

COUNTY COUNCIL OF WICOMICO COUNTY, MARYLAND

2011 Legislative Session

Legislative Day No. 03

Resolution No. 25-2011

Introduced by: The President of the Council at the request of the County Executive

A RESOLUTION APPROVING A MERCHANT SERVICES AGREEMENT BETWEEN POST INTEGRATIONS, INC., BA MERCHANT SERVICES, LLC AND WICOMICO COUNTY, MARYLAND AND AUTHORIZING THE COUNTY EXECUTIVE TO EXECUTE THE AGREEMENT.

WHEREAS, The Department of Recreation, Parks and Tourism currently accepts credit cards bearing the name and logo of Visa or MasterCard (collectively "Association Cards") for goods and services offered by the department; and

WHEREAS, POST Integrations, Inc. has submitted a Merchant Services Agreement for services including but not limited to authorization, capture, and settlement of items and any reversals for Association Cards; and

WHEREAS, the Merchant Services Agreement shall commence upon the Effective Date and end five (5) years from the Conversion Date and may thereafter be renewed on a yearly basis.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNTY COUNCIL OF WICOMICO COUNTY, MARYLAND AS FOLLOWS:

- A. The County Executive is hereby authorized to execute and deliver the Merchant Services Agreement with POST Integrations, Inc. and BA Merchant Services, LLC in the name and on behalf of the County.
B. The Merchant Services Agreement shall be in substantially the form attached hereto as Exhibit A and made a part hereof, and in such form the Merchant Services Agreement is hereby approved as to form and content.

Done at Salisbury, Maryland, this 1st Day of February 2011.

ATTEST:

Handwritten signature of Matthew E. Creamer

Matthew E. Creamer, Council Administrator

COUNTY COUNCIL OF WICOMICO COUNTY, MARYLAND

Handwritten signature of Gail M. Bartkovich

Gail M. Bartkovich, Council President

CERTIFICATION

This Resolution was Adopted [checked], Adopted with Amendments ____, Failed ____, Withdraw [checked] by the County Council on February 1, 2011.

Certified by [Handwritten Signature] Matthew E. Creamer, Council Administrator



MERCHANT SERVICES AGREEMENT

Wicomico County Maryland	400009
Contract Entity	Merchant Services Agreement Number
500 Glen Avenue	52-6001054
Street Address	Federal Taxpayer Identification Number
Salisbury, MD 21804	Government Entity
City, State, Zip	Corporation, Partnership, LLC, LLP, etc.

This Merchant Services Agreement ("Agreement") is entered into between POST Integrations, Inc. ("POST"), BA Merchant Services, LLC ("Bank") (collectively "Provider") and the Contract Entity listed above, on behalf of itself and as agent for the various entities outlined on the attached "Merchant Location Schedule" (each a "Merchant"). Contract Entity and Merchant shall be referred to collectively as "Client". In entering into this Agreement and performing services for Merchant with respect to Card Transactions (defined below), POST is acting as an agent of and in conjunction with Bank, who is a wholly owned subsidiary of Bank of America, N.A., who is a member bank of Visa, Inc. and MasterCard International Incorporated ("Member").

INTRODUCTION

Client is in the business of providing goods and services to customers and desires to accept credit, debit and/or pre-paid cards (each a "Card") bearing the name and logo of Visa, MasterCard, American Express, Diner's Club, Discover, JCB or any other card brand Provider may choose to process (collectively "Association") for payment of sales and credits (each an "Item") of such goods and services. Provider is engaged in the business of providing services including but not limited to authorization, capture, and settlement of Items and any reversals thereof (each a "Transaction") for Association Cards. Merchant agrees to only submit valid Association Card Transactions according to the following terms and conditions.

1. OPERATING REQUIREMENTS

For all Card Transactions, Client agrees to abide by the Merchant Operating Guidelines and the terms and conditions of the Association's rules and regulations ("Association Rules") each as amended from time to time.

2. PROCESSING, SETTLEMENT AND OTHER SERVICES

Unless otherwise agreed by Provider in writing, Card Transactions shall be processed through Association networks or other networks designated by Provider via electronic authorization and data capture methods. Merchant shall use its best efforts to balance and settle every business day each payment application including but not limited to point-of-sale (POS) systems, property management systems (PMS), gateway/middleware systems, software or terminals (collectively "Payment Applications").

