

MERCHANT ELECTRONIC TRANSACTION PROCESSING AGREEMENT

ELECTRONIC TRANSACTION PROCESSING PROGRAM as it relates to Gift Card/Loyalty/Stored Value Agreement between North American Payment Systems, Inc. dba POS Payment Systems, 5676 Riverdale Avenue, Suite 103, Riverdale, New York 10471 (POS Payment), and "MERCHANT". whereas, MERCHANT hereby warrants that it is engaged in a lawful business and is duly licensed under the laws of the state, county, and city disclosed by MERCHANT on the Merchant Application, to conduct such business. POS Payment provides software and services for card-based electronic gift, loyalty and stored value programs. MERCHANT wants to receive POS Payment's software and services in connection with a customer stored value program designed for MERCHANT (as described in Paragraph 1 below, the "Electronic Transaction Processing Program"), and POS Payment wants to provide such software and services to MERCHANT under the terms and conditions of this Agreement. The parties therefore agree as follows:

1. Service to be provided by POS PAYMENT. Subject to the Terms and Conditions set forth in this Agreement, POS Payment hereby agrees to perform the following services for the benefit of the Merchant:
 - (a) POS PAYMENT shall provide for the electronic processing of Card Transactions and purchases made by customers of MERCHANT who hold Approved Cards (Approved Cards). POS PAYMENT shall electronically confirm that the holder of the Approved Card ("Cardholder") activating the Card Transaction through the MERCHANT has an active account on the POS Payment Card System in which there are sufficient funds that can be reserved or removed to pay for their purchases;
 - (b) POS Payment shall process electronic point of sale transactions for the MERCHANT, consisting of Card System services. POS Payment shall provide for the electronic debiting of the Cardholder's account when said Cardholder has made a purchase and the electronic crediting of the Cardholders account when value is added to the Cardholder account;
 - (c) POS Payment will supply to and accept from the MERCHANT all information and data reasonably required from time to time in connection with the Services as it relates to specific system updates.
2. Software License Agreement. This Software License Agreement ("License") regards the confidential, proprietary and trade secret computer software and related materials and services contemplated under this license (collectively known as "Software") of POS Payment, which MERCHANT will use to operate a marketing program under the Agreement. Any use of this Software is subject to this License and the Agreement. MERCHANT agrees not to use the Software for any purpose not specified in this Agreement. Any other use is prohibited.
 - (a) No part of this Software may be reproduced, transmitted, transcribed, stored in a retrieval system or translated into any language in any form by any means without POS Payment's prior written consent. The Software is protected by copyright laws and international copyright treaties, as well as other intellectual property laws and treaties. All rights, title and ownership of the Software belong exclusively and at all times to POS Payment. Except as expressly granted herein, nothing in this License or any other understanding or agreement made between MERCHANT and POS Payment shall be construed to transfer any other rights in the Software to MERCHANT or any other party. All rights not expressly granted to MERCHANT herein are retained by POS Payment.
 3. License Term. This License and MERCHANT's ability to use Software remain in effect only as long as (i) MERCHANT maintains, in full force and effect, a valid Services Agreement with POS Payment AND, (ii) MERCHANT is current in payment of all License fees required under the Agreement and its related exhibits. This License terminates on the same date of this Agreement however, the obligation contained in Sections 5 & 6 herein remains in effect until all obligations are fulfilled.
 4. Grant of License. This License grants MERCHANT the temporary, non-exclusive, limited license to use Software solely for the purposes contemplated under Agreement and, at all times, in strict accordance with the provisions of Agreement and License, including but not limited to the following matters:
 - (a) Software. The Software may be installed by POS Payment only, into a POS Payment-approved point-of-sale device or computer server, prior to device shipment to MERCHANT or, at POS Payment's election, the Software made be installed via electronic transmission from POS Payment to a POS Payment-approved device currently being used by MERCHANT.
 - (b) Network Services. The POS Payment-approved point-of-sale device or computer server may transmit to and receive from only the POS Payment host computer.
 - (c) Usage. The Software may be used to accept only POS Payment-defined media including, but not limited to, magnetic stripe, smart card, bar code, manual key entry, store data retrieved from the media or any associated key entry and transmitted to and received from POS Payment's host computer.
