

UNIVERSITY of HOUSTON



Merchant Agreement for Cougar 1Card

This Agreement is entered into and is effective as of \_\_\_\_\_ ("Effective Date"), by and between the University of Houston on behalf of its Cougar 1Card Program ("Program")...

The local business entity and its parent organization shall be known collectively as "Merchant" for purposes of this Agreement and its attachments. University and Merchant shall be known collectively as the "Parties" and singularly as a "Party" or the "Party."

RECITALS

Whereas, Program offers University students, faculty, staff, and certain other individuals who have been issued Cougar 1Cards ("Cardholders") the option of a debit payment method for purchases of goods and services; and

Whereas, Merchant offers certain goods and services to purchase by Cardholders; and

Whereas, Merchant must maintain, for purposes of Cardholder's use of the Card to purchase goods and services from Merchant, certain equipment (the "Equipment") to interface with University's designated access control system (the "System"); and

Whereas, Program desires to secure Merchant's agreement to comply with certain terms and conditions regarding participation in Program,

Now, therefore, Parties enter into this Agreement, in order to afford Cardholders the opportunity to use the card to obtain goods and services from Merchant.

Agreement of Parties

1. Article 1 - Responsibilities of Merchant

- a. Policies, Procedures Applicable to Program Transactions. Merchant shall conduct all Program transactions in accordance with all of the following, without limitation: (1) Purchases or Lease of Equipment. (2) Conduct of Transaction. (3) Identity of Cardholder.

disclaims liability to Merchant or any third party, including a Cardholder, for claims arising out of or related to Merchant's acceptance or non-acceptance of a Card for purposes of payment.

- (4) **Policy for Refunds.** Comply with Program refund policies and procedures including the following:
  - i. **Offer of Credit.** Credit - not cash - may be extended for purposes of exchanges or refunds of goods or services purchased with the Card.
  - ii. **Terms for Refunds at Attended Locations.** Refunds from attended reader locations may be authorized only at the same location where the goods or services for which the refund is requested were purchased.
  - iii. **Terms for Refunds at Unattended Locations.** Refunds from unattended reader locations must be directed to the Cougar 1Card Office. Department will provide Merchant with a monthly report listing refunds from unattended readers.
- b. **No Fees for Use of Card.** Merchant shall not charge a Cardholder any fee, set-off, or price differential for Cardholder's use of the Card to purchase goods or services from Merchant; however, Merchant may extend to Cardholders a discount for use of the card.
- c. **University's Remedies for Merchant's Failure to Adhere to Policies, Procedures.** Merchant's failure, in whole or in part, to adhere to Program policies and procedures, as set forth in this Agreement and/or in manuals, documents, other materials, and as amended from time to time, shall entitle University to declare Merchant in material default of this Agreement, subject to the termination provisions set forth in Article 6 of this Agreement.

## 2. **Article 2 – Equipment for Program**

- a. **Maintenance of Phone Line.** For purposes of locations not on University premises, Merchant shall install, maintain, and operate, at Merchant's sole expense, a designated phone line solely for purposes of accessing and interfacing with the System and processing Program transactions.
- b. **Conduct of Needs Assessment.** Department shall conduct a "Needs Request/Assessment," in order to determine what equipment is necessary and appropriate for Merchant's successful operation of Program.
- c. **Purchase or Lease of Equipment.** Merchant shall arrange with Department for (a) purchase or lease, (b) installation, and (c) maintenance, in good working order, of all Equipment determined necessary by University for efficient and effective processing of Program transactions. Merchant shall either purchase or lease Equipment through Department and shall execute documents Department determines are necessary to secure Equipment. The document setting forth the terms of sale or lease shall be attached to this Agreement as Exhibit B.
- d. **Use of Equipment without Purchase or Lease.** Merchant may request an alternate means of access to the System without purchasing or leasing Equipment. If Merchant's request is authorized in a writing signed by University's Cougar 1Card Director, then University will provide Merchant with a reader, printer, and associated communications equipment upon Merchant's compliance in full with requirements set forth in Exhibit A of this Agreement. If this alternative means of access is authorized, Merchant agrees to and shall accept sole responsibility for installation of a phone line for each Reader and for payment in full of all other costs associated with maintenance of the phone line.
- e. **Costs for Equipment.** Merchant shall bear sole and complete responsibility for costs of acquisition, installation, replacement, repair, and maintenance fees, all as deemed necessary by Department for Merchant's effective participation in Program.