3. DISPUTES

Merchant is fully liable to Provider for the full amount of any Item disputed by Provider, the cardholder or Card issuing bank ("Chargeback") or any Fees (as defined below) related thereto. Merchant is responsible for promptly responding to all Requests for Copy ("RFC") and Chargeback inquiries (collectively "Disputes"). Closed Disputes for reasons including but not limited to non-response and invalid authorization, shall be assessed an additional Fee. Merchant shall pay Provider on demand the value of all Chargebacks and related Fees. Merchant agrees to accept the Chargeback and shall be liable to Provider for the amount of such Chargeback. Merchant authorizes Provider to offset from incoming Items and to debit and/or credit Merchant's Settlement Account (as defined below), the Reserve Account (as defined below), or any other account held at any financial institution, the amount of all Chargebacks. Provider shall retain any Fees related to Disputes. Merchant shall fully cooperate with Provider in complying with the Association Rules regarding Chargebacks.

4. ACCOUNTS

- 4.1 **Establishment and Authority.** Merchant agrees to maintain an account held at a financial institution reasonably acceptable to Provider, with a balance of available funds sufficient to accommodate Merchant's obligations under this Agreement including but not limited to credits, Chargebacks, Fees and other amounts owed by Merchant ("Settlement Account"). Merchant irrevocably authorizes Provider to debit the Settlement Account for Chargebacks, Fees or any other amounts owed by Merchant under this Agreement or the Association Rules. Merchant agrees not to close the Settlement Account without providing Provider at least seven (7) days prior written notice including the designation of the new Settlement Account. If there are not sufficient available funds in the Settlement Account to satisfy Merchant's obligations, Provider may offset such amounts from payments due to Merchant from Items. Merchant agrees to promptly pay Provider on demand for these amounts.
- 4.2 **Settlement Account.** Provider shall deposit all funds evidenced by valid Items to the Settlement Account subject to this Agreement. Provider has the right, in its sole discretion, to delay crediting the Settlement Account with funds evidenced by submitted Items. Merchant authorizes Provider to (a) initiate reversal or adjustment entries and initiate or suspend such entries as may be necessary to grant Merchant provisional credit for any entry; and (b) act as Merchant's agent to collect Items from the Card issuing bank. As the collecting agent, Provider grants Merchant provisional credit for Items in the process of collections, subject to receipt of final payment by issuing bank and subject to all Chargebacks, returns, Fees and fines.
- 4.3 **Reserve Account.** If at anytime during the Term or within 180 days after termination of this Agreement, Provider perceives a failure or potential failure on Merchant's part to meet its obligations under this Agreement (including but not limited to unauthorized Card Transactions, cessation of business, insolvency, Chargebacks or competing claims), Provider reserves the right to require, and Merchant agrees to deposit and maintain such non-interest bearing accounts, additional funds or other security (which Provider may commingle with other funds) as Provider may require at a financial institution designated by Provider, in a reserve account ("Reserve Account"). Such Reserve Account to be funded within three (3) days, in amounts and upon such terms as determined by Provider in Provider's sole discretion. In instances of unauthorized Card Transactions, fraud or termination of this Agreement, Provider may require that such Reserve Account be funded immediately. Provider may also fund the Reserve Account with deductions from payments due to Merchant from Items or by a charge against the Settlement Account or any other Merchant account. Provider shall be entitled to the funds in the Reserve Account until such time as Provider is satisfied that Merchant has no further obligations under this Agreement. Merchant's failure to fund the Reserve Account may result in immediate termination by Provider of this Agreement. Once Provider has confirmed in its sole discretion that Merchant has no further obligations under this Agreement, Provider shall return to Merchant the balance of funds in the Reserve Account.
- 4.4 **ACH Authorization.** Merchant authorizes Provider or its agents to make deposits and withdrawals via the Automated Clearing House ("ACH") to the Settlement Account, the Reserve Account or any other account maintained by Merchant at any institution that is a receiving bank of ACH, all in accordance with this Agreement. This authorization extends to payments for any amounts owed under this Agreement by Merchant to Provider including but not limited to Chargebacks, Fees, and fines. Merchant shall confirm to any institution holding any account of this authorization and direct them to comply with Provider's directions and Merchant shall not change any such confirmation or direction without Provider's prior written consent. Any such confirmation, direction or authorization shall remain in effect until the later of 180 days after termination of this Agreement, or until all Merchant's obligations to Provider have been paid in full. If Merchant changes the Settlement Account, Merchant shall notify Provider promptly and this authorization shall apply to the new account and to any other account Merchant owns at any other financial institution.
- 4.5 **Settlement.** ACH clearing and availability of Merchant's funds are subject to the procedures of the financial institution Merchant uses as its depository financial institution. Provider does not guarantee the timeliness of settlement by Merchant's depository institution. All funds advanced by Provider to Merchant for Items acquired are provisionally credited subject to Provider's right of payment of Fees and contingent claims for Chargebacks, adjustments, and final settlement. Provider shall process all Items and credit the Settlement Account each business banking day for (i) the net aggregate face amount of Items acquired less (ii) the aggregate face amount of Chargebacks, disputes, adjustments, fines, Fees and other amounts due Provider; provided however, Provider is not obligated to pay Merchant or credit the Settlement Account for any Items transmitted to Provider after Merchant becomes insolvent, ceases to do business, or dissolves. At the times designated by Provider, Provider may deduct from the Settlement Account or any other account or means of collection provided for in this Agreement, or as a deduction from any amounts to be paid to Merchant, any actual or anticipated amounts owed to Provider by Merchant.

