

# PaymentWorks Service Agreement

This Agreement and the attached Standard Terms and Conditions (collectively, the “Agreement”) for access to and use of the PaymentWorks application and Website (collectively, the “Service”) is made effective as of the 21st day of June 2021 (the “Effective Date”) between Brunswick County, North Carolina (“Company”), with a principal place of business at 30 Government Center Drive NE. Bolivia, NC 28422 and PAYMENTWORKS, Inc. (“PaymentWorks”), a Delaware corporation with a principal place of business at 51 Sawyer Road, Waltham, MA 02453.

## Commercial Terms:

- **Agreement must have an Effective Date on or before June 21, 2021**
- **Pricing Term:**
  - **Year One: \$37,000**
  - **Year Two: \$45,000**
  - **Year Three: \$45,000**
  -
- **Subscription Term**
  - **Initial Subscription Period** - the initial annual subscription term will begin on the start date of the Discovery Process (estimated July 5, 2021) or as mutually agreed to by the parties. The subscription period is annual.
  - **Subscription Renewals** - The Subscription will renew on each anniversary of the initial subscription start (which will be either the Start of Discovery Process or as mutually agreed to by parties)
- **Invoicing**
  - Company will be invoiced for the initial annual subscription term as follows:
    - 50% upon the Start of Discovery Process; and
    - 50% upon delivery of a fully configured “sandbox” version of the Service;
  - Thereafter, Company will be invoiced on each anniversary of the initial subscription start date (which will be either the Start of Discovery Process or as mutually agreed to by parties).
- After the first three (3) years, the subscription rate may renew as set forth below at the previous rate plus an increase equivalent to the latest Consumer Price Index (furnished by U.S. Bureau of Labor Statistics) over the previous subscription price at the end of the three-year term.
- **This subscription is for SIM+ Services**
- **PaymentWorks Annual Usage Cap.** Pricing in this agreement covers the value of customer's usage of the PaymentWorks Supplier Information Management platform and Payment Risk Indemnification service, based on the customer's estimated annual usage metrics as supplied to PaymentWorks below:
  - **New payee Onboarding Count:** 350 - 550
  - **Annual Payees Paid Count:** 2,100 – 2,600
  - **AP Payments Amount:** \$133,304,799 - \$150,000,000.00
- **Usage exceeding these thresholds may incur additional charges**
- **PaymentWorks has made arrangements whereby Company can acquire excess coverage (above the \$2MM per occurrence limit noted in Section 6.2) by purchasing an excess policy directly from Chubb.**
- **The document entitled "Implementation Overview & Platform Description" dated 3/11/21 is incorporated herein by reference. To the extent the terms of that document conflict with the terms of this Agreement, the terms of this Agreement shall prevail.**

## Onboarding Services

PaymentWorks onboarding services include:

- **Configure the Testing and Production Environments**
- **Configure Roles/Permissions**

- Configure Business Control Approval Process
- Configure Single Sign On on the PaymentWorks side
- Perform Training
- Project Management to coordinate resources and project deliverables

Onboarding services are provided at an additional cost of \$15,000 and include up to 150 hours. Average PaymentWorks projects are completed within 140 hours, so we've placed the cap above expected usage. If additional implementation service hours are required they can be purchased at a rate of \$200/hour.

Onboarding services must be scheduled with the PaymentWorks Enablement Services group, and it is encouraged to select, negotiate and schedule a target-start date on or around contract execution. If the Company notifies PaymentWorks at least two weeks in advance that they cannot meet the target-start date, there is no financial penalty, but any rescheduling is subject to the availability of PaymentWorks Enablement resources.

### **Integration Consulting and Support**

Enterprise Resource Planning ("ERP") integration is the responsibility of the Company, but PaymentWorks is committed to providing the best-practices and support necessary to ensure a successful integration. Any automation of ERP integration consists of three classes of work, two of which can be provided by PaymentWorks. These are:

- Included: Work PaymentWorks must do to configure your ERP integration
- Optional: Work PaymentWorks, a third-party, or your IT-department could do
- ERP Access and Transformations: Work a third-party or your IT-department must do because it requires direct ERP access

**Included:** If/when you choose to automate the ERP integration, there are a small number of configuration tasks that PaymentWorks must perform: these hours are included in your license cost, capped at 20 hours. These cover:

- Secure communications configuration / key-exchanges
- Test scenario setup / execution

**Optional:** PaymentWorks offers consulting services to assist with the ERP-integration on an hourly basis at a rate of \$150/hour. If elected, these services may include:

- Business process analysis and advice on best practices for PaymentWorks integration with Company ERP and existing vendoring procedures.
- Configuration, testing and tuning of export formats.
- Technical advice and support on best practices and issue-resolution for the testing of dataflows and error processing.
- Specifications and documentation of the automated dataflows and data-mapping.
- Project management support to coordinate resources and timelines.

