

ORIGINAL

Wells Fargo Payment GatewaySM User Agreement

IMPORTANT: READ CAREFULLY BEFORE USING THE WELLS FARGO PAYMENT GATEWAY SERVICES OR AGREEING TO THIS WELLS FARGO PAYMENT GATEWAY USER AGREEMENT. ONLY SOMEONE WHO HAS APPROVAL AND AUTHORITY MAY AGREE (OR REFUSE TO AGREE) TO THESE TERMS AND CONDITIONS.

THIS IS A LEGALLY BINDING AGREEMENT.

By agreeing to this document, or otherwise acting to use the *Wells Fargo Payment Gateway* services, operated by Wells Fargo Bank, N.A. ("Wells Fargo") as a licensed reseller of CyberSource Corporation, a California corporation ("CyberSource"), or the products or services offered through the *Wells Fargo Payment Gateway* (including, but, not limited to, 1) payment processing services such as transmission of transactions to the appropriate payment processing network or third party service provider, transaction responses (approved/declined), and the detailed reporting of those transactions for the viewing, managing and usage of merchants and 2) all aspects of the user interface including the virtual terminal and hosted order page) ("Gateway Services"), you, as the end user person or entity ("You" or "Your") agree and consent to the terms and conditions of this User Agreement (the "Agreement"). The Gateway Services may not be provided and no payment transactions may be processed without prior acceptance of the terms of this Agreement. If You do not agree to all of the terms of this Agreement, do not indicate your acceptance of this Agreement and do not use the Gateway Services. CyberSource along with any other third party suppliers providing services related to the Gateway Services shall be collectively referred to as "third party suppliers" herein.

Definitions. As used herein, the following definitions apply:

"**Claim**" means any arbitration award, assessment, charge, citation, claim, damage, demand, directive, expense, fine, interest, joint or several liability, lawsuit or other litigation, notice, infringement or misappropriation of any Intellectual Property Right or violation of any law, and any consequential, indirect, special, incidental or punitive damages and any attorney's fees and expenses incurred in connection therewith. For purposes of the foregoing Claim definition, a Claim shall be considered to exist even though it may be conditional, contingent, indirect, potential, secondary, unaccrued, unasserted, unknown, unliquidated, or unmatured.

"**Confidential Information**" means the Gateway API, Documentation, Operational Procedures, the terms and conditions of this Agreement (including any schedule, exhibit or addendum), pricing or other proprietary business information, and any other information provided to You by Wells Fargo, whether or not such information is marked as confidential; provided, however, that Confidential Information will not include information that: (a) is or becomes generally known to the public through no fault of Yours; (b) was lawfully obtained by You from a third party free of any obligation of confidentiality; (c) was already in Your lawful possession prior to receipt thereof, directly or indirectly, from the disclosing party; (d) is independently developed by You without the use of the Confidential Information; (e) is disclosed with the express written permission of Wells Fargo; or (f) is disclosed pursuant to a lawful court or governmental order, provided You provide Wells Fargo with prompt prior written notice of any proceeding that may involve such an order, and an opportunity to contest any disclosure at such proceeding.

"**Customer**" means Your customer who would like to provide payment for Your goods or services.

"**Documentation**" means collectively, the operating instructions, user manuals, and help files, in written or electronic form, made available to You by download, and that are intended for use in connection with the Gateway Services.

"**Gateway API**" shall mean the Gateway software, in object code form, that is licensed to You under this Agreement, that formats, encrypts, and decrypts messages transferred between Your systems and Wells Fargo's systems during the course of You obtaining Gateway Services.

"Intellectual Property Rights" means any and all patents, copyrights, trademarks, trade secrets, service marks, and any other intellectual property rights, and any applications for any of the foregoing, in all countries in the world.

"Wells Fargo Parties" means Wells Fargo's and its affiliates' officers, directors, employees, shareholders, agents and attorneys.

"Merchant Account" shall mean an account set up for a merchant that requires a card processor, bank, merchant i.d., terminal i.d., merchant account number, or otherwise named unique merchant number. Multiple physical or virtual storefronts that process transactions under the same unique merchant number shall be deemed as one (1) Merchant Account.

"Monthly Gateway Fees" means your estimated gateway fees as provided in your Pricing Schedule or the average of Your actual fees payable to Wells Fargo for the prior 3 months, whichever is higher.

"Operational Procedures" means Wells Fargo's published policies and procedures contained in the various documents provided to You, as amended from time to time, concerning the Gateway Services provided pursuant to this Agreement, the terms of which are incorporated in this Agreement as if fully set forth herein.

"Pricing Schedule" means the document setting forth the fees payable by You for use of the *Wells Fargo Payment Gateway* and Gateway Services, which schedule shall be attached hereto as Exhibit A.

"Platform" means the Wells Fargo operated, or approved, electronic payment platform(s) and/or gateway(s) through which the payment services contemplated under this Agreement are provided.

"Service Description" means any addendum hereto which sets forth the details, including any supplemental terms and conditions, related to any optional service obtained as part of the Gateway Services.

"Your Systems" means any web site(s) operated or maintained by You or on Your behalf through which transactions are submitted for processing, and all Your other associated systems.