- 4.6 **Asserted Errors.** Client agrees to notify Provider in writing of any billing discrepancy within 10 days from the date of discovery of such discrepancy ("Discovery Date"). Provider is not liable for any billing discrepancy more than 30 days prior to such Discovery Date and no refunds, if warranted, shall be given prior to such time. All Items are subject to review, verification, acceptance and audit by Provider. Provider may reject Items to Merchant for correction at any time.
- 4.7 **Setoff.** Provider may, without notice, (i) delay or stop making payments to Merchant, (ii) increase Fees, or (iii) set off, retain or otherwise hold (or direct Merchant's bank to place a hold on) any funds to protect Provider against losses, Chargebacks, fines, perceived risk, or any amounts due or to become due under this Agreement, or based on Client's financial condition. Client agrees that Provider shall not be liable for any dishonor of any Items as a result of these actions, including but not limited to Client's own employee fraud. Client shall defend, indemnify and hold harmless Provider for any action it takes against the Settlement Account or Reserve Account or any other account that may or may not be owned by the Merchant pursuant to this Section. Client shall also defend, indemnify and hold harmless the institution at which Client maintains such account for acting in accordance with any instruction from Provider pursuant to this Agreement.

5. SECURITY INTEREST

To secure Merchant's obligations under this Agreement, including without limitation Merchant's obligation to pay any amounts due or owing to Provider hereunder, Merchant hereby grants to Provider a security interest in all funds at any time in the Settlement Account and the Reserve Account, regardless of the source of such funds (collectively the "Collateral"). Notwithstanding anything to the contrary in this Section 5, Merchant may at any time during the term of this Agreement without the consent or notice to Provider (i) sell or otherwise dispose of any of the assets of Merchant; (ii) create or grant a security interest, lien or any other encumbrance upon the assets of Merchant; and (iii) maintain the assets of Merchant in any reasonable manner. Provider agrees to duly execute and deliver to Merchant such instruments, documents and agreements as may be reasonably requested to permit Merchant to engage in any of the foregoing.

6. FEES AND OTHER AMOUNTS OWED

- 6.1 **Fees.** For the services provided by Provider, subject to Section 12.1, Client agrees to pay Provider the nonrefundable fees for each Association Card including but not limited to authorization, capture and embedded authorization therewith, settlement, processing, reclass, Dispute and Association assessments, access, and interchange fees specified in the attached Schedule of Rates and Fees and this Agreement and any Attachments hereto, as amended by Provider in accordance with this Agreement or any other Association or Member fees (collectively "Fees"). Provider shall have the right to charge or automatically increase Fees due to or in anticipation of any Association or Member liability or Fee, perceived risk, changes in the Merchant Operating Guidelines, communication costs, third-party charges, handling, or at the end of the Initial Term or any Renewal Term. Client agrees that Fees not listed in this Agreement shall be charged at Provider's current rate. The initial purchase period for any management module or report is six months and any cancellation of such service must be submitted to Provider in writing at the time of cancellation.
- 6.2 **Other Amounts Owed.** Association Fees shall be charged per the attached Association Fees schedules ("Association Fees"), which Association Fees may be amended by Provider from time to time. Fees are based on Merchant's transactions qualifying for the base traditional/core credit interchange and assessment rates of Visa CPS Retail All Other, MasterCard Merit 3 Base and any other Association's base rates and billed at such rates thereof. If the aforementioned interchange categories are not available, an equivalent base rate shall be assigned by Provider and billed to Merchant. Client is responsible for maintaining interchange data requirements on Merchant's Payment Applications. Provider shall bill Merchant on each Item for the applicable interchange fee based on the data the Provider receives from the Merchant in connection with each Item. Provider is not liable for the existence or the integrity of such Card Transaction data, nor shall Provider be liable for any losses incurred by Client resulting from any action or inaction of Client's Payment Application. Each Item not qualifying for the base rates shall be reclassified to a qualifying interchange rate and subsequently billed a reclass fee equal to the base rate plus the difference between the base rate and the qualifying rate, per the attached Association Fees schedules. Merchant shall pay any and all taxes, whether now existing or hereinafter imposed, if any, on the services provided by Provider or any other transactions contemplated by this Agreement.

