



# City of San Leandro

Meeting Date: October 18, 2021

## Staff Report

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**File Number:** 21-578

**Agenda Section:** CONSENT CALENDAR

**Agenda Number:** 8.C.

**TO:** City Council

**FROM:** Fran Robustelli  
City Manager

**BY:** Susan Hsieh  
Finance Director

**FINANCE REVIEW:** Susan Hsieh  
Finance Director

**TITLE:** Staff Report for a City of San Leandro City Council Resolution to Authorize the City Manager to Enter Into a Service Agreement with Hinderliter De Llamas & Associates (HdL) for Business License Tax Administration and Retail License Services for an Amount Not to Exceed \$881,800 for Calendar Years 2022, 2023, and 2024 and Authorize the City Manager to Enter Into a Merchant Services Agreement with Worldpay for an Amount Not to Exceed \$95,000 Annually

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# City of San Leandro

Meeting Date: October 18, 2021

## Resolution - Council

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**File Number:** 21-579 **Agenda Section:** CONSENT CALENDAR

**Agenda Number:**

**TO:** City Council

**FROM:** Fran Robustelli  
City Manager

**BY:** Susan Hsieh  
Finance Director

**FINANCE REVIEW:** Susan Hsieh  
Finance Director

**TITLE:** RESOLUTION of the City of San Leandro City Council to Approve and Authorize the City Manager to Enter Into a Service Agreement with Hinderliter De Llamas & Associates (HdL) for Business License Tax Administration and Retail License Services for an Amount Not to Exceed \$881,800 for Calendar Years 2022, 2023, and 2024 and Authorize the City Manager to Enter Into a Merchant Services Agreement with Worldpay for an Amount Not to Exceed \$95,000 Annually

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**WHEREAS**, the City in accordance with its purchasing provisions identified HdL to provide Business License Tax Administration and Tobacco Retail License Services; and

**WHEREAS**, the City wishes to enter into an agreement with HdL for said work and enter into an agreement with its partner Worldpay LLC for credit card processing services.

**NOW, THEREFORE**, the City Council of the City of San Leandro does **RESOLVE** as follows:

1. That said Agreement with HdL for \$881,800 spread over calendar years 2022, 2023, and 2024 is hereby approved and the City Manager is authorized to execute all documents and take all actions necessary to effectuate the intent of this resolution.
2. That said Agreement with Worldpay LLC is hereby approved and the City Manager is authorized to execute all documents and take all actions necessary to effectuate the intent of this resolution.

**CONSULTING SERVICES AGREEMENT BETWEEN  
THE CITY OF SAN LEANDRO AND  
HINDERLITER DE LLAMAS & ASSOCIATES (HdL)  
FOR  
BUSINESS LICENSE AND TOBACCO RETAIL TAX & FEES OPERATIONS MANAGEMENT SERVICES**

THIS AGREEMENT for consulting services is made by and between the City of San Leandro ("City") and Hinderliter De Llamas & Associates (HdL) ("Consultant") (together sometimes referred to as the "Parties") as of October 19, 2021 (the "Effective Date").

**Section 1. SERVICES.** Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to City the services described in the Scope of Work attached as Exhibit A at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, the Agreement shall prevail.

- 1.1 **Term of Services.** The term of this Agreement shall begin on the Effective Date and shall end on December 31<sup>st</sup>, 2024, with the option for two (2) one-year (1) term, the date of completion specified in Exhibit A, and Consultant shall complete the work described in Exhibit A on or before that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the City's right to terminate the Agreement, as referenced in Section 8.
- 1.2 **Standard of Performance.** Consultant shall perform all services required pursuant to this Agreement in the manner and according to the standards observed by a competent practitioner of the profession in which Consultant is engaged.
- 1.3 **Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. In the event that City, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Consultant shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.
- 1.4 **Time.** Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Subsection 1.2 above and to satisfy Consultant's obligations hereunder.
- 1.5 **City of San Leandro Living Wage Rates.** This contract may be covered by the City of San Leandro Living Wage Ordinance (LWO). Consultant's attention is directed to the San Leandro Municipal Code, Title 1, Chapter 6, Article 6. Consultant must submit completed self-certification form and comply with the LWO if covered.

**Section 2. COMPENSATION.** City hereby agrees to pay Consultant an amount not to exceed \$881,800.00 which shall be comprised of the fees, costs and expenses as described in Exhibit B – Compensation Schedule & Reimbursable Expenses, notwithstanding any contrary indications that may be

contained in Consultant's proposal, for services to be performed and reimbursable costs incurred under this Agreement. In the event of a conflict between this Agreement and Consultant's proposal, attached as Exhibit B, regarding the amount of compensation, the Agreement shall prevail. City shall pay Consultant for services rendered pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from City to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City in writing, Consultant shall not bill City for duplicate services performed by more than one person.

Consultant and City acknowledge and agree that compensation paid by City to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Consequently, the Parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. City therefore has no responsibility for such contributions beyond compensation required under this Agreement.

**2.1 Invoices.** Consultant shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred prior to the invoice date. Invoices shall contain the following information:

- The beginning and ending dates of the billing period;
- The Consultant's signature;

**2.2 Monthly Payment.** City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City shall have 30 days from the receipt of an invoice that complies with all of the requirements above to pay Consultant.

**2.3 Total Payment.** City shall pay for the services to be rendered by Consultant pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. City shall make no payment for any extra, further, or additional service pursuant to this Agreement.

In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a task or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed change order or amendment.

**2.5 Reimbursable Expenses.** Reimbursable expenses are not included in the total amount of compensation provided under this Agreement that shall not be exceeded.

**2.6 Payment of Taxes.** Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes.

**2.7 Payment upon Termination.** In the event that the City or Consultant terminates this Agreement pursuant to Section 8, the City shall compensate the Consultant for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets to verify costs incurred to that date.

**2.8 Authorization to Perform Services.** The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of authorization from the Contract Administrator.

**Section 3. FACILITIES AND EQUIPMENT.** Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement. City shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

City shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with City employees and reviewing records and the information in possession of the City. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of City. In no event shall City be obligated to furnish any facility that may involve incurring any direct expense, including but not limited to computer, long-distance telephone or other communication charges, vehicles, and reproduction facilities.

**Section 4. INSURANCE REQUIREMENTS.** Before fully executing this Agreement, Consultant, at its own cost and expense, unless otherwise specified below, shall procure the types and amounts of insurance listed below against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, Consultant shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects, and that such insurance is in effect prior to beginning work. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement. The cost of such insurance shall be included in the Consultant's bid or proposal. Consultant shall not allow any subcontractor to commence work on any subcontract until Consultant has obtained all insurance required herein for the subcontractor(s) and provided evidence to City that such insurance is in effect. VERIFICATION OF THE REQUIRED INSURANCE SHALL BE SUBMITTED AND MADE PART OF THIS AGREEMENT PRIOR TO EXECUTION. Consultant shall maintain all required insurance listed herein for the duration of this Agreement.

**4.1 Workers' Compensation.**

**4.1.1 General Requirements.** Consultant shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than \$1,000,000.00 (1 million) per accident. In the alternative, Consultant may rely on a self-insurance program to meet these

requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the California Labor Code shall be solely in the discretion of the Contract Administrator.

The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the entity for all work performed by the Consultant, its employees, agents, and subcontractors.

**4.1.2 Submittal Requirements.** To comply with Subsection 4.1, Consultant shall submit the following:

- a. Certificate of Liability Insurance in the amounts specified in the section; and
- b. Waiver of Subrogation Endorsement as required by the section.

#### **4.2 Commercial General and Automobile Liability Insurance.**

**4.2.1 General Requirements.** Consultant, at its own cost and expense, shall maintain commercial general liability insurance for the term of this Agreement in an amount not less than \$2,000,000.00 (\$2 million) and automobile liability insurance for the term of this Agreement in an amount not less than \$1,000,000.00 (\$1 million) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

**4.2.2 Minimum Scope of Coverage.** Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (most recent edition) covering comprehensive General Liability on an "occurrence" basis. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001, Code 1 (any auto). No endorsement shall be attached limiting the coverage.

**4.2.3 Additional Requirements.** Each of the following shall be included in the insurance coverage or added as a certified endorsement to the policy:

- a. The Insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.

- b. City, its officers, officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of work or operations performed by or on behalf of the Consultant; or automobiles owned, leased, hired, or borrowed by the Consultant.
- c. Consultant hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. Consultant agrees to obtain any endorsements that may be necessary to affect this waiver of subrogation.
- d. For any claims related to this Agreement or the work hereunder, the Consultant's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.

**4.2.4 Submittal Requirements.** To comply with Subsection 4.2, Consultant shall submit the following:

- a. Certificate of Liability Insurance in the amounts specified in the section;
- b. Additional Insured Endorsement as required by the section;
- c. Waiver of Subrogation Endorsement as required by the section; and
- d. Primary Insurance Endorsement as required by the section.

### **4.3 Professional Liability Insurance.**

**4.3.1 General Requirements.** Consultant, at its own cost and expense, shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than \$2,000,000.00 (2 million) covering the licensed professionals' errors and omissions. Any deductible or self-insured retention shall not exceed \$150,000 per claim.

**4.3.2 Claims-Made Limitations.** The following provisions shall apply if the professional liability coverage is written on a claims-made form:

- a. The retroactive date of the policy must be shown and must be before the date of the Agreement.

- b. Insurance must be maintained, and evidence of insurance must be provided for at least 5 years after completion of the Agreement or the work, so long as commercially available at reasonable rates.
- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant shall purchase an extended period coverage for a minimum of 5 years after completion of work under this Agreement.
- d. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

**4.3.3 Additional Requirements.** A certified endorsement to include contractual liability shall be included in the policy.

**4.3.4 Submittal Requirements.** To comply with Subsection 4.3, Consultant shall submit the Certificate of Liability Insurance in the amounts specified in the section.

#### **4.4 Cyber Liability Insurance.**

**4.4.1 General Requirements.** Consultant, at its own cost and expense, shall maintain cyber liability insurance for the term of this Agreement in an amount not less than \$2,000,000.00 (\$2 Million) per occurrence. Coverage shall be sufficiently broad to respond to the duties and obligations as is undertaken by Consultant in this Agreement and shall include, but not be limited to, claims involving infringement of intellectual property, including but not limited to infringement of copyright, trademark, trade dress; invasion of privacy violations; information theft; damage to or destruction of electronic information; release of private information; alteration of electronic information; extortion; and network security. The policy shall provide coverage for liabilities for financial loss resulting or arising from acts, errors, or omissions, in rendering technology services:

- Violation or infringement of any right of privacy, including breach of security and breach of security/privacy laws, rules or regulations globally, now or hereinafter constituted or amended;
- Data theft, damage, unauthorized disclosure, destructions, or corruption, including without limitation, unauthorized access, unauthorized use, identity theft, theft of personally identifiable information or confidential City information in whatever form, transmission of a computer virus or other type of malicious code; and participation in a denial of service attack on third party computer systems;
- Loss or denial of service;
- No cyber terrorism exclusion;

Such coverage must include technology/professional liability including breach of contract, privacy and security liability, privacy regulatory defense and payment of civil fines, payment of credit card provider penalties, and breach response costs, including without limitation,



notification costs, forensic analysis, credit protection services, call center services, identity theft protection services, and crisis management/public relations services.

**4.4.2 Claims-Made Limitations.** The following provisions shall apply if the cyber liability coverage is written on a claims-made form:

- a. The retroactive date of the policy must be shown and must be before the date of the Agreement.
- b. Insurance must be maintained, and evidence of insurance must be provided for at least 5 years after completion of the Agreement or the work, so long as commercially available at reasonable rates.
- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant shall purchase an extended period coverage for a minimum of 5 years after completion of work under this Agreement.
- d. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

**4.4.3 Additional Requirements.** A certified endorsement to include contractual liability shall be included in the policy.

**4.4.4 Submittal Requirements.** To comply with Subsection 4.4, Consultant shall submit the Certificate of Liability Insurance in the amounts specified in the section.

**4.5 All Policies Requirements.**

**4.5.1 Acceptability of Insurers.** All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A:VII.

**4.5.2 Verification of Coverage.** Prior to beginning any work under this Agreement, Consultant shall furnish City with complete copies of all Certificates of Liability Insurance delivered to Consultant by the insurer, including complete copies of all endorsements attached to the policies. All copies of Certificates of Liability Insurance and certified endorsements shall show the signature of a person authorized by that insurer to bind coverage on its behalf. If the City does not receive the required insurance documents prior to the Consultant beginning work, it shall not waive the Consultant's obligation to provide them. The City reserves the right to require complete copies of all required insurance policies at any time.

**4.5.3 Deductibles and Self-Insured Retentions.** Consultant shall disclose to and obtain the written approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement. At

the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, employees, and volunteers; or the Consultant shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

**4.5.4 Wasting Policies.** No policy required by this Section 4 shall include a “wasting” policy limit (i.e. limit that is eroded by the cost of defense).