"Updates" means an embodiment of the Gateway API that provides enhancements and/or improvements.

1. Term, Termination, Pricing and Amendment.

1.1 Term. The initial term of this Agreement shall commence and shall continue in force for three (3) years after it becomes effective. Thereafter, it shall continue until either party terminates the Agreement upon at least thirty (30) days written notice to the other. The initial term and any extension term are referred to as the "Term".

1.2 Termination without Cause. This Agreement may be terminated by either party upon thirty (30) days prior written notice to the other party, and which notice shall specify the effective date of the termination.

1.3 Termination for Cause.

- (i) Upon a material breach of any provision, duty or warranty under this Agreement or of any applicable Service Description, the nondefaulting party may terminate this Agreement by giving a thirty (30) calendar day written notice specifying the grounds for termination and allowing the breaching party to cure that default to the nondefaulting party's reasonable satisfaction by the end of the notice period. If Wells Fargo fails to cure its breach under this

sub-paragraph and You terminate this Agreement, Your termination shall not be subject to Section 1.4 (Early Termination Fee).

- (ii) Either party may immediately terminate this Agreement or any Service based upon any violation any laws, regulations, or Association Rules by the other party.
- (iii) Termination of Your agreement with Your payment processor shall allow Wells Fargo immediately terminate this Agreement (and/or any Gateway Services).

1.4 Early Termination Fee. You and Wells Fargo acknowledge and agree that in addition to any remedies contained in this Agreement or otherwise available under applicable law to Wells Fargo, and if this Agreement is terminated, (i) by You; or (ii) by Wells Fargo for cause, You shall be liable for an early termination fee equal to Your Monthly Gateway Fees multiplied by the remaining months left in the Term of the Agreement.

1.5 Effect of Termination. Upon the termination or expiration of this Agreement:

- (i) You will immediately account for and pay all Gateway Services fees and any early termination fees due and owing pursuant to this Agreement without demand or other notice of any kind, all of which are expressly waived by You; and
- (ii) Wells Fargo will cease providing Gateway Services.

1.6 Pricing. The Pricing Schedule is based on the transactional profile provided by You. You acknowledge that a variance between such profile and actual processing of transactions may result in Wells Fargo amending the Pricing Schedule. You agree that Wells Fargo may collect its fees under this Agreement in coordination with the provisions of your agreement with your payment processor. You further agree to establish a demand deposit account ("DDA") with Wells Fargo, and You agree that Wells Fargo may initiate ACH credits and debits to Your Wells Fargo DDA (and to any successor account with Wells Fargo that You may designate in writing) for the charges, fees, and/or other amounts due Wells Fargo for Gateway Services under this Agreement. You further authorize Wells Fargo to obtain and use information related to the DDA, including collected balance reports, and to obtain and use any information deemed by Wells Fargo to be reasonably necessary to process debit and/or credit entries to the DDA. You will be liable to Wells Fargo for any collection costs or attorney fees that are incurred in the event action is taken by Wells Fargo to collect any past due fees under this Agreement.

1.7 Amendment. Notwithstanding any other provision of this Agreement, Wells Fargo reserves the right to amend, at its discretion, the terms and conditions herein, including, without limitation, any addenda, and/or pricing and fees, by providing You notice thereof. Such amendments shall be effective thirty (30) days from the date notice is sent to You.

You may terminate this Agreement based on an amendment by Wells Fargo under this section (other than an amendment that is the result of a law, regulation or Association Rule change or requirement) ("Wells Fargo Amendment") if such Wells Fargo Amendment: (i) materially reduces the functionality of the Gateway Services, or (ii) increases the fees of the Gateway Services (unless the increase is due to Your failure to meet the pricing assumptions stated in the Pricing Schedule). In either of the above events, You may terminate this Agreement, as long as You provide written notice to Wells Fargo prior to the effective date of the Wells Fargo amendment at issue, and this termination shall not be subject to Section 1.4 (Early Termination Fee).

2. License Grant

2.1 Gateway API License. Subject to the terms of this Agreement, Wells Fargo hereby grants to You and You hereby accept, a personal, limited, non-exclusive, non-transferable license and right to the Gateway API and accompanying Documentation during the term of this Agreement for the following purposes: (i) install and use the Gateway API on as many machines as reasonably necessary (which

machines are and shall be maintained in facilities owned, occupied or leased by You) to use the Gateway Services for the purpose of selling products and services to Customers; and (ii) use the accompanying Documentation solely for the purpose of installing and using the Gateway APIs; and (iii) create a reasonable number of copies of the Gateway API and Documentation, with all copyright notices intact, for archival purposes only. It is expressly understood that the licenses granted in this Agreement extend to Your affiliates, Your agents, and Your sub-agents in the United States and world-wide who have a need to use the Gateway API system as end-users.

2.2 Documentation License. Subject to the terms and conditions of this Agreement, Wells Fargo hereby grants, and You hereby accept, a non-exclusive, non-transferable limited license, without right of sublicense, to use the Documentation during the term of this Agreement for the sole and limited purpose of supporting Your use of the Gateway API and *Wells Fargo Payment Gateway* service. You shall strictly follow all Documentation provided to You, as it may be amended from time to time by Wells Fargo, in its discretion. To the extent that there is any conflict between the Documentation and the terms of this Agreement, the terms of this Agreement shall govern and control. It is expressly understood that the licenses granted in this Agreement extend to Your affiliates, Your agents, and Your sub-agents in the United States and world-wide who have a need to use the Gateway API system as end-users.