- f. **Maintenance of Equipment.** Merchant agrees to and shall look solely to the manufacturer of Equipment and of its component parts for guarantees and warranties concerning any defects and defective workmanship.
- g. **Use of or Alterations to Equipment.** Merchant shall use Equipment in a prudent and lawful manner and shall not make any alterations, additions, or improvements to Equipment without the prior written consent of Department. All additions and improvements made to leased Equipment shall belong exclusively to University.
- h. **Delivery of Equipment.** Merchant shall arrange for delivery of Equipment by Department at a mutually acceptable time and place. Title, ownership, and risk of loss concerning purchased Equipment shall be in accordance with the manufacturer's instructions and terms. Title, ownership, and risk of loss concerning leased Equipment, or Equipment used pursuant to Section 2.d. shall be vested in and shall remain at all times and for all purposes with University.
- i. **Limitation of Warranty, Liability.** University, through Department, offers equipment necessary for Program solely as a vendor and not as a manufacturer. As such, all Equipment and its components are subject to the terms and conditions affecting sale of Equipment by the manufacturer. Merchant agrees to and shall look solely to the manufacturer for redress of claims related to or arising out of use of Equipment, whether such claims sound in products liability, tort, or contract.

**UNIVERSITY DISCLAIMS ANY WARRANTIES, WHETHER EXPRESS OR IMPLIED, OR OTHER REPRESENTATIONS OF ANY KIND WITH RESPECT TO EQUIPMENT PROVIDED, SERVICED, OR REQUIRED FOR PURPOSES OF PROGRAM, INCLUDING ANY REPRESENTATION OR WARRANTY RELATED TO THE DESIGN, CONDITION, OR PERFORMANCE OF SUCH EQUIPMENT, INCLUDING A WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. FURTHER, UNIVERSITY EXPRESSLY DISCLAIMS LIABILITY FOR ANY DAMAGES OR CLAIMS RELATED TO OR ARISING OUT OF A POWER FAILURE OR OUTAGE OR FAILURE, IN WHOLE OR IN PART, OF TELECOMMUNICATIONS OR COMPUTER NETWORK EQUIPMENT OR CONNECTIONS. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, UNIVERSITY SHALL HAVE NO DUTY OR OBLIGATION WHATSOEVER TO PROVIDE, INSPECT, SERVICE, MAINTAIN, OR REPLACE EQUIPMENT OR UTILITIES RELATED TO PROGRAM AND/OR THE SYSTEM. UNIVERSITY FURTHER DISCLAIMS LIABILITY TO ANY PARTY CLAIMING BY, THROUGH, OR UNDER THIS AGREEMENT, FOR LOSS OF WAGES OR PROFITS ARISING OUT OF USE, MISUSE, OR NON-USE OF PROGRAM OR THE SYSTEM. EQUIPMENT IS FURNISHED "AS IS," WITHOUT WARRANTY OF ANY KIND, WRITTEN OR ORAL, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. UNIVERSITY SHALL NOT BE LIABLE FOR ANY DIRECT, INDIRECT, OR SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER LEGAL THEORY, ARISING OUT OF MERCHANT'S USE, MISUSE, OR NON-USE OF EQUIPMENT.**

- j. **Right of Inspection.** University shall retain the right to inspect Equipment during Merchant's regular business hours or as mutually agreed by Merchant and Department.
- k. **Risk of Loss.** Merchant shall bear sole responsibility for the risk of loss, theft, destruction, or damage of Equipment, provided such loss or damage results from the acts or omissions of Merchant or its personnel, contractors, agents, officers, or employees. Such loss, theft, destruction, or damage of Equipment shall not relieve Merchant of the obligation to pay amounts due to University for lease of Equipment or fees, as applicable, or of any other obligation set forth in this Agreement. However, losses or damages to Equipment from causes beyond the control or fault of Merchant that, in the sole discretion of University, renders Equipment unsuitable for further use

with Program shall cause an abatement of the obligation to pay amounts and fees for use of Equipment.