7. CLIENT INDEMNITY AND PROVIDER LIABILITY

- 7.1 **Indemnification.** In addition to any other indemnities in this Agreement or in the Merchant Operating Guidelines, Client agrees to indemnify to the extent permitted by law, defend and hold Provider and Provider's affiliates (including officers, directors, employees, attorneys, shareholders, representatives and agents) harmless from and against any and all liabilities, judgments, arbitration awards, actions, suits, claims, demands, losses, damages, costs, expenses and attorneys' fees, or fees in bankruptcy proceedings, incurred

in connection with: (i) Items that do not conform to the requirements of this Agreement, the Association Rules, the Merchant Operating Guidelines or applicable laws; (ii) any Card Transaction or any act or omission in connection with a Cardholder; (iii) Client's breach or alleged breach of any term, covenant, condition, representation, warranty or agreement with any Cardholder, any Association or Provider, including the application to Provider, this Agreement, the Association Rules, Merchant Operating Guidelines and other Attachments or any violation of applicable laws; (iv) any security breach or alleged security breach involving cardholder data; (v) the rescission, cancellation or avoidance of a Card Transaction or Item, by operation of law, adjudication or otherwise; (vi) any claim, counterclaim, complaint, dispute or defense, whether or not well-founded with respect to a Card Transaction; or (vii) damages, including death or injury caused by the good or service purchased with the Card.

7.2 **Provider Liability.** Provider shall not be responsible or liable for any action taken by Provider (or the results thereof) which is authorized by this Agreement. Except as specifically set forth herein, Provider makes no warranties express, implied or statutory in connection with this Agreement and without limiting the foregoing, Provider disclaims all warranties of merchantability and fitness for a particular purpose. Provider may utilize third parties and systems of others, including Associations. Provider shall not be responsible or liable for any information provided by others or for the use of any systems of Provider or third-party systems of others or for any circumstances beyond its control. Provider shall not be liable for lost profits, consequential, special, punitive, exemplary, or incidental damages, even if the other party has been advised of the possibility of such damages. The sole and exclusive liability of Provider and remedy of Client hereunder, shall be general money damages for willful misconduct not to exceed the amount of the Item subject to claim or dispute, regardless of the characterization of such Item.

8. REPRESENTATIONS, WARRANTIES AND COVENANTS

8.1 **Conditions.** As a condition of transmitting any Card Transactions or Items to Provider, Client hereby continuously warrants, covenants and represents compliance with all of the relevant representations, warranties and covenants contained in this Agreement, the Association Rules, the Merchant Operating Guidelines, Payment Card Industry Data Security Standard ("PCI DSS"), and applicable law. In consideration of the preferred Fees Provider has provided to Client, Client agrees to process all Association Card Transactions with Provider (subject to Section 8.2) and to communicate all Association Card Transactions to Provider via internet lease line communications. If Client i) does not process all Association Card Transactions with Provider for all Outlets (subject to Section 8.2); ii) does not process all Association Card Transactions via internet lease line communications; iii) submits e-commerce transactions for processing; or iv) is determined to be non-PCI DSS compliant, Merchant's Transactions shall be automatically assessed an additional Transaction and/or Item Fee. Client acknowledges the Fees hereunder are based upon, in the aggregate, at minimum the Annual Volume Assumptions listed on the attached Schedule of Rates and Fees. Client understands that from time to time, Provider may compare actual activity against Annual Volume Assumptions and if the actual activity is less than any individual Annual Volume Assumption, Provider may automatically adjust Fees accordingly to reflect anticipated total Fees based on such assumptions.

8.2 **Exclusivity.** In consideration of the pricing of Fees Provider has provided, during the Term of this Agreement, Client shall not engage or contract with any other credit card processor, except Provider, who shall be the sole provider of Association Card Transactions for all Contract Entity's locations during the Term and any Renewal Term thereof. The only exception to the previous sentence is a location that may be required to process its credit cards through a financial institution which has provided such location with a loan ("Lender"); provided however, Client shall use its best effort to cause such Lender to execute Provider's "Credit Card Receivable Payment Direction Notice" to secure the loan and further cause such location to enter into this Agreement with Provider. In the event that Contract Entity takes over ownership or management of any location which is not already processing with Provider, Contract Entity shall use its best efforts to convert such location to Provider as soon as possible. If Contract Entity becomes affiliated with any location which is not owned or managed by Contract Entity and is not already processing with Provider, but with which Contract Entity has a franchise agreement, Contract Entity shall use its best efforts to cause all such franchise locations to enter into a Merchant Services Agreement with Provider. Contract Entity shall exclusively market Provider as its preferred credit card provider to all owned, managed and franchised locations.

