

(POSaaS) POS as a Service TERMS AND CONDITIONS

This POS as a Service Agreement (“**POSaaS Agreement**”) by and between Vitabyte and Customer consists of these Terms and Conditions, Sales Contract, all of which are incorporated herein by reference.

PLEASE READ THIS SERVICE AGREEMENT AND UNDERSTAND EACH PROVISION. IT REQUIRES YOU TO USE VITABYTE'S PROCESSING SERVICES. SECTION 11.e REQUIRES ALL CLAIMS OR DISPUTES WITH VITABYTE ABOUT ANY VITABYTE PRODUCT OR SERVICE TO BE RESOLVED IN BINDING INDIVIDUAL ARBITRATION—NOT IN A CLASS ACTION, AND NOT IN COURT BEFORE A JUDGE OR JURY. SECTIONS 8 & 9 LIMIT VITABYTE'S LIABILITY AND YOUR REMEDIES.

1. DEFINITIONS.

- a. “**Point of Sale**” or the “**POS**” shall mean any combination of hardware and/or software which the Customer receives into long term use, and/or partially or in full purchases according to this Agreement from the Seller, and includes, with no limitations, any and all improvements, installations, accessories installed and/or services of the Seller (work done by the Seller at the premises of the Customer or/and outside of the premises of the Customer).
- b. “**Hardware**” included in the POS shall mean computers, printers, touch screen monitors, monitors, keyboards, routers, card readers, servers, cash drawers, switches, network cables and/or any other equipment.
- c. “**Software**” included in the POS shall mean the POS software, Aldelo® POS software
- d. “**Customer**” or the “**Merchant**” shall mean the business listed on Sales Contract.
- e. “**Merchant Contract**” shall mean the contract between the Customer and merchant company authorized by Vitabyte for the purpose of providing of merchant services to the Customer. Merchant company may be changed at a future time by Vitabyte at its own discretion in which case Customer will need to reengage into a new Merchant contract.
- f. “**Monthly Fee**” shall mean the fee paid every month by the Customer to the Seller. Fee becomes due on the First Day of month for the current month. This fee may be collected by a third party merchant company authorized by Vitabyte, or by any other method initiated by Vitabyte on the attached Addendum of the Sales Contract.
- g. “**One Time Fee**” shall mean the fee being paid once should the Customer decide to purchase any office supplies, additional components of the POS, or order customization (except initial) or modification of the POS from the Customer, or if the POS should be repaired in case it is damaged by the fault of the Customer.
- h. “**Effective Date**” means the date Vitabyte approves Customer’s signed Sales Contract.
- i. “**Equipment**” means the POS and related peripherals selected on Sales Contract Attached Addendum.
- j. “**Install Date**” means the date on which the Equipment is installed at the Customer’s Location, or the date on which the Customer starts using the Equipment, whichever occurs first.
- k. “**Customer’s Location**” or “**Merchant’s Location**” means the Merchant’s address listed on Sales Contract.
- l. “**Processing Services**” means Vitabyte’s (or any selected affiliated by Vitabyte partner’s) credit, debit, electronic payment, and gift card processing services as provided for under the Vitabyte Merchant Transaction Processing Agreement.
- m. “**POSaaS**” or the “**POS as a Service**” shall mean the combination of POS, Processing Services and Technical Support

2. EXCLUSIVE PROCESSING REQUIREMENT

- a. **Vitabyte’s Processing Services.** Customer’s use of the Equipment requires exclusive use of Vitabyte’s Processing Services at all times. Merchant agrees not to use credit, debit, electronic payment, or gift card processing services from any provider except Vitabyte. By entering into this POSaaS Agreement, and as a condition precedent to Vitabyte providing Equipment to Merchant, Merchant agrees to enter into a Vitabyte Merchant Transaction Processing Agreement. The Processing Agreement consists of the Merchant Application and the Terms and Conditions, together with its addenda, reference documents, attachments and schedules.
- b. **Failure to Process with Vitabyte.** If at any time after the Install Date Merchant stops using Vitabyte’s Processing Services, in whole or in part, then Vitabyte shall charge merchant \$75.00 per Equipment terminal for each 30-day period that Vitabyte’s Processing Services are not used (“**Inactivity Fee**”). The Inactivity Fee is in addition to any other fees or charges. Notwithstanding the foregoing, Vitabyte reserves the right to terminate this Service Agreement or suspend Merchant’s access to the POS for Merchant’s intentional non-use of Vitabyte’s Processing Services,