- 1. **Failure to Maintain Equipment.** Merchant’s failure, in whole or in part, to maintain Equipment determined by University as necessary for Merchant’s successful participation in Program shall entitle University to declare Merchant in material default of this Agreement and subject to the termination provisions set forth in Article 6 of this Agreement.

3. **Article 3 – Fees and Payments for Program**

- a. **Primary Fee Structure for Program.** The Primary Fee Structure, as agreed upon by Parties, is set forth with specificity in Exhibit A. The Fee Structure includes the following: (a) cost of Equipment, (b) installation fee, (c) reader annual maintenance fee, and (d) service fees. The Fee Structure may be amended from time to time by means of a written agreement, signed by the authorized representatives of Parties. The authorized signatory for University shall be the Associate Vice President for Administration. The authorized signatory for Merchant shall be:

Name: \_\_\_\_\_

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

Address: \_\_\_\_\_

\_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

The authorized signatory for the parent entity is: \_\_\_\_\_.

- b. **Payment of Applicable Taxes.** The cost of any and all applicable taxes, if any, shall be borne by Merchant.
- c. **Billing, Invoices for Fees.** All fees are cumulative and are not assessed in lieu of each other. All fees are due and payable in full at the time of presentation of an invoice for payment.
- d. **Remedies for Late Payment.** Merchant’s failure, in whole or in part, to make timely payments for fees, services, and other assessments arising out of Merchant’s participation in Program shall entitle University to declare Merchant in material default of this Agreement and subject to the termination provisions set forth in Article 6 of this Agreement. In addition, if Department fails to receive payment in full within ten (10) business days after payment is due for any amounts owed by Merchant to University, then University may assess Merchant a late fee of one hundred dollars (\$100.00) per day that payment is late. Such late fees shall be payable in full to University at the time payment for amounts due is tendered. Termination of this Agreement and/or assessment of late fees shall not be in limitation of and shall not restrict University in any fashion whatsoever in obtaining any and all relief, damages, and remedies, whether in equity or in law, to which University is or may be entitled.
- e. **Interest on Late Payments.** University reserves the right to assess interest to the fullest extent permitted under law on amounts due that are not tendered in full to Program office within ten (10) business days after the date on which the payment was due and owing.

4. **Article 4 – Maintenance of Insurance Indemnification Obligations**

(not applicable to University Departments)

- a. **Insurance.** For the duration of this Agreement, for all renewal Terms and for purposes of indemnification obligations that are specified to survive termination or expiration of

the Agreement. Merchant shall obtain, at its sole expense and at no cost to University, the following coverage and shall maintain such coverage in full force and effect.

- (1) **Workers' Compensation.** Workers' Compensation covering all personnel of Merchant who provide services pursuant to this Agreement, at the statutory limits in effect as of the Effective Date of this Agreement and as modified from time to time by the regulatory body or insurance carrier charged with administering Workers' Compensation;
- (2) **Commercial General Liability.** Comprehensive General Liability, including operations, contractual liability, and products liability in the combined single limit of not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) in the aggregate;
- (3) **Additional Named Insureds, Subrogation.** With the exception of the Workers' Compensation policy, The University of Houston System and the University of Houston shall be additional-named insureds on all policies, and subrogation against University must be waived.