Optional PaymentWorks consulting services must be scheduled with the PaymentWorks Enablement Services group, and dates are subject to availability. It is recommended that a date for integration services be reserved prior to the completion of onboarding, typically 3-6 months after onboarding is completed. If the Company notifies PaymentWorks at least two weeks in advance that they cannot meet the integration-services start-date, there is no financial penalty, but any rescheduling is subject to the availability of PaymentWorks Enablement resources.

***ERP Access and Data Transformations:*** The coding or customization of any middleware or ERP import functionality is the Company's responsibility. Typically this work is performed by the Company's IT department, optionally in consultation with a third party selected by the Company who is trained on the product and has developed "connectors" to link certain ERPs to PaymentWorks.

Average PaymentWorks ERP-integration projects are completed with less than 140 hours of PaymentWorks time, so we've placed the cap above expected usage. If additional implementation service hours are required they can be purchased at a rate of \$200/hour. Unused Onboarding hours cannot be "rolled into" ERP-integration hours.

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date first above written.

ATTEST:

BRUNSWICK COUNTY

\_\_\_\_\_  
Clerk to the Board /  
Deputy Clerk to the Board

By:

\_\_\_\_\_  
Chairman, Board of Commissioners

[SEAL]

PaymentWorks:

Signed: Thayer Stewart

Name: Thayer Stewart

Title: CEO

Date: 6/11/2021

"This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

Julie A. Miller  
Julie A. Miller, Director of Fiscal Operations  
Brunswick County, NC

APPROVED AS TO FORM

Bryan W. Batton  
Robert V. Shaver, Jr., County Attorney /  
Bryan W. Batton, Asst. County Attorney  
Brunswick County, NC

# Standard Terms and Conditions to PaymentWorks Service Agreement

## 1. USE OF THE SERVICE

**1.1. Grant.** Subject to Company's compliance with the terms of this Agreement, PaymentWorks hereby grants Company a non-exclusive, non-transferable, limited right to access and use the Site and the Service. Such access and use shall be exercised only by users authorized by Company to access and use the Service on behalf of Company who have agreed to these Terms and Conditions (collectively, "Authorized Users"). Company may access and use the Service to share information about Company ("Company Data") and about transactions, invoices, invoice payment status, and related information (collectively, "Transaction Data") with Company Authorized Users and/or Company payees ("Payees"). Company will decide which Authorized Users and/or Payees have access to specific Company Data and Transaction Data through elections and criteria established by Company through the Service. PaymentWorks may from time to time modify the Service, features of the Service, or the Site in its sole discretion. Notwithstanding the foregoing, any modifications to the Service shall not materially reduce the functionality of the Service and intended use by Company.

**1.2. User Names and Passwords.** PaymentWorks shall provide Company Authorized Users unique login credentials ("User Name" and "Password") to be used to access the Service. Company and its Authorized Users are responsible for maintaining the confidentiality of the User Names and Passwords. Company and its Authorized Users shall immediately notify PaymentWorks of any unauthorized use of a Company issued User Name or Password and PaymentWorks shall issue a new User Name and/or Password. Company will be solely responsible and liable for all activities that occur under Company's associated User Names and Passwords. Company shall be liable for any participation in the Service for any persons who accesses the Site and the Services using the User Name and Password of an Authorized User.

**1.3 Company Responsibilities.** Company will (a) be responsible for Authorized Users' compliance with these Terms of Service, (b) be responsible for the accuracy, completeness, quality and legality of Company Data and Transaction Data provided by Company, including the means by which Company Data and Transaction Data were acquired, (c) use commercially reasonable efforts to prevent unauthorized access to or use of the Service and any Transaction Data, and notify PaymentWorks promptly of any such unauthorized access or use, and (d) use the Service and Transaction Data only in accordance with any applicable documentation provided by PaymentWorks and applicable laws and government regulations, and (e) comply with the

terms applicable to data validation services referenced in Section 6.4. PaymentWorks shall have no liability for the accuracy, completeness, quality or legality of any Company Data or Transaction Data provided through the Service, whether provided by Company, Third-Party Service Providers, or any Authorized User or Payee. Authorized Users, and Company agree to access the Site and Services in a secure manner in compliance with PaymentWorks' reasonable standards established from time to time. PaymentWorks, in its sole discretion, may specify connectivity standards to access the Site and the Services from time to time. If Company wishes to submit payment instructions through the Service, Company must agree to designate PaymentWorks as its Agent for submitting payment instructions in accordance with the requirements of Company's designated bank. For transactions that Company has elected to submit payment instructions through the Service, Company will transmit the payment instructions to PaymentWorks. Company is solely responsible for the content of the payment instructions, including the accuracy and completeness of the payment amount and the intended recipient entity.