3. TERM COMMITMENT

- a. Merchant understands that it is receiving Equipment and Software from Vitabyte at favorable pricing in exchange for Merchant’s term commitment. Merchant may terminate this POSaaS Agreement subject to the following conditions:
 - (i) Merchant may terminate this Service Agreement for any reason prior to the Install Date. Merchant will pay a restocking fee of \$250.00 per ordered Equipment terminal (“**Restocking Fee**”). All Equipment must be returned to Vitabyte, at Merchant’s expense, within 30 days following termination
 - (ii) Merchant may terminate this POSaaS Agreement for any reason after the Install Date. Merchant will pay an early termination fee equal to the Total Monthly Reoccurring Total listed on Sales Contract multiplied by the number of months remaining on the Initial Term and/or a Renewal Term (“**ETF**”).
 - (iii) Vitabyte may debit the Restocking Fee and/or the ETF from Merchant’s bank account on file with Vitabyte within 30 days of the date this POSaaS Agreement is terminated. Merchant is responsible for all additional fees and charges (including taxes) incurred under this POSaaS Agreement
- b) **Vitabyte’s Termination Rights.** Vitabyte may, without notice, suspend Merchant’s access to the Equipment and Software and/or terminate this Service Agreement for any of the following reasons:
 - (i) material breach of this POSaaS Agreement;
 - (ii) unlawful use of the Equipment or Software or Processing Services;
 - (iii) unauthorized modification of the Equipment or Software or installation of unauthorized third-party software;
 - (iv) failure or refusal to pay fees or charges on time;
 - (v) material breach of the Merchant Transaction Processing Agreement; or
 - (vi) Insolvency or bankruptcy. Vitabyte may, in its sole discretion, withhold Merchant’s funds derived from use of the Processing Services in order to satisfy all fees and charges incurred under this POSaaS Agreement

4. FEES AND PAYMENT

- a. **Total Monthly Service Fees.** Merchant shall pay the Total Monthly Service Fee listed on Sales Contract on the first business day of each month starting on the Install Date. Merchant permits Vitabyte to re-debit Merchant's bank account should any attempts to collect fees reject for any reason.
- b. **Shipping Fees.** Vitabyte will ship all Equipment via nationally recognized courier service (e.g., UPS). Merchant is responsible for all shipping costs and authorizes Vitabyte to debit Merchant's account. Vitabyte shall have no liability for failure of Equipment to reach its destination in a timely manner once it has delivered the Equipment to the carrier.
- c. **Changes to Terms and Fees.** Vitabyte may change any terms, conditions, rates, fees, expenses, or charges incurred under this Service Agreement upon 30 days' written notice to Merchant. Using the Equipment or Service after a change takes effect constitutes acceptance of the change. But Vitabyte will not change the Total Monthly Service Fees listed on Sales Contract during the initial Term.
- d. **Billing, Payments, and Credit Authorization.** Merchant grants to Vitabyte Automated Clearing House ("ACH") Authorization to credit and debit Merchant's demand deposit account or all fees and charges incurred under this POSaaS Agreement. Should any ACH debit made upon Merchant's demand deposit account for payment due under this POSaaS Agreement reject Merchant shall be charged a \$50.00 Non-Sufficient Funds Fee ("NSF Fee"). This authorization shall survive termination and last as long as Merchant owes any fees or charges, incurred under this POSaaS Agreement.