- b. **Certificates of Insurance.** At least fifteen (15) days prior to the Effective Date of this Agreement and at least thirty (30) days prior to the commencement of any renewal Term of this Agreement, Merchant shall furnish the University of Houston Risk Manager with certificates of insurance in a form acceptable to University, certifying that Merchant carries the foregoing insurance policies and coverage. The certificates shall be sent to the Risk Manager at the following address:

Director, Risk Management  
University of Houston System  
Office of Facilities Planning & Construction  
4211 Elgin, Ste. 200  
Houston, TX 77004-1852

- c. **Notification to Risk Manager.** The insurance policy or policies shall contain a covenant by the insurance company issuing the same that they will not be canceled unless a thirty (30) day prior written notice of cancellation is given to the Risk Manager of the University of Houston System. In the event Merchant receives notice of insurance cancellation of any of the policies required under this Agreement, then Merchant shall obtain a policy of insurance with the same limitations and coverage from an insurance carrier acceptable to University prior to the effective date of cancellation. If Merchant fails to obtain such an insurance policy, the omission shall be considered a material breach of this Agreement, entitling University to invoke the termination provisions of Article 6 of this Agreement.
- d. **Indemnification by Merchant.** Merchant agrees to and shall indemnify and hold harmless the University of Houston System and the University of Houston, its Board of Regents, officers, agents, employees, and personnel, from and against claims arising out of or related to performance of this Agreement, including all expenses of litigation, court costs, and attorney's fees and for general conduct, whether based upon agency, employment, apparent agency, joint venture, partnership, or any other legal theory by which liability is adjudged against the University of Houston System or the University of Houston for the acts, omissions, negligence, or gross negligence of Merchant and/or any personnel, contractors, employees, agents, or officers provided by Merchant pursuant to the Agreement.

## 5. **Article 5 – Responsibility of University**

- a. **Support for Program.** University agrees to and shall provide support necessary for implementation and maintenance of Program, including the following: (i) provision of on-campus support determined necessary for handling inquiries and managing Program accounts, including telecommunication services, central computing services, databases, CPU, and software necessary for efficient functioning of Program; (ii)

submission and processing of work orders, (iii) promotion and marketing of activities related to Program; and (iv) establishment of a 24-hour emergency number for purposes of reporting lost or stolen cards and emergency repairs.

- b. **Equipment for Program.** University, in its sole discretion, shall determine and recommend Equipment necessary for Merchant to offer Program to Cardholders.
- c. **Maintenance and Repair of Equipment.** Maintenance of equipment will be coordinated by Department in accordance with the terms set forth in Exhibit A. Merchant shall be fully liable for any repair necessitated by damage, destruction, theft, and/or loss of Equipment. In the event Equipment needs maintenance or repair, University may provide, based on availability and need, loaner equipment to Merchant. University shall repair or replace defective materials at University's sole discretion and expense, subject to the manufacturer's warranties or guarantees related to Equipment. **SUCH REPAIR OR REPLACEMENT SHALL BE MERCHANT'S SOLE REMEDY FOR FAILURE OR NONPERFORMANCE OF EQUIPMENT PROVIDED PURSUANT TO THIS AGREEMENT.**
- d. **Provision of Reports.** Department will provide Merchant with access to reports generated by the System and to monthly computations of undisputed card sales generated at Merchant's location(s). Such reports shall specify the processing amount owed to Merchant, in accordance with the Fee Structure specified in Exhibit A.