 - (d) Limitations on Reverse Engineering, Data Transfer and Disassembly. MERCHANT agrees not to (i) reverse engineer, decompile or disassemble the Software, (ii) allow such activity by any other party, and (iii) transfer the Software to any party not approved in advance by POS Payment.
 - (e) Separation of Components. The Software is licensed as a single product.
 - (f) Single Point-of-Sale Device or Computer Server. This Software is licensed with the POS Payment-approved point-of-sale device or computer server as a single integrated product. The Software may be used only with this POS Payment-approved and installed point-of-sale device or computer server.
 - (g) Rental. MERCHANT may not rent, lease or transfer the Software to any party without POS Payment's prior written approval.
 - (h) Upgrades. Upgrades, modifications and/or improvements to the Software must be used only in strict accordance with this License and the Agreement.
 5. Intellectual Property. All title and interest in and to the Software and its related documents or other deliverables (including but not limited to images, photographs, animation, video, audio, music, text, copyright, trademark, trade secret, patent and any other form of property or intellectual property) incorporated into the Software and/or its related printed materials are owned by POS Payment. MERCHANT may not copy the Software or the printed materials accompanying the Software without first receiving POS Payment's written permission and ensuring that all of POS Payment's ownership and copyright statements are clearly reproduced on all allowed copies. Nothing in this License shall be construed as granting MERCHANT a license or right to use any POS Payment intellectual property except as provided herein. Without prejudice to any other rights, POS Payment may terminate this License if MERCHANT fails to comply with one or more of the specifications in this License.
 6. Non-Disclosure. MERCHANT understands and acknowledges that Software (including any copies or derivative works thereof) contains trade secrets and other proprietary information of POS Payment. MERCHANT shall not disclose the Software to others, or otherwise make the Software available to others (including MERCHANT's employees), except as necessary for MERCHANT to use the Software in accordance with the terms of this License and Agreement. MERCHANT shall take all reasonable steps necessary to preserve the confidentiality and proprietary nature of the Software. Such steps shall meet or exceed those taken by MERCHANT for protection of its own highly confidential and valuable information.
 7. Duties to be provided by MERCHANT. Subject to the Terms and Conditions set forth in this Agreement, MERCHANT agrees:
 - (a) MERCHANT will supply to POS Payment all information and data reasonably required from time to time by POS Payment to perform Services under the location of POS Terminals and Cardholder Data and content as may be agreed upon by the parties from time to time and within such time or times as may be reasonably necessary to perform the services promptly and in a proficient manner;
 - (b) MERCHANT will maintain all transaction records and other records required by law or regulation to maintain in connection with the operation of the Card Terminals.
 - (c) MERCHANT will obtain, operate and maintain at its own expense the Card Terminals.
 - (d) MERCHANT will be responsible for the accuracy and adequacy of all data transmitted by it or on its behalf for processing by or storage of information on POS Payment's Card Processing System.
 - (e) MERCHANT will maintain sufficient "back-up" information and data to reconstruct any information or data loss due to any system malfunction.
 - (f) MERCHANT will comply with all federal, state and local laws and regulations relating to information bearing on financial transactions, if applicable;
 - (g) MERCHANT will make its personnel and records available to POS Payment, all within such time or times and in such forms or manner as may be reasonably necessary to enable POS Payment to perform the services promptly and in a proficient manner.
 8. Use of Name and Logo. POS Payment shall have approval from the MERCHANT as it relates to any reference to or use of MERCHANT's name, logo, trademark, service marks, copyrights or any other proprietary classification of MERCHANT or its affiliates in any advertising, promotional or other materials provided by or for POS Payment and POS Payment shall comply with any conditions of any such approval required by MERCHANT.
 9. Transaction Fees. Transactions are defined as a) Issuance, Redemption, Void, Balance Inquiry, Merchandise Credit, Card Replacement, Adjust Amount, Activate Card, or Tip Redemption processed through a terminal or pc-based electronic data transmission that is originated by MERCHANT and a transaction response is processed from the host server and returned to MERCHANT. Escalation transactions or card maintenance fees administered monthly to MERCHANT'S Cardholders for maintenance services and calculated in accordance with MERCHANT'S establishment requirements and agreed to by MERCHANT'S Cardholders are legal in the state(s) that MERCHANT business is located and/or operating.