8.3 **Accepted Transactions.** Merchant shall not submit any Association Card Transaction which is (i) not a bona fide, direct Transaction between the Merchant and the Cardholder in the Merchant's ordinary course of business; (ii) a Transaction between a Cardholder and an entity other than Merchant; (iii) a credit transaction related to a sales transaction not originally processed by Provider; (iv) a Transaction without a valid authorization; or (v) a transaction representing the refinancing of an existing obligation of a Cardholder; the reprocessing of an Item which previously resulted in a Chargeback. Merchant agrees that obtaining authorization for any Card Transaction does not constitute a guarantee of payment and does not relieve

Merchant of liability for Chargebacks. Provider may reject Transactions, block Card Transactions or close the routing identification number ("ID") of any Merchant owned/managed revenue center accepting credit cards ("Outlet") without prior notice for breaches or suspected breaches of this Section, for other reasonable cause or in the event of termination of this Agreement. Merchant will not present any Item to Provider for processing without Provider's prior written authorization which relates to the sale of goods or services on Cards for future delivery, including but not limited to rooms, conventions, banquets, catering, gift certificates, gift cards or pre-paid cards (collectively "Future Delivery"). Provider in its sole discretion may require Merchant to submit Future Delivery Items under a separate Outlet ID.

8.4 **Payment Applications.** Client agrees to use only Payment Applications acceptable to Provider and that comply with the Payment Card Industry ("PCI") Payment Application Data Security Standard ("PA-DSS"). Client represents and warrants that they do not currently use and shall not use any non-compliant Payment Applications. Client shall notify Provider immediately if Client chooses to upgrade a current Payment Application or install a new Payment Application at a Merchant location. Client is solely responsible for all Payment Applications including the cost, performance, compatibility, integration, installation, interchange qualification, operation and the compliance with the PCI DSS of such Payment Application. Client shall reimburse Provider for all fees associated with such Payment Applications or third-party networks.

8.5 **PCI DSS.** Provider warrants that Provider is fully compliant with the PCI DSS and regularly performs PCI DSS audits per the Association's requirements. Client warrants that they are fully compliant with the PCI DSS including but not limited to performing self-assessment questionnaires and network scans. In addition, Client shall comply with all Provider's compliance and validation programs in effect from time to time and reimburse Provider for any associated costs and expenses. Client shall notify Provider immediately with regard to any PCI DSS non-compliant issues including but not limited to non-compliant Payment Applications. Client further warrants that they do not retain or store magnetic-stripe data, PIN or CVV2/CVC2 data subsequent to the authorization of a transaction and they have purged all such historical data from their systems and shall continue to purge such data on an on-going basis. Client shall immediately report to Provider any suspected data comprises at any location. Client is responsible, and shall reimburse Provider, for all costs, expenses, fees and fines associated with Client's PCI DSS compliance and any non-compliance issues. Provider shall only interact with and provide information directly to full-time employees of Client, who shall be the sole individuals granted access to Provider's on-line merchant web site ("Web Site"). Client shall not provide access to Provider's Web Site and Provider shall not interact with or otherwise provide information to any outside consultant or contractors at any time for any reason. Client warrants that they shall require all employees that have access to Provider's Web Site to protect their user ID and passwords and prohibit users from sharing such information with anyone at anytime, and monitor such activity thereof.

8.6 **Corporate Power.** Contract Entity represents and warrants that it is duly authorized to bind Merchant to all provisions of this Agreement and to execute any document and to take any action on behalf of Merchant which may be required by Provider now or in the future. If Merchant is not a party to this Agreement, Contract Entity agrees that Merchant's first submission of an Item to Provider constitutes Merchant's acceptance of this Agreement. Contract Entity on behalf of itself and as agent for Merchant represents and warrants that this Agreement shall not violate any law or conflict with any other agreement to which they are subject.

9. INFORMATION

9.1 **Inquiries.** Client authorizes Provider to make, from time to time, any business and personal credit, tax report, and other inquiries Provider considers necessary to review the acceptance and continuation of this Agreement. Client also authorizes any person or credit reporting agency to compile information to answer those credit inquires and to furnish that information to Provider.

9.2 **Documents.** Client shall provide business and financial information anytime upon Provider's request. Client shall notify Provider within 10 days of the following information with regard to Contract Entity or Client: any change in name, location, ownership, nature of business, adverse financial condition, or any change in information furnished to or obtained by Provider. A failure to notify Provider of such information shall result in Contract Entity being fully liable for Merchant.

10. TERM AND TERMINATION

10.1 **Effective Date.** This Agreement shall not be effective until accepted in writing by Provider by signing and dating this Agreement (such acceptance being the "Effective Date").

10.2 **Conversion Date.** For the purposes of this Agreement, the "Conversion Date" shall be defined as the date upon which all required underwriting documentation has been received by Processor and all Merchants on the attached Merchant Location Schedule have converted to Provider and are processing Items from all Merchant Outlets through Provider as confirmed by Provider's issuance of the Conversation Certificate, a form of which is attached hereto.