**4.5.5 Endorsement Requirements.** Each insurance policy required by Section 4 shall be endorsed to state that coverage shall not be canceled by either party, except after 30 days’ prior written notice has been provided to the City.

**4.5.6 Subcontractors.** Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and certified endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

**4.6 Submittal of Proof of Insurance Coverage.** All certificates of insurance and original endorsements effecting coverage required in this Section 4 must be electronically submitted through the City’s online insurance document management program, PINS Advantage. Contractor shall comply with all requirements provided by City related to the PINS Advantage program.

**4.7 Remedies.** In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant’s breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Terminate this Agreement.

**Section 5.** **INDEMNIFICATION AND CONSULTANT’S RESPONSIBILITIES.** Refer to the attached Exhibit C, which is incorporated herein and made a part of this Agreement.

**Section 6.** **STATUS OF CONSULTANT.**

- 6.1 **Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subsection 1.3; however, otherwise City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.
- 6.2 **Consultant Not an Agent.** Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

**Section 7. LEGAL REQUIREMENTS.**

- 7.1 **Governing Law.** The laws of the State of California shall govern this Agreement.
- 7.2 **Compliance with Applicable Laws.** Consultant and any subcontractors shall comply with all laws and regulations applicable to the performance of the work hereunder, including but not limited to, the California Building Code, the Americans with Disabilities Act, and any copyright, patent or trademark law. Consultant's failure to comply with any law(s) or regulation(s) applicable to the performance of the work hereunder shall constitute a breach of contract.
- 7.3 **Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any subcontractors shall comply with all applicable rules and regulations to which City is bound by the terms of such fiscal assistance program.
- 7.4 **Licenses and Permits.** Consultant represents and warrants to City that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required to practice their respective professions. Consultant represents and warrants to City that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses from City.

- 7.5 Nondiscrimination and Equal Opportunity.** Consultant shall not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by Consultant under this Agreement. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in any subcontract approved by the Contract Administrator or this Agreement.

**Section 8. TERMINATION AND MODIFICATION.**

- 8.1 Termination.** City or Consultant may cancel this Agreement at any time and without cause upon written 30 days notification.

In the event of termination, Consultant shall be entitled to compensation for services performed to the effective date of termination; City, however, may condition payment of such compensation upon Consultant delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement.

- 8.2 Extension.** City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension shall require a written amendment to this Agreement, as provided for herein. Consultant understands and agrees that, if City grants such an extension, City shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the Contract Administrator, City shall have no obligation to reimburse Consultant for any otherwise reimbursable expenses incurred during the extension period.

- 8.3 Amendments.** The Parties may amend this Agreement only by a writing signed by all the Parties.

- 8.4 Assignment and Subcontracting.** City and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written approval of the Contract Administrator. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors noted in the proposal, without prior written approval of the Contract Administrator.

- 8.5 Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Consultant shall survive the termination of this Agreement.
- 8.6 Options upon Breach by Consultant.** If Consultant materially breaches any of the terms of this Agreement, City's remedies shall include, but are not limited to, the following:
- 8.6.1** Immediately terminate the Agreement;
  - 8.6.2** Retain the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement;
  - 8.6.3** Retain a different consultant to complete the work described in Exhibit A not finished by Consultant; or
  - 8.6.4** Charge Consultant the difference between the cost to complete the work described in Exhibit A that is unfinished at the time of breach and the amount that City would have paid Consultant pursuant to Section 2 if Consultant had completed the work.

**Section 9. KEEPING AND STATUS OF RECORDS.**

- 9.1 Records Created as Part of Consultant's Performance.** All reports, data, maps, models, charts, studies, surveys, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Consultant prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the City. Consultant hereby agrees to deliver those documents to the City upon termination of the Agreement. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use. City and Consultant agree that, until final approval by City, all data, plans, specifications, reports and other documents are confidential and will not be released to third parties without prior written consent of both Parties.
- 9.2 Consultant's Books and Records.** Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the City under this Agreement for a minimum of 3 years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement.
- 9.3 Inspection and Audit of Records.** Any records or documents that Subsection 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the City. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds \$10,000.00, the Agreement shall be subject to the

examination and audit of the State Auditor, at the request of City or as part of any audit of the City, for a period of 3 years after final payment under the Agreement.

#### **9.4 Confidentiality; Software Use and Warrant; Records.**

Consultant will comply with the requirements of the applicable laws, ordinances and/or regulations concerning the confidentiality of tax records.

As used herein, the term "proprietary information" means all information, techniques, processes, services or material that has or could have commercial value or other utility in Consultant's Business, including without limitation: Consultant's (i) software, computer or data processing programs; (ii) data processing applications, routines, subroutines, techniques or systems; (iii) desktop or web-based software; (iv) audit, tax or fee collection/administration or business processes, methods or routines; (v) marketing plans, analyses and strategies; and (vi) materials, techniques and intellectual property used. Except as otherwise required by law, City must hold in confidence and may not use (except as expressly authorized by this Agreement) or disclose to any other party any proprietary information provided, learned of or obtained by City in connection with this Agreement. The terms of this Section 9.4 do not apply to any information that is public information or information that must be disclosed by the City pursuant to state and federal law, including Government Code section 6250 et seq., the California Public Records Act.

If access to any software which Consultant owns is provided to City as part of this Agreement (including, without limitation, if City chooses to subscribe to such software and reports option as part of the Services) (such Consultant-owned software is, collectively, the "Software"), Consultant hereby provides a limited, non-exclusive, non-transferable license to City for the use by such of City's staff as may be designated from time to time by City and approved by Consultant in writing to use the Software pursuant to and during the Term of this Agreement. The Software must only be used by such authorized City staff, and City must not sublicense, sublet, duplicate, modify, decompile, reverse engineer, disassemble, or attempt to derive the source code of the Software. The license granted hereunder does not imply ownership by City or any of City's staff of the Software nor any rights of City or any of City's staff to sublicense, transfer or sell the Software, or rights to use the Software for the benefit of others. City may not create (or allow the creation of) any derivative work or product based on or derived from the Software or documentation, nor modify (or allow the modification of) the Software or documentation without the prior written consent of Consultant. In the event of a breach of this provision (and without limiting Consultant's remedies), such modification, derivative work or product based on the Software or documentation is hereby deemed assigned to Consultant. Upon termination of this Agreement or this Software license, this Software license will be deemed to have expired and City must immediately deactivate, cease using and remove, delete and destroy all the Software (including, without limitation, from City's computers and network). Consultant warrants that the Software will perform in accordance with the Software's documentation.

All documents, preliminary drafts, communications and any and all other work product related to the Services and provided by Consultant to City either in hard copy or electronically are the property of City. This does not include any software, programs, methodologies or systems used in the creation of such work product, nor does it include any drafts, notes or internal communications prepared by Consultant in the course of performing the Services that were not otherwise provided to City in either hardcopy or electronic form, all of which may be protected by Consultant or others' copyrights or other intellectual property. Consultant shall be responsible for clearly identifying those drafts, notes or internal communications prepared by Consultant in the course of performing the Services that it believes are protected under Consultant or others' copyrights or other intellectual property. It is possible that any documents, drafts, communications or other work product provided to City may be considered public records under applicable law and/or may be discoverable through litigation. Consultant agrees to indemnify, defend, and hold harmless the City, its agents and employees, from any judgment, fines, penalties, and award of attorneys' fees awarded against the City in favor of a party requesting information under the California Public Records Act, and any and all costs connected with that defense. This obligation to indemnify survives termination of services and this Agreement. Consultant may publicly state that it performs the Services for City.

Subject to applicable law, Consultant is responsible for retaining all final documents and other final work product related to the Services for a period of not less than three (3) years from the date provided to City. Retention of any other documents, preliminary drafts, communications and any and all other work product provided to City by Consultant is the responsibility of City. Consultant has no responsibility to retain any drafts, notes, communications, emails or other writings created or received by City in the course of performing the Services (other than the final documents and other final work product related to the Services and provided to City for the term of years referenced above).

## **Section 10. MISCELLANEOUS PROVISIONS.**

- 10.1 Attorneys' Fees.** If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.
- 10.2 Venue.** In the event that either party brings any action against the other under this Agreement, the Parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Alameda or in the United States District Court for the Northern District of California.
- 10.3 Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any

provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.

- 10.4 No Implied Waiver of Breach.** The waiver of any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 10.5 Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the Parties.
- 10.6 Use of Recycled Products.** Consultant shall prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.
- 10.7 Conflict of Interest.** Consultant may serve other Cities, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Consultant in a “conflict of interest,” as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Consultant shall not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement that would violate California Government Code Section 1090 *et seq.*

Consultant hereby warrants that it is not now, nor has it been in the previous 12 months, an employee, agent, appointee, or official of the City. If Consultant was an employee, agent, appointee, or official of the City in the previous 12 months, Consultant warrants that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of California Government Code Section 1090 *et seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the City for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of California Government Code Section 1090 *et seq.*, and, if applicable, will be disqualified from holding public office in the State of California.

At City’s sole discretion, Consultant may be required to file with the City a Form 700 to identify and document Consultant’s economic interests, as defined and regulated by the California Fair Political Practices Commission. If Consultant is required to file a Form 700, Consultant is hereby advised to contact the San Leandro City Clerk for the Form 700 and directions on how to prepare it.

- 10.8 Solicitation.** Consultant agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.



**10.9 Contract Administration.** This Agreement shall be administered by George Bonnin ("Contract Administrator"). All correspondence shall be directed to or through the Contract Administrator or his or her designee.

**10.10 Notices.** Any written notice to Consultant shall be sent to:

George Bonnin  
120 S. State College Blvd. Suite 200  
Brea, CA 92820  
gbonnin@hdlcompanies.com

Any written notice to City shall be sent to:

Fran Robustelli  
City Manager  
835 E 14<sup>th</sup> Street  
San Leandro, CA 94577  
frobustelli@sanleandro.org

With a copy to:

City of San Leandro  
Department of Finance  
c/o Purchasing Agent  
835 East 14<sup>th</sup> Street  
San Leandro, CA 94577

In Process

**10.11 Integration.** This Agreement, including the scope of work attached hereto and incorporated herein as Exhibits A, B, C, and D represents the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.

<u>Exhibit A</u>	Scope of Services
<u>Exhibit B</u>	Compensation Schedule & Reimbursable Expenses
<u>Exhibit C</u>	Indemnification
<u>Exhibit D</u>	COVID-19 Compliance Requirements

**10.12 Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

**10.13 Certification per Iran Contracting Act of 2010.** In the event that this contract is for one million dollars (\$1,000,000.00) or more, by Consultant's signature below Consultant certifies that Consultant, and any parent entities, subsidiaries, successors or subunits of Consultant are not identified on a list created pursuant to subdivision (b) of Section 2203 of the California Public Contract Code as a person engaging in investment activities in Iran as described in subdivision (a) of Section 2202.5, or as a person described in subdivision (b) of Section 2202.5 of the California Public Contract Code, as applicable. Client acknowledges and agrees that any other public agency within the State (e.g., city, county, district, public authority, public agency, municipality or other political subdivision) may procure services that are substantially similar to any of the Services set forth in this Agreement, provided that such public agency executes a separate agreement with Consultant wherein the fees payable for the services rendered to such public agency are the responsibility of such public agency and not Client.

**SIGNATURES ON FOLLOWING PAGE**

The Parties have executed this Agreement as of the Effective Date. The persons whose signatures appear below certify that they are authorized to sign on behalf of the respective Party.

CITY OF SAN LEANDRO

Hinderliter De Llamas and Associates (HdL)

\_\_\_\_\_  
Fran Robustelli, City Manager

DocuSigned by:  
*Robert Gray, Director of Tax & Fee Administration*  
\_\_\_\_\_  
Robert Gray, Chief Information Officer  
October 7, 2021 | 11:27:20 PM PDT

Attest:

\_\_\_\_\_  
Consultant's DIR Registration Number  
(If applicable)

\_\_\_\_\_  
Leticia I. Miguel, City Clerk

Budget Approved:

Approved as to Fiscal Authority:

\_\_\_\_\_  
Susan Hsieh, Finance Director

\_\_\_\_\_  
Account Number

Approved as to Form:

DocuSigned by:  
*[Signature]*  
\_\_\_\_\_  
7841338F0D3F470  
Richard D. Pio Roda, City Attorney

October 7, 2021 | 8:26:31 PM PDT

Per Section 10.7: Form 700 Required

## EXHIBIT A

### SCOPE OF SERVICES

Consultant will provide the following Services relative to City's Business and Tobacco Retail License Tax and Fees Operations Management Services:

#### 1. Operations Management Services

- 1.1. Establish and maintain database of City businesses and tobacco licenses.
- 1.2. Receive and process applications, renewals, and payments in a timely fashion.
- 1.3. Send renewal notices to active businesses within 30 days of the renewal period end date or at another interval specified by City.
- 1.4. Provide businesses multiple options for submitting applications, renewals, payments, or support requests (including via website, email, mail, phone, and fax. Consultant license specialists will be available for live interactions Monday through Friday, 8:00am to 5:00pm Pacific).
- 1.5. Remit revenue to City no less than monthly.
- 1.6. Provide City staff access to website portal offering business registry inquiry, reporting, and electronic department approval capabilities.

