



## **Terms and Conditions of Merchant Gift/Loyalty Agreement**

All information contained on this application was completed by owner(s) and/or officer(s) of Customer and they warrant that all information indicated throughout this application are accurate and acknowledge that any variance to this information could result in delayed and/or withheld settlement of funds. No blank spaces were left incomplete. "N/A" or "None" has filled in any spaces where applicable. This agreement shall not be binding or take effect until Customer has been approved by an OPTICARD officer and an identifying number has been issued.

### **RECITALS**

OPTICARD has developed a proprietary prepaid software and service program known as the "Opticard". The Opticard service and product (together with its related software, cards and documentation, as updated from time to time, herein, the "Opticard Service") integrates with various retail store locations to provide a prepaid/stored value tracking system for anonymous activity at a retail business. Customer desires to purchase the Service from OPTICARD for use in its retail business and OPTICARD desires to provide the Opticard Service to Customer. OPTICARD and Customer would like to specify herein the terms and conditions upon which Customer will purchase the Opticard Service.

### **AGREEMENTS**

Now, therefore, for and in consideration of the mutual covenants contained herein and other good and valuable consideration, OPTICARD and Customer agree as follows:

### **OPTICARD LICENSE**

OPTICARD hereby grants to Customer a limited non-exclusive revocable license and right to use, order and purchase from OPTICARD the Opticard Service at locations to be determined at a later date. Customer may submit requests for Opticard Service in a form designated by OPTICARD. This Merchant Gift/Loyalty Agreement shall constitute the initial customer order under this Agreement. Pricing for Opticard Service shall be as provided in the Merchant Gift/Loyalty Agreement hereto and by this reference incorporated herein. OPTICARD will notify Customer of acceptance (in writing or electronically) of each additional customer order and the date by which OPTICARD will initiate such additional Opticard Service. Customer covenants and agrees that OPTICARD shall be the sole and exclusive stored value processing provider to Customer and its affiliates during the term of the Agreement; each Opticard card issued pursuant to this Agreement will contain an account number and magnetic stripe encoded to OPTICARD's specifications and will incorporate an approved Opticard logo into the design of the card. If Customer fails to perform any of its obligations hereunder or shall commit an act of bankruptcy within the meaning of the Federal Bankruptcy Act or if bankruptcy, receivership, insolvency, liquidation, or other similar proceedings shall be instituted involuntarily against Customer and such proceeding is not dismissed within sixty (60) days of such notice. In the event of such termination, OPTICARD shall have no obligation to continue to maintain or support the Opticard Service; no payments made to OPTICARD by Customer hereunder shall be refunded to it; and the obligations of Customer under this Agreement shall survive any termination thereof.

### **FEES, PAYMENT AND TAXES**

The fees required under the terms of this Agreement are as set forth on page one of this Agreement. Payment of monthly recurring charges for the Opticard Service will be collected via ACH from Customer's designated bank account (see Page 1) on or about the 5th of each month. Other charges including setup fees, cards, and hardware are due as indicated on Page 1 of this Agreement will be invoiced monthly and due 30 days after the date of invoice and similarly will be collected via ACH from Customer's designated bank account on or about the 5th of each month following the month of invoice. Transactions performed outside the 48 contiguous states may incur a communications surcharge per transaction. Past due amounts bear interest at 1.5% per month or the highest rate allowed by law (whichever is less). Customer is responsible for all charges respecting the Service, even if incurred as the result of unauthorized service. If Customer reasonably disputes an invoice or a monthly recurring charge, Customer may pay the undisputed amount and submit written notice of the disputed amount (with details of the nature of the dispute and the Opticard Services and invoice(s) or charge(s) disputed). Disputes must be submitted in writing within 90 days from the date of

the invoice or billing. If the dispute is resolved against Customer, Customer shall pay such amounts plus interest from the date originally due.

Except for taxes based on OPTICARD's net income, Customer will be responsible for all taxes that arise in any jurisdiction, including value added, consumption, sales, use, gross receipts, excise, access, bypass, franchise or other taxes, fees, duties, charges or surcharges imposed on or incident to the provision, sale or use of the Opticard Service. Charges for Opticard Service are exclusive of taxes. Customer may present OPTICARD a valid exemption certificate and OPTICARD will give effect thereto prospectively.

Billing is performed on a monthly basis. Any account signed during days 1-15 of the month will be billed for that full month. Accounts signed after the 15th day of the month will be billed starting the following month. Monthly invoices will be emailed to merchant and collected via ACH transfer. Invoices will also be available via the merchants web account. A copy of a voided check must be submitted with agreement. Merchant must maintain a valid email address on file with OPTICARD and must maintain a valid checking account in which OPTICARD can draft payments.