- 10.3 **Term.** Subject to the provisions of this Agreement and unless terminated as allowed herein, Provider's processing rates shall be guaranteed for the initial term of this Agreement ("Initial Term") which shall commence upon the Effective Date and end five (5) years from the Conversion Date. Thereafter, this Agreement shall automatically renew for successive one year periods (each a "Renewal Term") during which time an additional Transaction and/or Item Fee shall be automatically assessed. The Initial Term together with any and all Renewal Terms shall herein after referred to the "Term".
- 10.4 **Termination.** Contract Entity may terminate this Agreement at the end of the Initial Term or at the end of any Renewal Term upon the giving of twelve (12) months written notice prior to the expiration of the then existing Term; provided, however, if Client sends Transactions to Provider for processing after the effective date of any termination or expiration of this Agreement and Provider elects to process such Transactions, this Agreement shall automatically renew for a Renewal Term and any such termination or expiration shall be of no force or effect. Upon expiration or termination, Contract Entity shall assume full liability of all Merchants. Per Association requirements, Provider may terminate this Agreement at any time, for any reason, including without prior notice, effective immediately. Contract Entity may terminate this Agreement in the event of a material breach of this Agreement by Provider, after giving Provider sixty (60) days prior written notice outlining the material breach and giving Provider the opportunity to remedy such material breach; provided, however, if such material breach has not been so remedied, Contract Entity shall provide another thirty (30) days written notice and opportunity to cure before terminating this Agreement. All obligations of Client under this Agreement for Card Transactions and Items prior to termination (including document retention and Disputes) shall survive termination. Provider shall have the right to match any competitor's pricing as a result of any request for proposals ("RFP") process conducted by Client or upon termination of this Agreement. Provider shall also have the right to participate in any RFP conducted by Client without any requirement to terminate this Agreement.
- 10.5 **Early Termination.** No party shall be liable for damages (including prospective sales or profits) due to termination, with the exception of Contract Entity's obligations during the Term with regard to Provider's Fees (actual or anticipated). Client acknowledges that it would be difficult to calculate the damage to Provider if, prior to the end of the Initial Term or any Renewal Term, Contract Entity terminates this Agreement or if Client ceases to submit Transactions to Provider ("Client Early Termination"). Therefore, if such Client Early Termination occurs, Client shall owe Provider as liquidated damages, an attrition amount calculated as follows: the Fees paid to Provider for the most recent full 12-month processing period, divided by 12 (or such lesser amount if this Agreement has been in effect for less than 12 months) multiplied by the number of months, including any pro rata portion of a month, remaining in the then-current Term ("Client Attrition Fees"). Client agrees that such Attrition Fees are not a penalty, but rather are reasonable in light of the financial harm caused by such Client Early Termination. In addition, any Merchant's minimum processing period with Provider shall be 12 full calendar months and if a Merchant ceases to submit anticipated Transactions to Provider prior to that time ("Merchant Early Termination") the Merchant shall be charged an attrition fee equal to the most recent full 3-months of Fees or the equivalent thereof ("Merchant Attrition Fees"). Contract Entity shall assume full liability related to any Merchant that ceases to submit anticipated Transactions to Provider prior to the end of the Initial Term or any Renewal Term.

11. ASSOCIATION RULES

Client agrees to be bound by the applicable requirements and terms of the Association Rules, as amended from time to time, and all applicable laws. The Association Rules are incorporated into this Agreement by reference as if they were fully set forth in this Agreement. Client agrees to retain and send to Provider records as required by the Association Rules. Provider is authorized by Client and required by Associations to inform any Association or other relevant party if this Agreement is terminated for cause. Client understands that the Associations publish a list of names (including principals) of merchants terminated for cause. Client agrees to indemnify Provider, to the extent permitted by law, (pursuant to the provisions hereof) from any and all claims which Client or any other person may have as a result of being placed on any such list. Client represents and warrants that it has not been placed on any such list previously.

12. GENERAL PROVISIONS

12.1 **Entire Agreement.** This Agreement (including the Merchant Operating Guidelines, Association Rules and any Attachments) and the application to Provider, sets forth the parties entire understanding and supersedes any prior communications, proposals or agreements, written or oral, between Provider and Client or Client's designated representatives. Notwithstanding the foregoing, Merchants on the attached Merchant Location Schedule that are currently processing with Provider as of the Effective Date, if any ("Current Merchants") shall continue to be subject to the terms and conditions of the Merchant Services Agreement between Provider and Client in existence as of the Effective Date, if any ("Prior Agreement"). Upon the Conversion Date, all Merchants set forth on the attached Merchant Location Schedule including Current Merchants shall

be subject to the terms and the condition of this Agreement and the Prior Agreement shall automatically terminate. No failure or delay on the part of any party in exercising any right under this Agreement shall operate as a waiver of that right, nor shall any single or partial exercise of any right preclude any further exercise of that right. This Agreement may not be modified, except in writing signed by Contract Entity and Provider, or as otherwise provided herein.

