

LEASE TERMS & CONDITIONS

- 13.0 Equipment. BANK agrees to lease to MERCHANT and MERCHANT agrees to lease from BANK the equipment identified in Section VI of this Agreement or such other comparable equipment BANK provides MERCHANT (the "Equipment"), according to the terms and conditions of this Agreement. BANK is providing the Equipment to MERCHANT "as is" and makes no representations or warranties of any kind as to the suitability of the Equipment for any particular purpose.
- 13.1 Effective Date and Term of Agreement.
- (a) The Lease Agreement becomes effective on the earlier of the date BANK delivers any piece of Equipment to MERCHANT (the "Delivery Date") or acceptance by BANK. This Lease Agreement remains in effect until all of MERCHANT'S obligations and all of BANK'S obligations under it have been satisfied. BANK will deliver the Equipment to the site designated by MERCHANT.
- (b) The term of this Lease Agreement begins on a date designated by BANK after receipt of all required documentation and acceptance by BANK ("the Commencement Date"), and continues for the number of months indicated on the Equipment Lease Agreement. THIS IS A NON-CANCELABLE LEASE FOR THE TERM INDICATED.
- (c) MERCHANT agrees to pay an Interim Lease Payment in the amount of one-thirtieth (1/30th) of the monthly lease charge for each day from and including the Delivery Date until the date preceding the Commencement Date.
- (d) MERCHANT ACKNOWLEDGES THAT THE EQUIPMENT AND/OR SOFTWARE LEASED UNDER THIS LEASE AGREEMENT MAY NOT BE COMPATIBLE WITH ANOTHER PROCESSOR'S SYSTEMS AND THAT BANK DOES NOT HAVE ANY OBLIGATION TO MAKE SUCH SOFTWARE AND/OR AND OR EQUIPMENT COMPATIBLE IN THE EVENT THAT MERCHANT ELECTS TO USE ANOTHER SERVICE PROVIDER. UPON TERMINATION OF THIS MERCHANT PROCESSING AGREEMENT MERCHANT ACKNOWLEDGES THAT EQUIPMENT AND/OR SOFTWARE LEASED UNDER THIS AGREEMENT MAY NOT BE ABLE TO BE USED WITH SAID SERVICE PROVIDER.
- 13.2 Site Preparation. MERCHANT will prepare the installation site(s) for the Equipment, including but not limited to the power supply circuits and phone lines, in conformance with the manufacturer's and BANK'S specifications and will make the site(s) available to BANK by the confirmed shipping date.
- 13.3 Payment of Amounts Due.
- (a) The monthly lease charge is due and payable on the same day of each successive month thereafter of the lease period for each piece of lease equipment, except that the first payment of the monthly lease charge for each piece of Equipment is due and payable upon acceptance of the Equipment by MERCHANT. MERCHANT agrees to pay all assessed costs for delivery and installation of Equipment.
- (b) In addition to the monthly lease charge, MERCHANT shall pay, or reimburse BANK for, amounts equal to any taxes or assessments on or arising out of this Agreement or the Equipment, and related supplies or any services, use or activities hereunder, including without limitation, state and local sales, use, property, privilege and excise tax, exclusive, however, of taxes based on BANK'S net income. Reimbursement of property tax calculation is based on an average tax rate.
- (c) MERCHANT'S lease payments will be due despite dissatisfaction with the Equipment for any reason.
- (d) Whenever any payment is not made by MERCHANT in full when due, MERCHANT shall pay BANK as a late charge, an amount equal to ten percent of the amount due but no less than \$5.00 for each month during which it remains unpaid (prorated for any partial month), but in no event more than the maximum amount permitted by law. MERCHANT shall also pay to BANK an administrative charge of \$10.00 for any debit we attempt to make against MERCHANT'S bank account that is rejected.
- (e) In the event MERCHANT'S account is placed into collections for past due lease amounts, MERCHANT agrees that BANK can recover a collection expense charge of \$50 for each aggregate payment requiring a collection effort.
- 13.4 Use and Return of Equipment; Insurance
- (a) MERCHANT shall cause the Equipment to be operated by competent and qualified personnel in accordance with any operating instructions furnished by BANK or the manufacturer. MERCHANT shall maintain the Equipment in good operating condition and protect it from deterioration, normal wear and tear excepted.
- (b) MERCHANT shall not permit any physical alteration or modification of the Equipment, or change the installation site of the Equipment, without BANK'S prior written consent.
- (c) MERCHANT shall not create, incur, assume or allow to exist any consensually or judicially imposed liens or encumbrances on, or part with possession of, or sublease the Equipment without BANK'S prior written consent.
- (d) MERCHANT shall comply with all governmental laws, rules and regulations relating to the use of the Equipment. MERCHANT is also responsible for obtaining all permits required to operate the Equipment at MERCHANT'S facility.
- (e) BANK or its representatives may, at any time, enter MERCHANT'S premises for purposes of inspecting, examining or repairing the Equipment.