### **SERVICE PROVIDED**

OPTICARD will provide the following facilities and capabilities necessary in order to provide Customer with the following level of service:  
Authorization. OPTICARD will provide authorization of an OPTICARD transaction requested and initiated by the retail location via a dial telephone, IP or other network structure and will respond to each request with an approval or decline. Card. Each Opticard card issued pursuant to this Agreement will contain an account number and magnetic stripe encoded to OPTICARD's specifications. Reports. OPTICARD will provide periodic reports and/or file transfers for the purpose of enabling Customer to better monitor and manage the program implemented at each of its affiliated retail store locations. Customer will have access to an OPTICARD online web site through a username and password. Emergency Service. In the event an act of God, a drastic machine failure, or clerical error renders Customer's system using the Opticard Service inoperable, OPTICARD agrees to use its best efforts to provide whatever reasonable service is required and requested by Customer within the scope of OPTICARD's ability to restore the Opticard Service to operation. The highest priority shall be given to the situation by OPTICARD.

### **AUTHORITY OF PARTIES**

Each party represents and warrants that it is a corporation duly authorized, validly existing, and in good standing under the laws of the jurisdiction under which it is incorporated and the execution of this Agreement and that this Agreement is valid and binding upon the party and is enforceable in accordance with its terms. Customer acknowledges and agrees to the marks or trade names of OPTICARD are valid logos, service marks, trademarks, and/or trade names owned by OPTICARD and its affiliates (the "Opticard Marks") and that OPTICARD and its affiliates have sole right to use the Opticard Marks and that valuable good will is attached to the Opticard Marks. Customer will not use the Opticard Marks unless specifically agreed to in writing in advance by OPTICARD.

### **WARRANTY/LIMITATION OF REMEDY**

OPTICARD warrants that any maintenance or other services rendered to Customer in accordance with the terms of this Agreement will be performed in a professional manner by qualified personnel. OTHER THAN THOSE WARRANTIES SET FORTH BOTH PARTIES SPECIFICALLY DISCLAIM ALL WARRANTIES EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE OPTICARD SERVICE, DEFECTS IN THE DISKETTE OR OTHER PHYSICAL MEDIA AND DOCUMENTATION, OPERATION OF THE PROGRAMS AND/OR HARDWARE, AND ANY PARTICULAR APPLICATION OR USE OF THE PROGRAMS AND/OR HARDWARE CONSTITUTING A PART OF THE OPTICARD SERVICE.

### **LIMITATION OF LIABILITY**

OPTICARD and Customer agree to indemnify and hold each other harmless from any liability, expense, cost, damage settlement obligation arising from any claim, suit, or cause of action relating to the use of the Opticard Service resulting from gross negligence or willful, knowing and intentional misconduct of either itself or any of its agents or employees.

OPTICARD's liability under this Agreement shall not exceed the fees paid by Customer to OPTICARD under this Agreement. OPTICARD will not be liable for lost profits or other consequential or incidental damages, even if OPTICARD has been advised of the possibility of such damages. Customer shall have no claim for any liability that is brought more than two (2) years from the occurrence of any events that may rise to such liability.

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY LOSS OR PROFIT OR ANY OTHER COMMERCIAL DAMAGE, INCLUDING BUT NOT LIMITED TO SPECIAL, INCIDENTAL CONSEQUENTIAL, PUNITIVE OR OTHER DAMAGES. ALL LIABILITY BY EACH PARTY HEREUNDER IS EXPRESSLY LIMITED TO THE AMOUNTS PAID TO SUCH PARTY UNDER THIS AGREEMENT.

### **CANCELLATION AND TERMINATION CHARGES**

Customer may terminate the Opticard Service upon 30 days written notice to OPTICARD identifying the terminated Opticard Service. If Customer does so, or if Opticard Service is terminated by OPTICARD as the result of an uncured default by Customer, Customer shall pay OPTICARD a termination charge equal to the sum of (i) all unpaid amounts for Opticard Service provided through the date of termination; (ii) any off system third party termination charges paid by OPTICARD for the Opticard Service; and (iii) a termination fee of \$95. Customer has a 90 day introductory period that would allow the Customer to cancel this agreement with no termination charge as outlined in (iii) above.

## ASSIGNABILITY

Customer may not assign its rights and obligations hereunder to a third party, without prior written consent of the other party, which consent shall not be unreasonably withheld, provided that such consent shall not relieve the assigning party of any of its obligations hereunder. Notwithstanding the foregoing, either party may assign this Agreement to a parent, affiliated or subsidiary corporation, or a partnership, limited liability company or other entity consisting of some of the existing shareholders without consent upon notice to the other party and so long as the Opticard Service may only be installed in the existing Customer locations.

## TERM AND TERMINATION

This Agreement shall be effective the Effective Date and shall have a term of twelve months (12) months. Thereafter, this agreement will automatically renew for additional one (1) year terms, unless notice is provided in writing by either party sixty (60) days prior to the termination then current term of this Agreement. As long as this Agreement is in force, all Opticard cards issued pursuant to this Agreement shall continue to be maintained on the OPTICARD system Grounds for Termination. This Agreement may be terminated under any of the following conditions: (i) expiration of the term set forth in the Term and Termination Section of this Agreement; (ii) mutual agreement of the parties; or (iii) by Customer as set forth in the Cancellation and Termination Charges Section of this Agreement; or (iv) if Customer does not pay OPTICARD within thirty (30) days from receipt of an invoice and after written notice from OPTICARD, Customer does not make payment within ten (10) business days; or (v) the default of either party of any term of this Agreement after receipt of written notice from the non-breaching party.