**1.4. Restrictions on Use.** Company and its Authorized User's shall not: (a) make the Service or any Transaction Data obtained through the Service from any Authorized User or Payee available to, or use the Service or any Transaction Data obtained through the Service from any Authorized User or Payee for the benefit of, anyone other than Company, (b) sell, resell, license, sublicense, distribute, rent or lease the Service or any Transaction Data obtained through the Service from any Authorized User or Payee, or include the Service or any Transaction Data obtained through the Service from any Authorized User or Payee in a service bureau or outsourcing offering, (c) use the Service to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy or confidentiality rights, (d) use the Service to store or transmit Trojan horses, worms, time bombs, cancel bots or other similar harmful or deleterious programming routines, (e) interfere with or disrupt the integrity or performance of the Service or third-party data contained therein, (f) attempt to gain unauthorized access to the Service or any Transaction Data or its related systems or networks, (g) permit direct or indirect access to or use of the Service or any Transaction Data in a way that circumvents a contractual usage limit, (h) copy the Service or any part, feature, function or user interface thereof, (i) copy any Transaction Data obtained through the Service from any Authorized User or Payee except as permitted herein, (j) frame or mirror any part of any Service or Transaction Data, other than framing on Company's own intranets or otherwise for Company's own internal business purposes, (k) access the Service or any Transaction Data obtained through the Service from any

Authorized User or Payee in order to build a competitive product or service, or (l) reverse engineer the Service or any element thereof (to the extent such restriction is permitted by law), or (m) access or use the Service or any Transaction Data obtained through the Service from any Authorized User or Payee in violation of any applicable, Federal, State or local law, rule or regulation.

**1.5. Reservation of Rights.** All rights in and to the Site and the Service, including without limitation proprietary schema, tools, methodologies, methods of the Services and software; and any patent rights, copyrights, trade secrets, trade names, service marks, trademarks, moral rights, know-how related to the Site or the Service (collectively, "PaymentWorks Intellectual Property Rights"), not expressly granted to Company hereunder are reserved by PaymentWorks.

## 2. PAYMENTWORKS RESPONSIBILITIES

**2.1. Service and Support.** PaymentWorks will, subject to Company's payment of applicable fees and compliance with these Terms of Service, use commercially reasonable efforts to: (a) make the Services and Transaction Data (to the extent authorized by the applicable Authorized User or Payee) available to Company pursuant to these Terms of Service, (b) provide standard support for the Service, at no additional charge, and/or upgraded support if purchased, and (c) make the Service available 24 hours a day, 7 days a week, except for: (i) planned downtime (of which we shall give at least 8 hours electronic notice and which we shall schedule to the extent practicable during the weekend hours between 6:00 p.m. Friday and 3:00 a.m. Monday Eastern time), and (ii) any unavailability caused by circumstances beyond our reasonable control, including, for example, an act of God, act of government, flood, fire, earthquake, civil unrest, act of terror, strike or other labor problem, Internet service provider failure or delay, or denial of service attack. For transactions that Company has elected to submit for electronic (EFT) payment, PaymentWorks will transmit Company's payment instruction to the Company's designated bank for processing; provided, however, that PaymentWorks reserves the right to refuse to transmit any payment instructions submitted through the Service with respect to a transaction for a specific Payee in its sole discretion. In the event that PaymentWorks refuses to transmit any payment instructions with respect to any Payee, PaymentWorks will notify Company via email and Company will have the option to either (i) request a different payment method from the Payee through the Service, or (ii) facilitate the payment instructions outside of the Service; and provided, further, that in either case, the warranty set forth in Section 6.2 (ii) will not apply to such transaction. In the event that any banking information supplied by PaymentWorks is changed after submission to Company's designated bank, the warranty set forth in Section 6.2 (ii) will not apply. In the event that Company changes

payment instructions after submission by PaymentWorks, Company must notify PaymentWorks in writing of such change within two business days or the warranty set forth in Section 6.2(ii) will not apply.

**2.2. Protection of Company Data and Transaction Data.** PaymentWorks will use commercially reasonable efforts to maintain administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of Company Data and Transaction Data provided by the Company. Those safeguards will include, but will not be limited to, measures for preventing access, use, modification or disclosure of Company Data and Transaction Data by PaymentWorks personnel except (a) to address service or technical problems, (b) as compelled by law, (c) as Company designates through elections made through the service or (d) as Company expressly permits in writing. Company expressly acknowledges and agrees that Company Data and Transaction Data will be made available to Authorized Users and processors, including without limitation the Company's bank, and Payees through the Service in accordance with elections and criteria established by Company Authorized Users. In the event PaymentWorks becomes aware of an actual or alleged security breach, it shall notify Company in writing, as soon as practicable, of such security breach.