#### 2. Compliance Services:

1) Identify and register businesses which are subject to licensure or taxation, 2) collect known debt as pertains to business license or tax, and 3) identify under-reported tax liability.

##### 2.1. Discovery Services

- 2.1.1. Develop a list of businesses subject to City licensure or taxation.
- 2.1.2. Notify non-compliant businesses of their options to comply or dispute their non-compliant status. Notification and support to businesses will be facilitated through the website, mail, email, phone, and fax.
- 2.1.3. Review information and forms submitted by the business for completion and accuracy, inclusive of any additional required documentation (i.e., home occupation permit). All submissions are filed and stored electronically and made available to City upon request.
- 2.1.4. Provide businesses with detailed invoicing and options to pay via website, mail, and phone.
- 2.1.5. Remit revenue to City no less than monthly, along with all business applications and any additional documentation.

##### 2.2. Collection Services

- 2.2.1. Identify businesses subject to City licensure or taxation which have known debt to City and have failed to pay within an appropriate time frame.
- 2.2.2. Notify businesses of their options to comply or dispute their non-compliant status.
- 2.2.3. Provide businesses with detailed invoicing and options to pay via website, mail, and phone.
- 2.2.4. Remit revenue to City no less than monthly.

### **2.3. Audit Services**

- 2.3.1. Identify potential under-reporting and/or misclassified businesses.
- 2.3.2. Audit businesses mutually agreed to by City and Consultant that are identified as potential under-reporting businesses.
- 2.3.3. Submit audit summaries to City and discuss further actions.
- 2.3.4. Educate businesses on proper reporting practices.
- 2.3.5. Invoice and collect identified delinquencies.

### **3. Payment Processing Services**

- 3.1 Consultant's service includes PCI compliant payment gateway services, which supports both credit card and eCheck transactions.
- 3.2 Payment Processing - Consultant shall provide its Services to support payments remitted to City. Consultant shall transmit transactions for authorization and settlement through Consultant's certified payment processor.
- 3.3 City Responsibilities - As a condition to its receipt of the Service, City shall execute and deliver any and all applications, agreements, certifications, or other documents required by Networks or other third parties whose consent or approval is necessary for the processing of Transactions. "Network" is an entity or association that operates, under a common service mark, a system which permits participants to authorize, route, and settle Transactions among themselves, including, for example, networks operated by VISA USA and Mastercard, Inc., NYCE Corporation, American Express, and Discover.
- 3.4 City hereby grants Consultant the full right, power, and authority to request, receive and review any Data or records reflected in a Transaction report. City represents and warrants that it has the full right and authority to grant these rights.

## EXHIBIT B

### COMPENSATION SCHEDULE & REIMBURSABLE EXPENSES

#### 3.1. Operations Management Services

3.2. Fees for performing operations management Services as outlined in the Scope of Work shall be as follows:

- \$13.00 for each business license processed account, which is any account for which an application or renewal/return was processed, or active account which was sent a renewal notice.
  -
- \$7,500.00 for the administration of the tobacco retail licenses for year one (1).
- \$5,000.00 for the administration of the tobacco retail licenses for year two (2) and beyond.

3.3. Fees related to travel and lodging expenses are billed at cost and apply to all meetings (including implementation, training, operations, and support). Travel expenses only apply to out-of-scope travel and must therefore be pre-approved by City.

3.4. Fees will be invoiced monthly to City for Services performed during the prior month. Fees will be netted out of City's monthly revenue disbursement. City will submit payment for any balance due to Consultant within 30 days of receiving the invoice.

#### 4. Compliance Services

4.1. Fees for performing compliance Services apply to all monies received for the current tax/license period and any other prior period collected (including monies received for taxes, penalties, interest, and fees).

4.1.1. Fees for performing discovery Services shall be a contingency Fee of 35% of the revenues received as a result of the Services.

4.1.2. In the event that City discovers a non-compliant business and reports the business to Consultant (including a calculation of all taxes/fees due), Consultant will categorize the business as a collection service effort and thus apply the lower collection Services contingency Fee rate.

4.1.3. Fees for performing collection Services shall be a contingency Fee of 25% of the revenues received as a result of the Services.

4.1.4. Fees for performing audit Services shall be a contingency Fee of 35% of the revenues received as a result of the Services.

4.2. Consultant recognizes City's authority to waive or reduce the tax/fee debt of a business. Should City decide to do so for a business whose deficiency was identified by Consultant, Consultant shall be entitled to compensation in the amount of one half (1/2) of the Fees Consultant would have otherwise earned. Deficiencies which are uncollectable due to insolvency or dissolution of the business, or for deficiencies which are otherwise incapable of collection (i.e., statute of limitation or other legal defense) shall not be considered a City voluntary election to waive, and thus, Consultant would not be entitled to compensation related thereto under this provision.

4.3. Fees related to travel and lodging expenses are billed at cost and applied to all meetings (including implementation, training, operations, and support). Travel expenses only apply to out-of-scope travel and must therefore be pre-approved by City.

4.4. Fees will be invoiced monthly to City for Services performed during the prior month. Fees will be netted out of City's monthly revenue disbursement. City will submit payment for any balance due to Consultant within 30 days of receiving the invoice.

**5. Payment Processing Services** – Consultant will configure payment processing services to utilize either a taxpayer funded model (convenience fee), or City funded interchange pass-through model. City may switch between these models upon written request to Consultant.

**5.1 Taxpayer funded model** - City authorizes Consultant to collect each convenience fee from the taxpayer.

<i>Item</i>	<i>Price</i>
<i>Credit and Debit Cards processing</i>	2.9%, minimum of \$2.00
<i>ACH/eCheck processing</i>	\$1.25 per transaction
<i>ACH/eCheck Returns</i>	\$0
<i>Chargebacks</i>	\$0

**5.2 City funded interchange pass-through model.**

<i>Item</i>	<i>Price</i>
<i>Credit and Debit Cards processing</i>	2.9%
<i>ACH/eCheck processing</i>	\$0.50 per transaction
<i>ACH/eCheck Returns</i>	\$10.00 per event
<i>Chargebacks</i>	\$17.50 per event

5.3 In addition to the charges specified, City shall be responsible for (a) all interchange and network provider fees, (b) all dues, fees, fines and assessments established and owed by City to Visa and/or Mastercard, (c) for all costs and fees associated with changes to ATM protocol caused by City's conversion to the Services, and (d) any increase in postage charges, provided that any increase in charges resulting from (a) through (d) shall not exceed the actual increase incurred by Consultant.

5.4 Consultant reserves the right to review and adjust all City and convenience fee pricing on an annual basis in June. This adjustment may be consistent with the then most recent ECI adjustment or three percent (3%) whichever is greater. Items that will be considered in the review of fees may include, but are not limited to regulatory changes, card association rate adjustments, card association category changes, bank/processor

## EXHIBIT C

### INDEMNIFICATION

Consultant shall indemnify, defend with counsel acceptable to City, and hold harmless City and its officers, elected officials, employees, agents and volunteers from and against any and all liability, loss, damage, claims, expenses, and costs (including without limitation, attorney's fees and costs and fees of litigation) (collectively, "Liability") of every nature arising out of or in connection with Consultant's performance of the services called for or its failure to comply with any of its obligations contained in this Agreement, except such Liability caused by the sole negligence or willful misconduct of City.

Notwithstanding the forgoing, to the extent this Agreement is a "construction contract" as defined by California Civil Code Section 2782, as may be amended from time to time, such duties of Consultant to indemnify shall not apply when to do so would be prohibited by California Civil Code Section 2782.

The Consultant's obligation to defend and indemnify shall not be excused because of the Consultant's inability to evaluate Liability or because the Consultant evaluates Liability and determines that the Consultant is not liable to the claimant. The Consultant must respond within 30 days to the tender of any claim for defense and indemnity by the City. If the Consultant fails to accept or reject a tender of defense and indemnity within 30 days, in addition to any other remedy authorized by law, so much of the money due the Consultant under and by virtue of this Agreement as shall reasonably be considered necessary by the City, may be retained by the City until disposition has been made of the claim or suit for damages, or until the Consultant accepts or rejects the tender of defense, whichever occurs first.

Consultant shall also indemnify, defend and hold harmless the City from all suits or claims for infringement of any patent rights, copyrights, trade secrets, trade names, trademarks, service marks, or any other proprietary rights of any person or persons because of the City or any of its officers, employees, volunteers, or agents use of articles, products things, or services supplied in the performance of Consultant's services under this Agreement, however, the cost to defend charged to Consultant shall not exceed Consultant's proportionate percentage fault.



## EXHIBIT D

### REQUIREMENTS RELATED TO THE COVID-19 PANDEMIC AND THE CITY OF SAN LEANDRO'S EMERGENCY DECLARATION

The novel coronavirus ("COVID-19") has been declared a worldwide pandemic by the World Health Organization. The City of San Leandro is currently in a local emergency and state of emergency due to the COVID-19 pandemic.

COVID-19 is extremely contagious, and is believed to spread mainly from person-to-person contact, through touched surfaces, and in airborne particles. As a result, federal, state, and local governments, including the City of San Leandro, and federal, state, county, and local health agencies recommend social distancing and additional cleaning protocols to limit the spread of the disease. The City has taken steps and put in place preventative measures recommended by federal, state, and local health agencies to reduce the spread of COVID-19. These measures include steps each person must take to prevent the spread of COVID-19 and include, but are not limited to, requiring face coverings, frequent hand washing and/or use of hand sanitizer, social distancing where possible, limiting of person-to-person contact, frequent cleanings of high-touch surfaces, and avoiding entering any building if they have COVID-19 symptoms.

Consultant shall obey all local orders and abide by all applicable preventative measures recommended by federal, state, county, and local health agencies and any preventative measures specifically implemented by the City. Consultant agrees that when entering any City buildings, Consultant will follow all COVID-19 related signage, wear a face covering, follow all social distancing protocols, and abide by any other COVID-19 preventative measure that are in place when performing the services described in this Agreement. Consultant shall also adhere to any subsequently communicated COVID-19 preventative measures as directed by City staff. The COVID-19 preventative measures are subject to change over time, and Consultant shall maintain knowledge of and adhere to the current COVID-19 preventative measures when interacting with City employees, officials, volunteers, agents, and representatives, and when entering City buildings.

## BANK CARD MERCHANT AGREEMENT-Biller Solutions Merchant

This Bank Card Merchant Agreement is made among **WORLDPAY, LLC** ("Processor") having its principal office at 8500 Governors Hill Drive, Symmes Township, OH 45249-1384, the **Member Bank** and **Merchant**. Processor, Member Bank and Merchant hereby agree as follows:

**I.** Processor and/or Member Bank participates in programs affiliated with MasterCard, VISA, Discover, and Other Networks which enable holders of Cards to purchase goods and services from selected merchants located in the United States by use of their Cards.

**II.** Merchant wishes to participate in the MasterCard, VISA, Discover, and the Other Networks systems at its United States locations by entering into contracts with Cardholders for the sale of goods and services through the use of Cards.

NOW, THEREFORE, in consideration of the foregoing recitals and of the mutual promises hereinafter set forth, the parties agree as follows:

### 1. **Definitions.**

For the purposes of this Agreement, the following terms shall have the meanings set forth below:

**Account** shall mean an open checking account at a financial institution acceptable to Processor which Processor or its agent can access through the ACH system.

**Account Change** means a change in the Account or the financial institution where the Account is located.

**ACH** shall mean the Federal Reserve's Automated Clearing House ("ACH") system.

**Agreement** means this Bank Card Merchant Agreement and each exhibit, schedule, and addendum attached hereto or referencing this Agreement, as well as all documents and other materials incorporated herein by reference.

**Association** means VISA, MasterCard, Discover, or any Other Network, as the same are defined herein.

**Cardholder** shall mean any person authorized to use the Cards or the accounts established in connection with the Cards.

**Cards** shall mean MasterCard, VISA, Discover and Other Network cards, account numbers assigned to a cardholder, or other methods of payment accepted by Processor, for which pricing is set forth in the Agreement.

**Data Incident** shall mean any alleged or actual compromise, unauthorized access, disclosure, theft, or unauthorized use of Card or Cardholder information, regardless of cause, including without limitation, a breach of or intrusion into any system, or failure, malfunction, inadequacy, or error affecting any server, wherever located, or hardware or software of any system, through which Card information resides, passes through, and/or could have been compromised.