2.3 Use Restrictions. You shall not, and shall not cause or permit any third party to: (i) use the Gateway API in any way, other than in accordance with this Agreement, the Documentation or as otherwise instructed by Wells Fargo in writing; (ii) use the Gateway API or Documentation, either directly or indirectly, to develop any product or service that competes with the products and services provided under this Agreement; (iii) disassemble, decompile, decrypt, extract, reverse engineer or modify the Gateway API, or otherwise apply any procedure or process to the Gateway API in order to ascertain, derive, and/or appropriate for any reason or purpose, the source code or source listings for the Gateway API or any algorithm, process, procedure or other information contained in the Gateway API, except as otherwise specifically authorized in accordance with this Agreement; (iv) provide the Gateway API or Documentation to any third party, other than to Your authorized employees, agents, sub-agents and contractors who shall be subject to confidentiality obligations that are no less restrictive than the confidentiality provisions of this Agreement; (v) make any copies of the Gateway API or Documentation, except as is incidental to the purposes of this Agreement, or for archival purposes (any copies made hereunder shall contain all appropriate proprietary notices); (vi) rent, lease, assign, sublicense, transfer, distribute, allow access to, or time share the Gateway API or Documentation; (vii) circumvent or attempt to circumvent any applicable security measures of the Gateway API; (ix) attempt to access or actually access portions of the *Wells Fargo Payment Gateway* service not authorized for Your use; or (x) use the Gateway API for any unlawful purpose.

2.4 Ownership of Intellectual Property Rights.

(a) Gateway API. Wells Fargo and/or its licensors shall retain all right, title and interest in and to the Gateway API and Documentation, and any and all Intellectual Property Rights embodied therein or associated therewith, and You shall have no rights thereto except as expressly set forth herein.

(b) Modifications and Derivative Works. Wells Fargo and/or its third party suppliers shall own all right, title, and interest in any modifications, derivatives, improvements, enhancements or extensions of or to the Gateway API ("Derivative Works"), including any related Intellectual Property Rights, regardless of which party creates such Derivative Work. You hereby irrevocably transfer, convey and assign to Wells Fargo in perpetuity all right, title, and interest in such Derivative Works, including without limitation all Intellectual Property Rights, including the right to make Derivative Works and collective works with respect thereto, it being understood, however, that You have, and transfer, no rights with respect to Your products (exclusive of the Gateway API and Derivative Works). Wells Fargo will have the exclusive right to apply for such Intellectual Property Rights as it wishes with respect to the Derivative Works. You agree to execute such documents, render such assistance, and take such other action as Wells Fargo may reasonably request, at Wells Fargo's expense, to apply for, register, perfect, confirm, and protect Wells Fargo's rights in the Derivative Works including (without limitation) an assignment of copyright. Without limiting the foregoing, Wells Fargo will have

the exclusive right to commercialize, prepare and sell products based upon, sublicense, prepare derivative works from, or otherwise use or exploit the Derivative Works. You hereby waive any and all moral rights, including any right to identification of authorship or limitation on subsequent modification, that You (or Your employees, agents or consultants) have or may have in any Derivative Works. You will not remove, modify, or obscure any copyright or other proprietary notices on the Gateway API or the Documentation.

2.5 Updates. From time to time Wells Fargo may, at its discretion, release Updates. In the event Wells Fargo so notifies You of any such Update, You shall integrate and install such Update into Your systems within thirty (30) days of Your receipt of such notice. You acknowledge that failure to install Updates in a timely fashion may impair the functionality of the Platform or any Gateway Services provided hereunder. Neither Wells Fargo nor its third party suppliers will have any liability for Your failure to properly install the most current version of the Gateway API or any Update, and Wells Fargo will have no obligation to provide support or services for any outdated versions.

2.6 Licensors. The licenses granted hereunder may be subject to other licenses currently held by Wells Fargo. Should any license held by Wells Fargo to certain technology or Gateway API be terminated or suspended, the corresponding license(s) granted to You hereunder may also be terminated or suspended in the sole and absolute discretion of Wells Fargo. You acknowledge and agree to such potential termination or suspension and hereby waive any and all damages, whether actual, incidental or consequential resulting therefrom. If, pursuant to this Section, Wells Fargo terminates any license(s) granted to You hereunder, You shall have the right to terminate this Agreement immediately without penalty.

2.7 Export Compliance. You agree not to export or re-export the Gateway API or any underlying information or technology except in full compliance with all applicable laws and regulations. In particular, but without limitation, none of the Gateway API or underlying information or technology may be downloaded or otherwise exported or re-exported (i) to any country to which the United States has embargoed goods (or any national or resident thereof); (ii) to anyone on the United States Treasury Department's list of Specially Designated Nationals or the United States Commerce Department's Table of Deny Orders; or (iii) in a any manner not in full compliance with the requirements of the United States Bureau of Industry and Security and all applicable Export Administration Regulations. If You have rightfully obtained the Gateway API outside of the United States, You agree not to re-export the Gateway API except as permitted by the laws and regulations of the United States and the laws and regulations of the jurisdiction in which You obtained the Gateway API. You warrant that you are not located in, under the control of, or a national or resident of any such country or on any such list.