5. MERCHANT'S RESPONSIBILITIES

- a. **Equipment Failure.** Merchant must notify Vitabyte immediately upon Equipment or Software failure. Merchant must allow Vitabyte unrestricted and free access to the Equipment and Software to correct failures. Merchant must provide any necessary data communication facilities and equipment at no charge to Vitabyte.
- b. **Activation of Equipment.** Upon installation of the Equipment at the Merchant Location, Merchant represents and warrants that:
 - (i) Merchant received and accepts the Equipment;
 - (ii) customization of the Equipment and/or Software (for example, the menu) was satisfactorily programmed to Merchant's specifications;
 - (iii) the Equipment is in good working order;
 - (iv) and the Equipment was tested and is capable of performing Processing Services.
- c. **TITLE OF EQUIPMENT.**
 - (i) **Initial Term.** During the Initial Term, title to the Equipment remains in Vitabyte and Merchant will not pledge, loan, or attempt in any other manner to dispose of the Equipment (or any interest in it) or to permit any liens, encumbrances, or legal process to be incurred or levied on the Equipment while in Merchant's possession or control. In the event Merchant materially breaches this POSaaS Agreement, Vitabyte may demand return of the Equipment, Vitabyte may charge the Merchant for Vitabyte's full cost of the Equipment. The requirement to return the Equipment to Vitabyte shall be in addition to and shall not preclude Vitabyte from exercising any other right or remedy under this POSaaS Agreement or applicable law.
 - (ii) **Renewal Term.** On the first day following expiration of the Initial Term, and conditional on Merchant's full payment of the Total Monthly Service Fee listed on Sales Contract all other applicable fees and charges, title of the Equipment will automatically pass to Merchant.
 - (iii) **Security, Interest.** Merchant hereby grants to Vitabyte a first priority purchase money security interest in the Equipment (including any replacements, substitutions, additions, attachments and proceeds). Merchant agrees the Vitabyte may file, on Merchant's behalf, a UCC-1 Financing Statement and/or other necessary documentation sufficient to protect and secure Vitabyte's security interest. Merchant will promptly execute any other required documents and/or records reasonably requested by Vitabyte for the purpose of securing Vitabyte's right in the equipment.
- d. **Taxes.** Merchant shall be responsible for all sales, use, excise, stamp, documentary, value added, and ad valorem taxes, license and registration fees, assessments, fines, penalties and similar charges imposed on the ownership, possession, or use of the Equipment by any state, local, or federal governmental or regulatory authority and shall issue, where required and requested, a valid tax exemption certificate to Vitabyte. Merchant will reimburse Vitabyte for any of these taxes that Vitabyte pays or advances on behalf of Merchant.
- e. **Merchant's Maintenance Efforts.** Merchant shall maintain and protect the Equipment in good operating condition, repair, and appearance, and protect the Equipment from deterioration other than normal wear and tear; shall use the Equipment in the regular course of its business, with its normal operating capacity, without abuse, and shall comply with the laws, regulations, directives, requirements, and rules with respect to the use, maintenance, and operation of the Equipment and Software; Merchant shall use the Equipment and solely for business purposes; shall not make any modifications, alterations or additions to the Equipment or Software without the written consent of Vitabyte; shall not affix and shall not remove the Equipment from the Merchant Location without Vitabyte's written consent, which not be unreasonably withheld.
- f. **Equipment Condition and Return.** All Equipment must be returned to Vitabyte by Merchant within the timeframes specified by this Service Agreement in good operating condition other than normal wear and tear. Merchant will not change or remove any lettering or numbering on the Equipment. To extent permitted by applicable law, without demand or legal process, Vitabyte and its agents may enter into the premises, including the Merchant Location, where the Equipment may be found and take possession of and remove the Equipment, without sole discretion, damaged beyond normal wear and tear or is not returned when due will result in a charge to Merchant of the full cost of the Equipment to Vitabyte.
- g. **Merchant Security.** Merchant shall be responsible for
 - (i) maintaining virus protection and security for all of its systems, data, and overall network access, and
 - (ii) all risk of loss, theft, damage, premises is solely Merchant's responsibility and agrees to notify Vitabyte immediately if Equipment is lost, destroyed, stolen, or taken by any other person. Merchant shall at all times remain in compliance with the Payment Card Industry Data Security Standard ("PCI DSS") requirements, including remaining aware at all times of changes to the PCI DSS and promptly implementing all procedures and practices as may be necessary to remain in compliance with the PCI DSS, in each case, at Merchant's sole cost and expense. Merchant shall be solely responsible for storing and backing up Merchant's data stored on the Equipment. Vitabyte shall have no liability to Merchant for loss or destruction of Merchant's data.
 - (iii) **Insurance.** While the Equipment is in Merchant's possession or control, Merchant shall insure the Equipment at its own cost and expense against loss or damage from fire, theft, bodily injury, or other casualty in an amount not less than thirty six times the Total Monthly Service Fee listed on Sales contract. At Vitabyte's request, Merchant shall provide a certificate of insurance to Vitabyte naming it as a loss payee or additional insured with respect to loss of or damage to the Equipment during the Initial Term.

6. VITABYTE'S RESPONSIBILITIES

a. Installation.