**Impact of Termination.** In the event of the termination of this Agreement, OPTICARD shall no longer provide the Opticard Service on the cards but upon the request of Customer within ninety (90) days of such termination or cancellation, OPTICARD will download information on the active issued Opticard cards, including the full card number and balance for any card with a balance greater than zero, to a new card provider.

**Notice of Breach.** In the event of a breach of this Agreement (other than a monetary breach) by either party, the non-breaching party shall be entitled to terminate this Agreement upon thirty (30) days written notice, describing the breach, except that if the breaching party remedies the default in good faith within the thirty (30) day notice period, this Agreement shall not terminate.

## MISCELLANEOUS

**Binding Forces.** This Agreement shall be binding upon and inure to the benefit of and be enforceable by the administrators, legal representatives, agents, successors, and permitted assigns of the parties hereto.

**Notices.** All notices provided for by this Agreement shall be made in writing and shall be deemed received by the intended recipient: (i) on the business day that such notice is sent by teletype or facsimile to the intended recipient provided that such notice is also sent by United States Mail, be certified mail, return receipt requested and postage paid thereon; (ii) the third business day after the date place in United States Mail, certified mail, return receipt requested and postage paid thereon; and (iii) the first day after notice is sent by express mail or other overnight mail service. All notices shall be delivered to the address indicated below, the parties' signature to this Agreement, unless the party giving any such notice has been notified, in writing, of a change of such address.

**Entire Agreement.** This Agreement attached hereto shall constitute the entire agreement between the parties with respect to the subject matter of this Agreement and the parties represent that there are no collateral agreements or side agreements not otherwise provided for within the terms of this Agreement. The terms and conditions of this Agreement supersede those of all previous agreements, if any, between the parties with respect to the subject matter of this Agreement. **Modifications and Amendments.** No modification or amendment of this Agreement shall be effective or binding upon the parties unless in writing and signed by both parties.

**Governing Law.** The situs for all transactions covered by this Agreement shall be Omaha, Nebraska. This Agreement shall be governed and construed and enforced in accordance with the laws of the State of Nebraska. Any claims or charges made hereunder shall be brought in state or federal court in Douglas County, Nebraska. The parties hereto irrevocably consent to the jurisdiction and venue of such court and waive any present or future objection to venue or jurisdiction in such court. The parties agree that service of process may be made upon them by certified or registered mail or any other method authorized under local rules of civil procedure.

**Waiver.** Failure of either party to demand strict compliance with any of the terms, covenants or conditions hereof shall not be deemed a waiver of such term, covenant or condition, nor shall any waiver or relinquishment by either party of any right or power hereunder at any one time or more times be deemed a waiver or relinquishment of such right or power at any other time or times.

**Severability.** The invalidity or unenforceability of any provision or provisions of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effect.

**Section Headings.** The section headings contained in this Agreement are inserted for purposes of convenience only and shall not affect the meaning or interpretation of this Agreement.

**Partnership.** Nothing contained in this Agreement shall be deemed or construed to create a partnership, tenancy-in-common, joint tenancy, joint venture, co-ownership or similar relationship by or between OPTICARD and Customer.

**Force Majeure.** Neither party shall be liable, nor shall any credit allowance or other remedy be extended, for any failure of performance or equipment due to

causes beyond such party's reasonable control ("force majeure event"). In the event OPTICARD is unable to deliver Opticard Service as a result of a force majeure event, Customer shall not be obligated to pay OPTICARD for the affected Opticard Service for so long as OPTICARD is unable to deliver the affected Opticard Service.

**Affiliates.** Service may be provided to Customer pursuant to this Agreement by an affiliate of OPTICARD, but OPTICARD shall remain responsible to Customer for the delivery and performance of the Opticard Service.

**Confidential Information.** OPTICARD and Customer acknowledge that in the course of dealings between parties, each party will acquire information about the other party, its business activities, pricing and operations, its technical information and trade secrets, of a highly confidential and proprietary nature. Each party shall hold such information in strict confidence and shall not reveal the same except for any information generally available to or known to the public, known prior to the negotiations leading to this Agreement, independently developed outside the scope of this Agreement or lawfully disclosed by or to a third party or tribunal. The confidential information of each party shall be safeguarded by the other to the same extent that it safeguards its own confidential materials or data relating to its own business. Further, any information or documentation disclosed between the parties during the performance of this agreement (including this Agreement) shall be subject to the terms and conditions of the applicable non-disclosure agreement then in effect between the parties.

**Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute the same instrument. A document signed and transmitted electronically is to be treated as an original and shall have the same binding effect as an original signature on an original document.