2.8 Return/Destruction. Upon termination or expiration of this Agreement, all licenses granted hereunder shall immediately terminate, and within five (5) days thereof, You shall either return to Wells Fargo or destroy the Gateway API and the Documentation, and shall so certify to Wells Fargo in writing.

2.9 No other Licenses. Except as expressly provided above, no license for any patents, copyrights, trademarks, trade secrets or any other intellectual property rights, express or implied, are granted hereunder.

2.10 Use of Transaction Data. As required by applicable law and regulations, Wells Fargo reserves the right to copy and distribute to third parties any information associated with Your use of the Gateway API or Your activities on the *Wells Fargo Payment Gateway*.

3. Service and Service Descriptions

In addition to use of the Wells Fargo Payment Gateway service, You may subscribe for use of optional Gateway Services, subject to Wells Fargo's approval. Wells Fargo shall provide such elected Gateway Services in accordance with this Agreement and, and any terms or conditions applicable specifically to such Gateway Service(s) which are described in the applicable Service Description. Each Service Description shall be effective with respect to You, upon the earlier of: (i) Your first use of the applicable Service; or (ii) confirmation notice by Wells Fargo that You have been approved for the Service and that the Service is now

available to You. Wells Fargo may terminate Your rights to use a Gateway Service based on failure to comply with this Agreement (which includes the applicable terms specific to such Service) without terminating this Agreement or other Gateway Services, however, a termination of this Agreement will terminate all Gateway Services.

4. Platform Matters

4.1 Integration with Your Systems. While Wells Fargo provides the Gateway API to You, You acknowledge that the Gateway API and/or hosted order page may by itself be insufficient to allow Your Systems to function with the Platform. Programming, development and maintenance of Your Systems and their functionality are Your sole responsibility. You have the sole responsibility to select and employ any competent programming agent(s) to accomplish the programming required to make Your Systems function correctly with the Platform and the payment services contemplated hereunder ("Integration"). You shall be responsible for all technical support for Your Systems and Integration related issues. You agree that You will use commercially reasonable efforts to complete the Integration as soon as possible. You will be responsible for all of Your own development and implementation costs associated with such Integration. Notwithstanding any other provision of this Agreement, You acknowledge that unless and until You complete the Integration, no services need be provided by Wells Fargo to You pursuant to this Agreement, except as otherwise specifically provided in Section 4.2 below. In addition, You acknowledge and agree that, even if you have completed Integration, if You have not entered into a valid merchant processing agreement with processor acceptable to Wells Fargo you cannot receive payment processing services through the *Wells Fargo Payment Gateway* service.

4.2 Set-Up Assistance Services. Subject to Section 4.1 above, upon Your request to Wells Fargo, and upon payment of any applicable Fees, Wells Fargo will provide You with set-up services to assist with the Integration.

4.3 Shut Downs. Wells Fargo reserves the right, from time to time, without prior notice, to shut down and restart the Platform for maintenance and/or Gateway API upgrades; provided, however, that Wells Fargo will provide you with commercially reasonable prior notification if Wells Fargo anticipates the need to shut down the platform for more than 1 hour.

4.4 Orders by Customers. You are solely responsible for accepting, processing, and filling any orders for purchases by Your Customers, and for handling any inquiries arising therefrom. You shall use the highest standards in the industry in responding to complaints by Customers. Neither Wells Fargo nor its third party suppliers will be responsible or liable for any unauthorized access to Your data or Your Systems by any means or device.

5. Confidentiality. You shall not disclose the Confidential Information to any third party, or use the Confidential Information in any manner except as explicitly authorized under this Agreement. You agree to use the same degree of care to prevent disclosure of the Confidential Information as You use to protect Your own confidential information, but in no event less than a reasonable standard of care. In the event of any unauthorized disclosure of Confidential Information, You shall immediately provide Wells Fargo with written notice of the details of such disclosure (including but not limited to the identification of the receiving party).

6. Security of Information.

6.1 You warrant that You will comply with all required security standards at all times during this Agreement. Any failure to comply with such security requirements: will permit Wells Fargo to suspend the *Wells Fargo Payment Gateway* service; and/or shall constitute a material breach of this Agreement and permit termination for cause under Section 1 above. Without limiting the foregoing, you specifically agree to comply with all Card Association Security Requirements including, without limitation, the Visa Customer Information Security Program (CISP), the MasterCard Site Data Protection Program (SDP), Payment Card Industry Data Security Standards (PCI), any other applicable Association requirements regarding data security, and any additional security requirements provided to you from time to time by Wells

Fargo. If any Wells Fargo security requirements provided to you are changed, Wells Fargo shall provide You with notice of such changed security requirements, and You shall have thirty (30) days (or a longer period as may be agreed to between the parties) to make the changes necessary to comply with the changes to such Wells Fargo security requirements.