- 12.2 **Governing Law.** This Agreement shall be governed by the laws of the State of Arizona. The parties agree that all performances and transaction under this Agreement shall be deemed to have occurred in Arizona and that the parties entry into and performance of this Agreement shall be deemed to be the transaction of business within the State of Arizona. The parties submit to the exclusive jurisdiction and venue of the state and federal courts location in Phoenix, Arizona for any action arising, directly or indirectly, out of this Agreement or the performance or breach of this Agreement. The parties stipulate that such venue is convenient. The parties waive any right to a trial by jury in any action arising out of or related to this Agreement.
- 12.3 **Waiver of Class Action and Punitive Damage Claims.** Client waives all rights to pursue any claims on a class or consolidated basis or in a representative capacity against Provider. Client shall not join any claim with the claim of any other person or entity against Provider. Client waives, to the fullest extent allowed by law, any claims to recover punitive or exemplary damages. Client agrees not to bring any claim against Provider except to the extent that Client suffers a direct financial loss. Client agrees to the entry of injunctive relief to stop any such lawsuits or to be removed as a participant in the suit.
- 12.4 **Confidentiality.** Provider and Client agree to keep confidential (and store in a secured area with limited access to only those with a business need to know) and shall not copy, publish, sell, exchange, disclose or provide to others or use, for any purpose other than performing its obligations under this Agreement, any information, documents or data, provided or disclosed by the other party, or any account information (including account numbers) related to Card Transactions. Client shall retain in strictest confidence all information and data belonging to or relating to the business of Provider. Client agrees that this Agreement is confidential and will not disclose to any third party any detail of the Agreement, including but not limited to the negotiations, pricing and terms of this Agreement. The obligations of confidentiality set forth in this Section 12.4 shall not apply to information (a) known by the receiving party prior to its receipt from the disclosing party; (b) obtained from a third party that had not obligation of confidentiality; (c) in the public domain; or (d) independently developed by or for the receiving party by an entity having no access to such confidential information. Client authorizes Provider and Provider may obtain from and share with credit reporting agencies and the Associations all financial, credit, sales, experience and other information about Client pertaining to their obligations under this Agreement.
- 12.5 **Construction.** Any alteration or strikeover in the text of this pre-printed Agreement shall have no binding effect, and shall not be deemed to amend this Agreement. The headings used in this Agreement are inserted for convenience only and shall not affect the interpretation of any provisions. The language used shall be deemed to be the language chosen by the parties to express their mutual intent, and no rule of strict construction shall be applied.
- 12.6 **Assignment.** This Agreement may not be assigned by Client directly or by operation of law, without Provider's express prior written consent and any purported assignment without Provider's consent shall be null and void. If a purported assignee or successor-in-interest by means of a merger, consolidation or sale of substantially all of its assets or stock nevertheless uses the services provided by Provider under this Agreement without Provider's prior written consent, the restrictions and obligations, but not the rights and benefits, of this Agreement shall be binding on such purported assignee or successor-in-interest. Subject to the foregoing, this Agreement shall be binding on the Client's permitted assignee or successor-in-interest. Provider's rights and obligations may be assigned without notice to Client.
- 12.7 **Notices.** All written notices to Contract Entity required by Section 12.6 and all notices to Provider shall be provided to the mailing address (via recognized express courier service with tracking of shipment) set forth on the signature page hereof; provided that either party may change their notice address by written notice in accordance with this Section 12.7. All such notices shall be effective as of the date of receipt if sent via a recognized express courier service with tracking of the shipment. All other notices will be sent via email to the Contract Entity Signatory or the designated "Primary" contact for each Merchant, as it may be updated from time to time ("Other Notices"). Contract Entity and each Merchant acknowledge and accept Provider's newsletter as a form of notice for Other Notices under this Agreement and shall abide by such notice when received. Updates to the Merchant Operating Guidelines shall be posted on the Provider's Web Site from time to time. Contract Entity and each Merchant are responsible for logging onto Provider's Web Site on a daily basis to check for reports and advices from Provider, including but not limited to incoming Disputes, daily deposit reports, client notices and updated Association Fees and Merchant Operating Guidelines. Provider in its sole discretion may substitute, change or eliminate any report or access to information at anytime. Contract Entity and each Merchant are liable for maintaining User access and User rights to Contract Entity's

and Merchant's information on Provider's Web Site.