**Discover** shall mean Discover Financial Services, LLC.

**Event of Default** shall mean each event listed in Section 13.

**Float Event** shall mean a circumstance where Processor, for whatever reason, advances settlement or any amounts and/or delays the assessment of any fees.

**Force Majeure Event** shall mean, labor disputes, fire, weather or other casualty, power outages, and funding delays, however caused, governmental orders or regulations, or any other cause, whether similar or dissimilar to the foregoing, beyond Processor's reasonable control.

**MasterCard** shall mean MasterCard International, Inc.

**Member Bank** shall mean a member of VISA, MasterCard and/or Other Networks, as applicable, that provides sponsorship services in connection with this Agreement. As of the commencement of this Agreement, the Member Bank shall be Citizens Bank, National Association.

**Merchant Supplier** shall mean a third party other than Processor or Member Bank used by Merchant in connection with the Services received hereunder, including but not limited to, Merchant's software providers, equipment providers, and/or third party processors.

**Operating Regulations** means the by-laws, operating regulations and/or all other rules, policies and procedures of VISA, MasterCard, Discover, and/or Other Networks as in effect from time to time.

**Other Network** shall mean any network or card association other than VISA, MasterCard, or Discover in which Merchant participates hereunder.

**PCI** shall mean the Payment Card Industry Data Security Standard.

**Rules Summary** means the document containing a summary of key Operating Regulations governing this Agreement as amended from time to time, which is incorporated into this Agreement by reference

**Service** shall mean any and all services described in, and provided by Processor pursuant to, this Agreement.

**Service Delivery Process** means Processor's then standard methods of communication, service and support, including but not limited to communication via an online Merchant portal, email communication, statement notices, other written communications, etc.

**Term** The term of this agreement is to be month to month.

**VISA** shall mean VISA USA, Inc.

**2. Rules Summary: Operating Regulations:** Merchant acknowledges receipt and review of the Rules Summary, which are incorporated into this Agreement by reference. Merchant agrees to fully comply with all of the terms and obligations in the then current Rules Summary, as changed or updated by Processor from time to time, at Processor's sole reasonable discretion with notice in accordance with the Service Delivery Process. The Rules Summary is a summary of key Operating Regulations that govern this Agreement. In the event there is a change in the Rules Summary by Processor that is not related to or based on a corresponding Association rule or requirement, such provision will not be binding on Merchant. Merchant agrees to participate in the Associations in compliance with, and subject to, the Operating Regulations. Without limiting the foregoing, Merchant agrees that it will fully comply with any and all confidentiality and security requirements of the USA Patriot Act (or similar law, rule or regulation), VISA, MasterCard, Discover, and/or Other Networks, including but not limited to PCI, the VISA Cardholder Information Security Program, the MasterCard Site Data Protection Program, the American Express Data Security Requirements (DSR), and any other program or requirement that may be published and/or mandated by the Associations. Should any Operating Regulation(s) not be publicly available or otherwise made available to the Merchant, such unavailability shall not alter or limit Merchant's obligation to comply with the Operating Regulations. Notwithstanding Processor's assistance in understanding the Operating Regulations, Merchant expressly acknowledges and agrees that it is assuming the risk of compliance with all provisions of the Operating Regulations, regardless of whether Merchant has possession of those provisions. Both MasterCard and VISA make excerpts of their respective Operating Regulations available on their internet sites. Merchant acknowledges responsibility for any liability resulting from its decision not to participate in optional Association programs, including but not limited to any increased Data Incident liability resulting from its decision not to participate in an Association EMV program. In the event Merchant chooses to participate in an optional Association program, including but not limited to an EMV program, Merchant acknowledges and agrees that it shall be responsible for (i) ensuring compliance with any applicable program requirements and/or Operating Regulations applicable to such program, including but not limited to making any updates to its point of sale equipment and (ii) any cost associated with its participation in the applicable program, including any costs assessed to Merchant by Processor.

**3. Application; Change in Business.** Merchant represents that all information supplied by Merchant in connection with its application or other request for services is complete and accurate. In accordance with Section 326 of the USA Patriot Act, Processor is required to review and record information from the documents used in identifying new merchant customers. The preceding sentence is intended to inform Merchant of Processor's procedures and of Processor's responsibility under the USA Patriot Act. Merchant agrees to provide Processor with 30 days prior written notice of Merchant's intent to change its business form or entity in

any manner (e.g. a change from a limited liability company to a corporation), and/or of Merchant's intent to sell its stock or assets to another entity.

**4. Card Acceptance.** Merchant must accept all Cards and complete all Card transactions in accordance with the Operating Regulations. In the event Processor for whatever reason is unable to obtain, or due to system delays chooses not to wait to obtain, authorization from an Association, Processor may at its option "stand-in" for such entities and authorize the sales transaction based on criteria established by Processor, and Merchant remains responsible for such sales transaction in accordance with this Agreement. Merchant has identified to Processor the products and/or services for which it intends to accept Cards as payment. Merchant agrees that it shall only complete and deliver to Processor sales transactions produced as the direct result of bona fide sales made by Merchant to Cardholders for such identified products and/or services, unless otherwise agreed by Processor in writing

**5. Transaction Processing.** Processor or Member Bank will initiate payment to Merchant of the total face amount of each sales transaction acquired and accepted hereunder, subject to the terms and conditions of this Agreement, the Operating Regulations, and applicable law, after Processor receives payment for such sales transactions. Unless otherwise agreed to in writing by Processor, Merchant shall electronically deliver to Processor and in a format acceptable to Processor all credit vouchers and sales transaction records within two (2) business days after the applicable transaction date (or such shorter period as determined by the applicable Association), except (i) in the case of a delayed merchandise delivery, when the sales transaction record shall be delivered within two (2) business days of the merchandise delivery or (ii) as specified otherwise in the Operating Regulations. Merchant agrees that it shall deliver sales transaction records to Processor at least every business day. The preparation and delivery to Processor by Merchant of sales transactions shall constitute an endorsement to Processor by Merchant of each sales transaction, and Merchant authorizes Processor or its representative to place Merchant's endorsement on any sales transaction at any time. Processor may refuse to acquire any sales transaction or claim the amount of which, in whole or in part, it could charge back to the Merchant pursuant to this Agreement, if it had acquired the sales transaction or claim. Merchant acknowledges and agrees that Processor is not responsible for any action or inaction taken by the financial institution or other entity that issued the Card(s) to the Cardholder or the processor of such Card(s). Merchant agrees that Processor may set off any amounts due to Processor from amounts owed to Merchant, including but not limited to any amounts owed to Merchant from Processor and/or any of its affiliate(s).

**6. Exception Items.** Merchant agrees to reacquire and pay Processor the amount of any sales transaction, and Processor shall have the right at any time to charge Merchant's Account therefore with notice via Processor's Service Delivery Process, for any return, chargeback, compliance case, any other Association action, or if the extension of credit for merchandise sold or services or sales transactions performed was in violation of law or the rules or regulations of any governmental agency, federal, state, local or otherwise; or if Processor has not received payment for any sales transaction, notwithstanding Processor's prior payment to Merchant for such sales transaction pursuant to Section 5 above or any other section. Not limiting the generality of the foregoing, Merchant agrees that any operational and/or other Services performed on behalf of Merchant, including but not limited to, production of facsimile drafts in response to copy requests, response to compliance cases, augmentation of Merchant data for interchange, transaction stand-in, digital draft storage and retrieval, etc. shall in no way affect Merchant's obligations and liability in this Agreement including those in the foregoing sentence. Merchant may instruct Processor in the defense of chargebacks, compliance cases and similar actions, and Merchant agrees that it will promptly provide any such instructions to Processor. When Processor has determined it has all necessary information and instructions, Merchant hereby authorizes Processor to resolve chargebacks and respond to retrieval requests and other inquiries without further consulting Merchant.

**7. Merchant Suppliers.** Merchant may use one or more Merchant Suppliers in connection with the Services and/or the processing of some or all of its Card transactions. In no event shall Merchant use a Merchant Supplier unless such Merchant Supplier is compliant with PCI and/or the Payment Application Data Security Standard ("PA-DSS"), depending on the type of Merchant Supplier, as required by the Operating Regulations. Merchant acknowledges and agrees that Merchant shall cause its

Merchant Supplier to complete any steps or certifications required by any Association (e.g., registrations, PA-DSS, PCI, audits, etc.). Merchant shall cause its Merchant Supplier to cooperate with Processor in completing any such steps or certifications (if applicable), and in performing any necessary due diligence on such Merchant Supplier. Merchant shall be solely responsible for any and all applicable fees, costs, expenses and liabilities associated with such steps, registrations, and certifications. Merchant shall bear all risk and responsibility for conducting Merchant's own due diligence regarding the fitness of any Merchant Supplier(s) for a particular purpose and for determining the extent of such Merchant Supplier's compliance with the Operating Regulations and applicable law. Merchant expressly agrees that Processor shall in no event be liable to Merchant or any third party for any actions or inactions of any Merchant Supplier used by Merchant, even if Processor introduced and/or recommended the use of such Merchant Supplier to Merchant, or never objected to the use of such Merchant Supplier, and Merchant hereby expressly assumes all such liability.

**8. Cardholder Information.** Merchant shall not disclose, sell, purchase, provide, or exchange Cardholder name, address, account number or other information to any third party other than to Processor or an Association for the purpose of completing a sales transaction unless specifically permitted by the Operating Regulations. Merchant represents and warrants that neither it nor its Merchant Supplier shall retain or store any portion of the magnetic-stripe data subsequent to the authorization of a sales transaction, nor any other data prohibited by the Operating Regulations and/or this Agreement.

Processor acknowledges responsibility for payment card data on its proprietary systems. Processor will (i) maintain its PCI-DSS certification and (ii) be validated as a PCI-DSS compliant service provider. In the event Processor is deemed not to be in compliance with PCI-DSS, Processor shall make commercially reasonable efforts to become compliant and maintain compliance thereafter. As of the execution of the Agreement, PCI-DSS information and standards can be found at the Payment Card Industry Security Council website at <https://www.pcisecuritystandards.org/index.htm>.

**9. Term.** The term of this Agreement shall commence the date Processor executes this Agreement, and shall continue for the Term as defined in Section 1 of this Agreement. Except as hereafter provided, unless either party gives written notice to the other party at least 60 days prior to the expiration of any term, the Agreement including all addenda, schedules and exhibits hereto or referencing this Agreement shall be automatically extended on a calendar month to calendar month basis. All obligations of Merchant incurred or existing under this Agreement as of the date of termination, shall survive such termination.

**10. Processor Fees.** Merchant agrees to that Processor will collect a convenience fee from cardholders along with each transaction processed for Merchant and such convenience fee is subject to change via Processor's Service Delivery Process. In the event Processor changes or its convenience fees pursuant to the immediately preceding sentence ("Fee Change"), Merchant may, subject to the following provisions, terminate the Agreement upon 60 days advance written notice to Processor provided Processor receives such written notice from Merchant of its intention to so terminate within 90 days of the date the Fee Change becomes effective. Upon Processor's receipt of Merchant's written notice pursuant to the immediately preceding sentence, Processor shall have 30 days to rescind or waive the Fee Change, and, in the event Processor elects to rescind or waive the Fee Change, Merchant shall not have the right to terminate this Agreement as a result of the Fee Change and this Agreement shall remain in full force and effect notwithstanding Merchant's written notice to terminate. Merchant acknowledges and agrees that this Section shall not be intended or construed to permit Merchant to terminate the Agreement as a result of a change or increase in fees from third parties and/or in pass through fees as referenced in this Agreement. At Merchant's request, Processor may, in its sole discretion, establish multiple Merchant billing definitions on its system, and in such event, Processor shall assess all applicable fees separately and independently with respect to each such billing definition.

**11. Third Party Assessments.** Notwithstanding any other provision of this Agreement, Merchant shall be responsible for all amounts imposed or assessed to Merchant, Processor, and/or Member Bank in connection with this agreement by Member Bank and/or third parties such as, but not limited to, Associations and Merchant Suppliers (including telecommunication companies), to the extent that such amounts are not



the direct result of the gross negligence or willful misconduct of Processor. Such amounts include, but are not limited to, fees, fines, assessments, sponsorship fees, penalties, loss allocations, etc. Any changes or increases in such amounts shall automatically become effective upon notice to Merchant via Processor's Service Delivery Process and shall be immediately payable by Merchant when assessed by Processor. In the event of a Float Event, Processor reserves the right to assess to Merchant, and Merchant shall pay to Processor, a cost of funds associated with the Float Event (which Processor may at its option assess as a transaction surcharge), the amount of which shall be determined by Processor in its reasonable discretion, and which may be changed by Processor from time to time, and such cost of funds shall be effective as of the start of the Float Event and shall be immediately payable by Merchant when assessed by Processor.