 - (a) MERCHANT will research and abide by all federal, state and local escheatment laws and assume any and all responsibility to properly abide by and operate within these laws.
 - (b) Card Maintenance Fees will begin at the beginning of the thirteenth (13) month from the card issue date or upon an agreed date as set by MERCHANT.
 - (c) POS Payment is not responsible for any errors or omissions as they relate to individual merchant programs or cardholder costs.
 - (d) Monthly Maintenance Fees will be billed at a minimum cost of thirty-five cents (\$0.35) per card per month until the card balance equals zero dollars (\$0.00) upon which the maintenance fee will terminate.
 10. Fee Schedule. In consideration for the performance of Services by POS Payment, MERCHANT agrees to pay POS Payment, or its agent, the fees and other charges set forth in the MERCHANT Agreement. The fees and charges will be collected directly from the MERCHANT in advance of POS Payment performing any processing services or secured through a third party leasing company agreement. In the event other new cards are ordered, prior payment before delivery is required. MERCHANT will allow POS Payment rights to debit funds for the additional fees from MERCHANT'S bank account through the Automated Clearing House (ACH) in accordance with the National Automated Clearing House Association (NACHA).
 11. Monthly Electronic Payment Agreement. This Agreement authorizes automatic monthly withdrawals from MERCHANT'S bank account for the fees associated with Software and Services for card based electronic gift, loyalty and stored value programs. MERCHANT will receive a statement via email on a monthly basis for the preceding month. The statement will be debited from MERCHANT'S bank account on or about the fifteenth (15th) of each month.
 - (a) If the funds are not available on the predetermined withdrawal date, MERCHANT will be charged a \$30.00 as Insufficient Funds Fee.
 - (b) If there are insufficient funds for more than 2 consecutive months, the Program will be terminated and will be reinstated upon full payment and at POS Payment's discretion.
 - (c) MERCHANT hereby authorizes North American Payment Systems, Inc. or its Agent to withdraw any amounts owed by MERCHANT by ~~transferring~~ debiting entries to MERCHANT'S bank account at the Financial Institution (hereinafter BANK) indicated on this Merchant Application. Furthermore, MERCHANT authorizes BANK to accept and to charge any debit entries initiated by POS Payment to MERCHANT'S bank account. In the event that POS Payment withdraws funds erroneously from MERCHANT'S account, MERCHANT authorizes POS Payment to credit MERCHANT'S bank account for an amount not to exceed the original amount of the debit.
 - (d) This authorization is to remain in full force and effect until POS Payment and/or BANK has received written notice from the MERCHANT of its termination in such time and in such manner as to afford POS Payment and/or BANK a reasonable opportunity to act on it.
 12. Responsibility for Taxes and Expenses. MERCHANT understands and agrees that it shall be responsible for the payment of all federal, state and local taxes (and any amounts legally levied instead of taxes), exclusive of taxes based upon POS Payment net income, arising out of or incidental to MERCHANT'S participation in this Agreement as well as all other expenses, fees, and charges. MERCHANT agrees to indemnify and hold POS Payment harmless from all sales and/or use tax claim, cost, penalty or expense, including reasonable legal and accounting expenses, arising under this Agreement. If MERCHANT claims tax-exempt status, MERCHANT shall promptly, upon POS Payment's request, provide POS Payment with valid tax exemption certifications. MERCHANT acknowledges that fees and charges quoted by POS Payment do not include taxes.
 13. Limitation of Liability. Notwithstanding anything in this Agreement to the contrary, in no event shall MERCHANT, its affiliates or its directors, officers, employees, agents or subcontractors, be liable under any theory of tort, contract, strict liability or other legal theory for lost profits, lost revenues, lost business opportunities, exemplary, punitive, special, incidental, indirect or consequential damages, each of which is hereby excluded by agreement of the parties, regardless of whether such damages were foreseeable or whether any party or any entity has been advised of the possibility of such damages.