6.2 Wells Fargo shall be responsible for the security of data once it becomes part of the *Wells Fargo Payment Gateway*, and shall comply with applicable laws and Card Association requirements as they relate to the security and processing of this data. Data will become part of the *Wells Fargo Payment Gateway* when it has been received by Wells Fargo from Your systems, and data will cease to be part of the *Wells Fargo Payment Gateway* when it has been received by the processor from Wells Fargo.

7. Privacy. You agree that, during the term of this Agreement, You will adequately communicate and comply with an appropriate privacy policy explaining Your online collection and use of the personal information of Your Customers ("Privacy Policy"). Unless required by law, Bank Card Association Rules, or done pursuant to this Agreement, You shall not, under any circumstances, sell, purchase, provide, or otherwise disclose any Customer's account information, transaction information, or other personal information to any third party. You shall store all data securely.

8. Audit Rights. Upon commercially reasonable advance notice to You, Wells Fargo may audit Your usage, records and security of the Gateway API, Your Customer's payment processing information, and the Gateway Services provided hereunder to ensure (i) that You are using the Gateway API and the services in full compliance with the provisions of this Agreement; (ii) that all applicable fees have been paid; (iii) that You are adhering to Your Privacy Policy; and; (iv) that You are in full compliance with all applicable laws, regulations and rules (including but not limited to Bank Card Association rules). Any such audit shall be conducted during regular business hours at Your offices and shall not interfere unreasonably with Your business.

9. Assignment of Agreement or Processing for Others. You may not assign this Agreement without Wells Fargo's prior written consent. You may not transfer or sell Your rights under this Agreement. You are prohibited from processing payments for or on behalf of any other individual or business. Use of the Wells Fargo Gateway or Gateway Services is provided for single Merchant Accounts only. Wells Fargo may freely assign this Agreement, its rights, benefits or duties hereunder, either in whole or in part. Subject to the foregoing, this Agreement shall inure to the benefit of and be binding upon the successors and assigns of Wells Fargo and Your heirs, executors, administrators, successors and assigns. Any sale, transfer, reorganization, merger or change in control of all or substantially all of Your assets shall be deemed to be an assignment for purposes of this Section.

10. Legal Responsibility.

10.1 Enforcement. In the event You violate any terms or conditions of this Agreement, You shall pay for all costs, including reasonable attorneys' fees for actions taken by Wells Fargo, whether by suit or otherwise, to enforce Wells Fargo's rights under this Agreement. In the event of any legal action with third parties or regulatory agencies concerning any transaction or event arising under this Agreement, You shall: (i) promptly notify Wells Fargo of the Claim(s) or legal action; (ii) reasonably cooperate with Wells Fargo in the making of any Claim(s) or defense(s); and (iii) provide information, assist in the resolution of the Claim(s) and make available at least one employee or agent who can testify regarding said Claim(s) or defense(s).

10.2 Indemnification. You shall indemnify, defend, and hold harmless all Wells Fargo Parties from any Claim(s) arising from the conduct of Your business, any transactions submitted using the *Wells Fargo Payment Gateway* service hereunder for payment processing, any false or inaccurate representation made by You or the negligence, fraud, dishonesty or willful behavior of any of Your employees or agents, or from Your failure to strictly comply, in whole or in part, with any: (i) terms and conditions pursuant to this Agreement and any addenda hereto or Documentation; or (ii) applicable law, regulations or rules. Upon written notice from Wells Fargo to You, You shall immediately undertake the defense of such Claim by representatives of Your own choosing, subject to Wells Fargo's reasonable approval.

10.3 IP Infringement. If the *Wells Fargo Payment Gateway* service (or any part thereof) is claimed, or is adjudicated, to be infringing any patent, copyright or any other intellectual property right of any third party, Wells Fargo, at its option and own expense, may take one or more of the following actions:

- (i) secure for You the right to continue using the *Wells Fargo Payment Gateway* service at no additional charge to You;
- (ii) replace or modify the *Wells Fargo Payment Gateway* service to make them non-infringing without material reduction of functionality; or
- (iii) terminate this Agreement or any applicable Gateway Service.

Wells Fargo (or its third party suppliers) shall have no liability for any claim of infringement based on (i) products or services of Wells Fargo (and/or its third party suppliers) which have been modified by parties other than Wells Fargo (or its third party suppliers); (ii) Your use of the *Wells Fargo Payment Gateway* service and/or any Gateway Services in conjunction with data where use with such data gave rise to the infringement claim; (iii) Your failure to install upgrades or patches provided by Wells Fargo (or its third party suppliers) where such upgrade or patch would have removed the infringing condition; or (iv) Your use of the Gateway Services with software or hardware not authorized by Wells Fargo (or its third party suppliers), where such use with such other software or hardware gave rise to the infringement claim.

THE ABOVE REMEDIES ARE THE SOLE AND EXCLUSIVE LIABILITY OF WELLS FARGO AND ARE THE SOLE AND EXCLUSIVE REMEDIES AVAILABLE TO YOU AGAINST WELLS FARGO IN THE EVENT OF SUCH ACTION OR THREATENED INFRINGEMENT.