- (f) The Equipment shall remain BANK'S personal property and shall not under any circumstances be considered to be a fixture affixed to MERCHANT'S real estate. MERCHANT shall permit BANK to affix suitable labels or stencils to the Equipment evidencing BANK'S ownership.
- (g) MERCHANT shall keep the Equipment adequately insured against loss by fire, theft, and all other hazards and MERCHANT shall provide proof of insurance. The loss, destruction, theft, or damage of or to the Equipment shall not relieve MERCHANT from MERCHANT'S obligation to pay the full purchase price or total monthly lease charges hereunder.
- (h) MERCHANT may choose not to insure the Equipment and participate in the Equipment Service Program. The Equipment Service Program provides a replacement of the Equipment for as long as MERCHANT participates in the Program during the Lease Term. The Equipment Service Program includes (i) free comparable replacement terminal (new or refurbished) in the event of a defect or malfunction (terminal defects or malfunctions caused by acts of God are not covered by this Program), (ii) free shipping and handling on both the replacement terminal and return of the defective terminal, (iii) free overnight shipping and handling on replacement terminal if requested to 3:00pm ET (Monday-Thursday). If MERCHANT doesn't return damaged equipment, MERCHANT will be charged the full purchase price of the replacement equipment sent to MERCHANT. The monthly fee of \$9.95 for the optional Equipment Service Program is a per terminal fee. MERCHANT can choose to insure the Equipment and terminate MERCHANT'S participation in the program at any time by calling the Customer Service department.
- 13.5 Title to Equipment. BANK at all time retains title to the Equipment unless BANK agrees otherwise in writing. MERCHANT agrees to execute and deliver to BANK any statement or instrument that BANK may request to confirm or evidence BANK'S ownership of the Equipment, and MERCHANT irrevocably appoints BANK as MERCHANT'S attorney-in-fact to execute and file the same in MERCHANT'S name and on MERCHANT'S behalf. If a court determines that the leasing transaction contemplated by this Agreement does not constitute a financing and is not a lease of the Equipment, then BANK shall be deemed to have a first lien security interest on the Equipment as of the date of this Agreement, and MERCHANT will execute such documentation as BANK may request to evidence such security interest.
- 13.6 Return or Purchase of Equipment at End of Lease Period. Upon the completion of MERCHANT'S lease term or any extension thereof, MERCHANT will have the option to (a) return the Equipment to BANK, or (b) purchase the Equipment from BANK for its then fair market value, calculated as a percentage of the aggregate lease payments in accordance with the following: If the term of this Lease is forty- eight (48) months or more, the buyout option as a percentage of the aggregate lease payments shall be ten percent (10%). If the term of this lease is thirty-six (36) to forty-seven (47) months, the buyout option as a percentage of the aggregate lease payments shall be fifteen percent (15%). If the term of this lease is twenty-four (24) to thirty-five (35) months, the buyout option as a percentage of the aggregate lease payments shall be twenty percent (20%) or (c) after the final lease payment has been received by BANK, the Agreement will revert to a month by month rental at the existing monthly lease payment. If MERCHANT does not want to continue to rent the Equipment, then MERCHANT will be obligated to provide BANK with 30-day written notice to terminate and return the equipment to BANK. If BANK terminates the lease pursuant to Section 11(b) due to a default by MERCHANT, then MERCHANT shall immediately return the Equipment to BANK no later than the tenth business day after termination, or remit to BANK the fair market value of the Equipment as determined in good faith by BANK. BANK may collect any amounts due to BANK under this Section 7 by debiting MERCHANT'S bank account, and to the extent BANK is unable to obtain full satisfaction in this manner, MERCHANT agrees to pay the amounts owed to BANK promptly upon BANK'S request.
- 13.7 Software License. BANK retains all ownership and copyright interest in and to all computer software, related documentation, technology, know-how and processes embodied in or provided in connection with the Equipment other than those owned or licensed by the manufacturer of the Equipment (collectively "Software"), and MERCHANT shall have only a nonexclusive license to use the Software in MERCHANT'S operation of the Equipment.
- 13.8 Limitation on Liability. BANK is not liable for any loss, damage or expense of any kind or nature caused directly or indirectly by the Equipment, including any damage or injury to persons or property caused by the Equipment. BANK is not liable for the use or maintenance of the Equipment, its failure to operate, any repairs or service to it, or by any interruption of service or loss of use of the Equipment or resulting loss of business. Our liability arising out of or in any way connected with this Agreement shall not exceed the aggregate lease amount paid to BANK for the particular Equipment involved. In no event shall BANK be liable for any indirect, incidental, special or consequential damages. The remedies available to MERCHANT under this Agreement are MERCHANT'S sole and exclusive remedies.
- 13.9 Warranties.
- (a) All warranties express or implied, made to MERCHANT or any other person are hereby disclaimed including without limitation, any warranties regarding quality, suitability, merchantability, fitness for a particular use, quiet enjoyment or infringement.
- (b) MERCHANT warrants that MERCHANT will only use the Equipment for commercial purposes and will not use the Equipment for any household or personal purposes.