6. **Article 6 – Term and Termination**

- a. **Term of Agreement.** The Agreement shall be effective as of \_\_\_\_\_, for an initial Term of one (1) year, subject to the termination provisions of this Agreement. The Agreement shall automatically renew on its Anniversary Date for additional one (1) year terms after expiration of the Initial Term, subject to the termination provisions of this Agreement.
- b. **Termination.** The Agreement may be sooner terminated on the first to occur of the following:
  - (1) **Mutual Agreement.** In the event University and Merchant mutually agree in writing, the Agreement may be terminated on the terms and date stipulated in the writing.
  - (2) **Termination by Default.** In the event either Party shall give notice to the other that such other Party has substantially defaulted in the performance of any obligation under the Agreement, and such default shall not have been cured within 15 consecutive days following the receipt of such notice by Party who is alleged to be in default, Party giving such notice shall have the right to terminate the Agreement immediately.
  - (3) **Termination for Cause.** University may, without further notice, terminate this Agreement immediately if Merchant (i) petitions for reorganization under the Bankruptcy Code or is adjudged bankrupt, (ii) becomes insolvent or a receiver is appointed due to the insolvency; or (iii) makes a general assignment of its assets or business for the benefit of its creditors.
  - (4) **Termination without Cause.** In the event either Party shall, with or without cause, at any time give to the other at least 30 calendar days' advance written notice, the Agreement shall terminate on the future date specified in such notice.
- c. **Notices regarding Termination.** All notices required under the termination provisions of this Agreement shall be given in accordance with the notice provisions set forth in this Agreement.
- d. **Effects of Termination.** Upon termination of the Agreement, as provided above, neither Party shall have any further obligation hereunder, except for (i) obligations accruing prior to the date of termination and (ii) obligations, promises, or covenants contained in

this Agreement that are made expressly to extend beyond the term of this Agreement. If, however, Merchant has executed an Equipment Lease Agreement, attached as Exhibit B to this Agreement, then termination of this Agreement shall additionally cause University to invoke the termination provisions set forth in Equipment Lease Agreement.

- e. **Return of Equipment.** Upon termination or expiration of this Agreement, Merchant agrees to and shall return all Equipment leased from and/or owned by University to Department within three (3) business days following the effective date of termination or expiration. Such Equipment shall be returned to Department in good, working condition, reasonable wear and tear excepted. Department shall be entitled to enter onto Merchant's premises and remove any such Equipment that is not returned within the specified period. Merchant consents to such entry by Department and to removal of all Equipment leased or owned by University from Merchant's premises.

7. **Article 7 – Miscellaneous Provisions**

a. **Legislative Requirements.**

- (1) **Payment of Taxes.** In accordance with laws of the State of Texas, Merchant certifies that, upon the Effective Date of this Agreement, either (1) Merchant is not delinquent in payment of State of Texas corporate franchise taxes, or (2) Merchant is not subject to the payment of such taxes. Merchant agrees that any false statement with respect to franchise tax status shall be a material breach of this Agreement, and University shall be entitled to terminate this Agreement upon written notice to Merchant.

- (2) **Payment of Child Support.** A child support obligor who is more than thirty (30) days delinquent in paying child support, and a business entity in which the obligor is a sole proprietor, partner, shareholder, or owner with an ownership interest of at least twenty-five percent (25%) is not eligible to receive payments from state funds under a contract to provide property, materials or services until all arrearages have been paid or the obligor is in compliance with a written repayment agreement or court order as to any existing delinquency. Under Section 231.006 of the Family Code, Merchant certifies that the individual or business entity named in this Agreement is not ineligible to receive payment from the state and acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate.

- b. **Cumulative Rights.** All rights, remedies, obligations, undertakings, warranties, representations, and covenants contained herein shall be cumulative, and none of them shall be in limitation of any other right, remedy, obligation, undertaking, warranty, representation, or covenant of either Party.

- c. **Assignment.** No assignment of the Agreement or the rights and obligations hereunder shall be valid without the prior written consent of the non-assigning Party.

- d. **Amendment.** Except as otherwise expressly provided herein, no amendment or variation of the terms of the Agreement shall be valid unless in writing and signed by authorized representatives of both University and Merchant.

- e. **Governing Law.** This Agreement shall be construed and governed according to the laws of the State of Texas, without giving effect to its conflict of laws provisions. Any alternative dispute resolution, suit, action, claim, or proceeding with respect to or arising out of the Agreement or any judgment entered by any court in respect thereof, shall take place solely in the courts or locations that are situated in the State of Texas, County of Harris.

- f. **Mediation.** In the event that a dispute arises under this Agreement, Parties agree that they will attempt to resolve the dispute by using mediation before the institution of any formal legal proceedings. The mediator selected will be mutually acceptable to both of Parties.