**12. Exclusivity.** Processor and Member Bank reserve the right to enter into other agreements pertaining to the Services with others including without limitation other merchants. The parties agree that Processor shall be the exclusive provider of the Services to Merchant at all of its locations. Merchant agrees that Processor shall be the exclusive provider to Merchant, at all of Merchant's locations, of the Services and any services that are the equivalent of the Services available from another provider, including any Services or their equivalents that relate to any Cardholder transactions originating at or with a Merchant Supplier that incorporate Merchant's goods and/or services.

**13. Default.** The following events shall be considered an "Event of Default":

- (i) Merchant becomes subject to any voluntary or involuntary bankruptcy, insolvency, reorganization or liquidation proceeding, a receiver is appointed for Merchant, or Merchant makes an assignment for the benefit of creditors, or admits its inability to pay its debts as they become due; or
- (ii) Merchant fails to pay or reimburse the fees, expenses or charges referenced herein when they become due; or
- (iii) Merchant is in default of any terms or conditions of this Agreement whether by reason of its own action or inaction or that of another; or
- (iv) Processor reasonably believes that there has been a material deterioration in Merchant's financial condition; or
- (v) any standby letter of credit, if and as may be required pursuant to Section 20, will be cancelled, will not be renewed, or is not in full force and effect; or
- (vi) Merchant ceases to do business as a going concern, or there is a change in ownership of Merchant which changes the identity of any person or entity having, directly or indirectly, more than 30% of either the legal or beneficial ownership of Merchant.

Upon the occurrence of an Event of Default, Processor may at any time thereafter terminate this Agreement by giving Merchant written notice thereof. However, except in instances where immediate termination is required by any Association or if Member Bank and/or Processor reasonably believe that the Event of Default poses material risk to either of them or involves a violation of applicable law, Merchant will have 30 days following Processor's notice to cure an Event of Default under Section (ii), (iii), (iv) or (v) prior to termination under this section. Termination of Merchant for any reason shall not relieve Merchant from any liability or obligation to Processor. Merchant shall also reimburse Processor for any damage, loss or expense incurred by Processor as a result of a breach by Merchant, including any damages set forth in any addendum and/or schedule and/or exhibit hereto and including all past due, unpaid and/or future invoices for services rendered by Processor in connection with this Agreement. All such amounts shall be due and payable by Merchant upon demand. Processor shall also have the option to require Merchant to reacquire all outstanding sales transactions acquired by Processor hereunder.

**14. Processor Nonperformance:** In the event Merchant, in good faith, reasonably believes that Processor has substantially failed to provide the Services, other than as a result of (i) a failure by Merchant (or any Merchant Supplier, or other third party acting at the request of or on behalf of Merchant) to perform any obligation under the Agreement, or to provide accurate data to Processor upon which Processor is dependent to provide accurate and timely Services to Merchant, or (ii) any Force Majeure Event, Merchant agrees to notify Processor in writing within 30 days of the date upon which such failure first occurred. Merchant agrees that such notice shall be sent in accordance with the terms of this Agreement, and shall specifically describe the nature of

such failure by Processor, specify the date such failure first occurred and specifically reference this section.

Processor will attempt to resolve such failure within 30 days of Processor's actual receipt of such notice from Merchant. Should Processor not resolve such failure within the cure period described in the foregoing sentence, Merchant may terminate this Agreement upon 90 days prior written notice to Processor, provided Processor actually receives such notice of termination within 30 days after the end of such cure period.

**15. Taxes.** Any sales, use, excise or other taxes (other than Processor's income taxes) payable in connection with or attributable to the Services provided to the Merchant per this Agreement shall be paid by Merchant. Processor may, but shall not have the obligation to, pay such taxes. In the event Processor pays such taxes, Merchant shall immediately reimburse Processor or Processor may, at Processor's sole option, charge Merchant's Account.

**16. Binding on Successors: Assignment.** This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, administrators, successors, transferees and assignees. Neither this Agreement nor any interest herein may directly or indirectly be transferred or assigned by Merchant, in whole or in part, without the prior written consent of Processor, which will not be unreasonably delayed or withheld. Merchant will remain liable for any amounts owed under this Agreement after an unauthorized transfer or assignment by Merchant, even if Processor continues to provide Services to such transferee or assignee. This Agreement is for the benefit of, and may be enforced only by, Processor and Merchant and their respective successors and permitted transferees and assignees, and is not for the benefit of, and may not be enforced by, any third party.

**17. Notices.** All notices, requests, demands and other communications to be delivered hereunder unless specified otherwise herein shall be in writing and shall be delivered by nationally recognized overnight carrier, registered or certified mail, postage prepaid, to the following addresses:

**if to Processor:** Worldpay, LLC, 8500 Governors Hill Drive, Mail Drop 1GH1Y1, Symmes Township, OH 45249-1384, Attention: General Counsel/Legal Department;

**if to Merchant:** to the Merchant address provided above, Attention President/Owner; or to such other address or to such other person as either party shall have last designated by written notice to the other party.

Notices, etc., so delivered shall be deemed given upon receipt.

**18. Unenforceable Provision.** If any term or provision of this Agreement or any application thereof shall be invalid or unenforceable, the remainder of this Agreement and any other application of such term or provision shall not be affected thereby.

**19. Payment.** Merchant shall always maintain an open Account. Merchant irrevocably authorizes Processor to debit and/or credit the Account to settle any and all fees and other amounts due Processor under this Agreement, and such authority shall remain in effect for a period of one (1) calendar year following the date of termination of this Agreement, regardless of whether Merchant has notified Processor of an Account Change as defined below. Merchant shall always maintain the Account with sufficient cleared funds to meet its obligations under this Agreement. In the event Merchant desires an Account Change, Merchant shall give Processor 30 days prior written notice in accordance with the provisions of Section 17 of any such change, and Processor shall use reasonable commercial efforts to effect such Account Change; however, such Account Change shall not be effective until the date on which Processor actually makes such Account Change on Processor's system. In no event shall Processor have any liability for any amounts directed to an Account that has been designated by any purported representative of Merchant or its Merchant Supplier at any time during the term of this Agreement, regardless of any Account Change. All amounts due Processor under this Agreement shall be paid without set-off or deduction, and shall be due from Merchant as of the date Processor originates an ACH debit transaction record to Merchant's Account. Any fees not collected from Merchant by Processor when due shall bear interest at one (1) percentage point per month but in no event more than the highest rate permitted by law. The acceptance by Processor, Processor's affiliate or other financial institution of Merchant's closing (or termination of) its Account shall not constitute a mutually agreed upon termination of this Agreement. Without limiting the generality of any other provision of this Agreement, Processor and/or Member Bank are hereby authorized by Merchant to charge amounts due under this Agreement.)

against each day's sales transactions ii) against any reserve; or iii) by making an ACH debit to Merchant's Account.

**20. Reserve; Letter of Credit.** As a specifically bargained for inducement for Processor to enter into this Agreement with Merchant, Processor at its option reserves the right to i) establish from amounts payable to Merchant hereunder, and/or cause Merchant to pay to Processor, a reserve of funds satisfactory to Processor to cover actual or anticipated fees, liabilities, chargebacks, returns and any other applicable assessments incurred or expected to be incurred by Processor or Member Bank related to the Services provided to Merchant; and/or ii) require Merchant to establish an irrevocable standby letter of credit, including additional and/or replacement letters of credit if required by Processor, with a beneficiary designated by Processor, and which are issued from a financial institution other than Member Bank or any of its affiliates, that is acceptable to Processor, in a format, with an expiration date, and in an amount acceptable to Processor in its sole discretion. In the event Merchant fails to establish, for any reason whatsoever, a reserve and/or a letter of credit as required above, Processor shall have all of the rights and remedies available to Processor in this Agreement, including but not limited to exercising the rights and remedies of Processor in Section 13. In the event Processor exercises its right to establish a reserve or require a letter of credit pursuant to this Section, Merchant may, subject to the following provisions, terminate the Agreement upon 30 days advance written notice to Processor provided Processor receives such written notice from Merchant of its intention to so terminate within 90 days of the date on which Processor establishes the reserve or requires the letter of credit. Upon Processor's receipt of Merchant's written notice pursuant to the immediately preceding sentence, Processor may, at its option, return the reserve to Merchant or waive the requirement for a letter of credit, and, in the event Processor elects to return the reserve to Merchant or waive the requirement for a letter of credit, Merchant shall not have the right to terminate this Agreement pursuant to this Section and this Agreement shall remain in full force and effect notwithstanding Merchant's written notice to terminate.

Merchant shall not sell, assign, transfer or encumber all or any part of its interest in the reserve account, if any, or any present or future rights under this Agreement, including but not limited to, Merchant's right to receive any payments or funds. Neither Processor nor Member Bank shall be obligated to honor any such purported attempt to sell, assign, transfer or encumber such interest, rights, payments or funds unless both Processor and Member Bank consent in writing. In the event Merchant breaches this paragraph, then, in addition to any other rights and remedies Processor may have under this Agreement and otherwise, Processor shall have the right, at its option, to withhold any or all funds or payments which would otherwise be payable to Merchant under this Agreement until it shall have received instructions concerning the disposition of such payments or funds, satisfactory in form and substance to Processor and signed by both Merchant and any purported assignee. Merchant shall indemnify Processor and hold it harmless from and against any and all claims, liabilities and damages which may be asserted against Processor by any purported assignee or any other person arising out of Merchant's purported sale, assignment, transfer or encumbrance of all or any of Merchant's present or future rights under this Agreement.

**21. Indemnification.**

A. Subject to the other limitations, terms and conditions of this Agreement, Processor shall indemnify, defend, and hold harmless Merchant, and its directors, officers, employees, affiliates and agents from and against all third party proceedings, claims, losses, damages, demands, liabilities and expenses whatsoever, including all reasonable legal and accounting fees and expenses and all reasonable collection costs, incurred by Merchant, its directors, officers, employees, affiliates and agents to the extent resulting from or arising out of Processor's gross negligence, or willful misconduct.

B. Merchant shall indemnify, defend, and hold harmless Processor, and its directors, officers, employees, affiliates and agents from and against all proceedings, claims, losses, damages, demands, liabilities and expenses whatsoever, including all reasonable legal and accounting fees and expenses and all reasonable collection costs, incurred by Processor, its directors, officers, employees, affiliates and agents resulting from or arising out of the Services in this Agreement, Merchant's processing activities, the business of Merchant or its customers, any sales transaction acquired by Processor, any noncompliance with the Operating Regulations (or any rules or regulations promulgated by or in

conjunction with the Associations) by Merchant or its agent (including any Merchant Supplier), any Data Incident, any infiltration, hack, breach, or violation of the processing system of Merchant, its Merchant Supplier, or any other third party processor or system, or by reason of any breach or nonperformance of any provision of this Agreement on the part of the Merchant, or its employees, agents, Merchant Suppliers, or customers.

C. The indemnification of each party shall survive the termination of the Agreement. The indemnified party shall (i) provide prompt written notice of any claim to the indemnifying party; (ii) cooperate with all reasonable requests of the indemnifying party; and (iii) surrender exclusive control of the defense and settlement of any third party claim to the indemnifying party provided that the indemnifying party will obtain the indemnified party's written consent prior to agreeing to any settlement or agreement that requires the indemnified party to make any admission of fault or to pay any amounts in connection with such settlement or agreement that are not fully paid for by the indemnifying party. The indemnified party shall not unreasonably withhold or delay any consent required under this Section. The indemnified party may elect to participate in the action with an attorney of its own choice at its own expense.

**22. Review of Settlement Activity and Reports; Notice of Failure by Processor.**

Merchant agrees that it shall review all reports, notices, and invoices prepared by Processor or its agent and made available to Merchant, including but not limited to reports, notices, and invoices provided via Processor's online reporting tool. Processor reserves the right to send some or all of the reports and/or invoices and/or notices of any pricing changes permitted under this Agreement via communication methods utilized as components of its Service Delivery Process which method Processor may change from time to time with notice via Processor's Service Delivery Process. Merchant expressly agrees that Merchant's failure to notify Processor that Merchant has not received any settlement funds within five business days from the date that settlement was due to occur, or fails to reject any report, notice, or invoice within thirty business days from the date the report or invoice is made available to Merchant, shall constitute Merchant's acceptance of the same. In the event Merchant believes that Processor has failed in any way to provide the Services, Merchant agrees to provide Processor with written notice, specifically detailing any alleged failure, within 30 days of the date on which the alleged failure first occurred.

**23. Choice of Law; Jurisdiction; Venue.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Ohio without regard to conflicts of law provisions. The parties hereby consent and submit to service of process, personal jurisdiction, and venue in the state and federal courts in Cincinnati, Ohio or Hamilton County, Ohio, and select such courts as the exclusive forum with respect to any action or proceeding arising out of or in any way relating to this Agreement, and/or pertaining in any way to the relationship between Merchant and Processor. MERCHANT AND PROCESSOR HEREBY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY MATTER UNDER, RELATED TO, OR ARISING OUT OF THIS AGREEMENT OR ANY TRANSACTIONS OR RELATIONSHIPS CONTEMPLATED HEREBY.