11. Limitation of Liability.

11.1 General Limitations. Neither Wells Fargo nor its third party suppliers shall be liable for the merit and legitimacy of the orders forwarded by You. All liability for validity of orders remains with You. Neither Wells Fargo nor its third party suppliers shall be responsible for any data entry errors, Customer misrepresentations, or reporting errors resulting from Your actions. Neither Wells Fargo nor its third party suppliers shall be liable to You or Your Customers for the accuracy of the information provided by the *Wells Fargo Payment Gateway* service or use of the Gateway Services.

11.2 Special Damages. In no event shall Wells Fargo or its third party suppliers be liable to You, or to any other person or entity, under this Agreement, or otherwise, for any punitive, exemplary, special, incidental or consequential damages, including, without limitation, any loss or injury to earnings, profits or goodwill.

11.3 Maximum Liability. Notwithstanding anything to the contrary contained in this Agreement, in no event shall Wells Fargo or its third party suppliers' liability under this Agreement for all Claims arising under, or related to, this Agreement exceed, in the aggregate (inclusive of any and all Claims made by You against Wells Fargo and/or its third party suppliers, whether related or unrelated) the total amount of fees paid by You for the Gateway Services during the 12-month period immediately preceding the date the event giving rise to such Claim(s) occurred.

11.4 Other Damages. In addition to the limitation of liability provisions set forth herein, neither Wells Fargo nor its third party suppliers will be liable for any Claims under this Agreement arising directly or indirectly from or otherwise concerning: (a) any termination, suspension, delay or disruption of service (including billing for a service) by the Internet, any common carrier or any third party service provider; (b) any failure, disruption or malfunction of the Gateway API, the services provided hereunder or the Internet, or any communications network, facility or equipment beyond Wells Fargo's reasonable control, whether or not attributable to one or more common carriers or third party service providers; (c) any failed attempts by You or Your Customers to access any Systems or to complete processing transactions; or (d) any failure to transmit,

obtain or collect data from Customers or for human, machine or Gateway API errors or faulty or Your or Your Customer's erroneous input.

12. DISCLAIMER OF WELLS FARGO WARRANTIES. YOU ACKNOWLEDGE AND AGREE THAT THE USE OF THE WELLS FARGO PAYMENT GATEWAY, GATEWAY SERVICES AND THE GATEWAY API ARE AT YOUR SOLE RISK. NEITHER WELLS FARGO NOR ITS THIRD PARTY SUPPLIERS MAKE ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AND NO IMPLIED AT LAW WARRANTY SHALL ARISE FROM THIS AGREEMENT, THE GATEWAY API, THE DOCUMENTATION, THE GATEWAY SERVICES PROVIDED HEREUNDER, OR FROM PERFORMANCE BY WELLS FARGO, INCLUDING, WITHOUT LIMITATION: (A) ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE; (B) ANY WARRANTIES OF NONINTERFERENCE OR NON-INFRINGEMENT; OR (C) ANY WARRANTIES THAT ANY PRODUCT OR SERVICE PROVIDED HEREUNDER (INCLUDING BUT NOT LIMITED TO THE GATEWAY API) WILL (1) MEET YOUR REQUIREMENTS; (2) OPERATE ACCORDING TO YOUR EXPECTATIONS; (3) PROVIDE ACCURATE DATA; OR (4) OPERATE UNINTERRUPTED OR ERROR FREE. NEITHER WELLS FARGO NOR ITS THIRD PARTY SUPPLIERS MAKE ANY REPRESENTATION, WARRANTY OR GUARANTEE WHATSOEVER IN RELATION TO ANY PRODUCTS OR SERVICES PROVIDED BY THIRD PARTY SERVICE PROVIDERS. ANY AND ALL SUCH WARRANTIES DESCRIBED IN THIS SECTION ARE EXPRESSLY DISCLAIMED BY WELLS FARGO AND ITS THIRD PARTY SUPPLIERS AND ARE WAIVED BY YOU. WELLS FARGO AND ITS THIRD PARTY SUPPLIERS DO NOT WARRANT THAT ANY ERRORS WILL BE CORRECTED. EXCEPT AS OTHERWISE SPECIFICALLY SET FORTH HEREIN, ALL GATEWAY API AND SERVICES PROVIDED HEREUNDER ARE PROVIDED ON AN "AS-IS, WITH ALL FAULTS" BASIS. THIS DISCLAIMER OF WARRANTIES CONSTITUTES AN ESSENTIAL PART OF THE AGREEMENT. All decisions to reject any processing transaction or payment for Your products or services are solely Your responsibility.