- g. **Notices.** All notices required or permitted to be given under the Agreement must be in writing and must either be delivered personally to the designated agent of Party to whom the notice is directed or be mailed by registered or certified mail, return receipt requested, addressed as shown below.

UNIVERSITY:

MERCHANT:

AVC/AVP for Administration  
 University of Houston  
 4800 Calhoun  
 Houston, TX 77004-2162

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

with copies to:

with a copy to:

Executive Director, Auxiliary Services  
 (same address)

\_\_\_\_\_  
 \_\_\_\_\_

Director, Cougar 1Card Program  
 (same address)

\_\_\_\_\_

- h. **Prohibited Discrimination.** Parties shall comply with all applicable federal and state laws prohibiting discrimination against any person on the grounds of race, color, national origin, religion, creed, sex, age, or handicap in employment or any condition of employment or in participation in the benefits of the services provided under this Agreement.
- i. **Compliance with Laws, Regulations, Enforcement Opinions, Policies.** This Agreement shall be performed in accordance with University policies and with applicable laws of the State of Texas and, to, the extent applicable, all federal laws and all rules and regulations of any regulatory body or officer having jurisdiction over Parties and/or subject matter of this Agreement.
- j. **Authority.** Each individual executing this Agreement on behalf of any Party expressly represents and warrants that he/she has authority to do so, and thereby to bind Party on behalf of which/whom he/she signs, to the terms of this Agreement.
- k. **Severability.** If any part of the Agreement should be determined to be invalid, illegal, inoperative, or contrary to applicable law, statute, regulation, or University policies, that part of the Agreement shall be reformed, if reasonable possible, to comply with the applicable provisions of law, statute, regulation, or University policy, and, in any event, the remaining parts of the Agreement shall be fully effective and operative insofar as reasonable possible.
- l. **Waiver.** A waiver by either Party of the breach or violation of any provision of the Agreement shall not operate as or be construed to be, a waiver of any subsequent breach of the Agreement.
- m. **Force Majeure.** Neither Party shall be liable nor deemed to be in default for any delay or failure in performance under the Agreement or other interruption of service deemed resulting, directly or indirectly, from acts of God, acts of public enemy, war, accidents, fires, explosions, hurricanes, floods, failure of transportation, strikes, or other work interruptions by either Party's employees, or any similar cause beyond the reasonable control of either Party.
- n. **Nonassumption of Liabilities.** Unless expressly provided herein, Parties do not assume or become liable for any of the existing or future obligations, liabilities, including obligations assumed by Merchant in regard to its employees, agents, contractors or personnel, or debt of the other.
- o. **No Third Party Beneficiaries.** This Agreement is entered into by and between Parties hereto and for their benefit. Unless explicitly provided in this Agreement, there is no

intent by either Party to create or establish third Party beneficiary status or rights in any third Party, and no such third party shall have any right to enforce any right or enjoy any benefit created or established under this Agreement.

- p. **Relationship of Parties.** It is expressly acknowledged by Parties to the Agreement that Merchant is an independent contractor.
- q. **Entire Agreement.** The Agreement constitutes the entire Agreement between Parties regarding the subject matter hereof and supersedes any and all other agreements, understandings, negotiations, or representations, whether oral or written, between Parties.
- r. **Agreement Execution.** Each multiple original of this document shall be deemed an original, but all multiple copies together shall constitute one and the same instrument.

In witness whereof, the authorized representatives of Parties have executed this Agreement in multiple originals, effective as of the day first written in paragraph one of this Agreement.

**UNIVERSITY OF HOUSTON**

**MERCHANT**

\_\_\_\_\_  
 Signature Date  
 Name: \_\_\_\_\_  
 AVC/AVP for Administration

\_\_\_\_\_  
 Signature Date  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_

**PARENT CORPORATION**

\_\_\_\_\_  
 Signature Date  
 Deborah A. Marks  
 Director, Cougar 1Card Program

\_\_\_\_\_  
 Signature Date  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_

**Note: Modification of this Form requires approval of OGC**