**24. Limit of Liability; Force Majeure.**

A. EXCEPT FOR THOSE EXPRESS WARRANTIES MADE IN THIS AGREEMENT, PROCESSOR DISCLAIMS ALL WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. MERCHANT HEREBY ACKNOWLEDGES THAT THERE ARE RISKS ASSOCIATED WITH THE ACCEPTANCE OF CARDS AND MERCHANT HEREBY ASSUMES ALL SUCH RISKS EXCEPT AS MAY BE EXPRESSLY SET FORTH HEREIN.

B. Without limiting the foregoing, neither party shall be liable for lost profits, lost business or any incidental, special, consequential or punitive damages (whether or not arising out of circumstances known or foreseeable by the other party) suffered by such party, its customers, or any third party in connection with the Services provided hereunder. However, nothing in the foregoing sentence is in any way intended, and shall not be construed, to limit (i) Merchant's obligation to pay any fees, assessments or penalties due under this Agreement, including but not limited to those imposed by telecommunications services providers, VISA, MasterCard and/or Other Networks; or (ii) any damages due from Merchant related to an early termination of this Agreement; or (iii) any damages due from Merchant related to the failure by Merchant to exclusively receive the Services from Processor to the extent required by the Agreement, and/or (iv) Merchant's obligation to

indemnify Processor pursuant to section 21. In no event shall Processor be liable for any damages or losses (i) that are wholly or partially caused by the Merchant, or its employees, agents, or Merchant Suppliers that should have been reported to Processor pursuant to Section 22, (ii) that first occurred, whether or not discovered by Merchant, more than 30 days prior to Processor's receipt of written notice from Merchant or (iii) that were caused due to errors in data provided by Merchant to Processor.

C. Processor's liability related to or arising out of this Agreement shall in no event exceed an amount equal to the lesser of (i) actual monetary damages incurred by Merchant or (ii) fees paid to and retained by Processor for the particular Services in question for the three calendar months immediately preceding the date on which Processor received a written notice from Merchant detailing Processor's material nonperformance under this Agreement. For avoidance of doubt, the cap on Processor's liability set forth in the immediately preceding sentence will not limit Processor's obligation to settle funds due to Merchant under this Agreement.

D. Processor shall not be deemed to be in default under this Agreement or liable for any delay or loss in the performance, failure to perform, or interruption of any Services to the extent resulting from a Force Majeure Event. Upon such an occurrence, performance by Processor shall be excused until the cause for the delay has been removed and the Processor has had a reasonable time to again provide the Services. No cause of action, regardless of form, shall be brought by either party more than 1 year after the cause of action arose, other than one for the nonpayment of fees and amounts due Processor under this Agreement. Any restriction on Processor's liability under this Agreement shall apply in the same manner to Member Bank. In the event that Merchant has a claim against Member Bank in connection with the Services provided under this Agreement, Merchant shall proceed against Processor (subject to the limitations and restrictions herein), and not against Member Bank, unless otherwise specifically required by the Operating Regulations.

E. Processor and Merchant recognize and agree that any limitations of liability set forth in this Agreement are fair and reasonable.

**25. Controlling Documents.** This Agreement (including all addenda and schedules and exhibits hereto and all documents and materials referenced herein) supersedes any and all other agreements, oral or written, between the parties hereto with respect to the subject matter hereof, and sets forth the complete and exclusive agreement between the parties with respect to the Services and, unless specifically provided for herein, other services are not included as part of this Agreement. If there is a conflict between the Bank Card Merchant Agreement and an addendum or schedule or exhibit hereto, the addendum or schedule or exhibit shall control. If there is a conflict between the Rules Summary and this Agreement, the Rules Summary shall control. If there is a conflict between Operating Regulations and this Agreement, the Operating Regulations shall control. If there is a conflict between the Operating Regulations and the Rules Summary, the Operating Regulations shall control.

**26. Regulatory Remedial Right.** Processor may suspend or cease providing any Service in this Agreement if: (i) in Processor's reasonable opinion, such Service, or the business of Merchant, violates or would violate the Operating Regulations, or any federal, state or local statute or ordinance, or any regulation, order or directive of any governmental agency or court; (ii) Merchant is accused by any federal, state or local jurisdiction of a violation of any applicable statute or ordinance or any regulation, order or directive of any governmental agency or court, or if Processor reasonably believes, based upon the opinion of its legal counsel, that Merchant may be in violation of any of the foregoing; and/or (iii) in Processor's reasonable opinion, Merchant's activities may result in increased regulatory scrutiny or reputational harm. Processor may also suspend or cease providing any Service in this Agreement to Merchant if directed to do so by Member Bank. Should Merchant not process sales transactions through Processor's system for a period of one year or more, Processor may remove Merchant from Processor's systems without notice, without relieving Merchant from any of Merchant's obligations under this Agreement.

**27. Conversion; Deconversion.** Merchant shall take all necessary steps to, and shall, promptly convert to Processor's system for the Services in this Agreement not later than 90 days after the execution of this Agreement by Processor. Processor agrees that it shall not charge Merchant for Processor's standard and customary internal testing and conversion preparation only, in connection with Merchant's initial conversion to Processor's system at the commencement of this

Agreement, and as determined by Processor in its sole reasonable discretion. The foregoing shall not be deemed to limit Merchant's obligation to pay any third party fees and expenses incurred by Processor in connection with Merchant's conversion, which shall remain the sole responsibility of Merchant. Merchant agrees to be responsible for all direct and indirect costs (including but not limited to those incurred by Processor, its affiliates and/or agents) in connection with and/or related to Merchant's conversion from Processor at the termination of this Agreement and/or related to any conversion or programming effort affecting the Services after Merchant's initial conversion to Processor.

## **28. Confidential Information.**

(a) **Confidential Information Supplied by Processor.** Merchant acknowledges that Processor will be providing Merchant with certain confidential information, including but not limited to, this Agreement, third party audit reports, and information relating to the finances, systems, methods, techniques, programs, devices and operations of Processor and/or the Associations. Merchant shall not disclose any such confidential information to any person or entity (other than to those employees and Merchant Suppliers of Merchant who participate directly in the performance of this Agreement and need access to such information). Without limiting the foregoing, Merchant agrees that it will fully comply with any and all confidentiality and security requirements of the USA Patriot Act (or similar law, rule or regulation), VISA, MasterCard, Discover, and/or Other Networks.

(b) **Confidential Information Supplied by Merchant.** Processor acknowledges that Merchant will be providing Processor with certain confidential information, including information relating to the methods, techniques, programs, devices and operations of Merchant. Such confidential information does not include transaction information which has been de-identified or aggregated. Processor will not disclose confidential and proprietary information about Merchant to any person or entity (other than to those employees and agents of Processor who participate directly in the performance of this Agreement and need access to such information). Merchant acknowledges receipt of Processor's privacy notice ("Privacy Notice"). Merchant should direct any questions or requests for another copy of the Privacy Notice to a Processor customer service representative or Merchant's primary relationship manager, if applicable. Notwithstanding anything to the contrary in the Privacy Notice or this Agreement, Processor may use, disclose, share, and retain any information provided by Merchant and/or arising out of the Services, during the term and thereafter: (a) with Merchant's franchisor, Merchant's franchisee(s), association(s) to which Merchant belongs and/or belonged as of the commencement of this Agreement, (b) with any affiliate of Merchant; (c) in response to subpoenas, warrants, court orders or other legal processes; (d) in response to requests from law enforcement agencies or government entities; (e) to comply with applicable laws, regulations, or Operating Regulations; (f) with Processor's affiliates, partners and agents; (g) to perform analytic services for Merchant, Processor and/or others including but not limited to analyzing, tracking, and comparing transaction and other data to develop and provide insights for such parties as well as for developing, marketing, maintaining and/or improving Processor's products and services; and/or (h) to offer or provide the Services hereunder.

(c) **Miscellaneous.** The parties acknowledge that the injury that would be sustained by the party disclosing information as a result of the violation of this Section 28 cannot be compensated solely by money damages, and therefore agrees that the disclosing party shall be entitled to seek injunctive relief and any other remedies as may be available at law or in equity in the event of a violation of the provisions contained in this Section 28. The restrictions contained in this Section 28 shall not apply to any information which becomes a matter of public knowledge, other than through a violation of this Agreement or other agreements between the parties.

(d) **Publicity.** Merchant and Processor agree that they will work together to issue a mutually agreeable joint press release after the execution of this agreement and/or after the conversion of Merchant to Processor's Services. In any event, Merchant acknowledges and agrees that Processor may make public the execution of this Agreement by Merchant and/or any of Merchant's affiliates, and/or the Services that may be or have been provided under the Agreement. Merchant agrees that Processor may include Merchant's name and logo on a list of Processor's customers, which may be made public. Merchant agrees that, upon Processor's request, Merchant will provide testimonial information related to the Services received by Merchant hereunder.



**29. Financial Statements.** If at any time Merchant is not a publicly traded company, Merchant shall provide Processor with an audited financial statement for Merchant's most recent fiscal year end and/or quarterly financial statements prepared and certified by Merchant's chief financial officer within 15 days of Processor's request therefore.

**30. No Waiver.** If either party waives in writing an unsatisfied condition, representation, warranty, undertaking or agreement (or portion thereof) set forth herein, the waiving party shall thereafter be barred from recovering, and thereafter shall not seek to recover, any damages, claims, losses, liabilities or expenses, including, without limitation, legal and other expenses, from the other party in respect of the matter or matters so waived. Except as otherwise specifically provided for in this Agreement, the failure of any party to promptly enforce its rights herein shall not be construed to be a waiver of such rights unless agreed to in writing. Any rights and remedies specifically provided for in any addendum or schedule or exhibit are in addition to those rights and remedies set forth in this Agreement and/or available to Processor at law or in equity.

**31. Compliance with Law.**

Merchant represents and warrants to Processor that it will comply with all applicable federal, state and local laws and regulations in connection with Merchant's receipt of the Services and/or applicable to Merchant's business operations. Processor will comply with federal, state and local laws and regulations applicable directly to Processor in its provision of the Services.

**32. Security, Data Incidents.** Merchant will be solely responsible for the security, quality, accuracy, and adequacy of all transactions and information supplied hereunder, and will establish and maintain adequate audit controls to monitor the security, quality, maintenance, and delivery of such data. Without limiting the generality of the foregoing, Merchant represents and warrants to Processor that it has implemented and will maintain secure systems for maintaining and processing information and for transmitting information to Processor. Processor shall have no liability whatsoever for the security or availability of any communications connection used in connection with the Services provided hereunder. Merchant acknowledges that Processor is responsible only for the security of its own proprietary systems, and not for the systems of any third party, including without limitation any Merchant Supplier of Merchant. Merchant shall notify Processor immediately if Merchant becomes aware of or suspects a Data Incident. Merchant agrees to fully cooperate with Processor and any Association with respect to any investigation and/or additional requirements related to a suspected Data Incident.

**33. Audits.** At any reasonable time upon reasonable notice to Merchant, Merchant shall allow auditors, including the auditors of any Association or any third party designated by Processor or the applicable Association, to review the files held and the procedures followed by Merchant at any or all of Merchant's offices or places of business. Should Processor conduct an audit which is not required by the Operating Regulations or is not requested by an Association, such audit will be at Processor's sole expense; otherwise the audit shall be at Merchant's expense. Merchant will assist such auditors as may be necessary for them to complete their audit. In the event that a third-party audit is requested by an Association, and/or required by the Operating Regulations, Processor may, at its option, and at Merchant's sole expense, either retain a third party to perform the audit, or require that Merchant directly retain a specific third party auditor. If Processor requires that Merchant directly retain the auditor, Merchant shall arrange immediately for such audit to be performed, and will provide Processor and the Associations with a copy of any final audit report.

**34. System Requirements and Upgrades.** Merchant agrees that the Services shall be provided in accordance with Processor's then current systems, standards and procedures and that Processor shall not be required to perform any special programming, to provide any special hardware or software or to implement any other system, program or procedure for Merchant. Unless otherwise agreed in writing by Processor, all sales transaction, settlement and other data and information used in connection with the Services shall be provided to Processor in Processor's then current data formats and by means of Processor's then current telecommunications configurations and protocols. Processor may make changes in the Services based upon, but not limited to, technological developments, legislative or regulatory changes, or the introduction of new services by Processor. Merchant shall comply with all time deadlines, equipment and software

maintenance and upgrading requirements to the extent required by the Associations and/or Operating Regulations. Merchant shall use best efforts to comply with all other time deadlines, equipment and software maintenance and upgrading requirements which Processor may reasonably impose on Merchant from time to time.