- (i) Merchant shall be entitled to a one-time installation of the Equipment at the Merchant Location. Merchant must make an installation appointment with Vitabyte Technical Support and confirm the appointment at least 48 hours prior to the appointment. Merchant shall be billed a \$150.00 reschedule fee if (a) Merchant reschedules the installation less than 24 hours prior to the appointment; (b) an authorized representative of the Merchant not available to acknowledge the installation in writing; or (c) the Merchant location, in Vitabyte's reasonable discretion, is not suitable to conduct the installation ("**Reschedule Fee**").
- (ii) Merchant agrees that the installation of the Equipment must be completed within 60 days from the date the Equipment is shipped by Vitabyte. Upon the expiration of the 60-day period, the Equipment will be deemed installed and the Install Date deemed to have occurred.

b. **Equipment / Software Support and Maintenance.** Vitabyte shall provide Merchant with 24 hours a day, 7 days a week remote technical support for the Equipment and Software. Vitabyte will use commercially reasonable efforts to answer questions and resolve any problems related to the Equipment and Software, but does not guarantee resolution of the problems reported. Vitabyte shall provide remote support to determine if the Equipment is defective and, if so, at Vitabyte's sole discretion, it will: repair Equipment, send to maintain the Equipment as set forth in Section 5.e shall result in additional charges for services and/or replacement of the Equipment.

c. **Training.** Merchant shall receive complimentary access to Vitabyte's library of online training webinars via YouTube. During the installation of the Equipment, Merchant shall receive complimentary training sessions. Merchant may request additional onsite training, subject to Vitabyte's approval and technician availability; additional charges may apply.

d. **Software Customization.** Vitabyte shall provide reasonable Software customization based on the information requested by Vitabyte and provided by Merchant. Any additional customization after the Equipment has been shipped to Merchant is excluded from this Service Agreement and will be charged at Vitabyte's then current rate. VITABYTE DOES NOT WARRANT THAT CUSTOMIZATION WILL BE HARMLESS FOR ANY ERRORS IN THE EQUIPMENT AND SOFTWARE.

e. **Software Updates.** Vitabyte may, in its sole discretion, make Software updates available to Merchant. Merchant must install all Software updates within 30 days. Vitabyte reserves the right not to provide support services, or charge Merchant additional fees for support, if Merchant does not install a Software update on time. Vitabyte will provide remote backup of the Software on a regular basis. Vitabyte will use commercially reasonable efforts, in the event of software failure, to assist Merchant in recovering Software backup files to facilitate the successful operation of the Equipment.

f. **Non-standard Support and Maintenance.** Vitabyte may, in its sole discretion and for additional charges, provide services and repair, redesign, reinstall, reconfigure, or replace the Equipment when either such services are required due to causes not attributable to normal wear and tear, including:

- (i) Merchant's failure to continually maintain the Merchant Location in conformance with commercially reasonable standards;
- (ii) impairments in the performance of the Equipment resulting from changes to the Equipment made by Merchant or mechanical, electrical, or electronic interconnections made by Merchant;
- (iii) damage caused by accidents, natural disasters, or the negligence of, or improper use or misuse of, the Equipment by repair necessitated as a result of relocation of the Equipment;
- (iv) change in laws or Card Association rules that require service, repair, or replacement beyond normal day-to-day maintenance;
- (v) any third-party hardware or software in conjunction with the use of the Equipment without Vitabyte's express written consent; or
- (vi) theft of the Equipment.

7. LIMITED SOFTWARE LICENSE

Vitabyte grants to Merchant a non-exclusive, non-transferrable, royalty free license, without the right to sublicense, to use the Software internally in conjunction with the Equipment.

Vitabyte reserves all rights not extended hereunder. Merchant may not alter, reverse engineer, decompile, or disassemble the Software, or otherwise attempt to derive source code from the Software. Merchant may not manufacture, copy, sublicense, distribute, replicate, transfer or otherwise dispose of any copies of the Software. Nothing contained in this Service Agreement shall give Merchant any ownership interest, or title to, the Software, source code, and the related documentation. Merchant acknowledges that the performance of the Software is conditioned on Merchant providing, at its sole cost and expense a continuously available and secure network. This license shall immediately terminate upon expiration or termination of this POSaaS Agreement. This license is not a license of any trademarks, service marks, trade names, or logos, and does not include any software other than the Software. Vitabyte reserves the right to amend or otherwise modify this license upon notice to Merchant at any time. Using the Software after an amendment or modification takes effect constitutes acceptance of it.