## 3. PAYMENT.

**3.1. Fees.** Company shall pay the fees described on the cover sheet attached hereto and as otherwise set forth herein. Except as otherwise specified herein, (i) fees are based on the type of subscription purchased and not actual usage, and (ii) payment obligations are non-cancelable, except in the event of non-appropriation as set forth below.

**3.1.1. Non-Appropriation.** If the Board of County Commissioners of Company does not appropriate the funding needed by Company to make payments under this Agreement for a given fiscal year, Company will not be obligated to pay amounts due beyond the end of the last fiscal year for which funds were appropriated. In such event, Company will promptly notify PaymentWorks of the non-appropriation, and this Agreement will be terminated at the end of the last fiscal year for which funds were appropriated. No act or omission by Company which is attributable to non-appropriation of funds shall constitute a breach of or default under this Agreement.

**3.2. Invoicing and Payment.** Company must provide PaymentWorks with valid and updated credit card information or with a valid purchase order or alternative document reasonably acceptable to PaymentWorks. If Company provides credit card information, Company authorizes PaymentWorks to charge such credit card for all fees specified through the registration process for the initial

subscription term and any renewal subscription term(s) as set forth in Section 5 (Term). Such charges shall be made in advance, either yearly or in accordance with any different billing frequency specified. If payment will be by a method other than a credit card, PaymentWorks will invoice Company in advance and otherwise in accordance with the registration. Unless otherwise stated, invoiced charges are due net 30 days from receipt of invoice. Company is responsible for providing complete and accurate billing and contact information to PaymentWorks and notifying PaymentWorks of any changes to such information.

**3.3. Overdue Charges.** If any undisputed invoiced amount is not received by PaymentWorks by the due date, then without limiting rights or remedies, (a) those charges may accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, and/or (b) PaymentWorks may condition future renewals on providing payment by credit card.

**3.4. Suspension of Service and Acceleration.** If any amount owing by Company under this or any other agreement for PaymentWorks services is 30 or more days overdue (or 10 or more days overdue in the case of amounts Company has authorized PaymentWorks to charge to a credit card), PaymentWorks may, without limiting our other rights and remedies, accelerate Company's unpaid fee obligations under such agreements so that all such obligations become immediately due and payable, and suspend Company's access to the Service until such amounts are paid in full. PaymentWorks will give Company at least 10 days' notice that payment is overdue, before suspending Company's access to the Service.

**3.5. Taxes.** PaymentWorks fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including, for example, value-added, sales, use or withholding taxes, assessable by any jurisdiction whatsoever (collectively, "Taxes"). Company is responsible for paying all Taxes associated with the use of the Service by the Company and its Authorized Users. If PaymentWorks is legally obligated to pay or collect Taxes for which Company is responsible under this Section 3.5, we will invoice Company and Company must pay that amount unless Company provides PaymentWorks with a valid tax exemption certificate authorized by the appropriate taxing authority.

**3.6. Future Functionality.** Company acknowledges and agrees that its subscription to the Service is not contingent on the delivery of any future functionality or features, or dependent on any oral or written public or private statements made by PaymentWorks regarding future functionality or features.

## 4. PROPRIETARY RIGHTS

**4.1. Title to Technology.** All interest, title and right in and to PaymentWorks Intellectual Property, including without limitation, all computer software programs or applications, or programs or applications of PaymentWorks' third party licensors, utilized by PaymentWorks in the establishment, operation, and/or the provision of Service, in whole or in part, shall be, vest with and remain the exclusive property of PaymentWorks and its third party licensors.

**4.2. Title to Company Data and Transaction Data.** All Company Data is and shall remain the property of Company. All Transaction Data is and shall remain the property of its lawful owner. PaymentWorks makes no claims, warranties or representations with regard to the ownership of Transaction Data or Company Data. Transaction Data includes but is not limited to EFT information for vendors. PaymentWorks may share Transaction Data, in the singular or aggregate, by providing reports or otherwise, to Authorized Users and Payees involved in a transaction and may identify the parties as being involved in the transaction in connection therewith, all in accordance with elections and criteria established by Company Authorized Users through the Service; and Company hereby grants PaymentWorks a world-wide license to host, copy, transmit, display and otherwise use Company Data and Transaction Data as necessary to do so. In addition, Company hereby grants PaymentWorks a perpetual, world-wide, limited license to de-personalize (remove any Company identifying information) and aggregate any and all Transaction Data to determine usage trends, perform analytics, improve the Service, promote and market the effectiveness of the Service, sell such aggregated de-personalized Transaction Data to any third party, or for any other internal-business purpose.