13. Your Warranties. You warrant all of the following: (i) All representations and statements made in this Agreement and any other related document, by You or on Your behalf are true, accurate, and complete in all respects and You hereby authorize Wells Fargo to verify and confirm all information provided herein by any means at its disposal; (ii) You are engaged in a lawful business, which includes the sale of merchandise and/or services and are duly licensed to conduct such business under the laws of the state(s), county(s), city(s), and country(s) in which You operate; (iii) You shall not submit any payment transactions that violate any laws of any related state, county, city, or country or any bankcard association rules and shall otherwise comply with all applicable laws, regulations, or rules in connection with Your obligations under this Agreement; (iv) That there are no outstanding or contemplated assignments, grants, licenses, encumbrances, security interests, liens, obligations or agreements (whether written, oral or implied) that are inconsistent with this Agreement and the rights and obligations herein; (v) That you will process your card transactions with a Wells Fargo approved card transaction processor ("Processor") throughout the Term of this Agreement; (vi) That Your election to purchase optional Gateway Services (other than access to the *Wells Fargo Payment Gateway* service itself) may require You to sign additional agreements, which agreements will be provided to You prior to the purchase of such Gateway Service; (vii) That You shall be responsible for any fines, penalties, fees or assessments imposed by a Bank Card Association based upon Your (i) use of the *Wells Fargo Payment Gateway* Service or (ii) noncompliance with a Bank Card Association's rules or requirements; (viii) That Wells Fargo may use subcontractors to provide some or all of the *Wells Fargo Payment Gateway* service, and shall have the right to terminate or retain subcontractors in Wells Fargo's sole discretion; (ix) That Your installation, configuration and use of the Gateway Services shall conform to specifications set forth in the Documentation; (x) That You shall bear (a) all collection risk (including without limitation, credit card fraud and any other type of fraud) with respect to sales of its products; and (b) all responsibility and liability for the proper payment of all taxes that may be levied or assessed (including without limitation, sales taxes) in respect of sales of its products; (xi) That You shall be solely responsible for maintaining complete backup records of all information relating to orders, inquiries, and purchases and any information submitted to Wells Fargo (or its third party suppliers) for the purpose of providing the Gateway Services; and (xii) that in the event of a conflict between the terms of a Service Description and this Agreement, the terms of the Service Description shall govern.

14. Notices. You agree to notify Wells Fargo of any change in Your name, type of business, or any other information required on Your merchant processing application at least thirty (30) business days prior to the effective date of change. Any notice or other communication required or permitted to be given hereunder shall be in writing, addressed or transmitted to the party to be notified at such party's last known address or number, and shall be: (i) if sent by Wells Fargo, hand delivered or delivered by facsimile transmission, overnight courier or certified, registered, regular mail or e-mail; or (ii) if sent by You, certified or registered mail, postage prepaid return receipt requested. Any notice delivered hereunder shall be deemed effective, as applicable, upon delivery, if hand delivered or sent by overnight courier; upon receipt as evidenced by the date of transmission indicated on the transmitted material, if by facsimile transmission or e-mail; on the date of delivery indicated on the return receipt, if mailed by certified or registered mail; or ten (10) days after mailing, if by regular mail (or as otherwise required by applicable law). The parties' addresses may be changed by written notice to the other party as provided herein. Until changed by subsequent written notice to You, Wells Fargo's address for notices under this Section shall be: Wells Fargo Bank, 1200 Montego Way, Walnut Creek, CA 94598, Attn: Merchant Services.

15. Force Majeure. Wells Fargo shall not be held responsible for any delays in or failure or suspension of service caused by mechanical or power failure, computer malfunctions (whether Gateway API, hardware and firmware related), transmission link failures, communication failures, failure, delay or error in clearing or processing a transaction (including through interchange) or any other system, failure, delay or error by any third party or in any other third party system, strikes, labor difficulties, fire, inability to operate or obtain service for its equipment, unusual delays in transportation, acts of God or other causes reasonably beyond the control of Wells Fargo.

16. Governing Law and Integration. This Agreement, plus any addenda attached hereto, constitute the entire Agreement between the parties concerning subject matter hereof and supersedes all prior and contemporaneous understandings, representations and agreements in relation to its subject matter. **THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA, WITHOUT REGARD TO THE CONFLICT OF LAWS PRINCIPLES THEREOF.** The parties agree that any suit, action, or proceeding arising out of or relating to this Agreement, or the interpretation, performance or breach of this Agreement, shall be instituted in any court of the State of California. Each party irrevocably submits to the jurisdiction of those courts and waives all objections to jurisdiction or venue.

17. Severability and Interpretation. If any provision, in whole or in part, of this Agreement is held invalid or unenforceable for any reason, the invalidity shall not affect the validity of the remaining provisions of this Agreement, and the parties shall substitute for the invalid provision a valid provision which most closely approximates the intent and economic effect of the invalid provision. Neither this Agreement, nor any addenda, shall be interpreted in favor or against any party because such party or its counsel drafted this Agreement or such addenda. No course of dealing, usage, custom of trade or communication between the parties shall modify or alter any of the rights or obligations of the parties under this Agreement. This Agreement is solely for the benefit of Wells Fargo (and its affiliates) and neither You nor any other person or entity shall have any right, interest or claim under this Agreement. As used in this Agreement, (i) the term "include," or any derivative of such term, shall not mean that the items following such term are the only types of such items; (ii) the term "shall" indicates a mandatory obligation; (iii) the term "may" indicates a permissive election and does not imply any duty to exercise such election; and (iv) the term "discretion" means the sole and absolute discretion of the party granted the discretion, absent an express limitation on such discretion.