8. WARRANTY LIMITATION AND DISCLAIMER.

EXCEPT AS SPECIFICALLY SET FORTH IN THIS SERVICE AGREEMENT, VITABYTE DOES NOT MAKE (AND EXPRESSLY DISCLAIMS) ANY REPRESENTATIONS AND WARRANTIES IN RESPECT OF THE EQUIPMENT, SOFTWARE, PROCESSING SERVICES, AND/OR OTHER SERVICES PROVIDED BY VITABYTE UNDER THIS SERVICE AGREEMENT, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT, AND ANY WARRANTIES THAT MAY ARISE FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR USAGE OF TRADE. VITABYTE DOES NOT GUARANTEE THAT THE EQUIPMENT OR SOFTWARE WILL SATISFY MERCHANT'S REQUIREMENTS, OR THAT THE OPERATIONS OF SUCH WILL BE UNINTERRUPTED OR ERROR FREE. THE EQUIPMENT, SOFTWARE, AND PROCESSING SERVICES ARE PROVIDED WITH ALL FAULTS AND THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY, AND EFFORT WILL BE WITH THE MERCHANT. SHOULD THE EQUIPMENT OR SOFTWARE PROVE DEFECTIVE, MERCHANT, AND NOT VITABYTE, ASSUMES THE ENTIRE COST OF ALL NECESSARY SERVICING OR REPAIR. VITABYTE SHALL NOT BE LIABLE FOR ANY COSTS OR FOR PERFORMING ANY SERVICES HEREUNDER ARISING IN CONNECTION WITH MERCHANT'S NEGLIGENCE, ABUSE, MISUSE, OR FAILURE TO PERFORM ROUTINE MAINTENANCE OR STANDARD OPERATING PROCEDURES. VITABYTE DISCLAIMS ANY WARRANTY, EXPRESS OR IMPLIED, THAT AFTER THE INITIAL INSTALLATION OF THE EQUIPMENT AND SOFTWARE, THAT THE EQUIPMENT, SOFTWARE OR CUSTOMER'S DATA WILL REMAIN VIRUS-FREE. MERCHANT WAIVES ANY CLAIMS HEREUNDER AGAINST VITABYTE ARISING FROM MERCHANT'S FAILURE TO HAVE OR MAINTAIN CURRENT VIRUS PROTECTION, OR FROM A FAILURE OR BREACH OF CUSTOMER'S SECURITY FOR MERCHANT'S SYSTEMS OR DATA, OR FROM ANY UNAUTHORIZED ACCESS TO MERCHANT'S SYSTEMS. VITABYTE FURTHER DISCLAIMS ANY RESPONSIBILITY OR LIABILITY FOR PROBLEMS FROM MERCHANT'S DECISION TO USE A PARTICULAR INTERNET SERVICE PROVIDER OR MERCHANT'S ABILITY TO CONNECT TO THE INTERNET. MERCHANT ACKNOWLEDGES THAT ITS ABILITY TO ACCESS DATA, RECEIVE REMOTE TECHNICAL SUPPORT, AND OPERATE THE EQUIPMENT, MAY BE AFFECTED BY PROBLEMS WITH MERCHANT'S INTERNET CONNECTIVITY. ANY SUCH PROBLEMS ARE OUTSIDE OF VITABYTE'S CONTROL. MERCHANT WAIVES ANY CLAIMS IT MAY HAVE AGAINST VITABYTE DUE TO MERCHANT'S INABILITY TO ACCESS DATA OR CONNECT TO THE INTERNET WHICH IS BASED ON OR ARISING OUT OF ANY OF THE FOREGOING REASONS.

9. **LIMITATION OF LIABILITY**

VITABYTE AND VITABYTE'S AFFILIATES (INCLUDING PARENTS, SUBSIDIARIES, AND OTHER RELATED ENTITIES), SUCCESSORS, AND ASSIGNS SHALL NOT BE LIABLE TO MERCHANT OR MERCHANT'S OWNERS, PARTNERS, SHAREHOLDERS, AFFILIATES (INCLUDING PARENTS, SUBSIDIARIES, AND OTHER RELATED ENTITIES), SUCCESSORS, OR ASSIGNS, FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, PUNITIVE, OR SPECIAL DAMAGES, INCLUDING LOST PROFITS, BUSINESS INTERRUPTION, OR ECONOMIC DAMAGES (INCLUDING THOSE ASSOCIATED WITH IMPROPER OR INADEQUATE TAXES CHARGED), OF ANY KIND, WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER THEORY ARISING OUT OF THIS SERVICE AGREEMENT, OR MERCHANT'S USE (OR INABILITY TO USE) THE EQUIPMENT OR SOFTWARE, EVEN IF ADVISED IN ADVANCE OF THE POSSIBILITY OF SUCH DAMAGE. IN NO EVENT SHALL THE MERCHANT BE ENTITLED TO RECOVER OR COLLECT ANY DAMAGES IN EXCESS OF THE FEES PAID UNDER THIS SERVICE AGREEMENT DURING THE THREE (3) MONTHS IMMEDIATELY PRECEDING THE DATE OF MERCHANT'S FIRST CLAIM OF INJURY OR DAMAGE. IN NO EVENT SHALL VITABYTE OR VITABYTE'S AFFILIATES (INCLUDING PARENTS, SUBSIDIARIES, AND OTHER RELATED ENTITIES), SUCCESSORS, OR ASSIGNS, BE RESPONSIBLE FOR ANY LIABILITY OR DAMAGE INCURRED AS A RESULT OF DOWNTIME OF THE EQUIPMENT OR SOFTWARE.