**4.3. Company's license to PaymentWorks.** Company hereby grants a limited, non-transferable license to PaymentWorks for PaymentWorks to use Company's name and logos to identify Company as a user of the Site, including without limitation to display Company Data on the Site and to display Transaction Data, including without limitation Payment Instructions, to processors and to display Transaction Data through the Service, all consistent with elections and criteria established by Company, during the Term of this Agreement. PaymentWorks shall obtain Company's prior written consent for any other uses of Company's name, logos, and trademarks.

## 5. TERM AND TERMINATION

**5.1. Term.** This Agreement shall commence on the Effective Date and shall continue in effect for an initial term of three (3) years as set forth above, unless terminated by a party in accordance provisions below ("Term"). Thereafter, the

Agreement shall renew automatically for successive one-year terms, unless either party provides written notice of non-renewal at least sixty (60) days in advance of the end of the then-current term.

**5.2. Termination for Cause.** Either Party may terminate this Agreement by providing the other no less than five (5) days advance written notice in the event that the other Party (A) is in material breach of any term, condition or provision of this Agreement, which breach, if capable of being cured, is not cured within five (5) days after the non-breaching Party gives the other Party written notice of such breach; or (B) terminates or suspends its business activities, becomes insolvent, admits in writing its inability to pay its debts as they mature, makes an assignment for the benefit of creditors, or becomes subject to direct control of a trustee, receiver or similar authority, or becomes subject to any bankruptcy or insolvency proceeding under federal or state statutes which is not rescinded within sixty (60) days of its commencement.

**5.3. [Reserved]**

**5.4. Effect of Termination.** Upon termination of this Agreement, Company shall immediately discontinue use of the Site and the Service. In the event of an early termination by Company under Sections 5.2, PaymentWorks will provide a refund to Company in an amount equal to the fees paid by the Company for access to and use of the Service for each full month following the effective date of termination.

**5.5. Survival.** Notwithstanding any termination of this Agreement, Section 4 ("Proprietary Rights"), Section 6 ("Warranties"), Section 7 ("Indemnification"), Section 8 ("Disclaimer and Limitation of Liability") and Section 9 ("Additional Terms and Conditions") shall survive termination of this Agreement. All other rights and licenses granted hereunder will cease upon termination.

**5.6. Return of Company Data and Transaction Data (collectively, "Company Information").** Following termination of this Agreement, upon written request by Company, PaymentWorks shall grant Company access to PaymentWorks website for a period of ninety (90) days, solely to allow Company to remove, extract, or otherwise, download Company Information from the Service. During this period, PaymentWorks shall, at no charge, provide Company a commercially reasonable means to retrieve Company Information. Upon expiration of the ninety (90) day period for Company to remove the Company Information, PaymentWorks will delete and destroy all Company Information from its systems or media so it cannot be restored or accessed at a future point in time. Any information that cannot be deleted by commercially reasonable means shall remain subject to any restrictions relative to the same contained in this Agreement.

## **6. WARRANTIES.**

**6.1. Mutual Warranty.** Each Party represents and warrants that it has the authority to enter into this Agreement.

**6.2. PaymentWorks Warranty.** PaymentWorks represents and warrants that: (i) the Service will be provided in accordance with the terms and conditions of Section 2; and (ii) the provision of the Service by PaymentWorks will not (A) infringe on any third party's rights, including any intellectual property or proprietary rights, (B) violate any obligation of confidentiality, (C) violate any applicable law, statute, ordinance or regulation; or (D) contain viruses, Trojan horses, worms, time bombs, cancel bots or other similar harmful or deleterious programming routines and (iii) with respect to any transaction processed through the Service that Company has both elected to submit through the Service for EFT payment to a U.S. Bank account and provided payment instructions in accordance with Section 1.3, and for which the EFT credentials have been collected from the recipient entity through the Service, except as set forth below, the bank account to which the funds are transferred will be owned by the entity associated with the Tax ID provided to Company by PaymentWorks. In the event of a breach of the warranty set forth in Section 6.2 (iii), PaymentWorks will either remedy the breach or reimburse Company for the amount of the payment directed to the incorrect account, up to \$2,000,000 in the aggregate, notwithstanding any limitation on liability set forth in Section 8 of this Agreement. Company acknowledges that the Warranty set forth in Section 6.2 (iii) will not apply to any transaction in which the Company or any employee or agent of the Company has engaged in fraud. Company acknowledges that the Warranty set forth in Section 6.2 (iii) will not apply, and no EFT credential verification will be attempted, for any transaction made through the Service to an EFT credential and associated Tax ID collected by Company outside of the Service and uploaded to the Service by the Company.