 - (a) Notwithstanding anything in this Agreement to the contrary, MERCHANT'S cumulative liability for all losses, claims, suits, controversies, breaches, or damages for any cause whatsoever (including, but not limited to, those arising out of or related to this Agreement) and regardless of this form of action or legal theory shall not exceed the amount of fees received or paid by MERCHANT to POS Payment pursuant to this Agreement for services performed in the immediately preceding 12 months.

- (b) Notwithstanding anything in this Agreement to the contrary, in no event shall POS Payment, its affiliates or its directors, officers, employees, agents or subcontractors, be liable under any theory of tort, contract, strict liability or other legal theory for lost profits, lost revenues, lost business opportunities, exemplary, punitive, special, incidental, indirect or consequential damages, each of which is hereby excluded by Agreement of the parties, regardless of whether such damages were foreseeable or whether any party or any entity has been advised of the possibility of such damages.
- (c) Notwithstanding anything in this Agreement to the contrary, POS Payment's cumulative liability for all losses, claims suits, controversies, breaches or damages for any cause whatsoever (including, but not limited to, those arising out of or related to this Agreement) and regardless of this form of action or legal theory shall not exceed the average of three months transaction processing revenues received by POS Payment from MERCHANT over the preceding twelve months, or such lesser time if this agreement has been in effect for less than twelve months.
 - (d) MERCHANT hereby agrees that in the event that the system is down and able to verify transactions for MERCHANT, POS Payment will not continue to process transactions. MERCHANT agrees that it will be solely responsible in the event that any transactions authorized by MERCHANT without the knowledge or assent of POS Payment, will be the sole responsibility of MERCHANT and MERCHANT will indemnify and hold harmless POS Payment from and against any and all damage, loss, liability, consequential damage, expense, claim or obligation arising in connection therewith.
14. Confidential Information. "Confidential Information" shall mean any of the following information disclosed by either party:
 - (a) Any data or information that is competitively sensitive material, and not generally known to the public, including, but not limited to, products planning information, marketing strategies, plans, finance, operations, MERCHANT relationships, pricing, MERCHANT profiles, sales estimates, business plans, internal performance results relating to the past, present or future business activities of MERCHANT or POS Payment or any of their affiliates and the Merchants, clients and suppliers of any of the foregoing;
 - (b) Any scientific or technical information, design, process, procedure, formula, or improvement that is commercially valuable and secret in the sense that its confidentiality affords MERCHANT, POS Payment or any of their affiliates a competitive advantage over its competitors; and
 - (c) All confidential or proprietary concepts, documentation, reports, data, specifications, computer software, source code, object code, flow charts, databases, inventions, information, and trade secrets, whether or not patentable or copyrightable.
- (d) Confidential Information includes without limitation, all documents, inventions, substances, engineering and laboratory notebooks, drawings, diagrams, computer programs and data, specifications, bills of material, equipment, prototypes and models, and any other tangible manifestation (including data in computer or other digital format) of the foregoing which now exist or come into the control or possession of the party.
15. Confidentiality Obligations. Except as expressly authorized by prior written consent of the other party, each party shall:
 - (a) Take appropriate action by instruction or Agreement with its employees and agents having access to the Confidential Information to fulfill its obligations under this Confidentiality Agreement; and
 - (b) Safeguard all Confidential Information received by it using a reasonable degree of care, but not less than that degree of care used by it in safeguarding its own similar information or material; and
 - (c) Use all Confidential Information received by it solely for purpose of performing its obligations under this agree and for no other purpose whatsoever; and
 - (d) Not disclose any confidential information received by it to third parties.
16. Exceptions to Confidentiality. The obligations of confidentiality and restriction on use in Section 15 shall not apply to any confidential information that (a) Was the public domain prior to the date of this Agreement or subsequently came into the public domain through no fault of the recipient; or (b) Was lawfully received by the recipient from a third party free of any obligation of confidence to such third party; or (c) Was already in the possession of the recipient prior to receipt thereof, directly or indirectly, from the disclosing party; or (d) Is required to be disclosed in a judicial or administrative proceeding after all reasonable legal remedies for maintaining such information in confidence have been exhausted including, but not limited to, giving the disclosing party as much advance notice of the possibility of such disclosure as practical and the disclosing party may attempt to stop such disclosure or obtain a protective order concerning such disclosure.