18. Amendment and Waiver. No modification, amendment or waiver of any of the terms and conditions of this Agreement shall be binding upon Wells Fargo, whether written, oral, or in any other medium, unless made in writing and approved and signed by Wells Fargo. All rights and duties within this Agreement are material and time is of the essence; no waiver of any rights hereunder shall be deemed effective unless in writing executed by the waiving party; no waiver by either party of a breach or any provision of this Agreement shall constitute a waiver of any prior or subsequent breach of the same or any other provision of this Agreement; no failure to exercise, and no delay in exercising, any right(s) hereunder on the part of either party shall operate as a waiver of any such right; all of Wells Fargo's rights are cumulative; and, no single or partial exercise of any right hereunder shall preclude further exercise of such right or any other right.

19. **Legal Relationship.** Each party is an independent contractor and not an agent or representative of the other party. No party shall have any right or authority to create any obligation or make any representation or warranty in the name or on behalf of any other party. This agreement shall not be interpreted or construed to create an association, joint venture or partnership between the parties or to impose any partnership obligation or liability upon any party.

20. **No Unauthorized Publicity.** You shall not use the name, marks or refer to the identity of Wells Fargo in advertisements, publicity releases, promotional materials or marketing correspondence without first securing the written consent of Wells Fargo.

21. **Survival.** Upon termination or expiration of this Agreement, a party's obligations shall cease except for those remaining or required to be performed following such termination. For the avoidance of doubt, the Definitions and the provisions of Sections 2.4, 2.6, 2.9, 2.10, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, and 19 shall survive the termination or expiration of this Agreement. All representations, warranties, indemnities and covenants made herein shall survive the termination of this Agreement and shall remain enforceable after such termination.

BY ACCEPTING THIS AGREEMENT BY SIGNING BELOW OR BY EXECUTING ANOTHER DOCUMENT IN WHICH THIS AGREEMENT IS REFERENCED, YOU ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTAND AND AGREE TO BE BOUND BY ALL TERMS IN THIS AGREEMENT (INCLUDING THE SPECIFIC LIMITATIONS, RESTRICTIONS AND DISCLAIMERS SET FORTH ABOVE) AND ALSO THAT YOU ARE AUTHORIZED TO MAKE A DECISION TO AGREE TO AND ACCEPT THIS LEGALLY BINDING AGREEMENT. IF YOU DO NOT AGREE TO ALL TERMS IN THIS AGREEMENT, YOU ARE NOT AUTHORIZED TO USE THE WELLS FARGO PAYMENT GATEWAY AND GATEWAY SERVICES.

Approved as to form

By: Karin Murabito
Karin Murabito
Sr. Deputy City Attorney

ACCEPTED AND AGREED:

City of San Jose ("Company")

By: Julia H. Cooper
Name: Deputy Julia H. Cooper
Title: Deputy Director of Finance

Wells Fargo Bank, N.A. ("Wells Fargo")

By: K. Risk Olsen
Name: K. Risk Olsen
Title: Vice President

Exhibit A
Pricing Schedule

[See attached]

Wells Fargo Treasury Management Proposal

City of San Jose

Pricing as of May 2009

<u>Service Description</u>	<u>Charge Basis</u>	<u>Price</u>
Merchant Services		
Pmt Gateway Credit Card Trans	transaction	0.10000
Pmt Gateway Monthly Base	gateway account	75.00000

Total Monthly Activity Charges

Setup Charges

Pmt Gateway Set Up - Medium	set up	750.00000
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Total Setup Charges

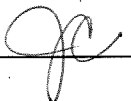
The above pricing estimate is based on certain assumptions drawn from projected volume, scope of services and/or other information you have provided. The pricing is subject to change if the actual volume and/or scope of services differ from the assumptions upon which the pricing estimate was based.

Wells Fargo Payment Gateway Disclosure:

The following disclosure pertains to Payment Gateway pricing only.

It does not apply to non-Payment Gateway pricing in this proposal.

The proposed Pricing Schedule is guaranteed for 60 days from the date proposed. Your acceptance of the pricing herein is indicated by execution of the agreement to which it is attached. You are responsible for any charges assessed by outside third parties that are not disclosed in the Wells Fargo Payment Gateway Agreement, including this Pricing Schedule. To the extent that this Pricing Schedule includes pricing for third party products and services, Wells Fargo disclaims any and all legal liability and responsibility for said products and services. Your agreement with any third party provider shall govern Your relationship with such third party provider. In the event that Wells Fargo is billed for the third party's services, You agree to reimburse Wells Fargo Bank for such services. Wells Fargo's pricing is based on the information provided by You. Any difference to our stated understanding may affect this pricing. Fees for supplies, shipping, handling and applicable sales tax may apply and are subject to change without notice. Additional information is available upon request.

 Merchant Initials

RECEIVED
San Jose City Clerk

2001 JUN 15 PM 1:33



Memorandum

TO: City Clerk's Office

FROM: Bonnie Hamilton

SUBJECT: Payment Gateway Service Agreement

DATE: June 15, 2009

Please execute the enclosed Payment Gateway Service Agreements. These were intended to be part of the group of Merchant Card agreements executed on June 3, 2009 but could not be included due to missing Wells Fargo signatures. The insurance requirement was cleared on May 20, 2009.

Regards,

Bonnie Hamilton
Ext: 53875

RECEIVED
San Jose City Clerk
2009 JUN 15 P 1:32