10. **GENERAL INDEMNITY.**

Merchant agrees to indemnify, defend, and hold Vitabyte, Vitabyte's affiliates (including parents, subsidiaries, and other related entities), employees, contractors, subcontractors, successors, assigns, and agents (collectively the "Vitabyte Indemnified Parties") harmless from and against any and all costs, damages, penalties, claims, actions, suits (collectively "Claims") of whatsoever kind and nature arising out of, related to, arising from, or in connection with Merchant's unauthorized modification or misuse of the Equipment or Software, or Merchant's breach of this Service Agreement, or from Merchant's negligent acts or omissions. Merchant's indemnification obligation includes payment of all reasonable attorneys' fees, costs and expenses. Merchant shall promptly notify Vitabyte in writing of any Claim and any such suit will not be settled without Vitabyte's consent, such consent not to be unreasonably withheld. Merchant shall retain counsel reasonably acceptable to Vitabyte and Vitabyte shall cooperate in the defense of such claim. Vitabyte may appear, in its sole discretion and at its own expense, through counsel it selects.

11. **NON-COMPETITION.** Merchant agrees not to solicit any current, past or former employee of Vitabyte or to hire such person for a period of at least three (3) years from the date hereof or date of such employee or person leaves the employer, whichever is later. It is further agreed that any such employee or former employee establish his/her company, entity, enterprise, business or become employed in any way or associated with any other separate company which offers the same or similar products and services which will tend to compete, directly or indirectly with Vitabyte. Vitabyte agrees not to engage such company for such purpose which is substantially similar to the purpose and intent of this agreement. Merchant hereby agrees that in the event of a breach of this non-compete paragraph, it is impossible or impracticable to calculate damages incurred by Vitabyte because of difficulty in tracing the cause and effect and damages. Therefore, the legal remedy available to Vitabyte may be inadequate, irreparable injury may be suffered by Vitabyte. Accordingly, the parties agree that the remedy of specific performance of this Agreement may be available to the Vitabyte and injunctive relief will be granted without opposition either, mandatory or prohibitive to prevent or prohibit such a breach and may be available in the New York State Supreme Court pursuant to Article 64 of the CPLR. The parties further agree to have an exclusivity agreement for Vitabyte, Vitabyte to be the POS Vendor for Merchant for a period of two (2) years with no other POS vendor to be used by the Merchant. In the event that the Merchant breaches this provision, it will be deemed a default under this agreement, and the default provisions of this agreement shall apply.