**35. Title to the Services.** Merchant agrees it is acquiring only a nontransferable, non-exclusive right to use the Services. Processor shall at all times retain exclusive title to the Services, including without limitation, any materials delivered to Merchant hereunder and any invention, development, product, trade name, trademark, service mark, software program, or derivative thereof, developed in connection with providing the Services or during the term of this Agreement.

**36. Limited Acceptance.** If so indicated below, Merchant acknowledges and agrees that it wishes to be a Limited Acceptance merchant, which means that Merchant has elected to accept only certain VISA/MasterCard card types as indicated below, or via later notification. Merchant further acknowledges and agrees that Processor has no obligation other than those expressly provided under the Operating Regulations and applicable law as they may relate to limited acceptance and that Processor's obligations do not include policing card types at the point of sale. As a Limited Acceptance Merchant, Merchant will be solely responsible for the implementation of its decision for Limited Acceptance. Merchant will be solely responsible for policing, at the point of sale, the card type(s) of transactions it submits for processing by Processor. Should Merchant submit a transaction for processing for a card type it has indicated it does not wish to accept, Processor may process that transaction and Merchant will pay the applicable fees, charges, and assessments associated with that transaction. For Merchant's convenience, a general description of VISA/MasterCard card types are:

- a. Consumer Credit - a consumer credit card issued by a U.S. Issuer or a commercial credit card issued by a non-U.S. Issuer; this category does not include VISA or MasterCard branded signature-based debit cards.
- b. Consumer Debit - a VISA or MasterCard branded signature-based debit card (including certain stored-value and prepaid cards).
- c. Commercial - a VISA or MasterCard branded credit card issued by a U.S. Issuer that bears the descriptive term "Business Card", "Corporate Card", "Purchasing Card", "Fleet Card", or similar descriptive term indicated pursuant to the Operating Regulations.

Only if checked below, Merchant wishes to be a Limited Acceptance Merchant, which means that Merchant will accept only the VISA/MASTERCARD card types indicated below:

- VISA Credit Cards
- VISA Debit Cards (signature based)
- MasterCard Credit
- MasterCard Debit Cards (signature based)

**37. Security Interest.** This Agreement will constitute a security agreement under the Uniform Commercial Code. Merchant grants to Processor a security interest in all accounts owned or controlled by Processor at Member Bank that are funded with settlement amounts, including the Reserve Account, and the proceeds thereof (collectively, the "Secured Assets"), to secure all of Merchant's obligations under this Agreement. With respect to such security interest, Processor will have all rights afforded under the Uniform Commercial Code, any other applicable law, and in equity. In addition to the security interest in the Secured Assets, Processor shall have a contractual right of setoff against the Secured Assets.

Every such right of setoff shall be deemed to have been exercised immediately upon the occurrence of an Event of Default hereunder without any action by Processor or notation in the Processor's records, although Processor may enter such set off on its books and records at a later time. Merchant warrants and represents that no other person or entity has a security interest in the Secured Assets. If a bankruptcy proceeding is filed by or against Merchant under the Bankruptcy Code (whether the petition is filed voluntarily and/or involuntarily), it waives any applicable protection related to the automatic stay provisions of 11 U.S.C. §362 (or any replacement section) and consents to an appropriate reserve of funds being established between the parties pursuant to this Agreement or by Court Order.

**38. Modification of Agreement.** Except as provided in this Agreement, this Agreement including any addendum or schedule or exhibit hereto shall only be modified or amended by an instrument in writing signed by Merchant and Processor. Any changes, additions, stipulations or deletions, including lining out, by Merchant, except where indicated by a space to be filled in (e.g., the space for Merchant's name and address), shall not be deemed to be agreed to or binding upon Processor unless agreed to in writing in the form of an amendment signed by each party hereto. Merchant agrees that Processor may amend this Agreement upon notice to Merchant if such amendment is a requirement of applicable law or an Association.

**39. Headings and Construction.** The headings used in this Agreement are inserted for convenience only and will not affect the interpretation of any provision. Merchant and Processor each acknowledge that the limitations and exclusions contained in this Agreement have been the subject of active and complete negotiation between the parties and represent the parties' voluntary agreement. The parties agree that the terms and conditions of this Agreement shall not be construed in favor of or against any party by reason of the extent to which any party or its professional advisors participated in the preparation of this document.

**40. Authorization.** Each of the parties hereto represents and warrants on behalf of itself that it has full power and authority to enter into this Agreement; that the execution, delivery and performance of this Agreement has been duly authorized by all necessary corporate, limited liability company or partnership or other appropriate authorizing actions; that the execution, delivery and performance of this Agreement will not contravene any applicable by-law, corporate charter, operating agreement, partnership or joint venture agreement, law, regulation, order or judgment; that execution, delivery and performance of this Agreement will not contravene any provision or constitute a default under any other agreement, license or contract which such party is bound; and, that this Agreement is valid and enforceable in accordance with its terms.

**41. Counterparts.** This Agreement may be executed and delivered in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

**42. Facsimile and Electronic Signatures.** Merchant and Processor agree that electronic signatures will have the same legal effect as original (i.e. ink) signatures and that an electronic, scanned, facsimile, or duplicate copy of any signatures will be deemed an original may be used as evidence of execution.

**43. Member Bank.** The Processor and Member Bank may jointly or individually assert or exercise any rights or remedies provided to Processor and Member Bank hereunder. Processor and Member Bank reserve the right to allocate the duties and obligations assigned hereunder to Processor between themselves, as they deem appropriate in their sole discretion. Member Bank has certain obligations to Merchant pursuant to the Operating Regulations. In the event of any conflict between this Agreement and the Operating Regulations on the subject of Member Bank's obligations, the Operating Regulations shall control. Processor is party to an agreement with Member Bank and under such agreement is authorized to provide the services described herein. This Agreement shall be deemed accepted by Member Bank as of the date the first transaction is acquired under this Agreement. As of the commencement of this Agreement, Member Bank shall be Citizens Bank, National Association located in Providence, Rhode Island. The Member Bank may delegate certain or all of its duties to an affiliate of the Member Bank at any time, without notice to Merchant. The Member Bank may be changed, and its rights and obligations assigned to another party by Processor at any time without notice to Merchant.

**44. Agency Appointment.** The parties acknowledge and agree that (a) the funds comprising the cardholder payments are property of Merchant; (b) Merchant hereby appoints the approved processor, the FIS affiliate legal entity as defined in the Biller Solutions Agreement ("Approved Processor"), as Merchant's agent to receive cardholder payments on Merchant's behalf; (c) the completion of cardholder payments and/or the receipt of money from cardholders hereunder by the Approved Processor shall be considered payment to Merchant, extinguishing cardholder's payment obligation to Merchant (in the principal amount paid by cardholder) as if the cardholder had paid the Merchant directly, even if the funds associated with the cardholder payment are not settled by Approved Processor to Merchant; (d) Approved Processor, and not the cardholder, is solely liable to Merchant for cardholder payment funds if the Approved Processor fails to remit

cardholder payment funds to Merchant; (e) the Approved Processor is not involved in the collection of any cardholder's debt nor the provision of Merchant's goods or services to cardholders; and (f) each cardholder payment is subject to Approved Processor's terms and conditions. For the duration of its designation, the Approved Processor shall be joined as a party to the Agreement for the limited purpose of receiving cardholder payments from cardholders as agent on Merchant's behalf, and the Approved Processor's sole obligation under this Agreement will be to accept cardholder payments on Merchant's behalf and remit cardholder payments to Merchant.

**45. Affiliates.** The parties acknowledge that Processor, Worldpay, LLC (an FIS owned entity), is contracting on behalf of itself and FIS owned affiliated entities ("Affiliates") and such Affiliates are permitted transferees as applicable. Services and obligations under this Agreement, which may include services for which Approved Processor is responsible pursuant to Section 44 Agency Appointment, may be delivered by Affiliates including but not limited to Link2Gov Corporation and Metavante Payment Services, LLC at any point in the term of the agreement. Notwithstanding the foregoing, Worldpay, LLC will remain at all times responsible for complying with its obligations under this Agreement.

**46. American Express. American Express Program.**

Capitalized terms in this Section 46 are defined in the American Express Merchant Operating Guide. The following will only apply to Merchant's participation in the American Express Program.

a. Merchant hereby authorizes Processor to submit Transactions to, and receive settlement from, American Express on behalf of the Merchant. If Merchant is placed in the American Express Program, Merchant shall be responsible for complying with the provisions set forth in the Rules Summary and the American Express Merchant Operating Guide, which can be located at <http://americanexpress.com/merchantopguide> and is incorporated herein by reference.

b. Processor may disclose Transaction Data, Merchant Data, and other information about the 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 marketing purposes within the parameters of the Agreement. American Express may use the information from the Agreement at the time of setup to screen and/or monitor Merchant in connection with Card marketing and administrative purposes.

c. Merchant shall not assign to any third party any payments due to it under the 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 the Merchant may sell and assign future Transaction receivables to Processor, its affiliated entities and/or any other cash advance funding source that partners with Processor or its affiliated entities, without consent of American Express.

d. Merchant confers on American Express the third party beneficiary rights, but not obligations, to the Merchant's Agreement and subsequent addendums (collectively the "Agreement") between Merchant and Processor and, as such, American Express has the express right to enforce the terms of the Agreement against the Merchant. Sponsored Merchant warrants that it does not hold third party beneficiary rights to any agreements between Processor and American Express and at no time will attempt to enforce any such agreements against American Express.

e. Merchant may elect to opt out of accepting American Express Cards at any time without directly or indirectly affecting its rights to accept other payment products by notifying Processor.

f. Processor may terminate the Merchant's right to accept American Express Cards if it breaches any of the provisions in this Section 46, the Rules Summary or the American Express Merchant Operating Guide.

g. Processor has the right to immediately terminate a Merchant from the American Express Program for cause, fraudulent or other activity, or upon American Express' request.

h. Merchant may not bill or collect from any American Express cardholder for any purchase or payment on the Card unless Chargeback has been exercised, the Merchant has fully paid for such Charge, and it otherwise has the right to do so.

i. Upon termination of the Agreement or termination of Merchant's participation in the Program, Merchant must remove any and all



American Express Licensed Marks from the Merchant's Website and wherever else the American Express Marks are displayed.

j. MERCHANT ACKNOWLEDGES AND AGREES THAT IN NO EVENT SHALL AMERICAN EXPRESS, ITS AFFILIATES, AGENTS, SUCCESSORS, OR ASSIGNS BE LIABLE TO MERCHANT FOR ANY DAMAGES, LOSSES, OR COSTS INCURRED, INCLUDING INCIDENTAL, INDIRECT, SPECULATIVE, CONSEQUENTIAL, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES OF ANY KIND (WHETHER BASED ON CONTRACT, TORT, INCLUDING NEGLIGENCE, STRICT LIABILITY, FRAUD, OR OTHERWISE, OR STATUTES, REGULATIONS, OR ANY OTHER THEORY), ARISING OUT OF OR IN CONNECTION WITH THE AGREEMENT.

**47. Other Services.** In the event Merchant rents or purchases any equipment from Processor in connection with the Services, Merchant agrees to abide by all the terms and conditions of Processor's standard Addendum B which is incorporated herein. Merchant acknowledges that Processor rounds, assesses, and calculates interchange and other fees and amounts and on return, chargeback and certain other transactions retain such amounts, in accordance with its Service Delivery Process.

**48. ACH Services.** If ACH services are required, the terms of governing ACH services titled "Bank Card Merchant Agreement -Check Commerce ACH Exhibit" are included as part of this Agreement.

Citizens - BCMA - SS Terms and Conditions Biller Partner Merchant (1.2021).docx

In Process

**Bank Card Merchant Agreement  
Check Commerce ACH Exhibit**

This Check Commerce ACH Exhibit to the Bank Card Merchant Agreement (the "ACH Exhibit") is a part of the Agreement among **WORLDPAY, LLC**, on behalf of itself and its affiliates ("Processor"), **Member Bank**, and **Merchant**. Capitalized terms not otherwise defined herein shall have the meaning ascribed to it in the Agreement or, where not defined in the Agreement, the National Automated Clearing House Association ("NACHA") Operating Rules (the "Rules"). For purposes of this ACH Exhibit, the definition of Services in the Agreement shall include automated clearing house ("ACH") payment processing services currently provided by the below referred Company (the "ACH Services"). In the event of a conflict between the Agreement and this ACH Exhibit, the provisions of this ACH Exhibit shall prevail with respect to any conflict.