**6.3. Company's Warranty.** Company represents and warrants that (i) its Authorized Users have authority to act on behalf of Company; and (ii) all Company Data, Transaction Data and other materials submitted by Company to or through the Site or the Service will not (A) infringe on any third party's rights, including any intellectual property or proprietary rights, (B) violate any obligation of confidentiality, (C) violate any applicable law, statute, ordinance or regulation; or (D) contain viruses, Trojan horses, worms, time bombs, cancel bots or other similar harmful or deleterious programming routines.

**6.4. DISCLAIMER.** EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION 6, THE SERVICE AND THE SITE AND ANY OTHER SERVICES OFFERED ON OR THROUGH THE SITE AND ANY REFERENCED THIRD-



PARTY SITES ARE PROVIDED "AS IS" AND "AS AVAILABLE" AND WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED. EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION 6, PAYMENTWORKS DISCLAIMS ALL EXPRESS AND IMPLIED WARRANTIES TO THE FULLEST EXTENT OF THE LAW, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE. PAYMENTWORKS DOES NOT WARRANT OR MAKE ANY REPRESENTATIONS REGARDING THE USE OR THE RESULTS OF THE USE OF THE SITE OR SERVICES, COMPANY DATA, TRANSACTION DATA OR MATERIAL ON THE SITE OR THE SERVICE IN TERMS OF THEIR CORRECTNESS, ACCURACY, COMPLETENESS, QUALITY, LEGALITY, TIMELINESS, RELIABILITY OR OTHERWISE.

PAYMENTWORKS PROVIDES NO WARRANTY OF ANY KIND RELATED TO ANY THIRD-PARTY DATA OR SOFTWARE THAT MAY BE INCORPORATED, DISPLAYED OR INCLUDED IN THE SERVICE, INCLUDING WITHOUT LIMITATION ANY DATA VALIDATION PROVIDED BY OR THROUGH THE SERVICE.

COMPANY SHALL BE BOUND BY THE TERMS APPLICABLE TO DATA VALIDATION, SUPPORT, AND FCRA RESTRICTIONS WHICH CAN BE VIEWED AT THE FOLLOWING LINK:

[http://static.paymentworks.com/static/perm\\_assets/legal/Schedule+D.pdf](http://static.paymentworks.com/static/perm_assets/legal/Schedule+D.pdf)

## 7. INDEMNIFICATION.

**7.1. Infringement.** PaymentWorks agrees to defend or, at its option, to settle, any claim brought against Company for infringement of any United States patent, copyright, trade secret or trademark by the Service as delivered, but excluding any such claim to the extent it is based on the content of any Company Data or Transaction Data, and to indemnify Company against all damages and costs finally assessed by a court of competent jurisdiction against Company under any such claim or action. Company shall take reasonable steps to mitigate any potential expenses and provide PaymentWorks with: (i) prompt written notice of any such claim or action, or possibility thereof; (ii) sole control and authority over the defense or settlement of such claim or action; and (iii) proper and full information and assistance to settle and/or defend any such claim or action. Company shall have the right to employ separate counsel and participate in the defense at its own expense; provided that PaymentWorks shall remain in control of the defense. In addition, PaymentWorks may, at its

sole option and expense, either: (a) procure for Company the right to use the allegedly infringing elements of the Service; (b) replace the allegedly infringing elements of the Service with non-infringing, functionally equivalent services; (c) modify the allegedly infringing elements of the Service so that they are not infringing; or (d) cease to provide the allegedly infringing elements of the Service, refund any fees paid by Company covering any future period of time during which such allegedly infringing elements Services were to be provided. Upon exercise of option (d) in the previous sentence, PaymentWorks shall have no further obligations or liability to Company with respect to the allegedly infringing elements of the Service. Except as specified above, PaymentWorks will not be liable for any costs or expenses incurred without its prior written authorization. THE FOREGOING PROVISIONS OF THIS SECTION 7 STATE THE ENTIRE LIABILITY AND OBLIGATIONS OF PAYMENTWORKS TO COMPANY WITH RESPECT TO ANY ACTUAL OR ALLEGED INFRINGEMENT OF ANY PATENT, COPYRIGHT, TRADE SECRET, TRADEMARK OR OTHER INTELLECTUAL PROPERTY RIGHT BY THE SITE, THE SERVICE, OR ANY PART THEREOF.

**7.2** To the extent allowed by law, Company shall indemnify, defend and hold harmless PaymentWorks and its directors, officers, members, managers and employees from and against all claims, actions, liabilities, losses, expenses, damages and costs (including reasonable attorneys' fees), that may at any time be incurred by reason of any third party claim arising out of or relating to (i) any Company Data or Transaction Data provided by the Company, (ii) a breach of these Terms of Service by Company, or (iii) any claim that is inconsistent with Company's representations or warranties to PaymentWorks contained herein. PaymentWorks shall have the right to employ separate counsel and participate in the defense at its own expense.