12. **MISCELLANEOUS TERMS INCLUDING BINDING ARBITRATION AGREEMENT**

- a. **Assignment.** Merchant shall not have the right to assign or otherwise transfer its rights or obligations under this Service Agreement except with the written consent of Vitabyte. Vitabyte shall have the right to assign any or all of its interest, rights, and obligations in this Service Agreement without the need for consent from Merchant. Any prohibited assignment shall be null and void. This Agreement shall be binding upon the heirs, successors, and permitted assigns of the parties.
- b. **Amendments.** This Service Agreement may be amended by Vitabyte, Vitabyte's affiliates, or assigns, upon 30 days' written notice. Using the Equipment after a change takes effect constitutes acceptance of the amendment.
- c. **Notices.** Notices permitted or required to be given hereunder shall be deemed sufficient if given by courier service that requires a signature upon delivery, registered or certified mail return receipt requested, addressed to Merchant's address on Sales Contract or Vitabyte's address in Section 11.e(iii) (or other addresses the parties may designate by like notice from time to time). Notices so given shall be effective as of the date stamped on the receipt.
- d. **Severability.** In the event that any of the terms of this Service Agreement are in conflict with any rule of laws, regulations, provisions or otherwise unenforceable under the laws or regulations of any government or subdivision thereof, such terms shall be deemed amended so that such term of provision complies with such applicable law or regulation, but such invalidity, unenforceability, or revision shall not invalidate any of the other terms of this Service Agreement and it shall continue in force, unless the invalidity or unenforceability of any such provisions hereof does substantial violence to, or where the invalid or unenforceable provisions comprise an integral part of, or are otherwise inseparable from, the remainder of this Service Agreement. Section 11.e(vii) applies if any part of the Arbitration Agreement (Section 11.e) is found illegal or unenforceable and prevails over this section if inconsistent with it.
- e. **Binding Arbitration Agreement.** The term "Merchant" in this Section 11.e ("Arbitration Agreement") includes Merchant and the Guarantor(s) listed on Sales Contract. This Arbitration Agreement binds all of them and Vitabyte.
 - (i) **Vitabyte and Merchant agree to resolve all claims and disputes of every kind between them or their respective owners, partners, shareholders, affiliates (including parents, subsidiaries, and other related entities), predecessors, successors, or assigns only through binding individual arbitration before the American Arbitration Association ("AAA").** This Arbitration Agreement is to be broadly interpreted. It includes: (A) claims or disputes relating to any aspect of the relationship between Vitabyte and Merchant including claims or disputes relating to this Service Agreement, the Equipment, the Software, the Processing Agreement, any Vitabyte product or service, and any agreement to which Merchant and Vitabyte are parties (even if the claim or dispute does not involve the Service Agreement), whether based in contract, tort, statute, fraud, misrepresentation, omission, or any other theory; (B) claims or disputes that arose before this POSaaS Agreement or any other agreement became effective (including claims or disputes relating to advertising); (C) claims or disputes that are the subject of purported class action litigation on the date this POSaaS Agreement becomes effective but Merchant is not a member of a certified class on that date; and (D) claims or disputes that arise after the termination of this POSaaS Agreement but relate to it or to the Equipment or Software.
 - (ii) **Class Action Waiver.** Merchant and Vitabyte waive their rights to sue before a judge or jury and to participate in a class action, class-wide arbitration, private attorney general action, or any other proceeding in which a party acts in a representative capacity. Instead, any claim or dispute will be resolved on an individual basis by a neutral arbitrator whose decision (called an "award") will be final except for a limited right of appeal under the Federal Arbitration Act. **The arbitrator may not join or consolidate proceedings together without the consent of all parties to all proceedings.**
 - (iii) Before seeking arbitration, Vitabyte or Merchant must first send to the other, by certified mail return receipt requested or a courier