- 13.10 Indemnification. MERCHANT shall indemnify and hold BANK harmless from and against any and all losses, liabilities, damages and expenses, (including attorneys' fees) resulting from (a) the operation, use, condition, liens against, or return of the Equipment or (b) any breach by MERCHANT of any of MERCHANT'S obligations hereunder, except to the extent any losses, liabilities, damages or expenses result from our gross negligence or willful misconduct.
- 13.11 Default; Remedies.
- (a) If any debit of MERCHANT'S bank account initiated by BANK is rejected when due, or if MERCHANT otherwise fails to pay BANK any amounts due hereunder when due, or if MERCHANT defaults in any material respect in the performance or observance of any obligation or provision of this Agreement or any agreement with any of BANK'S affiliates, alliances or joint ventures, any such event shall be a default hereunder. Without limiting the foregoing, any default by MERCHANT under a Merchant Processing Agreement ("MPA") with BANK or with an Alliance or joint venture to which BANK is a party will be treated as a default under this agreement. Such a default would include a default resulting from early termination of the MPA, if applicable.
- (b) Upon the occurrence of any default, BANK may at our option, effective immediately without notice, either (i) terminate this lease and BANK'S future obligations under this Agreement, repossess the Equipment and proceed in any lawful manner against MERCHANT for collection of all charges that have accrued and are due and payable, or (ii) accelerate and declare immediately due and payable all monthly lease charges for the remainder of the applicable lease period together with the fair market value of the Equipment (as determined by BANK), not as a penalty but as liquidated damages for BANK'S loss of the bargain. Upon any such termination for default, BANK may proceed in any lawful manner to obtain satisfaction of the amounts owed to BANK and, if applicable, BANK'S recovery of the Equipment, including entering onto MERCHANT'S premises to recover the Equipment. In any case, MERCHANT shall also be responsible for BANK'S costs of collection, court costs and reasonable attorneys' fees, as well as applicable shipping, repair and refurbishing costs of recovered Equipment. MERCHANT agrees that BANK shall be entitled to recover any amounts due to BANK under this Agreement by charging MERCHANT'S bank account or any other funds of MERCHANT'S that come into our possession or control, or within the possession or control of BANK'S affiliates, alliances or joint ventures, or by setting off amounts that MERCHANT owes to BANK against any amounts BANK may owe to MERCHANT, in any case without notifying you prior to doing so. Without limiting the foregoing, MERCHANT agrees that BANK is entitled to recover amounts owed to BANK under this Agreement by obtaining directly from an alliance or joint venture to which BANK is a party and with which MERCHANT has entered into an MPA any funds held or available as security for payment under the terms of the MPA, including funds available under the "Reserve Account; Security Interest" section of the MPA, if applicable.
- 13.12 Assignment. MERCHANT may not assign or transfer this Agreement, by operation of law or otherwise, without BANK'S prior written consent. For purposes of this Agreement, any transfer of voting control of MERCHANT or MERCHANT'S parent shall be considered an assignment or transfer hereof. BANK will assign this Lease Agreement after it's execution to First Data Global Leasing (FDGL), a business unit of First Data Merchant Services. After such assignment, BANK shall have no further obligation under the Lease Agreement.
- 13.13 Lease Guaranty. No guarantor shall have any right of subrogation to any of BANK'S rights in the Equipment or this Lease or against MERCHANT, and any such right of subrogation is hereby waived and released. All indebtedness that exists now or arises after the execution of this Agreement between MERCHANT and any guarantor is hereby subordinated to all of MERCHANT'S present and future obligations, and those of MERCHANT'S guarantor, to BANK, and no payment shall be made or accepted on such indebtedness due to MERCHANT from a guarantor until the obligations due to BANK are paid and satisfied in full.
- 13.14 Governing Law; Miscellaneous. This Agreement shall be governed by and will be construed in accordance with the laws of the State of New York (without applying its conflicts of laws principles). If any part of this Agreement is not enforceable, the remaining provisions will remain valid and enforceable.
- 13.15 Dispute Resolution and Arbitration. If the parties disagree as to any matter governed by this Agreement, the parties shall promptly consult with one another in an effort to resolve the disagreement. If such effort is unsuccessful, any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, except that equitable relief may also be sought in any court of competent jurisdiction.
- 13.16 Notices. All notices must be in writing, and shall be given (a) if sent by mail, when received, and (b) if sent by courier, when delivered; if to MERCHANT at the address appearing on the cover page of this Agreement, and if to BANK at 4000 Coral Ridge Drive, Coral Springs, Florida 33065 Attn: Lease Department. Toll free customer service: 1 (877) 257-2094.
- 13.17 Entire Agreement. This Agreement constitutes the entire Agreement between the parties with respect to its subject matter, supersedes any previous agreements and understandings and can be changed only by a written agreement signed by all parties. This Agreement may be executed in any number of counterparts and all of such counterparts taken together shall be deemed to constitute one and the same instrument. Delivery of an executed counterpart of a signature page of this Agreement by facsimile shall be effective as delivery of a manually executed counterpart of this Agreement.