## 8. LIMITATION OF LIABILITY.

**8.1. Limitation of Liability.** PAYMENTWORKS' LIABILITY TO COMPANY FOR DAMAGES WITH RESPECT TO THE SITE OR THE SERVICE SHALL NOT EXCEED THE FEES ACTUALLY PAID BY COMPANY TO PAYMENTWORKS FOR THE SERVICE DURING THE TWELVE (12) MONTHS PRIOR TO THE OCCURRENCE OF THE BREACH OR INCIDENT ASSERTED AS CAUSING HARM.

**8.2. No Consequential Damages.** NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, AND IRRESPECTIVE OF ANY FAULT OR NEGLIGENCE, NEITHER PARTY SHALL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES (INCLUDING



WITHOUT LIMITATION DAMAGES FOR HARM TO BUSINESS, LOST REVENUES, LOST SALES, LOST SAVINGS, LOST PROFITS (ANTICIPATED OR ACTUAL), LOSS OF USE, DOWNTIME, INJURY TO PERSONS OR DAMAGE TO PROPERTY AND CLAIMS OF THIRD PARTIES), HOWSOEVER CAUSED, ARISING OUT OF OR RELATED TO THIS SITE OR THE SERVICE, WHETHER OR NOT SUCH PARTY HAS BEEN APPRISED OR NOTIFIED THAT ANY SUCH DAMAGES OR LOSSES ARE POSSIBLE OR LIKELY, AND WHETHER OR NOT ANY PERMITTED REMEDY HAS FAILED ITS ESSENTIAL PURPOSE. THE FOREGOING DISCLAIMER WILL NOT APPLY TO THE EXTENT PROHIBITED BY LAW.

**8.3. Conditions.** The Parties agree that the above limitations of liability of Section 8 shall apply regardless of the form of action, whether in contract, warranty, strict liability or tort (including, without limitation, negligence of any kind, whether active or passive) or any other legal or equitable theory, but shall not apply to fees owed to PaymentWorks by Company.

## **9. ADDITIONAL TERMS AND CONDITIONS.**

**9.1. Notices.** Except as otherwise specified herein, all notices, permissions and approvals hereunder shall be in writing and shall be deemed to have been given upon: (i) personal delivery, (ii) the second business day after mailing, (iii) the second business day after sending by confirmed facsimile, or (iv) the first business day after sending by email (provided email shall not be sufficient for notices of termination or an indemnifiable claim). All notices to the Company shall be addressed to the address entered during the registration process or such address thereafter entered for notices by a Company Authorized User.

**9.2. U.S. Government Licenses.** PaymentWorks provides the Service, including related software and technology, for ultimate federal government end use solely in accordance with the following: Government technical data and software rights related to the Services include only those rights customarily provided to the public as defined in this Agreement. This customary commercial license is provided in accordance with FAR 12.211 (Technical Data) and FAR 12.212 (Software) and, for Department of Defense transactions, DFAR 252.227-7015 (Technical Data - Commercial Items) and DFAR 227.7202-3 (Rights in Commercial Computer Software or Computer Software Documentation). If a government agency has a need for rights not granted under these terms, it must negotiate with PaymentWorks to determine if there are acceptable terms for granting those rights, and a mutually acceptable written addendum specifically granting those rights must be included in any applicable agreement.

**9.3. Export Restrictions.** The Site, the Service, other technology PaymentWorks makes available, and derivatives thereof may be subject to export laws and regulations of the United States. Each party represents that it is not named on any U.S. government denied-party list. Company shall not permit Authorized Users to access or use the Service or any content in a U.S.-embargoed country or in violation of any U.S. export law or regulation.

**9.4 Terms and Conditions.** Company acknowledges and agrees that its use of the Services and the Transaction Data, and any use of Transaction Data by its Authorized Users or Payees, shall not modify or supersede the terms and conditions of any purchase agreements, invoices, or other negotiated terms agreed to by and between Company and any Authorized User or Payee.

## **9.5. Miscellaneous.**

**9.5.1.** Neither this Agreement nor any rights under this Agreement may be transferred or assigned by either party without the prior written consent of the other party.

**9.5.2.** This Agreement shall be interpreted and construed in accordance with the laws of the State of North Carolina, without regard to its internal conflict of laws principles. In connection with any dispute arising hereunder or litigation relating hereto, the parties hereby consent and subject themselves exclusively to, and agree to waive any objections to, the jurisdiction of the General Court of Justice of the State of North Carolina in Brunswick County or in the Federal District Court for the Eastern District of North Carolina, Wilmington division.