- service that requires a signature upon delivery, a written Notice of Dispute (“**Notice**”). A Notice to Vitabyte must be addressed to: Vitabyte Legal Department, 30-13 Steinway Street, Astoria, NY 11103. A Notice to Merchant must be addressed to its address in Vitabyte's records. The Notice must (A) describe the nature and basis of the claim or dispute; and (B) set forth the specific relief sought. If Vitabyte and Merchant do not reach an agreement to resolve the claim or dispute within 30 days after the Notice is received, Merchant or Vitabyte may commence an arbitration.
- (iv) Vitabyte or Merchant may bring an individual suit in a small claims court instead of sending a Notice or arbitrating. Merchant may sue in the small claims court in the county of Merchant's principal place of business or Queens County, New York; Vitabyte may sue in the small claims court in Merchant's principal place of business. This Arbitration Agreement does not preclude Merchant from bringing issues to the attention of federal, state, or local agencies (including an attorney general or the Office of the Comptroller of the Currency). Such agencies can, if the law allows, seek relief against Vitabyte on Merchant's behalf.
 - (v) The AAA's Commercial Arbitration Rules, as modified by this Arbitration Agreement, apply. To commence an arbitration, submit a Demand for Arbitration with the required fee to the AAA and send a copy to Vitabyte at the address in Section 11.e(iii). For information, visit adr.org or call 1-800-778-7879. For disputes involving \$25,000 or less, any hearing will be telephonic unless the arbitrator finds good cause to hold an in-person hearing. Any in-person hearing will be held in the county of Merchant's principal place of business.
 - (vi) For disputes involving \$75,000 or less, Vitabyte will pay all AAA and arbitrator's fees and will promptly refund Merchant's filing fee, unless the arbitrator finds the arbitration frivolous or brought for an improper purpose. For disputes involving more than \$75,000, AAA rules govern fees. Vitabyte will not seek its attorney's fees or expenses in any arbitration.
 - (vii) The arbitrator may award the same relief as a court could but may award declaratory or injunctive relief only to the individual party and only to the extent necessary to provide relief for that party's individual claim. Any court with jurisdiction may enforce the arbitrator's award.
 - (viii) If the class action waiver in Section 11.e(ii) is found to be illegal or unenforceable as to all or any part of a claim or dispute, then the Arbitration Agreement is null and void as to that part, which shall proceed in court with the rest proceeding in individual arbitration. If any other provision of the Arbitration Agreement is found to be illegal or unenforceable, that provision shall be severed and the rest will continue to apply in individual arbitration.
 - (ix) Notwithstanding any provision to the contrary, if Vitabyte makes any future change to this Arbitration Agreement (other than address changes) during the Initial Term or a Renewal Term, Merchant may reject that change by sending Vitabyte written notice within 30 days of receiving notice of the change to the address in Section 11.e(iii). The version of the Arbitration Agreement in force just before the rejected change will govern.
- f. **Governing Law.** The laws of the State of Merchant's principal place of business govern this Service Agreement, including claims for its enforcement or breach, except that the Federal Arbitration Act governs all matters relating to arbitration.
 - g. **One-Year Limit on Claims and Disputes.** Any claim or dispute must be filed in arbitration or small claims court (or in court if the Arbitration Agreement is found to be illegal or unenforceable so as to permit filing in court) within one (1) year of the date it first could be filed. Otherwise it is permanently barred.
 - h. **Conflicting Terms.** This Service Agreement shall prevail over any conflicting terms or oral statements that may be contained in any instructions or other communications Merchant submits to Vitabyte with respect to this Service Agreement.
 - i. **Independent Contractor.** Nothing in this Service Agreement or in its performance shall be construed to create any partnership, joint venture, or relationship of principal and agent or employer and employee between Vitabyte and Merchant or any of their respective affiliates or subsidiaries. Vitabyte and Merchant are and shall remain independent contractors. As such, neither Merchant nor any employees, agents, or affiliated persons of Merchant shall be entitled under any circumstances to maintain any action against Vitabyte for any bodily injury incurred by Merchant or any employees, agents, or affiliated persons of Merchant (including, but not limited to, the filing of claims under the workers' compensation laws of any state). Furthermore, Merchant acknowledges that Merchant shall be solely responsible for the purchase and maintenance of employment, and workers' compensation, and liability insurance coverage related to its employees, agents, or contractors, and that Vitabyte shall have no responsibility for any such coverage.
 - j. **Force Majeure.** Any delay or nonperformance of any provision of this POSaaS Agreement (other than for payment of fees or charges incurred under this Service Agreement or the requirement to file claims or disputes within one (1) year) caused by conditions beyond the reasonable control of the performing party shall not constitute a breach of this Service Agreement, and the time for performance of such provision, if any, shall be deemed to be extended for a period equal to the duration of the conditions preventing performance.
 - k. **No Waiver of Rights.** Unless expressly provided herein, no failure or delay on the part of any party in exercising any right under this POSaaS Agreement will operate as a waiver of that right, nor will any single or partial exercise of any right preclude any further exercise of that right.
 - l. **Survival of Some Terms.** Sections 3,4,5(d),7, 8, 9, 10, and 11, and any other provision that by its terms survives termination, shall survive the termination of this Service Agreement and continue to bind Vitabyte and Merchant.
 - m. **Entire Agreement.** VITABYTE'S REPRESENTATIVES MAY HAVE MADE ORAL STATEMENTS REGARDING THE EQUIPMENT, SOFTWARE, OR SERVICES. NONE OF THE ORAL STATEMENTS CONSTITUTE WARRANTIES, MERCHANT SHALL NOT RELY ON ANY OF THEM, AND THEY ARE NOT PART OF THIS SERVICE AGREEMENT. THIS SERVICE AGREEMENT, INCLUDING ITS REFERENCE HEREIN DOCUMENT CONSTITUTES THE ENTIRE AGREEMENT OF THE PARTIES WITH RESPECT TO THE SUBJECT MATTER HEREOF, AND SUPERSEDES ALL PREVIOUS PROPOSALS, ORAL OR WRITTEN, AND ALL NEGOTIATIONS, CONVERSATIONS, OR DISCUSSIONS HERETOFORE HAD BETWEEN THE PARTIES RELATED TO THIS SERVICE AGREEMENT. MERCHANT ACKNOWLEDGES THAT IT HAS NOT BEEN INDUCED TO ENTER INTO THIS POSaaS AGREEMENT BY ANY REPRESENTATIONS OR STATEMENTS, ORAL OR WRITTEN, NOT EXPRESSLY CONTAINED IN THIS POSaaS AGREEMENT.