlement of Merchant's Voyager Transactions,

(c) Settlement of Voyager Transactions will generally occur by the fourth banking day after the applicable Card Transaction is processed. Voyager shall reimburse Merchant for the dollar amount of sales submitted for a given day by Merchant, reduced by the amount of chargebacks, tax exemptions, discounts, credits, and other fees,

(d) For daily transmission of data, Merchant shall maintain true and complete records for not less than thirty-six (36) months from the date of generation of the data, and Merchant is responsible for the expense of retaining such sales data records and sales drafts,

(e) In addition to the information provided in Section 6.3, in no event shall Member Bank's cumulative liability to Merchant for losses, claims, suits, controversies, breaches or damages for any cause whatsoever in connection with Voyager Transactions, exceed the lesser of \$10,000.00 or the Voyager Transaction fees paid by Merchant for the two months prior to the action giving rise to the claim.

## **Section 12. Data Security.**

**12.1.** Merchant hereby warrants and represents that the POS Software, as listed in the Application is 100% accurate and that the POS Software used by the Merchant during the Initial Term or any Renewal Term of this Agreement is PCI-DSS Compliant as listed at [https://www.pcisecuritystandards.org/security\\_standards/vpa/](https://www.pcisecuritystandards.org/security_standards/vpa/). If Merchant conducts any business over the Internet or over a VOIP terminal, Merchant must: install and maintain a working network firewall to protect data accessible via the Internet; keep security patches up-to-date; encrypt stored data sent over open networks; use and update anti-virus software; restrict access to data by business "need-to-know"; assign a unique ID to each person with computer access to data by unique ID; regularly test security systems and processes; maintain a policy that addresses information security for employees and contractors; and restrict physical access to Cardholder Data. When outsourcing administration of information assets, networks, or data, Merchant must retain legal control of proprietary information and use limited "need-to-know" access to such assets, network, or data. Further, Merchant must reference the protection of Cardholder Data and compliance with the PCI Security Standards Council in each contract with Merchant's service providers. If Merchant stores Cardholder account numbers, expiration dates, and other personal Cardholder Data in a database, Merchant must follow each Network's guidelines on securing such Cardholder Data, including, without limitation, the Visa Cardholder Information Security Procedures (CISP), Mastercard Site Data Protection (SDP), and Discover Information Security and Compliance Program (DISC). Merchant understands that failure to comply with this Section may result in fines, fees, assessments or requests for reimbursement by Card Networks, and Merchant agrees to indemnify and reimburse Member Bank immediately for any fine imposed due to Merchant's breach of this Section. For more information on the Payment Card Industry Security Standards, including each of the specific security programs, see [www.pcisecuritystandards.org](http://www.pcisecuritystandards.org).

## **Section 13. AMERICAN EXPRESS CARD ACCEPTANCE**

**13.1. Purpose.** The terms of this Section 13 are additional terms applicable specifically to Merchant's acceptance of American Express Cards. If Merchant elects to participate in the American Express OptBlue program (the "Program"), the terms and conditions of this Section 13 shall apply. In the event of a conflict between any defined term(s) in this Section 13 and any other defined terms of this Agreement, the terms in this Section 13 shall control with respect to American Express Transactions only. Furthermore, in the event of any conflict between any defined terms in this Agreement, including any term(s) in this Section 13, and any defined term(s) provided by American Express, the terms defined by American Express shall control. Any capitalized term(s) not defined in this Section 13 or elsewhere in the Agreement shall have the meaning assigned by American Express. Merchant shall be bound by the American Express Network Rules, including the American Express Merchant Operating Guide, which may be amended from time to time and is hereby incorporated by reference: [https://icm.aexp-static.com/content/dam/gms/en\\_us/optblue/us-mog.pdf](https://icm.aexp-static.com/content/dam/gms/en_us/optblue/us-mog.pdf).

**13.2. Transaction Data.** Merchant authorizes Member Bank and/or its affiliates to submit American Express Transactions to, and receive settlement on such Transactions from, American Express on behalf of Merchant.

**13.3. Marketing Message Opt-Out.** Merchant may opt-out of receiving future commercial marketing communications from American Express by contacting Member Bank. Note that Merchant may continue to receive marketing communications while American Express updates its records to reflect this choice. Opting out of commercial marketing communications will not preclude Merchant from receiving important transactional or relationship messages from American Express.

**13.4. Conversion to American Express Direct Merchant.** Merchant acknowledges that it may be converted from the Program to a direct Card acceptance relationship with American Express if and when its Transaction volumes exceed the eligibility thresholds for the Program, meaning Merchant becomes a High CV Merchant. If this occurs, upon such conversion, (i) Merchant will be bound by American Express' then-current Card Acceptance Agreement; and (ii) American Express will set pricing and other fees payable by Merchant for Card acceptance.

**13.5. American Express as Third Party Beneficiary.** Notwithstanding anything in the Agreement to the contrary, American Express shall have third-party beneficiary rights, but not obligations, to the terms of this Agreement applicable to the Program to enforce such terms against Merchant.

**13.6. American Express Opt-Out.** Merchant may opt out of accepting American Express Cards at any time without directly or indirectly affecting its rights to accept Other Payment Products.

**13.7. Refund Policies.** Merchant's refund policies for purchases on the Card must be at least as favorable as its refund policy for purchases on any Other Payment Products, and the refund policy must be disclosed to Cardmembers at the time of purchase and in compliance with Applicable Law. Merchant may not bill or attempt to collect from any Cardholder for any American Express Transaction unless a Chargeback has been exercised, Merchant has fully paid for such Chargeback, and it otherwise has the right to do so.