**9.5.3.** In the event that any provision of this Agreement is held invalid, the remaining terms and conditions of this Agreement shall remain in full force and effect.

**9.5.4.** The failure of either party to enforce any of the provisions of this Agreement shall not be deemed to be a waiver of the right of either party thereafter to enforce any such provisions.

**9.5.5.** Except for the Company's obligation to make payments to PaymentWorks, nonperformance of either party shall be excused to the extent that performance is rendered impossible by strike, fire, flood, blackouts, governmental acts or orders or restrictions, failure of Companies or the Internet, or acts of God or terrorism, or any other reason where failure to perform is beyond the control and not caused by the negligence of the non-performing party.

**9.5.6.** Neither party shall disclose the pricing, fees, terms, conditions or other content of this Agreement or any

supplement(s) to any third party other than a respective party's officers, directors, members, managers, affiliates, employees, accountants, attorneys, investment bankers, independent contractors, agents or other representatives. The foregoing shall not apply to information required to be disclosed by law, regulation or court or governmental order, specifically including requests pursuant to the Public Records Laws of North Carolina contained in Chapter 132 of the North Carolina General Statutes. In the event a party receives such a request, it shall notify the other party, and the other party shall have the opportunity to defend against production of such records at its sole expense.

**9.5.7.** The relationship of PaymentWorks and Company established by this Agreement is that of independent contractors, and nothing contained in this Agreement will be construed to constitute the parties as partners, joint ventures, co-owners or otherwise as participants in a joint or common undertaking.

**9.5.8. Divestment from Companies that Boycott Israel.** PaymentWorks hereby certifies that it has not been designated by the North Carolina State Treasurer as a company engaged in the boycott of Israel pursuant to N.C.G.S. § 147-86.81.

**9.5.9. Debarment.** PaymentWorks hereby certifies that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this Agreement by any governmental department or agency. PaymentWorks must notify Company within thirty (30) days if debarred by any governmental entity during this Agreement.

**9.5.10. Non-Discrimination in Employment.** PaymentWorks shall not discriminate against any employee or applicant for employment because of race, ethnicity, gender, gender identity, sexual orientation, age, religion, national origin, disability, color, ancestry, citizenship, genetic information, political affiliation or military/veteran status, or any other status protected by federal, state or local law or other unlawful form of discrimination. PaymentWorks shall take affirmative action to ensure that applicants are employed and that employees are treated fairly during employment. In the event PaymentWorks is determined by the final order of an appropriate agency or court of competent jurisdiction to be in violation of any non-discrimination provision of federal, state or local law or this provision, this Agreement may be cancelled, terminated or suspended in whole or in part by Company, and PaymentWorks may be declared ineligible for further agreements with Company.

**9.5.11. Compliance with E-Verify.** Pursuant to N.C.G.S. § 143-133.3, PaymentWorks understands that it is a requirement of this Agreement that PaymentWorks and its subcontractors must comply with the provisions of Article 2 of Chapter 64 of the North Carolina General Statutes. In doing so, PaymentWorks agrees that, unless it is exempt by law, it shall verify the work authorization of its employees utilizing the federal E-Verify program and standards as promulgated and operated by the United States Department of Homeland Security, and PaymentWorks shall require its subcontractors to do the same. Upon request, PaymentWorks agrees to provide Company with an affidavit of compliance or exemption.

**9.5.12. Dispute Resolution.** Should a dispute arise as to the terms of this Agreement, both parties agree that neither may initiate binding arbitration. The parties may agree to non-binding mediation of any dispute prior to the bringing of any suit or action.

**9.5.13. Governmental Immunity.** Company, to the extent applicable, does not waive its governmental immunity by entering into this Agreement and fully retains all immunities and defenses provided by law with regard to any action based on this Agreement.

**9.5.14. Amendments.** No amendments or changes to this Agreement shall be valid unless in writing and signed by authorized agents of both parties.

**9.5.15.** These Terms of Service constitute the entire, final, complete and exclusive agreement between the parties regarding the subject matter hereof and supersede all previous agreements, intentions, or representations, oral or written, relating to the subject matter of this Agreement. Any representation or warranty not expressly contained in these Terms of Service will not be enforceable.

**9.5.16. Signatures.** This Agreement, together with any amendments or modifications, may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall be considered one and the same agreement. This Agreement may also be executed electronically. By signing electronically, the parties indicate their intent to comply with the Electronic Commerce in Government Act (N.C.G.S. § 66-358.1 et seq.) and the Uniform Electronic Transactions Act (N.C.G.S. § 66-311 et seq.). Delivery of an executed counterpart of this Agreement by either electronic means or by facsimile shall be as effective as a manually executed counterpart.