17. Ownership Property. POS Payment agrees that all of MERCHANT'S customer information shall belong exclusively to MERCHANT. MERCHANT waives own the creative communication materials produced exclusively for MERCHANT by POS Payment, limited by MERCHANT'S purchase of third party print (a) MERCHANT agrees that the computer software, point-of-sale software, procedures, methods, systems and/or system manuals, diagrams, report format and/or any other tangible or intangible form of information or property (including intellectual property) and modifications or enhancements thereto (collectively known as "Systems") used by POS Payment to generate Services shall, at all times and under all circumstances, belong exclusively to POS Payment. (b) MERCHANT makes no claims whatsoever regarding the ownership of or license to the Systems, except the specific, limited, and nonexclusive license right granted under this Agreement.
18. Limitation of liabilities. If a claim should arise as a result of the acts or omissions of either party, the party responsible for the act or omission agrees to indemnify, defend and hold the other harmless from any claim, cost, loss or damage (including reasonable legal expenses) arising from such claim. The indemnified party agrees to promptly notify the defending party of the claim, give sole control of defense to the defending party, and provide the defending party with prompt and reasonable non-monetary assistance in the defense of the claim. Under no circumstances shall either party be liable to the other for payment of direct, indirect, punitive, special, consequential or other damages of any kind.
19. Termination of Agreement. If this Agreement is terminated, POS Payment will be entitled to recover, and MERCHANT will pay on demand, any and all losses (including consequential damages and loss of profits, costs, expenses, and liabilities) incurred by POS Payment in connection with termination. MERCHANT agrees to pay POS Payment deconvension fees established by POS Payment, but in no event less than one hundred fifty dollars (\$150.00 USD) for each MERCHANT location. MERCHANT authorizes POS Payment to debit designated bank account and other accounts for said deconvension fees, plus any and all losses (including consequential damages and loss of profits, costs, expenses and liabilities) incurred by POS Payment in connection with termination. If the designated bank account does not have sufficient funds to pay for the deconvension fees, MERCHANT agrees to pay POS Payment immediately upon receipt of invoice therefore. POS Payment may hold payment of any monies due MERCHANT to insure that all other obligations of MERCHANT are satisfied.
20. Termination by POS Payment. MERCHANT understands and agrees that this Agreement and its participation in the system may be terminated for "Good Cause" by POS Payment. For purposes of this section "Good Cause" shall mean:
 - (a) A material breach of this Agreement by the MERCHANT;
 - (b) Failure to pay at the time specified any fees, charges or other amounts owed by the MERCHANT to POS Payment in accordance with the terms of this Agreement;
 - (c) A determination by POS Payment that all MERCHANT transactions have ceased and their relationship with the MERCHANT has therefore ceased; or
 - (d) The violation of any law or regulation applicable to the MERCHANT that has an adverse effect upon the operation of the system.
21. Responsibilities upon termination. MERCHANT and POS Payment understand and agree that in the event this Agreement is terminated:
 - (a) Neither party shall have any further rights with respect to each other except for those that arose prior to the effective date of the termination including, but not limited to, the mutual confidentiality provisions;
 - (b) MERCHANT shall not be entitled to a refund of any fees, charges, or other amounts paid to POS Payment and shall remain liable for, and shall continue to be responsible for, meeting all financial and other obligations arising from its participation (including the payment of any and all applicable fees, charges, and other amounts), may have accrued prior to the effective date of such termination;
 - (c) Each party shall be responsible for the reinstallation of their computer or telecommunications support services and all related charges;
 - (d) Each party shall cease the use of all materials and properties provided by the other and destroy or return all said material and property, as designated by the other party.
22. Continuing Obligations. The expiration or sooner termination of this Agreement shall not affect or impair in any manner or respect the obligation or rights of either party under this Agreement, nor any right, duty, or obligation arising pursuant to acts or omissions prior to the effective date of such termination.