**13.8. Termination.** Member Bank may immediately terminate Merchant for cause or for fraudulent or other activity, or upon American Express' request. Member Bank may also terminate Merchant's rights to accept Cards if it breaches any of the provisions of this Section 13 and / or any provision of the American Express Merchant Operating Guide. Upon termination of this Agreement or Merchant's participation in the Program, Merchant must cease all use of and remove American Express Licensed Marks from Merchant's website and wherever else they are displayed.

**13.9. Data / Information.** Member Bank may collect and disclose Transaction Data, Merchant Data, and other information about Merchant to American Express, and American Express may use such information to perform its responsibilities in connection with the Program, promote the American Express Network, perform analytics and create reports, and for any other lawful business purposes, including commercial marketing communications purposes within the parameters of this Agreement, and important transactional or relationship communications with American Express. American Express may use the information obtained in Merchant's application at the time of setup to screen and/or monitor Merchant in connection with Card marketing and administrative purposes.

**13.10. Assignment.** Merchant shall not assign to any third party any payments due to it under this Agreement and all indebtedness arising from Charges will be for bona fide sales of goods and services (or both) at its Establishments and free of liens, claims, and encumbrances other than ordinary sales taxes; provided, however, that Merchant may sell or assign future Transaction receivables to Member Bank, its affiliated entities and/or other cash advance funding sources that partners with Member Bank or its affiliated entities, without consent from American Express.

**13.11. Billing / Collection.** Merchant is prohibited against billing or collecting from any Cardmember for any purchases or payment on the Card unless Chargeback has been exercised, Merchant has fully paid for such Charge, and it otherwise has the right to do so.

**13.12. Applicable Law.** Merchant must comply with all Applicable Laws, rules and regulations relating to the conduct of Merchant's business. Merchant must comply with the American Express Data Security Requirements (DSR) and Payment Card Industry Data Security Standard (PCI DSS). Merchant must report all instances of a Data Incident immediately to Member Bank after discovery of the incident. Merchant must ensure data quality and that Transaction Data and customer information is processed promptly, accurately and completely, and complies with the American Express Technical Specifications. Merchant is responsible for being aware of and adhering to privacy and data protection laws and providing specific and adequate disclosures to Cardmembers of collection, use, and processing of personal data.

## Section 14. DEFINITIONS

- (a) “**Applicable Law**” means any and all applicable federal, state, and local laws, statutes, regulations, rules, codes, ordinances, court orders, and regulatory guidance that govern or affect this Agreement or the subject matter hereof, including, but not limited to, the U.S. economic sanctions laws and regulations administered by the Office of Foreign Assets Control (“**OFAC**”), consumer protection laws, data security, and privacy protection laws.
- (b) “**Application**” or “**Merchant Application**” means the document submitted by Merchant to Member Bank as part of Merchant’s request for the Processing Services
- (c) “**Card**” means any valid account or evidence of an account issued to a Cardholder under license from a Card Network or any representative or member of a Card Network that Merchant accepts as payment from Cardholders for goods, charitable donations or services. Cards include, but are not limited to, credit cards, debit cards, stored value cards, loyalty cards, electronic gift cards, authorized account or access numbers, paper certificates, credit accounts, and any other payment instrument with an embedded microcomputer EMV chip.
- (d) “**Cardholder**” means the person to whom the Card was issued, whose name may be embossed on the Card, and any authorized user of such Card.
- (e) “**Cardholder Data**” means information related to a Cardholder’s Card, which is obtained by Merchant from the Cardholder’s Card, or directly from the Cardholder in connection with his or her use of a Card (e.g., a security code, a PIN number, credit limits, account balances, or the Cardholder’s zip code when provided as part of an address verification system). Without limiting the foregoing, such information may include the Card account number and expiration date, the Cardholder’s name or date of birth, PIN data, security code data (such as CVV2 and CVC2), and any data read, scanned, imprinted, or otherwise obtained from the Card, whether printed thereon, or magnetically, electronically, or otherwise stored thereon.
- (f) “**Card Network(s)**” means (i) MasterCard International Inc. (“**MasterCard**”), Visa U.S.A., Inc. (“**Visa**”), DFS Services LLC d/b/a Discover Global Network (“**Discover**”) (including Diners Club International and any card issuer of payment cards processed and settled through the Discover network), American Express Travel Related Services Company, Inc. (“**American Express**”) each including applicable subsidiaries; (ii) debit card (“**Debit**”) and automated teller machine (“**ATM**”) networks; and (iii) any other payment card associations supported by Member Bank.
- (g) “**Card Network Rules**” means the written rules and regulations, operating rules, system manuals, procedures and requirements, releases and interpretations thereof, and other requirements (whether contractual or otherwise) imposed or adopted by any Card Network, including the PCI Security Standards Council, LLC, as the same may be amended from time to time.
- (h) “**Non-Regulated U.S. Bank**” means any issuer of Cards that together with its affiliates has assets less than ten billion (\$10,000,000,000).
- (i) “**Regulated U.S. Bank**” means any issuer of Cards that together with its affiliates, has assets equal to or greater than ten billion (\$10,000,000,000).
- (j) “**Transaction**” means any payment transaction processed under this Agreement that results in activity to a Cardholder’s account or Merchant’s Account, including the authorization, settlement, batch closing and if applicable, disputes, chargebacks, refunds, returns, and reversals with respect to any such payment transaction.
- (k) “**Transaction Data**” means all information that Merchant must obtain and transmit to Member Bank for a particular Transaction to be processed pursuant to, and in accordance with, this Agreement, including, without limitation, all authorization information and Cardholder Data required by the Rules for this purpose.