**Processor and Provider hereby agree as follows:**

- I. Appointment of Check Commerce as ACH Service Provider.** Merchant hereby retains, appoints, and accepts Base Commerce, LLC, dba, Check Commerce ("Company") as Merchant's data processing and collection agent for the ACH Services, including processing Entries originated by Merchant in accordance with the terms of the Agreement and this Exhibit whereby Company is a third-party beneficiary to the Agreement for purpose of the ACH Services. "Entries" for purpose of this ACH Exhibit mean the debiting of funds for the purpose of collecting ACH Payments from the account of Merchant ("Debit Entries") and/or the crediting of funds for the purpose of paying Merchant's accounts receivable (the "Credit Entry"), all in accordance with the terms of this ACH Exhibit, the Rules, and applicable federal and state laws, rules and regulations ("Regulations") governing ACH transactions.
- II. Authorization for ACH Entries and Debiting of Fees and Costs.** Merchant represents and warrants that it will obtain consent and authorization for Company to initiate or transmit automatic Debit Entries, Credit Entries, and adjustment Entries on behalf of each originator of an ACH Entry submitted to Company pursuant to this exhibit. Merchant shall keep all records of verifiable consumer authorizations for a period of two (2) years from the date an authorization is terminated or revoked. Merchant agrees to provide copies of such documents or records to Company immediately upon written request from Company. Without limiting Merchant's obligations under the Agreement, including this ACH Exhibit, Merchant understands and agrees that Processor will debit Merchant's account on file with Processor or Company for all setup fees as an ACH item. Processor shall debit each Merchant via an ACH transaction in accordance the terms of the Agreement and this ACH Exhibit for all Returned Entries, chargebacks, required withholdings, fines, or damages a Merchant incurs as a result of the performance of the ACH Exhibit. Processor will charge Merchant for all ACH Service monthly service and transaction fees and costs in accordance with the Agreement and this exhibit.
- III. Notification of Changes.** Merchant agrees to notify Company where applicable of any and all changes which occur from time to time in the information and statements contained in the Agreement or otherwise provided to Company, its Originating Depository Financial Institution ("ODFI"), or anyone else relating in any way to this exhibit.
- IV. Authorization for Sharing of Data to Company, Underwriting.** Merchant hereby authorizes Processor to provide to Company, any and all information Processor has obtained from Merchant during Processor's underwriting and due diligence of Merchant, including, but not limited to, all credit reports or other financial information about Merchant (the "Underwriting Documents"). Processor shall determine in its sole and absolute discretion what information will be included in the Underwriting Documents provided to Company and Processor's providing of such Underwriting Documents to Company will not constitute a violation of Processor's confidentiality obligations under the Agreement.
- V. Company as a Party to the Agreement for Provision of the ACH Services.** Notwithstanding Paragraph 16 of the Agreement and consistent with Section I of this ACH Exhibit, it is hereby acknowledged and agreed that Company is a third-party beneficiary of the Bank Card Merchant Agreement ("Agreement") for purpose of Company's provision of the ACH Services which form a part of the Services under the Agreement. Company may jointly with Processor or individually assert or exercise any rights or remedies in the Agreement available to Processor related to Company's obligations in this ACH Exhibit and rights under the Agreement, including but not limited to, any right to obtain indemnity from Merchant and to avail itself of any limits of liability. Any obligations of Merchant to Processor shall also be deemed obligations of Merchant to Company with respect to the ACH Services.
- VI. Processor and Company Provision of Services and Settlement of Entries.** Processor and Company reserve the right to allocate the ACH Services duties and obligations between themselves, as they deem appropriate in their sole discretion. Merchant acknowledges and agrees that Company will settle funds from Entries directly to Processor for Processor's settlement of such funds to Merchant, which such settlements to Merchant provided by Company to Processor will be solely the responsibility of Processor for which Company will have no responsibility or liability. Without limiting the foregoing, Company shall not be liable for lost profits, lost business or any incidental, special, consequential or punitive damages (whether or not arising out of circumstances known or foreseeable by Merchant or Processor) suffered by such party, its customers, or any third party in connection with the settlement of Entries not received by Merchant that were settled to Processor by Company pursuant to this section. Company has certain obligations to Merchant pursuant to the Rules. In the event of any conflict between the Agreement or this ACH Exhibit and the Rules on the subject of Company's obligations, the Rules shall control. Processor is party to an agreement with Company and under such agreement Company is authorized to provide the ACH Services described herein. This ACH Exhibit shall be deemed accepted by Company as of the date Company processes the first Entry under this exhibit on Merchant's behalf. Where Company in its sole and absolute discretion does not accept Merchant for the ACH Services, Merchant will be notified of such non-acceptance.
- VII. Reserve Requirements.** As of the date of this exhibit, Company does not intend to require a reserve or letter of credit under this ACH Exhibit. If circumstances arise in the future that Company determines in its reasonable discretion necessitates Merchant to establish a reserve or letter of credit to ensure Merchant's performance of its obligations pursuant to this ACH Exhibit, Company's rights and obligations with respect to such reserve or letter of credit required by Company ("ACH Services Reserve Account") in connection with amounts arising out of ACH Services (i.e. returned Entries, fees, damages, or other costs and expenses) will be coextensive with those of Processor with respect to any separate reserve required by Processor in connection with amounts arising out of Services provided by Processor, and the following additional terms will apply

specifically to the ACH Services Reserve Account: (a) Merchant acknowledges and agrees that the ACH Services Reserve Account may be commingled by Company with reserve funds held for other providers and merchants; (b) amounts will remain in the ACH Services Reserve Account for a period of two (2) years following the last debit Entry initiated by Merchant; (c) Merchant acknowledges and agrees that the ACH Services Reserve Account may be used by Company to fund any and all returned items; (d) Company shall have the right to offset and pay themselves from the ACH Services Reserve Account for all returned Entries, fees, damages, or other costs and expenses (including attorneys' fees and costs) that may arise out of ACH Services for Merchant and for which Merchant has agreed to pay pursuant to the terms of the Agreement and this ACH Exhibit; (e) Merchant acknowledges and agrees that, until such time as all of the amounts owed by Merchant and its obligations, including its obligation to pay all returns, are paid to Company in full, all funds in the ACH Services Reserve Account shall be considered to be held by Company for Company's sole interest, benefit, and protection, shall be considered to be the property of Company, and shall not be considered to be held for the benefit of Merchant, Merchant's bank, Member Bank, or Processor or be considered to be an asset for or property of Merchant, Merchant's bank, Member Bank, or Processor; (f) if Company reasonably believes that Merchant will in the future owe any amounts to Company under the Agreement or this ACH Exhibit for returns, anticipated returns, fines, fees, and if Company reasonably believes that Merchant will be unable or unwilling to pay such amounts when due, Company may also sequester, segregate or transfer to itself (including its own bank account(s)) any portion of the ACH Services Reserve Account that Company reasonably believes is needed to pay such amounts and may hold and use such amount for its own benefit and protection (as opposed to any such amount being held for Merchant's benefit or the benefit of any third party); and (g) if Company determines Merchant's business is operating in a manner that Company reasonably believes could cause a financial or legal risk, or if Merchant ceases to do business with Company for any reason, Company shall have the right at any time to place all of the provisional or final credit for each Debit Entry originated by Company on Merchant's behalf into the ACH Services Reserve Account. Merchant shall not have any possessory or equitable interest in any funds sequestered, segregated or transferred by Company pursuant to this Section. The aforementioned rights and remedies are not intended to be exclusive and are intended to be cumulative of all of Company's other rights and remedies under the Agreement, this ACH Exhibit and applicable law.

**VIII. Claims by or against Company; Choice of Law; Jurisdiction; Venue.** With respect to any and all claims directly or indirectly related to the ACH Services by, against or involving Company as a party, in any capacity, the Agreement and this ACH Exhibit shall be governed by, and construed and enforced in accordance with, the laws of the State of Arizona without regard to conflicts of law provisions. Merchant hereby consents and submits to service of process, personal jurisdiction, and venue in the state and federal courts in Phoenix, Arizona or Maricopa County, Arizona, and selects such courts as the exclusive forum with respect to any action or proceeding arising out of or in any way relating to claims directly or indirectly related to the ACH Services by, against or involving Company as a party, in any capacity under the Agreement, this ACH Exhibit and/or pertaining in any way to the relationship between Company, Merchant and Processor. MERCHANT, COMPANY, AND PROCESSOR HEREBY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY MATTER UNDER, RELATED TO, OR ARISING OUT OF CLAIMS UNDER THE SCOPE OF THIS ACH EXHIBIT OR ANY ENTRIES OR OTHER TRANSACTIONS OR RELATIONSHIPS CONTEMPLATED IN THIS ACH EXHIBIT.

**IX. Notice to and from Company.**

- A. All notices, requests, demands and other communications to be delivered by Merchant to Company, unless specified otherwise in the Agreement, shall be in writing and shall be delivered by nationally recognized overnight carrier, registered or certified mail, postage prepaid, to 1375N Scottsdale Rd, Suite 400, Scottsdale, Arizona 85257, Attention: Legal Department.
- B. All notices, requests, demands and other communications to be delivered to Merchant by Company, unless specified otherwise in the Agreement, shall be in writing and shall be delivered by or through the Service Delivery Process, which shall include Company's merchant payment portal, email, facsimile, statement message, nationally recognized overnight carrier, or registered or certified mail, postage prepaid, to Merchant at the Merchant address provided in the Agreement or otherwise on file with Company or Processor.
- C. Notices so delivered shall be effective when sent unless notice is provided by registered or certified mail, which shall be effective upon receipt.

**X. Review of Entries and Notice of Unauthorized Transfers:**

Merchant shall be liable for all transactions on its account, including fraudulent transactions processed by third parties that use the merchant's credentials or password, or who otherwise unlawfully access Merchant's account. Merchant is strictly responsible to establish and maintain the procedures to safeguard against unauthorized transmissions. Merchant represents and warrants that no individual will be allowed to initiate transfers in the absence of proper supervision and safeguards and agrees to take reasonable steps to maintain the confidentiality of any passwords, codes, security devices, and related instructions provided by Company or Processor. If Merchant believes or suspects that any such information or instructions have been known or accessed by unauthorized persons, Merchant agrees to notify Company and Processor immediately followed by written confirmation. The occurrence of unauthorized access will not affect any transfers made in good faith by Company, Processor, or an ODFI prior to receipt of such notification and within a reasonable time period to prevent unauthorized transfers. The Merchant's obligations in Paragraph 22 of the Agreement to review settlement activity and provide notice of a failure to properly settle funds to Merchant shall include an obligation on Merchant to promptly and regularly review all Entries and other communication received from Company and to immediately notify Company if there are any discrepancies between Merchant's records and those provided by Company, the ODFI or Merchant's bank, or with respect to any transfer not authorized by Merchant. If Merchant fails to notify Company within five (5) business days of the date Company or Processor e-mails, mails or otherwise provides a statement of account or other report of activity to Merchant relating to the ACH Services, then Merchant will be solely responsible for all losses or other costs associated with any erroneous or unauthorized transfer.

## Conversion of Merchant Processing to Worldpay

This Signature Page ("Signature Page") to the Bank Card Merchant Agreement ("Agreement") is made among **WORLDPAY, LLC** ("Processor"), Member Bank, and Merchant \_\_\_\_\_ ("Merchant"). Any capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Agreement.

HdL Companies and FIS are excited to announce that the provision of Merchant Processing services to you will be provided by Worldpay, LLC, the global leader of merchant processing services and a recent addition to the FIS family of companies.

Historically, card processing services have been provided to you via a third party, Chase Payment Tech, as a function of the FIS service package. Here forward, card processing services will be provided by a fully integrated FIS owned affiliate, Worldpay.

The card networks (including Visa, Mastercard, Amex, Discover) require that we, as sponsors to the networks, contract directly with each merchant receiving card processing services. Therefore, Worldpay, LLC presents this agreement to you for review and signature. For avoidance of doubt, this Agreement will not revise or amend any other agreements that you may have in place with FIS or HdL Companies, and is intended to be specific only to card acquiring and processing services provided by Worldpay, LLC.

Merchant acknowledges receipt of the Bank Card Merchant Agreement inclusive of amendments, schedules, exhibits, and attachments, including the documents listed below. The parties acknowledge and agree that execution of this Signature Page by Merchant shall be deemed execution of the following documents:

Bank Card Merchant Agreement  
Check Commerce ACH Exhibit

This Agreement governs the acquiring and processing of credit/debit cards. You represent that you have read the Agreement, including the portions contained on our agreement website (<http://info.worldpay.com/multipay>), and you understand its terms and agree to be bound by them. You can request a copy of the Agreement at any time by contacting a Client Support Representative at [Support@HdLCompanies.com](mailto:Support@HdLCompanies.com).

This Signature Page may be executed and delivered by electronic means. Electronic signature will be deemed original signature for all purposes and will legally bind the parties to the same extent as an original signature.

IN WITNESS WHEREOF, Merchant hereto has caused this Agreement to be executed by its authorized officer as of the date set forth below.

**MERCHANT LEGAL NAME:** \_\_\_\_\_ Merchant

Signature: \_\_\_\_\_

Name: Frances Robustelli

Title: \_\_\_\_\_

Date: \_\_\_\_\_