23. Warranty Disclaimer. Indemnity. POS Payment warrants that (i) its services will be performed by competent personnel and will be of professional quality; (ii) MERCHANT'S use of Software hereunder will not infringe on any patent, copyright, or trade secret right of any third party, (iii) Software is of merchantable quality and fit for the purpose of the electronic gift certificate and loyalty program; AND (iv) the electronic gift certificate and loyalty program will function as described in this Agreement.
24. Limitation of Liability. In no event will POS Payment be liable for indirect, special, punitive, incidental, or consequential damages arising under or relating to this Agreement or for lost profits, even if advised of the possibility of such damages or losses. In no event will POS Payment be liable or obligated in any manner for any amount in excess of transaction processing fees actually paid by MERCHANT to POS Payment hereunder during the twelve (12) month preceding the date on which any claim is made against POS Payment.
25. GENERAL.
 - (a) Assignment. Each party may assign its rights and obligations hereunder to any successor in interest to all or substantially all of its assets or equity securities. Except as provided above, neither party may assign any of its rights or obligations, in whole or in part, under this Agreement without the written consent of the other, and any attempted or purported assignment thereof without such consent will be null and void.
 - (b) No Agency. Neither the making of this Agreement nor the performance of its provisions will be construed to constitute either of the parties hereto as an agent, employer, employee, partner, joint venture, or legal representative of the other. Each party expressly acknowledges that it has no right or authority to incur or create any obligation, make any representation, or undertake any responsibility, express or implied, unless authorized in advance in writing by the other party. In no event will either party act or represent itself as an agent for the other party.
 - (c) Entire Agreement. This Agreement states the entire agreement and understanding of the parties on the subject matter of this Agreement and supercedes all previous agreements, arrangements, communications, and understandings about that subject matter.
 - (d) Amendment/Waiver. This Agreement may be amended, modified, superseded, or canceled, and any of the terms thereof may be waived, only by a written document signed by both parties to this Agreement or, in the case of waiver, by the party waiving any right under this Agreement.
 - (e) Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law or public policy or otherwise unenforceable, the remaining provisions will remain in full force and effect, and the invalid provision will remain in force as reformed by the court.
 - (f) Governing Law. This Agreement will be governed by, and construed in accordance with, the laws of the State of New York applicable to contracts made and to be performed wholly within such State, without reference to principles of conflicts of laws thereof.
 - (g) Jurisdiction. Each party hereby irrevocably and unconditionally accepts, and agrees to submit to, the exclusive jurisdiction of any state or federal court in the State of New York in respect of any dispute arising out of, based upon, or relating to, this Agreement.
 - (h) Force Majeure. POS Payment shall not be responsible or liable to MERCHANT for any loss or damage resulting from any causes that are beyond the reasonable control of POS Payment.
 - (i) Non-Exclusivity. POS Payment does not agree to any terms which may be construed as precluding or limiting in any way the right of POS Payment to provide services of any kind or nature whatsoever to any person or entity as POS Payment in its sole discretion deems appropriate.
 - (j) Notices. All notices, requests, or other communications or documents to be given under this Agreement will be in writing and will be directed to the persons designated below by first class mail and either certified or registered with return receipt requested. Notices to POS Payment will be sent to its office at 5676 Riverdale Avenue, Suite 103, Riverdale, New York 10471 (Attention: Guestkeeper Service Department). Notices to MERCHANT will be sent to its office a company. All notices will be effective on the date received. Either party may designate a different address by notice given in the manner provided via Certified Mail, Return Receipt Requested to Corporate offices.
 - (k) Counterparts. This Agreement may be signed in two or more counterparts, each of which will be deemed an original, with the same effect as if all signatures were on the same document.
26. This Agreement and its exhibits contain the entire understanding between the parties regarding the subject matter herein, and supercede and control all other prior writings, statements, or understanding relative to this Agreement, including any subsequent purchase orders or other documents related to the Agreement or Services provided hereunder. No other agreement or understanding shall be binding upon the parties unless first agreed to in writing by authorized officers of each party. Each party warrants that it's signatory to this Agreement has the full authority to commit his/her respective party to the obligations contained herein.