- 12.8 **Bankruptcy.** Client shall immediately notify Provider of any bankruptcy, receivership, insolvency or similar action or proceeding initiated by or against Client or any of its principals. Client shall include Provider 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 shall be cause for immediate termination or any other action available to Provider under applicable Association Rules or law. Client acknowledges that their obligations to Provider for all amounts owed under this Agreement arise out of the same transaction as Provider's obligation to deposit funds to the Settlement Account.
- 12.9 **Attorney's Fees.** Client shall be liable for and shall indemnify and reimburse Provider, to the extent permitted by law, for all attorneys' fees and other costs and expenses paid or incurred by Provider in the enforcement of this Agreement, or in collecting any amounts due from Client to Provider or resulting from any breach by Client of this Agreement.
- 12.10 **Use of Each Party's Name.** Provider is not authorized to use Contract Entity's name in any mass mailings or magazine ads distributed via U.S. mail without the express prior written consent of Contract Entity; provided, however, Provider may use Contract Entity's name and logo in a listing of Provider's customers. Client shall not use Providers name or marks without Provider's prior written consent. Any use of each party's name or marks under this Agreement shall inure to the benefit of such party and the other party shall not obtain any right in such name or marks.
- 12.11 **Amendment.** This Agreement, the Merchant Operating Guidelines and other Attachments, and the Association Rules may be amended and/or restated by Provider as set forth herein at any time by giving written notice effective on the date stated in the notice. Submission of any Card Transactions or Items by Merchant to Provider on or after any such effective date constitutes Client's acceptance of any such amendment to this Agreement. This Agreement shall be automatically amended when Card Transactions or Items from a new Merchant are submitted to Provider, which such additional Merchant shall automatically become a part of the attached Merchant Location Schedule and such submission shall constitute Merchant's acceptance of this Agreement.
- 12.12 **Severability and Waiver.** If any provision of this Agreement is void, unenforceable or illegal, the invalidity of that provision shall not affect any of the remaining provisions and this Agreement shall be construed as if the illegal provision is not contained in the Agreement. Neither the failure nor delay by Provider to exercise, or partial exercise of, any right under this Agreement shall operate as a waiver or estoppel of such right, nor shall it amend this Agreement. All waivers must be signed by the party against whom the waiver is sought to be effective.
- 12.13 **Independent Contractors.** Provider and Client shall be deemed independent contractors and none shall be considered agent, joint venturer or partner of the other except as otherwise provided in this Agreement.
- 12.14 **Force Majeure.** Neither party shall be liable to the other for any failure or delay in its performance of this Agreement in accordance with its terms if such failure or delay arises out of causes beyond the control and without the fault or negligence of such party ("Force Majeure Event"); provided, however, the parties hereto specifically acknowledge that a general economic downturn in the economy shall not be a Force Majeure Event notwithstanding the fact that it may be beyond the control and without the fault or negligence of any such party.
- 12.15 **Counterparts.** Provided that all parties execute a copy of this Agreement, this Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. The parties acknowledge that delivery of executed copies of this Agreement may be affected by facsimile or other comparable means, as well as by delivery of manually signed copies.
- 12.16 **Survival.** Any term or condition which must survive in order to give effect to its meaning, shall survive termination of this Agreement.

13. ADDITIONAL TERMS

- 13.1 **Exception to Exclusivity.** The provision of 8.2 of this Agreement shall only be binding and enforceable against Client as to its' locations on the attached Merchant Location Schedule.

SIGNATURES

Any unilateral alteration or modification to the pre-printed form of this Agreement has no effect and at the Provider's discretion, may render this Agreement invalid. By signing below, the signatories represent and warrant that it has all necessary corporate and legal authority to enter into this Agreement on behalf of itself and as agent for the various entities outlined on the attached "Merchant Location Schedule". Client represents that it has read this Agreement in full, including the Attachments listed below, and agrees to abide by the terms of this Agreement.

The following Attachments, without limitation, are expressly made a part of this Agreement as if fully set forth in the Agreement:

- 1) Merchant Location Schedule
- 2) Schedule of Rates and Fees
- 3) MasterCard Association Fees
- 4) Visa Association Fees
- 5) Conversion Certificate
- 6) Payment Application Authorization
- 7) Merchant Operating Guidelines

CONTRACT ENTITY

Signed By: _____

Printed Name: _____

Title: _____

Direct Phone: _____

Email: _____

Address: _____

Accepted at Phoenix, Arizona as of the following date: _____ (the "Effective Date").

POST INTEGRATIONS, INC.

Signed By: _____
 Laura Noffsinger
 COO, POST Integrations, Inc.

Address: 3131 East Camelback Road, Suite 320
 Phoenix, AZ 85016

Telephone: 800-921-9444

Facsimile: 602-808-8470

BA MERCHANT SERVICES, LLC

Signed By: _____
 Laura Noffsinger
 COO, POST Integrations, Inc.
 As Agent for BA Merchant Services, LLC